

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	
SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
PRAIRIE RIVERS NETWORK, and)	
CITIZENS AGAINST RUINING THE)	
ENVIRONMENT)	
)	PCB 2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

NOTICE OF FILING

TO: John Therriault, Assistant Clerk	Attached Service List
Illinois Pollution Control Board	
James R. Thompson Center	
100 West Randolph Street, Suite 11-500	
Chicago, IL 60601	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Respondent, Midwest Generation LLC's Response to Complainants' Motion in *Limine* to Exclude Expert Testimony of David Callen (Redacted), copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: June 10, 2016

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Respondent, Midwest Generation LLC's Response to Complainants' Motion in *Limine* to Exclude Expert Testimony of David Callen (Redacted) was filed electronically on June 10, 2016 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, on June 10, 2016 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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**RESPONDENT, MIDWEST GENERATION, LLC’S RESPONSE TO COMPLAINANTS’
MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY OF DAVID CALLEN**

Pursuant to 35 Ill. Adm. Code 101.500, Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, submits this Response to Complainants’ Motion *In Limine* to Exclude Expert Testimony of David Callen. The Hearing Officer should deny Complainants’ motion because Mr. Callen’s opinions are not impermissible legal conclusions. Instead, Mr. Callen has the experience, knowledge and qualifications that afford him the knowledge not common to a layperson and his testimony will assist the Board in reaching its decision.

I. INTRODUCTION

Complainants fail to apply the appropriate standard in their Motion in Limine – that is, whether an expert’s opinions are within his/her expertise and will aid the trier of fact. On July 1, 2015, Complainants submitted their *Expert Report of David A. Schlissel* (“Schlissel Report” attached as Ex. 1). Mr. Schlissel opined in great detail about NRG’s financial position and NRG’s ability to pay approximately \$262 Million for purported remediation at the MWG Generating Stations in

Pekin, Waukegan, Romeoville, and Joliet, Illinois (collectively the “Stations” or the “MWG Stations”). Mr. Schissel’s Report did not discuss the financial condition of MWG or MWG’s ability to pay. In response, MWG presented the opinions of Mr. David Callen and produced certain documents in support.¹ [REDACTED]

[REDACTED] On March 31, 2016, Complainants took the deposition of Mr. Callen (Ex. D of Complainants’ Motion). Complainants have not taken issue with Mr. Callen’s qualifications.

On May 20, 2016, Complainants filed their Motion *In Limine* to Exclude Expert Testimony of David Callen based on the assertion that three of Mr. Callen’s opinions and his reliance on two documents were “legal conclusions”.² Specifically, Complainants purport to challenge Mr. Callen’s opinions regarding: [REDACTED]

[REDACTED] and his description of the Schlissel report as “not relevant”. Complainants’ assertion - that legal conclusions should be automatically excluded - is misplaced because the proper analysis is whether an expert’s opinions are within his expertise and will aid the trier of fact.

Complainants fail to recognize that Mr. Callen’s opinions are based on his specialized knowledge, experience and training. As the Chief Accounting Officer (“CAO”), a Certified Public Accountant, and having extensive experience reviewing and interpreting financial documents, Mr.

¹ Mr. Callen’s opinions were attached, in part, to Complainants’ Motion as Ex. C; a supplement dated 12/7/15 is attached hereto as Ex 2.

² On May 31, 2016, the Hearing Officer issued an order extending the date of response to Complainants’ Motion to June 10, 2016.

Callen has the knowledge, qualifications and experience which afford him knowledge not common to a layperson. Complainants ignore the fact that Mr. Callen's review of financial documents will aid the trier of fact in understanding complex financial documents. Moreover, Mr. Callen's [REDACTED] is not "legal" or impermissible solely because lawyers may have drafted the document³, and his use of the term "relevant" is not "legal" or impermissible solely because lawyers may also use that term.

II. DISCUSSION

An expert may give legal conclusions and interpret alleged legal documents where the expert has the applicable qualifications and the opinion will aid the trier of fact. This is the case even if the expert is opining on the ultimate issue in the case. It is well settled that, "[a] person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions." *Johns Manville v. Illinois Department of Transportation*, PCB 14-3, (April 26, 2016) (B. Halloran) slip op. at 2, quoting, *Thompson v. Gordon*, 221 Ill.2d 414, 428-429 (Ill. 2006). This general rule was codified in 2010 by the Illinois Rules of Evidence 702, which states, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ill. R. Evid. 702. Additionally, as established in Illinois Rules of Evidence 704, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Ill. R. Evid. 704. In evaluating an expert's opinion as it relates to a claimed legal conclusion, the critical issue is whether the expert's legal testimony aids

³ If this were the case, then the opinions in the Schlissel Report are equally "legal" as they purport to interpret NRG's financial documents, including agreements and 10-K's, similarly prepared by attorneys.

the trier of fact by explaining a factual issue beyond its ordinary knowledge or whether the opinion merely recites a legal conclusion. *Martin v. Sally*, 341 Ill. App. 3d 308, 315, 792 N.E.2d 516, 522 (2003).

A. David Callen is presented as an Expert to assist the Board in Reaching its Conclusions

David Callen is presented as an expert to rebut the assertions made by Complainants' expert and to assist the Board in reaching its conclusions. In particular, Mr. Callen will assist the Board in understanding the [REDACTED]

[REDACTED]

[REDACTED].

1. The Board, through its Hearing Officer, Has Denied Motions *In Limine* to Exclude Expert Testimony Related to Legal Conclusions

Following Illinois Rules of Evidence 702 and 704, the Board recently denied motions *in limine* that were based on claims that an expert's testimony contained legal conclusions. In those two cases, the Hearing Officer applied the proper standard and found that the expert had the experience and qualifications to assist the Board in coming to its conclusions. *Johns Manville v. Illinois Department of Transportation*, PCB 14-3 (April 26, 2016)(B. Halloran), attached as Exhibit 3; *KCBX Terminals Co. v. Illinois Environmental Protection Agency*, PCB 14-110, 2014 WL 1757982, (April 28, 2014) (B. Halloran). Complainants do not distinguish, or even mention, either of these cases.

In *Johns Manville*, (PCB 14-3, April 26, 2016, B. Halloran), the respondent moved to bar the opinion testimony of complainant's proffered expert on multiple grounds, including that the opinions were legal conclusions that went to the ultimate issue of the case. The complainant's expert had opined that the respondent's conduct could be viewed as 'open dumping' under Section 3.3.05 of the Act and that the Illinois EPA would likely treat certain material as both 'solid waste'

and ‘hazardous waste.’” *Id* at slip op 1. The Hearing Officer established that Illinois Rules of Evidence 704 allows opinion testimony on the ultimate fact or issue to be decided by the trier of fact. *Johns Manville* slip op. at 2. Citing to *Thompson v. Gordon*, the Hearing Officer stated that a person is allowed to testify as an expert if his experience and qualifications give him the knowledge that is not common to a layperson and his testimony would aid the trier in fact. *Id* at 3. In allowing the expert to testify regarding his opinion, the Hearing Officer found that the expert could testify based upon the expert’s knowledge and experience, which go beyond that of an ordinary citizen and could consequently assist the Board in its determinations. *Id*. The Hearing Officer further held that the expert’s opinions in reviewing and applying environmental laws did “not amount to legal conclusions...” *Id*. Ultimately, experts may review legal documents and laws where such review will aid the Board.

Similarly, in *KCBX Terminals* (PCB 14-110, April 29, 2014, B. Halloran), the Hearing Officer denied two motions *in limine* seeking to bar opinions of two expert witnesses, finding that the experts’ opinions were not improper legal conclusions. The Hearing Officer stated that Illinois Rule of Evidence 704 allows opinion testimony on an ultimate fact or issue to be decided by the trier of fact. Ill.R.Evid.704. *Id* at 2. Citing to *Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 905, 866 N.E.2d 631 (2nd Dist. 2007), the Hearing Officer stated that an expert opinion may be admitted to assist the Board in understanding the ultimate issue to be decided. *KCBX* at 2. Noting that the Illinois EPA did not take issue with the qualifications of KCBX’s proffered experts, the Hearing Officer found that the experts’ opinions were not improper legal opinions. The experts’ opinions, that a party submitted sufficient information in its permit application for compliance with applicable requirements, were not improper and KCBX was permitted to introduce the evidence through its experts. *Id* at 2-3.

The single Board opinion Complainants rely upon does not support their motion. In *People of the State of Illinois v. Panhandle Eastern Pipeline Co.* PCB99-191 (June 22, 2000), the Board granted a motion *in limine* to limit certain testimony, but on different grounds. The Board did not bar the expert opinion because it was a legal opinion, but simply barred the testimony because the factual information on which the expert would testify was public information available in Board records or was the result of simple math. *Id* at 2. As a result, the opinion would not assist the trier of fact. In *Panhandle*, the proffered expert was a lawyer and a former Board member, William Forcade, who was prepared to discuss the Illinois judicial and administrative civil penalties in environmental cases and opine that the People's penalty demand was inappropriate. *Id*. The Board granted the motion *in limine*, finding that the subject on which the expert was going to testify was not the type of necessary information to be considered by the Board. *Id*. In other words, Mr. Forcade's opinion would not assist the Board in reaching its conclusions, likely because the Board did not need any assistance in interpreting the Illinois Environmental Protection Act and the underlying regulations it operates under on a daily basis.

