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\*ADMITTED IN FLORIDA ONLY

January 6, 1992

VIA HAND-DELIVERY

Mr. Thomas E. Murley  
Director  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
One White Flint North  
11555 Rockville Pike  
Rockville, Maryland 20852

Re: Texas Utilities Electric Company  
Docket Nos. 50-445A and 50-446A.

Dear Mr. Director:

This letter is written on behalf of Cap Rock Electric Cooperative, Inc., a party to the settlement dated June 8, 1990, with Texas Utilities Electric Company ("TUEC"), the owner and licensee of the Comanche Peak Nuclear Units 1 and 2, which was filed in the above-captioned proceeding.<sup>1/</sup> The 1990 Settlement resolved, inter alia, those differences between Cap Rock and TUEC which gave rise to Cap Rock's May 12, 1989 request for enforcement of the Comanche Peak antitrust license conditions pursuant to 10 C.F.R. § 2.206.<sup>2/</sup> This letter is to inform you of certain of the recent activities of TUEC with respect to that settlement which we believe are contrary to the plain language and intent of that settlement and which anticompetitively harm Cap Rock.

<sup>1/</sup> Power Supply Agreement Between Texas Utilities Electric Company and Cap Rock Electric Cooperative, Inc., dated June 8, 1990 ("1990 Settlement").

<sup>2/</sup> Request of Cap Rock Electric Cooperative, Inc. For An Order Enforcing And Modifying Antitrust License Conditions, dated May 12, 1989.

Susp review completed

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TUEC has refused to allow Cap Rock to purchase wholesale electric power from a supplier other than TUEC by contending that the 1990 Settlement does not permit Cap Rock to purchase bulk power from any utility except TUEC. In particular, TUEC contends that Cap Rock must buy all of its bulk power requirements from TUEC even after February 1, 1992, when Cap Rock's full requirements contract with TUEC will lawfully terminate. TUEC's contentions are contrary to the plain language and obvious intent of the 1990 Settlement, and Cap Rock recently has taken action in state court in Texas to prevent TUEC from using its transparent interpretation of the 1990 Settlement to prevent Cap Rock from purchasing power from a new wholesale supplier beginning February 1, 1992.<sup>3/</sup> The only way that TUEC can prevent Cap Rock from replacing TUEC with another wholesale power supplier is through the unlawful exercise by TUEC of its monopoly power over essential transmission facilities, which is precisely the conduct by TUEC which first compelled Cap Rock to seek enforcement of the Comanche Peak antitrust license conditions.

Cap Rock's request for enforcement of the Comanche Peak antitrust license conditions and related actions<sup>4/</sup> sought to obtain for Cap Rock, under reasonable rates, terms and conditions, the partial requirements electric power, coordination and other essential services TUEC is obligated to provide an "Entity" like Cap Rock under the Comanche Peak antitrust license

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<sup>3/</sup> By letter dated December 19, 1991, Cap Rock notified TUEC that, pursuant to the terms of the 1972 amendment to its 1963 service contract with TUEC, Cap Rock was terminating its service contract effective February 1, 1992. By that letter, Cap Rock provided the identical notice of termination for the service contract of Cap Rock's Lone Wolf Division (formerly Lone Wolf Electric Cooperative, Inc., a full requirements customer of TUEC with a service contract identical in all relevant respects to the 1963 Cap Rock/TUEC service contract). Cap Rock also confirmed its previous informal communications with TUEC that, as of February 1, 1992, the wholesale electric power needs of Cap Rock (and its Lone Wolf Division) would be served by West Texas Utilities company ("WTU").

<sup>4/</sup> See Cap Rock Electric Cooperative, Inc. v. United States Nuclear Regulatory Commission, United States Court of Appeals for the District of Columbia Circuit, Case No. 89-1735, dismissed on motion of petitioner by unpublished order.

conditions.<sup>5/</sup> Cap Rock's goal at that time was, and remains, to end its total dependence upon TUEC, Cap Rock's principal competitor at retail and the owner of the only transmission facilities with which Cap Rock is interconnected, for all of the bulk power which Cap Rock must purchase in order to serve its member-consumers.<sup>6/</sup> As the undersigned represented in the letter by which the 1990 Settlement was transmitted to you,<sup>7/</sup> the 1990 Settlement provides:

a means by which Cap Rock will be able to engage in an orderly transition from its current status as a full requirements customer of TU Electric, to a partial requirements customer of TU Electric and, ultimately, to a separate and independent electric utility. Cap Rock's transition, ultimately to independent status, will obviously be a complicated, multi-step process that will not occur overnight. Consequently, the [1990 Settlement] contemplates that many of the services that Cap Rock and TU Electric have agreed will be provided in the future will be provided

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<sup>5/</sup> An "Entity" is defined in Paragraph 3.D.(1)(c) and (d) of the license conditions.

