

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company :
:
Verified Emergency Petition for a :
Declaratory Ruling determining : 02-0455
Commonwealth Edison Company's :
obligations under the provisions of :
Article IX of the Public Utilities Act , :
including 220 ILCS 5/9-102, 103, 104, :
201, 240 and 241, to pay under ComEd's :
Rider 3-Qualified Solid Waste Energy :
Facility Purchases to Resource :
Technology Corporation for purchases :
of energy from Resource Technology :
Corporation's facility at 14732 East 2100 :
North Road, Pontiac, Illinois in :
quantities that are in excess of that :
facility's 10 MW configured capacity :
specified in the Commission's Order in :
Docket 97-0034 dated October 8, 1997 or :
for other relief. :

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

I. PROCEDURAL HISTORY

On July 5, 2002, Commonwealth Energy Company ("ComEd") filed a verified emergency petition with the Illinois Commerce Commission ("Commission"), pursuant to 83 Ill. Adm. Code 220.220, for a declaratory ruling determining ComEd's obligations under the provisions of the Public Utilities Act ("Act"), including 220 ILCS 5/9-102, 103, 104, 201, 240 and 241, to pay under its Rider 3-Qualified Solid Waste Energy Facility Purchases to Resource Technology Corporation ("RTC") for purchases of energy from RTC's facility located at 14732 East 2100 North Road, Pontiac, Illinois ("the Pontiac facility") in quantities that are greater than that facility's 10 MW configured capacity specified in the Commission's October 8, 1997 Order in Docket 97-0034, or for such other manner and type of relief as the Commission deems appropriate clarifying ComEd's obligation to pay RTC under Rider 3 for energy generated at the Pontiac facility in excess of 10MW.

On July 15, 2002, Commission Staff ("Staff") filed a response to ComEd's petition.

On July 16, 2002, the Commission, in conference, approved the following schedule proposed in Staff's response: a receipt deadline of July 19, 2002 for responses to ComEd's petition and Staff's response, and a receipt deadline of July 22, 2002 for replies to any responses.

On July 19, 2002, RTC filed a response to ComEd's petition and Staff's response.

On July 22, 2002, ComEd and Staff filed replies to RTC'S response.

RTC filed a petition to intervene in this proceeding which is hereby granted.

II. THE COMMISSION'S AUTHORITY TO ISSUE DECLARATORY RULINGS

Section 200.220 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.200) addresses declaratory rulings. Section 220.200(a) provides:

When requested by the affected person, the Commission may in its sole discretion issue a declaratory ruling with respect to:

- 1) the applicability of any statutory provision enforced by the Commission or of any Commission rule to the person(s) requesting a declaratory ruling; and
- 2) whether the person's compliance with a federal rule will be accepted as compliance with a similar Commission rule.

III. COMED'S EMERGENCY PETITION

ComEd indicates that it delivers electricity to the public in the northern portion of Illinois, and is a public utility within the meaning of Section 3-105 of the Act and an electric utility within the meaning of Section 16-102 of the Act. (ComEd Petition at 2)

ComEd indicates that RTC operates landfill gas-fueled electric generating facilities in Pontiac, Illinois and other locations within ComEd's service territory. ComEd states that the Commission's Order entered on October 8, 1997 in consolidated Dockets 97-0031 through 97-0045 (the "Order") considered information provided by RTC and concluded that the Pontiac Facility as configured in RTC's petition was a qualified solid waste energy facility fueled by landfill methane under Section 8-403.1(b) of the Act. The Pontiac Facility is the subject of Docket 97-0034. ComEd indicates that the Order contained similar findings with respect to RTC's other facilities in ComEd's service territory. ComEd notes that the Order indicated that the Pontiac facility "will have a capacity of 10 MW." (Order at 6)

ComEd indicates that its Rider 3 provides that the energy pricing specified therein is applicable only after “[a] determination by the Illinois Commerce Commission that the Facility qualifies under the terms of Section 8-403(b) of the Act.” ComEd states that it has an obligation to comply with the Order, the provisions of Rider 3 and the terms of Sections 9-102, 103, 104, 201, 240 and 241 of the Act requiring that all rates, charges and payments for services be consistent with its tariffs and applicable Commission orders. (ComEd Petition at 3)

