NO. B-38,879

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

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COTTON, BLEDSOE, TIGHE & DAWSON

Charles L. Tighe
State Bar No. 20024000
Rick D. Davis, Jr.
State Bar No. 05537700

500 W. Illinois, Suite 300
Midland, Texas 79702

WORSHAM, FORSYTHE, SAMPELS & WOOLDRIDGE

M. D. Sampels
State Bar No. 17557000
Angela Agee Hatton
State Bar No. 09231050
David P. Poole
State Bar No. 16123750

2001 Bryan Tower, Suite 3200
Dallas, Texas 75201

July 8, 1992

STSP reviews completed

NO. B-38,879

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

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COTTON, BLEDSOE, TIGHE & DAWSON

Charles L. Tighe
State Bar No. 20024000
Rick D. Davis, Jr.
State Bar No. 05537700

500 W. Illinois, Suite 300
Midland, Texas 79702

WORSHAM, FORSYTHE, SAMPELS & WOOLDRIDGE

M. D. Sampels
State Bar No. 17557000
Angela Agee Hatton
State Bar No. 09231050
David P. Poole
State Bar No. 16123750

2001 Bryan Tower, Suite 3200
Dallas, Texas 75201

July 8, 1992

TABLE OF CONTENTS

NO. B-38,879

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

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT[1]

TO THE HONORABLE JUDGE OF SAID COURT:

Texas Utilities Electric Company ("TU Electric"), Defendant in the above-entitled and numbered cause, files this Brief in Support of its Motion for Summary Judgment and its Response to Plaintiff's Motion for Summary Judgment pursuant to Tex. R. Civ. P. 166a, and would show the Court that it is entitled to summary judgment on the claims asserted against it by Plaintiff Cap Rock Electric Cooperative, Inc. ("Cap Rock"), as well as its counterclaims against Cap Rock, and that Cap Rock's Motion for Summary Judgment should be denied, all for the reason that there exists no genuine issue of material fact with regard to such claims and, as grounds therefor, would show the Court the following:

---

[1] TU Electric apologizes to the Court for the length of this Brief. However, TU Electric believes that it is important to discuss the summary judgment evidence in some detail in order to present the Court with a comprehensive analysis of the 1990 Power Supply Agreement, as well as to aid the Court in understanding the circumstances surrounding the making of the contract at issue in this case, for the purpose of considering TU Electric's Motion for Summary Judgment.

I.

INTRODUCTION

Cap Rock filed this suit seeking a declaratory judgment that the Power Supply Agreement, dated June 28, 1990, ("1990 Power Supply Agreement") [Def. Exh. 11][2] is unenforceable or, alternatively, if found to be enforceable, the agreement does not require Cap Rock to purchase any electric power and energy from TU Electric upon the effective date of the contract if Cap Rock does not elect to do so.

TU Electric filed its counter-claim for declaratory judgment seeking a declaration that the 1990 Power Supply Agreement is a fully binding, valid, and enforceable contract which requires Cap Rock to purchase from TU Electric, and TU Electric to sell to Cap Rock, for a period of ten years, all of the power and energy requirements of Cap Rock's customers, unless Cap Rock elects to reduce the load supplied by TU Electric by giving the required two or three year notice or Cap Rock terminates the contract on the giving of the proper notice.[3]

---

[2] Pursuant to the stipulation dated May 15, 1992 on file herein, the parties have agreed that all of the evidence introduced and admitted at the hearing on Cap Rock's application for temporary injunction is before the Court for purposes of TU Electric's Motion and Response. TU Electric further relies on the portions of the deposition of Russell Jones, together with exhibits referred to in that deposition, which are attached to the affidavit of M. D. Sampels (hereinafter "Jones Deposition") filed contemporaneously with this Brief.

[3] The notice requirements to reduce load supplied by TU Electric are contained in Sections 2.04 and 2.05 of the 1990 Power Supply Agreement. Section 2.04 requires Cap Rock to give "three years' advance written notice in years one through five, inclusive, and . . . five years' advance written notice thereafter." [Def. Exh. 11 at 7] Section 2.05 permits Cap Rock, with certain limitations, to serve all of the power and energy requirements of its customers at nine specified Points of Delivery by another supplier on two years' advance written notice, given in years one through five, so long as the Contract Demand at such Points of Delivery does not exceed 30 MW. [Def. Exh. 11 at 8] Termination of the 1990 Power Supply Agreement is governed by Section 2.02 which provides that Cap Rock may terminate the contract only by the giving of three years' notice in the first five years and five years' notice thereafter. [Def. Exh. 11 at 5] TU Electric only has the right to terminate the agreement "on notice equal to the balance of the ten-year term in years one through five, and on five years' notice thereafter." [Def. Exh. 11 at 6]

In its Motion for Summary Judgment, TU Electric maintains that, as a matter of law, the 1990 Power Supply Agreement is a fully enforceable and binding agreement and that, on February 1, 1992, the effective date of the 1990 Power Supply Agreement[4], it was a full-requirements contract. Specifically, TU Electric would show:

1. The 1990 Power Supply Agreement expressly identifies, in Sections 3.07(a), 3.01, 3.02 and 3.03, the amount of power and energy Cap Rock is required to purchase from TU Electric and TU Electric is required to sell to Cap Rock, as a matter of law;

2. The specification of Contract Demand is completely immaterial to the determination of the quantity of power and energy required to be purchased under the 1990 Power Supply Agreement and Contract Demand, as used in the 1990 Power Supply Agreement, is a planning tool;

3. The 1990 Power Supply Agreement specifies in Section 1.11 the standard and method to be applied in determining the Points of Delivery, thereby fixing their identity with absolute certainty;

4. There is no gap or moment in time between the termination of the 1963 Agreement and the effectiveness of the 1990 Power Supply Agreement during which Cap Rock could have removed its Points of Delivery from TU Electric's control area thereby avoiding its obligations under the 1990 Power Supply Agreement;

5. Exhibit A is not required for the 1990 Power Supply Agreement to be an enforceable contract;

6. The 1990 Power Supply Agreement is a full-requirements contract upon the effective date of the agreement and, as Cap Rock has publicly admitted, requires Cap Rock to give

---

[4] Section 2.01 of the 1990 Power Supply Agreement provides that the agreement "shall become effective, with respect to Cap Rock, from and after Cap Rock's termination of its full requirements Agreement for Purchase of Power, dated June 2, 1963, as amended [1963 Agreement], in accordance with its terms." [Def. Exh. 11] As discussed below, Cap Rock, by letter dated December 19, 1991, notified TU Electric of Cap Rock's termination of the 1963 Agreement effective at 12:01 a.m. on February 1, 1992. [Def. Exh. 20] TU Electric accepted Cap Rock's termination of the 1963 Agreement by letter dated January 30, 1992. [Def. Exh. 21] Therefore, in accordance with the express provisions of Section 2.01, the 1990 Power Supply Agreement became effective at 12:01 a.m. on February 1, 1992.

two or three years' notice before it may reduce load supplied by TU Electric; and

7. There was a meeting of the minds between TU Electric and Cap Rock on the terms of the agreement, as evidenced by the objective intent of the parties expressed in the writing itself and by the events surrounding the making of the contract.

The summary judgment evidence establishes that there is no genuine issue of material fact as to the enforceability of the 1990 Power Supply Agreement and that, as a matter of law, the 1990 Power Supply Agreement is an unambiguous, fully binding, valid and enforceable contract and is a full-requirements contract until Cap Rock gives the proper notice and the notice period has expired. The summary judgment evidence also demonstrates that Cap Rock's arguments[5] that the 1990 Power Supply Agreement is unenforceable or, alternatively, is not a full-requirements contract on the effective date are simply fabrications developed for the purpose of attempting to avoid Cap Rock's obligations under the agreement and in order to permit Cap Rock's management to receive a "success fee" under contracts tied to the savings in power costs by reason of Cap Rock's abrogation of the 1990 Power Supply Agreement and Cap Rock's

[5] Since Cap Rock's Motion for Summary Judgment does not set forth the legal arguments on which it relies, TU Electric assumes, for purposes of this Brief, that Cap Rock will make the same legal arguments in support of its Motion for Summary Judgment that it did in its Brief in support of its request for injunctive relief. Accordingly, the citations to Cap Rock's Brief are to the Brief filed by Cap Rock in support of its request for injunctive relief. TU Electric does, however, reserve the right to respond in its Reply Brief to any additional arguments raised by Cap Rock in support of its Motion for Summary Judgment.

subsequent purchase of power from West Texas Utilities Company ("WTU") and Southwestern Power Service Company ("SPS").[6]

For these reasons, as more specifically discussed below, TU Electric's Motion for Summary Judgment should be granted and Cap Rock's Motion for Summary Judgment should be denied.

II.

BACKGROUND

The summary judgment evidence regarding the circumstances surrounding the making of the 1990 Power Supply Agreement is instructive and helpful in interpreting that agreement.[7] Additionally, such evidence of Cap Rock's conduct after the contract was signed, clearly reveals the well-established propensity of the Cap Rock management to fabricate any position and do or say anything believed necessary in order to achieve Cap Rock's desired goals and, in this case, to further the personal financial interests of Cap Rock's management -- totally without

---

[6] As discussed in detail below, it is clear that a primary interest of Steve Collier, Cap Rock's Director of Power Supply and principal witness, and David Pruitt, Cap Rock's General Manager, in bringing this lawsuit was to obtain personal financial benefits for themselves through such "success fee" contracts. According to his September 10, 1991 notes to Mr. Collier, Mr. Pruitt considers such success fees as a "method to Attract other Eagles or stars & Keep Team together." [Jones Deposition, Exh. 2, p. 310029, emphasis added] In a September 20, 1991 letter to Mr. Pruitt, Mr. Collier likewise described success fees as a means for "getting, keeping and adequately compensating 'superstar' management staff." [Jones Deposition, Exh. 2, p. 310055, emphasis added] That Mr. Pruitt and Mr. Collier view themselves as the most valuable "eagles" and "superstars" to be rewarded under the Cap Rock success fee concept, and thus the individuals having the greatest personal financial interest in the outcome of this litigation, is obvious from Mr. Pruitt's instructions, in his September 10, 1991 notes to Steve Collier, that "As to sharing Based on Staff participation [the success fees should be] heavily weighted for you and me as to % of Total $." [Jones Deposition, Exh. 2, p. 310028, emphasis added]

[7] Even when construing an unambiguous contract where the proper interpretation is a question of law, the Court is required to consider such evidence of the circumstances surrounding the making of the contract, together with the four corners of the writing itself. Sun Oil Co. v. Madeley, 626 S.W.2d 726, 731 (Tex. 1981); City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 519 (Tex. 1968); Parker Chiropractic Research F. v. Fairmont Dallas Hotel Co., 500 S.W.2d 196, 201 (Tex. Civ. App. -- Dallas 1973, no writ).

regard to Cap Rock's contractual obligations to TU Electric. The arguments advanced by Cap Rock and the testimony of its principal witness, Steve Collier, before this Court are simply another example, albeit a particularly egregious one, of a long-standing pattern of such conduct.[8]

A. Cap Rock's early attempts to avoid its obligations under the 1963 Agreement and the events leading up to the execution of the 1990 Power Supply Agreement.

