CAUSE NO. B-88,879

CAP ROCK ELECTRIC COOPERATIVE, INC.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
V.	§	MIDLAND COUNTY, TEXAS
TEXAS UTILITIES ELECTRIC COMPANY,	§	
Defendant.	§	238TH JUDICIAL DISTRICT

BRIEF OF CAP ROCK ELECTRIC COOPERATIVE, INC.

APRIL 23, 1992

sisp review completed

CAUSE NO. B-38,879

CAP ROCK ELECTRIC COOPERATIVE, INC.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
V.	§	MIDLAND COUNTY, TEXAS
TEXAS UTILITIES ELECTRIC COMPANY,	§	
Defendant.	§	238TH JUDICIAL DISTRICT

BRIEF OF CAP ROCK ELECTRIC COOPERATIVE, INC.

APRIL 23, 1992

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

CAUSE NO. B-38,879

CAP ROCK ELECTRIC COOPERATIVE, INC.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
V.	§	MIDLAND COUNTY, TEXAS
TEXAS UTILITIES ELECTRIC COMPANY,	§	
Defendant.	§	238TH JUDICIAL DISTRICT

BRIEF OF CAP ROCK ELECTRIC COOPERATIVE, INC.

TO THE HONORABLE JUDGE HYDE:

A bedrock principle of the common law is that a bilateral contract consists of promises exchanged between parties for which the law will grant a remedy if the promises are not abided. The application of this time-honored principle is the crux of the dispute between CAP ROCK ELECTRIC COOPERATIVE, INC. (Cap Rock Electric) and TEXAS UTILITIES ELECTRIC COMPANY (TU Electric).

The dispute is not about whether requirements contracts are enforceable in Texas; plaintiff cheerfully concedes that they are. And it is not about the intricacies and complexities of the generation and sale of electric power; simple mastery of basic contract law doctrines--and not an engineering degree--is more than sufficient to the task at hand.

Once all of the underbrush is cleared away, the question for the Court is a simple one: Is a purported agreement that lacks a quantity term enforceable in this state? On this question there is no division of authority; such "agreements" are unenforceable. As Professor Corbin succinctly put it, "a court cannot enforce a contract unless it can determine what it is." A. Corbin, *Contracts* Section 95 (1952). This is all the more the case since TU Electric audaciously seeks specific performance, asking the Court to

articulate, define, and perfect obligations that were stillborn, having never come into being.

In this light, Cap Rock Electric has requested that this Court enter a declaratory judgment finding that there is no binding contract with TU Electric as a matter of law. Further, given that TU Electric controls all of the essential facilities[1] necessary for Cap Rock Electric to receive any electricity, plaintiff seeks an equitable remedy of an injunction to prevent TU Electric from interfering with the delivery of electricity over those essential facilities from other power sources.

The critical document, and indeed the only document that the Court need examine, is entitled "Power Supply Agreement Between Texas Utilities Electric Company and Cap Rock Electric Cooperative, Inc., dated as of June 8, 1990" (Plaintiff's Exhibit 3; hereinafter "1990 Document"). As more fully explained below, the document contains no quantity term (and no points of delivery) and specifically authorizes Cap Rock Electric to determine the quantity of electric power, if any, to be taken from TU Electric. This fundamental flaw cannot be overcome by abundant parol evidence or moribund legal arguments. And this flaw surfaces and resurfaces under a variety of doctrinal headings. Without a quantity term, the purported contract lacks essential terms and is too indefinite to be enforced. *See, eg., University National Bank v. Ernst & Whinney*, 773 S.W.2d 707 (Tex. App.--San Antonio, 1989); *Mooney v. Ingram*, 547 S.W.2d 314 (Tex. Civ. App.--Dallas, 977, writ ref'd n.r.e.). *See generally Restatement of Contract* (Second) Section 33 (19). There simply was no meeting of the minds on what was to be sold and brought. The execution of Exhibit A, relating to points of delivery and hence quantity, is a condition precedent to the parties' obligations under the 1990 Document. Since that condition was neither fulfilled nor discharged, there is no right to performance. *See Hohenberg Brothers Company v. George E. Gibbons & Co.*, 537

---

1 The essential facilities doctrine is addressed in the injunction section of this Brief.

S.W.2d 1, 3 (Tex. 1976). Hence the alleged contract is no more than an unenforceable agreement to agree in the future. *See, e.g., Paige and Wirtz Construction v. Van Doran Bri-Teco Company*, 432 S.W.2d 731, 735 (Tex. Civ. App.--Amarillo, 1968, writ ref'd n.r.e.). And, in a rephrasing of all of the doctrinal calamities that beset TU Electric, the alleged transaction falls under the Texas Statute of Frauds and the 1990 Document is in clear violation of the Statute.

To be entirely clear on what is before the Court, Cap Rock Electric does not contend that the 1990 Document is ambiguous. To the contrary, Cap Rock contends that that Document is quite intelligible; it is unambiguously indefinite, containing no quantity term. In the absence of any ambiguity, the Court cannot consider extrinsic or parol evidence in its interpretation. *See, e.g., Walker v. Horine*, 695 S.W.2d 572, 577 (Tex. App.--Corpus Christi, 1985); *Parker Chiropractic Research Foundation v. Fairmont Dallas Hotel Company*, 550 S.W.2d 196, (Tex. Civ. App.--Dallas, 1973); *H. B. Zachry Company v. Maerz*, 223 S.W.2d 552, 554 (Tex. Civ. App.--San Antonio 1949). It cannot create ambiguity where none exists. *Sun Oil Co. v. Madley*, 626 S.W.2d 726, 732 (Tex. 1981); *Paragon Resources v. National Fuel Gas Dist. Corp.*, 695 F.2d 991, 995 (5th Cir. 1983). The Court must limit its search for meaning to the four corners of the writing. *Rutherford v. Randal*, 593 S.W.2d 949, 953 (Tex. 1980). Under such circumstances, the matter is entirely one of law for the Court. *Pasadena Associates v. Connor*, 460 S.W.2d 473, 478 (Tex. App.--Houston [14th Dist.] 1970, writ ref'd n.r.e.).

Because the 1990 Document, standing alone, is determinative of this case, plaintiff will assume *arguendo* in the next section of the brief that there was a meeting of the minds, that there are no contract formation issues before the Court. Even if a contract is properly formed under applicable contract rules, it may still be unenforceable--and that is clearly the case here. In the words of Professor Corbin, "it is not enough that the parties think that they have made a contract; they must have

expressed their intentions in a manner that is capable of understanding. It is not even enough that they have actually agreed, if their expressions are not such that the court can determine what the terms of that agreement are." Corbin, *Contracts* Section 95.

If this Court rejects Cap Rock Electric's contentions with respect to enforceability, the parol and extrinsic evidence clearly demonstrates that there was no meeting of the minds between the parties with respect to a requirements contract for Cap Rock Electric's power needs. The four days of testimony give the Court great insight into the acrimony between the parties. The testimony also illuminates the persistent efforts of Cap Rock Electric to find another source of power and the equally tenacious efforts of TU Electric to prevent that from happening. But more importantly, the evidence abundantly shows that the parties attributed vastly different meanings to the 1990 Document, that they never shared a common understanding of their rights and obligations under the purported contract. Thus, there is a complete absence of mutual assent to the same material terms and conditions. Were the Court to find that an enforceable contract was properly formed, it would be faced with the onerous task of writing a contract to which one of the parties never assented and monitoring it until its termination. It is precisely this situation that the rules on essential terms, indefiniteness, and conditions precedent were designed to avoid.

I. 1990 DOCUMENT IS UNENFORCEABLE.

For purposes of this section of the brief, Cap Rock Electric will assume, without waiving it, that Cap Rock Electric entered into an agreement with TU Electric and that both Cap Rock Electric and TU Electric intended to be bound in some manner by the 1990 Document. In other words, Cap Rock Electric will ignore the intentions of the parties, possible lack of a meeting of the minds, and formation issues. Even with these assumptions, this Court must find the 1990 Document is unenforceable.

A. The 1990 Document Lacks Essential Terms.

In this case, the Court is confronted with a purported contract that lacks its most essential element--a quantity term.