2. Courts Allow Experts to Testify on Interpretation of Legal Documents

There is no absolute bar against expert testimony that interprets contracts, legal documents, or even federal statutes. A review of the cases cited by the Complainants shows that the actual issue was not whether the expert was giving a legal opinion, but whether the expert's legal opinion would assist the trier in fact.⁴ In fact, one of the cases Complainants rely upon states just that. In

⁴ *Cabrera v. ESI Consultants, Ltd*, 41 N.E.3d 957, 397 Ill.Dec. 306, 331 (1st Dist. 2015) (Court found that the contract was unambiguous and thus the court did not require interpretation by an expert); *People v. Patel*, 366 Ill.App. 3d 255 (1st Dist. 2006), (Court found that it did not need an expert interpreting "clear and unambiguous language" of a regulation); *LID Associates v. Dolan*, 324 Ill.App.1047 (1st Dist. 2001) (The plaintiff's expert, a real estate and trust lawyer, could not testify on the fiduciary duties of a general partner because it would not assist the trier of fact); *Coyne v. Robert H. Anderson & Associates*, 215 Ill.App.3d 104, 112 (2nd Dist. 1991) (Court excluded the expert's testimony because the inquiry was regarding an area within the common knowledge of the average juror); *McCormick v. McCormick*, 180 Ill.App.3d 184, 205 (1st Dist. 1988) (Court excluded expert testimony because it was not regarding matters beyond the court's knowledge or comprehension, and would not assist the trier

William Blair & Co v. FI Liquidation Corp. 358 Ill. App. 3d 324, 338 (1st Dist. 2005), the court stated “In the absence of ambiguity, contract interpretation is a question of law.” (Complainants’ motion at p. 6). However, Complainants did not include the following sentence which states, “a court can properly consider extrinsic evidence, such as an expert's opinion, on a provisional basis for the limited purpose of testing whether a contract is ambiguous.” *Id* at 339. In fact the *William Blair* opinion acknowledges that “[i]t is a proper rule of expert testimony to assist the jury to understand and apply the terms of a contract.” *Id* at 340, citing *Am. Coll. of Surgeons v. Lumbermens Mut. Cas. Co.*, 142 Ill. App. 3d 680, 702, 491 N.E.2d 1179, 1194 (1st Dist. 1986).

Additionally, a recent Illinois Appellate Court has allowed an expert witness to testify concerning the application of federal law to the facts in a case, finding that the expert’s qualifications assisted the jury in reaching a conclusion. In *McHale v. W.D. Trucking, Inc.* 39 N.E.3d 595 (1st Dist. 2015), the Appellate Court upheld the admission of an expert’s opinion applying the federal trucking regulations to the facts of the case to define the roles of the parties. The Court found that the expert provided his specialized knowledge regarding the relationship of the parties as they are established under the federal rules in the context of the trucking industry. *Id* at 623. In other words, the expert assisted the jury with knowledge of how the trucking industry interprets federal regulations, which is knowledge that is not common to a lay person.

3. Mr. Callen has the Knowledge, Qualifications and Experience to Assist the Board in Coming to Its Conclusion

Here, Mr. Callen is presented as an expert to rebut the opinions of the Complainants’ expert, David Schlissel. Mr. Schlissel opined that NRG could afford the \$262 million remedy proposed

in fact); *First Nat. Bank of Evanston v. Sousanes*, 96 Ill.App. 3d 1047, 1055 (1981) (Court upheld trial court’s decision to not allow testimony on lease because the facts were “not technical or beyond the understanding of the average juror”).

by the Complainants' Remedy Expert (Schlissel Report, Ex. 1). [REDACTED]

[REDACTED] Mr. Callen's expertise in reviewing financial documents and the business structure of NRG, including how MWG fits within the structure, is established by his education, his certification as a Certified Public Accountant, his experience as a Vice President of Financial Planning & Analysis, Director of Finance and Director of Financial Reporting, and his current position as the Chief Accounting Officer for NRG and NRG Yield, Inc. (See Ex. B of Complainants' Motion and ¶¶ 1 and 2 of the Affidavit of David Callen, attached as Ex.4).

[REDACTED] Notably, Complainants do not dispute Mr. Callen's experience or qualifications as a financial expert.

As Mr. Callen explained in his opinion and during his deposition, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] is exactly the purpose of presenting an expert opinion - to assist the trier of fact, in this case the Board, in reaching its conclusions. It is unlikely that the Board, experts in Illinois environmental law, would have common knowledge of [REDACTED]

[REDACTED]

Additionally, Mr. Callen's reliance upon an email from his in-house counsel is also not grounds for striking the opinion. In the *Johns Manville* matter, the Complainant's expert partially relied

upon another expert's information and opinion. *Johns Manville v. IDOT*, at slip op 3. Nevertheless, the Hearing Officer found that the second expert's opinion was minimal, and the expert stated that all of his opinions were his own. *Id.* As is common to managers, Mr. Callen relies upon NRG's corporate resources, including its legal department, to assist in recovering information required to support his understanding and knowledge of the NRG corporate structure and its holdings. (Ex. 4, ¶4).

[REDACTED]

Mr. Callen's opinions are his own and are based upon his extensive knowledge, qualifications and experience. Merely requesting assistance in accessing information more quickly is not reliance upon a legal opinion, particularly since the assistance did not actually refer to the provision on which he opined.

B. Complainants Misstate Mr. Callen's Reliance on Facts from MWG's Bankruptcy as "Legal"

Complainants also argue, without any legal support, that relying upon the terms of a bankruptcy agreement is "legal interpretation" and thus improper. Again, Complainants' analysis is misplaced. The correct analysis is whether Mr. Callen's opinions are within his scope of expertise and whether they will aid the trier of fact. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

and NRG Energy, Inc. 8-K, April 1, 2014, pp. F-79, F-100, relevant pages attached as Ex. 7, a full copy can be found on NRG's Investor website.⁷ Again, the outcome and purchase of a company out of bankruptcy is not an interpretation of a legal proceeding, but are facts that concern the CAO of a major corporation.

⁵ A quick review of the January 2014 presentation, which is attached as Exhibit 5, shows that a description of the bankruptcy terms is on Slide No. 10.

⁶ MWG has only attached the cover page and relevant pages of Ex. 6, but will provide the entire document to the Hearing Officer if requested.

⁷ <http://investors.nrg.com/phoenix.zhtml?c=121544&p=IROL-secToc&TOC=aHR0cDovL2FwaS50ZW5rd2I6YXJkLnNvbS9vdXRsaW5lLnhtbD9pcGFnZT05NjU3MjA4JTJlZHMzZD01Nw%3d%3d&ListAll=1>

C. “Relevant” is Not a Legal Term Of Art

Complainants’ argument that Mr. Callen cannot use the word “relevant” fails for the same reasons stated above. The proper analysis is that Mr. Callen’s expert opinion will aid the trier of fact in understanding the financial relationship between NRG and MWG. Nevertheless, Complainants’ broad statement that use of the term “relevant” somehow makes an opinion “legal” is incorrect on its face. Mr. Callen’s use of the term “relevant” is not a conclusion of a legal question, but is merely used in its common meaning. Experts are entitled to use legal terms if the common meaning and the legal meaning of the term are the same. *In re Objections to Tax Levies of Freeport School Dist. No. 145*, 372 Ill. App. 3d 562, 582 (2007) (Court found experts’ use of the term “risk management,” which was used in the statute at issue, was not improper); *Richman v. Sheahan*, 415 F. Supp. 2d 929, 947 (N.D. Ill. 2006) (Court found that where the word “conduit” also had an everyday meaning, the testimony should not be excluded as constituting a legal conclusion). Complainants never asked Mr. Callen to explain his use or meaning of the term “relevant” in his opinion, nor object to his use of the term in his deposition. (See Callen Dep. Tr. 8:9, attached as Ex. D to Complainants’ Motion). Had they, Mr. Callen would have told them that his use of the term “relevant” is not a legal conclusion but merely a description of Mr. Schlissel’s expert report which relied upon information immaterial to MWG’s financial condition. (Ex. 4, ¶6). Mr. Callen could have used any other synonymous word, such as stating that Mr. Schlissel’s opinion on NRG’s financial capabilities and relying upon NRG’s financial information was “not applicable”, “not pertinent”, “not material”, or “not germane,” all of which equally describe Mr. Schlissel’s report.

III. CONCLUSION

David Callen's opinions interpreting technical financial documents and explaining MWG's business structure following its bankruptcy should not be excluded because they are based upon his knowledge, qualifications, and experience, and will assist the Board in coming to its conclusions. Based on the above, Respondent, Midwest Generation, LLC respectfully requests that the Hearing Officer deny Complainants' Motion *In Limine*.

Respectfully submitted,

MIDWEST GENERATION, LLC.

By /s/ Jennifer T. Nijman
One of Its Attorneys

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SIERRA CLUB, ET AL. V. MIDWEST GENERATION, LLC PCB 13-15

RESPONSE TO MOTION IN LIMINE

EXHIBIT 1

EXPERT REPORT OF DAVID A. SCHLISSEL



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EXPERT REPORT OF DAVID A. SCHLISSEL

Conclusions

NRG Energy and its subsidiaries are well positioned to provide the needed financial resources to cover an estimated \$84,901,018 to \$261,257,191 cost of cleaning up the coal ash sites at the Joliet 29, Powerton, Will County and Waukegan sites. The Company can develop a financial plan to cover these costs over a period of years that combines (1) cash resources from operating flows, (2) other sources of liquidity, and (3) borrowings from the capital markets. Prudent management of these financial resources would allow NRG to undertake the cleanup without any material and lasting impact on its financial performance, especially if the cleanup costs are spread over several years.

