**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: Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Redacted Response to Complainants' Motion for Interlocutory Appeal from Hearing Officer Order which contains Non-Disclosable Information with Redacted Exhibits, a copy of which is hereby served upon you. The UNREDACTED Response to Complainants' Motion for Interlocutory Appeal from Hearing Officer Order, which contains Non-Disclosable Information and Exhibits containing Non-Disclosable Information have been mailed to the IPCB, Don Brown and e-mailed to the service list.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: May 11, 2021

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service for Midwest Generation, LLC's REDACTED Response to Complainants' Motion for Interlocutory Appeal from Hearing Officer Order, which contains Non-Disclosable Information with Redacted Exhibits, a copy of which is hereby served upon you was filed on May 11, 2021 with the following:

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

and that true copies of the UNREDACTED Response to Complainants' Motion for Interlocutory Appeal from Hearing Officer Order containing Non-Disclosable Information, and non-disclosable exhibits and the REDACTED Response to Complainant's Motion to Reconsider or Clarify along with the REDACTED Exhibits were emailed on May 11, 2021 to the parties listed on the foregoing Service List. The UNREDACTED Response and Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

/s/ Jennifer T. Nijman

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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**MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER ORDER**

The Hearing Officer properly determined that the only relevant financial information in this matter relates to Midwest Generation, LLC ("MWG"), the single party named and the only party the Board found responsible for the violations of the Illinois Environmental Protection Act ("Act"). Hearing Officer Order, p. 5. Thus, the Hearing Officer correctly excluded unrelated financial information about MWG's indirect parent company, NRG Energy, Inc. ("NRG"), which is not and has never been a party to this case.

Complainants' appeal is simply an attempt to expand the scope of "relevant" financial evidence in the damages/remedy phase of this case, without any basis. In essence, Complainants argue that the Illinois Pollution Control Board ("Board") should routinely evaluate a respondent's potential to access to financial resources from unnamed third parties to pay for respondent's damages – in this case the financial resources of an unnamed, indirect parent entity – regardless of the third party's obligations to actually provide funding to a respondent. Such third party financial information is not relevant, contrary to Board precedent, and flies in the face of Illinois corporate law.

By focusing on MWG's indirect parent entity, Complainants are improperly attempting to pierce the corporate veil through their expert's opinion, and the Hearing Officer was correct to bar that effort. Federal, State, and Board authority establishes that a parent corporation is not liable for the acts of its subsidiaries. Here, Complainants, through their expert, ask the Board to conduct a veil-piercing analysis despite the fact that the liability phase of this case is over and parental responsibility was never at issue. Even if the availability of funds beyond a party's own was a relevant consideration, which it is not, and Complainants had claimed parent liability, which they have not, the evidence is undisputed that MWG is a separate legal entity [redacted]

Instead of detailing any theories for appeal to the Board, Complainants merely attach to their appeal their underlying Response in Opposition to MWG's Motion *in Limine* ("Response"), which the Hearing Officer soundly rejected. Complainants provide no additional authority to support their unprecedented claim that the Board should look to a non-party's finances when determining a ***respondent's*** ability to pay. Complainants' lack of support for their appeal is further demonstrated by the fact that they ignore two of their purported arguments.[1] Complainants merely rehash the failed arguments presented to the Hearing Officer: that an indirect parent company's financial information is somehow relevant to the Board's 33(c) and 42(h) analysis that could arise if inability to pay becomes an issue in the future; and that the Board's opinion in *Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc.*, PCB 98-81 (May 6, 1999), cited by the Hearing Officer, is inapplicable. Complainants fail to respond to the list of federal and state

[1] Complainants argue, incorrectly, that the Hearing Officer's order was "contrary to broader caselaw" and "inconsistent with thrust of Board Rule 101.626(b)" -- without ever discussing those arguments in their brief. See Motion to Appeal, p.1.

authorities identified by MWG stating that consideration of a non-party parent's finances is not relevant. Complainants also do not explain how their demand to consider an indirect parent's financial information in an expert opinion is anything but a surreptitious attempt to pierce the corporate veil through their expert's opinion.[2] Complainants ultimately fail to present any basis to overturn the Hearing Officer's Order.

**A. Complainants Misstate the Basis for the Hearing Officer's Order and Conflate a Respondent's Ability to Pay with that of a Third Party Indirect Parent**

Complainants incorrectly suggest that the Hearing Officer based his decision to exclude evidence about NRG on whether the concept of "ability to pay" could be considered in this case. Comp.'s Appeal, p. 2. A simple reading of the Order reveals the Hearing Officer made no such statement. Rather, the Hearing Officer correctly found that a *non-party's* financial status is not relevant to a *party's* potential inability to pay and thus must be excluded. Hearing Officer Order, p. 5. Complainants are improperly conflating two legally distinct issues: (i) whether a party (MWG) may claim inability to pay when considering the Section 33(c) and 42(h) factors, versus (ii) whether the financial resources of an indirect, non-party parent company (NRG) are relevant to the analysis of *respondent's* inability to pay. The first issue is not disputed – the Board may (and has) considered *a party's* inability to pay. However, by merging the two distinct issues, Complainants' wrongfully claim that the financial status of MWG's indirect parent, NRG, is somehow relevant to MWG's potential future claim of inability to pay.[3] Complainants' effort leads to absurd results that conflict with Illinois corporate law and Board opinions.

[2] Complainants also have pending a motion for reconsideration of the Hearing Officer's Order providing no new information, no new law, and merely the same arguments as in their original Response. MWG filed its objections to Complainants' motion for reconsideration on May 3, 2021.

[3] MWG has not made a claim of inability to pay at this time, but reserves its rights to do so and is not foreclosed from making future arguments based on unknown conditions that may arise at a later time.

1. There is No Question That A *Respondent's* Inability to Pay is Relevant

The Hearing Officer and MWG agree that the Board may consider ***the respondent's***, in this case MWG's, inability to pay when reviewing the Section 33(c) and 42(h) factors, if it becomes an issue. Hearing Officer Order, p. 5. *People of the State of Illinois v. Victor Cory*, PCB 98-171, (July 22, 1999), *14 (Board considered the potentially high cost of a corrective action ***to the respondent***)(emphasis added); *People of the State of Illinois v. John Prior d/b/a Prior Oil Co. and James Mezo d/b/a Meza Oil Co.*, PCB 02-177, *15 (Board specifically stated that the "financial capacity of ***an entity that violated the Act*** is relevant.") (emphasis added).

Typically, the Board considers a party's ability to pay when a party claims an *inability* to pay. In those instances where a party claims inability to pay, the Board limits its financial review to the named party, and not to the ability of the party to potentially access other funds. *See People of the State of Illinois v. Berniece Kershaw and Dawin Dale Kershaw*, 1995 Ill. ENV LEXIS 418, *27 (Ill. Pollution Cont. Bd. April 20, 1995) (Board rejected ***respondents'*** claims of inability to pay penalty); *People of the State of Illinois v. Oak Valley Wood Products, Inc.*, 1993 Ill. ENV LEXIS 12, *4 (Ill. Pollution Cont. Bd. January 7, 1993) (Board ordered ***respondent*** to submit tax return to demonstrate inability to pay a higher penalty); *Illinois EPA v. Jake's Auto & Wrecking Co., Inc.*, 1972 Ill. ENV LEXIS 418, *3-4 (Ill. Pollution Cont. Bd. August 15, 1972) (Board reduced penalty due to respondents inability to pay).

In this case, the only named respondent is MWG, and the Board found MWG responsible for the violations of the Act and underlying regulations. Thus, only MWG's financial information may be relevant to an assessment of the inability to pay a remedy or penalty, should the issue arise.

