

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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| <b>ILLINOIS COMMERCE COMMISSION</b>   | ) |                           |
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| <b>Citation to show cause for continued<br/>QSWEF Certification of Pontiac Facility<br/>and to Investigate Compliance with the<br/>final order in Dockets 97-0031 Through<br/>97-0045 consolidated.</b> | ) | <b>Docket No. 02-0461</b> |
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**BRIEF OF THE STAFF  
OF THE ILLINOIS COMMERCE COMMISSION**

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JOHN C. FEELEY  
Office of General Counsel  
Illinois Commerce Commission  
160 North LaSalle Street, Suite C-800  
Chicago, IL 60601  
Phone: (312) 793-2877  
Fax: (312) 793-1556  
[jfeeley@icc.illinois.gov](mailto:jfeeley@icc.illinois.gov)

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*Counsel for the Staff of the  
Illinois Commerce Commission*

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Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, pursuant to Section 200.800 of the Rules of Practice (83 Ill. Adm. Code 200.800) of the Illinois Commerce Commission (“Commission”), respectfully submits its brief in the above-captioned matter.

**I. INTRODUCTION**

The Commission initiated this proceeding on July 10, 2002 based upon a Staff Report to investigate whether a qualified solid waste energy facility (“QSWEF”) located in Pontiac, Illinois at the Livingston landfill owned and operated by Resource Technology Corporation (“RTC”) continued to meet the requirements of Section 8-403.1 of the Illinois Public Utilities Act (“PUA”) (220 ILCS 5/8-403.1) and whether RTC-Pontiac had filed the necessary annual and bi-annual reports for 1998 to 2001. (ICC Docket No. 02-0461, Citation Order, p. 3) As is set forth in detail in Staff witness Thomas L.

Griffin's testimony there are three questions that need to be resolved in this proceeding.

Those questions or issues are:

1. Does RTC-Pontiac violate a Commission imposed limit on generating capacity from Docket Nos. 97-0031 -97-0045, consolidated?
2. Does RTC-Pontiac violate the Illinois law's requirement that its primary fuel source be landfill methane?
3. Does RTC-Pontiac violate the Commission's requirement, in Docket Nos. 97-0031 – 97-0045, consolidated, that it file bi-annual reports regarding its energy production facilities and annual reports regarding the status of its reimbursement fund?

(Griffin Dir., ICC Staff Exhibit 2.0 Revised, p. 4)

RTC challenged the citation order on several fronts. RTC challenged the first issue of whether it violated a Commission imposed limit on generating capacity by appealing a Commission Declaratory Ruling in ICC Docket No. 02-0455 (Commonwealth Edison Company Petition for Declaratory Ruling). RTC was successful in that challenge. The Illinois Appellate Court ruled that the Commission did not impose a 10 MW restriction on RTC-Pontiac<sup>1</sup>. Given that ruling, Staff filed testimony in this docket that concluded that RTC-Pontiac was not in violation of the order in Docket Nos. 97-0031 -97-0045, consolidated as to the capacity issue. (*Id.*, p. 6-7) With respect to the third issue, subsequent to the issuance of the citation order Staff determined that RTC-Pontiac had submitted the required bi-annual and annual reports in that the dates on the documents indicated that RTC-Pontiac had sent the reports in the past and was in compliance with the Commission's order on that issue. (*Id.*, p. 17) In addition to challenging the Commission on the first issue, RTC also challenged the Commission's authority with respect to the second issue in the circuit court of Cook County by filing a

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<sup>1</sup> The mandate of the appellate court was issued in January of 2004.

complaint for declaratory ruling and seeking injunctive relief against the Commission. The trial court granted the Commission's motion to dismiss. RTC appealed and the appellate court affirmed the circuit court of Cook County. (Resource Technology Corp. v. ICC, 354 Ill.App.3d 895 (2004)(Appendix 1))<sup>2</sup> Given all of the above, the only remaining issue is issue number 2, as to whether RTC-Pontiac violated the requirement that its primary fuel source be landfill methane?

