UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 23, 1992

Mark C. Schechter, Chief
Transportation, Energy and
Agriculture Section, Antitrust Division
U.S. Department of Justice
555-4th Street, N.W.
Washington, D.C. 20001

In the Matter of
Texas Utilities Electric Company
(Comanche Peak Steam Electric Station, Unit 2),
OL Antitrust Review, Docket No. 50-446A

Dear Mr. Schechter:

Pursuant to Section 105c(2) of the Atomic Energy Act, as amended, and the Commission's Rules thereunder, I am enclosing for your review and comment a draft OL antitrust review for the Comanche Peak Steam Electric Station, Unit 2 dealing with the issue of "significant change" from the last antitrust review of this facility. This document was prepared by the Policy Development & Technical Support Branch, Office of Nuclear Reactor Regulation.

If you have any questions concerning this document or the nuclear facility in question, please give me a call.

Sincerely,

Joseph Rutberg
Deputy Assistant General Counsel
Office of the General Counsel

Enclosure: As stated

Sisp review completed

COMANCHE PEAK STEAM ELECTRIC STATION, UNIT 2

TEXAS UTILITIES ELECTRIC COMPANY

DOCKET NO. 50-446A

STAFF RECOMMENDATION

NO SIGNIFICANT ANTITRUST CHANGES

JULY 1992

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I. Introduction

A prospective operating licensee is not required to undergo a formal antitrust review unless the Nuclear Regulatory Commission (NRC or Commission)[1] determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Attorney General and the Commission at the construction permit (CP) stage. Concentration on changes in the applicant's activities since the previous antitrust review expedites and focuses the review on areas of possible competitive conflict heretofore not analyzed by the Attorney General or the Commission.

In its Summer decision,[2] the Commission has provided the staff[3] with a set of criteria to be used in making the significant change determination for operating license (OL) applicants:

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are reasonably attributable to the licensee(s); and (3) have antitrust implications that would most likely warrant some Commission remedy. [4]

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[1]The Commission has delegated the responsibility for making a significant change determination to the Director of the Office of Nuclear Reactor Regulation.

[2]Virgil C. Summer Nuclear Station Unit 1, Docket No. 50-395A, June 26, 1981 at 13 NRC 862 (1981).

[3]"Staff" hereinafter refers to the Inspection and Licensing Policy Branch of the Office of Nuclear Reactor Regulation and the Office of the General Counsel.

[4]Commission Memorandum and Order, p. 7, dated June 30, 1980 (CLI-80-28).

To warrant a significant change finding, i.e., to trigger a formal OL antitrust review, the particular change(s) must meet all three of these criteria.

The Comanche Peak Steam Electric Station, Unit No. 2 (Comanche Peak 2) is scheduled to receive its full power license in December 1992, more than three years after the completion of the Comanche Peak Steam Electric Station, Unit No. 1 (Comanche Peak 1) significant change operating license review in August 1989 and more than two and one-half years since the Comanche Peak 1 operating license was issued in April 1990. It is staff policy[5] to conduct separate significant change operating license reviews of multiplant facilities when a reactor is scheduled to be licensed eighteen months or more after the previous unit has been licensed. Consequently, the staff requested updated Regulatory Guide 9.3 information from the licensee[6], TU Electric Company (TU Electric) on December 5, 1991.

After evaluating the information submitted in response to Regulatory Guide 9.3 and the comments received by members of the public in response to publication of receipt of the Regulatory Guide 9.3 information in the Federal Register, the staff has

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[5]See NUREG-0970, Section 3.1, p. 9.

[6]See Regulatory Guide 9.3, "Information Needed by the AEC Regulatory Staff in Connection with its Antitrust Review of Operating License Applications for Nuclear Power Plants", October 1974.

determined that none of the changes that have been identified since the previous antitrust review of the Comanche Peak facility, i.e., the operating license review of Comanche Peak 1, is "significant" in the context of the Commission's Summer decision. As a result, the staff is not recommending that a formal antitrust review be conducted at the Comanche Peak 2 operating license stage.