ComEd indicates that it has made monthly payments at the “retail rate” to RTC pursuant to Rider 3 for energy produced at the Pontiac Facility. ComEd asserts that in 2002, the Pontiac Facility began to produce energy in excess of its maximum 10 MW configured capacity under the Order. ComEd states that RTC requested payment at the retail rate under Rider 3 for the Pontiac Facility’s production in excess of the maximum configured capacity provided in the Order. (ComEd Petition at 2-3)

ComEd indicates that RTC is the debtor in possession in a Chapter 11 proceeding pending in the United States Bankruptcy Court for the Northern District of Illinois, Case No. 99 B 35434 (“the RTC Bankruptcy Proceeding”). ComEd states that on July 2, 2002, RTC requested and obtained a temporary restraining order in the RTC Bankruptcy Proceeding requiring ComEd to make payments to RTC under Rider 3 for the billing period ending May 24, 2002 for energy produced at the Pontiac facility in excess of the maximum 10 MW configured capacity specified in the Commission’s Order in consolidated Dockets 97-0031 through 97-0045. ComEd indicates that on July 2, 2002, the United States Bankruptcy Judge granted ComEd relief from the automatic stay in the RTC Bankruptcy Proceeding to seek a declaratory ruling from the Commission concerning ComEd’s obligations under the Act, the Commission’s Order and ComEd’s Rider 3 to make payments to RTC for energy produced at the Pontiac Facility in excess of the 10 MW configured capacity specified in the Commission’s Order. ComEd states that the Bankruptcy Judge scheduled a preliminary injunction hearing in the RTC Bankruptcy for July 9, 2002 to consider whether to extend the Court’s Order requiring payment under Rider 3 with respect to energy purchased from the Pontiac Facility. ComEd stated that it seeks a declaratory ruling or other relief in this matter so the Commission’s determinations will be available to the Bankruptcy Judge at the July 9, 2002 preliminary injunction hearing, or as soon thereafter as possible. (ComEd Petition at 2-4)

IV. STAFF’S RESPONSE

Staff notes that each Docket, 97-0031 through 97-0045, was initiated by a separate petition specific to each of RTC’s fifteen separate facilities. Staff states that the Order in those consolidated proceedings contains findings specific to each of the fifteen separate facilities regarding the facilities’ locations and generating capacity. According to Staff, the Order states: “The Docket 97-0034 landfill, located at 14732 East North Road, Pontiac, Illinois, will have a capacity of 10 MW, with a projected commercial operation date in the 1st quarter of 1998. The facility is located in ComEd’s territory.” (Staff Response at 1-2, citing Docket 97-0031 et al., Order at 6) Staff asserts

that the language in the order was based upon the testimony of George Calvert, then President of RTC during cross-examination. (Staff Response at 2-3, citing Docket 97-0031 et al., citing Tr. at 68-69)

Staff says it reviewed ComEd's Rider 3 (ILL. C. C. No. 4, 6th Revised Sheet No. 62.10 and 2nd Revised Sheet No. 62.20), and found nothing that would oblige ComEd to pay the retail electricity rate for purchases of energy from RTC's facility located at 14732 East 2100 North Road, Pontiac, Illinois, in quantities that are in excess of that facility's 10MW configured capacity specified in the Commission's Order in Docket 97-0034 dated October 8, 1997. (Staff Response at 4)

In Staff's view, if ComEd were seeking, without regard to any litigation pending elsewhere, a definitive determination of its rights and obligations under the Public Utilities Act and its tariffs vis a vis RTC, there is some question whether a declaratory action would be the appropriate procedural mechanism for such a request. Staff argues, however, that in a federal proceeding, the Court has effectively set in motion a process whereby ComEd is to seek from the Commission its guidance as to the operation of State law. Staff notes that ComEd has chosen a mechanism under which it may, in the Commission's sole discretion, receive from the Commission a determination as to how a number of provisions of the Public Utilities Act apply to ComEd in the current controversy with RTC. Staff believes that the Commission may, in its discretion, determine under 83 Ill. Adm. Code 200.220 whether the provisions of the Public Utilities Act, read in context with a particular set of relevant facts, oblige ComEd to pay the retail rate for the output of the Pontiac facility to the extent the facility has a greater capacity than contemplated by the Commission's Order in Docket 97-0034. Staff supports a determination that ComEd has no such obligation. (Staff Response at 4)

