

1 APPEARANCES:

2 MR. MICHAEL S. PABIAN
3 10 South Dearborn Street
4 35th Floor
5 Chicago, Illinois 60606
6 Appearing for the Petitioner,
7 Commonwealth Edison Company;

8 SONNENSCHNEIN, NATH & ROSENTHAL, by
9 MR. THOMAS A. ANDREOLI
10 233 South Wacker Drive
11 Suite 8000
12 Chicago, Illinois 60606
13 Appearing for Respondents,
14 PDV Midwest Refining, L.L.C. and
15 CITGO Petroleum Corporation;

16 PIPER RUDNICK, by
17 MR. DAVID I. FEIN and
18 MR. CHRISTOPHER J. TOWNSEND
19 203 North LaSalle
20 Suite 1500
21 Chicago, Illinois 60601
22 Appearing for Respondents,
The Chicago Carbon Company,
The Needle Coker Company, and
Union Oil Company of California.

23 SULLIVAN REPORTING COMPANY, by
24 Christine L. Kowalski, RPR

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

I N D E X

Witnesses: Direct Cross direct cross By
(None.)

Number E X H I B I T S In Evidence
 For Identification

(None so marked.)

1 JUDGE GILBERT: Pursuant to the authority of the
2 Illinois Commerce Commission, I now call
3 Docket 02-0277.

4 If I could have the appearances
5 for the record, please, beginning with the
6 Complainant/Petitioner.

7 MR. PABIAN: For ComEd, your Honor, Michael S.
8 Pabian, P-a-b-i-a-n, 10 South Dearborn Street,
9 35th Floor, Chicago, Illinois 60606. My telephone
10 number, (312) 394-5831.

11 MR. FEIN: On behalf of the Needle Coker Company
12 and the Chicago Carbon Company, the law firm of
13 Piper Rudnick, 203 North LaSalle Street, Suite 1500
14 Chicago, Illinois 60601, by David I. Fein and
15 Christopher J. Townsend.

16 MR. ANDREOLI: Thomas A. Andreoli of the law firm
17 of Sonnenschein, Nath & Rosenthal, 203 South Wacker
18 Drive, Chicago 60606, on behalf of CITGO Petroleum
19 Corporation and PDV Midwest Refining, L.L.C.

20 JUDGE GILBERT: Okay. I have in hand a document
21 entitled The Respondent's Declaration in Support of
22 Joint Motion for Summary Judgment. This was filed

1 in response to my request for clarification of the
2 motion for summary judgment made by the Respondents
3 in the case.

4 I have some questions, I think,
5 for all the parties. First let me ask with respect
6 to this document if everyone would take a look at
7 page 2 to make sure that I have in fact received
8 clarification. If you would look at the first full
9 paragraph on that page that begins with the words
10 "summary judgment," that sentence says that summary
11 judgment is appropriate as to any and all relief
12 sought by ComEd in this matter based upon the claim
13 that a prohibited resale took place. And in that
14 paragraph Respondents go on to say that they seek
15 summary judgment as to such claims.

16 Now, if you'll then look at the
17 next paragraph on that page under Roman Numeral II,
18 in the first sentence it says the Respondents seek
19 partial summary judgment. Shall I assume that the
20 second paragraph to which I've referred you takes
21 precedence over the first paragraph I referred you
22 to and that you are in fact seeking only partial

1 summary judgment and not addressing any and all
2 claims for relief made by ComEd?

3 MR. ANDREOLI: The answer is yes, your Honor.

4 JUDGE GILBERT: Okay. And so I would look to
5 each of the numbered and letter-designated sections
6 of your declaration in order to understand exactly
7 what your motion is directed to; would that be
8 correct?

9 MR. ANDREOLI: Yes your Honor.

10 JUDGE GILBERT: Okay. Let me ask at this point
11 then, ComEd, any response to the declaration?

12 MR. PABIAN: No, your Honor. We feel that our
13 reply to the initial motion was adequate to cover
14 the arguments as clarified by Respondents.

15 JUDGE GILBERT: Okay. All right. One of the
16 points made in the declaration is that there are
17 forward-looking claims being made by ComEd in the
18 complaint. And I understand that the complaint is
19 denominated both a petition and a complaint, but
20 just for the sake of simplicity I'll refer to it as
21 the complaint.