II. Background

The staff conducted a "significant change" operating license review of Comanche Peak 1 and the Director of the Office of Nuclear Reactor Regulation (Director) made a finding on June 16, 1989 that the changes that had occurred in the licensee's activities since the previous antitrust review were not "significant changes" as proscribed by Summer. This finding was published in the Federal Register on June 26, 1989, and provided for requests for reevaluation within thirty days. On July 26, 1989, Cap Rock Electric Cooperative, Inc. (Cap Rock) filed a request to reevaluate the Director's finding.[7]

Cap Rock alleged that TU Electric was not providing services, i.e., partial requirements power, use of transmission, and

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[7]Cap Rock also appealed the Director's No Significant Change Finding to the Circuit Court of Appeals; cf. Cap Rock Electric Cooperative, Inc. v. United States Nuclear Regulatory Commission, United States Court of Appeals for the District of Columbia Circuit No. 89-1735. Docketed November 30, 1989.

coordination of planning and development, which were specifically proffered by the Comanche Peak (Units 1 and 2) license conditions. The Director reevaluated his finding and on August 29, 1989, the Director issued a reevaluation and affirmation of the original no significant change finding. The Director's reevaluation finding stated that the issues raised by Cap Rock,

> do have relevance in the context of the Commission's antitrust review responsibilities; however, as I indicated in my Finding, the proper forum for their resolution is that of an antitrust compliance proceeding. . . . I expect the compliance process to resolve the issues raised by Cap Rock.[8]

On May 12, 1989, Cap Rock filed a §2.206 petition before the Commission alleging that TU Electric was violating its antitrust license conditions and cited the same abuse by TU Electric it had alleged in its earlier comments before the Commission pursuant to the Comanche Peak 1 significant change operating license review. Subsequent to the Director's reevaluation finding suggesting resolution of the dispute between the parties in a compliance proceeding, both Cap Rock and TU Electric began extensive settlement negotiations. Several meetings were held among the parties and the staff participated in two settlement conferences with the parties. Subsequent to these meetings, Cap Rock and TU Electric reached agreement on a Power Supply Agreement dated

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[8]"Reevaluation and Affirmation of No Significant Change Finding Pursuant to Comanche Peak Steam Electric Station, Unit 1 Operating License Antitrust Review", p. 10.

June 8, 1990, that purportedly resolved the differences between the parties and resulted in withdrawal of the §2.206 petition by Cap Rock on June 28, 1990. As a result of this settlement agreement, Cap Rock moved to dismiss its action in the D.C. Circuit as well.

A. Comanche Peak 2 Regulatory Guide 9.3 Response

As indicated above, the staff conducts individual significant change operating license reviews of each reactor of a multiplant facility when the reactors are scheduled to be licensed at least eighteen months apart. The two Comanche Peak reactors are scheduled to be licensed approximately three years apart, thereby opening up a window in the antitrust operating license review process. In order to close this gap and fulfill the legislative mandate imposed by §105c, i.e., identifying "significant changes" at the operating license stage of the licensing process, the staff instituted an updated significant change operating license review for Comanche Peak 2.

In response to the staff's December 5, 1991, request to TU Electric for updated Regulatory Guide 9.3 information, the licensee responded on February 5, 1992, updating changes in its activities that have occurred since the significant change operating license review of Comanche Peak 1. Notification of receipt of this information was published in the Federal Register

on February 24, 1992. The Notice provided for a sixty day period within which any interested person could file comments pertaining to antitrust aspects of the information being considered by the staff in its significant change operating license review of Comanche Peak 2. Comments were received from Cap Rock[9] and Cajun Electric Power Cooperative, Inc. (Cajun)[10].

III. Changes Since the Previous Antitrust Review

Section 105c(2) of the Atomic Energy Act of 1954, as amended, requires a second antitrust review at the operating license stage if "significant changes" in the licensee's activities have taken place since the completion of the construction permit antitrust review or as interpreted by the staff in this instance, since the previous review of antitrust issues, i.e., the Comanche Peak 1 significant change operating license review. Over the passage of time, large utility concerns undergo numerous changes in the way they conduct their business. The staff is concerned only with changes in the licensee's activities that could impact the competitive process in the relevant geographic and product markets accessible to the licensee. From the licensee's responses to Regulatory Guide 9.3 and information gathered from public sources, as well as contacts with other government

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[9]Letter from John Michael Adragna to Anthony T. Gody, dated March 25, 1992.

[10]Letter from Thomas L. Rudebusch to Anthony T. Gody, dated March 25, 1992.

agencies, staff has identified several changes associated with TU Electric's conduct and activity since the completion of the Comanche Peak 1 significant change operating license review in 1989.

A. Wholesale Power Operations

Changes in Customer Base

A majority (56.6%) of TU Electric's load is comprised of wholesale and industrial customers as opposed to retail or ultimate consumers. The commercial operation of TU Electric's Comanche Peak 1 facility in August 1990 and the inclusion of the capital costs associated with this large baseload plant in TU Electric's ratebase coupled with the general economic recession in the same time period have resulted in some customer switching in TU Electric's service area and surrounding areas.

