

1 (Were the following proceedings  
2 were out of in camera)

3 JUDGE RILEY: We're back on the record.

4 MR. WEIL: No longer in camera.

5 BY MR. WEIL:

6 Q Let us walk through this carefully.

7 The petition seeking joint approval of  
8 an interconnection agreement between Novacon, LLC,  
9 and SBC Illinois Bell was filed sometime in the fall  
10 of 2003, correct?

11 A I believe so, but it was based on an  
12 agreement we made with SBC in August.

13 JUDGE RILEY: The question simply asked whether  
14 or not it was filed sometime in the autumn of 2003.  
15 That's all.

16 THE WITNESS: Sure.

17 JUDGE RILEY: Okay.

18 BY MR. WEIL:

19 Q Now, thereafter, on or about January 10,  
20 2004, Novacon, LLC, purported to transfer all of its  
21 assets to the applicant here today, Novacon  
22 Holdings, LLC; is that correct, sir?

1           A       Yes.

2           Q       Three weeks or so later, you appeared in  
3 this room, did you not, on behalf of Novacon, LLC,  
4 in connection with Novacon, LLC's joint petition  
5 with SBC seeking approval of an interconnection  
6 agreement; is that not correct, sir?

7           A       That is correct.

8           Q       Did you at that time, before Mr. Levin or  
9 counsel on his behalf raised it, notify the  
10 Commission or staff that Novacon, LLC had, in fact,  
11 purported to have transferred its assets, all of its  
12 assets with the exception of cash, to Novacon  
13 Holdings, LLC, three weeks earlier?

14          A       No.

15          MR. WEIL:  Nothing further.

16          JUDGE RILEY:  All right.  Thank you.

17                    Let's take a brief recess.  We're  
18 going to have to start redirect pretty quickly.  
19 Okay.  Just give it a couple minutes.  I'll be right  
20 back.

21

22                    (Whereupon, a brief recess

1                                   was taken.)

2           MR. WEIL:   First is I move to admit the Exhibits  
3 1 through 10 which I introduced on  
4 cross-examination.

5                                   And the second is that I would make  
6 copies of, after this proceedings, and circulate  
7 them, Exhibits 9 and 10, additional copies.

8           JUDGE RILEY:   What was No. 1?

9           MR. WEIL:   What was 1?

10          MR. KOPECKY:   One of the two web sites.

11                                   5 was the transcript, I think.

12          MR. WEIL:   5 was the transcript.

13          JUDGE RILEY:   Counsel, for my purposes -- I need  
14 copies of 9 and 10, but for my purposes as far as  
15 the three copies are concerned, it will be quicker  
16 for me to make them later on.

17          MR. WEIL:   What was Exhibit 8?

18          JUDGE RILEY:   8?

19          MR. WEIL:   Letter of November 21.

20          MR. FOSCO:   8 is the letter from Mr. Brustein.

21          MR. WEIL:   I gave away all my copies of it  
22 unfortunately, and of No. 9 as well.

1 MR. WEIL: I need 1 and 9.

2 MR. MOORE: 1 is the web site.

3 MR. WEIL: I'm sorry, I need --

4 MR. KOPECKY: 9 and 8.

5 MR. WEIL: Yeah, 8 and 9, sorry. 8 and 9, thank  
6 you.

7 Now, I need -- is it possible that I  
8 could have one copy of 8 and 9 back and I think I  
9 gave at least one of those -- I think I gave lots of  
10 extra copies. Thank you.

11 And then 9 and 10 are the ones that I  
12 only had one copy of.

13 JUDGE RILEY: Mr. Brady, what was your remark --  
14 well, strike that.

15 Are you going to have extensive  
16 redirect?

17 MR. FOSCO: Your Honor, we -- we do have -- I  
18 literally think it's like three or four questions as  
19 a result of what came up of intervenor's cross.

20 JUDGE RILEY: So it's not extensive?

21 MR. FOSCO: No.

22 MR. WEIL: Was my -- were my --

1 JUDGE RILEY: No, we're going to get to that  
2 just now.

3 You moved for the admission of  
4 Intervenor's Cross Exhibits 1 through 10; is that  
5 correct?

6 MR. WEIL: Correct.

7 MR. MOORE: I thought you withdrew 10.

8 JUDGE RILEY: I thought it was No. 9.

9 MR. WEIL: No, you're correct, I withdrew 10.  
10 Is that right?

11 MR. KOPECKY: Yes.

12 MR. ROWLAND: I had No. 9 as withdrawn. Which  
13 was --

14 JUDGE RILEY: That's what I thought too. It was  
15 No. 9. What's No. 10?

16 MR. KOPECKY: 9 was the letter from Mr. Levin  
17 which we left in.

18 MR. WEIL: Right. He's right. He's right. We  
19 withdrew No. 10.

20 MR. KOPECKY: The December 18 letter from me is  
21 withdrawn, whatever number that is.

22 MR. WEIL: 1 through 9. We move admission of 1

1 through 9.

2 JUDGE RILEY: Response.

3 MR. MOORE: Yes, we would object to Cross  
4 Exhibit No. 2, the proposed bank loan, which there's  
5 simply no foundation for this.

6 This is a document that Mr. -- sorry,  
7 late day, Mr. Weil (sic) was not familiar with and  
8 it was actually, if I recall, was something that  
9 occurred before his time. So there's no foundation  
10 for Exhibit 2.

11 Cross Exhibit 5, the transcript of the  
12 hearing of the interconnection agreement, it's not  
13 evidence. I mean, it's -- the Commission wants to  
14 take administrative notice, that's fine, but we  
15 would object. That's really on relevancy, if  
16 nothing else.

17 I fail to understand how a statement  
18 by counsel of, you know, how many customers he  
19 believed the company had can become evidence in this  
20 proceeding when you have got the witness that's  
21 familiar most with the company talking about how  
22 many customers he has.

1                   So we object to Exhibit 5 as  
2 irrelevant.

3                   And Cross Exhibit 9, the Levin letter  
4 to Mr. Reninger, we would object to that on  
5 foundation; that this is something that Mr. -- again  
6 has nothing to do with this witness. There's no  
7 foundation laid for it. It wasn't sent to him, he  
8 didn't write it, and barely familiar with it.

9           MR. WEIL: Your Honor, I established both  
10 relevance and foundation as to each exhibit that I  
11 introduced.

12                   I just chose not to seek their  
13 admission after each exhibit in order to expedite  
14 matters.

15                   But I -- my response is that I  
16 painstakingly established foundation as to each  
17 exhibit and relevance.

18           MR. WENTZ: Can we stipulate that as to the  
19 transcript that the only thing you will use out of  
20 that transcript is that statement?

21           JUDGE RILEY: That was the one specifically  
22 referenced on Page 20?

1 MR. WEIL: For this proceeding, yeah. That's  
2 all I used it for. I used it to -- right, for that,  
3 right.

4 JUDGE RILEY: Staff, would you agree with that  
5 also? So stipulate?

6 MR. FOSCO: So stipulate.

7 MR. MOORE: We'll withdraw our objection to  
8 that.

9 JUDGE RILEY: Sorry.

10 MR. MOORE: We'll withdraw our objection to  
11 that.

12 JUDGE RILEY: Okay. Based upon the stipulation  
13 of the -- that the reference to the remark of  
14 hundreds of customers is the only purpose for which  
15 that will be used?

16 MR. MOORE: That's right.

17 MR. WEIL: As to the other two which were  
18 foundation objections, your Honor, I established  
19 foundation to each exhibit.

20 JUDGE RILEY: With regard to Exhibit 2, I'm  
21 going to admit it over objection.

22 And, again, as I say I'm looking at

1 all of this material in a much different viewpoint  
2 than anyone else apparently.

3 (Whereupon, Intervenor Cross  
4 Exhibit No. 2 was admitted  
5 into evidence.)

6 JUDGE RILEY: With regard to No. 9, I don't see  
7 the relevance of it at all and I'm going to deny the  
8 admission of No. 9.