22 Do you believe Respondents are

1 correct that you are looking for forward-looking
2 relief?

3 MR. PABIAN: Yes, your Honor. We're looking for
4 the authority to -- direction to establish
5 appropriate billing arrangements among the entities
6 out there that are actually receiving service. And
7 those billing and metering arrangements have not
8 been fully established yet. So yes, to that extent
9 we are asking for forward-looking relief. We would,
10 yes, keep it like that.

11 JUDGE GILBERT: All right. Now, in Footnote 1 to
12 the declaration, the Respondents purport to set out
13 what the current arrangements are between ComEd and
14 each of the Respondents.

15 MR. PABIAN: Yes.

16 JUDGE GILBERT: Is the information in that
17 footnote correct as far as you're concerned,
18 Mr. Pabian?

19 MR. PABIAN: Let me just check one moment, your
20 Honor.

21 JUDGE GILBERT: Okay.

22 MR. PABIAN: I believe, your Honor, it's

1 partially correct. The -- there was a meter for
2 Chicago Carbon to which billing had been
3 established, but that meter does not cover all of
4 the service being received by Chicago Carbon at the
5 facility.

6 So it is our contention that the
7 current arrangement, the metering arrangement out
8 there, still involves an inappropriate provision of
9 either resale or inappropriate provision of service
10 to both Needle Coker and Chicago Carbon through
11 meters that are currently being billed to PDV
12 Midwest, your Honor.

13 Now, part of that load is being
14 covered under a separate meter to Chicago Carbon,
15 but not all of it. So we still would need
16 forward-looking relief to establish the correct
17 metering for all of the load that is being taken by
18 both Chicago Carbon and Needle Coker.

19 JUDGE GILBERT: All right. Do you have your
20 complaint with you?

21 MR. PABIAN: No, I don't your Honor. I'm sorry.

22 MR. FEIN: I have a copy of it.

1 JUDGE GILBERT: With regard to the concerns about
2 metering that you've just expressed, although I
3 think I have an answer to this question I'm going to
4 ask you, where in your prayer for relief would I
5 look for the specific prayer that seeks to have the
6 metering arrangements you've just discussed
7 addressed?

8 MR. PABIAN: It would be in Paragraph F,
9 including but not limited to directing Unocal,
10 Needle Coker, Chicago Carbon, as a condition for
11 receiving electric service to install electric
12 facilities required by its standard terms and
13 conditions necessary for ComEd to provide metering
14 of electric service to their facilities as separate
15 retail customers.

16 JUDGE GILBERT: Let's go back to the footnote on
17 page 2 of the declaration.

18 MR. FEIN: Page 3?

19 JUDGE GILBERT: I'm sorry, page 3. Thank you.

20 Second sentence, Since that time,
21 referring to January 29th of last year, Chicago
22 Carbon has been served under ComEd Rate 6L. As far

1 as you know, that's correct, Mr. Pabian?

2 MR. PABIAN: As far as I know, that's correct as
3 to -- with respect to some of its load but not all
4 of its load out there.

5 JUDGE GILBERT: Okay. And to the extent the load
6 is being served under 6L, does ComEd object to that?

7 MR. PABIAN: No.

8 JUDGE GILBERT: All right. So going forward, you
9 wouldn't want any relief with respect to that part
10 of the load that's being served on 6L?

11 MR. PABIAN: Right. It's the remaining load that
12 they're essentially taking through PDV Midwest.

13 JUDGE GILBERT: All right. In the next sentence
14 of that footnote it says, From January 29th, 2002,
15 through approximately May 21st of this year, CITGO
16 and Needle Coker received electric service under a
17 combination of Rate RCDS and Rider PPO-MI. Would
18 that be correct as far as you know?

19 MR. PABIAN: Well, we -- it's our position that
20 they, as well as Chicago Carbon, received service
21 that was being provided to PDV Midwest or CITGO
22 under a RCDS and PPO-MI arrangement. But it's still

1 our contention that Needle Coker was inappropriately
2 being served under that arrangement.