Background

NRG Energy is the second largest power generator in the U.S., with over 51,000 megawatts (MW) of generation capacity at 93 fossil and nuclear plants, 14 utility scale solar facilities, 35 wind farms, and multiple distributed solar facilities, as of December 31, 2014.¹ In addition to its domestic generation assets, NRG also has a relatively small amount of capacity (749 MW) outside the U.S.

As of December 31, 2014, approximately 31 percent (16,734 MW) of its generation capacity was coal-fired, 48 percent (25,301 MW) was gas-fired, 11 percent (6,008 MW) was oil-fired, 2 percent (1,176 MW) was nuclear, and 8 percent (4,259 MW) was from renewables.²

According to NRG, many of its generation assets are located within densely populated areas that tend to have “more robust wholesale pricing as a result of relatively favorable

¹ NRG Energy, Inc., 2014 Annual Report (Form 10-K), 14 (Feb. 27, 2015).

² *Id.* at 13.

local supply-demand balance.”³ NRG has generation assets located in or near Houston, New York City, Chicago, Washington, D.C., New Jersey, southwestern Connecticut, Pittsburg, Cleveland, and the Los Angeles, San Diego, and San Francisco metropolitan areas.⁴

The majority of the Company’s conventional generation capacity is located in Eastern markets (ISO-NE and PJM) with forward capacity markets that extend three years into the future. As NRG has explained in its 10-K filing for the year ending December 31, 2014, these capacity revenues “not only enhance the reliability of future cash flows but are not correlated to natural gas prices.”⁵

NRG’s Asset Diversification

The company has made substantial investments and acquisitions in recent years to reposition its generation portfolio and diversify beyond what had been its core merchant business selling power from traditional fossil and nuclear power plants. This diversification has positioned, and can be expected in the coming years to increasingly position, NRG to manage its commodity price risks⁶, to reduce its merchant exposure from fossil-fired assets,⁷ and to profit financially from what NRG Energy’s President and Chief Executive Officer David Crane has described as “the early but unmistakable stage of a technology-driven disruption of historic proportion” and a power plant retirement “tsunami washing across [NRG’s] core markets that will benefit [NRG] as one of the last men standing...”⁸ The major changes impacting the energy industry include: low commodity prices, development of a clean energy economy with increasing reliance on

³ *Id.* at 9.

⁴ *Id.*

⁵ *Id.* at 14.

⁶ NRG Energy, Inc., *Fourth Quarter 2014 Results Presentation 4* (Feb. 27, 2015); TheStreet Transcripts, *NRG Energy (NRG) Earnings Report: Q4 2014 Conference Call Transcript* (Feb. 27, 2015).

⁷ *Id.*

⁸ TheStreet Transcripts, *NRG Energy (NRG) Earnings Report: Q4 2014 Conference Call Transcript* (Feb. 27, 2015).

distributed wind and solar resources,⁹ and thousands of megawatts of, mainly, coal plant retirements. According to NRG, its portfolio diversification and its commercial operations hedging strategy provide it with reliable future cash flows.¹⁰

NRG's investment in renewable resources more than tripled between December 31, 2012, and December 31, 2014, from 1,270 to 4,259 MW.¹¹ As a result of this increase, renewable resources increased from three percent to eight percent of NRG's total capacity in the two-year period. This diversification has made NRG one of the nation's largest domestic wind operators, and has reduced its merchant exposure from financially risky coal-fired assets.

NRG also has undertaken to optimize its generation portfolio by converting some coal-fired assets to burn natural gas instead of coal, retrofitting other coal-fired assets in its generation fleet with required environmental controls, and repowering dormant fossil-fired capacity. As of June 15, 2015, NRG reported that it planned to complete approximately 7,100 MW of planned environmental retrofits and 4,400 MW of fuel conversions by the fall of 2016.¹² The Company also reported that it planned to add another 1,155 MW of new gas-fired capacity in Texas and California between 2016 and 2020.¹³

As well as being a power provider, NRG's Home Retail subsidiary provides retail electric service to more than 3.2 million recurring customers in Texas and the Northeast. This makes NRG the largest energy retailer in Texas and one of the largest retailers in the

⁹ See, e.g., Galen Barbose, Samantha Weaver and Naim Darghouth, *Tracking the Sun VII: An Historical Summary of the Installed Price of Photovoltaics in the United States from 1998 to 2013* Lawrence Berkeley National Laboratory and United States Department of Energy, 5 and 10 (Sept. 2014); the American Wind Association website at <http://www.awea.org/>; the Solar Energy Industries Association website at <http://www.seia.org/>.

¹⁰ NRG Energy, Inc., 2014 Annual Report (Form 10-K), 14 (Feb. 27, 2015).

¹¹ NRG Energy, Inc., 2012 Annual Report (Form 10-K), 8 (Feb. 27, 2013); NRG Energy, Inc., 2014 Annual Report (Form 10-K), 13 (Feb. 27, 2015).

¹² NRG Energy, Inc., *Investor Presentation* 25 (June 2015).

¹³ *Id.*

U.S., with sales in Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Ohio and Texas.¹⁴

NRG's 2014 and First Quarter 2015 Financial Performance

NRG Energy reported total assets of \$40.33 billion as of March 31, 2015, down slightly from \$40.665 billion it reported as of December 31, 2014.¹⁵ Recent acquisitions include Gen-On in 2012, Edison Mission Energy in 2014, and Alta Wind, also in 2014.

NRG Energy and its subsidiaries had \$15.868 billion in total operating revenues in 2014, up from \$11.295 billion in 2013. The estimated \$84,901,018 to \$261,257,191 cost of cleaning up the coal ash sites at the Joliet 29, Powerton, Will County and Waukegan sites would represent 0.5 percent to 1.7 percent of the 2014 total operating revenues of NRG Energy and its subsidiaries, or even less if these cleanup expenditures were spread over more than one year. The U.S. EPA has determined that "The cost-to-revenue ratios provide screening level indicators of potential economic impacts. Entities incurring costs below 1 percent of revenue are unlikely to face economic impacts."¹⁶

The Company's total interest expense of \$1.119 billion in 2014 represented approximately 7 percent of its total operating revenues. This meant that the annual interest expenses in 2014 were a lower percentage of total operating revenues than they were in either 2012 or 2013.

NRG had Adjusted EBITDA (earnings before interest, taxes, depreciation and amortization) of \$3.128 billion in 2014¹⁷ and anticipates earning between \$3.2 billion and \$3.4 billion in Adjusted EBITDA in 2015.¹⁸ The estimated \$84,901,018 to \$261,257,191 cost of cleaning up the coal ash sites at the Joliet 29, Powerton, Will

¹⁴ *Id.* at 10.

¹⁵ NRG Energy, Inc., *NRG Energy, Inc. Reports Full Year and Fourth Quarter Results, Reaffirms 2015 Guidance* (Feb. 27, 2015).

¹⁶ U.S. EPA, *Effluent Limitations Guidelines for the Steam Electric Power Generating Point Source Category*, 78 Fed. Reg. 34,432, 34,495 (Proposed June 7, 2013) (to be codified at 40 C.F.R. 423).

¹⁷ NRG Energy, Inc., *Fourth Quarter 2014 Results Presentation 17* (Feb. 27, 2015).

¹⁸ NRG Energy, Inc., *Investor Presentation 31* (June 2015).

County and Waukegan sites would represent 2.7 percent to 8.4 percent of NRG's 2014 Adjusted EBITDA, or even less if these cleanup expenditures were spread over more than one year.

NRG's operations have provided a substantial cash flow for the Company, producing \$951 million in Free Cash Flow before Growth in 2014¹⁹ and a projected \$1.1 billion to \$1.3 billion in 2015.²⁰ The estimated \$84,901,018 to \$261,257,191 cost of cleaning up the coal ash sites at the Joliet 29, Powerton, Will County and Waukegan sites would represent 8.9 percent to 27.5 percent of NRG Energy's 2014 Free Cash before Growth, or even less if these cleanup expenditures were spread over more than one year.

NRG's total corporate liquidity was \$3.94 billion at the end of 2014, of which \$2.573 billion represented cash and cash equivalents, and \$1.367 billion reflected funds that were available from an NRG Corporate Credit Facility (e.g., line of credit).²¹ NRG's total Liquidity at the end of March 2015 was \$4.031 billion or slightly higher than it had been at the end of 2014.²² The estimated \$84,901,018 to \$261,257,191 cost of cleaning up the coal ash sites at the Joliet 29, Powerton, Will County and Waukegan sites would represent 2.2 percent to 6.6 percent of NRG Energy's 2014 total corporate liquidity, or even less if these cleanup expenditures were spread over more than one year.

This recent performance demonstrates that NRG Energy would have the current financial capability to fund the estimated cleanup costs at the Joliet 29, Powerton, Will County and Waukegan sites.

Recent Developments

There are a number of important recent developments that individually and together suggest that NRG Energy will have an enhanced capability in coming years to fund

¹⁹ NRG Energy, Inc., *Fourth Quarter 2014 Results Presentation* 17 (Feb. 27, 2015).

²⁰ NRG Energy, Inc., *Investor Presentation* 31 (June 2015).

²¹ NRG Energy, Inc., *NRG Energy, Inc. Reports Full Year and Fourth Quarter Results, Reaffirms 2015 Guidance* (Feb. 27, 2015).

