

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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RESOURCE TECHNOLOGY CORPORATION,)
) No. 99 B 35434
)
 Debtor.)

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RESOURCE TECHNOLOGY CORPORATION,)
) No. 02 A 884
)
 Plaintiff,)

vs.)

COMMONWEALTH EDISON,) Chicago, Illinois
) July 2, 2002
) 10:00 a.m.
 Defendant.) 2:30 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EUGENE R. WEDOFF

APPEARANCES:

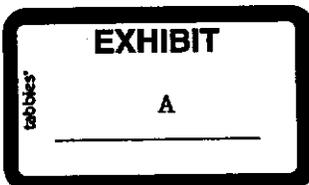
MR. BRIAN SHAW
MR. GARY STERN
MS. ELIZABETH SHARP
on behalf of RTC;

MR. CHARLES SKLARSKY
on behalf of ComEd;

MR. WILLIAM BARRETT
on behalf of the creditors committee;

MR. MIKE BARRETT
on behalf of Allied Waste;

MR. STEVEN TOWBIN
on behalf of Banco PanAmericanos and other secured
creditors.



OFFICE OF THE CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
CHICAGO, ILLINOIS

1 THE CLERK: Resource Technology versus
2 Commonwealth Edison, 02 A 884. Plaintiff's
3 emergency motion for temporary restraining order.

4 MR. SKLARSKY: Good afternoon, your Honor.
5 Charles Sklarsky on behalf of ComEd.

6 MR. W. BARRETT: William Barrett for the
7 creditors committee.

8 MR. M. BARRETT: Good afternoon, Judge. Mike
9 Barrett on behalf of Allied Waste.

10 MR. SHAW: Good morning, your Honor. Brian
11 Shaw on behalf of the debtor-in-possession.

12 MR. STERN: Your Honor, good afternoon. I'm
13 Gary Stern on behalf of RTC.

14 MS. SHARP: Elizabeth Sharp on behalf of RTC.

15 MR. TOWBIN: Steven Towbin on behalf of Banco
16 PanAmericanos and other secured creditors.

17 THE COURT: I've read the motion. Who is
18 going to be presenting it?

19 MR. SHAW: Your Honor, a combination of Mr.
20 Stern and I. There is both legal argument and, if
21 the court requires it, we also have Mr. Connolly
22 here today who can give some oral testimony
23 regarding some of the background information and, in
24 addition, what the debtor perceives to be the
25 irreparable harm if it loses this cash flow at this

1 stage of the case.

2 THE COURT: Okay. I guess the pressing
3 question that I have, having read the motion, is how
4 does a damages case turn into a case for preliminary
5 injunctive relief? You say the debtor really needs
6 the money. Well, I expect most people who have a
7 claim for damages would really need the money, and
8 my understanding is that a claim for damages doesn't
9 give rise to a need for a preliminary injunctive
10 relief.

11 MR. SHAW: Your Honor, I think under normal
12 circumstances that may very well be the case, but
13 these are not normal circumstances within the
14 confines of this Chapter 11 proceeding. At this
15 point if this cash flow is cut off we believe
16 wrongfully and unilaterally, the debtor is going to
17 be in default of a substantial number of
18 obligations --

19 THE COURT: Okay. So I guess the question is
20 what authority do you have for the proposition that
21 when a Chapter 11 debtor-in-possession really needs
22 money the court can issue a preliminary injunction
23 requiring a defendant in a damage action to pay the
24 money prior to a resolution of the merits of the
25 case?

1 MR. SHAW: Your Honor, I do not have legal
2 authority with me today, but we believe --

3 THE COURT: Okay. So all you've got is an
4 argument that because it's really needed by RTC that
5 I ought to use a rule different from the ordinary
6 rules for preliminary injunction.

7 MR. SHAW: Judge, it's a little more than
8 really needed. It's our belief that this will be
9 the end of the case in a very short order and the
10 end of the company, and that can't be replaced.

11 THE COURT: All right. From the point of
12 view of Commonwealth Edison, that very situation
13 would indicate that they're paying the money to you
14 could mean irreparable injury to them because they
15 very well might be making payment to an entity that
16 won't be in existence two or three months from now
17 and they will never be able to recover the money.

18 MR. SHAW: Your Honor, I understand that's
19 the flip side. But at the same time, for the
20 argument that Mr. Stern will discuss, we don't
21 believe that Commonwealth Edison has the statutory
22 authority to go -- any authority, contractual
23 authority to go --

24 THE COURT: I just want any scrap of
25 authority you have for the proposition that I should

1 treat a damages case -- now, authority not argument.

2 MR. SHAW: I understand. Legal authority.

3 THE COURT: Any scrap of authority for the
4 proposition that I can treat a damage claim as one
5 requiring immediate payment by virtue of what
6 amounts to a temporary restraining order.

7 MR. SHAW: We can look. I can't produce it
8 to you instantaneously obviously.

9 THE COURT: I would have thought that that
10 would you something that you'd have to research in
11 support of this motion because, frankly, it goes
12 pretty much contrary to black letter law as far as
13 what constitutes irreparable injury. Now, obviously
14 there can be a situation in any number of contexts
15 where the plaintiff in a damage action really needs
16 the money that's involved in the matter that's under
17 dispute. But the ordinary rule is that the payment
18 of damages does not constitute irreparable injury.
19 The need to have damages paid does not constitute I
20 irreparable injury. One is supposed to contrast the
21 availability of damages, legal remedy, to the --
22 which is the context in which extraordinary relief
23 like this is not allowed to a situation in which
24 damages would not be sufficient. All you're asking
25 for is damages.

1 MR. SHAW: Well, your Honor, we're asking
2 actually for -- I think we're asking for more than
3 that. I think we're asking not only for the
4 700-or-so-thousand dollars that was held back last
5 month, but we are also asking for a specific
6 performance requiring to perform in the future.
7 That's --

8 THE COURT: You're asking for past payment
9 and for future payment.

10 MR. SHAW: Correct. And I'm not -- you know,
11 I think that is -- and I know --

12 THE COURT: I mean, I can think of any number
13 of --

14 (Simultaneous colloquy.)

15 MR. SHAW: -- somewhat different.

16 THE COURT: -- come up. Tenants not paying
17 the rent claiming that the landlord is in violation
18 of their lease agreement. The landlord comes into
19 court and says, "I really need this money. If I
20 can't get the money, I'll be default on my mortgage
21 and the mortgagee will foreclose on my property. We
22 can't fully try the merits, we have to have the
23 tenant pay the money now. I want an order, a
24 temporary restraining order requiring the money to
25 be paid."

1 My understanding is that that kind of
2 an argument simply wouldn't fly. No matter how much
3 the plaintiff needs the money, a dispute regarding
4 money is one that has to be tried. It can't be
5 adjudicated from the context of a temporary
6 restraining order.

7 MR. TOWBIN: Your Honor --

8 THE COURT: Again, if you have contrary
9 authority to what my understanding is -- I'm basing
10 this on what I remember from law school as much as
11 anything else. This is not something that strikes
12 me as particularly esoteric. If you have authority
13 that runs contrary to what I take to be a fairly
14 rudimentary understanding of the way temporary
15 restraining orders and preliminary injunctions work,
16 I would be very happy to look at that. But you come
17 here with nothing on that subject and only a request
18 to go and look at it. I think you're going to have
19 to look at it because that's the issue that troubles
20 me more than anything else as I look at this. I
21 don't propose to have what amounts to a trial of a
22 damage question with no opportunity for preparation
23 by the other side with no discovery, with no
24 opportunity to present expert testimony on what
25 appears to me, at least at first glance, to be a

1 fairly technical issue to try to resolve all of that
2 this afternoon as a predicate for ordering
3 Commonwealth Edison to pay money to the debtor
4 strikes me as highly problematic. And, again, if
5 you have authority, I'd be happy to look at it. But
6 in the absence of authority, I would not propose to
7 have such a hearing. It's really that simple. I do
8 not feel at all comfortable in ordering a party, a
9 defendant in a damage action, to pay damages on a
10 preliminary injunction basis. Worse than that, a
11 temporary restraining order basis. Temporary
12 restraining order is intended to maintain the status
13 quo. You're intending to do precisely the
14 opposite.

15 MR. SHAW: Well, actually -- I understand.

16 THE COURT: They're not paying you now. You
17 want them to pay you. You want by way of TRO the
18 very relief that you're asking for in your complaint
19 on the merits. So if you want to take a recess and
20 come back with something in half an hour or so and
21 do some quick research, that's fine. But,
22 otherwise, I'm not going to hold a hearing unless
23 we've got the legal basis for the relief that you're
24 seeking to establish.

25 MR. SHAW: We will take a recess. Thank you.

1 THE COURT: All right.

2 MR. SKLARSKY: Your Honor --

3 THE COURT: The hearing that I'm in the
4 middle of is likely to last at least until 2:30. So
5 if you want to come back at 2:30, that would be
6 fine.

7 MR. SKLARSKY: May I have leave to file our
8 appearance?

9 THE COURT: Yes.

10 (Proceedings recess to 2:30 p.m.)

11 THE CLERK: Recalling the Resource matter.

12 MR. SKLARSKY: Charles Sklarsky and Karen
13 Newbury on behalf of ComEd.

14 MR. SHAW: Brian Shaw on behalf of the
15 debtor-in-possession.

16 MR. STERN: On behalf of RTC, Gary Stern.

17 MR. TOWBIN: Steven Towbin on behalf of Banco
18 PanAmericano.

19 MR. W. BARRETT: William Barrett for the
20 creditors committee.

21 THE COURT: Okay. Did you find any
22 authority?

23 MR. SHAW: Your Honor, we did find some
24 authority. The first case I'd like to mention to
25 the court, and this case I actually do have a copy

1 of for opposing counsel and the court --

2 THE COURT: All right.

3 MR. SHAW: -- is a case captioned Kamine --

4 THE COURT: Well, you're going to pass it
5 up.

6 MR. SHAW: Okay.

7 (Document tendered.)