V. RTC'S RESPONSE TO COMED'S PETITION AND STAFF'S RESPONSE

In its response, RTC contends that ComEd's petition for a declaratory ruling should be stricken in its entirety as unfounded in law or fact and without proper jurisdiction. (RTC Response at 13)

RTC asserts that ComEd's Petition and Staff's Response raise issues of fact and potential questions of law related to whether the Commission's October 8, 1997 Order in consolidated dockets 97-0031 through 97-0045 mandated a wattage limit of 10 MW for RTC's Pontiac facility. RTC indicates that ComEd and Staff fail to cite any case law, statute or regulation which grants authority to the Commission to set wattage limits on individual qualified solid waste energy facilities ("QSWEF") such as RTC's Pontiac facility. (RTC Response at 4)

RTC states that the Illinois regulatory definition of a QSWEF does not include a megawatt limitation. RTC notes that 83 Ill. Adm. Code 445.20 provides that QSWEF "means a facility that meets the criteria set forth in 18 CFR 292 in effect on January 1, 1989 (hereinafter referred to as 18 CFR 292), and the Local Solid Waste Disposal Act (Ill. Rev. Stat. 1989, ch. 85, par. 5901 et seq.), hereinafter referred to as the "Local Solid

Waste Disposal Act,” or an electric generating facility which uses methane gas generated from landfills and meets such requirements of 18 CFR 292”. RTC notes that Section 8-403.1 of the Public Utilities Act (220 ILCS 5/8-403.1) provides that QSWEF “means a facility determined by the Illinois Commerce Commission to both qualify as such under the Local Solid Waste Disposal Act, to use methane gas generated from landfills as its primary fuel, and to possess characteristics that would enable it to qualify as a cogeneration or small power production facility under federal law.” Finally, RTC states that the Federal regulations for “qualifying small power production facilities” (18 CFR 292.204(a)) impose a “power production capacity” limitation of “80 megawatts per facility,” which is greater than the amount RTC would ever produce at the Pontiac facility. (RTC Response at 4-5)

RTC indicates that ComEd is seeking a ruling regarding the rates that it is required to pay for energy produced by RTC’s Pontiac facility. Thus, RTC indicates that ComEd is seeking a determination of its obligations under the Public Utilities Act. RTC asserts that Staff’s response raises questions as to whether the Commission has authority to issue a declaratory ruling that would determine express rights and obligations under the Public Utilities Act and tariffs filed thereunder. RTC states that neither ComEd nor Staff have explained how the failure of the Bankruptcy Court to rule on the issue raised by ComEd grants jurisdiction to the Commission. RTC indicates that if ComEd is concerned about its ability to claim tax credits, such concerns should be addressed to the Illinois Department of Revenue. (RTC Response at 5-6)

RTC also asserts that ComEd is not entitled to emergency relief on an expedited basis. RTC indicates that neither ComEd nor Staff have alleged any basis for the emergency nature of the petition. RTC notes that the Commission entered a citation order on July 10, 2002 in Docket 02-0461 pursuant to Sections 10-101 and 10-108 of the Public Utilities Act initiating an investigation as to whether RTC’s Pontiac facility continues to meet the requirements for a QSWEF under Section 8-403 of the Public Utilities Act. RTC asserts that the citation proceeding and ComEd’s emergency petition involve potentially the same or similar issues. RTC states that if the Commission’s final order in Docket 02-0461 revokes the QSWEF status of the Pontiac facility, ComEd’s issue becomes moot. RTC indicates that if the instant proceeding results in a ruling that ComEd is required to pay the Rider 3 retail rates for all energy purchased from the Pontiac facility or only for the first 10 MW of energy produced by that facility, RTC will remain a QSWEF and the citation proceeding will be moot. RTC contends that the two proceedings should have the same schedules and analyses. (RTC Response at 6-7)