Following the above challenges by RTC, Staff filed direct testimony on October 28, 2004. Staff's testimony consisted of the expert witness testimony of Michael J. Carolan, an outside expert, and David A. Borden a Staff in-house expert witness. Mr. Carolan is an engineer with extensive professional experience in the QSWEF industry in Illinois as an owner and president of QSWEFs. Mr. Borden is an economist who subsequently left the Commission. In his place, Staff offered the testimony of Mr. Thomas L. Griffin. Mr. Griffin is an accountant who handles QSWEF issues for the Commission. Following the filing of Staff's direct testimony, Staff and RTC had a discovery dispute which ultimately was resolved by the Commission ruling on a Staff petition for interlocutory review on February 25, 2005.

On August 15, 2005, direct testimony was filed on behalf of RTC-Pontiac by the law firm of Robinson Curley & Clayton, P.C., even though Ungaretti & Harris were the attorneys representing the then Chapter 11 Trustee for RTC, Gregg E. Szilagyi. Ungaretti & Harris indicated in a filing that they believed the Chapter 11 bankruptcy case against RTC was going to be dismissed and that Robinson Curley & Clayton, P.C. would then be counsel for RTC once the bankruptcy matter was dismissed. (Trustee's Motion for Leave to File Additional Appearance and for Extension of Time to file

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<sup>2</sup> Rehearing was denied on February 2, 2005.

Testimony, pp. 1-2 (filed July 1, 2005)) On November 8, 2005, Ungaretti & Harris withdrew their appearance and Mr. Szilagyi's appearance given that RTC's Chapter 11 bankruptcy matter was converted to a case under Chapter 7 and Mr. Jay A. Steinberg was appointed Chapter 7 Trustee for RTC. Robinson Curly & Clayton also withdrew their appearance for the same reason. Arnstein & Lehr LLP later filed an appearance for itself and Mr. Jay A. Steinberg. On April 27, 2006, Staff filed its rebuttal testimony. Staff's rebuttal witnesses were again Mr. Michael J. Carolan and Mr. Thomas L. Griffin. On May 19, 2006 Mr. Jay A. Steinberg, the Chapter 7 Trustee and his attorney Arnstein & Lehr LLP withdrew their appearances.

On June 5, 2006, John Connolly, the president of RTC, filed a motion to continue this matter and for leave to appoint counsel. On June 14, 2006, the ALJ held a hearing at which time he inquired of representatives for Mr. Connolly and the Chapter 7 Trustee, Jay A. Steinberg, as to who had the right to legally represent RTC in this matter. At the hearing, in response to a question from Staff counsel, the Chapter 7 Trustee Jay A. Steinberg stated the following:

MR. FEELEY:

Q. Have you as the Chapter 7 Trustee authorized Mr. Connolly or anyone else to defend this action?

A. The only appearance was through Mr. Chatz and since he has withdrawn, the estate, technically, is not part of the hearing.

JUDGE HILLIARD:

He asked you whether or not you authorized Mr. Connolly.

THE WITNESS:

No.

JUDGE HILLIARD:

The answer is no?

THE WITNESS  
No.

MR. FEELEY

Q. And no one else?

A. Correct.

(June 14, 2006 Transcript, pp.142-143) In response to a question from Staff Counsel Mr. Connolly confirmed that the Chapter 7 Trustee did not authorize him to file his motion to continue the hearing and for leave to appoint counsel. (June 14, 2006 Transcripts, p. 152) Following that hearing, Staff and counsel for Mr. Connolly, Gould & Ratner, filed briefs on the issue raised in the motion. Staff in its brief objected to Mr. Connolly's motion. On August 10, 2006, the ALJ denied Mr. Connolly's motion. Mr. Connolly filed a petition for interlocutory review with the Commission. On September 13, 2006 the Commission denied Mr. Connolly's petition for interlocutory review.