²² *Id.*

\$84,901,018 to \$261,257,191 in coal ash cleanup costs at the Joliet 29, Powerton, Will County and Waukegan sites:

1. The creation of the new Lower Hudson Valley Capacity Zone in NYISO that will result in higher capacity prices for the generation in the zone. For example, a representative for NRG Energy has been quoted as saying that “NRG is prepared to bring 385 MW back online and this is in great part responsive to the creation of the Lower Hudson Valley capacity zone” and that the Company will make a significant investment in Unit 2 at its Bowline plant which was not justified by the price signals sent before the creation of the new capacity zone.²³
2. FERC’s approval of the ISO-New England Pay-for-Performance capacity program and the PJM Capacity Performance Plan that are expected to lead to higher capacity market prices, and thus to substantially higher capacity revenues in coming years from NRG’s 2.9 gigawatts (GW) of capacity in ISO-New England and its 17.6 GW of capacity in PJM.²⁴

For example, the clearing price for existing capacity in ISO-New England’s first auction after FERC approved the Pay-for-Performance plan in May 2014 (that is, the February 2015 Forward Capacity Auction (FCA) 9) was \$9.55 per kilowatt-month for capacity for the 2018/2019 capacity-year.²⁵ This was approximately \$2.52 per kilowatt-month (or 36 percent) higher than the clearing price in ISO-New England’s previous FCA 8 auction.²⁶ FERC’s recent approval of PJM’s Capacity Performance Plan also is expected to increase capacity prices for many independent power producers like NRG in PJM’s upcoming August 2015 forward capacity auction and for “years to come.”²⁷ These capacity market changes have

²³ Platts McGraw Hill Financial, *New capacity zone in New York boosting power generation picture: ISO*, (Dec. 17, 2014).

²⁴ NRG Energy, Inc., *Fourth Quarter 2014 Results Presentation* 10 (Feb. 27, 2015).

²⁵ ISO New England, *Forward Capacity Market (FCA 9) Result Report 1* (Feb. 4, 2015).

²⁶ ISO New England, *Forward Capacity Market (FCA 8) Result Report* (Feb. 5, 2014).

²⁷ UBS Securities, *US Electric Utilities & IPPs: Poised to Perform with PJM* (June 11, 2015).

the potential to increase NRG's annual revenues from its generation capacity in ISO-NE and PJM by hundreds of millions of dollars.

3. The tripling of NRG's home solar customers in just one year, from 4,349 in 2013 to 13,390 in 2014.²⁸ NRG has set as a priority achieving further growth to 35,000 to 40,000 cumulative customers in 2015.²⁹ I expect NRG will experience further increases as customer interest in distribution solar rises due to continued declines in installed solar system prices.³⁰
4. NRG's planned conversions of the Dunkirk, Big Cajun and Joliet Units 6-8 to burn natural gas, which can be expected to improve NRG's economics from operating those plants given the relative prices of natural gas and coal.
5. NRG is projecting a greater than \$500 million decline in its annual committed capital expenditures beyond 2016, which I expect will clear up funds for other expenditures.³¹ The estimated \$84,901,018 to \$261,257,191 cost of cleaning up the coal ash sites at the Joliet 29, Powerton, Will County and Waukegan sites would represent 17 percent to slightly more than one-half of this projected \$500 million in capital expenditures, or even less if these cleanup expenditures costs were spread over more than one year.

These developments demonstrate that NRG not only has the current financial capability to fund the estimated cleanup costs, but also will be even better positioned to do so in the coming years.

²⁸ NRG Energy, Inc., *Fourth Quarter 2014 Results Presentation* 14 (Feb. 27, 2015).

²⁹ *Id.* at 15.

³⁰ See, e.g., Galen Barbose, Samantha Weaver and Naim Darghouth, *Tracking the Sun VII: An Historical Summary of the Installed Price of Photovoltaics in the United States from 1998 to 2013* Lawrence Berkeley National Laboratory and United States Department of Energy, 1-3 and 13 (Sept. 2014).

³¹ NRG Energy, Inc., *Investor Presentation* 19 (June 2015).

SIERRA CLUB, ET AL. V. MIDWEST GENERATION, LLC PCB 13-15

RESPONSE TO MOTION IN LIMINE

EXHIBIT 2

**MWG'S FOURTH SUPPLEMENTAL RESPONSE TO
COMPLAINANTS' FIRST SET OF INTERROGATORIES
AND SUPP. DOCUMENT RESPONSE,
DECEMBER 7, 2015**

(REDACTED - NON-DISCLOSEABLE INFORMATION)

SIERRA CLUB, ET AL. V. MIDWEST GENERATION, LLC PCB 13-15

RESPONSE TO MOTION IN LIMINE

EXHIBIT 3

HEARING OFFICER OPINION

JOHNS MANVILLE V. IDOT, PCB 14-3, APRIL 26, 2016

RECEIVED
CLERK'S OFFICE

APR 26 2016

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

April 26, 2016

JOHNS MANVILLE,)	
)	
Petitioner,)	
)	
v.)	PCB 14-3
)	(Enforcement)
ILLINOIS DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Respondent.)	

 ORIGINAL

HEARING OFFICER ORDER

On February 8, 2016, the Illinois Department of Transportation (IDOT) filed two motions: a motion *in limine* to bar certain opinion testimony of Douglas G. Dorgan (Mot. to Bar Dorgan), and a motion *in limine* to bar introduction of certain statements made by former IDOT employee Duane Mapes (Mot. to Bar Mapes). Johns Manville (JM) also filed two motions on February 8, 2016. JM filed a motion *in limine* to bar IDOT from calling Steven Gobelman as a lay witness at hearing (Mot. to Bar Gobelman), and a motion to exclude Mr. Gobelman's opinion testimony (Mot. to Excl. Op. Test. Gobelman).

On February 16, 2016, IDOT filed its responses to JM's Mot. to Bar Mapes and JM's Mot. to Bar Gobelman. Also on February 16, JM filed its responses to IDOT's Mot. to Bar Dorgan and IDOT's Mot. to Bar Mapes.

This order first summarizes the filings regarding each motion and then provides my ruling on each motion.

IDOT's MOTIONS

IDOT's Motion In Limine To Bar Opinion Testimony Of Douglas Dorgan

Summary of IDOT's Motion

IDOT requests an order barring Mr. Dorgan from testifying at hearing about his disclosed opinions 3.2, 3.3 and 3.4. Mot. to Bar Dorgan. Mr. Dorgan's disclosed opinions include the proposition that IDOT's conduct was a violation of Section 21 of the Illinois Environmental Protection Act (Act), that the Illinois Environmental Protection Agency (Agency) "likely would view IDOT's conduct to be 'open dumping' under Section 3.305 of the Act," and that the Agency "would treat crushed and buried ACM as both 'solid waste' and 'hazardous waste.'" *Id.* at 2. IDOT argues that these opinions are legal conclusions that go to the ultimate issue before the Board and are therefore impermissible. *Id.*

IDOT next argues that opinions offered in section 3.2 of Mr. Dorgan's report go to the fundamental question in this case: how IDOT designed and constructed the highway project over forty years ago. *Id.* at 3. IDOT contends that Mr. Dorgan lacks the specialized knowledge, training or experience necessary to render an expert opinion and therefore his opinion must be barred. *Id.* at 3-5. Further, IDOT argues that Mr. Dorgan's opinions relating to the construction work should be barred because the opinion, in part, was based on another expert's opinion. *Id.* at 5. IDOT states that Mr. Dorgan indicated in his deposition that when reaching his opinions, he consulted with a colleague, Mr. Talbot, about construction-related issues. *Id.* at 6-7. IDOT argues that because Mr. Dorgan relied on another expert's opinion to form his own, Mr. Dorgan must be barred from testifying about those issues at hearing. *Id.* at 7-8.

Finally, IDOT seeks to bar Mr. Dorgan's opinions in sections 3.2 and 3.3 of his report because they are speculative, according to IDOT. *Id.* at 8. Specifically, Mr. Dorgan opined that remedial activities are more extensive because "IDOT used, spread, buried, placed and disposed of ACM waste, including Transite pipe, throughout Site 3 and portions of Site 6 during construction . . ." *Id.* IDOT argues that Mr. Dorgan's opinions must be barred because they "are based on nothing more than information provided to him by his colleague" and because they are speculative and unfounded. *Id.*

Summary of JM's Response

JM responds that Mr. Dorgan's opinions do not speak to the ultimate issue in the case because "while IDOT's conduct is relevant to the ultimate question, the only ultimate question is whether JM, as a matter of law, has met its burden of proof." Resp. at 2. JM next argues that even if IDOT committed the alleged violations, "nowhere in the body of Mr. Dorgan's Expert Report does Mr. Dorgan ultimately conclude that IDOT violated the [Act]." Resp. at 3. Moreover, JM argues that opinion testimony describing "the conduct of IDOT in reference to specified rules, regulations and statutes" is permitted under Illinois Rules of Evidence 704. Resp. at 3-4.

JM next contends that Mr. Dorgan is qualified to provide the expert opinions in Section 3.2 of his report because of his education and work history, including environmental consultant at engineering firms. Resp. at 5-8. JM argues that Mr. Dorgan's opinions were not based on Mr. Talbot's opinions, and that Mr. Talbot only assisted Mr. Dorgan in reviewing figures. Finally, JM states that Mr. Dorgan's opinions are not speculative and are based on documentary evidence. Resp. at 11-13.