9 MR. WEIL: Thank you, your Honor.

10 JUDGE RILEY: Having dealt with that then, all  
11 other Cross Exhibits 1, 3, 4, 6, 7 and 8 are  
12 admitted.

13 MR. WEIL: 2 as well?

14 JUDGE RILEY: Yes. No. 2 is admitted.

15 MR. WEIL: 5 is admitted for the limited purpose  
16 subject to the stipulation.

17 JUDGE RILEY: The parties stipulated to the  
18 language on Page 20 as it appears on the record.  
19 Thank you.

20 (Whereupon, Intervenor's Cross  
21 Exhibits 1, 2, 3, 4,  
22 5 as stipulated, 6, 7 and 8 were

1 admitted into evidence.)

2 MR. BRADY: Your Honor, may I --

3 JUDGE RILEY: What is it?

4 MR. BRADY: Just bring it to your attention,  
5 if we're doing housekeeping matters, there was one  
6 document that I used in the cross-examination of  
7 Mr. Scholle which was -- it's a confidential  
8 document.

9 This was their responses -- it was  
10 Novacon Holdings' response to Staff Data Requests  
11 1.1 and 1.2, the balance sheet and the income  
12 statement.

13 JUDGE RILEY: Do I have that? I recall what you  
14 were referring to, yeah.

15 MR. BRADY: So I don't know if this is the  
16 appropriate time to raise that for admission --

17 JUDGE RILEY: We have not dealt with that?

18 MR. BRADY: -- into the record, but I at least  
19 want to reserve a spot to discuss that.

20 JUDGE RILEY: Let me get it here.

21 MR. ROWLAND: It's Cross 2.

22 MR. BRADY: Staff Exhibit No. 2. I have got

1 labeled confidential on here as well.

2 MR. ROWLAND: Thanks.

3 JUDGE RILEY: I have it here. I know that.

4 MR. BRADY: If not I have an extra copy.

5 JUDGE RILEY: That will be quicker.

6 You are moving for the admission of  
7 that exhibit into evidence?

8 MR. BRADY: Yes, as a confidential, proprietary  
9 document.

10 JUDGE RILEY: Okay.

11 MR. WEIL: Answers to 1.1 and 1.2?

12 MR. BRADY: Yes.

13 JUDGE RILEY: How did you mark that?

14 MR. BRADY: Staff Exhibit No. 2.

15 JUDGE RILEY: Is there any objection to the  
16 admission of Staff Exhibit No. 2 into evidence?

17 MR. MOORE: No objection.

18 MR. WEIL: No objection.

19 JUDGE RILEY: No objection. Staff Exhibit 2 is  
20 admitted subject to confidential and proprietary  
21 treatment.

22 MR. BRADY: Thank you, your Honor.

1 (Whereupon, Staff Cross  
2 Exhibit No. 2 was admitted  
3 into evidence.)

4 JUDGE RILEY: Did we already deal with Staff  
5 Exhibit 1?

6 MR. BRADY: Yes we did.

7 JUDGE RILEY: Staff Exhibit 1 has been admitted.  
8 Redirect?

9 MR. WENTZ: Yes, your Honor. Can I just stand  
10 over there?

11 REDIRECT EXAMINATION

12 BY

13 MR. WENTZ:

14 Q Mr. Scholle, just a few questions.

15 There has been -- Mr. Weil asked you a  
16 number of questions about informing the Commission  
17 and SBC -- or informing the Commission about the  
18 transfer of assets.

19 You know, prior to the date of the  
20 proceeding involving the interconnection agreement,  
21 are you aware of any notification or communication  
22 that was made to the Commission?

1           A       I think actually there was a letter that  
2 went out prior to that date. The more I think about  
3 it, I think it went out prior to that date as  
4 opposed to immediately thereafter.

5           Q       Okay. And you had mentioned a savings that  
6 Novacon Holdings would be realizing and you  
7 mentioned a number of things. I won't go through  
8 them all.

9                         One of the things -- I mean with your  
10 contracts with your providers, are any of those  
11 changing? Are the terms of any of those changing?

12          A       With respect to some of our upstream  
13 providers, yes, we're enjoying additional savings.

14                         We have also negotiated with SBC and  
15 we will be enjoying some savings as well.

16                         In fact, we negotiated a very large  
17 settlement with SBC last year.

18          Q       Now, much of Mr. Weil's cross-examination  
19 related to the financing of Novacon, LLC, and just  
20 to put this in perspective, from the information  
21 that you're aware of as when you were manager of --  
22 I guess you still are of Novacon, LLC, I mean who

1 has provided or what has been the source of the  
2 financing and funding for Novacon, LLC?

3 A The 11 members of Novacon, LLC, who  
4 eventually became the 11 members of Novacon Holdings  
5 put up all of the funding for Novacon, LLC, and now  
6 Novacon Holdings.

7 Q Okay. Do you have any idea -- knowledge  
8 about how much total they would have put up over the  
9 history of the company?

10 A Close to a million dollars. I think the  
11 figure is 940 or \$960,000.

12 Q Okay. Now, I think Mr. Weil indicated  
13 and -- that Mr. Levin has approximately 51 percent  
14 of the equity of Novacon, LLC; is that correct?

15 A Yes.

16 Q Now, during the period of time that you  
17 have been manager of Novacon, could Novacon have  
18 gotten a bank loan based on the assets that it had,  
19 a bank loan of what we're talking about, half a  
20 million dollars?

21 A No.

22 Q And why not?

1           A        Because we didn't have assets to support  
2 such a loan.

3           Q        Okay. So the loans that you got were based  
4 on what types of collateral or security?

5           A        Personal guaranties.

6           Q        Okay. And those personal guaranties were  
7 provided by whom?

8           A        The 11 investors in Novacon Holdings.

9           Q        Okay. Let me approach the witness. And I  
10 guess we want to make this what is Applicant's  
11 Exhibit -- is it No. 2?

12           JUDGE RILEY: That would be No. 2, right.

13           BY MR. WENTZ:

14           Q        And ask the witness if he has seen this  
15 document before.

16           A        Yes, I have.

17           Q        Okay. Now I don't have a copy. I'll read  
18 over your shoulder. Sorry about that. We can just  
19 read together.

20                           And in what context did you become  
21 aware of this document?

22           A        As manager of Novacon, LLC.

1                   Ultimately as manager -- as executive  
2 director of Novacon, LLC, and ultimately as manager  
3 of Novacon, LLC.

4       Q       And this document is dated what date, sir?

5       A       May 13th, 2003.

6       Q       Okay. What does it relate to?

7       MR. WEIL:  Objection, hearsay, your Honor. Rank  
8 hearsay.

9       MR. KOPECKY:  There's no foundation laid for it.

10      JUDGE RILEY:  Who's objecting?

11      MR. WEIL:  I will.

12                   The objection is no foundation, wasn't  
13 prepared or signed by him, he hasn't testified that  
14 he had anything to do with its preparation or  
15 signing.

16                   It's probably the same basis that you  
17 denied Exhibit 9.

18      JUDGE RILEY:  Counsel, what's your response?

19      MR. WENTZ:  Yes. I'll be glad to respond.

20                   I mean, this is a notification that,  
21 as it indicates, was sent out to all the members.

22                   Mr. Scholle was acting executive

1 director at that time.

2 I mean, this is -- I mean, this is --  
3 this goes right to the very point that Mr. Weil has  
4 been spending the last two hours on.

5 And the question is, you know, why  
6 did -- why was -- why was Holdings formed, okay.

7 This gives the basis of that. And it  
8 sets it out very clearly.

9 Your Honor, if you want something  
10 irrelevant (sic) that goes to the heart of this  
11 proceedings, this is exactly it.

12 JUDGE RILEY: I'll hold on a ruling in abeyance.

13 Ask your questions. Lay a foundation,  
14 if you can.

15 MR. WENTZ: Well, I mean it's no more -- your  
16 Honor ruled. Let's face it, I mean, your Honor  
17 ruled on even much less foundation than that to  
18 permit the signed loan agreement with Ben Franklin  
19 Bank in, all right. There's nobody here that was  
20 party to that, okay.