2. The Hearing Officer is Correct That Information about NRG, a Non-Party, is Not Relevant

In deciding that a non-party's finances are not relevant, the Hearing Officer properly relied upon *Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc*., PCB 98-81 (May 6, 1999). That case is the most similar to the instant case as it also involved a complainant asking the Board to consider the finances of a non-party when assessing the penalty. Just like here, the Board in *Charter Hall* rejected that request, stating that the complainants had not established that the parent company, which was not a party to the matter, was responsible for the violations, and thus had not demonstrated that the information was relevant. *Id.* at 14. In fact, the Hearing Officer used the exact same language in his Order in this case as the Board in *Charter Hall*. Hearing Officer Order, p. 5.

The Hearing Officer further stated that NRG was not a named party in this case and the Board found only MWG responsible for the violations of the Act. This is the same conclusion the Board made in *Johns Manville v. Illinois Dept. of Transportation*, PCB 14-3, (Dec. 21, 2017), at *4-5. In that case, the Board barred discovery about financial contributions of a third party company because the third party was not named and had not been found to have violated the Act. *Id.* Thus, relying on Board precedent, the Hearing Officer here correctly excluded the information in Complainants' experts' report about NRG's finances. *See also People v. Morgan*, 758 N.E.2d. 813, 843 (2001) (Ill. Supreme Court upheld exclusion of a non-party's testimony because it was so remote in nexus to the defendant's defense that it was not relevant.)

3. Considering a Non-Party's Finances to Establish a Penalty or Corrective Action under Section 33(c) or 42(h) of the Act Would Lead to Unreasonable Results

By conflating the issues of a *party's* inability to pay with the relevance of a *non-party's* financial status to pay for a named party's violations, Complainants seek to impose a new and unprecedented theory that will lead to extreme results. Comp's Appeal, pp. 4-5. Whether a

respondent has access to other forms of capital or financial assistance outside its own economic and corporate status is not a relevant factor when evaluating a penalty or corrective action. In addition to the clear conflict with corporate law (*See infra* Sec. B), if the Board were to consider a corporate respondent's potential to access to an unnamed third party's finances, where does the inquiry end? In a future case, a Complainant will argue that the Board should consider a corporate respondent's access to lines of credit to determine whether the corporate respondent would be able to borrow funds sufficient to withstand a higher penalty or corrective actions. Or, if the respondent is an individual or family owned business, a Complainant will argue that the Board should demand information from that party's banks, family, and peers for the ability to access to funds to analyze the respondent's ability to pay.

Moreover, under Complainants' theory, *any* parent company would be considered as a source of funds for the purposes of assessing a Board order, regardless of the separate legal status of the parent.[4] Thus, if the Board were to impose a penalty by arbitrarily considering the assets of an indirect parent company, it would regularly force responsible named parties to pay inflated penalties based upon the financial status of a non-party not required to pay or finance its subsidiary, potentially bankrupting the responsible party. The information developed in discovery in this matter perfectly demonstrates this scenario. [redacted]

[4] Complainants appear to argue that the Board should, in every case, undertake a detailed factual analysis of the "connection" between a respondent and any parent entity (or other third party that could provide funding), without ever naming the third party in the case and without a finding of piercing the corporate veil. Again, the argument is an end run around corporate law and beyond the scope of the Act. (See *infra* at Sec. B).

[redacted] This is clearly not relevant, is directly contrary to corporate law, and has no support in the Act.

Because Complainants' theory to consider the finances of an indirect parent company, parent company, or any other potential source of a company's assets in assessing the 33(c) and 42(h) factors is beyond the scope of the Act, Board Rules and, as discussed below, is an end run around standard principles of corporate law, the Hearing Officer was correct to exclude the sections of Mr. Shefftz' opinion about any entity other than MWG.

4. Section 101.626(b) of the Board's Procedural Rules is Inapplicable

Complainants cite to Section 101.626(b) of the Board's Procedural rules yet provide no explanation of their argument or how Section 101.626(b) would apply. Even a brief analysis shows that Section 101.626(b) is not applicable here because evidence must first be found to be relevant and the Hearing Officer determined that financial information about NRG, an indirect parent company, is not relevant.

Section 101.626(b) provides that the Hearing Officer should admit "evidence" if the admissibility depends upon a good faith argument as to the interpretation of substantive law. 35 Ill. Adm. Code 101.626(b). However, under the maxims of statutory construction, Section 101.626(b) cannot be viewed alone. When interpreting a statute, "a court must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in

isolation." *People v. Burge*, 2021 IL 125642, ¶ 20, 2021 Ill. LEXIS 243, *12 (March 18, 2021).[5] In fact, in *People v. Burge*, the Illinois Supreme Court specifically rejected the appellant's attempt to read a subsection in isolation (subsection (c) of 725 ILCS 5/113-4). *Id.* The Court stated that the statute must be viewed as a whole, and looked to all of the subsections to interpret subsection (c). Looking to the first subsection of Section 113-4, the Illinois Supreme Court stated that subsection (a) serves the general provision "that sets the scope for the remainder of the provisions within section 113-4…" *Id.* ¶21.

Similarly here, the first subsection in section 101.626 sets the scope for the remainder of the provisions in the section. Subsection (a) of 101.626, entitled "Evidence", defines information that may be evidence, stating that it must be "relevant, material, and would be relied upon by a prudent person…" 35 Ill. Adm. Code 101.626(a). Subsection (b) of 101.626, entitled "Admissibility of Evidence", states that evidence – which is defined to be relevant in subsection (a) – will be admitted if its admissibility depends upon a good faith interpretation of substantive law. Thus, before subsection (b) applies, the Hearing Officer must first find that the evidence is relevant under Section 101.626(a). 35 Ill. Adm. Code 101.626(a).

In this case, the Hearing Officer found that information about a non-party, indirect parent is not relevant. Thus, there is no basis to consider whether it falls under an "interpretation of substantive law." Even if the information related to a non-party were relevant, which it is not, Complainants never explain the "substantive law" they seek to interpret, other than relevancy. Stating that information that the Hearing Officer found to be *not* relevant must be admitted because Complainants have an argument on the interpretation of relevancy, is a circular argument that fails on its face.

[5] "Administrative regulations have the force and effect of law, and are to be construed by standards governing the construction of statutes." *People v. Hanna*, 207 Ill.2d 486, 800 N.E.2d 1201 (2003)

5. The Hearing Officer Was Correct to Find *People of the State of Illinois v. Panhandle Eastern Pipe Line Co.* Inapplicable

The Hearing Officer correctly distinguished *People of the State of Illinois v. Panhandle Eastern Pipe Line Co.* PCB 99-191, Nov. 15, 2001. In assessing the issue of relevancy, the Hearing Officer accurately noted that the parent company in *Panhandle* owned its subsidiary long before the violations in that case occurred. In contrast, in this case NRG only purchased MWG in 2014. NRG's purchase occurred after MWG entered into compliance commitment agreements with Illinois EPA, after Complainants first filed their complaint in 2013, and after a majority of the alleged violations were resolved. Ex. 2, Callen 2016 Dep. p. 49:13-14. Additionally, in *Panhandle*, the Board was never faced with the question of whether the parent's finances were relevant because *it was never at issue*. In fact, respondent presented its parent's financials as part of the economic consideration. *Panhandle*, Nov. 15, 2001, p. 30. Additionally, at the hearing there were no objections to including consideration of the parent's financial status as part of the penalty analysis. Sept. 19, 2000, *Transcript,* p. 358-359 attached as Ex. 3. *Panhandle* provides no support for Complainants' notion that NRG's finances are somehow relevant to MWG's inability to pay, and it is disingenuous to argue otherwise.