The dispute between TU Electric and Cap Rock which culminated in the execution of the 1990 Power Supply Agreement had its genesis in Cap Rock's demands that TU Electric provide it with partial requirements power and energy, as well as the necessary services to facilitate Cap Rock's proposed purchases of power and energy from other suppliers, despite the fact that Cap Rock was obligated to purchase all of its customers' power requirements from TU Electric under a 1963 Agreement for Purchase of Power ("1963 Agreement").[9]

---

[8] The record in this case is replete with summary judgment evidence which discredits and impeaches the testimony of Steve Collier and establishes beyond any doubt his total lack of credibility. Such evidence is particularly critical for purposes of considering Cap Rock's Motion for Summary Judgment which must be based on the testimony of Mr. Collier, its principal witness. As an interested witness by reason of his success fee contracts, Mr. Collier's lack of credibility alone requires that the Court deny Cap Rock's Motion because Rule 166a of the Texas Rules of Civil Procedure permits the granting of summary judgment based on the testimonial evidence of an interested witness only if that evidence is, among other things, "otherwise credible and free from contradictions and inconsistencies." (Emphasis added)

A motion for summary judgment should not be granted if there are "circumstances in evidence tending to discredit or impeach [the] testimony" of an interested witness. Great American Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965); see also, Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989)("If the credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate.").

[9] Despite the position it earlier took to the contrary, Cap Rock now admits that the 1963 Agreement was a full-requirements contract. [Cap Rock Brief at 23] The reason for Cap Rock's change in position is plain. Cap Rock now perceives it to be of benefit to argue that the 1990 Power Supply Agreement cannot possibly be a full-requirements contract on the effective date of the agreement because, when the contract was negotiated, Cap Rock was trying to end its status as a full-requirements customer of TU Electric. [Cap Rock Brief at 17] Cap Rock's argument is wholly without merit.

During the negotiation of the 1990 Power Supply Agreement, as discussed below, TU Electric was not willing to agree to a contract under which Cap Rock could move on and off its system at will, as Cap Rock wished to do. This fundamental difference in positions was resolved, as Mr. Pittman testified, by the compromise embodied in the 1990 Power Supply Agreement under which TU Electric is committed, for ten years, to sell to Cap Rock all of its customers' power and energy requirements and Cap Rock is committed to purchase all of those requirements from TU Electric, except that, upon two or three years' notice in the first five years and five years' notice thereafter, Cap Rock is entitled to purchase power from other sources. [April 14-15, 1992, Tr., p. 129-30]

Cap Rock began planning to purchase power from sources other than TU Electric nearly five years ago. By letter dated October 29, 1987 [Def. Exh. 66], David Pruitt, General Manager of Cap Rock, informed TU Electric that Cap Rock had "recently . . . entered into a letter contract with a cogenerator[10] utilizing a Dallas area host site." Mr. Pruitt also stated that:

> We will formally, in the near future, per [the 1963 Agreement], give you written notice of our intent to terminate our all requirements contract.

[Def. Exh. 66 at 2]. Had Cap Rock given the three years' notice to terminate the 1963 Agreement, as provided for under that contract [Pl. Exh. 15, December 5, 1972 amendment] and as Mr. Pruitt

---

[10] A cogeneration facility is typically a facility producing steam, which is used in a manufacturing process, as well as electricity. The electrical energy generated by such a process is usually partially consumed by the manufacturing facility and any excess is sold to electric utilities for resale to their customers.

indicated it was planning to do, Cap Rock would now be free of any contractual obligation to purchase power from TU Electric and therefore fully entitled to commence its planned purchases of power from WTU or any other source it might choose, in that such termination would have been effective in late 1990. But Cap Rock chose not to pursue that course of action.

Instead, David Pruitt subsequently advised TU Electric, by letter dated May 19, 1988 [Def. Exh. 1], that, notwithstanding its obligation to purchase all of its power and energy requirements from TU Electric under the 1963 Agreement, Cap Rock had:

> **executed a contract** for the purchase of capacity and associated energy from a cogeneration project . . . for an initial term of fifteen years. . . .

In his May 19, 1988 letter, Mr. Pruitt also made a number of demands of TU Electric in derogation of Cap Rock's commitments under the 1963 Agreement -- demands which bear a striking resemblance to those made by Cap Rock immediately prior to its initiation of this lawsuit:

> **The cogeneration developer will be contacting you directly to initiate arrangements for wheeling and scheduling.** [Cap Rock] require[s] information on tariffs, rates, and contract terms and conditions for supplemental power service and for emergency and maintenance standby power services. We also need similar information on scheduling services for delivery of cogenerated power and coordination services to our delivery points. * * * **We would expect you to have an application for approval of such tariffs and contracts filed at the Texas PUC within sixty (60) days.** (Emphasis added)

[Def. Exh. 1]

While TU Electric advised Cap Rock, by letter dated May 5, 1989 to David Pruitt [Def. Exh. 2], that TU Electric would not be "an impediment to [Cap Rock's] goals [to purchase power from other sources]," TU Electric insisted upon Cap Rock complying with the notice provisions of the 1963 Agreement before TU Electric would provide less than all of its power and energy requirements. Specifically, TU Electric informed Cap Rock that:

> should Cap Rock wish to become a fully self-sufficient electric utility or should it wish to purchase power from others or self-produce all or a part of its requirements, TU Electric will not be an impediment to these goals. However, as we have indicated in the past, **there are two requirements that Cap Rock must satisfy if it wishes to secure power from other sources. First, your full requirements [1963 Agreement] with TU Electric must terminate in accordance with its terms, and second, Cap Rock must place itself in a position of being able to take delivery of power obtained from other sources by becoming a control area or obtaining that service from a third party.** (Emphasis added)

[Def. Exh. 2]

Although Cap Rock now concedes that it was required to purchase all of its power and energy requirements from TU Electric under the 1963 Agreement [Cap Rock Brief at 23; March 26, 1992, Tr., p. 83], Cap Rock took a different position in its response to TU Electric's May 5, 1989 letter. By letter dated May 9, 1989 [Def. Exh. 3], Cap Rock claimed that TU Electric's position constituted a violation of the antitrust License Conditions for TU Electric's Comanche Peak Steam Electric Station [Pl. Exh. 2], and informed TU Electric that "Cap Rock therefore intends immediately to file the appropriate request with the Nuclear Regulatory

Commission to obtain enforcement of [the] Comanche Peak antitrust license conditions." [Def. Exh. 3]

On May 12, 1989, Cap Rock filed such an enforcement request with the Nuclear Regulatory Commission ("NRC") seeking an order, among other things, "requiring [TU Electric] to make available to Cap Rock . . . partial requirements [power]. . . ." [Def. Exh. 4 at 1][11] TU Electric contested Cap Rock's enforcement request, primarily on the grounds that neither the license conditions nor the antitrust laws require TU Electric to cancel, change, or otherwise amend the full-requirements 1963 Agreement in order to facilitate Cap Rock's purchase of power from other sources. [Def. Exh. 5; see also April 14-15, 1992, Tr., p. 121-22] Specifically, TU Electric advised the NRC on June 30, 1989 that:

> The Cap Rock Request presents nothing more than a complaint that TU Electric will not assist it in undertaking to disregard and/or breach its full requirements [1963 Agreement]. Cap Rock still seeks exactly what it denies seeking -- preferential treatment over other TU Electric customers and ultimately the effective reformation or rescission of an existing, valid contract. In so doing, Cap Rock demonstrates no basis in the License Conditions or the antitrust laws for the relief it seeks. . . . TU Electric will . . . continue to honor the terms of [the 1963 Agreement] with Cap Rock and expects no less of Cap Rock and, in doing so, will not act as an impediment to Cap Rock's desire to avail itself of other sources of bulk power. . . .

---

[11] Cap Rock had previously, in August 1988, filed Comments with the NRC, in the then pending Comanche Peak Antitrust Operating License Review, alleging that TU Electric was interfering with Cap Rock's ability to purchase power and energy from sources other than TU Electric, in violation of TU Electric's License Conditions for Comanche Peak. [See Def. Exh. 5 at 1, 4] As Mr. Pittman testified, "The NRC subsequently found that [Cap Rock's] requests were not valid and denied that request and comments" [April 14-15, 1992, Tr., p. 116], and, in June 1989, the NRC issued a finding of "No Significant Antitrust Changes" in the Comanche Peak Antitrust Operating License Review. [See Def. Exh. 5 at 4] Cap Rock thereafter appealed the NRC's decision to the U. S. Court of Appeals for the District of Columbia Circuit. [March 26, 1992, Tr. at 237] After execution of the 1990 Power Supply Agreement, as required by Section 10.17(b), Cap Rock moved for dismissal of its appeal and likewise withdrew its May 12, 1989 enforcement request at the NRC. [See Def. Exh. 14 at 2]

[Def. Exh. 5 at 33-34]

It was as a result of settlement discussions regarding Cap Rock's enforcement request, which began in January 1990 at the suggestion of the NRC Staff [April 14-15, 1992, Tr., p. 118-19][12], that the 1990 Power Supply Agreement was negotiated and executed by the parties on June 8, 1990. [April 14-15, 1992, Tr., p. 127-30]

The 1990 Power Supply Agreement, pursuant to Section 2.01 thereof, became effective on February 1, 1990 upon Cap Rock's termination of the 1963 Agreement. [Def. Exhs. 20 and 21] As discussed in detail below, the 1990 Power Supply Agreement embodies the agreement of the parties that, upon the effective date of the contract, TU Electric will continue to sell and Cap Rock will continue to purchase all of Cap Rock's power and energy requirements unless and until Cap Rock gives TU Electric the requisite two or three year notice to reduce the load supplied by TU Electric or to terminate the contract.[13]

---

[12] At the beginning of those discussions, as evidenced in Defendant's Exhibit 6, the NRC Staff announced to TU Electric and Cap Rock that TU Electric was not obligated to wheel power to Cap Rock from other sources, "as long as Cap Rock remains a customer of TU Electric pursuant to the terms of its full requirements [1963 Agreement] with TU Electric". [Def. Exh. 6; see also April 14-15, 1992, Tr., p. 122-24]

[13] Not only do the unambiguous, express provisions of the 1990 Power Supply Agreement confirm that it is a full-requirements contract upon the effective date, but, as discussed below, that was also the agreement embodied in the May 15, 1990 Principles of Agreement [Def. Exh. 10], which formed the basis for and were incorporated into the 1990 Power Supply Agreement.

In a May 10, 1990 memorandum to the Board of Directors of Cap Rock seeking approval of the Principles of Agreement at a Board meeting scheduled for May 17, 1990 [Def. Exh. 9], David Pruitt advised the Board of the importance of the definitive agreement contemplated by the Principles of Agreement, stating that:

> When we do get a definitive contract agreed to and signed by TU Electric, this will be the foundation of our power supply plan. This is the key piece to the puzzle that had to be before anything else could be evaluated or achieved. (Emphasis added)

It is this "foundation" and "key piece to the puzzle" -- the 1990 Power Supply Agreement -- that Cap Rock now repudiates and is seeking to have this Court declare void and unenforceable.

B. Cap Rock fully recognized its obligations under the 1990 Power Supply Agreement when the contract was executed.

The summary judgment evidence clearly demonstrates that, when the 1990 Power Supply Agreement was executed, Cap Rock recognized and understood its full-requirements and notice obligations under the contract. On June 11, 1990, three days after the agreement was executed, Steve Collier reported to David Pruitt as follows:

> THE GOOD NEWS IS THAT WE HAVE NEGOTIATED A DEFINITIVE POWER SUPPLY AGREEMENT!