3 JUDGE GILBERT: So you're saying that Needle
4 Coker should not have been part of that RCDS and PPO
5 contract?

6 MR. PABIAN: They were not a party to that
7 contract, that's correct.

8 JUDGE GILBERT: But you're saying they did
9 receive service pursuant --

10 MR. PABIAN: They were --

11 JUDGE GILBERT: -- to that contract?

12 MR. PABIAN: -- taking service -- service was
13 being resold, if you will, by or provided by PDV
14 Midwest or CITGO, I believe is their agent, to
15 Needle Coker and also during that time to Chicago
16 Carbon as well for part of their load.

17 JUDGE GILBERT: All right. I have another
18 question for you.

19 But before I get to that, for the
20 Respondents, when you say in that sentence that
21 CITGO as well as NCC received electric service, by
22 CITGO are you referring to the PDV Midwest Refinery

1 or do you mean anything else?

2 MR. ANDREOLI: That's exactly what I mean.

3 JUDGE GILBERT: Okay.

4 MR. ANDREOLI: Or what we mean rather, I
5 apologize.

6 JUDGE GILBERT: All right. Then for you,
7 Mr. Pabian, with regard to your disagreement with
8 the statement in that third sentence of the footnote
9 on page 3, what portion of your prayer for relief
10 would I look to to see what you're asking for with
11 respect to that sentence?

12 MR. PABIAN: Okay. Well, I would think at a
13 minimum A -- Paragraph A, your Honor, that there's
14 been a prohibited resale -- I'm sorry, A pertains to
15 the Rate CS contract, I'm sorry.

16 C and D are probably the most
17 operative paragraphs with respect to these. The --
18 it's ComEd's contention that at all times from the
19 commencement of the Rate CS contract to the present,
20 including the period of time after the termination
21 of the Rate CS contract, that both Needle Coker and
22 Chicago Carbon should have been considered separate

1 customers and served accordingly.

2 By asking as to a finding of the
3 correct rate, the net amount billed would be
4 affected -- even if it's under Rate 6L, could be
5 affected by the total load served for each customer.
6 So a reconfiguration of the appropriate rates to be
7 billed individual customers, even during the period
8 during which PDV Midwest or CITGO was served under
9 the Rate PPO -- I'm sorry, Rider PPO and Rate RCDS
10 arrangement, the relief we are requesting are under
11 Paragraphs C and D, your Honor.

12 JUDGE GILBERT: All right. Is my understanding
13 correct that the complaint in its current written
14 form does not mention any of these other
15 arrangements? And by that I mean the Rate RCDS
16 Rider PPO contract, the service to Chicago Carbon
17 under Rate 6L and the current service for CITGO and
18 NCC from Exelon Energy.

19 MR. PABIAN: Well, it certainly wouldn't
20 reference Exelon Energy since that was a contract
21 that was just entered into this May. Is that
22 correct?

1 MR. FEIN: That is correct.

2 MR. PABIAN: I mean, that was just recently
3 entered into --

4 JUDGE GILBERT: Right.

5 MR. PABIAN: -- by them. But the -- and since
6 the complaint was filed on, I believe, August 2nd,
7 it probably wouldn't have mentioned the PPO
8 arrangement. However, it is -- it is broad enough
9 in its request for relief to -- to the extent that
10 we are requesting a ruling that in fact Needle Coker
11 and Chicago Carbon should appropriately be
12 considered separate customers who should be metered
13 and billed separately for service, that prayer for
14 relief applies to any service arrangement out there,
15 no matter whether it was under a Rate CS contract or
16 under the Rider PPO tariffs.

17 JUDGE GILBERT: Well, let me ask you a two-part
18 question. What facts would I use in order to make
19 that finding and what facts would I refer to in
20 order to resist their motion for summary judgment
21 with respect to these new arrangements?

22 MR. PABIAN: Well, first of all, I think their

1 motion for summary judgment essentially temporally
2 only refers to the period of time during the Rate CS
3 contract, I believe. And to that extent, the
4 provision of service after that under Rider PPO was
5 probably at least not relevant for the motion's
6 sake, I suppose.