8 MR. SHAW: Kamine/Besicorp Allegany versus
9 Rochester Gas & Electric Corp., 908 F.Supp. 1180.
10 This is a case that is strikingly similar to the
11 issue at hand. You have a private power company who
12 had a contract with a local utility requiring the
13 utility to purchase electricity and pay a set
14 slightly inflated rate to the local power company.
15 The power company and the utility were in litigation
16 in state court over the -- well, whether or not the
17 contract had been breached. And at that time the
18 power company -- the utility company unilaterally
19 terminated the contract or attempted to. The
20 private power company went into the federal district
21 court seeking a temporary restraining order
22 requiring the utility both to purchase electricity
23 under the agreement and abide by the terms of the
24 agreement. In terms of pricing the court held that
25 both the pending foreclosure, the pending possible

1 foreclosure for failure to pay a secured creditor,
2 as well as the potential destruction of the business
3 did indeed constitute irreparable harm. It cited
4 another case actually from the Southern District of
5 New York, Travellers International A.G. versus
6 TransWorld Airlines, 722 F.Supp. 1087 at 1105,
7 Southern District of New York, 1989, for the
8 proposition that the destruction of a business has
9 long been held to constitute the type of irreparable
10 injury for which there is no adequate money remedy.
11 The court went on to enter the temporary restraining
12 order, required the utility to both purchase
13 electricity under the agreement and pay the rate the
14 power company requested under the power purchase
15 agreement.

16 Judge, a couple of other cases: 265 BR
17 707, the United States Bankruptcy Court for the
18 Territory of the Virgin Islands, in re Diamond
19 Industrial Corporation. In that case, and I
20 apologize I don't have a page cite for you in that
21 case, the court held that a business is ceasing to
22 exist is the quintessential irreparable harm. And,
23 in this instance, again a company trying to force
24 the other company to make payments to it. And then
25 generally --

1 THE COURT: This is the 265 BR 707?

2 MR. SHAW: Yes, sir. And then generally,
3 Roland Machinery versus Dresser, Inc., 749 F.2d 380
4 at 386, a 1984 Seventh Circuit case, does cite
5 generally that damages often can be adequate. And
6 then that was a case where a cancellation of a
7 distributorship agreement was at issue and a company
8 came in and tried to get a TRO and/or a preliminary
9 injunction to prevent the termination of the
10 agreement.

11 THE COURT: Okay.

12 Mr. Sklarsky.

13 MR. SKLARSKY: Yes. Having quickly reviewed
14 this case, I'd say it's quite different than the
15 circumstances that we are faced with. As I see this
16 case, this a situation where the utility was
17 refusing to accept power, to buy power, under any
18 circumstances from the generator, which is not our
19 case at all. We are buying power from --

20 THE COURT: Yes. But the court did enjoin
21 the utility from paying less than six cents per
22 kilowatt hour. So --

23 MR. SKLARSKY: Which apparently --

24 THE COURT: -- it resolved the dispute
25 regarding the price that ought to be paid at least

1 on this temporary restraining order basis as well.

2 MR. SKLARSKY: Well, I haven't read the case
3 carefully enough to know whether the PPA, the power
4 purchase agreement, that was at issue there may have
5 very clearly set out that price because what the
6 overview says is that the power company was ordered
7 to accept the power and comply with the terms of the
8 PPA.

9 Here what we have is a dispute over the
10 terms of the PPA. It's not a PAA in our situation.
11 It's actually a tariff, which is different than a
12 PPA. A tariff is a law. It's not a contract. What
13 we have is a dispute over the meaning of what this
14 tariff provides and what the order of the ICC
15 provides. Which are buying power. We are
16 continuing to buy power in accordance with what we
17 believe are the lawful terms of that tariff and of
18 the ICC's order. And the dispute is really over
19 whether our interpretation of that tariff is correct
20 versus --

21 THE COURT: Okay. Well, the initial question
22 that I raised is whether that dispute is
23 appropriately resolved on a TRO basis. Do you have
24 anything you want to say on that question?

25 MR. SKLARSKY: Absolutely. I think the

1 answer to that is clearly it is not appropriately
2 resolved on a TRO basis for a variety of reasons.
3 One, we would be, in effect -- we would be the ones
4 irreparably harmed if we are ordered on a TRO basis
5 without an opportunity for discovery, for a full
6 hearing, and for really an opportunity for the ICC
7 to weigh in on what this tariff means. It's their
8 tariff, it's their order, and they're the ones
9 ultimately who are going to have to tell us whether
10 our view of this tariff is correct. So we would be
11 paying money to this debtor on the basis of a TRO
12 without any input from the ICC with virtually, it's
13 self-admitted here in court today, no ability. If
14 it turns out we're right and they're wrong, we're
15 never going to get our money back. We're the ones
16 that are going to be irreparably injured by this
17 requested relief.

18 So those are, in a nutshell, the
19 reasons. I think your Honor was right in your first
20 reaction that where money damages are available, and
21 they are here, there is no question that ComEd, if
22 it turns out we're wrong, we can pay the money
23 damages. We have the ability to do that. They
24 cannot pay us if they are -- if it turns out that
25 they're wrong, they cannot pay us and they cannot

1 give us any adequate assurance that we will be
2 paid. And in some of the cases that we were looking
3 at during the break, they make precisely that
4 point. For example, this is a case that's --
5 American National Bank & Trust of Chicago.

6 THE COURT: What's the citation?

7 MR. SKLARSKY: I'm trying to find this.

8 MS. NEWBURY: It's a Lexis cite.

9 MR. SKLARSKY: It's a Lexis cite, your
10 Honor. We got it off of Lexis. 2001 U.S. District.
11 Lexis 1556. And here there were certain...

12 THE COURT: This is Seventh Circuit case?

13 MR. SKLARSKY: It's a bankruptcy.

14 MS. NEWBURY: Northern District of Illinois

15 MR. SKLARSKY: Northern District case, your
16 Honor.

17 THE COURT: Who is the Judge?

18 MS. NEWBURY: Judge Kocoras.

19 THE COURT: So this wasn't published in BR?

20 MR. SKLARSKY: Not that I'm aware of.

21 THE COURT: Okay. And it's American National
22 Bank versus whom?

23 MR. SKLARSKY: AXA.

24 MS. NEWBURY: American National Bank as
25 trustee for Emerald Investments, LP.

1 MR. SKLARSKY: Versus AXA Client Solutions,
2 LLC.

3 THE COURT: Okay.

4 MR. SKLARSKY: And what they're saying here
5 in the text is as a general rule, he recognizes as a
6 general rule the defendant's ability to compensate
7 plaintiff money damages precludes issuance of a
8 preliminary injunction, citing another Seventh
9 Circuit case Signo Corporation versus Weldlock
10 Systems.

11 THE COURT: And what's the citation for
12 that?

13 MR. SKLARSKY: 700 F.2d 1108.

14 THE COURT: Okay.

15 MR. SKLARSKY: 1983. And it says, "We
16 therefore agree with defendants that injunctive
17 relief would be inappropriate as to the \$2.16
18 million withdrawal charge." So they're asking for
19 money damages. And this really just is the basic
20 proposition that your Honor had referred to earlier.

21 And then in another matter, and this is
22 in the Bankruptcy Court for the Western District of
23 Pennsylvania, it's 58 BR 632.

24 THE COURT: 58 BR 632?

25 MR. SKLARSKY: Yes. And it's a matter where

1 there are progress payments involved. The court is
2 saying that the debtor -- citing another case, it
3 says, "Where the debtor had filed a mandatory
4 injunction requiring a turnover by a creditor on an
5 executory contract, the action was treated as one
6 requiring specific performance," and the court did
7 not permit monies to be paid although it permitted
8 other aspects of the executory franchise contract to
9 be performed. The Chic -- this is citing the Chic
10 Smith Ford court, treated the action as one for a
11 preliminary injunction and found that money damages
12 were not appropriate in preliminary injunction
13 actions, citing in re Arthur Treachers Franchise
14 Litigation, 689 F.2d 1137, Third Circuit, 1982. And
15 then they go on to say about this case, "The instant
16 turnover action is similar to an injunction for a
17 specific performance. To award specific performance
18 of the progress money payments called for under
19 these Bethlehem contracts, while other aspects of
20 the same contract are in dispute under a rubric of
21 an action and turnover, would not be equitable," and
22 this is the point, "unless adequate protection were
23 offered to Bethlehem. Under the facts of this case,
24 we find that adequate protection has not been
25 offered to Bethlehem for a turnover of these

1 progress payments and, therefore, denies the
2 injunction." So even in the unusual circumstance
3 where money damages are deemed that you might even
4 consider a TRO where the only relief sought is money
5 damages, there still is going to have to be -- there
6 should be adequate protection to ComEd, and this
7 debtor cannot provide us adequate protection.

8 THE COURT: All right. I'm going to want to
9 look at these cases. It seems to me that I have to
10 determine as an initial matter whether the potential
11 for the debtor going out of business, if it doesn't
12 receive contract payments to which it's due, is a
13 sufficient basis for issuing a temporary restraining
14 order. That's the question that has to be decided
15 as an initial matter. If that is the case, if I
16 read these authorities and conclude that that is an
17 appropriate thing for a court to do, then I suppose
18 there may very well be disputes as to whether
19 nonpayment will cause the debtor to go out of
20 business before we can resolve this more reasonably
21 on the merits. And, two, whether the debtor can
22 show a likelihood of success on the merits. Both of
23 those would also be required, it seems to me, in
24 order to issue the TRO even if a TRO would be
25 appropriate under those circumstances.

