



3. Whether the Commission violated the express language of the Public Utilities Act by setting maximum wattage capacities for QSWEFs outside the scope of 220 ILCS 5/8-403.1 (the “Retail Rate Law”) and whether the creation of these “maximum configured capacities” for QSWEFs by the Commission without statutory support interferes with the express duties of the legislature.

4. Whether the Commission discriminated against RTC and its Pontiac facility by “splitting” the statutory rights it is owed as a QSWEF and setting arbitrary limits on the amount of electricity that must be purchased under the Retail Rate Law by a public utility generated at the Pontiac Facility.

5. Whether the Commission, by its Order, violated the stated purpose of 220 ILCS 5/8-403.1 of the Public Utilities Act to “encourage the development of alternative energy production facilities in order to conserve [the State’s] energy resources and to provide for their most efficient use” by setting arbitrary limits on the amount of electricity that must be purchased under the Retail Rate Law from a facility which is determined to be a QSWEF.

6. Whether the Commission has any authority, statutory, regulatory or otherwise which permits it to set limits on the MW capacity of QSWEF facility which are lower than 80 MW for small power production facilities specified under federal law [18 C.F.R. part 292.204 (a)].

WHEREFORE, if the Commission declines to grant rehearing, RTC respectfully requests that said denial of rehearing be ordered on an emergency basis so that the matter may be properly and timely appealed to the appropriate court for final determination in a timely manner so as not to irreparably harm RTC, its creditors, and adversely affect the public health and welfare by

the incentives as permitted by the legislature to produce electricity from qualified Solid Waste Facilities.

Respectfully submitted,

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Bankruptcy Proceeding which is attached hereto as Exhibit A in its entirety according to Commissions rules for filing attachments).

**1. The Commission failed to address the Prejudicial effect the Emergency Proceeding had on RTC and Other Intervener.**

Without legitimate basis or a showing of either necessity or harm, the Staff and the ALJ pushed the proceeding forward without permitting discovery or investigation into the basis for ComEd's position that the Commission, in 1997, without statutory authority, set MW capacities for QSWEF facilities which were first, self-executing and were permanently binding even after compliance with FERC Supplemental self-certification approval of increase in wattage capacity. ComEd alleges that its declaratory action sought relief as to tariffs it was required to file with the Commission. This does not raise the issue of emergency proceedings in that no tariffs or filings were due to the Commission until December, 2002. (83 ILAC 445.50(e)).

RTC, and its creditors were precluded from conducting discovery on these and other related issues. It is the policy of the Commission to obtain full disclosure of all relevant and material facts to a proceeding. (83 Ill. Adm. Code 200.340). RTC was prohibited from engaging in necessary discovery to demonstrate that ComEd should be required to purchase electricity generated at the Pontiac Facility under Rider 3 in excess of 10MW.

**2. The Commission disregarded the ICC's Rules of Practice requiring that each party be granted a full and fair opportunity to complete fact finding and requiring that the Commission include as a distinct portion of its Order specific findings of fact and law including a basis for its jurisdiction to hear ComEd's Petition.**

All Orders shall include findings and conclusions and the reasons or basis therefore on all material issues of fact, law or discretion presented on the record. (83 Ill.Admin. Code 200.820(a)(1)). The Proposed Order contains no "reasons or basis therefore on [any] material issues of fact, law or discretion." The purpose of requiring the Commission's Order to incorporate such findings is to allow a Court of Review to make a determination as to whether the Commission ruled properly and within the realm of their statutory authority. Here, the

Commission's Order, like the Proposed Order to which RTC took exception fails to identify any basis for its cursory conclusions and fails to cite to evidence received in support of its conclusions. (83 Ill. Adm. Code 200.820(a)(1)). Both Orders simply repeat arguments of Staff, ComEd and RTC which are not evidentiary in nature and fail to address that evidence which the Commission found authoritative. Along the same lines despite repeated Exception to same, The Commission's Order fails to cite authority in Law for its conclusions.

A Commerce Commission determination may be reversed if the Commission's findings are not supported by evidence; if the proceedings are prejudicial to the Appellant; if the determination is outside the jurisdiction of the Commission; or if the ruling is a violation of State or Federal Law. 220 ILCS 5/10-201. The Commission must deny ComEd's Petition or, in the alternative, remand the entire proceeding for proper analysis of the jurisdictional and procedural questions raised. The Commission has the authority pursuant to 220 ILCS 5/10-113 to act at any time, to rescind, alter or amend any rule, regulation, order or decision made by it.

ComEd's petition is brought as a "motion" under 83 Ill.Admin Code § 200.190, however, the nature of the motion is not recognized under that administrative code section. Further, the declaratory relief for an interpretation of a prior commission order, is not one of the specified circumstances under 83 Ill. Adm. Code 220.220. Under Section 220.220, the only grounds for seeking a declaratory ruling is "[w]hen the affected party" seeks a declaration with respect to "the applicability of any statutory provision" or "Commission rule" and "whether the person's compliance with a federal rule will be accepted as compliance with a similar Commission rule." None of these circumstances are presented by the ComEd petition. Therefore a declaratory relief proceeding cannot be brought before the Commission for the relief that Com Ed seeks here. For this significant reason, the determination granted in the Proposed Order is beyond the relief that may be granted under 83 Ill. Adm. Code §200.190 or under §220.220 and cannot stand.