Discussion and Ruling

Illinois Rules of Evidence 704 allows opinion testimony on the ultimate fact or issue that will be decided by the trier of fact. Expert opinion testimony is admitted to assist the Board in understanding the ultimate issue to be decided. *See Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 905 (2d Dist. 2007). A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its decision. *Thompson v. Gordon*, 221 Ill. 2d 414, 428-29

(Ill. 2006). An expert only needs to have knowledge and experience beyond the average citizen. *Id.*

I find that Mr. Dorgan may testify as an expert given his knowledge and experience, which go beyond that of an ordinary citizen and could consequently assist the Board in its determinations. Mr. Dorgan's assertions regarding the environmental concerns of this case do not amount to legal conclusions, but rather opinions as to the relationship between the facts of this case and applicable laws. Such testimony could conceivably aid the Board. Nor will his testimony encroach upon the Board's ultimate determination, although opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the Board. Ill. R. Evid. 704.

Further, even though Mr. Dorgan consulted with a colleague and had the colleague review Mr. Dorgan's report, the colleague's contribution was minimal and Mr. Dorgan represented that all of the opinions in his report are his own. Finally, Mr. Dorgan's opinions are not impermissibly speculative but based on documentary evidence in the record including a number of reports and manuals. Mr. Dorgan will be allowed to offer his disclosed opinions found in sections 3.2, 3.3 and 3.4 of his report.

IDOT's Motion *In Limine* to Bar Opinion Testimony of Douglas Dorgan is denied. IDOT, however, may renew its objection at hearing.

IDOT's Motion In Limine To Bar Introduction Of Certain Statements Made By Former IDOT Employee Duane Mapes

Summary of IDOT's Motion

IDOT seeks an order barring JM from entering into evidence or eliciting testimony regarding statements former IDOT employee Duane Mapes made to former IDOT attorney J. Randall Schick. Mot. to Bar Mapes at 1-2. IDOT contends the statements are inadmissible hearsay. *Id.* at 2. IDOT further contends that the statements are not admissible as non-hearsay admissions of a party-opponent under Illinois Rule of Evidence 801(d)(2)(D) because the statements were not made while Mr. Mapes was an IDOT employee. *Id.* at 3.

Summary of JM's Response

JM contends that Mr. Mapes' statements are not hearsay under Illinois Rule of Evidence 801(d)(2) because IDOT "manifested an adoption or belief in the truth of Mr. Mapes' statements by transmitting them to the USEPA in IDOT's 104 (c) Response" Resp. at 3-4. Additionally, JM claims the statements are not hearsay under Illinois Rule of Evidence 801(d)(2)(C) because IDOT authorized Mr. Mapes to make the statements. *Id.*

JM also argues that even if the statements are hearsay, they fall within the hearsay exception under Illinois Rule of Evidence 803(8) and 804(b)(3). *Id.* at 4. JM contends that the public records exception under Rule 803(8) applies because IDOT's 104(e) CERCLA Response

was a public record setting forth IDOT activities related to matters observed during IDOT's work on the project that IDOT had a duty to report to the USEPA, and that nothing in the Response indicates a lack of trustworthiness. *Id.* at 5. JM further states that the hearsay exception under Rule 804(b)(3) applies because by making the statement, Mr. Mapes was subjecting himself to potential civil or criminal liability and therefore would not make the statement unless he believed it to be true. *Id.* at 6.

Further, JM argues that Mr. Mapes' statements are admissible under the Illinois Administrative Procedure Act because a "reasonably prudent man can and would rely upon the statements made in that 104(e) Response." *Id.* at 7, citing 5 ILCS 100/10-40 (2014); *see also* 35 Ill. Adm. Code 101.626(a). JM also maintains that the statements should not be barred because Illinois Rules of Evidence 703 and 705 allow an expert witness to rely on otherwise inadmissible statements in formulating an opinion and the expert must disclose the basis for his opinion. *Id.* Finally, JM contends that even if the statements are not admitted for the truth of the matter asserted, they should be admitted to explain the USEPA's investigatory procedure in arriving at its decision to order remedial work on Sites 3 and 6. *Id.* at 9.

Discussion and Ruling

I find Mr. Mapes' statements admissible for a number of reasons cited by JM. For one, they are admissions by a party-opponent through an employee authorized to make statements to USEPA on behalf of IDOT. Beyond that, IDOT's 104(e) Response is a public record and admissible under the corresponding exception to the hearsay rule. Even in the event they are hearsay, I find them trustworthy and material and, having been included in IDOT's 104(e) Response, are the kind of information as would be relied upon by prudent persons in the conduct of serious affairs. *See* 35 Ill. Adm. Code 101.626(a).

IDOT's Motion *In Limine* to Bar Introduction of Certain Statements Made by Former IDOT Employee Duane Mapes is denied. IDOT, however, may renew its objection at hearing.

JM's Motions

JM's Motion To Exclude Opinion Testimony Of Steven Gobelman

Summary of JM's Motion

JM seeks an order excluding opinion testimony from IDOT employee Steven Gobelman. JM first argues that after reviewing Mr. Gobelman's report and deposition, it was unable to discern "whether he has actually arrived at any 'opinions' and the bases for those opinions." Mot. to Excl. Op. Test. Gobelman. JM claims that rather than offering opinions, Mr. Gobelman is merely offering "commentary" on issues in this case. *Id.* at 7. JM argues that the statements must be excluded because it cannot identify any actual opinions, or the bases for any opinions, and IDOT failed to comply with the requirement under Supreme Court Rule 213(f) to disclose the "conclusions and opinions of the witness and the bases therefor." *Id.* at 7-9.

JM next argues that Mr. Gobelman lacks the knowledge, skill, experience, training or education required under Illinois Rules of Evidence 702 to testify as an expert on IDOT's historical and utility practices, JM's economic motivations, and USEPA's remedial strategy and decision making processes. *Id.* at 10-14. In particular, JM argues that in Comments 1-3 and 5-8 of his report, Mr. Gobelman makes comments regarding IDOT's historical practices as they relate to this case. *Id.* at 11. JM claims that he should not be allowed to offer such testimony because he reached his opinions without having any first-hand knowledge of IDOT's past practices, without studying sufficient examples of such practices, and without discussing such practices with any person that took part in past projects. *Id.* at 12.

JM next argues that in Comments 4 and 8-11 of his report, Mr. Gobelman similarly offered comments regarding utility practices, JM's economic motivations, and USEPA's decision making process without having the requisite knowledge or experience to be considered an expert on the topics. *Id.* at 13-14. Lastly, JM argues that Mr. Gobelman's opinions regarding IDOT's historical practices, utility practices, JM's economic motivations, and USEPA's deliberative process are based solely on speculation. *Id.* 15-21.

Summary of IDOT's Response

IDOT contests JM's assertions and states that Mr. Gobelman's ample experience and qualifications make him qualified to offer all of his expert opinions in this case. *Resp.* at 6-13. IDOT also maintains that Mr. Gobelman's opinions are not speculative and are either based on his own knowledge and experience or other documents relevant to this case. *Id.*

Discussion and Ruling

Applying the same standard and reasoning used in my ruling regarding Mr. Dorgan's testimony, I deny JM's motion.

While working for IDOT for over twenty years, Mr. Gobelman participated in the investigation and remediation of contaminated sites and also has examined the records of the project at issue in this case, along with the records of several other IDOT highway construction projects. IDOT has demonstrated that Mr. Gobelman has experience and knowledge of IDOT's historical practices, utility practices, economic considerations of remediation projects, and USEPA's concerns with contaminated property beyond that of an average citizen. Therefore, Mr. Gobelman may offer opinion testimony on these subjects as an expert witness.

Furthermore, after reviewing Mr. Gobelman's report and deposition testimony, I find that regardless of how Mr. Gobelman characterized his opinions, it is plain he did offer opinions and identified documentary evidence and experience on which they are based. Nor am I persuaded that Mr. Gobelman's testimony is speculative or that IDOT violated Supreme Court Rule 213(f)'s disclosure requirement.

JM's Motion to Exclude Opinion Testimony of Steven Gobelman is denied. JM, however, may renew its objection at hearing.

**JM's Motion In Limine To Bar IDOT From Calling Steven Gobelman As A Lay Witness
At Hearing**

Summary of JM's Motion

JM seeks an order barring Mr. Gobelman from testifying as a lay witness. JM argues that IDOT did not disclose Mr. Gobelman as a fact witness in discovery and JM did not have the opportunity to depose him as a fact witness. Mot. to Bar Gobelman at 3. JM argues that if he is allowed to testify as a lay witness, the scope of Mr. Gobleman's testimony must be limited to discussing IDOT's Section 104(e) response. *Id.*

Summary of IDOT's Response

IDOT argues that Mr. Gobelman should not be barred from testifying as a lay witness because during his deposition, JM questioned Mr. Gobelman "extensively" and about matters beyond his expert opinions including but not limited to his involvement in IDOT's 104(e) Response. Resp. at 3-4. IDOT adds that Mr. Gobelman "may be the only living person" involved in the 104(e) Response. *Id.* at 3. IDOT adds that it properly identified Mr. Gobelman in response to an interrogatory about persons contacted in preparing the 104(e) Response. *Id.* at 1-2. Consequently, IDOT argues that JM will not be prejudiced or "harmed in any way" by Mr. Gobelman testifying as a lay witness. *Id.*

Discussion and Ruling

I find no basis for barring Mr. Gobelman from testifying as a lay witness, nor any reason to exclude lay testimony on subjects other than just IDOT's Section 104(e) Response. JM was not limited in the subjects it could explore in deposing Mr. Gobelman and clearly inquired into his knowledge of facts relating to the sites at issue and IDOT records. *See* Resp. at 3 & Exh. B. JM has not shown that it will be prejudiced if Mr. Gobelman testifies as a lay witness and on matters other than just IDOT's 104(e) Response.