RTC states that in applying for QSWEF status, it was required to indicate in which “utility service territory” each proposed QSWEF facility would operate. RTC indicates that ComEd was fully cognizant that the law may require various electric utilities, such as itself, to enter into Section 8-403.1 contracts with landfill generation facilities (see also statutory provisions related to the Retail Rate Law 415 ILCS 10/1 et seq.; 415 ILCS 5/1 et seq; and 35 ILCS 620/1 et. seq.). RTC states that these policies are created to benefit small energy providers, while at the same time, provide incentives, including tax benefits, to ComEd and other utilities for purchasing energy

from these “environmentally sound” endeavors. RTC indicates that federal statutes, PURPA, FERC regulations, and the Illinois Public Utilities Act encourage small energy producers such as RTC to enter into these non-traditional energy producing businesses by granting them higher returns when the product is sold and allowing for deferred reimbursement of the Public Utility Fund. RTC states that these Acts also favor ownership of multiple facilities which are permitted to be combined to meet the “primarily engaged in generating energy from QSWEF” requirement for owners of these facilities. (RTC Response at 8)

RTC asserts that ComEd is not harmed by the determination that the facilities owned by RTC are QSWEFs. RTC indicates that ComEd was aware that it must pay the Rider 3 rates for energy purchased from QSWEF facilities. RTC notes that 83 Ill. Adm. Code 445.70(b)(5) provides that “[i]n no event shall a utility be required to reimburse the General Revenue Fund for tax credits received under Section 8-403.1 of the Act or this Part.” RTC emphasizes that ComEd ultimately receives tax credits to offset higher payments for energy purchased from QSWEF facilities. (RTC Response at 8-9).

RTC asserts that the Commission’s October 8, 1997 Order in consolidated Dockets 97-0031 through 97-0045 relied on the aggregate megawatt capacity of each of RTC’s proposed facilities to determine whether RTC met the qualifications necessary to become an owner of QSWEF facilities. RTC states that the Commission simply added together the approximate megawatts expected to be produced at each facility in determining that the facilities have a gross power production capacity (“PPC”) of 65 MW, and used this figure to determine whether RTC was primarily engaged in producing energy from QSWEFS. (Order at 8) RTC indicates that federal law imposes a “power production capacity” limitation of “80 megawatts.” 18 CFR 292.204(a). RTC states that the megawatt usage at the Pontiac facility clearly falls well within both the Federal regulation and the Commission’s standard. (RTC Response at 9)

In contending that ComEd’s reliance on the 10 MW capacity for the Pontiac facility is inappropriate, RTC notes that its petition filed in Docket 97-0034 does not mention a MW limit for the Pontiac facility. RTC states that ComEd has not provided environmental or public safety rationale to validate the importance of a 10MW limitation for the Pontiac facility. RTC notes that the 10 MW figure was provided by an RTC witness in response to a Staff question seeking the approximate capacity of each of the 15 facilities that were being considered for QSWEF status in Dockets 97-0031 through 97-0045. RTC asserts that the MW capacities are neither absolutes nor caps, but rather are points of reference for evaluation. RTC states that the volume of methane produced within landfills changes as a result of the size and age of the landfill and other factors. (RTC Response at 10-11)

RTC asserts that the Commission’s Order in consolidated dockets 97-0031 through 97-0045 relied on the approximate output megawatt capacity for RTC’s proposed QSWEF facilities to grant QSWEF ownership status in ComEd’s service territory, as follows:

Beecher	6 MW
Pontiac	10 MW
McCook	5 MW
Lansing	3 MW
Hillside	10 MW
Paxton	5 MW

RTC indicates that the aggregate capacity output of its QSWEFs in ComEd's service territory is lower than the approximate aggregate of 39 MW anticipated in the October 1997 Order. RTC states that even if the Pontiac facility is producing more than 10 MW as initially estimated, the aggregate MW currently in use in the ComEd service territory is only 30 MW. RTC asserts that as a result of the Order in Dockets 97-0031 through 97-0045, Com Ed was required by law to purchase up to 39 MW of RTC owned QSWEF facility energy at the retail rate. (RTC Response at 10-11)

RTC also asserts that in or about the fall of 2000, ComEd consented to the construction of an interconnect at the Pontiac facility that enabled its capacity to exceed 10 MW. RTC indicates that it expended in excess of \$700,000 for the construction of the interconnect. RTC notes that it executed a Rate 18 Standby Electric Service Contract with ComEd on October 6, 2000 that reflects a capacity of 25 MW for the Pontiac facility. RTC states that it is incredulous for ComEd to come before the Commission two years later to complain of capacity in excess of 10 MW. (RTC Response at 2 and 11-12)