ComEd petitions the Commission to interpret its 1997 Order in Docket number 97-0034 granting RTC's facilities, including the Pontiac Facility, QSWEF status with a total gross generating capacity of 65 MW. ComEd does not seek relief and the Proposed Order does not address any relief pursuant to sections 5/9-102; 5/9-103; 5/9-104; 5/9-201; 5/9-240; and 5/9-241 of the Public Utilities Act. No evidence has been presented to the Commission which establishes

any issue as to any ComEd's filed rates. ComEd has been paying and continues to pay Rider 3 Rates to RTC's Pontiac Facility for all electricity produced at the Pontiac Facility. A request that the Commission interpret its 1997 Order entered in Docket number 97-0034 is beyond the relief that may be obtained in a declaratory ruling brought under 83 Ill. Adm. Code §200.190 or under §220.220 and therefore ComEd's petition must be dismissed. ComEd in its Response to RTC's Request for Oral Argument concedes that it has not asserted that the Public Utilities Act imposed any caps on a QSWEF's capacity. (ComEd's Response to RTC's Emergency Motion Requesting Oral Argument page 2, para 3, filed August 30, 2002).

**3. The Commission violated the express language of the Public Utilities Act by setting maximum wattage capacities for QSWEFs outside the scope of 220 ILCS 5/8-403.1 and interfered with Legislative Powers of Law Making.**

The Proposed Order improperly concludes that ComEd's electric purchases under Rider 3 are limited to 10 MW under the Commission's October 8, 1997 Order entered in Docket 97-0034. The Proposed Order wrongly concludes that because the "10 MW limitation is less than the 80 MW federal limit for small power producers under PURPA", that the Commission can limit the amount of MW generated by a QSWEF. This conclusion has no basis in law or fact. Specifically, the Staff states that the Commission is bound to determine QSWEF status after a request from the owner of an electric facility, pursuant to 83 ILAC 445 et seq. (See specifically 445.30 (a)). That statute at 83 ILAC 445.20 "definitions" defines a "qualifying facility" as a "cogeneration facility or a small power production facility which meets the criteria for qualification set forth in 18 CFR 292 Subpart B." The qualification for a small power production facility is for any production less than 80 MW. There is nothing in the statute which permits the Commission to limit the size of the facility other than the "ceiling" established in 18 C.F.R. 292. Indeed to do otherwise is contrary to the law itself which states "It is hereby declared to be the policy of this State 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. This stated policy purpose would be meaningless were the Commission entitled to

limit the size of the electricity that could be generated at a QSWEF, provided such amounts generated are below the federal “ceiling” of 80 MW.

Further, the Commission’s actions are in direct contravention of the federal statute incorporated by reference into 220 ILCS 5.8-403.1. Under the federal statute 18 C.F.R. 292, in the event that a small power production facility increases the amount of MW that it produces at a facility, and provided that the amount is still less than the 80 MW ceiling, all the small power producer need to is to file a recertification with FERC which describes the increase in capacity of that small power production facility. 18 ILAC 445.30(b) specifically recognizes applications to the Federal Energy Regulatory Commission (FERC) as demonstrating compliance with 18 CFR 292. RTC did in fact file with FERC pursuant to 18 C.F.R. 292.207(a) said certification and application for re-self certification, which was ultimately approved, for additional megawatt capacity. Yet, the Commission imposes different standards by adopting the instant Order which is contrary to the Commission’s own regulations. (A true and correct copy of the Re self-certification application is adopted herein having been previously made part of the record).

Finally, the Order entered by the Commission is contrary to ComEd’s own Rider 3. If a facility is determined to be a QSWEF, then all of its electrical output qualifies under Rider 3, according to ComEd’s own tariffs. ComEd’s Rider 3 provides, “This rider is applicable to a Qualified Solid Waste Energy Facility (the Facility) as defined in Section 803.1 of the Public utilities Act (the Act). A determination by the Illinois Commerce Commission that the Facility qualifies under the terms of Section 8-403.1(b) of the Act is required before service will be permitted hereunder.” The Rider does not contemplate splitting or setting limits on the amount of MW that may be purchased under Rider 3.

#### **4. Independent Caps Constitute Discriminatory Practices and Disparate Practices of Splitting QSWEFs**

The Commission, in granting QSWEF status to fifteen separate RTC owned facilities, did not set uniform “maximum” capacities per facility. Each facility was individually granted

QSWEF status. (See Order in Consolidated Docket 97-031 through 97-045). The Staff and ComEd now argue that the Pontiac facility at issue here is set at a maximum electrical generating capacity as a QSWEF at 10 MW. Alternate “configured capacities” were set for the other RTC owned QSWEFs. (See Order in Consolidated Docket 97-031 through 97-045).