JM's Motion *In Limine* To Bar IDOT From Calling Steven Gobelman As A Lay Witness At Hearing is denied. JM, however, may renew its objection at hearing.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

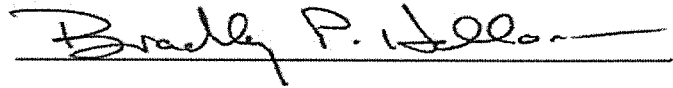
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
312.814.8917
Brad.Halloran@illinois.gov

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed and mailed, first class, on April 26, 2016, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 26, 2016:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

@ Consents to electronic service

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SIERRA CLUB, ET AL. V. MIDWEST GENERATION, LLC PCB 13-15

RESPONSE TO MOTION IN LIMINE

EXHIBIT 4

AFFIDAVIT OF DAVID CALLEN

(REDACTED - NON-DISCLOSEABLE INFORMATION)

SIERRA CLUB, ET AL. V. MIDWEST GENERATION, LLC PCB 13-15

RESPONSE TO MOTION IN LIMINE

EXHIBIT 5

JANURAY 2014 EME UPDATE PRESENTATION



NRG Energy

Edison Mission Transaction Overview



Safe Harbor

Forward Looking Statements

In addition to historical information, the information presented in this communication includes forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Exchange Act. These statements involve estimates, expectations, projections, goals, assumptions, known and unknown risks and uncertainties and can typically be identified by terminology such as "may," "should," "could," "objective," "projection," "forecast," "goal," "guidance," "outlook," "expect," "intend," "seek," "plan," "think," "anticipate," "estimate," "predict," "target," "potential" or "continue" or the negative of these terms or other comparable terminology. Such forward-looking statements include, but are not limited to, statements about the anticipated benefits of the acquisition of the Edison Mission Energy assets, the Company's future revenues, income, indebtedness, capital structure, plans, expectations, objectives, projected financial performance and/or business results and other future events, and views of economic and market conditions.

Although NRG believes that its expectations are reasonable, it can give no assurance that these expectations will prove to have been correct, and actual results may vary materially. Factors that could cause actual results to differ materially from those contemplated above include, among others, general economic conditions, hazards customary in the power industry, weather conditions, competition in wholesale power markets, the volatility of energy and fuel prices, failure of customers to perform under contracts, changes in the wholesale power markets, changes in government regulation of markets and of environmental emissions, the condition of capital markets generally, our ability to access capital markets, unanticipated outages at our generation facilities, adverse results in current and future litigation, failure to identify or successfully implement acquisitions and repowerings, our ability to implement value enhancing improvements to plant operations and companywide processes, our ability to obtain federal loan guarantees, the inability to maintain or create successful partnering relationships, our ability to operate our businesses efficiently including NRG Yield, our ability to retain retail customers, our ability to realize value through our commercial operations strategy and the creation of NRG Yield, the ability to close the proposed EME transaction, and the ability to realize anticipated benefits of the transaction (including expected cost savings, other synergies and our ability to successfully transact with NRG Yield) or the risk that anticipated benefits may take longer to realize than expected.

NRG undertakes no obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, except as required by law. The adjusted EBITDA and free cash flow forecasts are estimates as of January 7, 2014. These estimates are based on assumptions believed to be reasonable as of that date. NRG disclaims any current intention to update such guidance, except as required by law. The foregoing review of factors that could cause NRG's actual results to differ materially from those contemplated in the forward-looking statements included in this Presentation should be considered in connection with information regarding risks and uncertainties that may affect NRG's future results included in NRG's filings with the Securities and Exchange Commission at www.sec.gov.

Additional Information

NRG has filed a registration statement (including a prospectus) with the SEC with respect to the NRG common stock that is expected to be issued in the transaction to which this presentation relates. This presentation shall not constitute an offer to sell or a solicitation of an offer to buy, nor shall there be any sale of NRG common stock in any state or jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state or jurisdiction. You should read the prospectus in that registration statement and other documents NRG has filed with the SEC for more complete information about NRG. You may obtain these documents for free by visiting EDGAR on the SEC Web site at www.sec.gov. Alternatively, the Company will arrange to send you the prospectus if you request it by calling 609-524-4500 or emailing investor.relations@nrenergy.com.





Agenda

- + Transaction Overview – *D. Crane*
- + Operational Assessment – *M. Gutierrez*
- + Financial Overview – *K. Andrews*
- + Closing Remarks and Q&A – *D. Crane*



Edison Mission Transaction Overview

Value Today

Potential For More Value Tomorrow

NYLD Eligible Assets¹

1,598 MW

- Contracted Wind
- Walnut Creek

EME Merchant Assets^{1,2}

Midwest Generation

4,314 MW

- Powerton & Joliet
- Waukegan & Will County

Gas, Oil & Wind

1,775 MW

- Merchant Wind
- Tax Equity Wind
- ST Contracted Gas
- Oil peakers

**Edison Mission
Marketing & Trading**

Immediate to Near-Term Value Drivers

- ✦ Drop-down opportunities for NRG Yield
- ✦ SG&A and cost savings
- ✦ Environmental compliance optimization
- ✦ Operational improvements and O&M rationalization
- ✦ EMMT value added complementary to NRG's Commercial Operations team



- ✦ Expanded operational benefits
- ✦ Retail / wholesale integration in Illinois
- ✦ Financing optimization of non-recourse entities
- ✦ Operational economies of scale
- ✦ Market recovery across PJM



NRG's Platform Provides Immediate Value and a Path for Long-Term Financial Accretion



¹ See Appendix slide 16 for detailed asset summary
² Excludes non-core assets (Ambit and Big Sky Wind)

Applying Lessons from the GenOn Transaction



Cost Synergies

- ✦ Alignment of corporate functions and integration into the NRG platform

>65% savings versus EME est. corporate G&A of \$107 MM¹



~\$70 MM/Year²

Operational Improvements

- ✦ Operational improvement and capex efficiencies, driven by the application of:



~\$10 MM/Year²



Total Expected Benefits of ~\$80 MM/Year



¹ Source: EME's Presentation to Unsecured Noteholders on 1/9/2013; Based on estimated 2014 corporate G&A costs
² Represents estimated annual run-rate target beyond 2014; Impact to 2014 dependent on anticipated closing date and timing of synergy realization



Putting the EME Transaction in Perspective

(\$ millions)

Full Year 2014 Guidance¹

	Capacity (MW)	Adj. EBITDA	CAFD	Implied Enterprise Value ²
NYLD Eligible Assets	1,598	\$185	\$60 - \$70	\$2,491 - \$2,735
EME Merchant Assets³	6,089	\$145 ⁴	NA	\$109 - \$353
Total Portfolio	7,687	\$330	\$60 - \$70	\$2,844

Based on
current 4.1%
CAFD yield²

EV/EBITDA:
0.7x - 2.4x

\$/kW:
\$18 - \$58



Providing Substantial Growth for NYLD While Acquiring the Merchant Assets at a Significant Discount



¹ Actual contribution to 2014 will not include full 12 months due to anticipated closing date; Excludes approximately \$80 MM of transaction costs and costs to achieve synergy target
² See slide 11 for details; As of 1/6/2014; Assumes 65.25 million Class A and Class B shares outstanding; Yield based on 2014 NYLD CAFD guidance of \$103 MM as a percentage of market capitalization
³ Excludes non-core assets (Ambit and Big Sky Wind)
⁴ 2014 Adjusted EBITDA does not include full run-rate synergy target

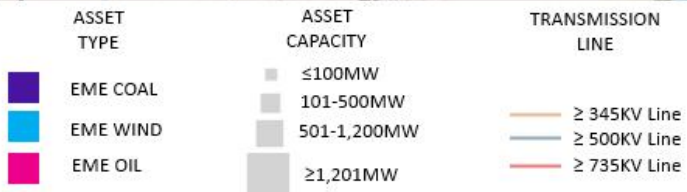


Operational Assessment



Edison Mission PJM Portfolio Overview

Over 4.7 GW of Capacity



Source: SNL Financial

Key Market Developments

Market Driver	Outlook
Demand Response	Proposed new rules expected to result in reduced DR participation in the Base Residual Auction
Imports	Proposed new rules would cap imports into the RTO region of PJM, where the EME assets are located
Retirements	Disciplined bidding in BRA; Significant un-cleared coal generation
Demand Growth	Low growth
Natural Gas Basis	Falling gas basis shrinking dark spreads in outer years



★ Positioning for Long-Term Option Value While Optimizing Near-Term Performance ★



Economies of Scale: Leveraging NRG's Platform

Realizing Value of the EME Merchant Assets...