Several wholesale customers of TU Electric have requested to leave TU Electric's system either partially or entirely. The inclusion of a large, baseload power plant into ratebase may result in "rate shock" for some wholesale customers and those customers that are contractually and physically capable of seeking alternative sources of power usually attempt to do so. Through May 1992, two Texas municipalities, Bridgeport and Bowie, have left the TU Electric system since the previous review and are now taking power from the Texas Municipal Power Agency.

During this period, the City of Bartlett, Texas and Hunt-Collin Electric Cooperative, Inc. became wholesale customers of TU Electric, leaving the Rayburn Country Electric Cooperative, Inc. and Brazos Electric Power Cooperative, Inc. systems respectively.

Since September 1986, TU Electric has purchased the distribution facilities in multi-certified service areas from Denton County Electric Cooperative, Grayson-Collin Electric Cooperative and Kaufman County Electric Cooperative.

Changes in Wholesale Power Rates

According to TU Electric's response to Regulatory Guide 9.3, the structure of TU Electric's wholesale power rate was changed to implement separate summer and winter demand charges in order to recognize the differences between on-peak (summer) and off-peak (winter) costs. A summer/winter demand differential reflects this cost difference, recognizes the differences in load characteristics between wholesale customers and enables the wholesale customer to offer cost-based peak load pricing to its customers. TU Electric also implemented separate customer and energy charges based on the voltage level of service to reflect cost of service differences.[11]

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[11]TU Electric response to Regulatory Guide 9.3 request dated February 5, 1992, p. 6.

Tex-La/TU Electric Agreements

Pursuant to litigation between TU Electric and Tex-La Electric Cooperative of Texas, Inc. (Tex-La) regarding the Comanche Peak Joint Ownership Agreement,[12] Tex-La and TU Electric entered into a Power Supply Agreement effective February 1, 1990. This agreement permitted Tex-La to,

> purchase power from sources other than TU Electric (in which case TU Electric will provide scheduling agent service for such purchases pursuant to contract terms) and to transfer loads from TU Electric to other electric utilities.[13]

Subsequent to the TU Electric/Tex-La settlement agreement, in February of 1990, both parties entered into an agreement which enabled Tex-La to take service (economy energy) from the municipal electric system of the City of Austin, Texas. Moreover,

> TU Electric and Tex-La executed a transmission service agreement, effective July 1, 1991, in order to give Tex-La access to its entitlement to the output of power produced at Denison Dam and Whitney Dam.[14]

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[12]See the staff analysis, "Finding of No Significant Antitrust Changes", pursuant to the Comanche Peak Steam Electric Station, Unit 1 significant change operating license review.

[13]Op. Cit., p. 29.

[14]Ibid., p. 30.

CSW/TU Electric Compensation Agreement

During the period 1987-89, a dispute arose between TU Electric and the Central and the South West (CSW) operating companies pursuant to the compensation due in connection with the transfer of power and energy to, from and over the North direct current (DC) intertie. The DC intertie linking Texas intrastate utilities with Oklahoma (and ultimately Louisiana) interstate utilities, embodied resolution of an interstate power dispute between Texas utilities arising from disconnection of service (opening up electrical ties) between Electrical Reliability Council of Texas (ERCOT) utilities and Southwest Power Pool (SWPP) utilities in the late 1970's.[15]

The Federal Energy Regulatory Commission (FERC) entered orders in this proceeding which were appealed by the CSW companies and the Oklahoma Municipal Power Authority (OMPA) to the Circuit Court for the District of Columbia. Settlement discussions between TU Electric and the CSW companies continued and ultimately,

> culminated in the execution of the Settlement Agreement on July 25, 1991. Under the Settlement Agreement, TU Electric and the CSW Operating Companies entered into TSAs [transmission service agreements] covering eight transmission paths for the transfer of electric power to, from and over the North and East Ties. . . . The parties

[15]See the staff "Finding of No Significant Antitrust Changes" for Comanche Peak 1 for a description of the dispute and its relevance to the Comanche Peak facility significant change operating license reviews.