1 So what I'm going to do is take a brief
2 recess and read these cases and let you know whether
3 I think we have a basis for going forward.

4 MR. SHAW: Your Honor, I do think there is
5 one other basis the court should consider. In
6 essence, the acts of Commonwealth Edison are
7 affecting or taking control of the property of the
8 estate, and we do believe that the court would have
9 jurisdictional basis to --

10 THE COURT: I don't think jurisdiction is the
11 issue here.

12 MR. SHAW: -- basis under 362 to also address
13 these issues because, in essence, they are --

14 THE COURT: Not making a payment under a
15 contract is a violation of the automatic stay?
16 Well, even if that is what's going on here, we'd
17 have a hearing on that and there would be notice and
18 an opportunity for discovery and we would have a
19 hearing, maybe 30 days. The problem I have right
20 now is the request that I rule today --

21 MR. SHAW: I understand.

22 THE COURT: -- ordering Commonwealth Edison
23 to make payments. That's the whole issue. If we
24 had 30 days or even a couple of weeks, we would be
25 in a very different situation than we are right

1 now. I take it your argument is if I don't issue an
2 order today or maybe tomorrow requiring Commonwealth
3 Edison to make these payments, you're going to be
4 out of business, you can't wait ten days.

5 MR. SHAW: The next payment is coming up in
6 the next ten days, and that payment could be --

7 THE COURT: All right. Let me read these
8 cases and I'll come back and let you know what we
9 should do next.

10 MR. SKLARSKY: Your Honor, I have handwritten
11 notes on these cases.

12 THE COURT: That's fine. I can find the
13 cases.

14 (Brief recess.)

15 THE COURT: Although the question is not one
16 that I was able to thoroughly research in the time
17 that I had available, I've come to at least the
18 preliminary conclusion that a failure to make
19 payments that results in the destruction of a
20 plaintiff's business may be the basis for a
21 preliminary injunction. The Arthur Treacher case
22 that was cited in support of the competing position
23 actually does not hold that damages can never be the
24 basis for irreparable injury. What happens is the
25 court finds it's not necessary for it to reach that

1 question. Reading from page 1146 of the opinion
2 which is published at 689 F.2d 1137, "Moreover, we
3 are not persuaded by Arthur Treacher's argument that
4 unless the preliminary injunction is upheld, Arthur
5 Treacher faces an imminent threat of bankruptcy
6 which it contends constitutes irreparable injury.
7 Arthur Treacher has never claimed, and the district
8 court never found, that the survival of Arthur
9 Treacher, a company with net assets of approximately
10 \$9 million, depended solely on the immediate payment
11 of the \$200,000 allegedly owed by A&B." So what the
12 court did here was simply not reach the question of
13 whether a failure to make payments that would result
14 in the destruction of a business might constitute
15 irreparable injury. It found that there was no
16 proof that such destruction would take place.

17 On the other hand, the Supreme Court of
18 the United States in *Duran versus Salem Inn, Inc.*,
19 422 U.S. 922, 925 Supreme Court Reporter 2561,
20 upheld a preliminary injunction issued on the basis
21 that failure to grant the injunction would result in
22 the destruction of the debtor's business. Reading
23 from page 932 of the official reports, "While we
24 regard the question as a close one, we believe that
25 the issuance of a preliminary injunction on behalf

1 of respondents Salem and Tim Rob was not an abuse of
2 the district court's discretion. As required to
3 support such relief, these respondents alleged and
4 petitioner did not deny that absent preliminary
5 relief they would suffer a substantial loss of
6 business and perhaps even bankruptcy. Certainly the
7 latter type of injury sufficiently meets the
8 standards for granting interim relief or, otherwise,
9 a favorable final judgment that might well be
10 useful."

11 Plus, although, again, I've not been
12 able to thoroughly research the question, what
13 research I have been able to engage in leads me to
14 believe that if RTC is able to establish the other
15 elements that would be required for issuance of a
16 preliminary injunction, temporary restraining order,
17 the fact that what they're seeking is a payment as
18 opposed to some other form of injunctive relief
19 would not be favored.

20 So go ahead.

21 MR. SHAW: Your Honor, I don't know if you
22 want an opening statement or if you --

23 THE COURT: Very brief. We obviously have a
24 limited amount of time available, so I would urge
25 you to be expeditious.

1 MR. SHAW: I think Mr. Stern will give you an
2 outline of the arguments that deal with the merits,
3 and then I will follow up very quickly with the
4 other three elements, and then put Mr. Connolly on
5 the stand.

6 THE COURT: Fine.

7 MR. STERN: Thank you, your Honor. Your
8 Honor, what we essentially have here is a case where
9 there is a contract in effect between the two
10 parties. The contract applies a rider three rate
11 if, in fact, the applicable facility is a QF
12 facility, is a qualifying facility. The ICC issued
13 an order in 1997 saying that the facility is a
14 qualifying facility. No order, no notice, nothing
15 has been delivered to RTC indicating --

16 THE COURT: Okay. Let me stop you right
17 there. Your position is that a facility either is a
18 qualified facility or not, that it can't be a
19 qualified facility up to a certain level of
20 production and then unqualified beyond that level of
21 production.

22 MR. STERN: My position is that the ICC can
23 determine that at a certain level of output it may
24 not be a qualifying facility. My position is that
25 at this point that determination by the ICC has not

1 been made. Commonwealth Edison has taken it upon
2 itself to make that determination --

3 THE COURT: Okay. Let me just get my
4 question answered first, if I could. Your position
5 is that a facility is either qualified or not
6 qualified, but it's not possible to have a facility
7 that's qualified up to a certain level but beyond
8 that level is not qualified.

9 MR. STERN: That is correct.

10 THE COURT: Okay. And so what you're saying
11 here is that since the ICC made the determination
12 that this facility is qualified, it doesn't matter
13 what production it engages in even though the ICC
14 might later make the determination that because of
15 this excessive level of production it's no longer
16 qualified.

17 MR. STERN: Right. In other words, we have
18 to go on the record that it exists at this point.
19 And as of this point, we are a qualified facility.

20 THE COURT: And your position is only the ICC
21 can make that determination.

22 MR. STERN: No. It's possible also for the
23 Federal Energy Commission to also make that
24 determination. Where the relevance of the ICC is
25 here is that the actual statute, the rider three of

1 the statute in the applicability section,
2 specifically says rider three is applicable. In
3 fact, if I may pull that out, "This rider is
4 applicable to a qualified solid waste energy
5 facility. A determination by the Illinois Commerce
6 Commission that the facility qualifies under the
7 terms of Section 8403.1(e) of the act is required
8 before service will be permitted hereunder. In 1997
9 there was an order issued by the ICC that the
10 facility did qualify. No contrary order, notice,
11 correspondence of any kind has been delivered that
12 it does not qualify. Therefore, our position is
13 that this is simply a reading a contract question,
14 construction of the contract, the contract still
15 applies in its present form.

16 If Commonwealth Edison wishes to
17 contest that or feels we don't qualify, there are
18 procedural remedies at the ICC to petition the ICC
19 Ed Furk to petition them to change our status, to
20 question our status. They have not taken that
21 action at this point. All that they have done at
22 this point is simply arbitrarily made that
23 determination that in their mind we don't qualify at
24 this point.

25 In the case of Independent Energy

1 Producers, 36 F.3d 848, I have a copy of that.

2 (Document tendered.)

3 MR. STERN: If your Honor turns to page 7,
4 basically this is a case involving a qualifying
5 facility whereby the court interpreted whether a
6 California program whereby a utility could under the
7 California program assess whether a facility
8 qualified for purposes of special rate relief would
9 be upheld. And the Ninth Circuit, and I'll read a
10 decision, but I'll -- page 7 at the bottom what I'm
11 going to read from it, is the Commission's role, not
12 the state's or utility's role, to determine the QF
13 that have received certification from the Commission
14 no longer meet federal operating and efficiency
15 standards. A utility may not change the contractual
16 obligations between the QF and the utility based on
17 such a determination.

18 Commonwealth Edison has available
19 relief that they can pursue. They have decided not
20 to pursue that relief. Based on the Independent
21 Energy Producers decision, we feel that their
22 actions constitute a breach of contract and are
23 improper for them to make that determination.

24 One other issue: RTC two months ago
25 received financing, as your Honor is probably aware

1 of, in the bankruptcy proceeding. During that
2 proceeding, Commonwealth Edison had to complete a
3 consent to the lender in the proceeding which was
4 signed on April 8, 2002, Janet Bieniak, who I
5 believe is in the courtroom today. If Commonwealth
6 Edison thought on April 8th that we were not in
7 compliance and were doing something wrong, they
8 should not have filled out this consent in the
9 manner that they did. There is an estoppel argument
10 here as well that RTC has done business with
11 Commonwealth Edison. This April 8th agreement is
12 just sort of the final step in that. We have
13 proceeded, expended money, incurred costs on the
14 basis of Commonwealth Edison was going to supply
15 power to us. In the absence of the ICC coming in
16 and saying that's improper --

17 THE COURT: You don't mean they were going to
18 supply power to you, you were going to supply power
19 to them.

20 MR. STERN: We were going to supply power --
21 sorry, your Honor. Yes, right. In the absence of
22 an ICC determination to the contrary, we relied on
23 the existing agreement, we continue to rely on the
24 existing agreement.

25 THE COURT: Okay. But there is not a

1 question about Commonwealth Edison accepting your
2 power. It's only a question of how much they're
3 going to pay you for it. Is there anything in that
4 document that indicates what the price is that's
5 going to be paid?