[Def. Exh. 12, emphasis in original] Mr. Collier further reported that:

> I believe that the enclosed agreement represents a workable power supply agreement. **While it is not the perfect agreement that we would write unilaterally, it does give us a reasonable opportunity to implement power supply alternatives. * * * Even so, the power supply agreement term, notice requirements, and other constraints will pose significant limits as we attempt to develop our power supply alternatives.** I will look forward to presenting the benefits and difficulties of this agreement to the Cap Rock Electric and Lone Wolf Electric Boards sometime next week. (Emphasis added).

[Def. Exh. 12]

Significantly, Steve Collier's notes for his briefing of the Cap Rock and Lone Wolf Boards of Directors on the 1990 Power Supply Agreement states that one of the "CON's" of the contract, from Cap Rock's perspective, is that it "still has 3 yr notice." [Def. Exh. 43; see also March 27, 1992, Tr., p. 55-56] Steve Collier's briefing notes list the "PRO's" of the contract as follows: "better than we are now," "better than anyone else," and "workable." [Def. Exh. 43]

The minutes of the June 21, 1990 regular monthly meeting of the Cap Rock Board of Directors [Def. Exh. 44] reflect that, "[a]fter full discussion of the pros and cons of the [1990] Power Supply Agreement, and after a recommendation of acceptance and adoption by Steve Collier," the Board voted to approve the 1990 Power Supply Agreement by adopting the following resolution:

> RESOLVED, that the certain Power Supply Agreement between the Cap Rock Electric Cooperative ("Cooperative"), Texas Utilities Electric Company, and Lone Wolf Electric Cooperative, Inc., dated June 8, 1990 (the "Power Supply Agreement"), presented to and discussed at this meeting, be, and the same hereby is, in all respects, approved; and that the actions of the officers, employees, consultants and representatives of the Cooperative in negotiating, executing and delivering the Power Supply Agreement and the Mutual Release provided for therein, for and on behalf and in the name of the Cooperative, be, and the same hereby are, in all respects, ratified, approved and confirmed.

[Def. Exh. 44]

Cap Rock, through its counsel John M. Adragna, also informed the NRC of the execution of the 1990 Power Supply Agreement and the workable nature of the contract. By letter dated June 28, 1990 to Thomas E. Murley, Director of the Office of Nuclear Reactor Regulation [Def. Exh. 14], Cap Rock withdrew its enforcement request before the NRC as required by Section 10.17(b) of the 1990 Power Supply Agreement and advised the NRC that:

> The [1990 Power Supply Agreement] provides a means by which Cap Rock will be able to engage in an **orderly transition from its current status as a full requirements customer of TU Electric, to a partial requirements customer of TU Electric** and, ultimately, to a separate and independent electric utility. **Cap Rock's transition, ultimately to independent status, will obviously be a**

> **complicated, multi-step process that will not occur overnight.** (Emphasis added).

In addition, Cap Rock publicly acknowledged and touted the benefits of the 1990 Power Supply Agreement in the July 15, 1990 Cap Rock press release [Def. Exh. 15]:

> [Cap Rock] has reached a **landmark** agreement with its current sole power supplier, [TU Electric]. Under this exceptional new agreement, [Cap Rock] will be able to seek power from alternative suppliers that could "save Cap Rock Electric's consumers millions of dollars over the next decade," Steve Collier, Cap Rock Electric's Director of Power Supply and Regulatory Affairs, has announced.

Significantly, this press release, quoting Cap Rock's primary witness, expressly acknowledges the requirement under the 1990 Power Supply Agreement that Cap Rock give the two or three year notices specified in the contract before it has the right to begin purchasing part or all of its power and energy requirements from other suppliers:

> The agreement becomes effective when Cap Rock Electric terminates it [sic] current power supply contract with TU Electric, Collier said. **The new contract requires two or three years notice by Cap Rock to begin serving load with other power supplies, Collier explained.** (Emphasis added).

[Def. Exh. 15] This July 15, 1990 press release, issued immediately after the execution of the 1990 Power Supply Agreement, directly contradicts Cap Rock's current claim, and the sworn testimony of Mr. Collier [March 26, 1992, Tr., p. 108-110], that it

never intended to be a full-requirements customer of TU Electric after termination of the 1963 Agreement, except at its option.[14]

Similarly, Cap Rock's position in this case and Steve Collier's testimony is also directly contradicted by the contemporaneous record of a conversation between David Krupnick of SPS and Mr. Collier on June 21, 1990 [Def. Exh. 13], which is set forth in an inter-office memorandum of the same date from David Krupnick to Gary Gibson of SPS. Mr. Krupnick's memorandum states that:

> I spoke to Steve Collier today. . . . He indicated [Cap Rock] had reached a new power supply agreement with TU on June 8. **The agreement allows them to move 30 MW of their north system load off TU with 2 years' notice.**[15] (Emphasis added)

[Def. Exh. 13]

C. Cap Rock formulates a scheme to purchase power from other sources in derogation of its obligations under the 1990 Power Supply Agreement.

However, notwithstanding Cap Rock's clear recognition of its obligations under the express provisions of the 1990 Power Supply Agreement, but consistent with its efforts in 1987 through 1989 to avoid its obligations under the 1963 Agreement, Cap Rock embarked on a course of conduct entirely inconsistent with the commitments

---

[14] Significantly, as shown by the early drafts of the press release contained in Defendant's Exhibits 23 and 24, Mr. Collier participated extensively in the preparation of the July 15, 1990 press release and, in fact, "re-work[ed] . . . [an] initial draft" [Def. Exh. 24], including changing the last-quoted sentence above to its final wording.

[15] The "2 years' notice" clearly refers to Section 2.05 of the 1990 Power Supply Agreement which permits Cap Rock to remove all of the load, up to but not exceeding a total of 30 MW, at one or more of nine specified Points of Delivery on two years' advance written notice given in years one through five of the agreement. [Def. Exh. 11 at 8-9]

it made in the 1990 Power Supply Agreement. That course of conduct ultimately resulted in yet another attempt by Cap Rock to avoid its contractual obligations to TU Electric -- this time under the 1990 Power Supply Agreement.

At the same time Cap Rock was publicly acknowledging in the July 15, 1990 press release that the 1990 Power Supply Agreement "becomes effective when Cap Rock Electric terminates [the 1963 Agreement] . . . [and] requires two or three years notice by Cap Rock to begin serving load with other power supplies" [Def. Exh. 15], Steve Collier wrote a letter dated July 26, 1990 to Scott Moore, Manager of System Operations for WTU, stating that:

> Cap Rock Electric's power supply contract with TU Electric normally requires three years notice to reduce load or terminate. This means that we would not be able to purchase and receive long-term firm power before 1993. However, the transition from our current all-requirements [1963 Agreement] to a new power supply agreement that we have negotiated with TU Electric may allow us to serve some of our load from CSW[16] with less notice. (Emphasis added)

[Pl. Exh. 4 at 6]

Similarly, by letter dated October 5, 1990 regarding a possible CSW system power and energy sale to Cap Rock, Steve Collier again advised Scott Moore of WTU that:

> It is possible that [Cap Rock] could be [in] a position to begin to take energy under such a purchase in early 1991. Our [1963 Agreement] has a three year notice period, but can be terminated practically immediately upon a change in TU Electric wholesale rates. This means that we will be able to terminate our contract, if we

---

[16] CSW (i.e., Central and South West Corporation) is the parent holding company of WTU. [March 26, 1992, Tr. at 114]

> choose to, when the PUCT issues a final order in TU Electric's current rate case sometime in the new few months. The [1990 Power Supply Agreement] that we executed with TU Electric last year also has a three year notice period in the first five years, but the transition process from the existing contract to the new contract **should** enable us to immediately begin to take power from other sources. (Emphasis added)

[Pl. Exh. 5 at 1]

The notice provisions under the 1990 Power Supply Agreement were also the topic of discussion during a meeting on October 19, 1990 between Steve Collier, David Pruitt and Rusty Jones of Cap Rock and Gary Gibson and David Krupnick of SPS. Mr. Krupnick's notes from that meeting[17] read, in relevant part, as follows:

> S.C. Looked at feasibility of all load
>
> Power Agreement identified actual substations (2 year)
>
> Current contract has three years notice
>
> 30 days to 3 yrs in 120 day window on rate change around final order
>
> **2 years worse for 30 MW**
>
> **3 years worse for all system**

[Def. Exh. 26, emphasis added] Mr. Krupnick explained in his deposition that the initials "S.C." refer to Steve Collier [Pl. Exh. 20 at 100] and he testified as follows regarding the statements "2 years worse [case] for 30 MW" and "3 years worse [case] for all system":

> [They] refer[] to the fact that if [Cap Rock] had to put all their delivery points on this new 1990 [Power Supply

[17] See Plaintiff's Exhibit 20 at 98-103 (excerpts from deposition of David Andrew Krupnick).

> Agreement], if they couldn't have an interim supplier, then . . . two years would be the longest that they would have to wait to move 30 megawatts to [SPS]. * * *
>
> [And] they would have to wait the three years before they could move all of their system over to [SPS]. That was the notice requirement . . . for delivery points . . . not included in the two year notice.

[Pl. Exh. 20 at 103][18]

The foregoing communications from Steve Collier to WTU and SPS are clear evidence of not only a thorough understanding of the notice requirements to which Cap Rock agreed under the 1990 Power Supply Agreement, but also the early stages of a strategy developed by Cap Rock's management in a conscious effort to avoid those requirements. Of particular note is the fact that these early communications by Steve Collier are tentatively couched in terms of "may" and "should" and expressly contemplate a 'worst case' scenario of Cap Rock having to give two or three years' notice to TU Electric before it would have the right to reduce load supplied by TU Electric under the 1990 Power Supply Agreement.

These are not the words of a person who honestly, in good faith, always believed from the day it was executed that the 1990 Power Supply Agreement gave Cap Rock the right to immediately begin purchasing power from other sources, as Steve Collier has testified. [March 26, 1992, Tr., p. 108-10] They are the words of

---

[18] Further, Mr. Krupnick's deposition indicates that the statement "Power Agreement identified actual substations (2 year)" refers to a comment in an earlier memo from Steve Collier "that there were certain substations in the new [1990 Power Supply Agreement] that were identified that would require two years' notice if they were placed on the contract" [Pl. Exh. 20 at 100] -- a clear reference to the two year notice requirement in Section 2.05 of the 1990 Power Supply Agreement for the removal of load at certain specified Points of Delivery.

a person exploring possible means to circumvent the commitments he knew Cap Rock had made in the 1990 Power Supply Agreement, as reflected by the plain meaning of that contract. They are also the words of a person who, as we now know, stood to financially benefit by Cap Rock's circumvention of those commitments.