Section 3.01 of the 1990 Document starts with the phrase "Except as otherwise permitted by this agreement," Cap Rock Electric is to purchase from TU Electric and TU Electric is to sell "all of Cap Rock's power and energy requirements, including normal load growth, at each of the Points of Delivery for resale to Cap Rock's customers."[2] Points of Delivery is defined under Section 1.11 of the Agreement as:

> "Points of Delivery" shall mean all points ***within TU Electric's Control Area*** at which TU Electric maintains an electrical connection with Cap Rock existing on the effective date hereof, ***each of which Points of Delivery shall be specified on Exhibit A*** hereto, which shall be amended from time to time in accordance with Section 3.07(b) hereof. (Emphasis added.)

Exhibit "A" attached to the 1990 Document contains the notation:

[Information to be Specified on the Effective Date of this Agreement].

Exhibit "A" also has a column for listing the name of each of the Points of Delivery covered by the 1990 Document and another column for listing the Contract Demand. Contract Demand is defined under the Agreement as:

---

2 Of even more interest is the second sentence of Section 3.01. It provides that: "Cap Rock may, upon reasonable advance written notice, ***elect to retain*** one or more of its Points of Delivery. . . which exist on the effective date of this Agreement ***as full requirements Points of Delivery*** pursuant to this Section 3.01. . ." If this is a full requirements contract from the effective date, why does this sentence require notice for those delivery points to remain full requirements?

> "Contract Demand" shall mean the maximum amount of power and energy expressed in kilowatts (Contract Kw) ***that Cap Rock projects*** TU Electric will be required to provide at each Point of Delivery. Contract Demand ***will be specified on Exhibit A***, which may be changed from time to time as provided in Section 3.08 hereof. (Emphasis added.)

The only indication of how Exhibit "A" is to be filled out is under the definition of Contract Demand where it states that contract demand is the amount of power and energy "that ***Cap Rock projects*** TU Electric will be required to provide at each Point of Delivery." (Emphasis added). In other words, it is within Cap Rock Electric's sole discretion to determine what, if any, Contract Demand is to be included on Exhibit "A". TU Electric must accept whatever Contract Demand Cap Rock Electric designates.

This is not an all requirements contract as TU Electric alleges. If it were, there would be no need for an Exhibit "A", there would be no need to specify the Contract Demand on Exhibit "A", and there would be no need to give Cap Rock Electric the discretion to determine both Contract Demand and Points of Delivery. In other words, in order for the 1990 Document to be effective and have any meaning, Exhibit "A" must be completed. Therefore, Exhibit "A" is a material and essential term and a condition precedent of the parties obligations under the 1990 Document.

The prior dealings of the parties cannot be relied upon to fill in the missing quantity term. The 1990 Document contains a merger clause in Section 10.02 that specifically negates prior and contemporaneous understandings and representations. The Court cannot look to prior documents and must enforce the "agreement" as written. *Parker Chiropractic Research Foundation v. Fairmont Dallas Hotel Company*, 500 S.W.2d 196 (Tex. Civ. App.--Dallas, 1973); *Sun Oil Company v. Madeley*, 626 S.W.2d 726 (Tex., 1981). The 1990 Document is unambiguous in that it lacks an essential term--the quantity of electricity to be purchased by Cap Rock Electric from TU Electric.

B. A Purported Agreement, Lacking An Essential Term, Is Unenforceable.

In order for a purported contract to be enforceable, the essential terms of the contract must be set forth in the agreement. Their absence is fatal. For example, in *Gerdes v. Mustang Exploration Co.*, 666 S.W.2d 640 (Tex. App.--Corpus Christi, 1984), the price to be paid for water was left for future negotiations. In reviewing the contract, the Court found that it

> leaves completely open one of the most important considerations of the parties concerning future negotiations, i.e., the price to be paid for the water. This is the essence of the proposed contract and not a detail to be supplied by the court. Where any essential term of a contract is open for future negotiations there is no binding contract. . . The portion of paragraph 19 quoted above is clearly unenforceable.

Id. at 644. Just as a missing price term precludes judicial enforcement, a missing quantity term has the same effect. *Miller v. Vaughn & Taylor Construction Company*, 345 S.W.2d 852 (Tex. Civ. App.--Ft. Worth, 1961, writ ref'd n.r.e.) is directly on point. In *Miller*, a question arose as to whether there was breach of an employment contract for an auctioneer to sell certain property. The Court found that the written contract "showed by its terms that the quantity of property to be sold was to be determined by a list ***prepared by the owner*** and said list not having been prepared, the contract was not completed." (Emphasis added.) *Id.* at 853. In explaining its position, the Court observed:

> ***A contract is not sufficiently certain to be enforced if it fails to specify the quantity of the goods to be sold.*** This is also true of a contract that leaves the quantity to be sold or bought entirely optional with the seller or buyer. . . The contract shows by its own terms that there remained a certain matter for future determination, to-wit, what kind and how much property was to be sold as shown by a list prepared by the owner, which list was never prepared or submitted to appellant. The contract was therefore incomplete. . . if the agreement sought to be enforced as a contract leaves material matter open for further negotiation and agreement, is not an enforceable contract on account of not being definite and certain.

Id. at 853. (Emphasis added.)

In this case, the amount of contract demand is an item solely within the discretion of Cap Rock Electric under Section 1.01 of the 1990 Document. Exhibit "A" by its language declares that the "information to be specified on the effective date of this agreement". Schedule A was never completed. As in *Miller*, there are material matters for future determination--the quantity to be sold and where the purchase is to be made. In this case, the option is solely up to the buyer (Cap Rock Electric) and is unenforceable.

Since material matters have not been determined by Cap Rock Electric and TU Electric in order to complete Exhibit "A", the 1990 Document is not an enforceable contract. *See Scott v. Ingle Bros. Pacific Inc.*, 489 S.W.2d 554 (Tex. 1972); *Pine v. Gibraltar Savings Association*, 519 S.W.2d 238 (Tex. Civ. App.--Houston [1st Dist.] 1974, writ ref'd n.r.e.); *H. B. Zachry, supra.*

C. The 1990 Document Is Too Indefinite To Be Enforced.

Indefinite contracts are not enforceable in Texas. As the court stated in *University National Bank v. Ernst & Whinney*, 773 S.W.2d 707 (Tex. App.--San Antonio, 1989):

> If an alleged agreement is so indefinite as to make it impossible for a court to fix the legal obligations and liabilities of the parties, it cannot constitute an enforceable contract. . . A lack of definiteness in an agreement may concern the time of performance, the price to be paid, the work to be done, the service to be rendered or the property to be transferred. . . ***There is no authority to ask a jury to supply an essential term in the contract which the parties were unable to complete by mutual agreement.***

Id. at 710. (Emphasis added.) See also Restatement § 33 (contract is too indefinite to be enforced unless it provides "a basis for determining the existence of a breach and for giving an appropriate remedy").

The 1990 Document clearly falls under the *University National Bank* rule. Indeed, this case is quite similar to the situation in *Pine, supra.* In that case, a lender brought an action for a deficiency judgment. One of the questions raised was whether

the savings and loan agreed to participate in the development program. The Court summarized the agreement as one where Gibraltar would lend to Pine whatever amount of money he needed at any time within three years to construct houses. These loans were to be made according to prevailing market rates and industry standards. The Court found that the agreement was unenforceable:

> Although the interest rates probably could have been determined from prevailing market rates, Gibraltar had the right to reject the plans of the houses, there was no agreement as to the total amount to be loaned or when and how the interest was to be paid, when and how the principal was to be paid, the ratio of loan to appraisal value, or when the loans would mature. . . The agreement to provide interim constructing financing was no more than an agreement to agree, and Gibraltar's failure to agree to make these did not amount to a breach of contract.

Id. at 243-244.

Again, looking at the 1990 Document and Exhibit "A", there is no agreement as to the total amount of electric power to be purchased under Exhibit "A", and thus there is no enforceable agreement. And courts are not free to fill in essential terms and conditions as they wish:

> It is essential to the validity of a contract that it be sufficiently certain to define the nature and extent of his obligations. If an agreement is so indefinite as to make it impossible for a Court to fix legal liability of the parties thereto, it cannot constitute an enforceable contract.
>
> • • •
>
> A review of the terms and provisions of the contract here involved clearly show that the contract is incomplete because many of the essential terms thereof had not been resolved by the parties to it and because of the lack of essential parties to the contract. There was no meeting of the minds of such parties on materials matters. The agreement left such material matters open for future adjustment and agreement.