The Comanche Peak antitrust license conditions are a product of a settlement among the participants in a joint antitrust hearing convened by the Commission to consider the antitrust implications of granting licenses for the Comanche Peak and South Texas nuclear projects. The procedural history of the proceeding is set forth in the order of the Administrative Law Judge approving the license conditions. Houston Lighting & Power Company, et al. (South Texas Project, Units 1 and 2) and Texas Utilities Generating Company, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), 15 NRC 1145 (1983).

<sup>6/</sup> Cap Rock's is electrically interconnected only with TUEC's facilities. This means that, in order for Cap Rock currently to do business with any ERCOT electric utility company other than TUEC, Cap Rock must obtain transmission and other essential services from TUEC.

<sup>7/</sup> Letter to Thomas E. Murley, Director, Office of Nuclear Reactor Regulation, dated June 28, 1990.

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pursuant to separate agreements, negotiated pursuant to the [1990 Settlement].

In retrospect, that statement underestimated the ability of Cap Rock to negotiate arrangements with wholesale power suppliers other than TUEC, in effect, to completely replace TUEC as a provider of bulk power and related services to Cap Rock. Cap Rock has executed a contract with WTU pursuant to which WTU has agreed to take over control area responsibility for Cap Rock and to sell Cap Rock its full bulk power requirements, beginning 12.01 AM, February 1, 1992, the effective date of the termination of Cap Rock's full requirements contract with TUEC. It is estimated that this arrangement with WTU will save Cap Rock approximately \$250,000 per month. This arrangement will effectively remove from TUEC the burden of providing any service to Cap Rock, except for the transmission service essential to effectuate the transaction.

Cap Rock has also executed an agreement with Southwestern Public Service Company ("SPS") under which Cap Rock will switch its entire load from the WTU system to the SPS system beginning in 1993. Under the SPS agreement, SPS will construct the necessary transmission physically to interconnect the SPS and Cap Rock systems, thus obviating the need for any transmission or other services from TUEC. The SPS agreement also affords Cap Rock the flexibility to purchase bulk power resources from suppliers other than SPS.

All that is required from TUEC to permit Cap Rock's contract with WTU to go forward is for TUEC: (1) to coordinate with WTU so that, when WTU "ramps up" (*i.e.*, increases) its generation to serve Cap Rock's load, TUEC back down its generation, and (2) to provide the necessary transmission service. TUEC has refused to cooperate. Instead, TUEC has informed Cap Rock that TUEC believes Cap Rock must continue to buy all of its bulk power needs from TUEC even after February 1, 1992, when Cap Rock's full requirements contract with TUEC is lawfully terminated.

TUEC's position is contrary to the plain language of the 1990 Settlement, as well as its obvious intent. The purpose of the 1990 Settlement was to facilitate Cap Rock's independence from TUEC. TUEC did not wish to have a partial requirements customer on its system for any prolonged period, nor did it want to be responsible for control area or scheduling services necessary for Cap Rock's independence. The 1990 Settlement, therefore, provides for a range of services that Cap Rock might need, for a limited period of from five to ten years, to

facilitate Cap Rock moving its load off the TUEC system. The only terms under which TUEC was willing to provide regulating, scheduling and other services, however, are so restrictive from business and operating perspectives that the only real viable alternative available to Cap Rock was the one it has followed, which is to remove its load from the TUEC system by obtaining its bulk power, control area and other essential services from an electric utility company other than TUEC.