21 JUDGE RILEY: I'm aware of that. Go ahead.

22 MR. WENTZ: Mr. Scholle wasn't even a manager

1 involved at that time.

2 BY MR. WENTZ:

3 Q May 13, were you not an employee?

4 A I was an employee.

5 Q Okay. Would you kindly read the first two  
6 paragraphs.

7 MR. WEIL: Objection, there's no foundation.

8 MR. KOPECKY: This is clearly hearsay. What  
9 they're offering it for now is definitely the truth  
10 of the matter asserted, and his basis being that  
11 it --

12 MR. WENTZ: This is the notice that went out to  
13 the members.

14 MR. KOPECKY: This is well after Holdings was  
15 formed. Well after.

16 MR. WENTZ: This is a notice that went out to  
17 the members, okay. It even has -- it even has a --  
18 it was sent by certified mail and showed it was  
19 received by Mr. Levin.

20 MR. KOPECKY: Well, maybe Mr. Levin could  
21 testify to that but he's not on the stand now.

22 JUDGE RILEY: Mr. Levin did not write this.

1 MR. KOPECKY: It's extreme hearsay.

2 JUDGE RILEY: It's -- strike -- let me read here  
3 just a minute.

4 Counsel, I am uncomfortable if this is  
5 the same basis that I did deny the admission of  
6 Intervenor's Exhibit 9.

7 MR. MOORE: I thought --

8 JUDGE RILEY: This was prepared by someone who  
9 is not here. It has someone else's signature.

10 MR. ROWLAND: It's a company record.

11 MR. MOORE: I objected on foundation, you  
12 granted the motion on relevance. This is relevant.

13 MR. WEIL: It's the same objection that you  
14 sustained as to Exhibit 9.

15 MR. WENTZ: Not the same objection.

16 MR. KOPECKY: He's trying to get testimony in  
17 the backdoor. Same thing he accused Mr. Weil of and  
18 he stands up here and does it.

19 JUDGE RILEY: Calm down.

20 I'm sorry, counsel, I'm too  
21 uncomfortable with this. I'm going to deny it.

22 Do you have anything further?

1           MR. ROWLAND: We'd like to make an offer of  
2 proof for this letter and --

3           MR. WENTZ: We'd like to make an offer of proof  
4 and I would submit that this go into the record as a  
5 rejected exhibit, that's fine, but we'll just --

6           MR. WEIL: It's already in the record as a  
7 rejected exhibit and the offer of proof -- you try  
8 to lay a foundation unsuccessfully, the ALJ has  
9 already read the exhibit so I'm not sure --

10          JUDGE RILEY: What is your offer of proof? I'll  
11 allow that.

12          MR. WENTZ: I think the offer of proof is that  
13 what this will demonstrate is that contrary to what  
14 counsel for intervenors has been arguing all along,  
15 you know, the reason that they had to go to -- and  
16 form Holdings was because Mr. Levin would not go  
17 along with, you know, as a guarantor to extend the  
18 bank loan.

19          MR. WEIL: The rules of evidence are such that  
20 that's hearsay. And the objection isn't relevance.  
21 The objection is foundation.

22                            You have a witness who can testify to

1 having signed --

2 MR. WENTZ: That's the proffer of evidence.

3 MR. KOPECKY: So now we're done. That's it.

4 Your offer is made. Let's go.

5 MR. WENTZ: So let me just make one -- make

6 one -- one point, I guess, in all of this.

7 BY MR. WENTZ:

8 Q So I think you testified before,

9 Mr. Scholle, the key security of any loan for

10 Novacon, as with Novacon Holdings, would have been

11 personal guaranties?

12 MR. KOPECKY: Asked and answered.

13 BY MR. WENTZ:

14 Q All right. Now, I guess the other question

15 has been did Mr. -- much has been said about Mr.

16 Levin having 51 percent equity.

17 Does Mr. Levin -- you have been a

18 manager of Novacon, LLC, and are still the manager.

19 Does Mr. Levin have 51 percent of the

20 voting authority?

21 MR. KOPECKY: Objection, calls for a legal

22 conclusion.

1 THE WITNESS: No.

2 JUDGE RILEY: I sat here for two and a half  
3 hours listening to a cross-examination that dealt  
4 with all of these matters. I'm going to let him  
5 redirect on it. Go ahead.

6 MR. WENTZ: Yes.

7 BY MR. WENTZ:

8 Q Do you recall the question? You want it  
9 repeated?

10 A Could you repeat it, please.

11 Q As I said, we have talked about -- or the  
12 counsel for intervenor has noted that Mr. Levin has  
13 51 percent of the equity in Novacon, LLC, and I'm  
14 asking you, does Mr. Levin have 51 percent of the  
15 voting authority?

16 MR. KOPECKY: I reassert my objection. It's a  
17 legal conclusion.

18 JUDGE RILEY: I'm going to allow it. Go ahead,  
19 answer if you can.

20 THE WITNESS: No.

21 BY MR. WENTZ:

22 Q And the reason -- and how is the authority

1 determined, the voting authority determined?

2 A Each member has one vote in Novacon, LLC.

3 MR. KOPECKY: I object again that's -- can I  
4 have a continuing --

5 JUDGE RILEY: Continuing objection.

6 MR. KOPECKY: -- to the interpretation of the  
7 LLC agreement? Thank you.

8 MR. WENTZ: Thank you. And anything else?

9 MR. ROWLAND: Wait one second.

10 MR. WENTZ: Just a second.

11 BY MR. WENTZ:

12 Q Just one follow question to that one, if I  
13 may, and then I'll be done.

14 Mr. Scholle, when you acted on behalf  
15 of Novacon, LLC, in selling the assets to Novacon  
16 Holdings, on what authority did you have to act for  
17 that?

18 What authorization from the members  
19 did you have?

20 A The members voted --

21 JUDGE RILEY: Excuse me, do you have an  
22 objection, counsel?

1 MR. KOPECKY: The same continuing objection.

2 JUDGE RILEY: So noted. Please answer.

3 THE WITNESS: The members of Novacon, LLC, voted  
4 in favor of the transfer of assets to satisfy the  
5 secured obligation that we had to Novacon Holdings.

6 BY MR. WENTZ:

7 Q Okay. And what was the vote on that?

8 A The vote was ten in favor, one against, Mr.  
9 Levin, and one abstention.

10 MR. WENTZ: Thank you.

11 That's everything, your Honor.

12 JUDGE RILEY: Thank you. Staff?

13 MR. FOSCO: Just some brief recross, your Honor.

14 JUDGE RILEY: Redirect?

15 MR. FOSCO: Redirect.

16 RECROSS-EXAMINATION

17 BY

18 MR. FOSCO:

19 Q Good afternoon, Mr. Scholle. I have a few  
20 more questions.

21 A Good afternoon.

22 Q You, in response to redirect, I believe you

1 indicated that you thought now that a letter had  
2 been sent to the Commission regarding the  
3 interconnection agreement proceeding with SBC.

4                   And my question about that is if you  
5 recall what is the date of that letter, who might  
6 have sent it, if you recall?

7           A       I thought about it during the break and I  
8 remember that we sent a letter, and I am fairly  
9 certain that it went out the week or maybe ten days  
10 prior to the February 2nd hearing.

11          Q       But would that have been a letter from your  
12 counsel in that proceeding or from Novacon itself?

13          A       Counsel.

14          Q       Counsel?

15          Q       To all the parties in that case?

16          A       I believe so, certainly to SBC and to the  
17 Illinois Commerce Commission.

18                   I don't know who any of the other  
19 parties might be, but I'm sure we can go find a copy  
20 of the letter for you.

21          Q       You also just testified that Novacon, LLC,  
22 if I understood your testimony correctly, did not

1 have enough assets to be able to get a bank loan --  
2 I won't go into the amount -- without personal  
3 guaranties; is that correct?