It was not until early 1991 that TU Electric first learned of the specific nature of some of Cap Rock's plans to purchase power from other sources from an article in the February 4, 1991 edition of "Electric Utility Week" which stated that Cap Rock had "negotiated an agreement in principle to buy 40 MW of wholesale power from [SPS] for 10 years." [Def. Exh. 59] As Mr. Bunting testified at the injunction hearing, he called Steve Collier after reading the article and Steve Collier advised him that the announcement of an agreement in principle with SPS was "premature." [April 14-15, 1992, Tr., p. 249] During this telephone call:

> A. Mr. Collier said that when he got down to the point where he had his -- had this worked out, that he would sit down with TU Electric, and because he didn't want, and I quoted, **he didn't want to blind side us about things he was working on.**

[April 14-15, 1992, Tr., p. 251, emphasis added; see also Def. Exh. 60] Significantly, Mr. Bunting also testified regarding this conversation as follows:

> Q. Did Mr. Collier assure you in that conversation that he did not intend to take any action inconsistent with the 1990 Power Supply Agreement?
>
> A. Yes, sir.

* * *

Q. Did he assure you in that [conversation] that he was not going to take any load off of TU without the requisite two or three years notice, Mr. Bunting?

* * *

A. The whole essence of the conversation was predicated on the 1990 Power Supply Agreement. That was what was in my mind, that was my concern. They had a 1963 full requirements agreement, and I was concerned that they were going to take actions which would violate certain provisions of the 1990 Power Supply Agreement, so our conversation was in regard to the 1990 Power Supply Agreement.

Q. Did Mr. Collier assure you that he was not going to do so?

A. He assured he wasn't going to take any action that would be contrary to that agreement.

[April 14-15, 1992, Tr., p. 249-51] Of course, that is not how Cap Rock chose to proceed.

D. Cap Rock anticipates TU Electric's reaction to its plans to abrogate the 1990 Power Supply Agreement, and secretly develops a strategy designed to gain leverage over TU Electric for Cap Rock's load transfers to WTU and SPS.

In the summer of 1991, Cap Rock and SPS reached an agreement and executed a power supply contract dated July 3, 1991. [Def. Exh. 81 at 19] Simultaneously, Cap Rock continued to pursue its power supply negotiations with WTU. [Def. Exh. 16; March 26, 1992, Tr., p. 121]

During these negotiations, the Cap Rock management began to anticipate TU Electric's reaction, and the precise position TU Electric has taken in this lawsuit, to any attempt by Cap Rock to begin purchasing power from another source upon termination of the

1963 Agreement without first complying with the notice provisions of the 1990 Power Supply Agreement. For example, in a June 19, 1991 report to David Pruitt regarding Cap Rock's proposed purchase of power from WTU, Mr. Collier stated that:

> It is very likely that TU Electric will vigorously oppose our plan to move all of our load into the WTU control area in making the transition from our [1963 Agreement] to the new power supply agreement which we executed last year.

[Def. Exh. 29][19]

The following month, in another report to David Pruitt dated July 15, 1991, Steve Collier again emphasized that:

> Please be aware that this power supply arrangement [with WTU] has some risk of opposition or even litigation by TU Electric. We will be terminating our existing all-requirements agreement with TU Electric sometime in the next few months when the PUCT issues a final order in the Comanche Peak nuclear plant rate case. We read our new contract with TU Electric as allowing us to fill in the amount of load that we will choose to serve under the new contract. **TU Electric will take the position that all of the existing load must be transferred to the new contract and then two to three years notice given to serve load from WTU.** (Emphasis added).

[Def. Exh. 16]

---

[19] In characteristic fashion, Steve Collier also explained to David Pruitt in this report that the proposed purchase from WTU:

> is extremely attractive for at least three key reasons:
>
> (1) it can provide significant power supply savings beginning as early as this year,
>
> (2) it can remove all of our load from the direct control of TU Electric beginning as soon as this year, and
>
> (3) it can be a source of firm power supply for any portion of our load that is not transferred to [SPS].
>
> In addition to these key benefits, Cap Rock Electric will represent a much larger proportion of WTU's total load than is currently our circumstance with TU Electric. As a result, Cap Rock Electric will have much greater negotiating leverage. (Emphasis added)

[Def. Exh. 29 at 2-3]

Significantly, during cross-examination at the injunction hearing, Steve Collier admitted that, at the time he wrote these very words, he had not had any conversations of any sort with Darrell Bevelhymer, Director of Bulk Power Transactions for TU Electric, or Henry Bunting, at that time Manager of Inter-Utility Services for TU Electric, regarding the termination of the 1963 Agreement or Cap Rock's plan to not take any power and energy from TU Electric under the 1990 Power Supply Agreement. [March 26, 1992, Tr., p. 220] And yet Steve Collier predicted, with astounding accuracy, exactly what TU Electric's position would be in response to Cap Rock's plan.

The reason he was able to do so is obvious. Steve Collier, Cap Rock's principal representative during the negotiations of the 1990 Power Supply Agreement, **knew** that the plain meaning of the contract required "that all of the existing [Cap Rock] load must be transferred to the new contract and then two to three years notice given to serve load from WTU." [Def. Exh. 16] Again, there can be no doubt that these are not the words or actions of someone who honestly believed TU Electric and Cap Rock had agreed that Cap Rock would have the right to pursue its proposed purchase of power from WTU immediately upon the effective date of the 1990 Power Supply Agreement.

Mr. Collier also informed WTU, by letter dated June 12, 1991, that:

> As we discussed, TU Electric is not likely to be pleased . . . 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 current [1963 Agreement] to the new power supply agreement that we executed in June, 1991 [sic].

[Def. Exh. 28]

Thus knowing full well TU Electric would take the position that Cap Rock was required under the 1990 Power Supply Agreement to purchase full-requirements power and energy from TU Electric upon Cap Rock's termination of the 1963 Agreement -- as Cap Rock itself had recognized and publicly acknowledged when the contract was executed -- the Cap Rock management, the same persons who benefit under the WTU and SPS "success fee" contracts, began to develop a strategy of calculated harassment of TU Electric for the express purpose of attempting to gain leverage for the planned load transfers to WTU and SPS which they knew were in derogation of the 1990 Power Supply Agreement.

For example, in his June 19, 1991 report to David Pruitt regarding the SPS and WTU negotiations, Steve Collier stated that:

> Some information has been received which suggests that TU Electric may file for the Comanche Peak Unit No. 2 rate increase as early as December of this year. **This would be timely, as Cap Rock Electric's intervention in such a case would strengthen its bargaining position in the WTU and [SPS] load transfers.**
>
> TU Electric has also filed a notice of inquiry (NOI) application at the PUCT for some new combined cycle gas generation. The NOI proceeding is a precursor to an application for a certificate of convenience and necessity. **Cap Rock Electric will be intervening in the NOI proceeding to:** (i) receive valuable information on TU Electric load forecasts and resource plans, (ii) take reasonable steps to protect its consumers in light of the wholesale rate impact that this could ultimately have,

and (iii) **begin to build a negotiating position for the WTU and [SPS] load transfers.** (Emphasis added)

[Def. Exh. 29 at 3-4]

The Cap Rock management also laid the groundwork with its Board of Directors and membership for a response, which ultimately took the form of this lawsuit, to what Mr. Collier and Mr. Pruitt knew would be TU Electric's vigorous opposition to any attempt by Cap Rock to abrogate the 1990 Power Supply Agreement. For example, the minutes of the August 27, 1991 meeting of the Cap Rock Board of Directors [Def. Exh. 32] reflect the adoption of the following resolution "to be presented to the membership at the annual meeting for membership ratification":

> WHEREAS, the board and management of Cap Rock Electric Cooperative, Inc. ("Cap Rock Electric") were directed by resolution of the members on September 10, 1988 to make arrangements for more reliable and economical power supply, and
>
> WHEREAS, the board and management of Cap Rock Electric have negotiated agreements for power supply with other Electric Utilities, and
>
> WHEREAS, these alternative power supply arrangements are expected to provide substantial wholesale power cost savings and increased reliability and flexibility of power supply as compared to continued service solely by TU Electric, and
>
> WHEREAS, these alternative power supply arrangements will require the financing and construction of transmission, distribution and other facilities,
>
> BE IT THEREFORE RESOLVED by the members of Cap Rock Electric that the board and management of Cap Rock Electric should proceed with the implementation of the aforementioned alternative power supply arrangements and any other desirable alternatives, including:

(1) The necessary transmission, distribution and other facilities with financing and repayment, where possible, directly out of the savings resulting from lower wholesale power costs,

(2) The necessary negotiations, regulatory proceedings and, if necessary, legal proceedings with any party who may oppose or attempt to prevent implementation of economical and reliable power supply arrangements, and

(3) Joint business ventures with other utilities, energy companies or others to the extent that they result in additional economy, flexibility or reliability. (Emphasis added)

[Def. Exh. 32 at 4] This resolution was adopted by the Cap Rock membership at an annual membership meeting held on September 7, 1991. [Def. Exh. 33]

E. Cap Rock finally springs its plan on TU Electric by informing TU Electric that it no longer needs the 1990 Power Supply Agreement, ultimately resulting in the initiation of this lawsuit.

Cap Rock knew that the date upon which it would give notice to terminate the 1963 Agreement and attempt to implement its planned purchases of power from WTU (without abiding by its obligations under the 1990 Power Supply Agreement) was entirely within Cap Rock's control. Therefore, Cap Rock intentionally laid all the groundwork it thought necessary to carry out its scheme -- while steadfastly keeping those plans secret from TU Electric until the last possible minute. Once its plans were in place, Cap Rock finally decided that it was time to inform TU Electric that it was going to terminate the 1963 Agreement, but that it had no intention whatsoever of thereafter honoring the 1990 Power Supply Agreement.

In the fall of 1991, Steve Collier contacted Darrell Bevelhymer and requested a meeting, which was held on October 22, 1991 with Mr. Bevelhymer and Mr. Bunting of TU Electric. [April 14-15, 1992, Tr., p. 251-52; see also Pl. Exh. 10] Mr. Bunting testified regarding that meeting as follows:

> Q. Could you describe what occurred at that meeting, sir?
>
> A. **Mr. Collier asked, or in fact he told us that he didn't need the 1990 Power Supply Agreement any longer, and that he intended to take all of his load over to WTU in January of 1991.**
>
> Q. What was your reaction to that, Mr. Bunting?
>
> A. I was shocked.
>
> Q. Why?
>
> A. Because this was not my understanding of the 1990 Power Supply Agreement. I knew that we had negotiated this agreement over a number of months, that we had spent a long time negotiating this agreement, . . . which Cap Rock said was very important to them that gave them a lot of flexibility, and now for him to come up and make this statement did shock me.

[April 14-15, 1992, Tr., p. 252, emphasis added]

The next day, October 23, 1991, Mr. Collier wrote Mr. Bevelhymer, advising that:

> When we first executed the [1990 Power Supply Agreement] with TU Electric . . ., we expected that the TU Electric rates would become final and that the special 120 day window for termination [of the 1963 Agreement] would come and go before we would be able to finish our alternative power supply arrangements. At that time, we thought it might be necessary to provide notice to terminate our existing all-requirements [1963 Agreement] and begin serving load under the new [1990 Power Supply Agreement] before we would be in a position to begin to serve load with alternative power supply resources. **However, we**

> have been able to complete our power supply arrangements more quickly than we thought. . . . As a result, we now anticipate being able to . . . terminate our [1963 Agreement] without having to serve any wholesale load temporarily under the new [1990 Power Supply Agreement]. * * *
>
> We have . . . entered into a letter of intent with West Texas Utilities Company, and we anticipate completion and execution of a definitive contract within the next few weeks, to begin purchasing all of our wholesale power requirements from WTU as early as January, 1992. (Emphasis added)

[Pl. Exh. 10]

TU Electric responded by letter dated November 4, 1991, from Mr. Bunting to Mr. Collier, informing Cap Rock that:

> TU Electric expects Cap Rock to fully comply with the 1963 and 1990 power supply agreements. To comply with those agreements, it will not be possible for you to purchase power elsewhere, including Cap Rock's proposed purchase from [WTU] . . . until the cancellation of the 1963 agreement and only then upon the expiration of the . . . notices provided for in the [1990 Power Supply Agreement] and the compliance with all other terms of that contract.