O'Neil v. Powell, 470 S.W.2d 775, 778, 779 (Tex. Civ. App.--Ft. Worth, 1971, writ ref'd n.r.e.). Similarly, in *Mooney v. Ingram*, 547 S.W.2d 314 (Tex. Civ. App.--Dallas, 1977, writ ref'd n.r.e.), there was a contract to share in the profits in the sale of a ranch. The share would be based upon the proceeds from the portion of the ranch where improvements were made. The ranch was sold, but there was never a survey to

determine what part of the ranch included the improvements. While it was possible that a survey could have been conducted and a determination made as to what part of the ranch included the improvements, the Court rejected such judicial intervention.

> The contract is not, in itself, sufficiently definite to provide a measure of plaintiff's recovery. The amount of compensation for plaintiff's services was made to depend upon future events that never took place. According to the contract, English was first to have a survey made of the land he proposed to reserve, and then he was to sell the "remaining lands" for price over and above his investment in the ranch before Plaintiff would be entitled to any share in the profits. Since these events never occurred, the court has no means of determining the amount that would be due to plaintiff if English had fully performed. Consequently, the contract is too indefinite to support the damages awarded by the trial court.

Id. at 317.

While it is possible in this case to determine where Cap Rock Electric and TU Electric are physically connected, the Court should not do so. And, in any event, the exercise, would be futile. The 1990 Document contemplates more than a mere physical inspection to fill out Exhibit "A". It requires a determination by Cap Rock Electric of which, if any, Points of Delivery, are to be included and a determination of the amount, and what amount, if any, of Contract Demand, is to be included on Exhibit "A". Since the parties were unable to fill out and negotiate Exhibit "A" to the 1990 Document, this Court should not attempt to do what the parties failed to do.

D. Completion Of Exhibit "A" Is Condition Precedent To Performance.

The duty to purchase power from TU Electric by Cap Rock Electric was contingent upon the completion of Exhibit "A". In other words, the preparation of Exhibit "A" is a condition precedent to Cap Rock Electric's duty to perform under the 1990 Document.

Conditions precedent to an obligation to be performed are those acts or events, which occur subsequent to the making of a contract, that must occur before there is

right to performance and before there can be a breach of contractual duty. *Hohenberg Brothers Company v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976).

> A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. Conditions may, therefore, relate either to the formation of the contracts or liability under them. [Citing *Hohenberg*]. Conditions precedent to an obligation to perform are those acts or events which occur subsequently to the making of the contract that must occur before there is a right to immediate performance and before there is a breach of contractual duty.

Ibid. Gulf Construction Company v. Self, 676 S.W.2d 624, 627 (Tex. Civ. App.--Corpus Christi, 1984). No particular words are necessary to create a condition precedent, but the condition must relate to an essential or material term and be consistent with the contract viewed as a whole. *Id.* In this case, the completion of Exhibit "A" was both a condition to the formation of the agreement and to Cap Rock Electric's duty to perform any obligations arising under the 1990 Document.

Pasadena Associates, supra, is on point with respect to a condition precedent to the obligation to perform, and it is controlling. In *Pasadena*, the plaintiff sought to hold the defendants liable for breach of a promise to lend money to finance the construction of a new hospital wing. The defendants argued successfully that the performance of their promise was conditional upon the receipt by them of a commitment from the Tennessee Life Company to lend them the money in the first instance.

The Court held that the agreement was unambiguous and its construction presented a question of law for the court to determine from the four corners of the agreement. Reviewing the contract as a whole, the court in *Pasadena* found the defendants "were not obligated unconditionally to finance the expansion project involved, but they were to become liable only upon the issuance of a mortgage loan commitment by Tennessee Life Insurance Company or another lending institution." *Id.* at 478.

Just as the loan commitment in *Pasadena* was "the key to the entire transaction" (*Id.* at 478), the quantity term in this case was the linchpin of the proposed deal. The defendants in *Pasadena* were not bound to perform until the condition was met. Cap Rock Electric is not bound to perform until it exercises is discretion under the 1990 Document to specify the Points of Delivery and the Contract Demand and to fill in Exhibit "A". Until the contract quantity is specified, there is no enforceable agreement.

E. An Agreement To Agree Is Unenforceable.

At best, the 1990 Document may be viewed as an agreement to agree in the future. "A purported contract which is no more than agreement to agree in the future on essential terms, or one which does not adequately specify essential terms, ordinarily will be unenforceable." *Paige and Wirtz Construction v. Van Doran Bri-Teco Company*, 432 S.W.2d 731, 735 (Tex. Civ. App.--Amarillo, 1968, writ ref'd n.r.e.).

In *Scott v. Ingle Bros. Pacific Inc.*, 489 S.W.2d 554 (Tex. Sup., 1972), the Company purchased a plant and was to keep Scott as an employee. The contract stated that an employment agreement has been prepared even though none had. "An agreement simply to enter into negotiations for a contract later does not create an enforceable contract." *Id.* at 555.

Even where there has been a proposed settlement to litigation, the Courts have found no agreement to exist where future items were left to be negotiated. This is what occurred in *H. B. Zachry Company v. Maerz*, 223 S.W.2d 552 (Tex. Civ. App.--San Antonio, 1949). In that case the parties entered into a settlement of a lawsuit. The Defendants claimed no agreement had been reached since there was a matter left to future agreement that was not specified in the court settlement. The Court agreed.

> The agreement further shows on its face that it is incomplete, that there remained a further agreement to be entered into, that is, the place upon the ground where the avenue for ingress and egress was to be built. Thus material matters were left for future adjustment and there was no binding agreement entered into between the parties. All the essential terms of the contract must be settled and there must be a meeting of the

> minds on all such matters. The alleged agreement on its face shows that it was incomplete and the trial judge should not have entered judgment based on incomplete agreement.

Id. at 554.

F. The 1990 Document Violates The Statute of Frauds.

The 1990 Document also cannot be enforced; it does not conform to the Statute of Frauds, Tex. Bus. and Com. Code Sec. 26.01. The Statute of Frauds requires that a promise or agreement is not enforceable unless it is in writing if it is not to be performed within one year from the date of the making the agreement. The 1990 Document clearly falls within the requirements of the Statute of Frauds.

The memorandum required by the statute

> must be a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writing without resorting to oral testimony.

Cohen v. McCutchin, 565 S.W.2d 230,232 (Tex. Sup., 1978). *See also, Bratt & Mountandor v. Tennant*, 218 S.W.2d 847 (Tex.. 1949); *Boddy v. Gray*, 497 S.W.2d 600 (Tex. App.--Amarillo, 1973, writ refd, n.r.e); *Parker Chiropractic Research Fd., supra.* This rule was applied in *Dobson v. Metro Label Corporation*, 786 S.W.2d 63 (Tex. App.--Dallas, 1990) when an employee sued his former employer for wrongful discharge. In analyzing the agreement in *Dobson*, the court looked at the statute:

> Therefore, to satisfy the Statute of Frauds, the written memorandum must contain all the essential elements of the agreement between Dobson and Metro Label. The memorandum signed by Abbott shows only that he made an offer on July 14, 1987, for some unspecified managerial position at a salary of $60,000 per year, with no initial bonus arrangement. Dobson now contends that this writing establishes much more, namely that it was he who was hired, that his employer was Metro Label, that the job he accepted was a general manager of three Metro Label plants, and that the period of employment was for one full year. The memorandum itself, however, cannot be stretched so far. Considerable parol supplementation is needed to convert what is now a nebulous offer by Abbott into the definitive employment contract between Metro Label and Dobson upon which Dobson relies to obtain a recovery. Since resort to oral testimony is necessary to complete the

> material terms of the contract, we hod that as a matter of law the memorandum does not satisfy the Statute of Frauds.

Id. at 66.

In this case, the 1990 Document, like the agreement in *Dobson*, cannot be "stretched so far" as to make it enforceable. The Court must fill out Exhibit "A", project the Contract Demand for Cap Rock Electric, and determine all of the Points of Delivery covered by the 1990 Document. In the absence of a quantity term, the 1990 Document violates the Statute of Frauds and is unenforceable.