4 A Correct.

5 Q Okay. Is Novacon Holdings in that same  
6 situation?

7 A No.

8 Q It has enough assets on its own to get a  
9 bank loan?

10 A Oh. I thought you meant with respect to --  
11 no, the assets would not cover such a loan.

12 Q Okay. So it's the willingness of the  
13 members of Novacon Holdings to guaranty a loan that  
14 has allowed it to obtain the financing that it  
15 obtained?

16 A Yes, sir.

17 Q Okay. If I understand -- is the date that  
18 the new loan comes due, that's not proprietary, is  
19 it?

20 MR. WENTZ: The date?

21 MR. FOSCO: The date that the new note matures,  
22 is that proprietary?

1 MR. WENTZ: I wouldn't think so.

2 JUDGE RILEY: I think it was already stated as a  
3 matter of fact.

4 MR. FOSCO: I'm trying to keep all this  
5 straight.

6 MR. BRADY: It may have been in camera.

7 BY MR. FOSCO:

8 Q If I recall correctly the new note matures,  
9 is it February 1st?

10 A I think so.

11 Q Of 2005, correct?

12 A Yes, sir.

13 Q I guess my question to you is, is there  
14 anything about the organization documents of Novacon  
15 Holdings or anything -- an agreement that would lead  
16 you to believe that they will agree to reguarantee  
17 such a loan when the current loan comes due?

18 A Is there anything official in the operating  
19 agreement, is that your question?

20 Q Any kind of agreement, whether it's a, you  
21 know, an agreement among members, anything that  
22 would indicate what's going to happen in February

1 2005?

2 A Well, I would hope that the loan would be  
3 renewed from the bank. If it is not, I would think  
4 the members would do as they did the last time and  
5 take it out.

6 I think the only reason that they took  
7 out the loan was as a matter of convenience.

8 MR. FOSCO: No further questions. Your Honor.

9 JUDGE RILEY: All right. Thank you.

10 MR. WEIL: Just a couple.

11 RECROSS-EXAMINATION

12 BY

13 MR. WEIL:

14 Q You indicated that in response to some  
15 redirect questions that there were a couple other  
16 areas of savings, contracts with upstream providers  
17 you have achieved some savings.

18 Is that since January 10, 2004?

19 A No.

20 Q So those savings were actually achieved  
21 when you were manager and actively managing Novacon,  
22 LLC?

1 A Correct.

2 Q So that doesn't -- that doesn't help  
3 Novacon Holdings, LLC's creditworthiness at the --  
4 that doesn't differentiate Novacon Holdings, LLC,  
5 from Novacon, LLC, then, does it?

6 A Only in the extent that it helps us in 2004  
7 vis-a-vis 2003.

8 Q But these were savings that were achieved  
9 by Novacon, LLC, correct?

10 A Yes.

11 Q Then separately you said you reached a  
12 favorable settlement last year with SBC. Do you  
13 recall that testimony?

14 A Yes.

15 Q That was last year?

16 A Yes.

17 Q 2003?

18 A Yes.

19 Q So it was achieved by what entity?

20 A Novacon, LLC.

21 Q Novacon, LLC, achieved those savings?

22 So as I understood the question, the

1 question was were there any other areas of savings  
2 achieved by Holdings since it took over the assets  
3 of Novacon, LLC.

4                   And you have just testified, to  
5 clarify at least, that neither were savings achieved  
6 with respect to upstream providers nor were savings  
7 achieved in a settlement with SBC by Novacon  
8 Holdings, LLC; rather those savings were achieved by  
9 the predecessor entity Novacon, LLC; is that not  
10 correct, sir?

11           A       Yes.

12           Q       Have you determined that Novacon Holdings,  
13 LLC, is a profitable company today?

14           A       Yes.

15           Q       Is it your testimony that as a profitable  
16 company, Novacon Holdings, LLC, is incapable of  
17 obtaining a bank loan secured by the assets of the  
18 company?

19           A       No.

20           Q       That's not your testimony?

21           A       Repeat the question.

22           Q       Yes.

1                   Putting aside the issue of personal  
2 guaranties, you have stated that Novacon Holdings,  
3 LLC, the applicant, is profitable today?

4       A       Yes.

5       Q       It's got net EBITDA, right?

6       A       Yes.

7       Q       Earnings before interest, taxes,  
8 depreciation, appreciation? It's profitable, right?

9       A       Yes.

10      Q       And it's got a revenue stream coming in,  
11 pretty substantial, correct?

12      A       Yes.

13      Q       So -- and it's got hard assets, too,  
14 correct?

15      A       Yes.

16      Q       Based on that, is it your testimony that  
17 Novacon Holdings, LLC, could obtain a bank loan  
18 secured by its assets and not guarantied by its  
19 members today?

20      A       For some amount, sure.

21      Q       Have you explored that possibility?

22      A       No.

1 MR. WEIL: Thank you. Nothing further.

2 MR. ROWLAND: One question, and perhaps --

3 JUDGE RILEY: Re- --

4 MR. WENTZ: I have one. Stand up for this.

5 Just following up on Mr. Weil's last

6 question, if I may.

7 JUDGE RILEY: All right.

8 MR. WENTZ: Then I'll be all done.

9 JUDGE RILEY: Okay.

10 FURTHER REDIRECT EXAMINATION

11 BY

12 MR. WENTZ:

13 Q Mr. Scholle, just to follow up on

14 Mr. Weil's last question.

15 Could -- is Novacon or Novacon

16 Holdings, either one of them, capable of obtaining a

17 loan anywhere approaching \$500,000 without personal

18 guaranties?

19 A Not in my opinion.

20 MR. WENTZ: That's it.

21 JUDGE RILEY: Okay. Thanks.

22 Staff?

1 MR. FOSCO: Nothing from staff.

2 JUDGE RILEY: No further cross?

3 Mr. Scholle, thank you very much.

4 We do have the issue of Mr. Scholle's  
5 direct testimony. There was a motion to admit it as  
6 applicant's --

7 MR. ROWLAND: We move for the admission of  
8 Mr. Scholle's testimony which is Novacon Holdings  
9 Exhibit 1.0.

10 JUDGE RILEY: Staff, any response? Objection?

11 MR. FOSCO: No, sir, no objection from staff.

12 MR. WEIL: No objection.

13 JUDGE RILEY: No objection, then staff -- or  
14 Applicant's Exhibit 1.0, the direct testimony of  
15 Mr. Scholle is admitted into evidence.

16 And I would add that Mr. Scholle's  
17 testimony was submitted to our -- the office of the  
18 chief clerk of the Commission; is that correct?

19 MR. ROWLAND: I have to check with our office  
20 but I believe it was.

21 JUDGE RILEY: For inclusion on the e-docket  
22 system?

1 MR. MOORE: If it hasn't been, we'll make sure  
2 it's been done.

3 JUDGE RILEY: It's admitted as it appears on the  
4 e-docket system then.

5 (Whereupon, Applicant's  
6 Exhibit No. 1 was admitted  
7 into evidence.)

8 MR. FOSCO: Could we have maybe a five- or  
9 ten-minute break to consult with our client before  
10 we put him on the stand?

11 JUDGE RILEY: Is there any objection? Okay.

12 (Whereupon, a brief recess  
13 was taken.)

14 JUDGE RILEY: We have completed the testimony in  
15 its entirety of Mr. Scholle and staff, I'm going to  
16 turn to you now.

17 Do you have a witness that wanted to  
18 present for this forum?

19 MR. BRADY: Yes, your Honor. We want to call  
20 Robert Koch.

21 JUDGE RILEY: Mr. Koch.

22 (Witness sworn.)

1 JUDGE RILEY: Staff, please proceed.

2 MR. BRADY: Thank you, your Honor.

3 Your Honor, I guess initially I'd like  
4 to note for the record that Mr. Koch is joining us  
5 via the phone.

6 JUDGE RILEY: He's participating telephonically,  
7 right.

8 ROBERT KOCH,  
9 having been called as a witness herein, after having  
10 been first duly sworn, was examined and testified as  
11 follows:

12 DIRECT EXAMINATION

13 BY

14 MR. BRADY:

15 Q Mr. Koch, will you please introduce  
16 yourself for the court reporter and spell your last  
17 name.

18 A Yes, my name is Robert F. Koch, K-o-c-h.

19 Q And who are you employed by?

20 A I am employed by the Illinois Commerce  
21 Commission.

22 Q And what is your position?

1           A        I am a rates analyst in the  
2 telecommunications division.

3           Q        And have you reviewed the application that  
4 Novacon Holdings has submitted in this proceeding?

5           A        Yes, I have.

6           Q        And have you reviewed the technical and  
7 financial and managerial aspects of that  
8 application?

