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 No-2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER HALLORAN'S ORDER GRANTING MOTION IN LIMINE TO EXCLUDE SECTIONS OF COMPLAINANTS' EXPERT REPORT**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Attorney for Sierra Club

Dated: April 27, 2021

Electronic Filing: Received, Clerk's Office 04/27/2021

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	)	
	)	
Complainants,	)	
	)	
v.	)	PCB No-2013-015
	)	(Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

COMPLAINANTS' MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER HALLORAN'S ORDER GRANTING MOTION *IN LIMINE* TO EXCLUDE SECTIONS OF COMPLAINANTS' EXPERT REPORT

Pursuant to 35 Ill. Adm Code 101.518, Complainants respectfully request that the Illinois Pollution Control Board ("Board") reverse Hearing Officer Halloran's (the "Hearing Officer's") April 13, 2021 Order ("Order") granting Midwest Generation, LLC's ("MWG" or "Respondent") Motion *in Limine* to Exclude Sections of Complainants' Expert Report.[1] ("Motion").

As explained in the sections below, the Hearing Officer's ruling is based on a premature and improper conclusion regarding Respondent's possible future arguments, relies in large part on an out-of-context quote from a single case, and runs contrary to broader caselaw and practical considerations about the most efficient disposition of this litigation. The Hearing Officer's ruling is also inconsistent with the thrust of Board Rule 101.626(b), which makes clear that "[w]hen the admissibility of evidence depends on a good faith argument as to the interpretation of substantive

[1] Respondent also filed a concurrent Motion for Stay, which the Hearing Officer has not ruled on.

law, the hearing officer *will* admit the evidence." (emphasis added). Respondent may argue that the injunctive remedy and/or penalty proposed in this case is too financially burdensome, and Complainants are severely prejudiced by the Hearing Officer's ruling prohibiting Complainants from developing certain facts capable of rebutting that argument by limiting our ability to respond if and when Respondent does make such a claim. Even if the Board allowed Complainants to develop evidence later in this proceeding if or when MWG raises inability to pay, doing so would delay and disrupt this litigation. Developing evidence after the close of discovery and potentially in the middle of a hearing, would take weeks or months simultaneously delaying resolution of this matter by the same amount, at the cost of Board resources, and impose an environmentally costly delay in Complainants' ability to secure a remedy that cleans up Respondent's groundwater contamination.

I. The Hearing Officer's Order is Based on a Premature Assessment of the Issues in the Case.

The first reason to overturn the Hearing Officer's Order is that it is based on his premature conclusion that ability to pay will not be at issue in the case. The Hearing Officer's principal basis for dismissing caselaw supporting consideration of parent company finances in determining appropriate remedies and penalties was that the caselaw focused on situations where courts were addressing a violator's ability to pay. Because ability to pay is not explicitly listed as a penalty or Section 33(c) relief factor under Illinois law, the Hearing Officer determined that the caselaw was not analogous. Hearing Officer's Order at 5. But it is too early to be preclude that MWG's ability to pay for a remedy or penalty will not be contested; indeed, Complainants anticipate that it likely will become an issue before the Board.

Section 42(h) of the Environmental Protection Act ("Act") requires the Board, in determining appropriate civil penalties for violations of the Act, to consider, among other factors,

"the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise enhanc[e] voluntary compliance with this Act by the violator and other persons similarly subject to the Act." 415 ILCS 5/42(h). When determining the appropriate order and relief, the Board is required to consider any disagreements over ability to pay as part of remedy factor 415 ILCS 5/33(c)(iv), which examines "the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source."

The Board has previously examined claimed inability to pay when the issue is raised by a party facing possible penalties or other relief. Hearing Officer's Order at 4 (referencing Respondent's acknowledgment that "the Board has considered a party's ability to pay when a party claims an inability to pay"). Thus, although inability to pay is not explicitly listed among the Section 33(c) or 42(h) factors, the issue is often a factor in Board decisions. This consensus lines up with recent Board orders explicitly considering parties' ability to pay when determining appropriate penalties and injunctive relief. *See, e.g.*, *Illinois v. Victor Cory*, PCB Case No. 98-171, 1999 WL 562169 (July 22, 1999) (considering ability to pay when determining whether to require lagoon closure); *Illinois v. John Prior D/B/A Prior Oil Company And James Mezo D/B/A Mezo Oil Company*, PCB Case No. 02-177, 2004 WL 1090239 (May 6, 2004) (considering ability to pay as part of the "financial capacity" of a party when trying to calculate "a penalty amount that will deter future violations by the entity and those similarly situated").

At this stage in the litigation, the parties have not raised all remedy phase arguments. Respondent is free to argue that any injunctive remedy or penalty would impose a significant financial burden. As a result, Complainants' evidence regarding MWG's access to its parent company's finances are relevant. Indeed, the nature of the operational relationship between NRG

and MWG that Complainants highlighted in our briefing opposing MWG's Motion demonstrates that NRG's finances are critical to understanding MWG's ability to pay for penalties and other remedies. *See generally* Compl. Opp'n to Resp. Mot. in Lim. To Exclude Sections of Compl. Expert Report and Expedited Mot. for Stay (filed Feb. 24, 2021) (Non-Public version) (hereinafter "Compl. Opp'n to Mot. in Limine"). The Hearing Officer's Order, if not overturned, would prevent Complainants from developing the evidence that could ultimately assist the Board in making a fully informed decision on the question of MWG's ability to afford different remedies and penalties. Unless and until Respondent commits to waiving all such ability to pay arguments, the Hearing Officer's Order is improper, would prejudice Complainants, and should be overturned.