G. Specific Performance Cannot Be Ordered.

The lack of agreement on material terms and conditions can further be demonstrated by looking at TU Electric's counter-claim for specific performance of the 1990 Document.

In order for this Court to grant TU Electric's request for specific performance, the Court can only look at the 1990 Document for two reasons.

First, the 1990 Document itself contains the above cited merger clause, stating that the document is complete onto itself. In *Jones v. Riley*, 471 S.W.2d 650 (Tex. App.--Fort Worth, 1971), the court was faced with a document that contained a provision that the agreement "sets forth the entire agreement between the parties hereto, and all prior agreements, whether written or oral, are either merged herein or rescinded. . ." *Id.* at 655. The court found this language "prevents this written option agreement from being modified, varied, or contradicted by parol evidence of prior or contemporaneous oral agreements or negotiations between these parties." *Id.* at 661.

Second, case law prohibits a court, when specific performance is requested, from looking beyond the four corners of the document. In *Parker Chiropractic Research Fd., supra*, the foundation sought specific performance. The Court reviewed the rules regarding specific performance and stated:

> (1) A decree of specific performance ***must be based on a valid completed contract that possesses the essentials of a binding legal obligation. It will not be granted where material terms of the contract were not agreed to but left to future adjustment...***
>
> (2) A decree of specific performance of a contract ***is not a matter of right,*** but rests in the sound discretion of the court; a discretion not arbitrary but judicial, and exercised under the established doctrines and settled principles of equity...
>
> (3) The right to the remedy depends upon certain conditions: (a) ***the contract must be reasonably certain,*** unambiguous and based upon valuable considerations; (b) it must be fair in all its parts, free from misinterpretation, misapprehension, fraud, mistake, imposition or surprise; (c) the situation of the parties must be such that specific performance will not be harsh or oppressive; and (d) the one seeking the remedy must come to the court with clean hands...
>
> (4) Specific performance will not be decreed unless t***he terms of the contract are so expressed that the court can determine with reasonable certainty what is the duty of each party and the conditions of each performance...***
>
> Thus, to be enforceable, a contract to enter in to a future contract ***must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.*** Where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, ***there can be no implication of what the parties will agree upon.*** (Emphasis added.)

Id. at 200-201. Clearly none of these rules have been followed in the 1990 Document and this Court cannot require specific performance.

The rule requiring certainty before specific performance can be ordered requires the contract terms to be expressed "with such certainty and clarity that it may be understood without recourse to parol evidence to show the intention of the parties." *Bryant v. Clark*, 358 S.W.2d 614, 616 (Tex. Sup., 1962). Since specific performance is designed to compel performance, it "demands a *clear, definite and precise understanding* of all of the terms; they must be exactly ascertained before their performance can be enforced." (Emphasis in original.)

This Court cannot determine how Cap Rock Electric is in breach of the 1990 Document. In order to have specific performance, this Court will need to assume control of the 1990 Document until it is terminated. This Court will have to determine

Cap Rock Electric's contract demand at each Point of Delivery, determine the Points of Delivery, determine which delivery points can be moved under Paragraph 2.05, determine how emergency service is to be provided, how regulation service is to be provided, how maintenance service is to be provided and how back-up resources are to be determined, and every other aspect of the 1990 Document that was left to future negotiations by the parties.

H. Conclusion.

TU Electric has not found or cited in its initial Trial Brief a single case, and it will not find such a case, in which an essential term such as the quantity of what is to be bought and sold is omitted or left for future negotiation and a court has found an enforceable contract. Whether under the Statute of Frauds or the doctrines of essential terms, indefiniteness, agreements to agree, or conditions precedents, courts consistently decline the honor of writing a contract for the parties. This is particularly true if one of the parties seeks specific performance. And this is not a matter of good faith or reasonableness of interpretation. Rather it is a matter of the proper role of courts in relation to freedom of contract. Once again, no one has made this point more cogently than Professor Corbin: "If no method is agreed upon for rendering [the] subject matter [of an alleged contract] sufficiently definite for enforcement, the agreement must nearly always fail of legal effect; it is not customary for courts to fill the gap by finding that a 'reasonable' amount of goods or land or labor has been agreed upon as the exchange for money." Corbin § 100.

II. TESTIMONY AT HEARING.

Five witnesses testified at the four day hearing. Cap Rock Electric's witnesses were Steven E. Collier, director of Power Supply and Regulatory Affairs for the cooperative, and Whitfield Russell, an expert witness on power supply contracts and negotiations.

A fair summary of the testimony is that Cap Rock Electric's Mr. Collier believed that the document he was negotiating allowed him the flexibility to move all of Cap Rock Electric's load beginning on the effective date of the 1990 Document. This is supported by Paragraph 3.01 of the 1990 Document. This was not a recent interpretation by Mr. Collier. It is a position he took from the time that the 1990 Document was negotiated.[3]

The testimony is clear that Cap Rock Electric wanted to be free from TU Electric as soon as possible. The 1963 Contract between TU Electric and Cap Rock Electric allowed Cap Rock Electric to leave the TU Electric system on 30 days notice whenever TU Electric changed its rates. Plaintiff's Exhibit 15, December 5, 1972 amendment. Since that was the case, why would Cap Rock Electric sign a new contract that would require it to give three years' notice to TU Electric before it could leave?

TU Electric's witness Pitt Pittman testified that what Cap Rock Electric was seeking was a three year contract and that was the "quid pro quo" for signing the 1990 Document.[4] The 1990 Document clearly contradicts Mr. Pittman. Exhibit E of the 1990 Document is the mutual release. In signing the 1990 Document, Cap Rock Electric gave up any claim, demand, action, suits or damages in the following:

1. Public Utility Commission (PUC), Docket Nos. 9300 and 5640.

---

3 TU Electric sought to discredit Mr. Collier's testimony because Mr. Collier initially was to receive a success fee for the West Texas Utilities contract savings. Cap Rock Electric voluntarily corrected a potential misunderstanding of the facts surrounding Mr. Collier's success fee. TU Electric has yet to explain the propriety of its intrusion and invasion of privacy into the attorney-client relationship.

4 The transcript of the hearing on April 14-15, 1992 has not been transcribed, so there can be no citation to the record at this time. When the transcript is completed, Cap Rock Electric will provide citations.

2. Nuclear Regulatory Commission (NRC), Docket Nos. 50-445A and 50-446A.

3. District of Columbia Court of Appeals, Cause No. 89-1735.

4. Any claims under the 1963 Contract.

Simply, Cap Rock Electric gave up its right to pursue TU Electric for antitrust activities at the NRC and gave up its right to seek lower rates at the PUC. What Cap Rock Electric believed it gained was flexibility to find a new power supplier and the obligation by TU Electric to provide partial requirements, backup, standby, emergency, scheduling and wheeling services under the 1990 Document.

A. Cap Rock Electric Could Leave TU Electric On Effective Date.

Cap Rock Electric's Mr. Collier believed that the 1990 Document gave Cap Rock Electric the one-time option to leave the TU Electric system immediately upon the Effective Date. This could be done if Cap Rock Electric found a new power supplier and was able to move its delivery points from the TU Electric control area. This was expressly provided for under Paragraph 1.11 of the 1990 Document. Mr. Collier's interpretation was confirmed in contemporaneous correspondence sent to third parties. This can be shown in the following Exhibits:

1. Letter of Steven Collier to Scott Moore at West Texas Utilities dated July 26, 1990, Plaintiff's Exhibit 4, on Page 6:

> . . . the transition from our power supply agreement that we have negotiated with TU Electric may allow us to serve some of our load from CSW with less notice.

2. Letter of Steven Collier to Scott Moore of West Texas Utilities dated October 5, 1990, Plaintiff's Exhibit 5, on Page 1:

> . . . the transition process from the existing contract to the new contract should enable us to immediately begin to take power from other sources.

3. Letter of Steven Collier to Don Welch of West Texas Utilities dated June 12, 1991, Defendant's Exhibit 28, on Page 2:

> As we discussed, TU Electric is not likely to be pleased with this prospect and can be expected to insist that we do not have the option of simply moving all of the load to WTU in making the transition from our all-requirements wholesale power supply agreement to the new power supply agreement that we executed in June, 1990.