**B. Complainants' Reliance on an Alleged "Operational Relationship" Between MWG and NRG is a Thinly Disguised Veil-Piercing Theory**

Complainants' focus on an alleged "operational relationship" between MWG and NRG is simply an attempt to argue that NRG controls MWG and/or is MWG's alter ego – which is a veil-piercing analysis. Complainants' effort to "back-door" a veil-piercing theory through their expert is improper and was correctly barred. It is an accepted principle that a parent corporation is not liable for the acts of its subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 1884 (1998). In Illinois, to apply an exception to the rule of a separate corporate existence, a court is required to either pierce the corporate veil or find a subsidiary is merely an "alter-ego," both of

which are high bars, and courts are admonished to undertake the tasks "reluctantly." *Ted Harrison Oil Co. v. Dokka*, 247 Ill.App.3d 791, 795 (1993). These questions are complex and factually intensive and have never been raised in this case.[6]

Here, even if NRG's administrative operations were relevant, Complainants conveniently ignore the undisputed evidence that MWG is a separate corporate entity [redacted] although it is hard to tell because Complainants cite to their entire Response brief without providing any specific references or facts in support. Presumably, their support includes a self-serving reliance upon their own expert's opinion. But relying on their own expert's opinion to support the legal conclusion that an indirect parent corporation's finances are relevant or that the parent is financially responsible for its

[6] Piercing the corporate veil analyzes nine factors, including inadequate capitalization, failure to observe corporate formalities, nonpayment of dividends, absence of corporate records, and whether the corporation is merely a facade for the operation of the dominant stockholders. *Ted Harrison Oil Co. v. Dokka, 247 Ill.App.3d 791, 795 (1993)*. The "alter-ego" theory evaluates whether the entities have failed to maintain formal corporate distinctions, or whether recognition of the entities as distinct would allow them some unfair advantage. *Larson v. CSX Transp., Inc.*, 359 Ill. App. 3d 830, 840, 835 N.E.2d 138, 145 (1st Dist. 2005).

subsidiary's violations is circular, irrelevant, and should be summarily disregarded as an improper legal opinion. It is no surprise that NRG's finances are much larger than that of MWG. NRG owns, directly and indirectly, hundreds of other subsidiaries worldwide. But just because NRG is a large company with many other indirect subsidiaries that provide it with revenue, does not mean that its company finances, unrelated to MWG, are relevant to the Board's findings against MWG. [redacted]. The law in Illinois is clear that some overlap between a subsidiary and a parent corporation is insufficient to demonstrate that the subsidiary is the alter-ego of the parent. In *Larson v. CSX Transp., Inc*., 359 Ill. App. 3d 830, 840, 835 N.E.2d 138, 145 (1st Dist. 2005), the plaintiff attempted to make a similar argument, that the parent and subsidiary relationship were so intimate that the court could consider the parent's finances. In that case, the parent and subsidiary had some overlap of employees, the plaintiff's paycheck was from the parent, and the trucks and credit cards the plaintiff used displayed the parent's name. *Id*. The court rejected the plaintiff's claims, stating that to demonstrate the subsidiary is the alter-ego of a parent, a party must demonstrate that the subsidiary was not operated on a stand-alone basis, that its management worked for interests other than its own, or that any of the coordination between the parent and the subsidiary was the result of anything other than an arm's-length exchange of services which furthered the independent goals of the subsidiary. *Id*. The Board has similarly held that to pierce the corporate veil under an alter ego theory, a party must show that there is a unity of identity between the corporation and its owner, and that

recognizing the separate corporate identity would sanction a fraud or promote injustice. *People of the State of Illinois v. Wayne Berger and Berger Waste Management*, 1999 Ill. ENV LEXIS 175, *20-21, PCB 94-373 (May 6, 1999).

In this case, [redacted] Complainants' expert fails to acknowledge any of these facts, which were readily available to him. Complainants cite to no authority, because there is none, that a parent corporation conducting the administrative activities for its subsidiaries for economies of scale means that the parent is the alter ego of the subsidiary or that the parent's financial status is relevant in considering a Board order.

We are now far past the point where Complainants can raise the concept of piercing the corporate veil between MWG and its indirect parent company, NRG. The Board has already made a finding of liability against MWG and the Hearing Officer properly precluded Complainants from

surreptitiously inserting the idea that finances of an indirect parent company, consisting of many unrelated subsidiaries, are relevant during the remedy phase.

### C. Federal Courts Generally Exclude Evidence Concerning a Parent's Financial Condition

Complainants fail to acknowledge that federal courts have rejected the very strategy Complainants are attempting here.[7] In *St. Croix Renaissance Group v. St. Croix Alumina*, 2010 U.S. Dist. LEXIS 122611 *3-5 (D.V.I. Nov. 18, 2010), the court barred the plaintiffs' expert from testifying about the financial condition of the defendant's parent company because the parent corporation was not a party. Similarly, in *Adams v. Teck Comnico Alaska, Inc.*, 399 F.Supp.2d 1031, 1038 (D. Alaska 2005), the court excluded an expert opinion just like the Shefftz Opinion, because it improperly considered a non-named parent corporation's financial status for the economic benefit analysis. *See also United States v. Dico, Inc.,* 4 F. Supp. 3d 1047, 1065 n. 43 (S.D. Iowa 2014), *aff'd in part, rev'd in part on other grounds*, 808 F. 3d 342 (8th Cir. 2015) (Court refused to consider the assets of the non-party parent company finding it to be "somewhat at odds with the basic principle of corporate law that each incorporated business entity enjoys a separate legal existence."); *United States v. Mt. State Carbon, LLC*, 2014 U.S.Dist. LEXIS 97184, *94 (N.D.W.Va. July 17, 2014) (Court found that the non-party parent was "in no way liable or responsible for any civil penalties."); *United States v. Magnesium Corp. of Am.* 2006 U.S.Dist. LEXIS 39944, *14-16 (D. Utah 2006) (court denied motion to compel financial information about the defendant's parents, because the parent corporations were not parties to the case and the United States could not "back-door" a veil-piercing that was disallowed in *Bestfoods*.)

[7] Complainants do not cite to any federal law in their appeal, but the few federal cases Complainants refer to in their Response are inapplicable here. As discussed in MWG's Reply to Complainants' Response (attached as Ex. 6) each concerned penalties under federal law, which explicitly state that "ability to pay" is a consideration. 33 U.S.C. § 1319(g)(3); 42 U.S.C § 7413. *See* Ex. 6, pp. 8-9. In Illinois, the Act does not state that a party's ability to pay is a factor to consider in Sections 33(c) or 42(h), and the Board has historically only considered it when the party claims an inability to pay. *See supra* , Sec. A.a.

Just like the federal courts described here, the Hearing Officer was correct to exclude the portions of the Shefftz opinion that are about the financial condition of MWG's parent company because the parent corporation, NRG, is not a party and the opinions related to NRG are not relevant to this matter.

**D. CONCLUSION**

For the reasons stated herein, in the Board should uphold the Hearing Officer's opinion excluding the portions of the Shefftz opinion that concern NRG because it is not relevant. For ease of the Board's review, MWG has attached its Motion *in Limine* to Exclude Sections of Complainants' Expert Report and Memorandum in Support (Ex. 5), and MWG's Reply to Complainants' Response (Ex. 6).[8]

Respectfully submitted,
MIDWEST GENERATION, LLC

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

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[8] Because many of the exhibits attached to MWG's Motion *in Limine* and Reply are attached here, to avoid duplication MWG has not included the exhibits that were attached to the documents.

# EXHIBIT 1

## Contains Non-Disclosable Information

# EXHIBIT 2

## Contains Non-Disclosable Information

# EXHIBIT 3

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,
vs. No. PCB 99-191
PANHANDLE EASTERN PIPE LINE COMPANY,
Respondent.