6 MR. STERN: No. But in that agreement
7 Commonwealth Edison basically indicated that that
8 contract that existed was in full force and effect,
9 there were no breaches in that contract, and that we
10 were in full compliance with the terms of the
11 agreement. My sense from the letters we received
12 from Commonwealth Edison is that they feel we have
13 done something that makes us now ineligible to get
14 the rider three rate.

15 THE COURT: Did the contract provide for the
16 rider three rate to be paid?

17 MR. STERN: The contract provides for the
18 rider three rate to be paid because we are still a
19 qualifying facility under the ICC.

20 THE COURT: Okay. I think it's going to be
21 important for me to get the legal framework a little
22 clearer in mind in order to understand your
23 arguments. Is there a contract apart from tariffs
24 or statutes in effect between RTC and Commonwealth
25 Edison with respect to the facility in question?

1 MR. STERN: Yes, there is. And I have a
2 copy.

3 MR. SHAW: Actually, your Honor, it is
4 attached to the complaint as Exhibit A.

5 THE COURT: Okay. Does the contract call for
6 a rate to be paid by Commonwealth Edison?

7 MR. STERN: Yes. The contract basically has
8 other provisions, but there is a rider three rate,
9 there is a rider four rate. The rider three rate is
10 from the provision I read before, the applicability
11 section, is that if the facility has been certified
12 by the ICC to be a qualifying facility regardless of
13 the size of the plant, size of the power, we receive
14 the rider three rate. If theoretically we were no
15 longer a qualifying facility, we would not get the
16 rider -- the rider three rate would not apply, the
17 rider --

18 THE COURT: So as a matter of contract you're
19 saying Commonwealth Edison has agreed to pay the
20 rider three rate as long as the facility is a
21 qualified facility.

22 MR. STERN: Correct.

23 THE COURT: Now, is there any statute or
24 tariff that bears on the rate that's paid? Or is it
25 simply a matter of this contract?

1 MR. STERN: The rider three and rider four
2 rates ultimately are statutory. There is Illinois
3 statutory authority supporting them. This contract
4 largely, not entirely, but largely, mirrors
5 provisions of the Illinois --

6 THE COURT: So the contract incorporates by
7 reference provisions of regulatory tariffs or
8 statutes; is that right?

9 MR. STERN: Incorporates them, but also more
10 expressly from the provision -- I mean, the
11 provision I read is sort of a very close reading,
12 almost copying, of what the statute says. It's not
13 verbatim the same, but it's almost --

14 THE COURT: But would the statute somehow be
15 applicable in the absence of the contractual
16 language?

17 MR. STERN: The statute is consistent with
18 the contractual language in terms of that particular
19 provision. There are other provisions --

20 THE COURT: Well, I guess I'm asking this:
21 Could the contract have had some different rate
22 structure? Could the contract have provided for
23 something different than what these tariffs
24 provide?

25 MR. STERN: No, not as a qualified facility,

1 no.

2 THE COURT: So what I'm trying to get to the
3 point of is what controls here. Do the tariffs
4 control or does the contract control?

5 MR. STERN: The contract controls. The
6 statute is consistent with the contract on the issue
7 of the applicable rate. The contract controls.

8 MR. SHAW: Your Honor, your question is what
9 controls what is designated as a qualified facility
10 and thus entitled to the tariffs?

11 THE COURT: No.

12 What I'm gathering from you is that the
13 tariff says what should be paid to a qualified
14 facility.

15 MR. STERN: Correct.

16 THE COURT: The contract couldn't provide for
17 more or less than that to be paid to a qualified
18 facility, could it? Or could it? That's what I'm
19 trying to figure out, what is the force of this law
20 that is being incorporated in the contract.

21 MR. STERN: I understand your question. The
22 contract basically copies the law. My point, which
23 was probably confusing, was that other provisions of
24 the law are not in the contract. As to simply the
25 issue of what is the applicable rate, the contract

1 and the law are exactly the same. It would be my
2 belief that if the law was amended to be different
3 than the contract, the contract would need to be
4 amended as well.

5 THE COURT: Okay. So the answer to my
6 question is that the tariff, the law, determines
7 what the rate is that's paid, not the contract. The
8 contract and the law are the same right now. But if
9 there was a disagreement between them, the statute
10 would be controlling.

11 MR. STERN: Yes, I agree.

12 THE COURT: All right. Go head.

13 MR. STERN: In essence, in summary, just to
14 summarize, we view this as, in essence, a very
15 simple question. Can a utility on their own
16 volition determine that a facility is not a
17 qualifying facility for purposes of the particular
18 rate that's going to be applied based on the
19 Independent Producers case, based on remedies being
20 available to Commonwealth Edison. The point there,
21 Commonwealth Edison says they're going to be harmed
22 or hurt by this. They have remedies this. Is not
23 the only remedy. They have taken an inappropriate
24 remedy by seeking self-help and not paying what they
25 should be paying under the contract. But they have

1 procedural remedies that they can follow.

2 THE COURT: I take it this qualified facility
3 designation is something that's accorded to an
4 operation that's deemed to be particularly in the
5 public interest.

6 MR. STERN: Yes.

7 THE COURT: And so there is more paid for its
8 power than might be paid to some other producer of
9 power?

10 MR. STERN: That is correct. There is both
11 Illinois and federal language in favor of this sort
12 of green-power-type program.

13 THE COURT: All right.

14 MR. STERN: Thank you, your Honor.

15 THE COURT: Mr. Shaw, you wanted to add
16 something on another point?

17 MR. SHAW: Your Honor, just very quickly. I
18 will put Mr. Connolly on the stand and he will
19 discuss the factual issues of why the debtor
20 believes that the injunction or the restraining
21 order if not granted the debtor will suffer
22 irreparable harm.

23 With regards to the balancing of the
24 equities, I think you've got really on the RTC side
25 of the argument, in addition to the substantial

1 irreparable harm that would be brought upon RTC, you
2 have the fact of the matter that there is strong
3 public interest, and I'll tie this into the public
4 element as well, in promoting what's called green
5 power, the use of these sources. And, in fact,
6 Section 220 ILCS 58403 and, in particular,
7 subsection 4031 which deals with this type of
8 electricity says flat out, "It is hereby declared to
9 be the policy of this state to encourage the
10 development of alternate energy production
11 facilities in order to conserve our energy resources
12 and provide for their most efficient use. It is
13 clear public policy as well, which does fall on the
14 equity side and on the public interest side, and RTC
15 is one of the larger producers of this type of
16 energy in the state. If they go, it seems to me
17 that the policy that underlies these laws have been
18 enacted to encourage people to produce this type of
19 electricity is undermined, and that is all on top of
20 the fact that there is the general Bankruptcy Code
21 out there that says the purpose -- you know, the
22 Bankruptcy Code and Chapter 11 was enacted to try to
23 help rehabilitate debtors and try to keep them in
24 the economy and keep them as a participating member
25 of the economy along with their jobs and their

1 projection. It's our position that if this
2 restraining order or preliminary injunction is not
3 granted, that harms us as well.

4 On the other side of the coin, you've
5 got Commonwealth Edison, I won't even hazard a guess
6 where the 2 million or so dollars in payments they
7 appear to be -- appear, because we aren't exactly
8 sure what's going on here, but appear to have been
9 threatened by the ICC with is probably a blip on
10 their financial statement. ComEd also in our belief
11 has a strong argument under the same statute I read
12 to you which, by the way, requires them to purchase
13 electricity from a QSWEF generally if the QSWEF is
14 producing electricity in their utility region,
15 they're going to be required to purchase electricity
16 again to promote the use of this type of power.
17 They're required to do so and the ICC here has not
18 come in and give us any indication and we've not
19 been told that we've lost our status or we haven't
20 even been told directly -- given any notice that our
21 status is being questioned. But subsection (h), the
22 cite is 220 ILCS 5/8-403.1 subsection (h).

23 THE COURT: 5/8403?

24 MR. SHAW: 8-403.

25 THE COURT: Okay.

1 MR. SHAW: Subsection (h) states that nothing
2 in this section is intended to cause an electric
3 utility that is required to purchase power hereunder
4 to incur any economic loss as a result of its
5 purchase. It's RTC's belief that for the ICC to sit
6 idly by and not take a position on itself and keep
7 RTC as a QSWEF which -- and our belief under this
8 statute requires Commonwealth Edison to purchase
9 this electricity at the rate that's set forth in
10 rider three, that they will have a hard time when
11 they chose to be inactive in this situation to then
12 come back and try to take this money away from
13 Commonwealth Edison or deny them their tax credits
14 because that does make them suffer financial harm.

15 Under those circumstances, we think the
16 balance of the equities clearly favors the position
17 of RTC. And for very similar reasons we believe
18 that the public interest and the public policy of
19 the state of Illinois is best served by the position
20 set forth in keeping RTC in business and enabling it
21 to reorganize, rehabilitate, and continue to produce
22 green power.

23 THE COURT: Mr. Sklarksy, do you want to give
24 me an opening statement?

25 MR. SKLARSKY: Yes, I do. Thank you, your

1 Honor. I think we on behalf of ComEd see the issues
2 a little differently. We do not question the
3 of these generators as qualified facilities. The
4 RTC received an order in 1977 from the Illinois
5 Commerce Commission which certified these generation
6 facilities, not only the one at issue, which is at
7 Pontiac, Illinois, but approximately, I don't know,
8 20 or 25 other facilities as what they call QSWEFs,
9 qualified solid waste energy facilities. What they
10 do is they burn methane gas.