The evidence shows that by transition period, Cap Rock Electric's Mr. Collier was referring to the opportunity to enter no Contract Demand or no Points of Delivery on Exhibit "A" at the time the 1990 Document became effective. He viewed this as a one time opportunity under Paragraph 1.11.

This position is further supported by Defendant's Exhibit 26, which are the notes of David Krupnick of Southwestern Public Service Company and the designation from Mr. Krupnick's deposition, Plaintiff's Exhibit 20. Mr. Krupnick's vivid testimony on this point elicited by TU Electric's own attorney was:

> Q. But your best recollection is that Steve Collier is the one that made those representations?
>
> A. The majority of those discussions were with Steve Collier.
>
> Q. And specifically, was it your understanding that Steve Collier said, "When the 1990 Power Supply Agreement between TU Electric and Cap Rock goes into effect, Cap Rock can designate something less than all their points of delivery to be served by that contract by TU"?
>
> A. His discussions with us indicated they could indicate anything from zero to all of their delivery points under that.
>
> Q. And he said that specifically that you recall; is that right?
>
> A. As I recall. It may not have been those exact words, but that was certainly the understanding that we received from him.
>
> Q. That Cap Rock, if it chose to, could designate zero points of delivery to be served by TU Electric under the 1990 agreement; is that your understanding from what Steve Collier told you?
>
> A. Under the 1990 TU/Cap Rock agreement?
>
> Q. Yes, sir.
>
> A. Yes, that was my understanding.

Q. And was it your understanding that Cap Rock had the choice to receive zero electricity as of the very first day that 1990 agreement between TU Electric and Cap Rock went into effect?

A. Receive zero electricity from TU?

Q. Yes.

A. Purchase zero electricity from TU is what I understood.

Q. Okay. Meaning that Steve Collier represented to you that if Cap Rock chose to, it could purchase all of its power supply needs from a supplier other than TU Electric; is that correct?

A. That's my understanding, yes, sir.

Q. And that they could do so beginning on the first day that the 1990 agreement between TU Electric and Cap Rock went into effect?

A. Yes, sir, that was my understanding.

Plaintiff's Exhibit 20, Deposition Page 52, line 7 to Page 53, line 23. These representations were made by Mr. Collier to Mr. Krupnick "closer to the summer of 1990." Deposition at Page 50, lines 18 to 21. This would be shortly after the 1990 Document was signed.

Mr. Krupnick also testified that the timing of the SPS contract was tied to the engineering and construction of a transmission line, not the notice provisions in the 1990 Document. Plaintiff's Exhibit 20, Deposition Page 86, line 6 to Page 87, line 17.

B. Paragraph 3.01 Does Not Support Full Requirements Theory.

TU Electric's witnesses contend that the 1990 Document is a full requirements contract. They cited Paragraph 3.01 in support of their contention. Reliance on this section is not warranted for several reasons.

First, Paragraph 3.01 starts with the following:

> Except as otherwise permitted by this Agreement, . . .

TU Electric's Mr. Pittman said this was intended to refer to Paragraph 3.02 of the agreement. Paragraph 3.02 deals with partial requirements. He said in retrospect, the language should have been more specific in the reference to Paragraph 3.02.

However, a review of the earlier drafts of the contract do not support, indeed contradict, his contention. Paragraph 3.01 became less restrictive, not more restrictive for Cap Rock Electric, as negotiations continued.

Plaintiff's Exhibit 16, the May 21, 1990 draft of the 1990 Document shows the language of 3.01 stated in pertinent part:

> Except as provided in Section 3.02 hereof. . . .

The next draft of the agreement, Plaintiff's Exhibit 17, expanded the language to include more than just 3.02. The revision stated:

> Until Cap Rock commences the purchase of partial requirements power and energy in accordance with the requirements of Section 3.02 hereof. . .

In other words, rather than going from a general statement to a specific statement, the drafts of the 1990 Documents went from the specific ("Except as provided in Section 3.02") to the general ("Except as otherwise permitted by this Agreement"). The parties obviously meant to refer to more than Section 3.02 when those changes were finally adopted. This is further supported by reviewing the language on Exhibit "A" and comparing it to the language on Exhibits "B" and "D". Exhibit "A" does not refer to any specific paragraph of the 1990 Document, but Exhibits "B" and "D" have specific references to specific paragraph numbers.

Second, reliance on Paragraph 3.01 is misplaced because of the second sentence of that paragraph. The sentence reads as follows:

> . . . Cap Rock may, upon reasonable advance written notice, ***elect to retain*** one or more of its Points of Delivery (having voltage levels of less than 60,000 volts) which exist on the effective date of this Agreement as full requirements Points of Delivery pursuant to this Section 3.01. . . (Emphasis added.)

What does this sentence mean? The plain meaning is that in order for Cap Rock Electric to ***retain*** one or more of its 60,000 volt points of delivery as full requirements,

Cap Rock Electric must give TU Electric reasonable notice. Failure to give notice obviously means that they are not full requirements points on the effective date. What, then, are these points? If this is an all requirements contract from day one as TU Electric contends, then why must Cap Rock Electric give notice to retain these points as full requirements points of delivery? The answer must be that this is not a full requirements contract and that Cap Rock Electric, pursuant to Paragraphs 3.01, 1.01 and 1.11, has the right to elect which, if any, points of delivery to include on Exhibit "A".

C. Paragraphs 1.01 and 1.11 Do Not Support Full Requirements Theory.

This is further supported by the language change in Paragraph 1.01. Plaintiff's Exhibit 16, the May 21, 1990 draft, has the following definition of "Contract Demand":

> 1.01 "Contract Demand" shall mean the maximum annual gross metered load projected by Cap Rock at each Point of Delivery less the portion of the firm capacity of Cap Rock's Firm Power Resources, if any, which is allocated to such Point of Delivery, expressed in kilowatts (Contract Kw).

In the same draft, Points of Delivery was defined as:

> 1.08 "Points of Delivery" shall mean all points at which TU Electric maintains an electrical connection with Cap Rock, each of which shall be specified on Exhibit A hereto.

The final 1990 Document changes those definitions to:

> 1.01 "Contract Demand" shall mean the ***maximum amount of power and energy*** expressed in kilowatts (Contract Kw) ***that Cap Rock projects TU Electric will be required to provide*** at each Point of Delivery. ***Contract Demand will be specified on Exhibit A,*** which may be changed from time to time as provided in Section 3.08 hereof.
>
> 1.11 "Points of Delivery" shall mean all points ***within TU Electric's Control Area*** at which TU maintains an electrical connection with Cap Rock ***existing on the effective date hereof, each of which Points of Delivery*** shall be specified on Exhibit A hereto, which shall be amended from time to time in accordance with Section 3.078 (b) hereof.

The above bold italic shows the significant changes. By changing the language from the earlier draft, the parties to the 1990 Document wanted to express a different concept. Contract Demand took on the significance of being a term that Cap Rock Electric was to project and once having been projected, then TU Electric would be required to provide.

A fundamental question is why is Contract Demand in the 1990 Document if it is a full requirements contract as TU Electric contends? As Cap Rock Electric's Mr. Russell testified, Contract Demand is not necessary for a full requirements contract. Under a full requirements contract, Cap Rock Electric must purchase all the electricity going through the meter. Thus, there is no need for determining Contract Demand in the 1990 Document unless the parties contemplated that Cap Rock Electric could purchase partial requirements. Compare Plaintiff's Exhibit 15, the 1963 Contract, which was a full requirements contract, with the 1990 Document. The 1963 Contract did not have a Contract Demand term. It had a billing provision for contract kW. There also is no definition of Points of Delivery in the 1963 Contract.