RTC indicates that ComEd is asking the Commission to split a Section 8-403.1 facility into two segments. RTC asserts that adopting ComEd's position would result in a QSWEF facility being concurrently deemed a non-QSWEF facility on the basis of "approximate outputs" offered at the time of application. RTC contends that there is no Illinois or federal authority for such splitting. RTC asserts that such splitting undermines the primary purpose of Section 8-403.1 of the Public Utilities Act, which is to assist in the development of non-traditional generation facilities, such as the Pontiac facility. (RTC Response at 12)

VI. COMED'S REPLY TO RTC'S RESPONSE

According to ComEd, RTC argues that the Commission is without authority under the Act or the Commission's regulations to make any determination of the configured capacity of a small power production facility for purposes of Rider 3, and that RTC is entitled to generate output at any amount at each facility so long as the total output does not exceed 65 MW. ComEd believes RTC is incorrect. ComEd claims it is "a well established rule that the express grant of authority to an administrative agency also includes the authority to do what is reasonably necessary to accomplish the legislature's objective." (ComEd Reply at 3, citing Abbott Labs., Inc. v. Illinois Commerce Comm'n, 289 Ill. App. 3d 705, 712, 682 N.E.2d 340, 347 (1st Dist. 1997)) ComEd asserts that

federal regulations governing capacity limitations are not inconsistent and do not otherwise conflict with the Commission's authority.

ComEd argues that a QSWEF designation is purely a matter of state law reserved to the Commission's specialized expertise and is not governed by federal bankruptcy law. ComEd claims that the bankruptcy judge, the Honorable Eugene R. Wedoff, recognized this. In ComEd's view, the fact that the Act incorporates federal criteria in this determination does not change this conclusion. ComEd also asserts that RTC acknowledges "ComEd is seeking from the ICC a definitive determination of its obligations under the Public Utilities Act." (ComEd Reply at 4, citing RTC Response at 5)

According to ComEd, the legal issue is narrow and does not require the consideration of new or additional evidence, but simply a clarification of ComEd's obligation to pay the "Retail Rate" in excess of the configured capacity specified in the Commission's Order in Docket 99-0031, et al. ComEd believes there is no reason to delay this determination. (ComEd Reply at 4-5)

In ComEd's view, its Petition warrants expedited consideration because the resolution of the issue presented implicates ComEd's filed rate obligations under the Act. ComEd claims that it is important to apply its filed rates correctly. ComEd says it needs to know what portion of the Pontiac Facility's output ComEd is required to take under Rider 3 and what portion should be priced at Rider 4 rates as a matter of proper rate application. ComEd also asserts that RTC's entitlement to the "Retail Rate" could effect the decisions ComEd will make with respect to tax payments. ComEd argues that absent expedited consideration of its Petition, ComEd's continued compliance with the Bankruptcy Court's injunction could result in State subsidies not anticipated by the Commission's Order in Docket 99-0031 et al. (ComEd Reply at 5)

In response to RTC's assertion regarding aggregation, ComEd notes that RTC filed separate applications for each of its 15 facilities. It is ComEd's position that the Commission's reference to 65 MW of aggregate generating capacity simply reflects the consolidation of the original dockets into one proceeding. (ComEd Reply at 4)

ComEd argues that Rider 18 and ComEd's Rider 18 interconnect obligation do not broaden RTC's entitlement to payments under Rider 3, as RTC suggests. ComEd states that power sold to ComEd from a Qualified Facility, as defined under PURPA and FERC regulations, is purchased pursuant to Rider 4. ComEd says that its Rider 18 contract with RTC incorporates by reference both Riders 3 and 4. ComEd argues that the reference to 25 MW in the Rider 18 contract is not an admission that RTC may exceed 10 MW of gross capacity and remain entitled to the Retail Rate for the excess. ComEd claims, instead, that the Rider 18 contract is simply a recognition that ComEd will provide up to 25 MW of standby service to the Pontiac Facility without regard to whether the relevant generation is entitled to payment at the "Retail Rate," the avoided cost rate or some other rate. It is ComEd's position that the Rider 18 contract does not

otherwise control, condition or modify ComEd's obligation to purchase qualified electricity from the Pontiac Facility at the "Retail Rate." (ComEd Reply at 6)

ComEd asserts that its interconnection with RTC is irrelevant to the price at which ComEd buys power from RTC. ComEd claims it is required to interconnect with an independent power producer regardless of its QSWEF status. ComEd indicates that the Act provides that "[t]his Section does not require an electric utility to construct additional facilities unless those facilities are paid for by the owner or operator of the affected [QSWEF]." (ComEd Reply at 6, citing 220 ILCS 5/8-403.1(f)) ComEd argues that the capacity supported by this interconnection does not determine the price that RTC is eligible to receive for the electricity it produces.