11 THE COURT: I'm very familiar with it.

12 MR. SKLARSKY: Okay. So there are these
13 facilities which RTC petitioned the ICC for
14 certification as these QSWEFs. In their petition
15 they identified Pontiac as one of those facilities,
16 and they identified it as having a capacity of ten
17 megawatts. And for each of the other facilities in
18 the petition, RTC set forth the number of megawatts
19 that each facility would produce. The ICC then went
20 out and presumably investigated each of these
21 facilities in order to determine whether, in fact,
22 they should be certified as QSWEFs. The ICC order,
23 and I'll provide your Honor with a copy of it,
24 concludes that the evidence indicates that the
25 electric generating facilities will be configured to

1 have a maximum gross generating capacity of
2 approximately 65 megawatts. That's all of these
3 facilities together. They will be owned and
4 operated by RTC. The facilities will use methane
5 generated from the landfill and possess
6 characteristics which enable them to qualify as a
7 small power production facility under the Public
8 Utilities Act.

9 Then in the very next finding, which is
10 finding five, what I just read was finding four, it
11 says, "Under the facts set forth in finding four,
12 the facilities," and this is the key provision, "as
13 configured in the petition will be qualified a solid
14 waste energy facility pursuant to Section 8403.1(b)
15 of the Act." So what the ICC authorized, what they
16 found, was that these facilities could be certified
17 as configured, and this petition identifies the
18 Pontiac facility as being configured at ten
19 megawatts, so that's an important distinction.
20 ComEd does not question the certification in any
21 respect of that facility up to ten megawatts. ComEd
22 has and will continue to pay at the rider three
23 rate, which is what the tariff requires us to do,
24 for any power generated up to ten megawatts at that
25 rate.

1 THE COURT: Well, the question then I have to
2 ask you is the same question that I asked earlier.
3 You do not believe then that facility is either
4 qualified or not. You believe it could be qualified
5 up to a certain amount of production and then
6 unqualified thereafter.

7 MR. SKLARSKY: That's exactly correct.

8 THE COURT: All right. Well, this strikes me
9 as a question of law.

10 MR. SKLARSKY: To me it is a question of law.

11 THE COURT: So what authority do you have for
12 the proposition that facilities can be partially
13 qualified and partially unqualified?

14 MR. SKLARSKY: To my knowledge there is no
15 precedent on this question. The ICC in extremely
16 informal conversations with staff at ComEd has
17 questioned, has raised this question, questioned why
18 we were paying rate three rates. See, this problem
19 only arose beginning in January. Prior to that,
20 this facility at Pontiac was not generating in
21 excess of ten megawatts, at least not in any
22 significant capacity. It was only in recent months
23 that they have produced as much as 18 megawatts of
24 capacity or power.

25 In mid-March or April the ICC raised

1 questions about why we were paying at the rate three
2 for the entire 18 megawatts. Based on those
3 inquiries, we provided some additional information
4 to the ICC but have not gotten any definitive
5 response from the ICC one way or the other.
6 However, because this is not simply a matter of
7 contract interpretation, in our view this is our
8 obligation to adhere to a tariff which is to adhere
9 to a law.

10 THE COURT: Well, I got that impression from.
11 RTC as well, the law is controlling over the
12 contract.

13 MR. SKLARSKY: Right. And if it's our view
14 that the tariff -- we cannot pay an entity in
15 violation of the tariff. So we have then consulted
16 with our own internal legal staff and our regulatory
17 lawyers who believe that the position under this
18 tariff is that up to ten megawatts rider three
19 applies, and after ten megawatts rider four applies,
20 which is also a rate that's paid --

21 THE COURT: Well, it sounds to me as though
22 apart from questions of irreparable injury, we have,
23 as far as likelihood of success on the merits,
24 purely a question of interpreting this tariff.

25 MR. SKLARSKY: I believe that's correct.

1 THE COURT: And I don't know that that's
2 something as to which I need to take evidence. I
3 need to have a legal argument on the interpretation
4 of the law.

5 MR. SKLARSKY: I think there ought to be
6 legal argument. And I guess there is another issue,
7 which is whether your Honor wants to really decide
8 an issue which is traditionally been in the provinces
9 of the ICC. This is an issue --

10 THE COURT: You tell me the ICC hasn't
11 decided it. If there is a question of irreparable
12 injury here, I have to make a determination as to
13 whether the plaintiff will establish a likelihood of
14 success on the merits, and that's going to be a
15 question of how persuasive their argument is
16 regarding the interpretation of this material.

17 MR. SKLARSKY: Yes, I agree.

18 THE COURT: All right. So I think that's
19 what is going to have to take place there. I take
20 it each side is armed with its interpretation of the
21 tariff today so that I can hear argument on that
22 point?

23 MR. SKLARSKY: Yes. I mean I think it's --

24 THE COURT: All right. Fine.

25 MR. SKLARSKY: -- an argument that --

1 THE COURT: Then I just need you to address
2 the other two issues, but I think I've got this one
3 pretty clearly in mind.

4 MR. SKLARSKY: Okay.

5 THE COURT: Which is to say what do you have
6 to say about balance of hardships and irreparable
7 injury.

8 MR. SKLARSKY: Okay. I touched on that
9 briefly before. I do want to go back and just say
10 there are several generators at Pontiac. It's my
11 belief that -- well, I just don't know enough at
12 this point to know whether we are being provided
13 power from generators that weren't certified as
14 methane gas generators. But I'm assuming for our
15 purposes of discussion that the one generator, which
16 was certified is what we're talking about, in our
17 correspondence and our dealings with RTC to date we
18 have been talking about dealing with the generator
19 that was certified up to ten megawatts and not
20 anything else.

21 THE COURT: Well, I am sure we can have
22 testimony about this.

23 MR. SKLARSKY: Right.

24 THE COURT: But my understanding is that the
25 generators that are operating in Pontiac right now

1 are completely different from whatever generators
2 would have been certified in 1997. They got a loan
3 to put in new, different generators.

4 MR. SKLARSKY: Right.

5 THE COURT: So when you talk about "the
6 generator" that was certified, there is no "the
7 generator" that was certified that's operating there
8 at all.

9 MR. SKLARSKY: Well, I guess the question is
10 whether, and we don't know because we just don't
11 have the information, the generator that's there now
12 is operating on methane gas or some other fuel
13 source. I don't know.

14 THE COURT: Well, I can assure you again that
15 I've had a lot of testimony in a number of different
16 contexts about what's going on in Pontiac. And the
17 gas they're burning there is methane, there is no
18 question about that. It's generated by
19 decomposition of garbage in landfills, and that's
20 what they're in the business of controlling and
21 utilizing. The machinery that they're using to burn
22 that methane and convert it to electricity has
23 changed since the time they got the original
24 certification and now. And if that change causes
25 some kind of automatic loss of certification and you

1 want to make that argument to me under the tariffs,
2 I'll be happy to considerate argument. But those, I
3 think, are facts that are not going to be in
4 dispute.

5 MR. SKLARSKY: All right. Let me address --

6 THE COURT: Do you want to dispute that?

7 MR. SHAW: No, your Honor, I don't want to
8 dispute that. I just want to make sure the court
9 understands that while we don't think there needs to
10 be substantial testimony, we do think there is some
11 issues regarding the proceedings that took place in
12 conjunction with the granting of the order. And
13 also the submission of the RTC petition that led to
14 that order regarding the Pontiac facility, Mr.
15 Connolly did attend those and there are a very small
16 number of issues that we think the court should be
17 aware of, and we will be eliciting testimony on
18 that, although I'm not sure it affects the issue,
19 and you raised a legal issue. It may affect --
20 depending on your research, it may or may not affect
21 depending on what you conclude.

22 THE COURT: Go ahead, Mr. Sklarsky.

23 MR. SKLARSKY: Well, I touched briefly before
24 on the balancing of the hardships. ComEd is not in
25 the position to receive any protection. If we were,

1 in fact, ordered to make these payments in the
2 interim and ultimately it is determined that our
3 position is correct and we should not have made the
4 payments, what will happen is that the ICC will take
5 from ComEd the tax credits, which we're entitled to
6 take when we make these payments. They will reverse
7 those tax credits, we will have to repay, to the
8 extent we've taken tax credits for these payments,
9 that money to the state of Illinois.

10 Given the current financial
11 circumstances of the debtor, it's pretty clear we're
12 not going to ever get that money back and that they
13 cannot provide us with any adequate protection for
14 us getting that money back. So I think that that's
15 primarily the hardship that's balanced.

16 And I could say that, you know, they
17 enacted apparently a business plan which relies on
18 the sale at rider three rates of power in excess of
19 ten megawatts. Given the way the ICC order is
20 stated, it seems to me that the prudent thing for a
21 debtor which has been in a bankruptcy as long as the
22 debtor has, would have been for it to seek to amend
23 the petition to ensure -- to amend the order and ask
24 the ICC to amend the order to ensure that it could
25 sell in excess of ten megawatts of energy at rider

1 three rates. That I don't believe they ever did.
2 And now ComEd is being put in the position of having
3 its money at risk in a case where we're likely never
4 to get it back if it turns out that they're right
5 and they're wrong. And ComEd I don't think, in
6 balancing the hardships, should be put in the
7 position of essentially being their banker, whether
8 it's for a month or two months or however long this
9 issue may take to resolve before the ICC. And ComEd
10 is prepared to take steps to get it resolved before
11 the ICC. One of the things that we have already
12 drafted, we have in draft form, is a petition to
13 tee-up this issue squarely before the ICC. And,
14 actually, we were going to ask your Honor whether or
15 not you felt we should seek a modification of the
16 stay in order to do that, to get the RTC before the
17 ICC as a party, to resolve this issue.

18 THE COURT: Okay. Well, what response do you
19 make to this citation from the Ninth Circuit
20 Independent Energy Producers?