> also resolved by agreement the issues relating to compensation for transmission services provided during the periods 1987-89 and 1990. . . . The Settlement Agreement and North and East Tie TSAs were approved by the FERC by Order issued September 12, 1991. In October 1991, the Settlement Agreement was consummated and the appeals initiated by the CSW Operating Companies and OMPA dismissed.[16]

B. DC Intertie

The settlement of the interstate jurisdictional dispute between various Texas bulk power entities in September 1980 included the provision that two direct current transmission interties be built by the CSW companies and the Houston Lighting & Power Company (HL&P). As indicated in the Comanche Peak 1 "Finding of No Significant Antitrust Changes", the northern phase of this intertie near the Texas/Oklahoma border at Lawton, Oklahoma and Oklaunion, Texas, has been completed and in service since December 1984. However, as a result of delays in construction and site certification, the southern phase of the intertie has been modified (approved by the FERC in July 1987) whereby an eastern link, between TU Electric and the CSW companies was substituted for the southern link between HL&P and the CSW companies. As a result of delays in finalizing the East Tie Participation Agreement and disputes regarding implementation of tariffs developed to provide transmission service to, from and over the North and East ties (cf., CSW compensation agreement, supra), the participants were unable to meet the original completion date for the East tie of August 1991.

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[16]TU Electric 9.3 response, op. cit., pp. 39-43.

The CSW companies, HL&P and TU Electric, petitioned the FERC for an extension of time to complete construction of the East tie. On December 6, 1991, the FERC granted the request for an extension of time and required the tie to be constructed in two 300 MW segments by August 1998.[17]

C. TU Electric/Cap Rock Settlement Agreement

During the significant change operating license review of Comanche Peak 1, Cap Rock made certain allegations that TU Electric was not abiding by its antitrust license conditions. Cap Rock alleged, inter alia, that TU Electric was not supplying partial requirements power or transmission services as required by the Comanche Peak license conditions. The staff determined that the allegations were not germane to the operating license review process. Moreover, the staff indicated that the allegations were being addressed in a compliance proceeding presently before the staff. Discussions between TU Electric, Cap Rock and the staff ultimately resulted in a Power Supply Agreement between TU Electric and Cap Rock dated June 8, 1990.

According to Cap Rock, the Power Supply Agreement,

> provides a means by which Cap Rock will be able to engage in an orderly transition from its current status

[17]At the time of the staff review, the parties planned to complete the East tie in one 600 MW segment prior to the August 1998 schedule.

> 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. . . . The PSA, which received final approval by the Boards of Directors of the respective parties on June 21, 1990, constitutes a settlement of the outstanding disputes between Cap Rock Electric Cooperative, Inc. ("Cap Rock") and Texas Utilities Electric Company ("TU Electric"), including those differences that gave rise to the request for enforcement of the antitrust license conditions, pursuant to 10 C.F.R. §2.206, filed with your office by Cap Rock on May 12, 1989.[18] [Emphasis added]

Based upon the settlement reached by the parties, the staff closed out the compliance proceeding originated by Cap Rock in May 1989.

IV. Comments on Regulatory Guide 9.3 Response

In response to the Federal Register notice dated February 24, 1992, seeking input on the antitrust aspects of any changes in the licensee's activities since the previous review of antitrust issues, the staff received comments from Cap Rock and Cajun, both dated March 25, 1992. (Cf., "Background", supra.)

A. Cap Rock Comments

[18]Letter from John Michael Adragna to Thomas E. Murley, dated June 28, 1990.

Cap Rock, in its Comments,[19] states that TU Electric is,

> overtly exercising its monopoly power, in violation of its existing antitrust license conditions and applicable antitrust laws, anticompetitively to injure Cap Rock and other TUEC customers and competitors.[20]

Cap Rock asked the NRC to, 1) convene a hearing to determine a complete picture of the ongoing anticompetitive conduct of TU Electric, and 2) unequivocally establish that TU Electric is obligated by its antitrust license conditions to wheel for Cap Rock and other similarly situated entities. Cap Rock did not ask the NRC to adjudicate the merits of TU Electric's claims under the 1990 Power Supply Agreement; that question, according to Cap Rock, is currently being addressed in the action brought by Cap Rock in state court in Texas.[21]

In its Comments, Cap Rock indicated that in its August 1988 comments pursuant to the significant change operating license review of Comanche Peak 1 and again in its May 1989 §2.206 request to enforce the Comanche Peak license conditions, the NRC was asked to enforce <u>existing</u> antitrust license conditions and

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[19]"Comments of Cap Rock Electric Cooperative, Inc. Concerning Significant Changes in the Activity of Licensee Texas Utilities Electric Company that Warrant an Antitrust Review Before the Issuance of an Operating License", dated March 25, 1992. [Hereafter in Section IV. A, "Comments".]