[Def. Exh. 18]

By memorandum dated November 6, 1991, David Pruitt transmitted a copy of Mr. Bunting's November 4, 1991 letter to the Cap Rock Board members and management:

> The enclosed letter from TU Electric, Henry Bunting, who was one of the final negotiators in our contract that we signed with [TU Electric] in June of '90, stated the position that I have all along felt [TU Electric] would take. It's kind of their Declaration of War. They are taking a very hard line approach. They are trying to scare off SPS and WTU. * * *
>
> I feel we need to do whatever it takes in the news media, in the courthouse, interventions, make them sue us, etc. We need to develop a strategy so the "giant" (T.U.) has to stop us versus us trying to make the giant move.

[Def. Exh. 34, emphasis added]

Another meeting between TU Electric and Cap Rock was then scheduled for November 19, 1991, but was canceled at the last minute by Mr. Collier because, as TU Electric only learned during discovery in this case, Cap Rock had not yet completed its strategic planning for the current litigation. Yet another example of Steve Collier's willingness to play fast and loose with the truth in his dealings with TU Electric is reflected in his correspondence to Gary Gibson of SPS on November 19, 1991 and November 20, 1991 regarding this canceled meeting. [Def. Exhs. 19 and 31, respectively] Steve Collier's November 19, 1991 letter advised Mr. Gibson that Cap Rock was scheduled to meet with TU Electric that afternoon "to discuss our disagreement and to attempt to identify a resolution." [Def. Exh. 19] Mr. Collier further stated:

> We anticipate an adverse response by TU Electric. Therefore, we are having a strategy meeting with our lawyers and consultants in Midland tomorrow to finalize legal and other actions that we will take. We will continue to keep you apprised of our status and progress.

[Def. Exh. 19] The following day, November 20, 1991, Collier again wrote Mr. Gibson and informed him that:

> [W]e did not actually meet with TU yesterday as we had originally planned. **Upon advice of my attorneys, we cancelled the meeting at the last minute. This is because we did not have our legal strategy finalized, and so did not have in hand those filings that we would make in court and the accompanying press releases. . . .** Therefore, we will wait a week or two to meet with TU Electric until we have our legal strategy and the resulting filings in hand. (Emphasis added)

[Def. Exh. 31]

Not uncharacteristically, Steve Collier's explanation to TU Electric differed dramatically. By letter dated November 22, 1991 [Def. Exh. 45], Steve Collier wrote Henry Bunting as follows:

> I am writing to express my apologies for fouling up our meeting schedule earlier this week. After imposing upon you and your associates to delay the meeting until the afternoon I then had to cancel out. Unfortunately, something important came up that caused me to be unable to get to the meeting.

Subsequently, at the November 26, 1991 meeting of the Cap Rock Board of Directors, Steve Collier reported on his earlier discussions with TU Electric. The minutes of that Board meeting state that:

> Mr. Collier reported on power supply activities. (1) TU Electric - Contract Termination. CRE has had several discussions with TU Electric about CRE's plans with SPS and WTU as well as cancellation of the wholesale power contract CRE has with TUEC. **CRE had a strategy session to determine the next course of action against TU. CRE would consider the following courses of action: (a) negotiate with TU, (b) File legal actions against TU, and (c) Keep TU's name in the newspapers via PR campaign.** (Emphasis added)

[Def. Exh. 36][20]

---

[20] Also at the November 26, 1991 Board meeting, the Cap Rock Board adopted the following resolution regarding the proposed WTU contract:

> RESOLVED, that the certain wholesale full-requirements service rate schedule between [Cap Rock] and [WTU], effective January 1, 1992 (the "Power Supply Agreement"), presented to and discussed at this meeting, be, and the same hereby is, in all respects, approved; and that the actions of the officers, employees, consultants and representatives of the cooperative in negotiating, executing and delivering the power supply agreement for and on behalf and in the name of the cooperative, be, and the same hereby are, in all respects, ratified, approved and confirmed.

[Def. Exh. 51] While it would appear from this resolution that the Cap Rock Board was ratifying a contract that had been executed by Cap Rock and WTU sometime before November 26, 1991, the true facts are that neither Cap Rock nor WTU had signed the proposed contract as of that date. In fact, as it subsequently admitted in its March 25, 1992 Comments filed at the NRC, Cap Rock did not return its signed copies of the proposed WTU contract to WTU until January 2, 1992 and "the contract was never executed by WTU." [Def. Exh. 52 at 25; see also Def. Exh. 38, letter dated January 2, 1992 from Steve Collier to WTU enclosing Cap Rock's signed copies of the proposed WTU contract.]

Representatives of TU Electric and Cap Rock met again on December 12, 1991 [See Def. Exh. 20 at 2], but no resolution of the dispute was achieved. At that meeting, TU Electric informed Cap Rock that TU Electric would consider waiving the notification provisions of the 1990 Power Supply Agreement if Cap Rock was willing to make TU Electric and its customers whole, but Cap Rock declined to do so.

Therefore, consistent with the strategies developed by the Cap Rock management, lawyers and consultants on November 20, 1991 [Def. Exhs. 19 and 31] and discussed at the November 26, 1991 Cap Rock Board meeting [Def. Exh. 36], Steve Collier, by letter dated December 19, 1991, notified Darrell Bevelhymer of Cap Rock's termination of the 1963 Agreement and the Lone Wolf contract "effective at 12:01 a.m. on February 1, 1992." [Def. Exh. 20] Steve Collier's letter also stated that:

> As of that date, Cap Rock and its Lone Wolf Division will purchase all of its wholesale power requirements from [WTU]. As you know, and as it is explained in detail in a lawsuit entitled Cap Rock Electric Cooperative, Inc. v. Texas Utilities Electric Company, it is Cap Rock's position that TU Electric has no right to prevent or delay the WTU transaction. * * *
>
> Since beginning on February 1, 1992, WTU will be wheeling power to Cap Rock over [TU Electric's] system, we will need to execute with you a wheeling agreement. * * * I expect you to sign the [wheeling] agreement prior to February 1, 1992 when the wheeling will begin.

[Def. Exh. 20][21]

---

[21] Collier's December 19, 1991 letter was not received by TU Electric until December 26, 1991, nearly a week after this lawsuit was filed. [Def. Exh. 20]

On the next day, December 20, 1991, Cap Rock filed this suit asserting that the 1990 Power Supply Agreement is unenforceable, as well as seeking mandatory injunctive relief requiring TU Electric to take action to permit Cap Rock to receive electric power from WTU.[22]

By letter dated January 30, 1992, TU Electric informed Cap Rock that it accepted Cap Rock's December 19, 1991 letter as notice of termination of the 1963 Agreement and the Lone Wolf contract, effective at 12:01 a.m. on February 1, 1992, and that "[t]hereafter, TU Electric will supply Cap Rock's power and energy requirements . . ., in accordance with the provisions of the 1990 Power Supply Agreement, at the points of delivery and at the contract demands set forth" in TU Electric's letter. [Def. Exh. 21] As discussed in more detail below, TU Electric's January 30, 1992 letter thus identified each Point of Delivery under the 1990

---

[22] Cap Rock's Original Petition was filed at 9:55 a.m. on December 20, 1991. [Def. Exh. 22] Also on December 20, 1991, at 2:39 p.m., prior to TU Electric learning that this suit had been filed, TU Electric itself filed suit against Cap Rock in the 14th Judicial District Court in Dallas County, Texas for anticipatory repudiation and breach of contract, and seeking a declaratory judgment as to the meaning of the 1990 Power Supply Agreement. [Def. Exh. 70] After learning of the filing of this suit, TU Electric dismissed the Dallas County action against Cap Rock and, on January 13, 1992, filed a counterclaim against Cap Rock in this case seeking, among other things, a declaratory judgment that "the 1990 Power Supply Agreement becomes effective in accordance with its terms upon [Cap Rock's termination of the 1963 Agreement] and Cap Rock is required to purchase all of its power and energy requirements from TU Electric pursuant to the provisions of the 1990 Power Supply Agreement until such time as Cap Rock provides the requisite notice(s) to TU Electric as required by such Agreement." [Def. Exh. 75 at 9]

Although Cap Rock was well aware of TU Electric's counterclaim in this lawsuit and the specific nature of the declaratory relief being sought by TU Electric, that knowledge, characteristically, did not prevent Cap Rock from misleading the NRC, with a blatant falsehood, in its March 25, 1992 Comments. [Def. Exh. 52] Specifically, Cap Rock told the NRC that:

> It must be emphasized what [TU Electric] has not done. [TU Electric] has not sought legal or equitable remedies to redress what it contends would be an illegal breach of contract by Cap Rock. For example, [TU Electric] has not sought to test the merits of its "interpretation" in court by seeking a declaratory order confirming that interpretation. (First Emphasis in original, second emphasis added)

[Def. Exh. 52 at 4] Of course, that is precisely what TU Electric had done in its counterclaim more than two months before these Cap Rock Comments were filed at the NRC.

Power Supply Agreement by applying the standard in Section 1.11. Due to Cap Rock's failure to abide by its obligation under the contract to specify Contract Demands on the effective date, TU Electric's January 30, 1992 letter also assigned to the Points of Delivery the same Contract Demands that were in effect under the 1963 Agreement immediately prior to the effective date of the 1990 Power Supply Agreement, which TU Electric has the right to do under the 1990 Power Supply Agreement and Section 4.02 of TU Electric's Service Regulations as approved by the Public Utility Commission of Texas ("PUCT"). [Def. Exh. 65]

It is undisputed that, from February 1, 1992 through the present date, TU Electric has continued to supply to Cap Rock, and Cap Rock has continued to purchase from TU Electric, all of the power and energy requirements of Cap Rock's customers at the Points of Delivery listed in TU Electric's January 30, 1992 letter.

F. Cap Rock implements its public relations campaign against TU Electric and attempts to garner support from its members and local opinion makers for its position.