II. The Hearing Officer's Order Misstates the Relevant Law

The Board should also overturn the Hearing Officer's Order because it relies on a misunderstanding of the relevant caselaw. For instance, the Hearing Officer improperly focuses on two distinctions between this case and the Board's previous decision explicitly considering parent company finances in the context of a penalty determination, in *People of the State of Illinois v. Panhandle Eastern Pipe Line Company*, PCB Case No. 99-191, 2001 WL 1509515, at *29-30 (Ill. PCB Nov. 15, 2001). First, the Hearing Officer states that "it should be noted that in Panhandle, the parent company was the owner of the subsidiary . . . before the violations occurred," apparently implying that because NRG has "only" owned MWG since 2013, its finances ought not to be considered. Hearing Officer's Order at 5. This perspective betrays a fundamental misconception of what it means to consider parent company finances: it is not a punishment for bad behavior, nor is it a stand-in for piercing the corporate veil, as Respondent argued. Again, Complainants are not actually attempting to impose liability on NRG at all. Instead, we are asking that the Board recognize the simple fact that certain companies' finances

are so intimately tied up in those of their corporate parent that any question of financial capability must necessarily include that parent company. Thus, the length of time NRG has owned MWG is irrelevant.

Second, the Hearing Officer noted that MWG has objected to information relating to NRG's finances in the course of discovery, and that the question of NRG finances being relevant is at issue in a way that it was apparently not in *Panhandle*. Hearing Officer's Order at 5. While Complainants agree that MWG's discovery objections have preserved their right to make legal arguments, discovery objections do not have any bearing on whether the information is relevant. Information is either relevant or it is not. In this case, NRG's finances are relevant because Respondent will likely claim that certain penalties would pose an undue burden on them, at which point NRG's finances will provide helpful context to help the Board decide what costs MWG can and should be expected to shoulder.

The Hearing Officer's Order also misstates the lesson to be learned from *Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc.*, PCB Case No. 98-81, (Ill. PCB May 6, 1999)). The Hearing Officer drew a parallel between this case and the *Charter Hall* decision by emphasizing that Complainants "have not established NRG is responsible for the violations nor have they demonstrated that this information is relevant to the penalty." Hearing Officer's Order at 5. But again, considering NRG's finances is not a punishment and as such does not require that NRG be responsible for the violations; and, as Complainants have pointed out above, the Hearing Officer's previous statement of what information is relevant to the penalty notably excludes the possibility that MWG might argue that a penalty or injunctive relief is unaffordable. As long as there is a possibility that MWG will raise ability to pay, there is no basis to conclude that NRG's finances are irrelevant. Complainants acknowledge that *Charter*

Hall stands for the proposition that a parent corporation's finances need not automatically be considered; indeed, often companies operating under a parent display an independence of conduct and decision-making that might make a parent's finances irrelevant. But in this case, the overwhelming interconnectedness between NRG and all of its holding companies including MWG mandates that the Board think about any financial considerations in a broader context than just MWG. In other words, unlike the situation with *Charter Hall*, Complainants respectfully submit that we have demonstrated that interconnectedness. *See generally* Compl. Opp'n to Mot. in Limine.

Complainants are not restating their previous briefing explaining why excluding consideration of NRG's financial information is directly contrary to the Board's decision in *Panhandle* overall; we have reattached Compl. Opp'n to Mot. in Limine as Exhibit 1 for the Board's convenience.

III. CONCLUSION

For the foregoing reasons, Complainants respectfully request that the Board overturn the Hearing Officer's Order on MWG's Motion in Limine and remand for further proceedings.

Dated: April 27, 2021

Respectfully submitted,

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Gregory E. Wannier
2101 Webster St., Ste. 1300

Oakland, CA 94612
(415) 977-5646
Greg.Wannier@sierraclub.org

Attorneys for Sierra Club

Abel Russ
Attorney
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
802-662-7800 (phone)
ARuss@environmentalintegrity.org

Attorney for Prairie Rivers Network

Jeffrey Hammons
Environmental Law & Policy Center
1440 G Street NW
Washington, DC 20005
JHammons@elpc.org
(785) 217-5722

Attorney for ELPC, Sierra Club and Prairie Rivers Network

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
312-726-2938
KHarley@kentlaw.iit.edu

Attorney for CARE

CERTIFICATE OF SERVICE

The undersigned, Jeffrey Hammons, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER HALLORAN'S ORDER GRANTING MOTION IN LIMINE TO EXCLUDE SECTIONS OF COMPLAINANTS' EXPERT REPORT** before 5 p.m. Central Time on April 27, 2021 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 370 pages.

Respectfully submitted,

/s/ Jeffrey Hammons
Jeffrey Hammons

PCB 2013-015 SERVICE LIST:

Jennifer T. Nijman
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
jn@nijmanfranzetti.com
kg@nijmanfranzetti.com

Bradley P. Halloran,
Hearing Officer
Illinois Pollution Control Board
100 West Randolph St., Suite 11-500
Chicago, IL 60601
Brad.Halloran@illinois.gov

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Gregory E. Wannier
Sierra Club Environmental Law Program
2101 Webster St., Ste. 1300
Oakland, CA 94612
greg.wannier@sierraclub.org

Abel Russ
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
aruss@environmentalintegrity.org

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
Kharley@kentlaw.edu

Electronic Filing: Received, Clerk's Office 04/27/2021

Exhibit No. 1

Complainants' Opposition to Respondent's Motion in Limine to Exclude Sections of Complainants' Expert Report and Expedited Motion for Stay (filed Feb. 24, 2021)

Electronic Filing: Received, Clerk's Office 04/27/2021

Exhibit No. 1 contains confidential non-disclosable information so it is not attached to the public version of this filing