[20]Cap Rock Comments, at unnumbered p. 1.

[21]<u>Cap Rock Electric Cooperative, Inc. v. Texas Utilities Electric</u>, District Court of Midland County, 238th Judicial District, No. B38,879.

require TU Electric to wheel and provide partial requirements service -- thereby providing Cap Rock the opportunity to do business with bulk power suppliers other than TU Electric.

The staff believes Cap Rock's most recent Comments pursuant to the Comanche Peak 2 significant change operating license review, do not identify any new or different concerns than those expressed in Cap Rock's previous comments cited above. No changes in licensee's activities have been identified by Cap Rock. The allegations of anticompetitive conduct by TU Electric made by Cap Rock are identical to those made by Cap Rock during the previous significant change review of the Comanche Peak 1 facility.

B. Cajun Comments

Cajun's comments[22] do not address the issue of whether any changes have occurred in the licensee's activities that would tend to create or maintain a situation inconsistent with the antitrust laws or their policies, i.e., the basis for conducting an antitrust operating license review. Cajun suggests throughout its Comments that the Comanche Peak antitrust license conditions are in some form the governing authority in terms of determining

[22]"Comments of Cajun Electric Power Cooperative, Inc., on Antitrust Information Filed by Texas Utilities Electric Company Pursuant to Regulatory Guide 9.3", dated March 25, 1992.[Hereafter in Section IV. B., "Comments".]

operation and ownership of the East DC intertie linking ERCOT and SWPP. At page ten of its Comments, Cajun,

> suggests that the Commission review in this proceeding, the opportunities and procedures whereby interested utilities may participate in the East DC Tie, pursuant to CPSES License Conditions Paragraphs 3.D.2.(i) and (j).

Cajun concludes its Comments by requesting the Commission to,

> consider the foregoing information in its consideration of whether significant changes have occurred since the previous antitrust review and, further, clarify the procedures under which interested utilities may participate in ownership of the East DC Tie, consistent with the CPSES License Conditions.[23]

Cajun's principal concern expressed in its Comments is ownership in the East DC intertie. The 1980 settlement agreement that resolved the issues raised during the operating license antitrust review of Comanche Peak 1, established the ERCOT/SWPP direct current link and was approved by the FERC in 1981 and 1982 (Dkt. Nos. EL-79-8 and E-9558). The settlement agreement included antitrust license conditions for the Comanche Peak facility in May 1982. The FERC has jurisdiction over construction and ownership of the DC intertie and the NRC has jurisdiction over the antitrust license conditions which are a part of the Comanche Peak licenses.

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[23]Cajun Comments, pp. 10-11.

V. Do Comments or the Identified Changes Portend "Significant Changes"?

Pursuant to §105c(2) of the Atomic Energy Act of 1954, as amended, in order for the NRC to initiate a formal operating license antitrust review, significant changes must be identified in the licensee's activities or proposed activities subsequent to the previous antitrust review of the facility undergoing review. As indicated supra, the Commission has interpreted this "significant change" mandate in its Summer decision and established a set of criteria by which the staff measures changes in licensee activities to determine whether any identified changes will adversely affect competition in the bulk power services market in question. With §105c(2) and the Commission's Summer criteria as mandate, the staff reviewed TU Electric's responses to Regulatory Guide 9.3 as well as the comments from Cap Rock and Cajun to determine whether TU Electric's activities or proposed activities have changed since the completion of the Comanche Peak 1 operating license review.

A. Cap Rock Comments

Cap Rock asserts that TU Electric has not complied with the antitrust license conditions that require wheeling or transmission services to appropriate entities in the TU Electric service area. Further, Cap Rock states that TU Electric has not

offered to sell partial requirements wholesale power as required by the license conditions. According to Cap Rock,

> Barely two years after the 1990 settlement, Cap Rock is again being subjected to TUEC's anticompetitive refusals to wheel and efforts to prevent Cap Rock from obtaining alternative sources of bulk power. TUEC's monopoly power, and its apparent willingness to exercise it to the anticompetitive disadvantage of its competitors, have not changed in two years.[24] [Emphasis added.]