In addition to filing suit against TU Electric, Cap Rock implemented its planned strategy to "[k]eep [TU Electric's] name in the newspapers via PR campaign." [Def. Exh. 36] For example, Cap Rock announced the filing of this lawsuit in an article which appeared in the December 26, 1991 edition of the Stanton Herald. [Def. Exh. 37] Cap Rock also informed the media of the commencement of the injunction hearing on March 26, 1992, through

various blatantly one-sided press releases, none of which even mention the existence of the 1990 Power Supply Agreement but all of which tout the benefits of the non-existent WTU contract. [Def. Exh. 48 at 1-3] As the Court will recall, and no doubt as a result of Cap Rock's "PR campaign" [see March 26, 1992, Tr., p. 235], numerous representatives of the local media were present throughout the injunction hearing.[23]

Cap Rock's attempts to gain leverage over TU Electric were not, however, confined to the issuance of self-serving press releases and misleading statements to the press. In a obvious attempt to influence the general public and garner local support for its actions against TU Electric, Cap Rock also engaged in a massive letter writing campaign, which included letters to many individuals who are not even eligible to purchase electricity from Cap Rock. [Def. Exh. 77] As David Pruitt testified:

> Q. Did y'all do a letter writing campaign? Did y'all send letters to individuals throughout the Permian Basin regarding this dispute?
>
> A. Yes. * * *
>
> Q. And isn't it true that Cap Rock sent letters about this dispute to people who were not being served by Cap Rock Electric?
>
> A. Yes. * * *
>
> Q. . . . Isn't it true that some of these individuals that received these letters lived in places where Cap Rock couldn't give them electricity even if

[23] In a newspaper article which appeared in the April 10, 1992 Midland Reporter-Telegram [Def. Exh. 76], Cap Rock also announced its March 25, 1992 filing with the NRC of Comments seeking an antitrust review prior to the issuance of an operating license for TU Electric's Comanche Peak Steam Electric Station. [Def. Exh. 52]

they wanted to be served by Cap Rock. Isn't that true?

A. I would think that would be true.

Q. Well, wasn't this letter writing campaign . . . designed to persuade public opinion in favor of Cap Rock regarding this dispute?

A. It was our effort to make those people that received the letter aware of our efforts.

Q. **. . . And why do you want to make people aware of your efforts when they are not being served by Cap Rock and cannot be served by Cap Rock regardless of what happens in this dispute?**

A. **They're opinion makers, and we wanted them to have the facts of the dispute, that they might hear about it some other way. * * ***

Q. . . . [Y]ou were hoping that they would tell Cap Rock's story to others the way Cap Rock told it in that letter, correct?

A. Yes. * * *

Q. **And this was part of Cap Rock's overall plan to influence public opinion about this dispute, wasn't it?**

A. **It is -- it was part of the plan to make the general public aware of our efforts.**

[Def. Exh. 77 at 272-75, emphasis added]

Cap Rock's attempts to influence public opinion also included giving its members misleading and blatantly false information through the monthly Cap Rock newsletter. For example, in the February 1992 edition of the "Cap Rock Electric Hi-Lines," the Cap Rock management, although it knew that it did not have a contract with WTU, nonetheless informed the Cap Rock members that **"Cap Rock**

has contracted with [WTU]" for the purchase of power. [Def. Exh. 42, emphasis added]

G. Steve Collier's success fee contracts -- a significant motivating factor behind Cap Rock's attempts to abrogate the 1990 Power Supply Agreement and this lawsuit.

Throughout the events leading up to this lawsuit, and in the prosecution of this case, the Cap Rock management has vigorously attempted to convince its members, the general public and this Court that the decision to contest the enforceability of the 1990 Power Supply Agreement by filing this lawsuit was motivated solely by a desire to achieve a savings in power costs for the Cap Rock members.[24] However, the true motivating factor -- and, in particular, the motive behind Steve Collier's demonstrated propensity to disregard the truth when testifying under oath if necessary to lend credence to Cap Rock's baseless positions[25] --

---

[24] For example, a Cap Rock press release dated March 26, 1992 (the day before the hearing began on Cap Rock's request for injunctive relief) states that "Cap Rock Electric is seeking to stop [TU Electric] from interfering in the delivery of power to Cap Rock from [WTU]. * * * Cap Rock Electric can buy power for at least 20 percent less from WTU than it can from TU Electric. That savings will translate to about a 10 percent savings per year for Cap Rock Electric customers -- or about $3 million annually." [Def. Exh. 48 at 1]

[25] Mr. Collier's lack of credibility is well established and known to the Court. For example, despite the sworn statements in Cap Rock's Original Petition (which Mr. Collier verified), as well as the sworn testimony of Mr. Collier at the injunction hearing, that Cap Rock has a "contract" with WTU, the evidence conclusively demonstrates that no such contract exists.

Specifically, Cap Rock stated in its Original Petition, without equivocation, that "Cap Rock [has] entered into a contract with West Texas Utilities (WTU)." [Def. Exh. 22 at 6.] Mr. Collier, who verified the statements in Cap Rock's Original Petition under oath [Def. Exh. 22 at 14], similarly testified at the injunction hearing that he "believe[s] that there is a contract with WTU." [March 27, 1992, Tr., p. 10.]

However, by letter dated February 18, 1992, written after this lawsuit was filed but before the injunction hearing began on March 26, 1992, Mr. Don Welch, WTU's Vice President of Operations, informed Mr. Collier that "WTU's negotiations with Cap Rock . . . have not resulted in a contract between WTU and Cap Rock." [Pl. Exh. 9, emphasis added.] WTU's designated representative, David Teeter, also testified by deposition that there is no WTU contract:

> Q: So, there -- There is no contract between WTU and Cap Rock, is there?

(continued...)

is hardly that noble. The evidence in this case clearly demonstrates that a significant driving force behind Cap Rock's prosecution of this case, and Steve Collier's obvious willingness to testify under oath to anything believed necessary to prevail, is the desire by Steve Collier, and other members of the Cap Rock management team, to realize substantial, personal monetary gain which can only be obtained if Cap Rock is successful in its attempts to abrogate the 1990 Power Supply Agreement.

As shown by the testimony at the injunction hearing and the documents which Cap Rock ultimately produced only after being ordered to do so by the Court, the Cap Rock Board of Directors, on October 26, 1991, adopted Board Policy No. 142 regarding "Success

---

[25](...continued)

A: That is correct.

[Def. Exh. 72 at 65, emphasis added.]

The fact that there has never been a contract between Cap Rock and WTU is even supported by Cap Rock's own admissions. The document Cap Rock has represented to be the WTU contract [Def. Exh. 38], while signed by Cap Rock, is not signed by WTU. And, despite Mr. Collier's testimony that he "believed" there is a contract with WTU, he admitted that WTU has not signed the contract:

Q: . . . Did you receive back from WTU executed copies of [the WTU contract and attachments thereto]?

A. No, we have not.

[March 26, 1992, Tr., p. 125, emphasis added.]

Cap Rock also admitted in its March 25, 1992 Comments filed at the NRC that "Although Cap Rock returned its copies [of the proposed WTU contract] on January 2, 1992, the contract was never executed by WTU." [Def. Exh. 52 at 25, emphasis added, footnote omitted] This statement is particularly revealing. It proves that, although Cap Rock's Original Petition filed on December 20, 1991 states that Cap Rock had "entered into a contract" with WTU -- a statement Mr. Collier swore was "true and correct" [Def. Exh. 22 at 14] -- Cap Rock did not even return to WTU the copies of the proposed contract that Cap Rock had signed until January 2, 1992, thirteen days after the Original Petition was filed.

Finally, Cap Rock admits in its Brief that "WTU has not returned a signed contract to Cap Rock Electric" and Cap Rock does not have a "signed contract with WTU today." Cap Rock Brief at 34. Thus, clearly no contract between Cap Rock and WTU existed on the date Mr. Collier verified Cap Rock's Original Petition, nor did such a contract exist when Mr. Collier testified at the injunction hearing that Cap Rock had a contract with WTU.

In light of Mr. Collier's demonstrated willingness to give false and misleading testimony and to fabricate evidence when the truth does not support Cap Rock's position, TU Electric suggests that no weight should be given to his testimony as it relates to the positions advanced by Cap Rock.

Fee Compensation for Key Management Team Staff" [Def. Exh. 83] and the "Procedures and Guidelines for the Implementation and Awarding of Success Fees." [Def. Exh. 84, hereinafter "Procedures and Guidelines"][26]

The Procedures and Guidelines provide various means for determining the success fees, including the following:

> A success fee may be paid as a specific percentage, not to exceed 2% of actual reduction in costs or increases in margins resulting from leadership, effort and effectiveness in the completion of specific projects, contracts or programs.

[Def. Exh. 84 at 1]

---

[26] The genesis of Cap Rock's success fee program dates from Steve Collier's employment agreement with Cap Rock, dated May 15, 1989. [Def. Exh. 80] Attachment 4 of this agreement provides for "additional bonus compensation" to be "made up of two separate bonus pools, one based on performance and the other based on consulting fee revenues"; however, the agreement also states in Attachment 2 that Steve Collier "will . . . not expect any performance bonus compensation for the first year and a half of employment other than the consulting fees bonus described in Attachment 4." [Def. Exh. 80]

After that "first year and a half" had expired and after agreement was reached on the SPS contract, Steve Collier wrote to David Pruitt on July 15, 1991 suggesting implementation of a performance-related bonus:

> I hope to have some new analytical results from C. H. Guernsey & Company in the next few days to project the total savings that we anticipate for the first ten years of this [SPS] contract. This will form the basis for an incentive bonus as we have discussed when I was hired and when we began negotiating with [SPS].

[Def. Exh. 16 at 3]

On July 22, 1991, Steve Collier again wrote David Pruitt "to describe an approach to performance bonuses related to power supply activities." [Jones Deposition, Exh. 2, p. 310034] Steve Collier's suggestions included three specific approaches -- a "Nominal Cash Bonus", a "Percentage of Power Supply Savings", and a "Percentage of New Funds or Assets." [Jones Deposition, Exh. 2, p. 310035-310037] Mr. Collier explained the rationale for such "performance bonuses" as follows:

> Not only is bonus compensation in keeping with my employment agreement, it is really the only way that Cap Rock Electric is going to be able to provide the level of compensation that is appropriate for me and that I would obtain elsewhere. It is not practical for Cap Rock Electric to consider increasing my salary to anything near an appropriate market value due to: (i) our relatively small size, (ii) our situation as a small regulated electric utility, (iii) the likely negative reaction of other employees, (iv) the likely negative reaction of consumers.

[Jones Deposition, Exh. 2, p. 310034, emphasis added] Steve Collier's suggestions ultimately formed the basis for Cap Rock's Board Policy No. 142 and the Procedures and Guidelines.

The Procedures and Guidelines also provide that "[w]ith the exception of the annual bonus, each success fee shall be implemented through a written agreement." [Def. Exh. 84 at 2]

> Such success fee written agreement is contemplated to be drafted and submitted to the Board of Directors by the CEO/General Manager at the beginning of the project or other event upon which the success fee is based, **or as soon thereafter as it may be determined that such project or event may be eligible for success fee consideration.**

[Def. Exh. 84 at 2, emphasis added][27]

When Board Policy No. 142 and the Procedures and Guidelines were adopted in October 1991, Cap Rock had been pursuing its negotiations with WTU for some time and it had already entered into the SPS contract, which is dated July 3, 1991. [Def. Exh. 81] However, the Cap Rock management knew that, even if Cap Rock could somehow escape its obligations under the 1990 Power Supply Agreement, it would not be in a position to take power from SPS for several years because construction of the necessary transmission facilities had not yet commenced, nor had the necessary certificate of convenience and necessity for such facilities been obtained from the PUCT. [See Def. Exh. 16 at 3] Therefore, there was no

---

[27] Funding of the success fees is addressed in Paragraph 5 of the Procedures and Guidelines as follows:

> 5. Minimizing the impact on rate base revenue:
>
> Payment of success fees shall, as much as possible and practical, be accomplished through means that minimize the impact on rate base revenues of the Cooperative and may be implemented by the use of stock, amortization over the effective term of the relevant success, funding through affiliates, funding through non-operating income, and deferred compensation or other creative method.