9           A        Yes, I have.

10          Q        And do you have any comments or concerns  
11 about the technical, financial or managerial aspects  
12 of their application?

13          A        Yes, I believe there are still some  
14 concerns regarding the managerial as well as the  
15 financial capabilities of the company.

16          Q        Those are concerns that you have?

17          A        Yes, they are.

18          Q        Can you elaborate on some of the managerial  
19 concerns that you have.

20          A        Specifically having been made aware that  
21 Novacon Holdings is currently operating without a  
22 certificate in Illinois and also the fact that they

1 have received customers without letters of  
2 authorization, specifically to managerial.

3 Q When you say letters of authorization, you  
4 meant letters of authorization from their  
5 subscribers?

6 A That is correct.

7 Q Okay. You had also mentioned that you had  
8 some concerns about their financial capacity. Can  
9 you elaborate on that, please.

10 A Yes. I have -- being that I left work  
11 prior to 5:00 o'clock Friday afternoon, I was unable  
12 to review financial statements until this morning.  
13 And upon reviewing them, there are several financial  
14 statements I'm referring to are the ones provided in  
15 response to my data requests and they're dated  
16 January 31, 2004.

17 JUDGE RILEY: Are we -- let me interrupt here.  
18 Are we in camera again?

19 MR. BRADY: No. We shouldn't be. The one  
20 clarification -- he shouldn't be going into numbers  
21 at all.

22 JUDGE RILEY: All right.

1 BY MR. BRADY:

2 Q But this is the response to Staff Data  
3 Requests 1.1 and 1.2?

4 A That is correct.

5 Q Okay.

6 A And upon receipt in review, there are  
7 outstanding questions that have not been answered as  
8 of yet.

9 Q So as far as you're referring to the data  
10 requests that we had spoken about earlier in the  
11 proceeding?

12 A That is correct.

13 Q Okay. Are there any other financial  
14 concerns at this time?

15 A Yes.

16 I am concerned with the level of  
17 equity in the company, it's current ratio, and  
18 the -- if I can find the right words here, bear with  
19 me.

20 The way in which the transfer of  
21 assets on January 10th were handled in the financial  
22 statement.

1 Q Okay. Was there anything else, any other  
2 comment that you wanted to make about your review of  
3 the documents that have been provided by Novacon  
4 Holdings?

5 A No, there are not.

6 Q Okay. Are you prepared at this time to  
7 make --

8 MR. ROWLAND: Mr. Brady, can I just ask you a  
9 question?

10 Is it still staff's intention to  
11 submit data requests to Novacon Holdings?

12 MR. BRADY: Yes.

13 MR. FOSCO: Yes.

14 MR. ROWLAND: So we're still going to provide  
15 some information?

16 MR. BRADY: Yes.

17 MR. ROWLAND: Okay.

18 BY MR. BRADY:

19 Q Mr. Koch, I want to elaborate a little bit  
20 on some of the statements you made about Novacon  
21 Holdings' managerial, financial capacity.  
22 Specifically let's look at managerial first.

1                   You had mentioned that you were  
2 concerned about the fact that Novacon Holdings  
3 currently is operating without a certificate of --  
4 certificate authority from the Commission.

5                   Can you elaborate any further on --  
6 about your concerns.

7         A         Yes. I'm speaking obviously as a nonlawyer  
8 and purely as a member of the staff, and it is my  
9 understanding that a certificate of service  
10 authority should have been sought out prior to the  
11 transfer of customers being consummated.

12         Q         And you'd also -- you had also mentioned  
13 that you thought that -- you were also concerned  
14 about Novacon Holdings obtaining customers without  
15 receiving a letter of authorization from their  
16 customers.

17                   Can you expand on that and inform us  
18 as to how you understand that to operate?

19         A         Yes. It is my understanding that written  
20 letter of authorization is needed before a customer  
21 can be transferred from one carrier to another.  
22 That is, of course, to protect from an industry

1 problem known as slamming, which section 13-902 of  
2 the Public Utilities Act, to my understanding,  
3 serves to protect.

4                   And in lieu of letters of  
5 authorization, it is also my understanding that  
6 customer notification letters sometimes serve as a  
7 proxy in a mass conversion type of a transaction  
8 with -- in which a whole customer base is  
9 transferred.

10                   To my knowledge no such notification  
11 or letters of authorization had been provided by  
12 Novacon Holdings to obtain these customers.

13         Q        I guess, Mr. Koch, in our Staff Data  
14 Request 1. -- in 1.4, you had requested a copy of a  
15 notification provided to customers pertaining to the  
16 change in carrier.

17                   Do you recall that data request?

18         A        Yes, I do.

19         Q        And do you recall the fact that -- do you  
20 recall the response, the written response that was  
21 provided to staff?

22         A        The written response, if you could bear

1 with me just one moment --

2 Q Well, I guess specifically where I'm going  
3 is that they would provide a notice -- they would  
4 provide a copy of the notice under a separate cover?

5 A Yes. And I did receive an electronic copy  
6 of a customer notice.

7 Q So then you have seen -- do you have a copy  
8 of that notice in front of you?

9 A Yes, I do.

10 Q Can you -- we have -- we have identified  
11 that exhibit as Staff Exhibit No. 1, but what I'd  
12 like to do is will you -- can you describe what that  
13 document looks like before you?

14 A Yes. In the upper left-hand corner there's  
15 a company logo, if you will, for Novacon and it  
16 doesn't indicate Novacon Holdings but Novacon, and  
17 the body of the notification appears to be a change  
18 of address and not a change of carrier notification.

19 Q So then is this the type of notification  
20 that you are referring to that would be typically  
21 seen for a transfer of a subscriber from one carrier  
22 to another?

1           A       No, it is not.

2                       My understanding is that, and I have  
3 seen a couple of these in the past, that the  
4 notifications provided -- first off, they're  
5 provided at least 30 days prior to the switch.

6                       They indicate the carrier that  
7 currently holds the customer and the carrier that is  
8 receiving the customer and explicitly states that  
9 the transfer is occurring, and generally will  
10 include information regarding rates, terms and  
11 conditions, not changing it as the case has been in  
12 the few that I have had an opportunity to review.

13          Q       Okay. Just to be clear, is this -- this  
14 would be a letter -- this -- since it's coming from  
15 the carrier, it would be a notice of the change in  
16 carrier, not necessarily the letter of  
17 authorization, correct?

18          A       That is correct.

19          Q       Because the letter of authorization would  
20 come from the -- be a response from the subscriber?

21          A       Yes.

22                       And my understanding that the letter

1 of authorization would be something that the carrier  
2 would request and the customer would subsequently  
3 provide to them prior to switching.

4           Whereas a notification is something  
5 that is more of an administrative relief in a  
6 situation where customers are transferred in bulk  
7 from one carrier to another and wouldn't require  
8 written response from the customers.

9       Q     Now, Mr. Koch, in terms of some of the  
10 financial concerns that you have, you had mentioned  
11 two items you were concerned with: The amount of  
12 equity and the transfer of the assets.

13           Can you explain a little bit more  
14 about your concerns regarding the transfer of assets  
15 that occurred?

16       A     Yes.

17           I have reviewed the financial  
18 statements and cross-examination provided this  
19 morning and have tried to just get a sense of  
20 exactly all of what was involved, the impact on  
21 Novacon Holdings, of receiving the specified assets  
22 from Novacon, LLC, and there were an indication that

1 several, I believe eight different balance sheet  
2 accounts were affected, yet the level at which they  
3 were affected was not certain.