Of greater significance is the change in the definition to Points of Delivery. It added two new concepts. First, the points must be within TU Electric's control area. Second, the points must be existing on the effective date. This change is consistent with Mr. Collier's testimony that Cap Rock Electric could move from TU Electric's control area and not fall under the 1990 Document. TU Electric attempted to rebut this proposition by arguing that there is no instant in time between the termination of the 1963 Contract and the Effective Date of the 1990 Document. If this were so, Cap Rock Electric could never leave the TU Electric system. In his testimony, Mr. Collier explained:

> Q (By Mr. Balough) Let me kind of try a direct route. There were some questions by Mr. Sampels concerning how there could be an instantaneous termination of the '63 Contract and implementation of

the '90 Contract and yet move the control area. Could you explain to me how you believe that is possible?

A. Yes. The matter is how do you actually effectuate the transfer of the load from the TU control area to the WTU's control area contemporaneously with the transfer of the ruling agreement from the '63 Agreement to the '90 Agreement, and maybe to build a word picture, if you're precluded from any of the reasonable arrangements that utilities generally make to effectuate a switch, we know there's going to be a switch --

MR. SAMPELS: Your Honor, I'm going to object to anwer that first of all is nonresponsive to the question. We're trying to find out what this contract permits, and the answer is with respect to what some other utilities or utilities might do if they didn't have this contract. Now, I object to the answer being nonresponsive.

THE COURT: Objection is overruled. Go ahead.

A. If we assume that the transfer of the control areas has to be instantaneous and at the exact same second as the transfer of the contract, let me say again, that is not typically the way things are done. Everybody knows you have to throw switches, you have to switch things, and folks work together on that, but assuming that folks aren't going going to work together on that, then it has to be instantaneous. You line everything up, you line up all the meters, you line up all the signaling, you line up everything in WTU's control area and TU's control area, and at 12:01 a.m. on February 1, you plug it into the computer and away you go.

Now, that's not especially practical, but it is possible. I've never understood utilities to do that kind of thing. We would have this exact same problem if we moved the load under this agreement, gave three years notice move it to another control area, but when do you do it? In the instant between the time the notice is effective at the end of the three years and when does it start? Well, you do it and you tell the engineers make the switches, do the things, get it done, you may be five minutes one way or the other, but you do that, but if you absolutely positively had to do it at an instant in time, you stand there, and at the instant in time, you plug it into the computer and away you go. Now the signals are in this computer and that computer and these generators are responding instead of those. Now, that's not the way I understand any reasonable utilities would operate, but you could do that.

Hearings Transcript of March 26, 1992 at Page 249, line 13 to Page 251, line 16.

D. Cap Rock Electric Had Control Area Move Ready.

The evidence in this case demonstrates that Cap Rock Electric had made arrangements with West Texas Utilities (WTU) under which Cap Rock Electric would operate its delivery points under WTU's "Control area by means of telemetering."

Service Agreement Between West Texas Utilities and Cap Rock Electric, Page 1 of Rate Schedule TR-1, Plaintiff's Exhibit 6.

TU Electric argues that there is no contract between WTU and Cap Rock Electric. The testimony of David L. Teeter of WTU is:

> Q. And it was your intent on December 10th, that after you received a signed copy from Cap Rock, that WTU would, in turn, sign that agreement?
>
> A. Yes.
>
> Q. Okay.
>
> A. At some point, after receipt, after it had been executed by Cap Rock and we got it back, WTU would sign it, yes.

Deposition of David Teeter at Page 155, lines 4 to 11.

The only intervening factor after Cap Rock Electric signed and returned the WTU service agreement was the receipt by WTU of TU Electric's threatening letter. Plaintiff's Exhibit 8. Despite TU Electric's threat, WTU's Mr. Teeter stated WTU is still willing to do the deal. Teeter Deposition at Page 156, lines 10-12. Plaintiff's Exhibit 9 also shows that if there is no valid contract between Cap Rock Electric and TU Electric, WTU will provide electricity to Cap Rock Electric as planned. In other words, but for TU Electric's own actions and control of the essential facilities, the Cap Rock Electric/WTU agreement would be signed and would have been in place February 1, 1992 so that none of Cap Rock Electric's delivery points would have been in TU Electric's control area.

E. Adragna's Notes Refer To Paragraph 2.05.

One other issue that TU Electric attempted to raise was in Defendant's Exhibit 53 and 79. TU Electric attempted show through these documents that Exhibit A was not to be filled out until the effective date, because Cap Rock Electric was changing the name of some of the delivery points. However, Plaintiff's Exhibit 23, which is the complete set of John Adragna's notes of that meeting shows the discussion pertained to

Paragraph 2.05 of the 1990 Document. See page 2 of Plaintiff's Exhibit 23. This Paragraph, of course, is the one that specifically lists nine delivery points by name, including Knott and Ackerly. Those two points of delivery are specifically mentioned in the "excerpt" of Mr. Adragna's offered as Defendant's Exhibit 53. It was important that these delivery points be listed by name in the 1990 Document when it was written. However, as with all other delivery points, they would be required to be on Exhibit "A" on the Effective Date if Cap Rock Electric chose to take power from TU Electric at those points. These notes have nothing to do with whether or how Exhibit A should be filled out.

F. Conclusion.

Thus, from four days of evidence, little new light has been shed on the 1990 Document. However, the evidence does show that Cap Rock Electric never intended to sign up for three more years with TU Electric if another source of electricity was available prior to the effective date. The escape clause was Paragraph 1.11 and Paragraph 1.01 and Exhibit "A" that allows Cap Rock Electric exclusively to determine what TU Electric would be required to sell to Cap Rock Electric.

The evidence also shows that there was no meeting of the minds between Cap Rock Electric and TU Electric. Failure of the parties to agree on the intent of the contract is fatal to its enforceability.

The evidence leads to only one result -- there is no binding contract.

III. REQUEST FOR INJUNCTION.

A. Cap Rock Electric Has Proven Damages Are Incalculable.

Cap Rock Electric has requested this Court to enter an injunction to prohibit TU Electric from interfering with Cap Rock Electric obtaining its electricity elsewhere.

An injunction is appropriate since the unrebutted and uncontested testimony in this case is that Cap Rock Electric would suffer irreparable injury if it must continue to take electricity from TU Electric. The nature of the irreparable injury was explained both in the testimony of Mr. Collier and Mr. Russell. Moreover, TU Electric has admitted that "the potential harm to TU Electric in the event the requested mandatory injunctive relief may not be significant. . ." TU Electric's Motion to Deny Plaintiff's Request for Temporary Injunctive Relief at Page 44. TU Electric also admitted that damages in this case cannot be calculated. In Paragraph 8.05 of the 1990 Document that they seek to enforce, it states that "TU Electric and Cap Rock agree that it may be impossible to measure in terms of money the damages which may or will accrue by reason of Default under this Agreement . . ." This, of course, is not a default case, but the language does show that the Parties agreed that damages cannot be calculated.

Cap Rock Electric has approximately 10,000 members and approximately 20,000 electric meters in a 10,000 square mile area in the Permian Basin. Hearings Transcript of March 26, 1992 at Page 72-73. Cap Rock Electric's peak load is approximately 100 megawatts. TU Electric's Mr. Pittman testified that in 1990, TU Electric's peak load was approximately 18,000 megawatts and, in 1991, was approximately 17,000 megawatts. In other words, Cap Rock Electric comprises merely one half of one per cent of TU Electric's peak load. TU Electric's Mr. Henry Bunting testified that TU Electric must maintain 18 per cent of reserves for unforeseen events or approximately 3,600 megawatts. Cap Rock Electric's peak load is just 3 per cent of the reserves TU Electric must keep in case of load swings due to weather and loss or gain of

customers. This further shows the insignificance of Cap Rock Electric upon TU Electric. Indeed, Mr. Pittman testified that TU Electric lost over 1,000 megawatts (or 10 times the size of Cap Rock Electric's load) from 1990 to 1991 without any apparent adverse effect.

On the other hand, if this Court were to find that Cap Rock Electric does not have a contract with TU Electric, Cap Rock Electric would see its power costs decrease by 20 per cent. This means that oil companies in the Permian Basin would realize an annual savings of more than $1.7 million and residential customers would save a total of $1 million per year. Defendant's Exhibit 48 at page 2. In a depressed economic area, such a savings is significant. The extreme losses lie with Cap Rock Electric, not TU Electric, if the injunction is not granted.