Proceedings held on September 19, 2000, at 9:35 a.m., at the offices of the Illinois Pollution Control Board, 600 South Second Street, Suite 403, Springfield, Illinois, before John C. Knittle, Chief Hearing Officer.

VOLUME II

Reported by: Darlene M. Niemeyer, CSR, RPR
CSR License No.: 084-003677

KEEFE REPORTING COMPANY
11 North 44th Street
Belleville, IL 62226
(618) 277-0190

There were a couple of years that were missing and, in fact, I don't think I had any information relating to 1988, if I am not mistaken. And then the 10-K filings coming off of the SEC website for periods after that. In addition to that, I used the standard stock records, stock prices from bigcharts.com, and I may have used a couple of other sources that I don't necessarily remember.

Q. Okay. If I could direct your attention, Dr. Nosari, I think there is an exhibit before you that is People's Exhibit Number 7?

A. Yes.



Q. Have you located that document?

A. Yes, I have.

Q. Have you seen this document before?

A. Yes.

Q. Let me just back up for just a moment. I think that you mentioned before that you had attained financial data for Panhandle Eastern Pipe Line Company?

A. Yes.

Q. Why did you decide to attain financial information for this company?

A. Well, first of all, I used Panhandle -- I think you used the term Panhandle Eastern Pipe Line, and I used Panhandle

Eastern, which is the parent company of the Pipe Line Company.

Q. Why did you decide to use the parent company's financial information?

A. Because Panhandle Eastern Pipe Line Company is a wholly-owned subsidiary, which means that its financial situation is managed by the parent.

Q. Okay.

A. Another -- well, that is okay.

Q. Dr. Nosari, do you have anything further that you want to provide as an explanation to your last question -- as an answer to the last question?

A. Well, when I said that it was wholly-owned, and I don't



remember exactly what I said, but I used the parent company because it manages Panhandle Eastern Pipe Line Company, meaning that it is a related party and thus the best estimate of cost of capital would come from the parent company's financial statements and not from the subsidiary, because the parent would influence the subsidiary.

Q. Okay. Thank you.

MS. CARTER: Just one moment. I need to find this document.

Q. (By Ms. Carter) Where did you attain the SEC 10-K filings?

A. Well, the 10-K filings that I used we got off of Edgar.

# EXHIBIT 4

## Contains Non-Disclosable Information

# EXHIBIT 5

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

| | | |
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| **In the Matter of:** | ) | |
| | ) | |
| **SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT** | ) | |
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| | ) | |
| **MIDWEST GENERATION, LLC,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE SECTIONS OF COMPLAINANTS' EXPERT REPORT AND EXPEDITED MOTION FOR STAY PENDING THE BOARD'S DECISION**

Pursuant to 35 Ill. Adm. Code 101.500 and 101.514, Respondent, Midwest Generation, LLC ("MWGen"), requests that the Illinois Pollution Control Board ("Board") enter an Order granting its combined Motion to Stay and Motion *in Limine* to exclude the sections of Complainants' Expert Opinion of Jonathan S. Shefftz that opine as to MWGen's indirect parent, NRG Energy, Inc. ("NRG"). MWGen is the only party named in the complaint and the only party the Illinois Pollution Control Board ("Board") found to have violated the Illinois Environmental Protection Act ("Act"). Any discussion or opinions concerning NRG are beyond the Board's opinion, not relevant, and must be stricken. Until the Board confirms that the only relevant party is MWGen, the Board should stay any further discovery on this issue pending the Board's review. In support of its Motions, MWGen submits its Memorandum in Support and states as follows:

1. On October 3, 2012, Complainants filed a Complaint against MWGen, and no other party, alleging violations of the Illinois Environmental Protection Act ("Act") and its underlying

regulations. On December 15, 2014, long after NRG acquired MWGen's parent company, Complainants moved to file an Amended Complaint, which still only named MWGen. Neither the Complaint nor the Amended Complaint contain any allegations against or concerning NRG.

2. During the ten days of hearing before the Board on liability, only MWGen was the responsive party, with witnesses from each of MWGen's four facilities testifying.

3. On June 20, 2019, in an Interim Opinion, the Board found that MWGen, and no other party, violated the Act and underlying regulations. The Board modified the Interim Order on February 6, 2020, to correct an interpretation of the law, and MWGen was still the only party the Board found to have violated the Act.

4. On January 25, 2021, Complainants served their expert opinions on MWGen. One of the opinions is titled "Expert Opinion on Economic Benefit and Noncompliance and Economic Impact of Penalty Payment and Compliance Costs" by Jonathan S. Shefftz ("Shefftz Opinion"). The Shefftz Opinion is attached as Exhibit 1.[1]

5. In his opinion, Mr. Shefftz sets out an economic benefit analysis and proposed penalty analysis based in large part on the financial status of NRG, which is not a party to this case.

6. NRG is the indirect parent company of MWGen and also owns, directly and indirectly, hundreds of other subsidiaries worldwide. Neither NRG nor its other related subsidiaries or entities are parties to this matter. Neither NRG nor its other related subsidiaries or entities have been found responsible for groundwater contamination beneath the four Illinois stations operated by MWGen. All the pleadings in this case and all decisions and findings to date name only MWGen, including the Board's Interim Orders on liability.

[1] Because the Shefftz Opinion contains Non-Disclosable Information, it is only attached to the motion submitted to the Illinois Pollution Control Board Clerk, and has not been uploaded to the Board's website.

7. NRG's financial status as an indirect parent company is unrelated to this case and not relevant to any response actions that the Board could impose on MWGen. MWGen is a separate legal entity that operates the four stations at issue in Illinois. Complainants cannot at this late date attempt to circumvent the law of the case and pleading rules by having their expert opine that MWGen's parent company should essentially be a party to the case.

8. Case law supports excluding any information or opinion concerning NRG from the Shefftz Opinion because NRG is not named in this lawsuit and was not found to have violated the Act. In *Johns Manville v. Illinois Dept. of Transportation*, PCB 14-3 *slip op. *4* (Dec. 21, 2017), during the remedy phase of the case, the Board refused to allow respondent IDOT to seek discovery about the financial relationship between the complainant and another party. Although there were allegations that there was a financial connection between the parties for the remedy at issue, the Board did not allow discovery to proceed because the third party had not been found to have violated the Act, was not a party to the lawsuit in front of the Board, and no complaint had been brought before the Board alleging anyone else violated the Act.

9. The Board should also exclude the sections of the Shefftz Opinion that discuss NRG as a parent entity because any assertion of parent liability must be through the pleadings, and not surreptitiously through an expert opinion. *Gass v. Anna Hosp. Corp.,* 392 Ill. App. 3d 179, 185-86, 911 N.E.2d 1084, 1091 (5th Dist. 2009) (A party seeking to apply the exception to the rule of corporate existence must seek the relief in their pleading, and also carries the burden of proving actual identity or a misuse of corporate form).

10. MWGen requests that the Board stay discovery on the economic issues in this case pending the Board's decision on its Motion *in Limine*. While the Hearing Officer has the authority to hear motions related to discovery, under Section 101.514 of the Board's procedural rules, only the

Board may issue a stay in a proceeding. 35 Ill. Adm. 101.514. *See also People v. State Oil Co.*, PCB 97-103 (May 15, 2003), *aff'd sub nom State Oil Co. v. PCB*, 352 Ill. App. 3d 813 (2nd Dist. 2004) (The decision to grant or deny a motion for stay is vested in the sound discretion of the Board.)

11. MWG will suffer irreparable harm if the Board does not stay discovery on the economic issues. *North Shore Sanitary District v. Illinois EPA*, PCB 03-146 (March 20, 2003), *3 (The Board may consider the harm suffered by a movant if a stay is not granted.)