[Def. Exh. 84 at 4]

immediate prospect for financial benefit under a success fee contract associated with the SPS contract.

WTU, on the other hand, presented an entirely different prospect. Steve Collier had reported to David Pruitt as early as June 19, 1991 that the proposed purchase from WTU "can provide significant power supply savings beginning as early as this year" and "can be a source of firm power supply for any portion of our load that is not transferred to [SPS]." [Def. Exh. 29 at 2-3] Thus, both Steve Collier and David Pruitt knew that, if Cap Rock could somehow avoid its obligation to purchase all of its requirements from TU Electric under the 1990 Power Supply Agreement, upon termination of the 1963 Agreement, and immediately begin purchasing all of its power from WTU before later switching some or all of its load to SPS, Steve Collier and other members of the Cap Rock management team would be in a position to **immediately** garner significant, personal financial gain from a success fee contract tied to the WTU purchase.

Consequently, on November 26, 1991, **two** success fee contracts (one for the proposed WTU contract and one for the SPS contract) were executed by David Pruitt and Russell Jones, Chairman of the Cap Rock Board. [Def. Exhs. 85, 86, 88 and 89] Significantly, as discussed above, it was also on November 26, 1991, that the Cap Rock Board "approved" the proposed WTU contract [Def. Exh. 51] and discussed the specific strategies presented by the Cap Rock management regarding the "next course of action against [TU

Electric]", which included filing "legal actions against [TU Electric]." [Def. Exh. 36]

Steve Collier executed the WTU and SPS success fee contracts on December 10, 1991 and December 11, 1991, respectively -- less than two weeks before this lawsuit was filed on December 20, 1991. [Def. Exhs. 89 and 88]

Under the WTU success fee contract, the amount of the success fee is:

> two percent (2%) of the net savings, where the net savings is defined as the amount by which WTU purchased power costs are less than the purchased power costs would have been had TU Electric remained the full-requirements power supplier.

[Def. Exhs. 85 and 89] The SPS success fee contract contains identical language, except that the "net savings" is the difference between the SPS and TU Electric purchased power costs. [Def. Exhs. 86 and 88]

Each of these success fee contracts provides that Steve Collier, as the "Responsible Individual," is to receive 50% of the success fees, with the remainder being apportioned among "other management team members." [Def. Exhs. 85, 86, 88 and 89] At the injunction hearing, Steve Collier testified that, under the WTU success fee contract, he would have been able to supplement his salary by approximately $30,000 per year, representing an approximate 36% annual increase in his base salary. [April 14-15, 1992, Tr., p. 335-37] Once the SPS success fee contract went into effect, Mr. Collier testified that the amount of the annual success

fee he would receive would be approximately $30,000 to $40,000. [April 14-15, 1992, Tr., 336]

Significantly, the amount of the payments under the success fee contracts was to be based upon the net savings Cap Rock might achieve if it were able to purchase power from these alternate sources -- WTU or SPS -- as compared to purchasing full-requirements power from TU Electric under the 1990 Power Supply Agreement. On cross-examination at the injunction hearing, Mr. Collier testified as follows:

> Q. You said there was approximately 20 percent savings to Cap Rock under the SPS contract?
>
> A. Well, I used that as a similar example. We haven't been able to project exactly what the savings are, because we're having to build some transmission, and there'll be cost of that transmission that I believe will affect the net savings.
>
> Q. Is it fair to say it may be approximately 20 percent of this?
>
> A. It could be as much as 20 percent.
>
> Q. Compared to what? 20 percent savings to Cap Rock compared to what?
>
> A. Compared to what we would have paid for power had we continued to buy it from [TU Electric].
>
> Q. **In other words, compared to what you've had to pay had you remained at a full requirements customer of TU Electric under the 1990 Power Supply Agreement, right?**
>
> A. **Yes, sir,** even compared to what -- in the situation in which I didn't move the load to WTU, but I moved it in sections the SPS, there might be a year in which part of the load was moved, and it would be the total bill, part served by SPS, part by TU, compared to the total load served by TU.

Q. Under the [1990] Power Supply Agreement?

A. Yes, sir.

Q. Your testimony in this case, Mr. Collier, is you don't have any obligation to buy any power from TU Electric, is that not true?

A. Yes, sir.

Q. Well, why do you want to compare your savings and your bonus to what you would have had to pay under the 1990 Power Supply Agreement? Why don't you compare it the way you could have got it from some other supplier such as WTU?

A. **The approach that we've taken is that had we not negotiated the agreements and made the arrangements, we would have continued to buy our power from [TU Electric].**

Q. **And if you don't -- you're not able to successfully abrogate that contract through this Court, that's exactly what you'll have to do, isn't it, Mr. Collier?**

* * *

A. **If we are not successful in being allowed by this Court to purchase our power from WTU, there will be no savings from purchasing power from WTU.**

[April 14-15, 1992, Tr., p. 338-340, emphasis added]

Clearly, the one thing that stood in the way of Steve Collier and the "other management team members" being able to immediately receive payments under the WTU success fee contract was the 1990 Power Supply Agreement with TU Electric. Thus, in order to receive the benefits under their WTU success fee contract, Cap Rock's management had to find a way to escape Cap Rock's contract with TU Electric. Since TU Electric had already made it clear that it would not voluntarily permit Cap Rock to abrogate the 1990 Power

Supply Agreement [Def. Exh. 18], seeking judicial relief from Cap Rock's obligations under that agreement by bringing this lawsuit was the only avenue left to Cap Rock's management in its efforts to implement the proposed WTU contract and thereby benefit from the associated WTU success fee contract.

Furthermore, even though the Procedures and Guidelines provide that success fees are to be paid based on savings "resulting from leadership, effort and effectiveness in the completion of specific projects, contracts or programs" [Def. Exh. 84 at 1], Mr. Collier admitted on cross-examination that the price for the power Cap Rock proposes to purchase under both the SPS contract and the proposed WTU contract is fixed by the "standard" tariffs filed by SPS and WTU, respectively, with the Federal Energy Regulatory Commission. [April 14-15, 1992, Tr., p. 341] There is hardly any "leadership, effort and effectiveness" required, nor does it take an "eagle or star" or a "superstar" [Jones Deposition, Exh. 2, pp. 310029, 310055], to negotiate and execute contracts for the purchase of power under a "standard" fixed tariff rate. Clearly, the "success" for which Mr. Collier was to be rewarded under the success fee contracts was not for his ability to obtain power supply arrangements with WTU and SPS, but for his "success" in abrogating the 1990 Power Supply Agreement with TU Electric.

Thus, the significance of the WTU and SPS success fee contracts on this case is plain. The summary judgment evidence demonstrates that, at the time he verified Cap Rock's Original

Petition and throughout all of his direct testimony during the injunction hearing, Steve Collier, Cap Rock's principal witness, had a significant direct financial interest contingent upon the outcome of this case. That interest was not disclosed to TU Electric and the Court until the morning of April 15, 1992, the fourth and last day of the injunction hearing, and not until after Cap Rock had closed its direct case and only then after being ordered to do so by the Court.[28]

The complicity of the representatives of Cap Rock and their refusal to be candid with the Court must color Cap Rock's entire case, which is founded principally on the testimony of Mr. Collier. The misleading testimony by Mr. Collier, along with Cap Rock's misrepresentations to the Court, demonstrate the complete lack of veracity of Mr. Collier, and his total lack of credibility regarding the 1990 Power Supply Agreement due to his significant and direct financial interest in the outcome of this case.[29]

Simply put, the summary judgment evidence of the circumstances surrounding the making of the 1990 Power Supply Agreement

---

[28] Despite Cap Rock's claim that it "voluntarily corrected a potential misunderstanding of the facts surrounding Mr. Collier's success fee," Cap Rock Brief at 17, n. 3, TU Electric is confident the Court will recall the actual circumstances of the matters related to the disclosure of Mr. Collier's success fee contracts, and the vigorous attempts by Cap Rock and Mr. Collier to persuade TU Electric and the Court, through the giving of false and misleading testimony and false and misleading representations to the Court, that no signed success fee agreements existed when in fact the existence of such signed contracts was known not only to Mr. Collier, but to Cap Rock's attorneys as well. These serious matters are the subject of TU Electric's pending Motion for Imposition of Sanctions.

[29] Steve Collier's financial interest and demonstrated lack of credibility has a significant bearing on Cap Rock's Motion for Summary Judgment. Rule 166a of the Texas Rules of Civil Procedure provides that "A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, . . ., if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." (Emphasis added) Given the clear lack of credibility of Mr. Collier's testimony, this provision of the rule alone requires that the Court deny Cap Rock's Motion for Summary Judgment.

irrefutably establishes that the contract the parties negotiated is a full-requirements contract on its effective date and requires Cap Rock to give two or three years notice before it can begin purchasing power from other sources. TU Electric and Cap Rock both recognized the full-requirements and notice provisions of the contract at the time the agreement was negotiated, and they both publicly acknowledged those provisions shortly after the contract was executed. But Cap Rock now wishes to abrogate that contract. This is nothing new.

The summary judgment evidence also establishes the long-standing willingness of Cap Rock's management to fabricate any position and do or say anything believed necessary in order to achieve the desired goals of Cap Rock and, in this case, to further their own personal financial interests (totally without regard to Cap Rock's contractual obligations to TU Electric), as well as the total lack of credibility of Mr. Collier, Cap Rock's principal witness, regarding the 1990 Power Supply Agreement.

Contrary to Cap Rock's contentions, the summary judgment evidence, together with the four corners of the writing, conclusively demonstrate, as a matter of law, that the 1990 Power Supply Agreement is a fully enforceable contract which requires Cap Rock to purchase from TU Electric all of the power and energy requirements of Cap Rock's customers, until Cap Rock elects to give the required notice to reduce load supplied by TU Electric or to terminate the agreement.

III.

ARGUMENT AND AUTHORITIES

A. The Applicable Rules of Contract Interpretation.

As the Court no doubt recognizes, the primary goal of any Court in the interpretation of a contract is to ascertain the true intent of the parties to the contract. Coker v. Coker, 650 S.W. 2d 391, 393 (Tex. 1983). However, it is a fundamental rule of contract interpretation that the Court, as a matter of law, determines the intent of the parties from the express language of the agreement, the circumstances surrounding the making of the contract, Sun Oil Co. v. Madeley, 626 S.W. 2d 726, 731 (Tex. 1981), and from the four corners of the writing. General American Indemnity Co. v. Pepper, 339 S.W.2d 660, 661 (Tex. 1960)("all parts of the contract are to be taken together"). Thus, the interpretation of an unambiguous contract, as both Cap Rock and TU Electric believe the 1990 Power Supply Agreement to be, is a question of law for the Court to decide. City of Pinehurst v. Spooner Addition Water Co., 432 S.W. 2d 515, 518 (Tex. 1968); Myers v. Gulf Coast Minerals Management Corp., 361 S.W. 2d 193 (Tex. 1962).

