

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
)	02-0461
Citation to show cause for continued QSWEF)	
Certification of Pontiac Facility and to Investigate)	
Compliance with the final order in Dockets 97-0031)	
Through 97-0045 consolidated)	

**STAFF OF THE ILLINOIS COMMERCE COMMISSION
 BRIEF IN OPPOSITION TO
 MOTION TO CONTINUE HEARING AND FOR LEAVE TO APPOINT COUNSEL**

NOW COMES the Staff of the Illinois Commerce Commission (“Staff”), through its undersigned counsel, and pursuant to the schedule previously set by the Administrative Law Judge (“ALJ”), responds as follows to the Brief in Support of Motion to Continue Hearing and for Leave to Appoint Counsel (“Connolly Brief” and “Connolly Motion”) filed on E-Docket on June 28, 2006, by John Connolly (“Connolly”) not individually, but as president of Resource Technology Corporation (“RTC”). In opposition to the Connolly Motion, Staff responds as follows.

1. In his brief, Connolly states “the Trustee has effectively abandoned the Estate’s interest in the subject matter of this proceeding so that the debtor – or Connolly – now has the requisite standing to participate in this litigation.” Connolly further states that “...the order approving the settlement constitutes abandonment and the non-debtor entity (the prepetition debtor) now has the ability to protect the matters raised in this proceeding.” (Connolly Brief, p. 5)

2. The Staff disputes Connolly’s contentions and his argument that he should be allowed to litigate on behalf of RTC the pending action to revoke RTC’s QSWEF status at the Pontiac landfill.

BACKGROUND FACTS

3. On November 15, 1999, the bankruptcy matter known as In re Resource Technology Corporation was commenced. (Connolly Brief, p. 5) RTC operated as a debtor-in-possession until August 26, 2003 at which time Gregg Szilagyi was appointed as the Chapter 11 Trustee. On September 21, 2005, the case was converted to Chapter 7 and Jay Steinberg was appointed as the Chapter 7 Trustee.

4. Pursuant to court order the Chapter 7 Trustee was authorized to continue to operate RTC's business. (Tr. 139) The Chapter 7 Trustee while operating the business had employees who were the same employees of RTC before he was appointed trustee. One of those employees included Connolly. (Tr. 139-140)

5. Thereafter, the Chapter 7 Trustee and Leon Greenblatt and various related entities (the "Greenblatt Entities") entered into an agreement (the "Settlement Agreement") which settled various causes of action between the Chapter 7 Trustee and the Greenblatt Entities. The Settlement Agreement also provided for the assumption and assignment of certain executory contracts and the sale of certain of the assets of the RTC bankruptcy estate to various Greenblatt Entities including assets and executory contracts located at the Pontiac landfill. Finally, the Settlement Agreement provided for the abandonment by the Chapter 7 Trustee of permits related to the various sites including Pontiac. On March 16, 2006, the Bankruptcy Court entered an order approving the Settlement Agreement. By stipulation of the parties, a copy of the order and the Settlement Agreement were introduced into the record.

6. Pursuant to the order and the Settlement Agreement, the Chapter 7 Trustee conveyed to the Greenblatt entities the assets at the various sites including the assets at

Pontiac. As of March 28, 2006, the Chapter 7 Trustee ceased operations at the various landfill sites including at Pontiac.

7 Since March 28, 2006, Connolly has been carrying on RTC's business (Tr. 152) despite the fact that (1) the Chapter 7 Trustee ceased operating RTC's business and has not authorized any other party to operate, (2) RTC no longer owns the operating assets, and (3) RTC has abandoned its permits to operate its business (Trustee Notice of Withdrawal of Appearance- Part 1, Exhibit A -Settlement Agreement (Exhibit A), pp. 6-7 and Tr. 140)

ARGUMENT

I. THE TRUSTEE DID NOT ABANDON THE RIGHTS OF THE RTC ESTATE UNDER THE COMMISSION'S ORDER GRANTING QSWEF STATUS.

8. The Settlement Agreement which was approved by the Bankruptcy Court authorizes the Trustee to abandon "Permits." (Order Approving Settlement at p. 11, para. 19 (ICC Staff Ex. 5.0)) The order does not define what is meant by "Permits" but the Settlement Agreement defines them as "permits issued to RTC for the operation of its business." (Settlement Agreement p. 4(ICC Staff Ex. 5.0)) RTC's status as a QSWEF, however, is not based on a permit; it is based on an order entered by the Commission. It should be noted that the order itself states, "It is further ordered that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Law Review." (Order ICC Docket Nos. 97-0031 to 97-0045) (emphasis added)) If the Trustee wanted

to abandon the Estate's rights under the Commission's order granting QSWEF status, the Trustee's motion should have asked for that relief. It did not.¹

9. It should be further noted that the "bad acts" which form the basis for the instant citation proceeding are all acts committed after the RTC bankruptcy was filed and they are therefore acts of the bankruptcy estate. As the Chapter 7 Trustee made clear as part of his testimony, he has not authorized anyone else to defend this citation proceeding on behalf of the estate. (Tr. 142-143) Connolly, in his capacity as president of RTC therefore lacks authority to defend the "bad acts" of the RTC estate. See *Matter of New Era, Inc.*, 135 F. 3d 1206, 1209 (7th Cir. 1998)(holding that only the Trustee has standing to litigate on behalf of the bankruptcy estate).