4 Q And is it clear to you what is included in  
5 intangible assets, what types of -- or what items  
6 would constitute intangible assets just by looking  
7 at the document, by looking at the balance sheet  
8 provided by Novacon Holdings?

9 A No, that is just a -- more of a summary  
10 item in the balance sheet. It does not provide  
11 detail.

12 Q And then was it your understanding from --  
13 you were listening in to the early part of this --  
14 of our hearing, correct?

15 A That is correct.

16 Q And is it your understanding that the data  
17 requests that staff will be putting forth to Novacon  
18 Holdings should resolve these types of questions  
19 that you have on the transfer of assets?

20 A Hopefully they will clarify them, of  
21 course.

22 Q Yes. I'm sorry, clarify?

1           A       And if issues remain that has yet to be  
2 seen but they will -- they are intended anyway to  
3 provide me with a more adequate explanation of the  
4 impact of that transaction.

5           Q       Now, the other item under financial  
6 concerns that you had mentioned was the equity.

7                       Can you explain a little bit more  
8 about the equity that concerned you?

9           A       I'll be very careful.

10                      The equity situation of this carrier,  
11 as I have reviewed it, it appears at this time that  
12 the organization is funded entirely by debt and not  
13 by equity.

14           Q       And can you describe how that raises a  
15 concern with you being the fact that it's entirely  
16 funded by debt as opposed to equity, is that what  
17 you said?

18           A       That is correct. Well, not an easy  
19 question to answer orally. I can fumble through it,  
20 if you like. Bear with me.

21                      The concerns that I have with any  
22 carrier, not in just this particular situation --

1 Q Right.

2 A -- is when it is not funded adequately by  
3 a capital investment is that the liabilities of the  
4 corporation are significant enough in many cases  
5 that it makes it difficult for those obligations to  
6 be met over time.

7 If and when a carrier cannot meet  
8 those obligations, and bear with me, this is the  
9 part where I will struggle, their -- it doesn't  
10 provide much in the way of recourse for the debtors  
11 of or, excuse me, the lenders of this corporation if  
12 the corporation is unable to meet its obligation.

13 Q Have you seen a balance sheet from Novacon,  
14 LLC?

15 A In this proceeding, the only balance sheets  
16 and income statement I have seen are for Novacon  
17 Holdings.

18 Q Well, then, Mr. Koch, at this time, based  
19 on you typically handle these reviews for the  
20 Commission, don't you, on the certificates of  
21 service authority?

22 A I am one of three staff members that

1 currently provide that review. I have been doing so  
2 for roughly the last five years.

3 Q For both for certificates pursuant to  
4 Sections 13.403, 404 and 405?

5 A Staff only becomes involved if 404 or  
6 405 -- excuse me, 13.404 and 13.405 authorities are  
7 requested. If 13.403 is also included, I will  
8 review it as well, but not as a stand-alone, I will  
9 not review a 13.403 application.

10 Q And typically, you make a recommendation in  
11 these types of cases?

12 A Typically, yes.

13 MR. ROWLAND: Sean, I mean at this time I  
14 thought this was the sole purpose of getting the  
15 answers to data requests.

16 Why would we be going to the ultimate  
17 conclusion if those haven't been answered?

18 JUDGE RILEY: You're objecting then?

19 MR. ROWLAND: Yeah.

20 MR. FOSCO: Well, are you agreeing that we'll  
21 have a further hearing? I didn't think that was  
22 agreed to yet so we were going to get out what we

1 could get out in the hearing today.

2                   If you want to agree to have a further  
3 hearing --

4           JUDGE RILEY: My distinct understanding was that  
5 staff was going to issue additional data requests  
6 and I was going to set a second date because we're  
7 going to have a safety -- a back-up day for any  
8 possible testimony based upon the responses.

9                   I can't preclude anyone from bringing  
10 in a witness to ask questions with regard to the --  
11 to the answers, whatever they may be. So yeah.

12                   I don't think it's premature to ask  
13 for a recommendation. I'm going to have some  
14 follow-up questions of my own for Mr. Koch.

15           MR. ROWLAND: I understand except that since he  
16 has indicated he doesn't know the answers to certain  
17 information we ought to make sure he has the  
18 information before he's making --

19           JUDGE RILEY: I was going to say, could you  
20 qualify the question and say do you have a  
21 recommendation based upon the information thus far.

22                   Mr. Koch, is that -- do you understand

1 the question?

2 THE WITNESS: Yes, I do, your Honor.

3 JUDGE RILEY: Okay. What would your  
4 recommendation be based upon the record thus far  
5 that you have heard?

6 THE WITNESS: Based upon the record thus far,  
7 there are still outstanding concerns and at this  
8 time I could not offer a recommendation.

9 JUDGE RILEY: Okay.

10 BY MR. BRADY:

11 Q So you would need the responses to these  
12 data requests that we'd be sending out shortly and  
13 hopefully that would help us -- help you coming in  
14 with a recommendation?

15 A Yes. Depending on the responses, it would  
16 definitely be helpful in forming my recommendation  
17 in this proceeding.

18 MR. BRADY: Okay. We have no further questions  
19 at this time and we turn him over for --

20 JUDGE RILEY: One question for Mr. Koch myself  
21 and then we'll go to cross-examination in just a  
22 second.

1 EXAMINATION

2 BY

3 JUDGE RILEY:

4 Q Mr. Koch, you mentioned in your testimony  
5 that you talked about the Holdings meeting  
6 obligations.

7 Could you elaborate or clarify what  
8 obligations you were talking about?

9 A Yes. What I was referring to at the time  
10 are its obligations to those parties in which it has  
11 borrowed money, and more specifically I'm -- when I  
12 review these applications, I'm most concerned about  
13 the current liabilities.

14 JUDGE RILEY: Okay. Counsel, I have got a  
15 question for you.

16 You mentioned Data Request 1.4. Do I  
17 have that or is that part of the evidence?

18 MR. BRADY: No. We hadn't. No, we did not  
19 admit that in the record. No, we only admitted 1.1  
20 and 1.2 into the record and --

21 JUDGE RILEY: 1.4 bears directly upon what's  
22 been marked as Staff Exhibit 1?

1 MR. BRADY: There's a reference in 1.4. all it  
2 says is a copy of the notice will be provided under  
3 separate cover. And that's what this was --

4 JUDGE RILEY: This was referring to --

5 MR. BRADY: That was the response.

6 JUDGE RILEY: All right. Okay. That's  
7 everything I had for Mr. Koch.

8 Cross first.

9 CROSS-EXAMINATION

10 BY

11 MR. MOORE:

12 Q Mr. Koch, this is Steve Moore on behalf of  
13 Novacon Holdings.

14 JUDGE RILEY: Can you hear okay, Mr. Koch?

15 THE WITNESS: Yes, I can.

16 BY MR. MOORE:

17 Q Just moved the microphone toward me. Going  
18 toward your concerns on the managerial ability of  
19 the company, you indicated that one of your concerns  
20 is that we have been operating without a certificate  
21 of service authority.

22 Now, are there remedies for the

1 Commission when it finds a carrier out there  
2 providing service without a certificate?

3 MR. FOSCO: You're just asking his  
4 understanding, his knowledge?

5 MR. MOORE: Yes.

6 THE WITNESS: The only remedy I'm aware of is to  
7 get them in for a certificate as quickly as  
8 possible.

9 I am not certain what penalties or  
10 other remedies there might be.

11 BY MR. MOORE:

12 Q But one certain procedure is for the  
13 Commission, as you say, to get them in as soon as  
14 possible to get a certificate?

15 A Yes.

16 Q That's what's happening here, right?  
17 They're trying to get a certificate?

18 A Yes, they are trying to get a certificate.

19 Q Now, you indicated that another concern was  
20 that it has transferred customers without  
21 authorization. Now, you listened to the testimony  
22 of Mr. Scholle.

1                   It's your understanding that the  
2 customers here are all business customers, correct?

3       A       Correct.

4       Q       And that the service is primarily internet  
5 connectivity; is that your understanding?

6       A       My understanding is that the company offers  
7 a wide variety of services, some of which are  
8 regular point-to-point telecommunications services.