ComEd recommends that the Commission enter a declaratory ruling clarifying ComEd's obligation to pay RTC the "Retail Rate" for energy generated at the Pontiac Facility in excess of 10 MW. (ComEd Reply at 7)

VII. STAFF'S REPLY TO RTC'S RESPONSE

According to Staff, RTC asserts that the Commission's Order in Dockets 97-0031 et al. supports an interpretation that the generating facility at Pontiac, Illinois is permitted to generate up to 39 MW of electricity to sell to ComEd at the Section 8-403.1 Retail Rate. Staff says that RTC believes the Commission intended to grant RTC the ability to configure an aggregate MW capacity in ComEd's territory in whatever manner RTC might choose. Staff disagrees with RTC's interpretation and believes, instead, that the Order was intended to indicate that the Pontiac facility was to be configured at 10 MW. (Staff Reply at 2)

It is Staff's position that while RTC claims the Commission aggregated the capacity of all of RTC's proposed facilities to determine whether RTC could qualify as an owner of QSWEFs, the aggregation was actually performed for the specific and limited purpose of determining whether RTC was "primarily engaged in the business of producing or selling electricity, gas, or useful thermal energy from a source other than one or more qualified solid waste energy facilities." (Staff Reply at 3, citing Docket 97-0031 et al., Order at 7) Staff says such an analysis is necessary under Section 8-403.1(e) of the Act.

Staff states that the Commission is precluded from ordering a utility from entering into a contract to purchase electricity at the retail rate from a "non-primarily engaged" petitioner's facility. Staff argues, however, that the aggregation in which the Commission must perforce engage, for purposes of making the "non-primarily engaged" determination does not extend back to allow expanding the on-site capacity for each individual facility. In Staff's view, each individual facility remains configured as RTC represented in Docket 97-0031 et al. (Staff Reply at 3-4, citing Docket Nos. 97-0031 et al., Tr. at 68 – 69) Citing the Commission's Order in Dockets 96-0354/96-0378, Staff argues that the Commission has clearly indicated that it does not intend to permit a

petitioner, at its whim, to aggregate the generating capacities of separate QSWEF facilities. (Id., citing Docket 96-0354/96-0378, Order)

Staff argues that a review of the fifteen separate petitions underlying Docket 97-0031 et al. shows that RTC never requested the flexibility to shift portions of an aggregate capacity between sites. Staff also claims that the Commission did not engage in any utility territory-by-territory analysis to determine aggregate generating capacities. In Staff's view, RTC's argument that it can shift generating capacities among various facilities in ComEd's service territory, as long as the aggregate capacity is no more than 39 MW, is nothing more than an attempt to post hoc rationalize RTC's actions, and exceed the scope of authority granted by the Commission. (Staff Reply at 5)

With respect to RTC's aggregation argument, Staff claims that RTC accounted for only five of the six RTC facilities in ComEd's service territory. Staff says RTC failed to address the 6 MW facility at Beecher. Staff also argues that while the Commission's "primarily engaged" analysis employed aggregate PPC on a gross maximum basis, RTC presented capacities on a net basis. (Staff Reply at 7)

According to Staff, RTC's response mentions a supplemental self-certification submission recently made at the Federal Energy Regulatory Commission ("FERC") for the Pontiac facility. (Id., citing RTC Response at 3) Staff says the supplemental filing informs FERC that the Pontiac facility will have a gross power rating of 35 MW. Staff asserts that RTC actually intends to operate more than 46 MW in ComEd's service territory. In Staff's view, this belies RTC's attempt to post hoc rationalize the use of the 39 MW as an aggregate total that can shift between generation sites located within ComEd's service territory. (Staff Reply at 7)

It is Staff's position that if RTC wishes to change the configuration of its facilities, it should be required to petition for such a change. In Staff's view, a change of this nature would require additional Commission action. (Staff Reply at 8)