83 Ill.Admin. Code Section 445.30 which concerns the purchase and sale of electric energy from Qualified Solid Waste Energy Facilities specifically states that “the benefits of [the retail rate law] shall apply to *any* qualified solid waste energy facility.” 83 Ill.Admin. Code Section 445.30 (emphasis added). There is no MW limit that is set forth in the Illinois Administrative Code, nor does the Code suggest that a QSWEF can be “split” into part that is a QSWEF and part that is not. Indeed, the Proposed Order by artificially determining that RTC’s Pontiac Facility may only be a QSWEF up to 10 MW, runs afoul of 83 Ill.Admin. Code Section 445.30 which provides that the benefits of the Illinois Retail Rate Law will apply to any qualified solid waste energy facility.

The legislative body is the proper party to interpret a statute. Because the 1997 Order adopts and incorporates the FERC regulations to determine capacities and QSWEF status as that term is defined within 220 ILCS 5/8-403.1, the Commission will defer to those regulations to maintain the status quo. The FERC statute at 18 CFR 292.204(a) sets a small power production capacity of 80 MW per facility. Limiting the amount of MW that can be produced by a QSWEF under 80 MW is in violation of the 83 Ill.Admin.Code Section 445.30. Facility by facility capping by the Commission would amount to a discriminatory practice. All QSWEFs are bound by the same duties and are granted the same rights by statute.

##### **5. Public Policy Encourages Growth of QSWEF’s not Limitation**

Setting a 10MW limitation makes no sense and is contrary to the intent and purpose of 220 ILCS 5/8-403.1, *et seq.* (the “Illinois Retail Rate Law”). The stated purpose of the law is to promote the development of alternative forms of energy. The statute expressly provides, “It is hereby declared to be the policy of this State *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 (emphasis added). This expresses a legislative intent that encourages the development of larger QSWEFs, not smaller ones. With a QSWEF generating more electricity, more of the harmful methane gas that is created by the anaerobic digestion by methanogenic bacteria of refuse and other solid wastes deposited in sanitary landfills can be put to good use. In this case, the size of the Pontiac Landfill has increased dramatically over the years since the landfill is still open and accepting waste deposits. This causes an increase in the amount of methane gas that can be captured and used in electric generation facilities. The original estimates of 10 MW that were provided in the testimony presented in Docket Number 97-0034 were based on the size of the Pontiac Landfill at that time. With the growth of the landfill, the QSWEF facility is capable of generating more electricity and is required by the EPA to combust the gas which produces the electricity. This is the very purpose behind the Illinois Retail Rate Law, to promote the increased generation of electricity from methane gas as a primary fuel source.

Further the Retail Rate Law expressly defines a “qualified solid waste energy facility” to mean “a facility determined by the Illinois Commerce Commission to 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.” Again, there is nothing that sets a floor to the amount of electricity that may be generated by a QSWEF. All that exists is a “ceiling” in that a small power production facility under 18 CFR 292, Subpart B, is a facility that produces up to 80 MW. Neither the Staff nor ComEd identify any instance in which the Commission has previously in effect “split” a QSWEF, with only a portion of the QSWEF production eligible to Rider 3 rates. ComEd, the Staff and the Proposed Order do not submit evidence demonstrating that the action which they seek to have the Commission order is supported by any law or regulation, or even that such action is constitutional.

No where in any of the applicable statutes is the term “configured capacity” used, nor, as previously argued, is there any limitation other than the 80 MW small power production facility limitation.

Illinois has enacted the Illinois Retail Rate Law which defines a QSWEF and sets forth the policies applicable to QSWEFs. 220 ILCS 5/8-403.1. This statute does not address any production capacity limitations for QSWEFs and does not indicate that QSWEFs may be treated differently facility by facility. The Illinois Legislature defines facilities which will be QSWEFs and sets no limits on amount of production (other than they must remain small power producers as defined by 18 CFR 292.204) The Commission concedes that the Pontiac facility is a QSWEF and as a QSWEF is granted all rights and must abide by all duties applicable to QSWEFs. As a QSWEF owner, RTC has the right to produce landfill generated methane gas and receive rates as specified under the Retail Rate Law for the sale of the electricity generated from that production. (220 ILCS 5/8-403.1).

**6. The Commission has Given no Basis for its Assertion that it May Limit QSWEF Capacity for which an Eligible QSWEF facility is Entitled to Receive Rider 3 Rates.**

RTC adopts each of the prior Briefs and Arguments which it has made and continues to seek from the Commission a basis in law in which it is entitled to deprive a QSWEF of full status without hearing or Notice of wrong-doing.

Wherefore, RTC prays that the Commission grant its Emergency Application for Rehearing on an expedited basis within 5 days of receipt by the Commission (as opposed the 20 days set forth in 83 Ill.Adm.Code 220.880) issue a stay as to the effect of the September 4, 2002 finding of Commission and reverse the September 4, 2002 order.

Respectfully submitted,

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