21 MR. SKLARSKY: Well, in quickly reading this
22 case, and I only had a few minutes to look at it, it
23 seems to me that what is being said here is that a
24 utility cannot question the certification by the
25 state of a facility as a qualifying facility. We're

1 not doing that. We're not questioning their status
2 as a qualified facility. We are questioning whether
3 they're in compliance with the order which says ten
4 megawatts. That's what they are -- that's what they
5 were authorized as, and we were prepared to pay up
6 to ten megawatts to them as a QSWEF and anything
7 beyond that at --

8 THE COURT: Okay. This gets back to the same
9 question that I asked earlier, is a qualification
10 only up to a certain level, and beyond --

11 MR. SKLARSKY: Exactly.

12 THE COURT: -- that it's not qualified --

13 MR. SKLARSKY: Right.

14 THE COURT: -- or is it qualification in an
15 all-or-nothing proposition. You could just as well
16 say that because they're generating more than ten
17 megawatts that they're no longer qualified at all
18 and shouldn't pay the higher rate for any of the
19 electricity.

20 MR. SKLARSKY: We're not saying that. We're
21 -- that's not our view. Our view is that they're
22 certainly qualified up to ten megawatts.

23 THE COURT: Okay. Now, I take it you have
24 nothing to say at this point about irreparable
25 injury to them.

1 MR. SKLARSKY: I only know what they said in
2 their pleadings.

3 THE COURT: Right.

4 Okay. We'll hear the evidence then.

5 MR. SHAW: Your Honor, I'm going to call John
6 Connolly, the --

7 THE COURT: That's fine.

8 MR. SHAW: -- president of Resource
9 Technology, to the stand.

10 Your Honor, I'm going to throw out a
11 question which is as much to the ComEd people as to
12 the court. I know that you are intimately familiar
13 with Mr. Connolly's background through all the
14 litigation that's been generated in this
15 proceeding. I can have him give a narrative just to
16 give the background for the benefit of the
17 Commonwealth Edison --

18 THE COURT: Why don't we let him be sworn in
19 before we talk about it.

20 MR. SHAW: Okay.

21 (Witness sworn.)

22 THE COURT: It's unnecessary for my purposes
23 to have a detailed curriculum vitae for Mr.
24 Connolly. If you believe it's necessary for your
25 record, I'm not going to stop you from doing that.

1 MR. SHAW: Okay.

2 JOHN ERNEST CONNOLLY, WITNESS, SWORN

3 DIRECT EXAMINATION

4 BY MR. SHAW:

5 Q Mr. Connolly, can you state your full
6 name for the record.

7 A Sure. John Ernest Connolly.

8 Q And can you briefly tell us your
9 current -- well, are you currently employed by RTC?

10 A I am.

11 Q And could you tell us your current
12 position with RTC.

13 A Yes. I'm the president of RTC.

14 Q And could you give us a brief summary
15 of your employment history with Resource
16 Technology.

17 A Sure. I was hired by RTC in October of
18 1995 as an environmental manager responsible for
19 permitting, and promoted in the fall of '96 to
20 director of construction and environmental
21 management and am responsible for permitting and
22 construction of facilities. Then in 1999 I was
23 promoted to vice president of construction and
24 environmental management, and then in May of 2001 I
25 was promoted to president of the company.

1 Q And is Resource Technology your only --
2 have you been employed by any other entity which has
3 hired you to deal with environmental issues?

4 A Oh, sure, yeah. I've been in the
5 environmental field since I graduated from college
6 in 1984 as a mechanical engineer. I worked for
7 General Motors Corporation as a plant environmental
8 engineer from 1985 to 1989. I worked for Chemical
9 Waste Management, Inc., a subsidiary of Waste
10 Management, Inc., from August of 1989 until
11 September of 1995 when they dissolved, and then I
12 went to work for -- at Chemical Waste Management,
13 Inc., I was a senior environmental engineer, and I
14 worked my way up to a facility manager position.

15 Q Now, Mr. Connolly, are you familiar
16 with RTC's contract with Commonwealth Edison for the
17 Pontiac facility?

18 A I am.

19 MR. SHAW: Your Honor, may I approach the
20 witness?

21 BY MR. SHAW:

22 Q I am handing you what has been marked
23 Exhibit A to the complaint.

24 MR. SKLARSKY: Your Honor, we'll stipulate if
25 it's the exhibit.

1 MR. SHAW: Oh. Stipulate to have it
2 admitted?

3 MR. SKLARSKY: Yes.

4 MR. SHAW: Your Honor, I don't know. It's
5 been attached to the complaint. I don't know if you
6 need another copy for admission into evidence.

7 THE COURT: Exhibit A?

8 MR. SHAW: Yes.

9 THE COURT: It's admitted by stipulation.

10 MR. SHAW: Okay.

11 BY MR. SHAW:

12 Q Mr. Connolly, you --

13 THE COURT: Do you have an objection to any
14 of the other exhibits that are attached to the
15 complaint? We can get that taken care of right
16 now. Or are there any other --

17 MR. SHAW: I think that's the only exhibit
18 that's --

19 THE COURT: All right. Fine.

20 MR. SHAW: -- attached to the complaint.

21 THE COURT: Excuse me for the question. Go
22 ahead.

23 MR. SHAW: Yes, that is.

24 BY MR. SHAW:

25 Q Mr. Connolly, are you aware of whether

1 or not there was an earlier contract between
2 Resource Technology Corporation and Commonwealth
3 Edison regarding the Pontiac facility?

4 A Yes, I am. There was.

5 Q Are you aware of the terms of that
6 contract?

7 A Yes.

8 Q Do you know what -- in the original
9 contract or the future -- the earlier contract, do
10 you know what the generation rate -- or could you
11 explain what a generation rate is first.

12 A Sure. The original contract was set
13 for a production capacity to the utility grid of
14 18,000 kilowatts or 18 megawatts. That's the
15 electrons that actually get onto the grid from the
16 site to the Commonwealth Edison utility grid.
17 That's what they receive.

18 Q And are you aware of what the
19 generation amount in the current contract is?

20 A Oh, yes.

21 Q And that amount is?

22 A 25,000 kilowatts or 25 megawatts.

23 Q Are you aware of why there was an
24 increase from 18 megawatts to 25 megawatts in the
25 earlier -- from the earlier to the current contract?

1 A Sure. Certainly in the last few years,
2 two to three, we've observed a market increase in
3 terms of the rate of waste acceptance by the
4 landfill, and the landfill I believe now is the
5 largest landfill in the state of Illinois. And with
6 current waste acceptance rates of ten to 12,000 tons
7 per day and the permitted acreage that they're
8 already permitted to expand into, it was clear that
9 we were going to go above that 18 megawatt level at
10 some point in the not so distant future. So we
11 elected to request the contract to be modified to 25
12 megawatts because we knew at that time from feedback
13 from the ComEd technical people that was about as
14 high as they could go without any major, major
15 upgrades to the substations which would cost several
16 hundred thousand to a million dollars. So we
17 decided to set it at 25 megawatts, and that would
18 cover us for several years until we exceeded that.

19 Q At the time the current contract was
20 entered into, are you aware of whether or not
21 Commonwealth Edison was given a copy of the ICC
22 order granting the Pontiac facility QSWEF status?

23 A I am aware of that.

24 Q And were they given a copy of that?

25 A Yes.

1 Q Do you know why they would have been
2 given a copy?

3 A Well, it's required under rider three
4 of that contract that the utility verify that the
5 facility is a qualified solid waste energy facility
6 in order to grant them the rider three. So we have
7 to produce to the utilities, that order to the
8 utilities, in order to get that rate.

9 Q Now, can you tell us briefly currently
10 what is the operational status of the Pontiac
11 facility.

12 A Well, as we sit here today we're only
13 producing up to the ten megawatt level because of
14 what we perceived as the risk of not getting paid
15 above that or what we were to get paid of that rider
16 four rate. We can't do anything with that rate. It
17 doesn't cover debt service, it doesn't cover fuel
18 costs, it doesn't cover operation maintenance. You
19 lose money at that rate. So as we sit here today
20 we're operating at ten megawatts roughly.

21 Q Mr. Connolly, I want to step back very
22 briefly. Were you --

23 THE COURT: I want to stop at this point.

24 MR. SHAW: Okay.

25 THE COURT: You lose money on the margin by

1 producing energy beyond the ten megawatt level?

2 THE WITNESS: That's correct, your Honor.

3 THE COURT: What costs do you have that
4 increase with the increased production of energy?

5 THE WITNESS: Well, we have a lot of fixed
6 costs to start with. Certainly the operation and
7 maintenance with the Solar turbine people on site --

8 THE COURT: I don't want to consider your
9 fixed costs. I want to know the marginal costs for
10 increasing the production of energy.

11 THE WITNESS: Sure. The supplemental fuel
12 that we use for parasitic loads primarily with Nicor
13 increases.

14 THE COURT: You pay more in gas to Nicor than
15 you would get from the energy you produce?

16 THE WITNESS: Yes.

17 THE COURT: On a marginal basis.

18 THE WITNESS: Yes.

19 MR. SHAW: Your Honor, I think one of the
20 issues is that when we're talking about above ten
21 megawatts, we're talking about above ten megawatts
22 and being paid at rider four rates, not --

23 THE COURT: That's what I understand, yes.
24 That's exactly what I understand.

25 THE WITNESS: The rider four rate is about

1 three cents more, and it costs us -- with debt
2 service and everything rolled in, it costs more than
3 that.

4 THE COURT: But your debt service is not a
5 marginal cost. That's why I've asked you about the
6 marginal costs. You're telling me you pay more to
7 the gas company to run your turbines than you
8 generate in receipts under this rider four rate?