Cap Rock admits that its Comments reflect a situation that has not changed since the previous antitrust review of the Comanche Peak facility. Any formal (NRC) antitrust review at the operating license stage is contingent upon identification of changed circumstances that would tend to maintain or create a situation inconsistent with the antitrust laws or their policies. Cap Rock has not identified any changes in the licensee's activities since the previous antitrust review. Moreover, the concerns raised by Cap Rock in its Comments are the same concerns that were addressed and presumably resolved by extended negotiations between Cap Rock and TU Electric during the 1989-90 period and resulted in a Power Supply Agreement that, according to Cap Rock, settled the issues between the two parties.

The TU Electric/Cap Rock Power Supply Agreement dated June 8, 1990, was, in the staff's view, an agreement that addressed Cap

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[24]Cap Rock Comments, p. 9.

Rock's concerns which it had raised in its May 12, 1989 request to modify or suspend TU Electric's Comanche Peak license because of alleged non-compliance with the antitrust license conditions. The staff followed closely and participated in the settlement negotiations between Cap Rock and TU Electric and viewed the Power Supply Agreement and the settlement in general to be in the public interest. The Power Supply Agreement provided Cap Rock with the opportunity to leave the TU Electric system in an orderly manner, allowing sufficient planning horizons for each party to arrange for the eventual departure of Cap Rock from TU Electric's system as a full requirements customer. The Power Supply Agreement allowed Cap Rock up to ten years to seek out alternative power suppliers, develop its own control area and ultimately leave the TU Electric system as a totally independent electric utility. The current dispute between Cap Rock and TU Electric appears to revolve around interpretation of the Power Supply Agreement and particularly the applicability of the provision(s) in the Agreement dealing with "advance notice".

Though Cap Rock has not asked the NRC to interpret the Power Supply Agreement and the staff will not attempt to do so herein, the advance notice provision(s) in the agreement apparently was developed to serve both parties to the agreement. TU Electric cannot efficiently plan to meet system load requirements without a time horizon that will allow for adding or reducing generating capacity additions. Conversely, Cap Rock must have enough of a

planning horizon to seek out new power supply sources and arrange for delivery of this power and energy. As Cap Rock has indicated, the issue of whether the June 8, 1990 Power Supply Agreement is a binding contract, and the subsequent interpretation of this agreement if necessary, is presently pending in the district court of the State of Texas.

Although Cap Rock stated in its letter to the staff accompanying its final Power Supply Agreement in 1990 that, "The PSA [Power Supply Agreement] in no way affects the rights or obligations of either TU Electric or Cap Rock under the License Conditions.", the staff believed at the time the Power Supply Agreement was consummated that it represented a settlement of the issues raised by Cap Rock in its May 12, 1989 §2.206 petition which alleged non-compliance with these same antitrust license conditions. The staff still believes the Power Supply Agreement adequately addresses the issues raised by Cap Rock in 1989; moreover, the staff believes the Power Supply Agreement adequately addresses Cap Rock's most recent allegations of anticompetitive conduct pursuant to the Comanche Peak 2 significant change review. To the extent TU Electric and Cap Rock now have differing interpretations of this agreement and its attendant obligations, the parties have chosen the district court of the State of Texas to resolve these differences. The staff believes this is the proper forum in which these "contractual" issues should be resolved.

Should the State district court rule that the Power Supply Agreement is not a valid contract, Cap Rock could request the staff to consider any new §2.206 petition pursuant to TU Electric's alleged non-compliance with the Comanche Peak antitrust license conditions. However, regardless of the district court's decision in this instance, Cap Rock's most recent Comments are not germane to the staff's Comanche Peak 2 significant change operating license review. Cap Rock's Comments address alleged non-compliance of existing antitrust license conditions, not changes in TU Electric's activities since the most recent antitrust review.

B. Cajun Comments

Cajun's Comments do not address changes in TU Electric's activities since the previous antitrust review of Comanche Peak that fall within the regulatory purview of the NRC. Cajun asked the NRC to clarify the procedures under which entities may participate in the direct current (East) intertie linking ERCOT and SWPP. Apparently, Cajun has interpreted the Comanche Peak license conditions as the governing authority over such ownership arrangements. However, it is the staff's opinion that the settlement agreement approved by the NRC and the FERC pursuant to the Texas interstate dispute included very specific provisions for ownership in the intertie as well as the qualifications for ownership in the intertie. Criteria for ownership and windows of

opportunity for new ownership (paramount issues raised by Cajun in its Comments to the NRC) were established by the parties involved in the FERC proceeding in the early 1980's. Ownership participation in the East direct current intertie is contingent upon the provisions of the settlement before the FERC. As the Comanche Peak license conditions indicate (cf., 3.D.2.(i)), TU Electric is required to provide transmission services over its facilities, including any direct current lines,