On October 24, 2006, an evidentiary hearing was held in this matter at which time the direct and rebuttal testimony of Mr. Carolan and Mr. Griffin along with their attached exhibits/schedules (Carolan Dir., ICC Staff Exhibit 1.0 (Redacted and Unredacted) including attached schedules 1.01, 1.02, and 1.03 to 1.12 (Confidential and Public); Carolan Reb., ICC Staff Exhibit 3.0; Carolan Affidavit, ICC Staff Exhibit 3.01; and Griffin Dir., ICC Staff Exhibit 2.0 Revised including attached schedules 2.01, 2.02, 2.03 (Confidential and Public), 2.04, 2.05 and 2.06 (Confidential and Public); Griffin Reb., ICC Staff Exhibit 4.0; Griffin Affidavit, ICC Staff Exhibit 4.01, respectively) were admitted into evidence by affidavit. RTC's testimony was not offered and thus not admitted into evidence. Following the conclusion of the evidentiary hearing, a date was set for Staff to file a brief. Staff's position is that (1) RTC-Pontiac violated the PUA's

requirement that its primary fuel source be landfill methane (2) RTC- Pontiac's QSWEF determination be revoked and (3) RTC be ordered to payback to the State of Illinois immediately the sum of \$4,843,712.13.

## **II. ARGUMENT**

### **A. RTC-Pontiac failed to use methane gas generated from landfills as its primary fuel.**

#### **1. Staff's definition of "primary fuel" is supported by the law.**

Section 8-403.1 of the PUA often referred to as the Retail Rate Law, defines a QSWEF as a facility determined by the Illinois Commerce Commission to (1) qualify as such under the Local Solid Waste Disposal Act, (2) to use methane gas generated from landfills as its primary fuel, and (3) to possess characteristics that would enable it to qualify as a cogeneration or small power production facility under federal law. (220 ILCS 5/8-403.1)(Emphasis added). The second requirement that the QSWEF "use methane gas generated from landfills as its primary fuel" became effective March 14, 1996 as a result of Public Act 89-448 (Appendix 2). Staff acknowledges that the legislature's use of the word "primary fuel" indicates that the Illinois legislature must have intended to allow under certain circumstances, a QSWEF to use some fuel other than landfill methane gas. However, RTC-Pontiac for the period of January 2002 to December 2002 used natural gas (i.e., non landfill methane gas) 48.8% of the time or only used landfill methane gas 51.2% of the time and RTC-Pontiac for the period January 2003 to December 2003 used natural gas 41.3 % of the time or only used landfill methane gas 58.7% of the time. (Carolan-Dir., ICC Staff Exhibit 1.0 (Redacted), p. 12) In fact, one of

RTC-Pontiac's generating units, a Solar Titan generating unit which had a capacity of 13.5 MW to 15 MW (*Id.*, p. 8), ran entirely on natural gas and therefore used no landfill methane gas during 2002 and 2003 (*Id.*, p. 14).

The amount or percentage of how much methane gas generated from landfills must be used by a QSWEF or the flipside - how much of other fuels (i.e., natural gas) a QSWEF may use is a matter within the Commission's discretion (See, Resource Technology Corp. v. ICC, 354 Ill.App.3d 895, 903 (2004)) since the Illinois legislature did not define "primary fuel." (See, Chicago & North Western Ry. Co. v. Illinois Commerce Com., 130 Ill. App.2d 352, 361 (1970)) Despite claims by RTC to the contrary, Staff is not aware of any prior occasion where the Commission has interpreted or provided a definition for "primary fuel." Staff recommends that the Commission follow federal law when determining primary fuel use under the Retail Rate Law. More specifically, the Commission should look to Section 3(17)(A) and (B) of the Federal Power Act (FPA) which was added by Section 201 of Public Utilities Regulatory Policies Act of 1978 ("PURPA") (16 U.S.C. Section 796(17)(A) and (B)), 18 CFR Section 292.204(b) and the United States Appellate Court's ruling in, Southern California Edison Company, Petitioner v. Federal Energy Regulatory Commission, Respondent; Laidlaw Gas Recovery Systems, Inc., Intervenor, No. 98—1439 United States Court of Appeals for the District of Columbia Circuit. (338 U.S. App. D.C. 402; 195 F.3d 17; 1999 U.S. App. LEXIS 28140; 30 ELR 20175) (the "Laidlaw" decision) and their definition of "primary energy source" to define "primary fuel" under the Illinois Retail Rate law. Staff will now examine the FPA, PURPA, the Federal Regulatory Energy Commission's (FERC) regulation, 18 C.F.R. Section 292.204(b), and the Laidlaw decision.