12. Currently, MWGen is required to name its experts and provide the subject area of expert opinions by February 22, 2021. Both the nature and number of experts MWGen identifies will depend on whether the Board strikes NRG from the Shefftz Opinion.

13. Further, if a stay is not issued pending the Board's decision to strike NRG from the Shefftz Opinion, MWGen will be irreparably harmed by being forced to produce detailed economic analyses and opinions about the financial status of NRG, an entity that is not a party to this proceeding. There will be an enormous waste of judicial resources for the parties and for the Board.

14. Before MWGen can identify experts in response to Complainants' claims regarding economic benefit and deterrence, the Board must clarify that MWGen is the only Respondent subject to the Board's June 20, 2019 Order (as amended by the February 6, 2020 Interim Order).

15. MWGen's request for a stay is limited *only* to the expert opinion on economic issues. MWGen is not requesting a stay on discovery on the other issues identified by the Board, thus discovery will proceed on the more complex issues of whether any remedy or corrective action is required at the four MWGen stations.

WHEREFORE, for the reasons stated above, MWGen requests that the Board immediately stay discovery on economic issues pending its review and decision on the Motion *in Limine* to strike NRG from the Shefftz Opinion. MWGen further requests that the Board enter an order excluding the sections of the Shefftz Opinion that refer to NRG, and enter an order barring Jonathan Shefftz or any other expert or witness from opining or testifying about any entity other than MWGen.

Respectfully submitted,
Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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| **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.** | ) | |

**MEMORANDUM IN SUPPORT OF MIDWEST GENERATION'S MOTION *IN* LIMINE TO EXCLUDE SECTIONS OF COMPLAINANTS' EXPERT REPORT AND EXPEDITED MOTION FOR STAY PENDING THE BOARD'S DECISION**

Respondent, Midwest Generation, LLC ("MWGen"), submits this Memorandum in Support of its Motion *in Limine* and related Motion for Stay, requesting that the Illinois Pollution Control Board ("Board") enter an order excluding the portions of the Expert Opinion of Jonathan S. Shefftz ("Shefftz Opinion") that refer to MWGen's indirect parent, NRG Energy, Inc. ("NRG"), and barring any witness from opining or testifying about an entity other than MWGen. In support of its Motions, MWGen states as follows:

**A. Brief Background**

On October 3, 2012, Complainants filed a Complaint with the Illinois Pollution Control Board ("Board") against MWGen alleging violations of the Illinois Environmental Protection Act ("Act") and its underlying regulations at four of MWGen's Stations in Illinois. In 2013, NRG purchased MWGen's parent company, and MWGen became one of NRG's indirect wholly owned subsidiaries. On December 15, 2014, long after NRG acquired MWGen's parent company,

Complainants moved to file an Amended Complaint, which still *only* named MWGen.[2] Neither the Complaint nor the Amended Complaint contain any allegations against or concerning NRG. Further, since 2012, MWGen has continued to own and operate the four stations that are the subject of the Complaint and Amended Complaint.

Following extensive discovery concerning the four stations operated by MWGen, and a ten-day hearing where witnesses for MWGen testified about operations of the stations, on June 20, 2019, the Board issued an Interim Opinion, finding that MWGen violated the Act and underlying regulations. The Board also ordered the Hearing Officer to hold additional hearings to determine the appropriate relief and any potential remedy as to MWGen in consideration of Sections 33(c) and 42(h) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/33(c), 42(h). On MWGen's motion, the Board modified the Interim Order on February 6, 2020 to correct an interpretation of the law, again naming only MWGen. Since the Complaint was filed in 2012, MWGen has been the only Respondent in this matter, and the only entity the Board found to be the responsible party under the Act.

Following the Board's June 20, 2019 and February 6, 2020 Interim Orders, the Hearing Officer entered a discovery schedule on October 19, 2020, that included dates to identify experts and provide expert opinions. Pursuant to that schedule, on January 25, 2021, Complainants issued their experts' reports. One of the opinions was the "Expert Opinion on Economic Benefit and Noncompliance and Economic Impact of Penalty Payment and Compliance Costs" by Jonathan S. Shefftz ("Shefftz Opinion"), attached as Exhibit 1.[3] The Shefftz Opinion purportedly calculates an economic benefit and proposes a penalty analysis. However, the analysis is primarily based upon

[2] Complainants' Motion to Amend the Complaint was granted on February 19, 2015.
[3] Because the Shefftz Opinion contains Non-Disclosable Information, it is only attached to the motion submitted to the Illinois Pollution Control Board Clerk, and has not been uploaded to the Board's website.

the financial status of MWGen's indirect parent, NRG. Complainants have not named NRG in their Complaint nor in the Amended Complaint, and NRG has never been a party to this matter. Moreover, the Board made no findings as to NRG, issuing its June 20, 2019 Interim Order and its February 6, 2020 Interim Order as to MWGen only.

**B. Information Regarding Any Party Other Than MWGen is Not Relevant and Must be Excluded**

The only party the Board found to be responsible under the Act is MWGen. Accordingly, the only information that is relevant, discoverable, and may be presented to the Board for the next hearing is information about MWGen. In a case with a similar procedural posture to this case, the remedy phase, the Board held that discovery is limited to the party found to be in violation of the Act. In *Johns Manville v. Illinois Dept. of Transportation*, the Board found that the Illinois Department of Transportation ("IDOT") had violated the Act, and ordered a second hearing to determine the appropriate relief. *Johns Manville v. Illinois Dept. of Transportation*, PCB 14-3 (December 15, 2016). During discovery in preparation for the second hearing, IDOT requested information about financial payments between the complainant, Johns Manville, and another company, (ComEd) for remediation at the Johns Manville Site. *Johns Manville v. Illinois Dept. of Transportation*, PCB 14-3, (Dec. 21, 2017). Johns Manville objected and requested that the Board issue a protective order on the grounds that the information IDOT was related to a separate entity and was not relevant. The Board agreed. The Board stated that "the only one found to have violated the Act is IDOT" and it had not found anyone else to have violated the Act. *Id.* at *4. The Board further stated that no complaint had been brought before the Board alleging anyone else violated the Act. *Id*. Because the information about the financial relationship with another company was not relevant nor would lead to relevant information, the Board granted Johns Manville's motion for protective order and barred IDOT's request for information related to a party unassociated with

the matter. *Id*. at *4-5. The parallels between the instant case and the Johns Manville case are evident. Just as in this case, liability had already been determined in the Johns Manville case and the parties were in the remedy stage. Just as in this case, a party sought to present information about the financial relationship of a third party, not named in the case, arguing that the discovery related to the amount of the remedy. The Board should reach the same conclusion here as in Johns Manville and find that information concerning a third, unnamed party − NRG − are not relevant to a potential remedy concerning MWGen.

This is the case even when the third, unnamed party is a parent corporation. The Board has held that only information related to the respondent, and not its parent, is relevant in evaluating an appropriate penalty. In *Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc*., the complainant argued that the Board, in evaluating the penalty against respondent, should consider the financial status of the respondent's parent corporation as part of the analysis. *Charter Hall Homeowner's Assoc. v. Overland Transportation System, Inc*., PCB 98-81, *slip op.* at 14 (May 6, 1999). The Board rejected that suggestion, stating that complainants had not established that the parent company, which was not a party to the matter, was responsible for the violations, and thus had not demonstrated that the information was relevant. *Id.*

The Board's decisions in both the *Johns Manville* matter and in the *Charter Hall Homeowner's Assoc.* matter are supported by Illinois Supreme Court Rule 201(b)(1) which limits the scope of discovery to the actual issues in the case and the subjects of the pending action Pursuant to that rule, the Illinois Supreme Court has held that "[i]t is axiomatic that 'discovery should only be utilized to 'illuminate the actual issues in the case.'" *Sander v. Dow Chem. Co.*, 166 Ill. 2d 48, 64, 209 Ill. Dec. 623, 631 (1995) *quoting Owen v. Mann*, 105 Ill. 2d 525, 530 (Ill. 1985). The Illinois

Supreme Court further stated that the pleadings and defenses in a lawsuit determine the appropriate scope of relevant discovery. *Sander,* 166 Ill.2 at 64. .