> provided, however, that such transmission services and the rates to be charged therefor shall be subject to any regulatory agency(ies) having jurisdiction thereof.[25]

Ownership participation in the East direct current intertie has been provided for and established in the FERC settlement discussed supra and codified in FERC orders in 1981 and 1982. The Comanche Peak license conditions do not address the ownership or operation of the direct current intertie; however, they do address access to the direct current lines owned by TU Electric. Cajun has not indicated how TU Electric has inhibited its efforts to use TU Electric's portion of the direct current transmission intertie between ERCOT and SWPP. Cajun was a part of the original FERC proceeding and fully aware of the criteria and covenants accompanying the direct current intertie settlement. If Cajun has not been able to participate in ownership in the

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[25]License Conditions for Comanche Peak Steam Electric Station Units 1 and 2; license condition 3.D.2.(i).

East intertie, it is the FERC settlement criteria (principally the 500 MW limitation on load) that have excluded Cajun, not, apparently, because of any new anticompetitive activities by TU Electric which are subject to the Comanche Peak license conditions. The staff would be interested in any activity by TU Electric intended to preclude or inhibit ownership in the East intertie; however, Cajun has not cited any. The delays in constructing the East intertie, which are apparently of concern to Cajun, do not appear to be the result of any abuse of market power by TU Electric, but principally those associated with any large utility construction project such as the East intertie.

It appears that Cajun is not satisfied with the original FERC settlement criteria that excludes entities with loads exceeding 500 MW from reserving transmission capacity in the direct current intertie. The FERC indicated that Cajun should file a complaint before the FERC if it wished to clarify its status as a qualifying entity in the East intertie settlement.[26] Cajun has not done so to date.

Cajun is interested in ownership participation in the East intertie. The FERC settlement provides the opportunity for new owners. Cajun's Comments indicate that it has ample opportunity to address its concerns related to the East intertie at the FERC. Moreover, Cajun's Comments indicate that the FERC, not the NRC,

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[26]Cf., December 6, 1991 Order, at ¶62,030.

is the proper forum to address these concerns. Cajun has not identified any changed activity by TU Electric that would cause the staff to initiate an antitrust review before the NRC.

C. Changes Since the Previous Review

From the information available to the staff, the staff has determined that none of the changes identified in Section III herein stem from abuse of market power by TU Electric. Several changes in TU Electric's wholesale power operations have occurred; however, for the most part, they represent normal business operations. Customers wishing to change power suppliers and who are physically and contractually able to do so have done so and will probably continue to do so as market forces play a greater role in the generation sector of the electric utility industry. The staff generally views these customer changes as healthy for the competitive outlook in this geographical segment of the bulk power industry. TU Electric, with the addition of a large capital-intensive baseload power facility, i.e., Comanche Peak, will have to offer its wholesale customers capable of switching suppliers incentives, either economic or contractual, to remain on its system when Comanche Peak 2 is ultimately placed in TU Electric's ratebase.

TU Electric changed its wholesale power rate to reflect differences between on-peak (summer) and off-peak (winter) costs

of generation. According to TU Electric, this summer/winter rate differential enables a wholesale customer to offer cost-based, peak load pricing to its customers. Although the staff does not delve into the intricacies of utility rates and rate-making in its licensing reviews (which is primarily the jurisdiction of the Texas Public Utility Commission in this instance), it appears that TU Electric has implemented a feature into its wholesale power rate structure that may ultimately lead to a more efficient allocation of energy resources in its service area.

Two settlement agreements, between TU Electric and Tex-La and TU Electric and the CSW operating companies, were finalized during the review period that ended protracted negotiations and litigation involving parties in and adjacent to TU Electric's service area. The Tex-La agreement allowed Tex-La to branch out and purchase power from sources other than TU Electric and transfer loads from TU Electric to other power suppliers. The CSW agreement resolved a dispute primarily between TU Electric and the CSW operating companies involving compensation due as a result of power flows to, from and over the direct current intertie. The settlement agreement also established transmission service agreements between TU Electric and the CSW operating companies that apply to the proposed East direct current intertie -- enabling the parties to accelerate the development of this intertie. The settlement agreement between TU Electric and the CSW operating companies was approved by the FERC in September

1991. To the extent this agreement advances the development of the East direct current intertie, it is viewed as procompetitive by the staff. Otherwise, the staff has no specific comment on the merits of the terms and conditions of this agreement.