As to damages to Cap Rock Electric, to continue to purchase power from TU Electric, Cap Rock Electric's Mr. Collier testified that it means that Cap Rock Electric's rates are higher and that has several affects. He said:

> Remember that we discussed earlier this morning that we have a service area in which a large part of that service area either we or TU Electric can serve customers.
>
> Now, to what extent the higher price that now exists than would have existed under the WTU arrangement causes us not to obtain a customer that we might have otherwise obtained or to lose a customer that we may have or to have a customer that we have experience some reversal or setback to not drill an oil well, to not plant a field of cotton, to not do this or that, to go out of business because of the power costs, you know, how do you ever get back to that point? How do we ever recover from that. If you've lost the customer, you've lost them. You don't get them back, I don't think, just because you get money at some point.
>
> Somebody who's gone out of business because power costs were higher don't go back into business now because Cap Rock gets some money, and so I think we're irreversibly disadvantaged there, and then finally, in a similar way to how we are sort of made a pariah to our potential business partners, that well, we can't do business with you because we can never get around the TU roadblock, it essentially constrains considerably the actions and decisions that my board of directors, who are elected by their members, would make to be an entrepreneurial company to go forward and do things that are good for the members, because you draw the conclusion that, you know, no matter what we try to do, we're not going to be able to do it because TU Electric controls the transmission, and because they control transmission, they

> can take whatever view of the contracts they want to, and we're stuck, so we might as well not try things that are good for our members, and that kind of a change in attitude I think has immeasurable adverse implications in an industry where we are in West Texas where it's important for us to be stepping out and doing things for our members, so I just think we're affected adversely in a variety of ways which we can't recover from.

Hearings Transcript of March 26, 1992 at Page 137, line 4 to Page 138, line 17.

Cap Rock Electric also has been irreparably injured because of the alienation of WTU as a business partner. Hearings Transcript of March 26, 1992 at Page 136, lines 10-24.

Cap Rock Electric's expert Mr. Russell also testified as to irreparable injury. His testimony was from the perspective of an expert who regularly represents large industrial customers in their power supply activities. His testimony was that where there is uncertainty as to the power supply as is the case here, large industrial customers will not consider Cap Rock Electric as a potential power source. Since industrial customers are making decisions for the long term, these loads cannot be recovered. In addition, Mr. Russell testified that this is a critical period for such negotiations since industrial customers generally must make capital intensive investments for their facilities. With the current historically low interest rates and the low cost of gas, industrial customers are making long-term decisions now. The loss of such potential customers to Cap Rock Electric and the loss of potential jobs to the Permian Basin are incalculable and cannot be remedied by the payment of money damages at a later point in time by TU Electric.

B. TU Electric Controls Essential Facilities.

This injunction is necessary since TU Electric maintains essential facilities that are required by Cap Rock Electric to receive electricity.

TU Electric electrically surrounds Cap Rock Electric, (i.e., Cap Rock Electric is electrically interconnected solely with TU Electric). Cap Rock Electric cannot receive

power unless it is transmitted over TU Electric's lines. Cap Rock Electric is, therefore, entirely dependent upon the transmission facilities of TU Electric, its principal competitor at retail, for the transmission service necessary to allow Cap Rock Electric to purchase the power Cap Rock Electric needs to compete with TU Electric at retail. The only transmission facilities between Cap Rock Electric and WTU are TU Electric's transmission facilities. It is simply not feasible for Cap Rock Electric to duplicate the integrated TU Electric transmission grid between Cap Rock Electric and WTU. TU Electric's transmission system, therefore, is an "essential facility."

1. TU Electric Must Make Facilities Available.

A essential facility or "bottleneck monopoly" doctrine of antitrust law imposes upon a monopolist who controls an essential facility the obligation to make that facility available to competitors on non-discriminatory terms. This doctrine ensures that "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications." *Image Technical Services v. Eastman Kodak Co.*, 903 F. 2d 612, 620 (9th Cir. 1990).

A monopolist which denies a competitor access to an essential facility is liable under Section 2 of the Sherman Act for monopolizing or attempting to monopolize trade or commerce. A party seeking to invoke the essential facilities doctrine must show:

(1) control of the essential facility by a monopolist;

(2) a competitor's inability practically or reasonably to duplicate the essential facility;

(3) the denial of the use of the facility to a competitor; and

(4) the feasibility of providing access to the facility.

MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983).

The obligations of a monopolist controlling an essential facility to provide non-discriminatory access can be traced back to *U. S. v. Terminal Railroad Assoc.*, 224 U.S. 383 (1912). In that case, a consortium of railroads had gained control of every rail route feeding into St. Louis across the Mississippi River. The consortium had the power to exclude any competing railroad or to force that railroad to capitulate to any terms the consortium demanded. It was economically and geographically infeasible for a competitor to build another bridge. Therefore, the Supreme Court ruled that the consortium must allow competing railroads to use its facilities on a non-discriminatory basis. *Id.* at 411.

The seminal essential facilities doctrine case involves a refusal to wheel. In *United States v. Otter Tail Power Co.*, 331 F.Supp. 54 (D.Minn. 1971), *aff'd* 410 U.S. 366 (1973), Otter Tail, an investor owned public utility, refused to sell at wholesale or wheel electric power to several municipalities which were attempting to set up municipal power systems to compete with Otter Tail in the retail sale of power. The Court held that under the bottleneck monopoly theory, Otter Tail had violated section 2 of the Sherman Act, and enjoined Otter Tail from continuing its anti-competitive practices. The Court found that Otter Tail's:

> control over transmission facilities in much of its service area gives it substantial effective control over potential competition from municipal ownership. By its refusal to sell or wheel power, defendant prevents that competition from surfacing.

Id. at 61. As the Supreme Court subsequently concluded, the record made "abundantly clear that Otter Tail used its monopoly power in the cities in its service area to foreclose competition or to destroy a competitor, all in violation of the antitrust laws." *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 377 (1973). Like *Otter Tail*, TU Electric has complete control over transmission to its retail competitor, Cap Rock Electric.

In a case which bears many similarities to a refusal to wheel electricity, AT&T was held to have violated the Sherman Act by refusing to interconnect MCI's long

distance service with AT&T's local distribution facilities. The Court found that AT&T had complete control over the local distribution facilities required by MCI and that MCI could not practicably duplicate the local facilities. Relying on *Otter Tail*, the Court held that AT&T's local facilities were a natural monopoly and that AT&T was denying an essential facility to MCI. *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d at 1132-23 (7th Cir. 1983).

In *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd* 472 U.S. 585 (1985), the defendant, Aspen Skiing Co., operated three of the four skiing facilities in Aspen, while plaintiff, Aspen Highlands operated the other. In the past, Aspen Skiing and Aspen Highlands, had jointly issued a multi-day ski lift ticket good at all four mountains. Then Aspen Skiing refused to issue the four-area ticket and began to issue a three-area ticket, good only at Aspen Skiing mountains. Following *MCI*, the Court applied the four prong test. The Court held that the four-area multi-day ticket was an essential facility controlled by the defendant. Aspen Highlands could not issue a ticket good at the other three Aspen areas, and week long vacationers with a choice between a multi-day three-area ticket and a one-area ticket would choose the three-areas. The Supreme court concurred that in this case "the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610 (1985). TU Electric's intimidation of WTU is a deliberate attempt to discourage Cap Rock Electric from doing business with anyone but TU Electric.

2. TU Electric Is Exercising Monopoly Leveraging.

Another fundamental principles which underlie Section 2 of the Sherman Act, 15 U.S.C. § 2 is monopoly leveraging.

In *Berkey Photo, Inc. v. Eastman Kodak Co.*, F.2d 263 (2d Cir. 1979), the Second Circuit held that "the use of monopoly power attained in one market to gain a

competitive advantage in another is a violation of § 2 [of the Sherman Act], even if there has not been an attempt to monopolize the second market." This articulation of a § 2 violation, often referred to as "monopoly leveraging," precisely describes TU Electric's conduct towards Cap Rock Electric. TU Electric is exercising its monopoly power by denying Cap Rock Electric access to more economical bulk power from utilities such as WTU unless this Court grants Cap Rock Electric's injunction request. TU Electric keeps Cap Rock Electric's retail prices high. By preventing WTU or other alternative power sources from supplying Cap Rock Electric, TU Electric leverages its control of transmission into complete domination of bulk power sales to Cap Rock Electric.