Here, the issues in this phase of the case are to determine the whether the named Respondent, MWGen, is required to implement any potential remedy in consideration of Sections 33(c) and 42(h) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/33(c), 42(h). Discovery is limited to evaluating the factors under Sections 33(c) and 42(h) against the actions and status of MWGen, and no other party. Any discussions regarding other entities not named in the Complaint and not found to have violated the Act are not relevant. Because the Shefftz Opinion includes information and makes conclusions about NRG, an entity wholly unrelated to this matter, the Board should exclude those portions of the opinion. The Board should also bar Mr. Shefftz from opining or testifying about any entity other than the Respondent, MWGen.

**C. Complainants Cannot "Back-Door" A Parent Liability Theory Through Their Expert**

Complainants' attempt to insert a parent liability theory through their expert opinion, long after their pleadings were final and liability issues have been decided, is improper and should be barred. It is a generally accepted principle that a parent corporation is not liable for the acts of its subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 1884 (1998). Where a party seeks to have a court apply an exception to the rule of separate corporate existence, the party must "seek that relief in their pleading and carry the burden of proving actual identity or a misuse of corporate form which, unless disregarded, will result in a fraud on him." *Gass v. Anna Hosp. Corp.,* 392 Ill. App. 3d 179, 185-86, 911 N.E.2d 1084, 1091 (5th Dist. 2009)(emphasis added). Very simply, Complainants have never pled nor claimed an exception to the rules of parent liability and cannot do so through an expert for the remedy stage of this case. By asserting in the Shefftz

Opinion that MWGen and NRG "are so intertwined" that NRG's finances should be considered, Complainants are improperly trying to make NRG a responsible party.

To apply an exception of the rule of a separate corporate existence, a court is required to either pierce the corporate veil or find a subsidiary is merely an "alter-ego," both of which are high bars, and courts are admonished to undertake the tasks "reluctantly." *Ted Harrison Oil Co. v. Dokka*, 247 Ill.App.3d 791, 795 (1993). Both these questions are complex and factually intensive and have never been raised in this case.[4] Merely showing some overlap between a subsidiary and a parent corporation is insufficient to demonstrate that the subsidiary is the alter-ego of the parent. *Larson v. CSX Transp., Inc.*, 359 Ill. App. 3d 830, 840, 835 N.E.2d 138, 145 (1st Dist. 2005), *See also People of the State of Illinois v. Wayne Berger and Berger Waste Management*, 1999 Ill. ENV LEXIS 175, *20-21, PCB 94-373 (May 6, 1999).

Here, Complainants have made no attempt in any pleading to pierce the corporate veil between MWGen and its indirect parent company, NRG. Complainants have also not attempted to crest the high burden of proving that MWGen is merely the alter ego of NRG through the misuse of corporate form that would give it some advantage. In any case, Complainants are too late to make such an attempt. The Board has already made a finding of liability against MWGen, and cannot now allow Complainants to surreptitiously insert the idea of parent liability for the remedy phase through an expert report.

[4] Piercing the corporate veil analyzes nine factors, including inadequate capitalization, failure to observe corporate formalities, nonpayment of dividends, absence of corporate records, and whether the corporation is merely a facade for the operation of the dominant stockholders. *Id.* The "alter-ego" theory evaluates whether the entities have failed to maintain formal corporate distinctions, or whether recognition of the entities as distinct would allow them some unfair advantage. *Larson v. CSX Transp., Inc.*, 359 Ill. App. 3d 830, 840, 835 N.E.2d 138, 145 (1st Dist. 2005).

**D. The Board Should Immediately Stay Discovery on the Economic Issues Pending its Review**

The decision to grant or deny a motion for stay is vested in the sound discretion of the Board. *People v. State Oil Co.*, PCB 97-103 (May 15, 2003), *aff'd sub nom State Oil Co. v. PCB*, 352 Ill. App. 3d 813 (2nd Dist. 2004). The Board will grant a stay if a party would suffer irreparable harm without it. *North Shore Sanitary District v. Illinois EPA*, PCB 03-146 (March 20, 2003), *3.

Here, MWGen will suffer irreparable harm in preparing its defense if it is not granted a stay of discovery on the economic issues. Pursuant to the Hearing Officer's discovery schedule, MWGen must identify experts and provide the subject area of expert opinions by February 22, 2021. However, MWGen cannot begin to prepare its expert opinions in response to the Shefftz Opinion until the Board clarifies that that MWGen is the only Respondent subject to the Board's June 20, 2019 Order (as amended by the February 6, 2020 Interim Order). Without a stay, MWGen will be forced to prepare and produce detailed financial opinions about an entity that is not named in this proceeding. Also, a stay pending a clarification by the Board will reduce confusion in the record and limit additional delays. Without a stay, expert opinions will likely be produced that will contain information that is not relevant and require subsequent modification, further extending any discovery at a later date. To reduce confusion and provide clarification to the parties now, the Board should immediately stay discovery on the economic issues.

Notably, MWGen is not requesting a stay on any of the other issues that the Board identified in its June 20, 2019 Order, including expert opinions related to any potential corrective actions that may be required. MWGen's request is solely limited to a stay on the economic issues.

**E. Conclusion**

Because the Shefftz Opinion contains non-relevant information about NRG, an entity that is not party to this litigation, not named in the Complaint, and not found in violation of the Act by

the Board, the Board must exclude the portions of the Shefftz Opinion that concern NRG, and bar Mr. Shefftz or any other witness from offering an opinion on any entity other than MWGen. MWGen also requests that the Board immediately issue a stay on discovery *solely* on the economic issues pending its decision on this motion.

Respectfully submitted,
Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
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# EXHIBIT 6

## REDACTED

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**RESPONDENT'S REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE SECTIONS OF COMPLAINANTS' EXPERT REPORT AND EXPEDITED MOTION FOR STAY PENDING THE BOARD'S DECISION**

Complainants attempt to impose a new, overreaching approach to Illinois Pollution Control Board ("Board") orders by asking the Board to automatically evaluate to the financial resources of an unnamed parent entity, regardless of the subsidiary's relationship with the parent or the parent's obligations to provide funding. In other words, not only are Complainants asking the Board to expand the Illinois Environmental Protection Act ("Act") to evaluate a party's ability to pay as a matter of course, but also to evaluate a *non-party's* ability to pay. Even if the availability of funds beyond a party's own was a relevant consideration, which it is not, the evidence is uncontested -- and Complainants are fully aware – [redacted].

Complainants further misstate MWG's request for a partial stay. MWG's request is limited *solely* to a stay of expert discovery on the economic issue concerning NRG and nothing more. The expert discovery on the other issues that will be tried at the damages hearing will continue,

including production of expert reports on any remedial actions that may be required. MWG seeks a decision on the relevance of NRG, an un-named indirect parent, so that resources and time in remaining discovery and at the hearing are not wasted.

### A. "Ability to Pay" Via Access to Alternative Capital Other Than the Party Is Not a Factor to Consider Under the Act

Complainants mistakenly focus their response on the "ability to pay" and then seek to impose a new theory where the Board should consider the finances of any entity that might have the ability to fund a responsible party under the Act. Whether a named party has access to other forms of capital or financial assistance outside the named party's own economic and corporate status is not a factor the Board may consider under the Act when evaluating a penalty or corrective action.