PURPA which added Section 3(17) of the FPA, was enacted in response to the nation's fuel shortage back in 1978. When the law was enacted, approximately one-third of the electricity in the U.S. was generated through the use of oil and natural gas. (citations omitted) (Laidlaw, 195 F.3d 17, 19 (1999)) To encourage the development of facilities that generate electricity using renewable resources and facilities engaged in cogeneration of electricity and useful heat or steam that might otherwise be wasted and to overcome the reluctance of traditional utilities to buy from and sell to the alternative producers, Congress granted qualifying small power production facilities certain benefits. Under PURPA, such facilities were exempt from certain regulatory controls, and they were assured a market by providing a right to interconnect with the local public utility and to receive rates, as prescribed by FERC, up to the full avoided cost of the utility. (*Id.*)

The FPA defines a small power production facility to be “a facility which ... produces electric energy solely by the use , as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof[.]” (16 U.S.C. Section (17)(A)(i)) Further defining primary energy source, the FPA defined the term to mean:

the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under the rules prescribed by the Commission, in consultation with the Secretary of Energy –

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and (ii) the minimum amounts of fuel required to alleviate or prevent-

(I) unanticipated equipment outages, and  
(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages[.]

(16 U.S.C. Section 796(17)(B))

The FERC promulgated regulations under PURPA. In particular FERC enacted 18 CFR Section 292.204(b). Section 292.204(b)(1) provides: “Fuel use. (1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources. ... (ii)...” (18 CFR 292.204(b)(1)(i)).

Section 292.204(b)(2) further provides:

(2) Use of oil, natural gas, and coal by a facility, under Section 3(17)(B) of the Federal Power Act, is limited to the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. Such fuel use may not, in the aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electric energy.”

(18 C.F.R. Section 292.204(b)(2))

The Laidlaw case addressed the FPA (16 U.S.C. Section 796(17)(A) and (B)) and the FERC’s regulations, 18 C.F.R. Section 292.204(b). The facts of the Laidlaw case are as follows: Laidlaw Gas Recovery Systems, Inc. (“Laidlaw”) owned and operated landfill gas to energy plants which were designed to take methane gas produced by the landfill and burn it to produce electricity. Laidlaw had a contract with Edison, to supply power but at one of its locations, Coyote Canyon Landfill Gas Power Plant in Orange County, Laidlaw had difficulty meeting its contractual supply obligations to Edison. (Id., p. 20) Laidlaw filed a declaratory ruling with FERC to determine whether its Coyote Canyon plant would remain a “qualifying small power production facility” under Section 3(17)(C) of the FPA and FERC’s regulations if it began burning natural

gas to boost the output of its plant from 17MW to 20MW. Edison and the Public Utilities Commission for the State of California intervened in the matter. (*Id.*) Edison argued that under PURPA Laidlaw was restricted in how it used natural gas at its facility and therefore could only use natural gas for one of the specified uses in Section 3(17)(B) of the FPA. (*Id.*, p. 20) The court ruled against Laidlaw. The court in Laidlaw found that the structure of the FPA lent weight to the conclusion that Congress intended that the only permissible uses by a small power production facility would be for those fuel uses specified in Section 3(17)(B). (*Id.*, p. 25) The Laidlaw court found that the exceptions for fossil fuel use were of a limited number and character – for “emergency, maintenance, and quality control”. (*Id.*) In particular the Laidlaw court concluded that those purposes for which fossil fuel use could be used were for “startup, testing, or emergency nature as opposed to a continuing and permanent usage associated directly with the production of electricity.” (*Id.*, p. 26)