7 With respect to the issues as
8 applied to the Rate CS contract, we believe that we
9 supported our position in our reply and in the
10 affidavits we submitted in response to the motion
11 for summary judgment that basically the contract --
12 the Rate CS contract was only with PDV Midwest, that
13 it incorporated other terms and conditions -- tariff
14 terms and conditions by reference which prohibited
15 resale, and that a customer is a single entity and
16 each separate entity has to have a separate service
17 arrangement with us.

18 So I mean, all of those facts, we
19 believe, are set forth in our response to the motion
20 for summary judgment.

21 JUDGE GILBERT: All right. Well, my concern --
22 and I'll voice that and I'll express my concern to

1 you folks as well -- I'm sorry, for the record, by
2 "you folks," I meant the Respondents -- is that just
3 hypothetically, were I to grant their motion for
4 summary judgment on the merits as opposed to on the
5 arbitration issue -- and I don't mean by posing that
6 question that I'm inclined to do that, but just to
7 pose that hypothetically -- I would then be left
8 with a forward-looking case regarding contractual
9 arrangements and tariff arrangements that have not
10 even been mentioned in the complaint itself.

11 Now, I'll turn to the Respondents
12 and say I have had frustration with respect to both
13 of your cases, and I think that frustration was
14 obviously reflected in my request for a
15 clarification of your motion, as to simply what the
16 case is about, as to what issues are before me, what
17 parties are before me which began from the very
18 beginning when the petition was filed, what issues
19 are before me, and what facts are being alleged in
20 support of those issues. And I'm still not clear on
21 this.

22 MR. PABIAN: I may be wrong, your Honor, but I

1 think -- I'd have to go back and check, it's been
2 awhile. But we prefiled -- I mean, we filed direct
3 testimony. I'd have to go back and check if we got
4 into the Rider PPO issue in our direct testimony,
5 and we may have, and I'd have to go back and check.
6 But where we were looking at a full hearing on all
7 of our prayer for relief for the entire period of
8 time from the commencement of the Rate CS contract
9 up to the present -- and I believe, and subject to
10 check -- I believe we may have addressed the
11 Rider PPO issue in that testimony.

12 JUDGE GILBERT: I'd have to see because I'm not
13 sure either, to tell you the truth. I have not
14 looked at your testimony.

15 MR. PABIAN: Right. And there would be no reason
16 for you to have looked at that testimony.

17 JUDGE GILBERT: Right. The motion for summary
18 judgment and the declaration with respect to that
19 motion, assuming that Unocal is not a party to this
20 case -- and first I'll ask Respondents, that's
21 correct, is it not?

22 MR. FEIN: That's correct.

1 JUDGE GILBERT: Okay. Is it ComEd's position
2 that Unocal is a party to the case?

3 MR. PABIAN: No, your Honor, it's not necessary.
4 No, it's not.

5 JUDGE GILBERT: No answer has been filed on
6 behalf of Needle Coker; that's correct, isn't it?

7 MR. FEIN: You're dating my memory, your Honor,
8 but I believe when the answer was filed, it might
9 have just been filed by Chicago Carbon at the time
10 the answer was filed. Jogging my memory on timing
11 with this case, I believe there might have been some
12 time before Needle Coker had been properly served
13 and we went through the notice provision and all of
14 that.

15 JUDGE GILBERT: Okay. Well, I took a look both
16 at my own files and in the official file and I note
17 the answer from Chicago Carbon was on September 13th
18 of 2002; Needle Coker's appearance was approximately
19 three months later, December 6th of 2002. And I
20 didn't see an answer, and I just wanted to confirm
21 if that were the case, that in fact no answer had
22 been filed.

1 Also if I could, Mr. Pabian, if
2 you would take a look at the prayers for relief --

3 MR. PABIAN: Yes, sir.

4 JUDGE GILBERT: -- on page 15 of the verified
5 complaint and amended verified petition. I made
6 reference to this -- to a footnote in my ruling
7 requesting clarification on the motion for summary
8 judgment. And I will admit that this may be
9 somewhat of a pedantic concern and especially
10 alongside some of the other concerns I have with
11 regard to the shape of the case, but if you'd look
12 at Paragraph C --

13 MR. PABIAN: Yes, your Honor.

14 JUDGE GILBERT: -- in the second line when we see
15 PDV Midwest's -- and that's apostrophe s -- and
16 Unocal's -- apostrophe s -- Needle Coker and Chicago
17 Carbon operations at the Lemont facility.