9 THE WITNESS: That's correct. It works out
10 to be about four cents a kilowatt hour just for the
11 fuel cost.

12 THE COURT: Okay.

13 BY MR. SHAW:

14 Q Mr. Connolly, stepping back, were you
15 employed by Resource Technology Corporation at the
16 time that it submitted its petition for the ICC for
17 QSWEF certification for the Pontiac facility?

18 A Yes.

19 Q Are you aware of how those proceedings
20 transpired?

21 A Yes, yes.

22 Q And how are you aware of that or why
23 are you aware of that?

24 A I went along with Mr. Calvert to, I
25 believe, every one of those hearings. I certainly

1 wasn't the testifier there, he was as president of
2 the company. But I was with him at -- I don't think
3 I missed a single one as I recall here. I was with
4 him. It was the normal course for me to go along
5 with him to the hearings.

6 THE COURT: One other thing. Is the failure
7 to generate electricity beyond the ten megawatt
8 level requiring you to flare off methane gas?

9 THE WITNESS: No.

10 THE COURT: You're just leaving it in the
11 ground.

12 THE WITNESS: Right. There is enough
13 capacity with the landfill gas units to take the
14 current amount of gas from the landfill. There is
15 enough capacity there today, but that is growing
16 every day.

17 THE COURT: Okay. I'm not following you.
18 How much gas do you need to remove from the landfill
19 to prevent environmental problems? Are you able to
20 -- well, let me say this: If you were being paid
21 more than Commonwealth Edison is paying now for
22 electricity beyond ten megawatts, could you generate
23 more than ten megawatts?

24 THE WITNESS: Yes, we could.

25 THE COURT: There is enough methane gas for

1 you to do that?

2 THE WITNESS: No. There is a distinction
3 there. We are bringing in some Nicor gas from Nicor
4 as supplemental fuel for the entire facility in
5 order to provide primarily the parasitic loads for
6 the plant above and beyond that. So that is what
7 adds in above the --

8 THE COURT: Oh. There is not enough methane
9 gas there now to generate more than ten megawatts.

10 THE WITNESS: That's correct.

11 THE COURT: But you use Nicor gas where you
12 could otherwise be using methane gas to run the
13 plant?

14 THE WITNESS: We use methane gas from Nicor
15 to provide parasitic load to run the 3,000
16 horsepower motors that we have as opposed to
17 purchasing it directly from ComEd. And then we do
18 produce above that in accordance with Federal Energy
19 Regulatory Commission law.

20 THE COURT: You're going to have to bear with
21 me because I'm still having some trouble
22 understanding this. The amount of methane gas being
23 generated now is not sufficient to produce more than
24 10 megawatts of electricity.

25 THE WITNESS: Your Honor, I want to

1 distinguish that methane gas is -- comes from the
2 landfill. It's the same gas from --

3 THE COURT: I understand.

4 THE WITNESS: -- the landfill and the
5 pipeline.

6 THE COURT: That's right.

7 THE WITNESS: So I'll distinguish that the
8 amount of landfill gas as we sit here today --

9 THE COURT: That's what I said.

10 THE WITNESS: Right.

11 THE COURT: Methane gas from the landfill.

12 THE WITNESS: Right.

13 THE COURT: Landfill gas is not sufficient to
14 generate more than 10 megawatts of electricity for
15 Commonwealth Edison.

16 THE WITNESS: It's close. We're increasing
17 because --

18 THE COURT: Okay. I understand that. But I
19 understand also that you're asserting that
20 Commonwealth Edison failed to pay you for
21 substantial amounts above 10 megawatts.

22 THE WITNESS: That's correct.

23 THE COURT: So was there more landfill gas
24 earlier than there is now, or was this a situation
25 of using methane gas from the utility company as

1 opposed to methane gas from the landfill to run the
2 turbines?

3 THE WITNESS: It's the latter, your Honor.
4 We use methane gas from the utility company to run a
5 portion of the plant, as I described previously.

6 THE COURT: And that's why you say that it's
7 not economical for you now to generate more
8 electricity, because the only way for you to get
9 more methane gas is to buy it from the gas company
10 at 4 cents per kilowatt hour, if you want to call it
11 that, when you can only make 3 cents per kilowatt
12 hour on the rider four?

13 THE WITNESS: That's correct.

14 THE COURT: All right. I guess I understand
15 it now. Thank you.

16 If the landfill were generating more
17 landfill gas, it would be economical for you to sell
18 even at the rider four on a marginal level. See,
19 what I wasn't understanding is why would it cost you
20 so much on a margin that you couldn't make money
21 even at the lower rate. And it seems to me that if
22 there were enough landfill gas that you could run
23 your turbines and sell gas to -- and convert energy
24 at more than a 10 megawatt level, that on the margin
25 it would be profitable, perhaps not profitable

1 enough to sustain RTC's operations, debt service, et
2 cetera, but on the margin it would be profitable.

3 THE WITNESS: I think from a pure marginal
4 perspective, that may be correct.

5 THE COURT: What I didn't understand before,
6 with that in mind, is why would you not produce more
7 than 10 megawatts of electricity if you had the
8 landfill gas to do it. But you don't, and that
9 answers my question.

10 Okay. Go ahead, Mr. Shaw.

11 BY MR. SHAW:

12 Q Mr. Connolly, as I was asking you
13 earlier, you had stated you had attended the
14 proceedings regarding RTC's position.

15 MR. SHAW: Your Honor, if I may approach the
16 witness, I'm going to hand him, unfortunately, my
17 only copy, which I can give to the court, and I've
18 already shown it to ComEd's counsel, of the actual
19 petition that was submitted on behalf of RTC.

20 BY MR. SHAW:

21 Q Mr. Connolly, can you review that
22 document, please.

23 A Okay.

24 Q Mr. Connolly, are you familiar with
25 that document?

1 A I am.

2 Q Does that appear to be a true and
3 correct copy of -- what is that document?

4 A Well, this is Mr. Calvert's document
5 dated January 7th, 1997, as then president of RTC,
6 petitioning for qualifying status of the QSWEF under
7 the Illinois Public Utilities Act. This is a letter
8 going to Donna -- Ms. Donna Peton, Chief Clerk with
9 the Illinois Commerce Commission, and signed by Mr.
10 Calvert.

11 Q And you know that that's Mr. Calvert's
12 signature?

13 A Oh, yes.

14 Q Do you believe that that's a -- is that
15 a true and correct copy of the petition as
16 submitted, believe it is?

17 A Yes, I believe it is.

18 MR. SHAW: Your Honor, I would like to submit
19 the petition into evidence.

20 MR. SKLARSKY: No objection.

21 THE COURT: It's admitted.

22 BY MR. SHAW:

23 Q Mr. Connolly, are you aware of --

24 THE COURT: I guess we'll call that Exhibit
25 B.

1 MR. SHAW: Your Honor, I actually have
2 stickers which...

3 BY MR. SHAW:

4 Q Mr. Connolly, are you aware of anywhere
5 in that document where it sets out megawatt maximum
6 value or maximum capacity for the Pontiac facility?

7 A Let me just look at it real quick, but
8 I don't think it has it in there.

9 There is no megawatt number in this
10 document.

11 MR. SHAW: Your Honor, I don't know if you
12 want just to have the exhibits set up here for you.

13 THE COURT: That's fine. That's fine.

14 BY MR. SHAW:

15 Q Mr. Connolly, you testified earlier
16 that you were present at the proceedings. Are you
17 aware of any testimony at the proceeding regarding
18 what RTC thought it would build at the Pontiac
19 facility?

20 A I'm aware of general conversations
21 about all the facilities.

22 Q Are you aware of what was -- well,
23 could you reiterate or do you remember specifically
24 or generally what was said about the Pontiac
25 facility?

1 A I can't recall -- I recall, you know,
2 specific conversation where we talked about the
3 aggregate megawatt size for the whole company and
4 how big we were going to be inside the state of
5 Illinois versus outside the state of Illinois. I
6 can't tell you an exact number that we talked about
7 as far as Pontiac, but the concept was clearly,
8 clearly estimates and just best judgment at the time
9 of what we thought the facilities would be like.

10 Q And you testified earlier that -- well,
11 you testified earlier that circumstances have
12 changed since 1996 and 1997 at the Pontiac facility?

13 A Yes.

14 Q And could you -- and I believe you
15 testified that it is -- drastically changed in size?

16 A That is correct.

17 Q Mr. Connolly, are you aware of whether
18 RTC also submitted for certification and was
19 certified as a qualifying facility under federal
20 law?

21 A Yes, I'm aware of that.

22 Q And are you aware of any change in that
23 status at this time?

24 A No.

25 THE COURT: Okay. So under federal law it's

1 just a QF and under state law it's this QSWEF?

2 MR. SHAW: The federal government is more
3 efficient.

4 THE COURT: Is that right?

5 THE WITNESS: That's correct.

6 THE COURT: Okay.

7 MR. SHAW: Your Honor, may I approach?

8 THE COURT: Yes.

9 BY MR. SHAW:

10 Q I'm handing you, Mr. Connolly, what is
11 the initial petition to -- I believe it's FER
12 regarding the QF status. Mr. Connolly, are you
13 familiar with that document?

14 A I am.

15 Q Could you tell us what that document
16 is.

17 A Sure. This is a petition dated July 1,
18 1996, again signed by Mr. Calvert, then president of
19 RTC, going to Ms. Lois Cashtell (phonetic), the
20 secretary of the Federal Energy Regulatory
21 Commission in Washington, D.C., requesting
22 qualifying facility status for our facility in
23 Pontiac, Illinois.