II. THE TRUSTEE HAS NOT AUTHORIZED ANYONE TO CONTINUE OPERATIONS.

10. The Chapter 7 Trustee has ceased operations (Tr. 140) and is liquidating RTC (Tr. 135). As he testified at the hearing, he has not authorized anyone to continue operations. (Tr. 140-141) According to Connolly, however, the pre-petition RTC is a separate entity from the RTC bankruptcy estate and therefore is apparently free to act as its officers see fit including continuing operations at Pontiac.

11. Unfortunately, the Connolly Brief cites no authority for the proposition that the pre-petition officers of a corporation in Chapter 7 can operate the corporation while the bankruptcy is still pending without the authorization of the Trustee. Furthermore, although there is a distinction recognized between the bankruptcy estate and the debtor for certain purposes, the distinction does not apply across the board. For example, for

¹ RTC did hold permits from the Illinois Environmental Protection Agency and the IEPA objected to the abandonment of those permits. The parties resolved the objection. See Order Approving Settlement at p.

income tax purposes, a corporation in bankruptcy is deemed to be the same taxable entity as the bankruptcy estate. See 11 U.S.C. Section 346; 26 U.S.C. Sections 1398, 1399. Since both the debtor and the bankruptcy estate are the same taxable entity, any operations conducted by Connolly in the name of the debtor are attributable to the bankruptcy estate as well, notwithstanding the fact that the Chapter 7 Trustee has not consented to the debtor's continued operations. There is no authority for the proposition that pre-petition officers of a corporate debtor can unilaterally incur tax liability for the bankruptcy estate.

III. RTC IS IN CHAPTER 7 AND IS REQUIRED TO LIQUIDATE.

12. Finally, pursuant to Illinois law the “[d]issolution of a corporation terminates its corporate existence and a dissolved corporation shall not thereafter carry on any business except that necessary to wind up and liquidate its business and affairs, ...”(805 ILCS 5/12.30) In other words under Illinois law RTC can only wind up, it cannot continue to operate its business.

13. Pursuant to Delaware law “All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution ... but not for the purpose of continuing the business for which the corporation was organized. ...” (8 Del.C. Section 278) Like Illinois law RTC can only wind up and RTC cannot operate its business legally.

14. Regardless of whether Illinois corporate law or Delaware corporate law² applies to the dissolution of RTC, under either law, general corporate law is clear that RTC on an on going basis can only wind up RTC. That is Connolly cannot legally continue to

11, para. 19. (ICC Staff Ex. 5.0)

² The order granting RTC QSWEF status indicates that RTC is a Delaware corporation.

operate RTC's business. While Connolly cites to a number of cases in his brief to support his motion³ none of the case law support the position actually taken by Connolly that Connolly can legally continue to operate RTC's business as RTC was doing before it went into bankruptcy. The intent of Connolly to continue operating RTC just as it was before RTC went into bankruptcy is the apparent reason which Connolly seeks counsel to represent RTC in this matter and to continue this matter. However, given that the Chapter 7 Trustee has ceased operating RTC's business and Connolly cannot legally continue to operate RTC as an on going business, the Connolly Motion is being sought for an illegal purpose⁴ and therefore should be denied. See *Matter of Liberty Trust Co.*, 130 B.R. 467 (W.D. Tex. 1991); *contra In re CVA General Contractors. Inc.*, 267 B.R. 773 (Bankr. W.D. Tex. 2001).

³ In paragraph 22 Connolly argues that the Trustee has "effectively abandoned the Estate's interest in the subject matter of this proceeding so that the debtor – or Connolly – now has the requisite standing to participate in this litigation." (Connolly Brief, p. 5) However even the case law cited by Connolly indicates while a debtor may regain standing to pursue a cause of action if it is abandoned by the Trustee a cause of action that was not scheduled cannot be abandoned to the debtor. *Anderson v. Acme Markets, Inc.*, 287 B.R. 624, 629 (E.D. Pa. 2002). No where in the Connolly motion is it stated that ICC Docket No. 02-0461 was scheduled by the Trustee.

⁴ It should be noted that QSWEF status under 8-403.1 of the PUA can only be granted by Commission order. (220 ILCS 5/8-403.1)

WHEREFORE, for all reasons stated herein, Staff respectfully requests that the Administrative Law Judge deny the Connolly Motion and set this matter for an evidentiary hearing at which time Staff will offer its evidence into the record.

Respectfully submitted,

/s/

JOHN C. FEELEY
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

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Counsel for the Staff of the
Illinois Commerce Commission