As set forth above, the FPA’s Section 3(17)(A) and (B), the FERC’s regulations set forth at 18 C.F.R. Section 292.204(b) and the ruling in the Laidlaw case all provide that, with respect to “primary energy source”, natural gas can only be used for certain specified purposes and the use in total cannot exceed 25% of the total annual energy input for the relevant 12 month period. Staff recommends that the Commission define primary fuel under the Retail Rate Law consistent with the federal law definition for “primary energy source”. Therefore the Commission by applying federal law’s definition to the Retail Rate Law’s use of the term primary fuel to RTC-Pontiac would mean that under Illinois law the use of fuel other than methane gas generated from landfills (i.e. natural gas) must be restricted to the minimum amounts of fuel required for ignition,

startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting public health, safety or welfare, which would result from electric power outages. In addition, the use of fuel other than methane gas generated from landfills may not, in the aggregate, exceed 25 percent of the total fuel input, including landfill methane, during the 12-month period beginning with the date the QSWEF first produces electric energy and any calendar year subsequent to the year in which the QSWEF first produces electricity. The analysis performed by Staff's expert witness Michael J. Carolan shows that RTC-Pontiac did not meet this definition of primary fuel use.

The Commission's adoption of the federal law's definition of "primary fuel" would be consistent with the Illinois legislature's policy to encourage the development of energy production facilities in order to conserve energy resources and to provide for their most efficient use. The adoption of a definition for primary fuel use of less than 75% (i.e., allowing more than 25% natural gas and for any purpose) would only encourage QSWEF's to use natural gas which is contrary to the Illinois legislation's intent to conserve our energy resources and "[g]enerally, the interpretation of a statute must be grounded on the nature and object of the statute as well as the consequences which would result from construing it one way or the other" (the Village of Buffalo Grove v. the Illinois Commerce Commission, 180 Ill. App.3d 591, 595 (1989)). In addition, the State would be wasting resources by subsidizing power purchases that ComEd would otherwise procure without the Retail Rate law (Griffin Dir., ICC Staff Exhibit 2.0 Revised, p. 11) Clearly, allowing RTC-Pontiac to use natural gas anywhere between 41.3% of

the time to 48.8% does not result in the conservation of our energy resources or provide for their most efficient use. (220 ILCS 5/8-403.1.)

RTC-Pontiac argued in its prefiled testimony that the Commission's own administrative rules froze in place the federal rules definition of "primary fuel" which was in effect on January 1, 1989. That argument should be rejected. Assuming that the federal rules in effect on January 1, 1989 permitted the use of nond landfill gas in amounts up to 50% or even in excess of 50%, which Staff does not concede, the Commission's rules in Part 445 did not freeze Illinois' definition of "primary fuel" with the federal rules in effect on January 1, 1989. The reason that the Commission could not have frozen the definition of "primary fuel" to the Federal Rules in effect on January 1, 1989 is that "primary fuel" did not become part of the Illinois Retail Rate law until long after January 1, 1989. As mentioned above the requirement "to use methane gas generated from landfills as its primary fuel" became part of the Illinois Retail Rate Law on March 14, 1996. Therefore, the argument that the definition of "primary fuel" is frozen as of January 1, 1989 is ludicrous and the Commission's rules in Part 445 are not an interpretation of Section 8-403.1's use of the term "primary fuel".