9       Q       That's true, also between the companies'  
10 locations and, as I said, internet. Those type of  
11 point-to-point connections?

12      A       Correct.

13      Q       Now, did you understand Mr. Scholle to say  
14 that their customers receive service pursuant to  
15 contracts that have assignability clauses in them?

16      A       The aspect of their contracts as far as the  
17 assignability, I couldn't testify to.

18                   I do understand that they all -- his  
19 testimony was that they are under contract.

20      Q       Now, assuming for the moment that the  
21 customers do have contracts and that those contracts  
22 have assignability rights in those, in that

1 circumstance would the Commission still find  
2 managerial incompetence from failing to obtain  
3 certificates of -- I'm sorry, failure to obtain  
4 authorization to transfer?

5 MR. BRADY: If I might clarify something, you  
6 referred to the Commission, you meant not the  
7 Commission in making a decision here but you meant  
8 Commission as far as staff?

9 MR. MOORE: I'll -- let's change it to  
10 Commission staff.

11 MR. BRADY: Thank you.

12 THE WITNESS: As far as the staff goes, I would  
13 undoubtedly refer to our consumer services division  
14 in such a case because I certainly -- that would not  
15 be my forte and definitely as not a lawyer I  
16 couldn't speak towards whether -- to the aspects of  
17 contract enforcement and assignability at this time.

18 BY MR. MOORE:

19 Q And, similarly, given the transfer that  
20 occurred here it's not your position right now that  
21 these customers have been slammed, is it?

22 A No, it is not.

1 Q Getting to the financial issues, you  
2 indicated a concern with the intangible assets line.  
3 I understand we'll be getting out a data request.

4 But if you could just for the record  
5 here give us a definition from an accounting  
6 perspective of what generally would be an intangible  
7 asset when you look at it on a balance sheet.

8 A Generally I would see intangible assets as  
9 being say of the colonel's special recipe or, you  
10 know, some form of a trademark that would be hard to  
11 otherwise quantify that is nonetheless an asset of  
12 the corporation.

13 Q Is it the kind of a thing that needs some  
14 official/unofficial valuation to determine how much  
15 it is worth so you can determine how much to put  
16 into your balance sheet?

17 JUDGE RILEY: Do you understand the question,  
18 Mr. Koch?

19 THE WITNESS: I am having difficulty with it.

20 If you could repeat it, sir.

21 MR. MOORE: Certainly.

22 BY MR. MOORE:

1           Q       I guess you're giving a definition of  
2 intangible asset that sounds to me almost like a  
3 layman's definition in the sense of -- let me ask  
4 the question this way:

5                       Is it necessary to obtain a valuation  
6 of the intangible asset in order to determine how  
7 much -- what its value should be when put into a  
8 balance sheet?

9           A       And obtain a valuation from -- I guess the  
10 answer is I'm not certain.

11          Q       Now, in terms of your concerns with the  
12 equity ratio, it's my understanding you were  
13 concerned that with the amount of debt, that lenders  
14 may have no recourse; is that correct?

15          A       That is a concern, correct.

16          Q       Now, is it your understanding that the loan  
17 that is outstanding that is due in early 2005 has  
18 personal guaranty by each of the investors, is that  
19 your understanding?

20          A       Could you repeat that, sir.

21          Q       Is it your understanding that the \$500,000  
22 loan that is currently outstanding has a personal

1 guaranty from each of the investors?

2 A It is my understanding from the testimony  
3 of Mr. Scholle that there is guaranty of the  
4 \$500,000 bank loan.

5 Q And presumably the bank determined that  
6 those investors were financially capable of meeting  
7 those guaranties or else it wouldn't have given them  
8 the money, correct?

9 MR. FOSCO: I object, hearsay, foundation. I  
10 don't know how he can --

11 JUDGE RILEY: I kind of lost the thread.

12 MR. WEIL: It calls for speculation.

13 MR. MOORE: I'll withdraw the question.

14 MR. WENTZ: It's a good question.

15 MR. MOORE: I'll try it again. Let me rephrase  
16 it then.

17 BY MR. MOORE:

18 Q Do you believe the bank would have given  
19 half a million dollars loan if it wasn't satisfied  
20 with the financial credit of those 11 investors?

21 MR. WEIL: Objection, calls for speculation, I  
22 think.

1 MR. WENTZ: I don't think it calls for  
2 speculation at all.

3 JUDGE RILEY: Let me see -- I'm going to see if  
4 Mr. Koch can answer it.

5 MR. WENTZ: I think any financial analyst could  
6 answer that one.

7 THE WITNESS: I'm sorry, I had trouble hearing  
8 it. The Judge wants to hear my answer, correct?

9 JUDGE RILEY: Yes.

10 THE WITNESS: Okay, very well.

11 I could only speak of my own  
12 understanding and it would be -- it would be my  
13 understanding that before providing such a loan that  
14 they would seek some assurance of the viability of  
15 those that are obtaining the credit.

16 BY MR. MOORE:

17 Q One of your other concerns you indicated  
18 with the balance sheet was how the company has  
19 accounted for the transfer of assets of Novacon,  
20 LLC; is that correct?

21 A That is correct.

22 Q Can you explain how the proper or improper

1 accounting for that transfer in the balance sheet is  
2 relevant to the issues before this Commission of  
3 granting a license to Novacon Holdings?

4 A What I'm looking for right at this point is  
5 an understanding of exactly what has been recorded  
6 in these financial statements.

7 The reason for that is at this point  
8 I'm not certain of what that impact was, and I need  
9 clarification of that to get a picture of the  
10 financial condition of this company.

11 Further, the -- it simply was a matter  
12 that I was not made aware of with the financials  
13 that were provided to me prior to this morning and I  
14 definitely wanted time to explore the impact of  
15 that. And such time I certainly have not had to  
16 this date.

17 Q And we'll be seeing some data requests that  
18 give you the opportunity to get some more detail?

19 A Absolutely.

20 Q Now, these are the financial -- you say you  
21 saw them this morning. These are the ones that came  
22 in late Friday but you were gone, I guess?

1           A       Correct.  At least the date on the fax  
2 indicated it was received right at 5:00 o'clock  
3 close of business on Friday.

4           MR. MOORE:  I have no other questions.

5           JUDGE RILEY:  Thank you very much.

6           MR. WEIL:  Couple questions.

7                        CROSS-EXAMINATION

8                        BY

9                        MR. WEIL:

10          Q        Can you hear me, Mr. Koch?

11          A        Pardon me?

12          Q        Can you hear me?  It's Ed Weil, counsel for  
13 intervenor Bruce Levin.  Can you hear me all right?

14          A        I can hear you now.

15          Q        I just have a couple.

16                        When you testified as to -- you  
17 testified that in some instances an applicant is  
18 given relief by being given permission to send in  
19 effect bulk notification out when it's a situation  
20 that involves a mass number of subscribers versus  
21 having to obtain an authorization from individual  
22 subscribers.

1                   Based on your understanding of this  
2 applicant, is this a situation that would justify  
3 the use of bulk notification versus authorization  
4 from customers, as you understand the situation?

5           A       My understanding of the situation is that  
6 the requirement is that letters of authorization are  
7 necessary.

8                   However, that the Commission would  
9 allow for a waiver of that if a proper customer  
10 notification were provided, and I do believe that  
11 this is the type of an occurrence, being a mass  
12 migration, in which such a waiver would commonly be  
13 provided.

14          Q       And when you were talking about the  
15 intangible assets line item, that was a number that  
16 had -- was down to the penny, wasn't it?

17          A       If you'll bear with me, I'll turn back to  
18 it.

19          Q       I don't want you to blurt out what the  
20 number was because it's subject to the in camera and  
21 Mr. Levin is sitting here, but. . .

22          A       There are definitely pennies recorded, yes.

1 Q It was --

2 A To the cents.

3 Q -- down to the cents.

4 So it would appear at least to me  
5 looking at it that it was -- that someone had  
6 tallied up some form of intangible asset or  
7 combination of intangible assets to get to that  
8 number.