24 Q And are you familiar with Mr. Calvert's
25 signature?

1 A I am.

2 Q And you believe that's a true and
3 correct copy of his submission?

4 A Yes.

5 MR. SHAW: Your Honor, I would like to have
6 that admitted into evidence. I believe it would
7 be --

8 THE COURT: C.

9 MR. SHAW: -- C.

10 THE COURT: Yes.

11 No objection?

12 MR. SKLARSKY: No objection.

13 THE COURT: It will be admitted.

14 MR. SHAW: Thank you.

15 BY MR. SHAW:

16 Q Mr. Connolly, going back to the ICC
17 proceedings --

18 MR. SHAW: Judge, I believe you were already
19 actually handed an order, the ICC order.

20 MR. SKLARSKY: I don't know if I gave it to
21 the judge.

22 THE COURT: No. I think Mr. Sklarsky read
23 from it, but I didn't think he gave me a copy.

24 MR. SKLARSKY: No.

25 MR. SHAW: Your Honor, I'm going to assume

1 that there will be no objection to submission --

2 MR. SKLARSKY: No objection.

3 MR. SHAW: -- of that into evidence. I have
4 marked that Exhibit D.

5 THE COURT: You might want to just give the
6 date or some indication of what the exhibit is
7 titled so it's clear in the record.

8 MR. SHAW: Oh, the title -- the exhibit is
9 titled "Illinois Commerce Commission." It's dated
10 October 10th, 1997, Re 97-0031, et al. It's a cover
11 letter along with a certified copy of the order
12 entered by this commission, signed by Donna Caton,
13 C-a-t-o-n, Chief Clerk of the Commission.

14 THE COURT: That's Exhibit D.

15 BY MR. SHAW:

16 Q Mr. Connolly, are you aware of whether
17 or not the ICC, through its order, consolidated a
18 number of RTC petitions that were pending at the
19 time for various facilities regarding their QSWEF
20 status in the state of Illinois?

21 A Yes.

22 Q And were those matters consolidated?

23 A Yes.

24 Q Mr. Connolly, based on the ICC rulings
25 set forth in the order, are you aware of what RTC

1 had approved in its maximum, I'll call it,
2 megawattage for the state of Illinois for its
3 facility output?

4 A Sure. 65 megawatts for these 15.

5 Q Mr. Connolly, are you aware currently
6 of what megawattage RTC is producing at its --
7 currently producing at its QSWEF facilities in the
8 state of Illinois at this time?

9 A As we sit here today, we're probably in
10 the 25 megawatt range, but we've hit 35.

11 Q And if -- hypothetically, if you were
12 operating in the 20 or 25 load at Pontiac, where
13 would that place you in terms of complete maximum --
14 you know, complete aggregate megawattage in the
15 state of Illinois?

16 A It would be close to 40, maybe 45.

17 Q Are some of your -- are you aware of
18 whether or not some of your QSWEF sites that are
19 operating right now, are they producing less than
20 estimated at the time?

21 A Oh, yes. Yes.

22 Q Now, Mr. Connolly, I know you're aware
23 of this. Could you briefly explain currently what
24 comprises the facility at Pontiac.

25 A Sure. Well, first off we have an

1 extensive landfill gas collection system over a 110
2 acre waste parcel of land and that brings landfill
3 gas into the plant as the primary fuel source. We
4 have three Solar, and that's the manufacturer's
5 division at Caterpillar, Taurus turbines and one
6 Solar Titan turbine. That's what the facility
7 comprises of. The total megawatt nameplate of those
8 four is just over 29 megawatts.

9 Q Is that the facility that was
10 contemplated back in 1996 or 1997 when RTC was
11 petitioning the Commission?

12 A Oh, absolutely.

13 Q And when was this facility constructed
14 or placed on the landfill premises?

15 A We started construction in August of
16 2000.

17 Q Was RTC able to afford to build that
18 facility out of its own funds?

19 A No.

20 Q How did RTC enable -- how was RTC able
21 to pay for the construction or provide for the
22 construction of that facility?

23 A Well, we signed a contract design/build
24 general contractor contract with Network Electric
25 Company, and they also brought in 100 percent

1 financing for the project, construction financing.

2 Q And do you know -- are you aware of the
3 amount of that financing?

4 A Yeah. It was done in stages, but the
5 first stage in August of 2000, the rate was \$1.173
6 million per megawatt, multiply that by 15 megawatt
7 nameplate at that time, I think it comes out to 18
8 million, \$19 million.

9 Q Are you aware if Network Electric
10 Corporation received any collateral or a security
11 agreement for this financing?

12 A Oh, sure. They did.

13 Q And are you aware what their collateral
14 is?

15 A Well, they have the entire plant and
16 possibly the collection system, although I don't
17 recall exactly as I sit here today, but they have a
18 first position on the facility for sure.

19 Q Are you aware of the current
20 outstanding balance on the NEC -- I'll call it the
21 NEC loan at the Pontiac facility?

22 A Well, I need to step back here a bit,
23 because we recently closed the financing with
24 Aquilla who took NEC out of their position on three
25 Taurus turbines. NEC is still the financier for the

1 Titan turbine. So the facility I know with Aquilla
2 on Pontiac is somewhere in the neighborhood of \$24
3 million, and I would imagine most of that is still
4 owed since it's a pretty fresh closed deal. And
5 then the facility for the Titan with Network
6 Electric came to about \$17 million, a little under
7 that, but most of that is still owed.

8 Q Are you aware of whether NEC has
9 provided financing to RTC with regards to its
10 facilities at any other landfill sites?

11 A Sure.

12 Q Which sites are those?

13 A The Congress Development Company
14 landfill in Hillside, Illinois, and the Beecher
15 Development Company landfill in Beecher, Illinois.
16 Not the landfill, but the landfill gas-to-energy
17 project at those facilities.

18 Q Could you explain briefly in terms of
19 size and production capacity where the Beecher and
20 the Congress landfills fall generally within -- I'll
21 call it the RTC -- "empire" is not a good choice of
22 words, but the variety of RTC landfills that they're
23 working on?

24 A The Congress site is built with three
25 Taurus turbines, nameplate 5 megawatts each. So the

1 nameplate capacity is 15 megawatts. I will say it
2 won't produce quite that much because it's within a
3 building, as required by the Village of Hillside, so
4 it raises some of the ambient temperature and drops
5 the production a little bit. But it's in the 13
6 megawatt to 15 megawatt range, probably closer to
7 13. Sorry, long answer.

8 The Beecher is set up as one Taurus
9 unit, nameplate 5 megawatts.

10 Q So if you could -- in more laypeople
11 terms, if you could just say is Congress your first,
12 second, third largest facility and do the same for
13 Beecher, where does it fall in the scale of your
14 operating facilities right now?

15 A Sure. Congress is our second largest
16 facility behind Pontiac, and then Beecher would be
17 the third.

18 Q And just briefly could you tell me are
19 you aware of what the estimated cash flow out of the
20 Congress facility is on a monthly basis?

21 A Well, we're bringing it up to capacity,
22 but right now it's about 400,000 a month I think
23 gross --

24 Q And how soon will it reach capacity?

25 A Later on this year. We'll do some

1 upgrades to the well field to --

2 Q And at that point cash flow generated
3 from?

4 A It should be about 600,000 a month.

5 Q Could you give me the same figures, or
6 are you aware of the same figures for Beecher?

7 A Sure.

8 Q Could you tell me then?

9 A I think it's about 220,000 a month for
10 Beecher.

11 Q And that's at capacity, or is that
12 currently?

13 A No, that's at capacity. And to be
14 clear, Beecher is not running as we speak today.
15 We're finalizing the construction on the collection
16 system.

17 THE COURT: Are you talking about net or
18 gross numbers here?

19 THE WITNESS: I'm talking about gross, your
20 Honor.

21 THE COURT: Okay.

22 BY MR. SHAW:

23 Q Now, Mr. Connolly, do you understand
24 what the term "cross-collateralization" means?

25 A I do.

1 Q Are you aware of whether any fees loan
2 relating to the Pontiac facility, is that --

3 A Yes.

4 Q -- loan cross-collateralized with any
5 of its other loans?

6 A It is. It's cross-collateralized with
7 Congress and Beecher loans.

8 Q And its collateral -- NEC's collateral
9 at those two facilities, can you tell me what that
10 is comprised of?

11 A Congress and Beecher?

12 Q Yes.

13 A Yes. The collateral is clearly the
14 energy plant which comprises the three major
15 turbines and all the ancillary equipment. Congress,
16 I don't believe they have a first on the collection
17 system at Congress. They may have a second position
18 there. And then at Beecher they clearly have the
19 landfill gas-to-energy plant with the turbine, all
20 the ancillary equipment, that value. And, again, to
21 be complete, I'm not certain of their position on
22 the collection system.

23 Q Mr. Connolly, you previously mentioned
24 a recent closing on a financing with Aquilla. Are
25 you aware of whether Commonwealth Edison was aware

1 that you were entering into this financing at the
2 time you were doing so?

3 A Yes, I am aware of that.

4 Q And why are you aware of that or how
5 are you aware of that?

6 A One of the closing documents or
7 pre-closing documents I had to sign was the consent
8 by Commonwealth Edison.

9 MR. SHAW: May I approach the witness, your
10 Honor?

11 THE COURT: Yes.

12 MR. SHAW: Your Honor, I have handed the
13 witness what is titled on Aquilla Energy Capital
14 Corporation a letter to Commonwealth Edison, which
15 purports to be signed by Janet Bieniak dated April
16 8th, 2002.

17 BY MR. SHAW:

18 Q Mr. Connolly, are you familiar with
19 this document?

20 A I am.

21 THE COURT: Do we have a stipulation as to
22 this as well?

23 MR. SKLARSKY: Yes.

24 MR. SHAW: Okay. Thank you, Judge. I will
25 mark it.