Corporate Costs	<ul style="list-style-type: none"> Annual estimated corporate G&A savings of ~\$70 MM¹
Midwest Gen	<ul style="list-style-type: none"> 4.3 GW of PRB generation Up to \$350 MM obligation for environmental capex
Gas Fleet	<ul style="list-style-type: none"> 1.1 GW of gas-fired generation in CA 74% contracted with average PPA life of ~4 years²
Wind Fleet	<ul style="list-style-type: none"> ~350 MW of merchant, short-term contracted, and tax equity wind Geographically diversified
EMMT	<ul style="list-style-type: none"> Average Trading Revenue of ~\$70 MM over past 5 years³



...By Leveraging Core Competencies

- ✦ Alignment of corporate functions
 - ✦ Cost enhancements / performance improvements
 - ✦ Fuel additions / repowerings
 - ✦ Reduction in maintenance CapEx
 - ✦ Improved environmental compliance program
-
- ✦ Leverage NRG Commercial Operations team

Implied EME Merchant Value⁴ \$109 - \$353



★ Enhancing Value By Leveraging GenOn Experience and Successfully Integrating EME Operations ★

¹ See slide 4 for details
² Weighted by MW; See Appendix page 16 for detailed asset summary
³ Source: EME's Presentation to Unsecured Noteholders on 1/9/2013
⁴ See slide 11 for details; Market data as of 1/6/2014



Financial Overview



Revisiting Key Deal Terms & Conditions

Consideration **\$2,635 MM** of Cash and stock (~12.7 MM NRG Energy shares¹)

Key Purchase Price Adjustments include:

- Target Cash Balance² • **\$1,063 MM**; Adjusted by amounts above or below target (Closing Cash²)
- Target Debt Balance² • **\$1,545 MM**; Adjusted by amounts above or below target (Closing Debt²)

Excluded Liabilities

- Pension liabilities administered by EIX
- EME retains NOL's and other tax attributes up to transaction closing
- Cure payments under the Powerton/Joliet (PoJo) lease

PoJo Lease Amendment

- NRG assumes obligation effective as of 1/1/14; NRG Corporate Guaranty will be required
- Obligation to spend up to \$350MM in compliance CapEx
- Plants must retain ability to economically dispatch at full capacity or otherwise be capable as a capacity resource

Non-Core Assets

Assets Included:

- Big Sky
- Ambit

NRG has no obligation to support these entities



¹ Based on share price of \$27.62 per S-1 filed by NRG Energy on 12/24/2013

² As defined in the Asset Purchase Agreement; For purposes of establishing the \$1,063 MM, Cash includes cash and cash equivalents, restricted cash, margin and collateral deposits; Includes adjustments for any lease payments made by Seller beginning 1/1/2014; Excludes any changes in cash or debt at non-core assets



Understanding Transaction Value

(\$ millions, except \$/kW)

Implied Enterprise Value¹	
Purchase Price	\$2,635
Less: Acquired Cash per APA	(1,063)
Add: Non-Recourse Debt Assumed ²	1,272
Implied Enterprise Value	\$2,844

(A)	Total Enterprise Value \$2,844 MM
-----	--

NYLD Eligible Assets

EME Merchant Assets

	Range		Range	
CAFD ³	\$60	\$70	Implied Residual Value	\$109 - \$353
Current CAFD Yield ⁴	4.1%		2014 Adjusted EBITDA Guidance	\$145
Implied Equity Value	\$1,463	\$1,707	Implied 2014 EV/EBITDA	0.7x - 2.4x
Add: Debt	\$1,028		Implied \$/kW	\$18 - \$58
(B) Implied Market Value	\$2,491	\$2,735	Illustrative Multiples	
(A-B) Implied Residual Value	\$353	\$109	EV/EBITDA	9.0x - 7.0x
			Required Adj. EBITDA	\$12 - \$50

★ **NRG Yield Enables Acquisition of EME Merchant Assets at a Significant Discount** ★



¹ Excludes estimated Purchase Price Adjustments
² Per announcement on 10/18/2013; Based on 6/30/2013 balance sheet including incremental debt of \$23 MM from Viento refinancing; Excludes non-recourse debt associated with assets classified as non-core
³ CAFD represents Cash Available for Distribution
⁴ As of 1/6/2014; Assumes 65.25 million Class A and Class B shares outstanding; Yield based on 2014 NYLD CAFD guidance of \$103 MM as a percentage of market capitalization



Process Update Overview

+ **Bankruptcy Process**

- Plan Support Agreement approved by bankruptcy court and bid protections secured – Oct. 24th
- >2/3s (74%) of bondholders signed onto PSA – Nov. 6th
- Filing of Chap. 11 Plan of Reorganization and related disclosure statement – Nov. 15th
- Expiration of “Go Shop” Period – Dec. 6th
- Final Approval of the Plan – expected 1Q14

+ **Regulatory Approvals**

- DOJ / Hart-Scott-Rodino – received Nov. 26th
- FERC – filed Oct. 25th
- Public Utility Commission of Texas – filed Oct. 29th

+ **Required Notices**

- California Public Utilities Commission – Oct. 30th



On Track For 1Q14 Closing





Closing Remarks and Q&A



Conclusion

Immediate to Near-Term Focus



- Drop down NYLD-eligible assets
- Execute SG&A synergies and operational improvements
- Optimize the environmental compliance program
- Leverage EMMT platform

Long-Term Focus

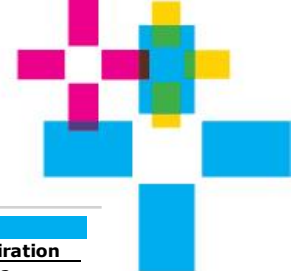


- Deliver expanded synergies
- Optimize the financing of non-recourse entities
- Leverage Illinois platform for retail growth
- Realize operational economies of scale





Appendix



Detailed Asset Summary

NYLD-Eligible Assets						
Asset	Net MW	Fuel Type	COD	Debt (9/30)	Debt Maturity	PPA Expiration
Walnut Creek	500	Natural Gas	2013	\$478	May-23	2023
Tapestry	204	Wind	>2008	\$204	Dec-21	>2031
Viento	304	Wind	>2005	\$202	Jul-23	>2025
High Lonesome	100	Wind	2009	\$66	Nov-17	2039
Laredo Ridge	80	Wind	2011	\$70	Mar-26	2031
Community Wind	30	Wind	2011	-	-	2031
Crosswinds	21	Wind	2007	-	-	2022
Hardin	15	Wind	2007	-	-	2027
Jeffers	50	Wind	2008	-	-	2028
Odin	20	Wind	2008	-	-	2028
Sleeping Bear	95	Wind	2007	-	-	2032
Spanish Fork	19	Wind	2008	-	-	2028
Storm Lake	108	Wind	1999	-	-	2019
Minnesota Wind Assets	52	Wind	Various	\$8	Various	Various
Total	1,598			\$1,028		
Weighted Average			4 Years			14 yrs

EME Merchant Assets						
Asset	Net MW	Fuel Type	COD	Debt (9/30)	Debt Maturity	PPA Expiration
Joliet	1,326	Coal	1959	-	-	-
Powerton	1,538	Coal	1972	-	-	-
Waukegan	689	Coal	1958	-	-	-
Will County	761	Coal	1958	-	-	-
Fisk Oil	197	Oil	1968	-	-	-
Waukegan Oil	108	Oil	1968	-	-	-
Kern River	150	Natural Gas	1985	-	-	2020
Sycamore	150	Natural Gas	1988	-	-	2020
Midway-Sunset	113	Natural Gas	1989	-	-	2018
Watson	196	Natural Gas	1988	-	-	2015
Coalinga	20	Natural Gas	1992	-	-	2016
Mid-Set	20	Natural Gas	1989	-	-	2016
Salinas River	21	Natural Gas	1992	-	-	2016
Sargent Canyon	21	Natural Gas	1992	-	-	2016
Sunrise	293	Natural Gas	2001	-	-	-
Doga	144	Natural Gas	1999	-	-	2019
Goat Wind	150	Wind	2008	-	-	-
Lookout	38	Wind	2008	-	-	-
Forward	29	Wind	2008	-	-	2017
Crofton Bluffs	12	Wind	2012	\$26	Dec-27	2032
Broken Bow	25	Wind	2012	\$51	Dec-27	2032
Cedro Hill	47	Wind	2010	\$119	Dec-25	2030
Mountain Wind I	19	Wind	2008	-	-	2033
Mountain Wind II	25	Wind	2008	-	-	2033
Total	6,089			\$196		

Non-Core Assets						
Asset	Net MW	Fuel Type	COD	Debt (9/30)	Debt Maturity	PPA Expiration
Big Sky	240	Wind	2012	\$228	Oct-14	-
Ambit	40	Waste Coal	1992	\$46	Oct-17	2036
Total	280			\$274		

Pro Forma Balance Sheet

\$ millions	As of September 30, 2013		Transaction Adjustment	September 30, 2013
	NRG ¹	EME ¹		Pro Forma
Cash and cash equivalents	2,129	1,138	(1,600)	1,667
Restricted cash, current portion	307	15	-	322
Total Cash	\$2,436	\$1,153	(\$1,600)	\$1,989
Recourse debt:				
Term loan facility and Revolver	2,011	-	432 ⁴	2,443
Unsecured Notes	5,718	-	700	6,418
Tax Exempt Bonds	373	-	-	373
Recourse subtotal	8,102	-	1,132	9,234
Non-Recourse debt:				
NRG Yield	1,167	-	-	1,167
EME NYLD Eligible Assets	-	1,028	-	1,028
Other EME non-recourse debt ²	-	495	-	495
Solar non-recourse debt ³	3,643	-	-	3,643
Unsecured Notes	2,799	-	-	2,799
Conventional non-recourse debt	689	-	-	689
Non-Recourse subtotal	8,298	1,523	-	9,821
Total Debt	\$16,400	\$1,523	\$1,132	\$19,055



¹ Debt excludes discounts/premiums from balances

² Includes non-recourse debt associated with assets classified as non-core in the amount of \$274MM

³ Includes 100% of CVSR project debt in Solar non-recourse debt, NRG Yield owns 48.95% of the project