Although the settlement establishing the DC intertie linking ERCOT with SWPP does not represent a change since the previous significant change operating license review of Comanche Peak 1, the proposed configuration of the intertie has changed since the previous review. The substitution of the two-phase (300 MW each) East intertie for the single-phase (600 MW) South intertie was agreed to by the principals involved and approved by the FERC in December 1991. Proposals for establishing rates for power and energy flows to, from and over and participation in the East intertie have resulted in contentious negotiations among interested entities as well as construction delays in completing the intertie. The staff views these issues as principally within the confines of the DC settlement agreement and the FERC, which approved the DC settlement agreement in the early 1980's. Jurisdiction over this aspect of the settlement agreement rests with the FERC and for this reason, the staff sees no reason for the NRC to address remedial options pursuant to contentions that evolve from interpretation of the DC settlement agreement.

The June 1990 settlement agreement between TU Electric and Cap Rock resolved specific issues pursuant to the Comanche Peak

antitrust license conditions. The agreement established rights and obligations for both of the parties and was approved by the NRC as resolving the issues raised by Cap Rock in the May 1989 compliance proceeding before the NRC. The staff viewed the agreement as procompetitive in that it allowed for the orderly progression of a totally captive wholesale customer in Cap Rock, to become an independent utility system, capable of shopping for alternative power suppliers and perhaps ultimately becoming a generator in its own right. The dispute over the terms and conditions of the agreement and the nature of the agreement itself are being addressed by the district court of the State of Texas. The staff considers this dispute contractual in nature and the issues and matters in controversy addressed by the district court as aptly covering the contractual nature of this dispute. Moreover, the staff believes this dispute is not only contractual in nature but not germane to the Comanche Peak 2 significant change operating license review. The dispute, as indicated supra, addresses non-compliance with existing antitrust license conditions -- not changes since the previous antitrust review. Consequently, there is no reason for the Commission to entertain a remedy in this licensing action. Should the district court rule the Power Supply Agreement non-binding, Cap Rock has the option to petition the Commission to consider a new §2.206 petition requesting the Commission to require TU Electric to comply with the Comanche Peak antitrust license conditions.

VI. Summary and Recommendation

In light of the fact that Comanche Peak 1 and Comanche Peak 2 will be licensed more than eighteen months a part, the staff initiated a significant change operating license review of Comanche Peak 2. Of concern to the staff is any activity by the licensee that has occurred since the previous significant change operating license review that may adversely impact the competitive process in the bulk power services market.[27] In an effort to identify any changed activity on the part of the licensee, the staff requested updated Regulatory Guide 9.3 information in December 1991. Notice of receipt of this information was published in the Federal Register and the staff received comments from two electric power cooperatives, Cap Rock Electric Cooperative, Inc. and Cajun Electric Power Cooperative, Inc.

The staff reviewed the comments from Cap Rock and Cajun and fully considered them in the context of the Commission's significant change review. The staff determined that the issues raised by Cap Rock addressed compliance or contractual matters, not licensing matters pertinent to the staff's §105c(2) operating license significant change review. Moreover, the issues of

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[27]The initial Comanche Peak 1 Regulatory Guide 9.3 request was dated September 2, 1986. Review of data pursuant to changed activity for the instant review begins where the earlier review left off.

concern to Cap Rock were being litigated in a manner that ultimately should resolve the concerns raised by Cap Rock. The staff determined that the concerns raised by Cajun in its comments to Regulatory Guide 9.3 were issues that should be addressed by the FERC, not the NRC, and that there was an ongoing forum at the FERC in which Cajun could seek redress from its concerns pursuant to participation in the Texas DC intertie.

TU Electric experienced changes in its business since the Comanche Peak 1 operating license review; however, the changed activity was in large part due to the changing electric bulk power industry and the role of power generators within this industry. The staff did not identify any changes in TU Electric's activities that would require a remedy by the NRC in this licensing action. None of the changes identified meet all three of the Commission's Summer criteria.

Section 105c(2) requires a formal antitrust review at the operating license stage only in the event of significant changes in the licensee's activities since the previous antitrust review. The NRC established criteria for identification of significant changes in its Summer decision and delegated the authority to make the significant change determination to the staff. The staff's analysis of the changes in the licensee's activities has not identified any changed activity that could be remedied in the Commission's licensing process as envisioned in Summer.

Consequently, the staff recommends that no affirmative significant change determination be made pursuant to the application for an operating license for Unit 2 of the Comanche Peak Steam Electric Station.