A detailed review of the language in Section 33(c) and Section 42(h) of the Act reveals that "ability to pay" is not included, and, more significantly, nothing suggests that a person's potential to access capital outside of themselves should be considered. 415 ILCS 5/33(c), 42(h). While the Board has considered a party's ability to pay when a party claims an *inability* to pay, that is not the case here.[1] And where a party claims inability to pay, the Board limits its financial review to the named party, and not to the ability of the party to potentially access other funds. *See People of the State of Illinois v. Berniece Kershaw and Dawin Dale Kershaw*, 1995 Ill. ENV LEXIS 418, *27 (Ill. Pollution Cont. Bd. April 20, 1995) (Board rejected respondents' claims of inability to pay penalty); *People of the State of Illinois v. Oak Valley Wood Products, Inc.*, 1993 Ill. ENV LEXIS 12, *4 (Ill. Pollution Cont. Bd. January 7, 1993) (Board ordered respondent to submit tax return to demonstrate inability to pay a higher penalty); *Illinois EPA v. Jake's Auto & Wrecking*

[1] A court has held that the Board may not consider the economic situation of a party and its ability to pay to increase a penalty. *Archer Daniels Midland Company v. Illinois Pollution Control Bd*., 119 Ill. App. 3d 428, 438 (4th Dist. 1983).

*Co., Inc.*, 1972 Ill. ENV LEXIS 418, *3-4 (Ill. Pollution Cont. Bd. August 15, 1972) (Board reduced penalty due to respondents inability to pay).

Here, Complainants are attempting to shoe-horn a new standard for consideration – whether a party potentially has broader access to capital beyond its own economic resources. That is not the standard allowed under the Act, and would lead to absurd results in direct contradiction to corporate law. If the Board were to consider a corporation's potential to access to capital outside of itself, then the Board would also need to consider the corporation's access to lines of credit to determine whether the corporation would be able to borrow funds sufficient to withstand a higher penalty or corrective actions. If the party were an individual or family owned business, the Board could demand information from that party's banks, family, and peers for the ability to access to funds.

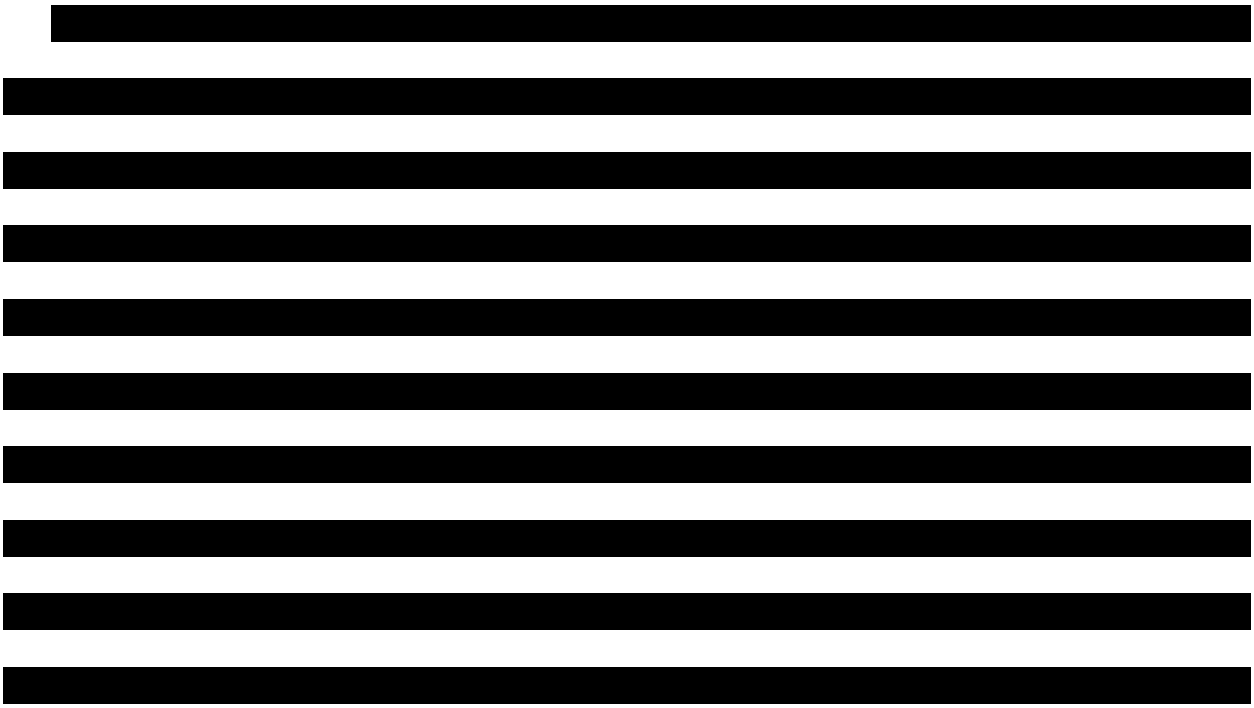
Moreover, under Complainants' theory, *any* parent company would automatically be considered as a source of funds for the purposes of assessing a Board order, regardless of the separate legal status of the parent. Thus, if the Board were to impose a penalty by arbitrarily considering the assets of an indirect parent company, it would regularly force responsible named parties to pay inflated penalties based upon the financial status of a non-party not required to pay or finance its subsidiary. This is clearly not how the Board operates, is directly contrary to corporate law, and has no support in the Act. As discussed in Section D below, the cases Complainants cite in support of their new theory are easily distinguished. In those cases, either the non-party parent's financial information was not at issue, or it was established that the non-party parent essentially financed the subsidiary. That is not the case here. Accordingly, the sections of the Shefftz Opinion about any party other than MWG are not relevant and must be stricken.

### B. The Shefftz Opinions Regarding NRG are not Relevant Because MWG Does Not Have Access to NRG's Capital nor Financial Assistance

Even if it were relevant under the Act whether MWG has access to other capital, the Shefftz Opinion [redacted]. In fact, in an inexplicable lapse, Shefftz fails to even reference or cite to MWG's Third Supplemental Response to Complainant's First Set of Interrogatories, Nov. 2, 2015 (attached as Ex. 1) nor the 2016 deposition of David Callen, NRG's Chief Financial Officer (excerpts attached as Ex. 2), both of which carefully explained [redacted]

[redacted] The law in Illinois is clear that some overlap between a subsidiary and a parent corporation is insufficient to demonstrate that the subsidiary is the alter-ego of the parent. In *Larson v. CSX Transp., Inc.*, 359 Ill. App. 3d 830, 840, 835 N.E.2d 138, 145 (1st Dist. 2005),

the plaintiff attempted to make a similar argument, that the parent and subsidiary relationship were so intimate that the court could consider the parent responsible. In that case, the parent and subsidiary had some overlap of employees, the plaintiff's paycheck was from the parent, and the trucks and credit cards the plaintiff used displayed the parent's name. *Id.* The court rejected the plaintiff's claims, stating that to demonstrate the subsidiary is the alter-ego of a parent, a party must demonstrate that the subsidiary was not operated on a stand-alone basis, that its management worked for interests other than its own, or that any of the coordination between the parent and the subsidiary was the result of anything other than an arm's-length exchange of services which furthered the independent goals of the subsidiary. *Id.* The Board has similarly held that to pierce the corporate veil under an alter ego theory, a party must show that there is a unity of identity between the corporation and its owner, and that recognizing the separate corporate identity would sanction a fraud or promote injustice. *People of the State of Illinois v. Wayne Berger and Berger Waste Management*, 1999 Ill. ENV LEXIS 175, *20-21, PCB 94-373 (May 6, 1999).