Staff concludes that the Commission should enter an Order determining that ComEd is not obliged by any of the provisions of the Public Utilities Act to pay the retail rate for purchases of energy from RTC's facility located at 14732 East 2100 North Road, Pontiac, Illinois, in quantities that are in excess of that facility's 10MW configured capacity specified in the Commission's Order in Docket 97-0034, dated October 8, 1997. (Staff Reply at 8)

VIII. COMMISSION'S CONCLUSION

ComEd seeks a declaratory ruling as to whether it is required to pay the retail rate under its Rider 3 for energy generated at RTC's Pontiac facility that is in excess of 10 MW. The first issue to be addressed is whether the Commission has authority to issue the requested declaratory ruling pursuant to 83 Ill. Adm. Code 200.200. Having reviewed the filings, the Commission concludes that under the unique circumstances

and facts presented herein, the requested declaratory ruling can be properly issued. As even noted by RTC, ComEd is seeking a determination of its obligations under the Public Utilities Act.

With regard to the subject matter of the requested declaratory ruling, ComEd and Staff assert that the Commission's October 8, 1997 Order in consolidated Dockets 97-0031 through 97-0045 determined that RTC's Pontiac facility's designation as a QSWEF was based on its configured capacity of 10 MW. RTC, on the other hand, contends that the Commission's Order relied on the approximate megawatt capacity for each of RTC's proposed QSWEF facilities to grant QSWEF ownership status in ComEd's service territory. RTC indicates that the Commission granted QSWEF status to six of its facilities in ComEd's service territory with an approximate aggregate capacity of 39 MW, and emphasizes that the aggregate capacity of those six facilities is currently 30 MW. RTC contends that the Commission's Order authorized RTC to shift output between QSWEF facilities so long as the total output of the QSWEF facilities did not exceed the total authorized level in ComEd's service territory. The Commission rejects RTC's position. The Order did not authorize a shift in output, but rather relied on the configured capacity of 10 MW in granting QSWEF status to the Pontiac facility.

The Commission disagrees with RTC's position that the Commission does not have authority to set wattage limits on individual QSWEFs such as the Pontiac facility. The Commission's approval of QSWEF status for the Pontiac facility at 10 MW does not conflict with federal law. RTC notes that the federal regulations for "qualifying small power production facilities" (18 CFR 292.204(a)) impose a power production capacity limitation of 80 MW per facility. The Commission's 10 MW limit on the Pontiac facility obviously does not exceed 80 MW.

The Commission rejects RTC's argument that there is no 10 MW limit on the QSWEF status for the Pontiac facility since the RTC witness at the hearing in Dockets 97-0031 through 97-0045 testified that 10 MW is the approximate capacity of that facility. RTC's argument might have some merit if the actual capacity of the Pontiac facility was close to 10 MW. The pleadings in this case indicate, however, that RTC has executed a Rate 18 Standby Electric Service Contract with ComEd that reflects a capacity of 25 MW for the Pontiac facility, and that a supplemental self-certification filing by RTC with FERC indicates that the Pontiac facility will have a gross power rating of 35 MW.

The Commission concludes that ComEd is not obligated under any provisions of the Public Utilities Act to pay the retail rate under its Rider 3 for energy generated at RTC's Pontiac facility in excess of 10 MW.

IX. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein, is of the opinion and finds that:

- (1) ComEd delivers electricity to the public in the State of Illinois and is a public utility as defined in the Public Utilities Act;
- (2) RTC has been granted QSWEF status for certain of its electric generating facilities fueled by landfill-generated methane in Illinois;
- (3) the Commission has jurisdiction over ComEd and RTC and the subject matter hereof;
- (4) the findings of fact and conclusions of law set forth in the prefatory portion of this Order are supported by the record herein and are hereby adopted as findings of fact and conclusions of law;
- (5) ComEd's request for a declaratory ruling should be approved;
- (6) ComEd is not obligated under any provisions of the Public Utilities Act to pay the retail rate under its Rider 3 for energy generated at RTC's facility located at 14732 East 2100 North Road, Pontiac, Illinois, that is in excess of 10 MW.

IT IS THEREFORE ORDERED that ComEd's request for a declaratory ruling is approved in accordance with Finding (6) of this Order.

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 Review Law.

DATED: July 29, 2002

Administrative Law Judge

Receipt deadlines:

Briefs on exceptions: 08-05-02
Replies: 08-09-02