9 It wasn't a plug number. It doesn't  
10 appear to be, or does it?

11 A Based on the fact that numbers were  
12 recorded into the pennies, I don't think alone  
13 speaks to whether it's any proxies or plugs were  
14 used.

15 I would say it simply -- it is a  
16 summary account that would have several items  
17 underneath it.

18 I couldn't tell you one way or the  
19 other how that number was constructed.

20 Q Right. It might include goodwill -- we  
21 don't know whether it's goodwill or intellectual  
22 property or other intangible assets, do we?

1           A       I am not certain, no.

2           Q       So I understood your earlier testimony to  
3 mean that you would like to see how the company, the  
4 applicant, arrived at that number?

5           A       That is correct.

6           MR. WEIL: I have nothing further. Thank you.

7           JUDGE RILEY: Thank you. Redirect?

8           MR. FOSCO: No, your Honor.

9           JUDGE RILEY: Redirect?

10          MR. MOORE: No.

11          JUDGE RILEY: All right.

12                    Mr. Koch, thank you very much.

13                    Staff have any other witnesses that  
14 they were going to call today or any other time?

15          MR. BRADY: No, your Honor.

16          JUDGE RILEY: Were you planning on -- let's get  
17 to the issue of the data requests then.

18                    You want to issue additional data  
19 requests to the applicant; is that correct?

20          MR. BRADY: Yes, and we're hoping to have  
21 something out -- I mean it's already close to 5:00  
22 o'clock. But I'm thinking we can still get

1 something e-mailed to the parties today.

2 MR. MOORE: We'll respond as quickly as  
3 possible. I still question whether we need a  
4 hearing.

5 We're going to give a response --  
6 presumably we're not going to need to cross-examine  
7 our own data request response.

8 Unless the staff has -- if the staff  
9 is satisfied with those responses, I'm not too sure  
10 where they need to have a hearing to do anything  
11 with it either. We put it in the record.

12 JUDGE RILEY: There's the question of whether or  
13 not they're going to be satisfied. We are  
14 speculating on that.

15 I presume that everything is going to  
16 be straightforward and above board, but you never  
17 know that the wording is going to, you know, maybe  
18 perfectly satisfactory to you. Will that be to  
19 staff? That's the problem.

20 MR. WEIL: And there is another party here.

21 JUDGE RILEY: Exactly. I was just about to turn  
22 and we also have an intervenor who may have more

1 questions.

2 MR. MOORE: I would object to having a hearing  
3 just because they want to drag out and have another  
4 cross-examination.

5 They could have asked these questions  
6 themselves -- if these are questions that they could  
7 have done long ago so, you know, we would object to  
8 a hearing just so they can do cross-examination.

9 MR. ROWLAND: We had a hearing last week and we  
10 have continued it today. We're bound and determined  
11 to get you the answers to your data requests and  
12 give you all the information you need.

13 JUDGE RILEY: One of the things I also want to  
14 point out is that insofar as this is a contested  
15 matter, it's not going to be just a question of me  
16 sending a order to the Commission upon the  
17 conclusion of the record.

18 There's going to be a proposed order  
19 before anything. That's going to be subject to  
20 closing briefs, a briefing schedule, and then  
21 exceptions and replies. So it is going to involve  
22 more time.

1 MR. FOSCO: Your Honor, we can't say until we  
2 see the responses, but I think to the extent that  
3 Mr. Koch is able to formulate a final opinion or  
4 recommendation, we would like to provide that to  
5 you.

6 If the hearing only takes a half hour,  
7 it only takes a half hour, but there is some more  
8 information that staff would like to review.

9 JUDGE RILEY: One of the things I want to know  
10 and I'm not clear on the procedure, will the  
11 intervenor have access to the answers that are  
12 provided to staff?

13 MR. ROWLAND: I think counsel will, per the  
14 protective agreement.

15 MR. WEIL: I would if the information that is  
16 subject to the proprietary -- if the information is  
17 proprietary, then yes, it would be limited to  
18 counsels is my understanding.

19 MR. ROWLAND: Based on what staff has indicated  
20 I think it is going to be.

21 MR. WEIL: The other thing I just wanted to ask  
22 procedurally is whether staff is also going to be

1 submitting a data request to Novacon, LLC, because  
2 you had indicated that earlier. That was long  
3 ago --

4 MR. BRADY: Yes.

5 MR. WEIL: -- today.

6 MR. BRADY: Yes, we are intending to, you know,  
7 pursue informal discovery along those lines, so  
8 there is that matter, and we would anticipate that  
9 it would be, again, would not require a whole lot of  
10 in-depth research to respond to these requests.

11 JUDGE RILEY: Okay.

12 MR. BRADY: There's only two questions, I  
13 believe, three questions.

14 JUDGE RILEY: As I said, I don't know if not  
15 setting a date forecloses anyone from --

16 MR. BRADY: I would say reconvening maybe Friday  
17 or Thursday of this week, you know -- actually I  
18 want to give a couple days depending on how long it  
19 would take you to respond. I was thinking you would  
20 be responding by the 10th.

21 MR. MOORE: If we get it today, I'm sure we'd  
22 respond by Wednesday, so a hearing on Friday.

1 MR. BRADY: Figure a couple days to review that.  
2 Either the 10th or Monday.

3 MR. WEIL: I'm out of office until Friday or I'm  
4 available Monday, either one.

5 JUDGE RILEY: Take a look at Monday.

6 MR. WEIL: Monday is the 15th, right.

7 JUDGE RILEY: I have got a matter up at 10:00  
8 but we can convene at 11:00. And as I said, you  
9 know I don't anticipate from what the parties have  
10 said that this is going to be terribly detailed or  
11 involved but my concern is not to foreclose anyone  
12 from another day in court if it is needed and I just  
13 don't want to summarily make that decision that  
14 everything is going to be tied up with the answers  
15 to these data requests. So I'm just doing this as a  
16 safety net for everybody. Is the --

17 MR. BRADY: I appreciate that.

18 JUDGE RILEY: Is Monday the 15th available? As  
19 I said I have a matter up at 10:00 but.

20 THE WITNESS: I'll be on vacation.

21 JUDGE RILEY: I'm sorry.

22 THE WITNESS: I'll be out of town.

1 MR. BRADY: Would you propose an alternative.

2 THE WITNESS: How is the 18th.

3 MR. BRADY: The 18th fits in my schedule.

4 JUDGE RILEY: I have got two matters up that  
5 day. But again they're oh, no, one of them may go.

6 MR. WEIL: 19th, 17th?

7 JUDGE RILEY: What about --

8 MR. WEIL: 16th.

9 JUDGE RILEY: -- 17th. I'll be up in front of  
10 the bench for a while but I don't know how long.

11 WITNESS KOCH: This is Springfield staff. And I  
12 will be in Chicago. Unfortunately I'll be part of  
13 the 02-0864 hearings scheduled for the entire week.

14 JUDGE RILEY: The entire week of the 15th?

15 WITNESS KOCH: So you're not going to be able --

16 MR. FOSCO: Bob, off the record.

17 JUDGE RILEY: We can go off the record  
18 (Whereupon, a discussion was  
19 had off the record.)

20 JUDGE RILEY: We have completed the examination  
21 of Mr. Scholle and Mr. Koch for now. Counsel, we'll  
22 wait information with regard to the data requests

1 and the answers.

2 MR. BRADY: Okay.

3 JUDGE RILEY: Until further notice we are  
4 continued to March 18th, 2004, at 2:00 p.m.

5 MR. WEIL: May I ask one last question. May I  
6 make a request orally now, just to save time, to get  
7 copies of the responses or the actual data requests  
8 and the responses to the data requests.

9 MR. ROWLAND: Yes. If you're agreeing to comply  
10 with the proprietary agreement.

11 MR. WEIL: Of course. Of course.

12 JUDGE RILEY: Okay. Thank you very much.

13 (Whereupon, further proceedings  
14 in the above-entitled matter  
15 were continued to March 18,  
16 2004, at 2:00 p.m.)

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