Staff's recommendations that: (1) RTC-Pontiac did not use landfill methane as its primary fuel; (2) that RTC-Pontiac's QSWEF status should be revoked; and (3) that RTC be ordered to payback to the State of Illinois immediately the sum of \$4,843,712.13 are all consistent with recent amendments to Section 8-403.1 of the PUA made by Public Act 94-0836. (Appendix 3) Public Act 94-0836 clarified the existing Illinois Retail Rate Law and confirms that (1) the retail rate is only for electricity that is generated by the QSWEF from landfill methane gas; (2) the Commission has the

discretion to revoke a QSWEF's status for not using landfill methane as its primary fuel<sup>3</sup>; and (3) the Commission has the authority to order a QSWEF to repay the State for all electricity sales that were not from using landfill methane gas. (220 ILCS 5/8-403.1(e-5))

**2. The evidence in the record supports the position that RTC-Pontiac did not use landfill methane as its primary fuel.**

To support the position that RTC-Pontiac was not using landfill methane gas as its primary fuel, Staff retained Michael J. Carolan an expert with over 40 years of work experience who was involved in permitting, constructing and operating 12 QSWEFs in Illinois. All of the landfill gas to energy projects that Mr. Carolan has been involved with and that include electric generation are Qualified Facilities ("QFs") as defined under federal law under the regulations of PURPA. (Carolan Dir., ICC Staff Exhibit 1.0, p. 3) Mr. Carolan was retained to offer his expert opinion on the use of natural gas and landfill gas at RTC's Pontiac facility at the Livingston landfill and to determine whether landfill gas was used as the primary fuel. (*Id.*, p. 3)

Mr. Carolan testified that landfill gas is "the gas produced by anaerobic bacteria during the natural process of the biodegradation of the solid waste in a landfill." (*Id.*, pp. 3-4) He further explained that the gas is collected through a vacuum hooked up to a system of pipes and wells. Landfill gas is consistently 50 to 53 percent methane and 40 to 42 percent carbon dioxide and the remaining gas is mostly nitrogen. Mr. Carolan explained that when he referred to landfill gas he was primarily referring to the methane component of landfill gas. (*Id.*, p. 4) According to Mr. Carolan natural gas is the

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<sup>3</sup> While the Commission has the discretion to revoke a QSWEF's previously granted approval for illegal fuel use, the Commission must revoke the previously granted QSWEF determination if the QSWEF does not repay moneys owed to the state within 90 days of a Commission order requiring repayment. (220 ILCS 5/8-403.1 (e-5))

commodity of compressed gas whose major source are the gas wells in North America. The principal component of natural gas is methane. (*Id.*)

In performing his analysis of RTC-Pontiac's operations, Mr. Carolan relied upon reports prepared by a company which operated and maintained the generating units at RTC-Pontiac. Those reports were provided to Staff from RTC. The generating units at RTC Pontiac were three Solar Taurus units with a 5 MW capacity and a Solar Titan unit with a rated capacity of 13.5 to 15 MW.

The Taurus units had associated compressors which were necessary to provide the vacuum source for the landfill gas collection system. (*Id.*, p. 8) Based upon his analysis, Mr. Carolan concluded that RTC Pontiac started operations in January 2001 and used only landfill gas through December 2001. (*Id.*, p. 5) Beginning in January 2002 through May 2004, RTC-Pontiac used natural gas in amounts and for uses such that landfill gas was not RTC-Pontiac's primary fuel. (*Id.*)

As set forth above, the standard which Mr. Carolan used for primary fuel use is the definition of "primary energy source" for small power production facilities under federal law. (*Id.*) Using that standard, Mr. Carolan explained that RTC Pontiac cannot use natural gas, except for the specific usage restrictions set forth in the federal law as follows:

- (i) the minimum amounts of fuel required for ignition, start-up, testing, flame stabilization, and control uses, and
- (ii) the minimum amounts of fuel required to alleviate or prevent
  - (I) unanticipated equipment outages, and
  - (II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages.

Such fuel use may not, in the aggregate exceed 25 percent of the total energy input of the facility during the 12 month period.