Berkey Photo has its antecedents in *United States v. Griffith*, 334 U.S. 100 (1948). In that case, the Supreme Court found a § 2 violation when a group of motion picture exhibitors with competitors in some localities refused to exhibit movies in localities in which they had monopoly power unless the distributor granted them exclusive showing rights in the contested markets. *Id.* at 108.

In *Kerasotes Mich. Theaters v. National Amusements*, 854 F.2d 135 (6th Cir. 1988), National Amusements alleged that Kerasotes had used its monopoly and market power in other cities to coerce distributors into providing first-run films in the Flint, Michigan area, where Kerasotes competed with National. The Court held this conduct violated § 2 of the Sherman Act. *Id.* at 136-37.

TU Electric has monopoly power over transmission and is using this power to leverage a superior position for itself in the market for bulk power by denying bulk power sellers access to captive bulk power purchases such as Cap Rock Electric.

C. TU Electric Interfered With WTU Arrangements.

This is further shown by TU Electric's attempted interference with Cap Rock Electric's contract with WTU as discussed earlier. Cap Rock Electric signed the contract

and returned it to WTU. On December 19, 1991, Darrell Bevelhymer of TU Electric sent a letter to David Teeter at WTU threatening a tortious interference suit by TU Electric against WTU if WTU followed through with the Cap Rock Electric contract. Plaintiff's Exhibit 8. WTU has not returned a signed contract to Cap Rock Electric. In spite of the letter, WTU's Mr. Teeter stated WTU was still wanting to do the deal with Cap Rock Electric. Teeter Deposition at Page 155, line 22 to Page 156, line 12.

If it were not for TU Electric's intimidation, Cap Rock Electric would have a signed contract with WTU today. This Court must enjoin TU Electric's intimidation and blockage of the essential facilities.

Moreover, in order to receive the electricity from WTU, TU Electric must coordinate its generation with WTU. It is only because TU Electric is exercising its monopoly power that Cap Rock Electric must seek the injunction.

D. Injunction Would Preserve Status Quo.

Normally an injunction will be granted to preserve the status quo. The status quo is the last actual, peaceable, non-contested status which proceeded the pending controversy. *Kjellander v. Smith*, 652 S.W.2d 595, 599 (Tex. Civ. App.-Tyler, 1983). In that case, an injunction was obtained to require the Defendant to remove a fence which ran down the middle of a public road in front of Plaintiff's property. In showing irreparable harm, the Plaintiffs alleged that irreparable harm would result if the fence were not removed and that the road was the only access to their property and that it rendered the road unreasonably inconvenient and hazardous. The Court found that that constituted a sufficient showing of irreparable injury. *Id.* at 599.

In this case, TU Electric controls the essential facilities to get power and energy to Cap Rock Electric. The transmission lines are similar to the road in *Kjellander*. As long as TU Electric blocks the road (transmission lines) with a fence (refusal to wheel and to coordinate with WTU) Cap Rock Electric is being irreparably injured. The last

peaceable activity to be preserved in this case was the termination of the 1963 Contract. TU Electric no longer is contesting that Cap Rock Electric properly terminated the 1963 Contract. The only contested issue in this case is the enforceability of the 1990 Document.

Two other cases that discuss preserving the status quo need mention. In *Westside Atrways Inc. v. J. R. Aircraft Corporation*, 694 S.W.2d 100 (Tex. App.-Houston [14th Dist.], 1985)., the owners of a jet airplane brought suits seeking a temporary injunction restraining the airplane management company, which repaired the plane from interfering with the owners use and possession of the aircraft. The facts of the case show that the airplane had been in the hanger in the possession of the management company. The plane rolled out of the hanger onto a public taxi way and the tow motor pulling the plane was disconnected. The owner's pilot started moving the plane forward and the management company block the plane's path with a car. The trial court found, and the appellate court agreed, that the last, non-contested status was just prior to the time the aircraft's path was blocked. *Id.* at 104. Comparing *Westside Airways* to this case, the last peaceable action was the termination of the 1963 Contract. TU Electric is now seeking to block Cap Rock Electric's purchase of power from WTU by analogy putting a car in front of the airplane. This it cannot be able to do.

The second case is *Henderson v. KRTS, Inc.*, 822 S.W.2d 769 (Tex. App.-Houston [1st Dist.], 1992). In that case, a buyer of a radio station brought an action against the seller to prevent the seller from interfering with buyer's efforts to move the station. The trial court granted the buyer a temporary injunction that specifically ordered seller to refrain from filing any Federal Communications Commission license applications, objections or other documents that delay or block the contemplated move of the station. In determining what the status quo sought to re preserved was the Court looked the last peaceable time before any contested issue arose.

> We find the status quo in this case was in September of 1990, when KRTS was pursuing its move to Alvin, free of any impediments by Henderson. We hold the trial court did not abuse its discretion in its order by enjoining Henderson from further interference with KRTS's application for the Alvin location.

Id. at 774. Again, the last peaceable status between Cap Rock Electric and TU Electric was the termination of the 1963 Contract. That is the status quo to be preserved. It is not the status quo for TU Electric to be using its monopoly powers in its essential facilities from blocking Cap Rock Electric to seek power and energy elsewhere.

Under the NRC anti-trust license conditions admitted as Plaintiff's Exhibit 2, TU Electric is obligated to wheel power and energy to Cap Rock Electric. As a result, the status quo is maintained by an order requiring TU Electric to wheel power from WTU to Cap Rock Electric.

Since the termination of the contract was last actual peaceable, non-contested status which preceded this lawsuit, the termination of the 1963 Contract must be allowed to stand and Cap Rock Electric must be allowed to receive electricity from WTU.

IV. CONCLUSION.

Cap Rock Electric has met its burden of proof in this case. It has shown a probable success on the merits of this case. It has shown that the last peaceable, non-contested, status quo to be preserved in this case was the termination of the 1963 Contract. Moreover, Cap Rock Electric has shown that it will be irreparably injured if it must continue to buy electricity at a cost twenty per cent higher than it could buy from WTU. The unrebutted evidence is that payment money damages later cannot adequately compensate Cap Rock Electric's loss in its competitive position, nor can it attract businesses that will choose to locate elsewhere during this period when Cap Rock Electric is forced to pay these higher rates. Nor can money damages be given to companies and businesses that are not longer in business, because TU Electric's high cost of electricity has contributed to their failure.

Weighing the equities involved, TU Electric is a multibillion dollar company. It sales of electricity as the testimony shows can be very significantly year by year. From 1990 to 1991 for example, TU Electric's own witnesses stated that their peak demand fell by 1,000 megawatts from 19,000 megawatts to 18,000 megawatts. Cap Rock Electric is but a mere 100 megawatts, so its presence or absence on the TU Electric's system is insignificant. On the other hand, a twenty per cent reduction in the cost of power to Cap Rock Electric is significant to not only the cooperative but also its ratepayers. Equity demands that the injunction be granted.

Respectfully submitted,

Richard C. Balough
Attorney at Law
1403 West Sixth Street
Austin, Texas 78703
(512) 477-7896
(512) 477-8657/fax

By: _____
Richard C. Balough
State Bar No. 01658500

J. Brian Martin
600 N. Loraine
P. O. Box 3881
Midland, Texas 79702
(915) 686-7133
(915) 683-2217/fax

Tom Gregg, Jr.
P. O. Drawer 1032
San Angelo, Texas 76902
(915) 655-9188
(915) 655-9180/fax

Of Counsel:

Mark J. Yudof
6302 Shadow Mountain Drive
Austin, Texas 78731
(512) 345-2669

Attorneys for:
Cap Rock Electric Cooperative, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief of Cap Rock Electric Cooperative, Inc. was Federal Expressed, to the parties below on this the 22nd day of April, 1992.

Mr. Charles L. Tighe
Mr. Harris E. Kerr
Cotton, Bledsoe, Tighe & Dawson
500 W. Illinois, Suite 300
Midland, Texas 79702

Mr. M. D. Sampels
Worsham, Forsythe, Sampels & Wooldridge
2001 Bryan Tower, Suite 3200
Dallas, Texas 75201

By: Richard C. Balough
Richard C. Balough