One of services essential to Cap Rock's ability to become independent of TUEC was the assured availability of full or partial requirements service from TUEC, to the extent required by Cap Rock, during the transition period. TUEC agreed to provide those wholesale power services in the amounts to be specified by Cap Rock upon termination of Cap Rock's full requirements contract with TUEC. Cap Rock needed such alternatives because, at the time of the 1990 Settlement, Cap Rock had no alternative sources of power under contract. The real possibility existed at that time that all or part of Cap Rock's load might have to be left on the TUEC system for a period of time during the transition, until Cap Rock finalized its alternative power supply arrangements. The choice as to whether, or how much, power Cap Rock would purchase during the transition period, however, is clearly Cap Rock's choice.

The plain language of the 1990 Settlement makes its clear that the election as to whether to purchase power from TUEC during the transition period, and the amount of such purchase, if any, is clearly Cap Rock's election. The 1990 Settlement specifies no amount of partial requirements service that Cap Rock must purchase. Rather, Section 1.01 of the Settlement provides that TUEC will sell Cap Rock the amount of power and energy (expressed as Contract Demand) that "will be specified on Exhibit A." Exhibit A to the 1990 Settlement is blank. Cap Rock has no obligation to purchase any power or energy from TUEC.

On December 20, 1991, Cap Rock filed a complaint in the District Court for Midland County, Texas, seeking, inter alia, a determination that the 1990 Settlement does not obligate Cap Rock to purchase any power from TUEC.<sup>8/</sup> The complaint alleges that, even if it had been the intent of Cap Rock and TUEC to obligate Cap Rock to purchase power from TUEC, a supposed agreement that does not specify a critical term such as the amount of the

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<sup>8/</sup> Cap Rock Electric Cooperative, Inc. v. Texas Utilities Electric Company, District Court of Midland County No. B38,879.

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purchase, is not enforceable as a contract under Texas law. In this regard, Cap Rock emphasizes that, to date, the only party to the 1990 Settlement that has performed any action pursuant to the settlement is Cap Rock. Cap Rock withdrew its motion for enforcement of the license condition and its related court appeal, and ceased its participation in a proceeding before the Texas Public Utility Commission concerning TUEC's wholesale and retail rates, including its rates to Cap Rock. TUEC has, to date, not performed any action, or provided any of the services, to which it committed in the 1990 Settlement.

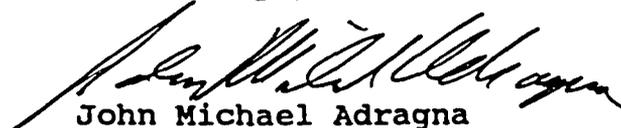
Cap Rock informs you of these events because it is concerned that TUEC ultimately may refuse to provide the wheeling services essential to Cap Rock's ability to consummate its purchase of full requirements and control area services from WTU. The one way that TUEC can prevent Cap Rock from taking service from WTU on February 1, 1992, is for TUEC to exercise its monopoly power over essential transmission facilities and service and to refuse to wheel Cap Rock's purchases from WTU to Cap Rock's loads. Even if TUEC were correct in its interpretation of the 1990 Settlement, which it is not, that would not give TUEC the right to refuse to wheel (in violation of the antitrust license conditions). TUEC's legal rights, in the face of what it contends is a breach of contract, are no different than those of any other party to a contract; TUEC can file suit in court to vindicate its rights. But TUEC cannot legally use its monopoly power as a means of "self help."

Cap Rock has accomplished just what TUEC argued before you that Cap Rock should do; Cap Rock has assumed the responsibility for its own power supply and will place no demands on TUEC for partial requirements, scheduling, back up and other services that TUEC is obligated to sell to Cap Rock, at Cap Rock's request, under the 1990 Settlement. Cap Rock will continue, however, to require TUEC transmission service, certainly at least until the transmission link with SPS is completed. TUEC's obligation to provide transmission service under the Comanche Peak antitrust license conditions ensures Cap Rock that such transmission service will be available.

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Cap Rock hopes that there will be no need to seek the assistance of your office in this matter. Cap Rock is confident that it will prevail in its action in Texas state court. Cap Rock will keep your office informed of the status of this matter as the action progresses.

Very truly yours,



John Michael Adragna

Attorney for Cap Rock Electric  
Cooperative, Inc.

JMA/dm

cc: William Lambe (Via Hand-Delivery)  
Lee Dewey, Esquire (Via Hand-Delivery)  
Merlyn Sampels, Esquire (Via Federal Express)