(*Id.*, p. 6) Mr. Carolan also clarified that all of the operations by RTC-Pontiac from the gas collection system through the interconnection to Commonwealth Edison Company comprised the QSWEF facility and the fuel to be used by the facility was solely to be landfill gas with natural gas to be used only for the permitted uses set forth above. (*Id.*, pp. 6-7)

The first step in Mr. Carolan's analysis was to determine whether RTC-Pontiac used fuel other than landfill gas in excess of 25% of the total fuel consumed, including landfill gas, for the 12 month period commencing when RTC-Pontiac first produced electricity, and for every subsequent calendar year. (*Id.*, p. 10) As mentioned previously, RTC-Pontiac used only landfill gas in 2001. (*Id.*) RTC-Pontiac's reports examined by Mr. Carolan showed that natural gas use began in 2002, continued to 2003 and into 2004. Because Mr. Carolan only had six months of fuel usage data available for 2004 he made no conclusions regarding 2004. (*Id.*, p. 13) For 2002, Mr. Carolan calculated the percentage use of natural gas to be 48.8% and for 2003 he calculated the percentage to be 41.3%. (*Id.*, p. 12) Mr. Carolan concluded that RTC-Pontiac exceeded the 25% limit for exceptions that permit the use of fossil fuels.

Mr. Carolan's next step was to determine whether the usage of natural gas by RTC-Pontiac was for any of the permitted uses: "ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. (18 C.F.R. 292.204(b)(2))" (*Id.*, p. 13)

With regard to the permitted uses of "ignition, startup and testing" Mr. Carolan explained that, when RTC-Pontiac commenced operations in January of 2001 it did not use natural gas and did not start to use natural gas until December 2001. (*Id.*) Therefore, when natural gas was first used, the facility had already ignited, started up and was tested - all of which occurred using only landfill gas. (*Id.*) With regard to the permitted use of "flame stabilization", Mr. Carolan analyzed how efficiently the generating units operated using the various fuel types of landfill gas and natural gas. To measure the efficiency, Mr. Carolan examined the heat rates for the generating units. Mr. Carolan's analysis showed that, using the heat rate as an indicator of efficiency, the heat rate was consistent whether or not natural gas was included in the fuel and, in fact, for the Taurus units the power production actually declined during the time period that natural gas was blended with landfill gas. (*Id.*, p. 16) Mr. Carolan thus concluded that RTC-Pontiac's use of natural gas in the Taurus units did not qualify under the permitted exception of "flame stabilization" for the period of January 2002 to May of 2004. (*Id.*, p. 17)

With regard to the permitted use of "control use" which according to Mr. Carolan includes the ability to operate the generating units in such a way that regulatory requirements are met, Mr. Carolan examined documents submitted by RTC to the Illinois Environmental Protection Agency ("IEPA"). Mr. Carolan examined those documents to determine whether the use of natural gas was necessary to not exceed set limits on certain emissions from the plant. Mr. Carolan found that RTC-Pontiac's Taurus units, while using only landfill gas during a test performance period, did not exceed the preset emission levels. Mr. Carolan concluded that there was no need to

use natural gas to achieve “control” in the Taurus units during the period January 2002 to May 2004. (*Id.*, pp. 17-20)

Finally, with respect to the issue of using natural gas to “alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public health, safety, or welfare which would result from electric power outages”, Mr. Carolan explained that ComEd, the electric utility in whose service territory RTC-Pontiac is located, does not consider QSWEFs like RTC-Pontiac as essential must run facilities. (*Id.*, p. 20) In addition, Mr. Carolan testified that, while the Taurus units operated, there was never an incident where the Taurus units did not export power to the ComEd grid and thus there was always a source of power to operate the gas collection system and other miscellaneous electrical requirements at RTC-Pontiac and, therefore, the occasion never would have arose that required natural gas use by RTC-Pontiac to maintain the health and safety of the local area. (*Id.*, pp. 20-21)