[redacted], the sections of the Shefftz Opinion that concern NRG are not relevant and must be stricken.

### C. Federal Courts Generally Exclude Evidence Concerning a Parent's Financial Condition

Contrary to Complainants' assertion, a series of federal courts have rejected the very strategy Complainants are attempting here. In *St. Croix Renaissance Group v. St. Croix Alumina*, 2010 U.S. Dist. LEXIS 122611 *3-5 (D.V.I. Nov. 18, 2010), the court barred the plaintiffs' expert from testifying about the financial condition of the defendant's parent company because the parent corporation was not a party. Similarly, in *Adams v. Teck*, the court excluded an expert opinion just like the Shefftz Opinion, because it improperly considered a non-named parent corporation's financial status for the economic benefit analysis. *Adams v. Teck Comnico Alaska, Inc.*, 399 F.Supp.2d 1031, 1038 (D. Alaska 2005). The court specifically rejected the plaintiffs' reliance on *United States v. Union Twp.*, 150 F.3d 259 (3rd Cir. 1998), very case relied on by Complainants, finding *Union Twp.* only supports that a court may consider a parent's financial statement to assure that the penalty would not be set at a level above the subsidiary's ability to pay. *Id.* (emphasis added). *See also United States v. Dico, Inc.*, 4 F. Supp. 3d 1047, 1065 n. 43 (S.D. Iowa 2014),

*aff'd in part, rev'd in part on other grounds*, 808 F. 3d 342 (8th Cir. 2015) (Court refused to consider the asset of the non-party parent company finding it to be "somewhat at odds with the basic principle of corporate law that each incorporated business entity enjoys a separate legal existence."); *United States v. Mt. State Carbon, LLC*, 2014 U.S.Dist. LEXIS 97184, *94 (N.D.W.Va. July 17, 2014) (Court found that the non-party parent was "in no way liable or responsible for any civil penalties."); *United States v. Magnesium Corp. of Am.* 2006 U.S.Dist. LEXIS 39944, *14-16 (D. Utah 2006) (court denied motion to compel financial information about the defendant's parents, because the parent corporations were not parties to the case and the United States could not "back-door" a veil-piercing that was disallowed in *Bestfoods*.)

Just like the federal courts stated here, the Board should also exclude the sections of the Shefftz Opinion regarding NRG, because NRG is not a party and thus those opinions are not relevant to this matter.

### D. The Cases Cited by Complainants are Either Inapplicable, or Confirm that a Parent's Finances Could be Relevant Only when the Parent is Required to Pay

The cases relied upon by the Complainants are inapplicable. In all of the cases, the parties demonstrated that the parents' finances were relevant, either by not objecting to consideration of the parent or by showing that the parent specifically provided financial support to the subsidiary.

#### i. In *Panhandle*, the Relevance of the Parent Company's Finances was not at Issue

Complainants' reliance on *People of the State of Illinois v. Panhandle Eastern Pipe Line Co.* PCB99-191, Nov. 15, 2001 is misleading, at best. In *Panhandle* , the Board was never faced with the question of whether the parent's finances should be considered because no one raised it. It was simply not at issue. During the hearing there were no objections to including consideration of the parent's financial status as part of the penalty analysis. *See* Sept. 19, 2000, *Transcript*, p. 358-359 attached as Ex. 4. While the entire record is not available on the Board's website, a review

of the documents on file indicates that no party objected to consideration of the parent company's financials during discovery. *Panhandle,* Case Activity located at https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=4042. Moreover, both the complainant and the respondent presented the respondent's parent's financials as part of the economic consideration. *Panhandle,* Nov. 15, 2001, p. 30. It is disingenuous to argue that the Board in *Panhandl*e considered the parent's finances when the issue of *whether* to consider the parent's finances was never before the Board.

In contrast, MWG repeatedly objected to the relevance of NRG's finances. In fact, prior to Mr. Callen's second deposition in 2020, counsel for MWG again raised the issue both before the deposition and on the record. Ex. 3, Callen 2020 Dep. p. 10:9-11 ("we would object as we have stated to the court, to the relevance of information concerning the financial status of NRG Energy, Inc."); Ex. 5 MWG's Responses to Complainants' Fifth Set of Document Requests, p. 5 – 6 ("MWG objects…because it…requests information that is not relevant and not reasonably calculated to lead to relevant, discoverable evidence"). Complainants argued that discovery is broad, and they believed they were entitled to pursue information on any connection between MWG and its parent. Through discovery, Complainants learned that [redacted], the Shefftz Opinion should not include [redacted].

ii. Under Federal Law, a Parent's Financial Information may only be Relevant if the Parent Provides Financial Support

The few federal cases Complainants rely upon similarly do not support their broad expansion of the Act. Each of the federal cases cited concerned penalties under federal law, which explicitly state that "ability to pay" is a consideration. 33 U.S.C. § 1319(g)(3); 42 U.S.C § 7413. As stated

above, the Act does not state that a party's ability to pay is a factor to consider in Sections 33(c) or 42(h), and the Board has historically only considered it when the party claims an inability to pay. *See supra* Sec. A. Moreover, contrary to Complainants' claim, the federal cases do not support generally looking to a parent's financial status as part of a penalty analysis, even for those statutes that specifically cite ability to pay as a factor. Instead, they only look to a parent's financial status if it is established that the subsidiary is financed by the parent or is financially reliant such that review is necessary. In *United States v. Union Twp.*, the parent company was "siphoning off profits from" the subsidiary and had complete control whether the subsidiary achieved compliance, indicating that the parent worked for its interests and provided financial support. *Union,* 150 F.3d at 268. The Third Circuit stated that due to those facts, the parent's financial resources are highly relevant to assure that the penalty was not set above the subsidiary's ability to pay. *Id.* Similarly, in *Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148 (D. Idaho 2012), the court found that consideration of a parent corporation's financial information was relevant because the parent company raised money from the subsidiary through "cash calls" that were recorded as intercompany loans, and the parent company "provided [the subsidiary] with a steady source of financing." *Id*. at 1170. In *In re: Carroll Oil Company*, 10 E.A.D. 635 (2002), the defendant and its "sister" company had financial agreements such that the sister company was a legitimate source of funds. Id at 668.

Here, even if ability to pay were at issue, [redacted]

**E. MWG's Request for a Stay is Limited in Scope**

Complainants clearly misunderstand the scope of MWG's request for a stay and spend considerable resources detailing the bases for a stay of the entire proceeding. MWG is not seeking

to stay the proceeding. MWG's request is limited *solely* to the economic expert issue concerning NRG and nothing more. MWG has already complied with the discovery schedule and named its experts, and will timely provide the expert reports for the other issues that will be presented at the damages hearing, including MWG's experts in response to Complainants' expert on remediation, MWG's expert on the economic value of the MWG's stations, and MWG's expert concerning MWG's financial condition. However, MWG will suffer irreparable harm if it is forced to prepare and produce detailed financial opinions about NRG – an entity that is not named in this proceeding. A limited stay of this parent-liability issue will allow the parties to tailor the opinions and responses to the issues that will be presented at the hearing. Thus, to reduce confusion on the scope of the economic issues, the Board should immediately stay discovery only on this economic issue.

**F. CONCLUSION**

For the reasons stated herein, in MWG's Motion to *in Limine* and Expedited Motion for Stay and the supporting Memorandum of Law in Support, MWG respectfully requests that the Board strike the portions of the Shefftz Opinion that address NRG because it is not relevant. MWG further requests that the Board immediately stay discovery on the NRG economic issue until it issues a decision on MWG's Motion *in Limine*.

Respectfully submitted,

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