18 MR. PABIAN: Yes.

19 JUDGE GILBERT: As I indicated in my footnote in
20 my ruling, I had -- or I perceived some ambiguity
21 with respect to what you were asking for there.

22 MR. PABIAN: Right. The only -- it is our

1 position, and I think we've dealt with this issue in
2 our direct testimony -- and again, your Honor would
3 have no reason to have referred to that -- it's our
4 position that PDV Midwest is now -- it would be
5 appropriately billed for the refinery only, and that
6 Needle Coker and Chicago Carbon should be billed
7 separately for the usage at the Needle Coker coking
8 plant and the calciner plant. And none of the
9 billings to PDV Midwest should include usage at
10 those other two facilities.

11 JUDGE GILBERT: Right. And I do understand the
12 basic case, at least as I thought the basic case was
13 shaped, and I've done a considerable amount of
14 research with respect to the issues that were raised
15 both in the complaint and petition and in the motion
16 for summary judgment.

17 But I think what I'm asking here
18 is just almost a basic question of syntax. Given
19 that PDV Midwest's is a possessive in that sentence,
20 what does that possessive refer to in the rest of
21 the sentence?

22 MR. PABIAN: It refers to operations, your Honor.

1 And it -- granted, it's a poorly drafted sentence.

2 I must admit I had nothing to do with it.

3 JUDGE GILBERT: Okay. That's not exactly an
4 admission, it's more of an exculpation, but...

5 MR. PABIAN: What we were meaning there -- what
6 we're meaning there is basically that PDV Midwest's
7 refinery should be billed separately from Needle
8 Coker and Chicago Carbon's operations.

9 JUDGE GILBERT: Right. So while it's not here,
10 if I wanted to understand that sentence, perhaps I
11 could add the word "operations" after Midwest's?

12 MR. PABIAN: Yes. Yes, your Honor. Absolutely.

13 JUDGE GILBERT: And that would -- all right.

14 All right. Let's go off the
15 record for a moment.

16 (Discussion off the record.)

17 JUDGE GILBERT: All right. We had an extensive
18 off-the-record discussion with respect to some of
19 the issues I was raising when we were last on the
20 record. The parties were very forthcoming and I am
21 completely appreciative of both their spirit of
22 cooperation and with the fairness that they extended

1 to each other.

2 We've selected the date of Friday,
3 June 13th, by which the parties will jointly file
4 an issues list. That will be a list of the issues
5 for summary judgment. That list will serve as a
6 clarification of what all of the parties expect to
7 be resolved by the motion for summary judgment that
8 was filed by the Respondents. And the ordinary
9 rules for summary judgment will apply to my
10 resolution of those issues. I'm trying to think if
11 there's anything more to say now before we close the
12 record today.

13 MR. ANDREOLI: With expect to the existing
14 schedule, your Honor.

15 JUDGE GILBERT: Right. The existing schedule
16 will have to be suspended. I'm thinking whether we
17 should set a certain date. Let's go off the record
18 for a moment.

19 (Discussion off the record.)

20 JUDGE GILBERT: All right. I'm forgetting a
21 little bit where I left off, but I'll say this:
22 After the parties file their joint statement of the

1 issues on June 13th, I will endeavor to render a
2 written decision by a time that will enable us to
3 have a status Wednesday, the 2nd of June (sic) at
4 11:00 a.m. And so we'll schedule that time subject
5 to the possibility that I won't have rendered that
6 decision by then, but that's my intention.

7 So for now we're continued until
8 Wednesday the 2nd at 11:00. The current schedule is
9 suspended. I have not looked at ComEd's filed
10 testimony, and I won't do that until the time is
11 appropriate which means after resolution of the
12 motion for summary judgment.

13 Anything else we have to discuss?

14 MR. ANDREOLI: No, your Honor.

15 MR. PABIAN: No, your Honor.

16 MR. FEIN: No.

17 JUDGE GILBERT: Thanks very much.

18 (Whereupon, further proceedings
19 in the above-entitled matter
20 were continued until
21 July 2, 2003 at 11:00 a.m.)

22