Mr. Carolan had some final comments on RTC-Pontiac which are significant as well. Mr. Carolan testified that the Titan generating unit was rather large and was not even connected to the landfill gas collection system and the capacity of the Titan greatly exceeded the combined load of the compressors. As a result it was not possible to even run that unit on landfill gas and therefore the Titan unit was run solely by natural gas. In addition, Mr. Carolan, based upon his experience, stated that the Taurus units at RTC-Pontiac were more typical of the types of generating units used at similar sized landfills and the Titan unit was not. (*Id.*, p. 22) The results of Mr. Carolan’s analysis lead to the conclusion that natural gas was only used at RTC-Pontiac to produce more

power for sale to ComEd at the retail rate when the retail rate exceeded the cost to purchase the natural gas. (*Id.*, p. 23)

**B. The Commission should revoke RTC-Pontiac's QSWEF determination and order RTC to immediately reimburse the State of Illinois the sum of \$4,843,712.13.**

As set forth in the testimony of Staff witness Griffin, Staff recommends that RTC-Pontiac's QSWEF determination be revoked by the Commission because RTC-Pontiac did not use landfill methane gas as its primary fuel source. (Griffin Dir., ICC Staff Exhibit 2.0 Revised, p. 5) In addition, Mr. Griffin determined that as a result of RTC not using landfill methane gas as its primary fuel, RTC should immediately reimburse to the State of Illinois the sum of \$3,454,584.16 for its use of natural gas to generate electricity during 2002 and also reimburse immediately to the State of Illinois the sum of \$1,389,127.97 for its natural gas used to generate electricity during 2003. (Griffin Reb., ICC Staff Exhibit 4.0, p. 2) Mr. Griffin recommended that in total RTC should immediately repay to the State of Illinois the sum of \$4,843,712.13.

Mr. Griffin's recommendation to revoke RTC Pontiac's QSWEF determination because of its illegal fuel use is consistent with the legislators stated policy of enacting Section 8-403.1 to "encourage the development of alternate energy production facilities in order to conserve our energy resources and to provide for their most efficient use." (220 ILCS 5/8-403.1(a)) By revoking RTC-Pontiac's QSWEF determination, the Commission will deter other QSWEF's

in the State from using natural gas illegally and that in turn would result in the conservation of energy resources. (Griffin Dir., ICC Staff Exhibit 2.0, p. 12) In addition, while ComEd was reimbursed for the electricity purchased from RTC-Pontiac to the extent it pays more than the market price for that electricity (*Id.*, p. 11), taxpayers are the ones that end up subsidizing the illegal sales by RTC and most certainly taxpayers should not be subsidizing the acts of RTC which are contrary to the law. The percentage of natural gas use by RTC-Pontiac (48.8% for 2002 and 41.3% for 2003 (Carolan Dir., ICC Staff Exhibit 1.0 (Redacted), p. 12) along with the fact that one turbine, the Solar Titan was running entirely on natural gas during 2002 and 2003 (*Id.*, p. 14)) and that RTC did not even use natural gas for any permitted use all demonstrate that RTC's use of natural gas was not the case of a QSWEF on limited occasions using more natural gas than it should have for the necessary operation of its turbines but rather RTC was trying to maximize its profits (Carolan Dir., ICC Staff Exhibit 1.0, p. 23) at the expense of Illinois taxpayers. Given all of the above, RTC-Pontiac's QSWEF determination should be revoked and RTC should be ordered to pay immediately to the State of Illinois the sum of \$4,843,712.13.

### III. CONCLUSION

For the reasons set forth above, Staff respectfully requests that the Illinois Commerce Commission approve Staff's recommendations in this docket.

Respectfully submitted,

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JOHN C. FEELEY  
Office of General Counsel  
Illinois Commerce Commission  
160 North LaSalle Street, Suite C-800  
Chicago, IL 60601  
Phone: (312) 793-2877  
Fax: (312) 793-1556  
[jfeeley@icc.illinois.gov](mailto:jfeeley@icc.illinois.gov)

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*Counsel for the Staff of the  
Illinois Commerce Commission*