⁴ Estimated purchase price adjustment based on EME's 9/30/2013 Balance Sheet and forecasted changes; Actual adjustments will be based on EME's balance sheet at closing



Appendix: Reg. G Schedules



Reg. G

Appendix Table A-1 EME Assets 2014 Midpoint Free Cash Flow before Growth Investments reconciliation to Adjusted EBITDA and Estimated Income Before Taxes

The following table reconciles estimated Income Before Taxes to Adjusted EBITDA

	2014
<i>\$ millions</i>	EME Assets
Income Before Taxes	\$ 140
Interest Expense	66
Adjustment to Reflect Reported Equity Earnings	22
Depreciation and Amortization	102
Adjusted EBITDA	\$ 330



Reg. G

Appendix Table A-2 2014 EME NYLD Eligible Assets Midpoint Cash Available For Distribution (CAFD) reconciliation to Adjusted EBITDA and Estimated Income Before Taxes

The following table reconciles estimated Income Before Taxes to Adjusted EBITDA to Midpoint CAFD

<i>\$ millions</i>	2014 EME NYLD Eligible Assets
Income Before Taxes	\$51
Interest Expense	54
Adjustment to Reflect Reported Equity Earnings	10
Depreciation and Amortization	70
Adjusted EBITDA	\$ 185
Interest Payments	(54)
Working Capital/other	(9)
Maintenance CapEx	(1)
Debt Amortization	(56)
Midpoint CAFD	\$ 65



Reg. G

Appendix Table A-3 EME Merchant Assets 2014 Midpoint Free Cash Flow before Growth Investments reconciliation to Adjusted EBITDA and Estimated Income Before Taxes

The following table reconciles Income Before Taxes to Adjusted EBITDA

<i>\$ millions</i>	2014 EME Merchant Assets
Income Before Taxes	\$89
Interest Expense	12
Adjustment to reflect reported equity earnings	12
Depreciation and Amortization	32
Adjusted EBITDA	\$ 145

SIERRA CLUB, ET AL. V. MIDWEST GENERATION, LLC PCB 13-15

RESPONSE TO MOTION IN LIMINE

EXHIBIT 6

**MWG INDEPENDENT AUDITOR'S REPORT
(REDACTED - NON-DISCLOSEABLE INFORMATION)**

SIERRA CLUB, ET AL. V. MIDWEST GENERATION, LLC PCB 13-15

RESPONSE TO MOTION IN LIMINE

EXHIBIT 7

NRG ENERGY, INC. 8-K, APRIL 1, 2014

[QuickLinks](#) -- Click here to rapidly navigate through this document

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

FORM 8-K/A
(Amendment No. 1)

**CURRENT REPORT PURSUANT
TO SECTION 13 OR 15(D) OF THE
SECURITIES EXCHANGE ACT OF 1934**

Date of report (Date of earliest event reported) **April 1, 2014**

NRG Energy, Inc.

(Exact Name of Registrant as Specified in Its Charter)

Delaware

(State or Other Jurisdiction of Incorporation)

001-15891

(Commission File Number)

41-1724239

(IRS Employer Identification No.)

211 Carnegie Center, Princeton, NJ
(Address of Principal Executive Offices)

08540
(Zip Code)

609-524-4500

(Registrant's Telephone Number, Including Area Code)

Not Applicable

(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
 - Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
 - Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
 - Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
-

EDISON MISSION ENERGY AND SUBSIDIARIES

MIDWEST GENERATION, LLC AND SUBSIDIARIES

COMBINED NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 9. Commitments and Contingencies (EME and Midwest Generation, except as noted) (Continued)

Future minimum operating lease payments at December 31, 2013 for Midwest Generation are:

Years Ending December 31, (in millions)	Operating Leases	LSTC
2014	\$ 2	\$ 283
2015	1	59
2016	1	23
2017	—	—
2018	—	—
Thereafter	—	101
Total future commitments	<u>\$ 4</u>	<u>\$ 466</u>

Operating lease expense amounted to \$7 million, \$14 million and \$16 million in 2013, 2012 and 2011, respectively.

Powerton and Joliet Sale Leaseback

Covenants in the Powerton and Joliet Sale Leaseback documents include restrictions on the ability of EME and Midwest Generation to, among other things, incur debt, create liens on its property, merge or consolidate, sell assets, make investments, engage in transactions with affiliates, make distributions, make capital expenditures, enter into agreements restricting its ability to make distributions, engage in other lines of business, enter into swap agreements, or engage in transactions for any speculative purpose.

The filing of the Chapter 11 Cases constitutes an event of default under the Powerton and Joliet Sale Leaseback and under instruments governing the Senior Lease Obligation Bonds issued to finance these leases. During the pendency of the Chapter 11 Cases, Midwest Generation did not make any of the three scheduled lease payments of \$76 million due on January 2, 2013, July 2, 2013 and January 2, 2014. Prior to the filing of the Chapter 11 Cases, EME and Midwest Generation had entered into a forbearance agreement with the owner-lessors, the owner-lessors' equity owners, and the Certificate Holders under which Midwest Generation paid the ratable portion of the rent due under the leases attributable to the period between December 17, 2012 and January 2, 2013 of \$7 million. After the expiration of the forbearance agreement, beginning in July 2013, EME and Midwest Generation agreed, among other things, to make monthly rental payments of \$3.75 million. In addition, the Bankruptcy Court approved the extension of the statutory deadline by which the Debtor Entities must assume or reject the Powerton and Joliet leases until March 31, 2014. Upon consummation of the NRG Sale, Midwest Generation will assume the Powerton and Joliet leases and EME will retain all liabilities with respect to the payment of the cure amount as set forth in the Asset Purchase Agreement (the Powerton and Joliet Cure Amount). The cure amount would have been approximately \$147 million at December 31, 2013. For additional information, see Note 16—Restructuring Activities—NRG Sale.

Each lease sets forth a termination value payable upon certain circumstances, which generally declines over time. A default under the terms of the Powerton and Joliet leases could result in foreclosure and a loss by Midwest Generation of its lease interest in the plant. In addition, under certain circumstances, a default would trigger obligations under EME's guarantee of such leases. These

EDISON MISSION ENERGY AND SUBSIDIARIES

MIDWEST GENERATION, LLC AND SUBSIDIARIES

COMBINED NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 16. Restructuring Activities (EME, Midwest Generation)

The Plan implements a reorganization of the Debtor Entities through a sale of substantially all of EME's assets under the NRG Sale and through the terms of the Settlement Agreement, which establishes a path for EME to emerge from bankruptcy free of liabilities as a wholly-owned subsidiary of EIX.

NRG Sale

On October 18, 2013, EME, Midwest Generation, and certain other Debtor Entities entered into a Plan Sponsor Agreement (the PSA) with NRG Energy, Inc. (NRG), the Purchaser, the Official Committee of Unsecured Creditors appointed in the Chapter 11 Cases, the counterparties to the Powerton and Joliet Sale Leaseback and certain of EME's noteholders that are signatories to the PSA, that provides for the parties to support and pursue confirmation by the Bankruptcy Court of the Plan, that will implement a reorganization of the Debtor Entities through a sale of substantially all of the assets of EME to NRG pursuant to the Acquisition Agreement. The PSA contains representations, warranties and covenants of the parties to support and pursue confirmation of the Plan.

The Acquisition Agreement between EME, NRG and the Purchaser, a wholly owned subsidiary of NRG, provides for the sale of substantially all of EME's assets, including the outstanding equity interests in certain of EME's direct subsidiaries (and thereby such subsidiaries' assets and liabilities), EME's cash and cash equivalents and EME's interest in substantially all of the other assets used in the operation of EME's and its subsidiaries' businesses (the Acquired Assets) to the Purchaser upon Bankruptcy Court confirmation and consummation of the Plan. Upon closing, the Purchaser will assume substantially all of the liabilities related to assets to be acquired, including, among other things, (i) all liabilities of EME under the Powerton and Joliet leases, other than the cure amount as set forth in the Acquisition Agreement (the Powerton and Joliet Cure Amount); (ii) all trade and vendor accounts payable and accrued liabilities arising from the operation of the Debtor Entities' businesses prior to the date of the closing of the transaction; and (iii) all cure amounts and other liabilities of the Debtor Entities other than the Homer City Debtors and certain agreed-upon excluded liabilities.

In particular, with respect to the Powerton and Joliet leases, at the closing of the transaction, NRG will (i) replace the existing EME guarantees with NRG guarantees; (ii) replace EME as a party to the tax indemnity agreements relating to the Powerton and Joliet leases; and (iii) covenant to make a capital investment in the Powerton and Joliet Stations, provided that NRG will not be obligated to make capital investments in excess of \$350 million.

In consideration of the foregoing, at the closing of the transaction, EME will retain all liabilities with respect to the payment of the Powerton and Joliet Cure Amount and would be responsible for bearing the costs of such cure payment for all amounts due under the lease before January 2, 2014. In addition, the intercompany note issued by EME for the benefit of Midwest Generation, will be canceled. Midwest Generation will assume the Powerton and Joliet leases and the other operative documents related thereto, as modified by mutual agreement of the parties, and all monetary defaults under each lease would be cured at closing. The Acquired Assets do not include (i) the Homer City Debtors, (ii) potential litigation claims of EME against its parent, EIX and (iii) various tax attributes of EME, including tax losses, tax loss carryforwards, tax credits, and tax refunds.

The total purchase price to be paid by the Purchaser for the Acquired Assets is \$2.635 billion, subject to certain adjustments provided in the Acquisition Agreement. The Acquisition Agreement