Here, while Cap Rock and TU Electric assert two vastly different positions regarding the 1990 Power Supply Agreement, the objective intent of the parties as expressed by the four corners of the instrument itself results in only a single possible

interpretation of the agreement -- namely, that it is an enforceable contract which requires Cap Rock to buy from TU Electric, and TU Electric to sell to Cap Rock, all of the power and energy requirements of Cap Rock's customers until Cap Rock has given the required notice and the notice period has expired.

When ascertaining the objective intent of the parties to a contract, the express language of the agreement must be the focal point. Enos v. Leediker, 214 S.W.2d 694 (Tex. Civ. App. -- Galveston 1948, no writ). This is consistent with the well-established rule that a court called on to construe the meaning of a contract must ascertain and give effect to the intention of the parties as revealed by the language of the instrument. R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517 (Tex. 1980). An agreement is to be viewed as of the time it was made and not in light of subsequent events, First Nat. Bank v. Kinabrew, 589 S.W.2d 137 (Tex. Civ. App. -- Tyler 1979, writ ref'd n.r.e.), and the objective intent of the parties, as expressed in the instrument, controls. Vanguard Ins. Co. v. Stewart, 593 S.W.2d 736 (Tex. Civ. App. -- Houston [1st Dist.] 1979) aff'd, 603 S.W.2d 761 (Tex. 1980).

When these rules are applied to the 1990 Power Supply Agreement, Cap Rock's argument that the agreement is unenforceable must fail. Cap Rock's entire argument is based upon the theory that the 1990 Power Supply Agreement "contains no quantity term (and no points of delivery)" thus authorizing Cap Rock, at its sole

option, to determine the quantity of electric power, if any, to be purchased from TU Electric on the effective date of the agreement. Cap Rock Brief at 2. Cap Rock bases its theory upon the fundamentally erroneous premise that "Contract Demand", as defined in Section 1.01 of the 1990 Power Supply Agreement, is a quantity term and that it enables Cap Rock to specify the amount of power and energy to be purchased by Cap Rock and sold by TU Electric, from zero to part or all of its customers' requirements, on the effective date of the contract.

Cap Rock's theory that the Points of Delivery are missing from the 1990 Power Supply Agreement, thereby making it unenforceable, is likewise based upon the erroneous premise that Cap Rock has the right and sole option under the 1990 Power Supply Agreement to determine "which, if any, Points of Delivery, are to be included . . . on Exhibit A," Cap Rock Brief at 10, when Exhibit A is completed on the effective date of the contract.

Cap Rock attempts to support its theories by looking solely to certain selected provisions of the 1990 Power Supply Agreement, taken in isolation and out of context from the entire instrument, thus breaking one of the cardinal rules of contract interpretation -- namely, that

> **all parts of the contract are to be taken together,** and such meaning . . . given to them as will carry out and effectuate to the fullest extent the intention of the parties.

General American Indemnity Co. v. Pepper, 339 S.W.2d 660, 661 (Tex. 1960)(emphasis added).[30] As the Texas Supreme Court stated in Southland Royalty Co. v. Pan American Petroleum Corp.:

> **in construing a contract all the provisions thereof must be construed together in order to arrive at the true intent of the parties.** We think the orderly manner of proceeding, though, is to start at the beginning of the contract and take up the pertinent provisions as they come, and when we analyze each one of them then look at the matter as a whole and try to arrive at the proper construction to be placed on the whole contract.

378 S.W.2d 50, 53 (Tex. 1964)(emphasis added).

As is discussed in detail in the following section of this Brief, when all of the provisions of the 1990 Power Supply Agreement are examined "as a whole" and "construed together" as required and the agreement is subjected to the other well-established rules of contract interpretation set forth above, the multiple flaws in Cap Rock's arguments become evident. Such a reading demonstrates, as a matter of law, that the 1990 Power Supply Agreement contains each and every term necessary for, and that it is, a fully enforceable and binding contract.

In addition, the four corners of the 1990 Power Supply Agreement, together with the summary judgment evidence, demonstrate, as a matter of law, that the 1990 Power Supply Agreement was, upon its effective date, a full-requirements

---

[30] See also, R. H. Sanders Corp. v. Hayes, 541 S.W.2d 262 (Tex. Civ. App. -- Dallas 1976, no writ)(all language in a contract is presumed to have some meaning and it is improper to rely on a single clause for construction); N. M. Uranium, Inc. v. Moser, 587 S.W.2d 809 (Tex. Civ. App. -- Corpus Christi 1979, writ ref'd n.r.e.)(each part of an agreement must be considered with every other part to determine the effect of one part on another); Crown West. Inv., Inc. v. Mercantile Nat. Bank, Dallas, 504 S.W.2d 785 (Tex. Civ. App. -- Tyler 1974, no writ)(construction is not to be on the basis of detached or isolated portions of the contract); Duracon, Inc. v. Price, 817 S.W.2d 147 (Tex. App. -- El Paso 1991, writ denied)(the courts presume that the parties intended every clause to have some effect).

contract which obligates Cap Rock to purchase from TU Electric and TU Electric to sell to Cap Rock all of the power and energy requirements of Cap Rock's customers, until expiration of the two or three year notice periods to reduce load supplied by TU Electric or termination of the contract.[31] As even Cap Rock recognizes, such contracts are fully enforceable, binding agreements. Cap Rock Brief at 1.[32]

B. The 1990 Power Supply Agreement is a Fully Binding and Enforceable Contract.

1. The 1990 Power Supply Agreement Identifies the Quantity of Power and Energy Cap Rock is obligated to Purchase as a Matter of Law, and specification of Contract Demand is Totally Immaterial to a Determination of the amount of Power and Energy to be Purchased and Sold under the Contract.

It is clear from the four corners of the 1990 Power Supply Agreement that, contrary to Cap Rock's contention, "Contract Demand", as defined in Section 1.01, is **not** the quantity of power and energy to be sold by TU Electric and purchased by Cap Rock. The quantity to be purchased and sold is instead set forth in Sections 3.07(a), 3.01, 3.02 and 3.03 of the 1990 Power Supply Agreement. [Def. Exh. 11]

---

[31] A clear example of Cap Rock's failure to read the 1990 Power Supply Agreement "as a whole" is the fact that Cap Rock's Brief omits any discussion of the load reduction notice requirements contained in Sections 2.04 and 2.05 of the 1990 Power Supply Agreement. As discussed in detail below, those notice requirements are one of the most critical elements -- if not the critical element -- of the "bargain" the parties made in the 1990 Power Supply Agreement.

[32] "[P]laintiff cheerfully concedes that [requirements contracts] are [fully enforceable in Texas]". Cap Rock Brief at 1.

Section 3.07(a) specifies that:

> Power and energy will be sold by TU Electric and purchased by Cap Rock under this Agreement at the Points of Delivery identified on Exhibit A hereto **in the amounts specified in Sections 3.01, 3.02 and 3.03 hereof.** (Emphasis added).

Section 3.01 of the 1990 Power Supply Agreement requires that:

> Except as otherwise permitted by this Agreement, Cap Rock shall purchase from TU Electric and TU Electric will sell to Cap Rock **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. (Emphasis added).

Section 3.02 provides that:

> **In the event and to the extent Cap Rock gives the requisite notice pursuant to Section 2.04 hereof** and during the period(s) that TU Electric may be required to schedule under Article V hereof, **Cap Rock shall purchase from TU Electric and TU Electric will sell to Cap Rock,** at each of the Points of Delivery (except Points of Delivery which are retained as full requirements Points of Delivery pursuant to Section 3.01 above (the "Retained Full Requirements Points of Delivery"), unless and until such Points of Delivery become partial requirements Points of Delivery as permitted therein), **partial requirements power and energy for resale to Cap Rock's customers.** (Emphasis added).

Section 3.03 specifies that the power and energy:

> supplied hereunder shall include normal load growth for each Point of Delivery specified in Exhibit A hereto.

Section 3.07(a) expressly refers to the "amounts" of power and energy to be purchased by Cap Rock and sold by TU Electric as being specified in the remainder of the quoted sections. It is a well-

recognized rule that "terms used in . . . any . . . contract, are to be given their plain, ordinary, and generally accepted meaning unless the [contract] itself shows them to have been meant in a technical or different sense." General American Indemnity Co. v. Pepper, 339 S.W.2d 660, 662 (Tex. 1960). Here, there is no indication anywhere in the 1990 Power Supply Agreement that the term "amount" as used in Section 3.07(a) is to be given anything other than its plain, ordinary, and generally accepted meaning, which is "a quantity." Webster's New Universal Unabridged Dictionary 60 (2nd ed. 1983). Thus, far from lacking a quantity term, Section 3.07(a) of the 1990 Power Supply Agreement **expressly** identifies the quantity of power and energy to be purchased by Cap Rock and sold by TU Electric as the **"amounts"** specified in the full-requirements, partial requirements and load growth sections -- i.e., Sections 3.01, 3.02 and 3.03.

Significantly, the term "Contract Demand" does not even appear in Sections 3.07(a), 3.01, 3.02 or 3.03. Therefore, it is ludicrous to suggest, as Cap Rock does, that the "amount" or "quantity" of power and energy Cap Rock is obligated to purchase under the 1990 Power Supply Agreement is the "Contract Demand." Instead, as discussed below, the term "Contract Demand," as defined and used in the 1990 Power Supply Agreement, is a planning tool.

Contract Demand is defined in Section 1.01 of the 1990 Power Supply Agreement as follows:

> "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.[33]

The fact that Contract Demand was not intended by the parties as the expression of the quantity of power and energy that is to be purchased and sold under the 1990 Power Supply Agreement is further evidenced by Section 3.05 which establishes the rate of charge for the power and energy to be purchased by Cap Rock (in the amounts specified in Sections 3.01, 3.02 and 3.03) and expressly recognizes that such power and energy may be "**in excess of Contract Demand.**" Specifically, Section 3.05 states that:

> It is distinctly understood and agreed that the monthly rate of charge **(including any charges for power and energy in excess of Contract Demand** and any demand determinations affecting billing demand) for all power and energy which Cap Rock shall purchase from TU Electric and TU Electric is required to sell to Cap Rock under this Agreement shall be pursuant to TU Electric's Rate WP Wholesale Power, or its successor, as the same may from time to time be fixed and approved by the PUCT. (Emphasis added.)

That Contract Demand is not a quantity term is also evidenced by the provisions of the TU Electric's Rate WP, Wholesale Power [Def. Exh. 64]. As Mr. Houle testified at the injunction hearing, Rate WP is the tariff approved by the PUCT pursuant to which "[a]ll charges for power and energy under the 1990 Power Supply Agreement

---

[33] Section 3.08 of the 1990 Power Supply Agreement provides, in relevant part, that:

> Contract Demand shall be specified for each Point of Delivery identified on Exhibit A. Contract Demand at any Point of Delivery may be changed from time to time on Exhibit A, upon 12 months' prior written notice to TU Electric (but no more frequently than once every 12 months), as the result of normal load growth or normal load reductions (which, in either case, does not include load transferred to or from another source, including Cap Rock) at each such Point of Delivery.

are billed. . . ." [April 14-15, 1992, Tr., p. 287] The approved tariffs of regulated public utilities, such as TU Electric, have the force and effect of law. Southwestern Bell Telephone Co. v. Vollmer, 805 S.W.2d 825, 829 (Tex. App. -- Corpus Christi 1991, writ denied); Southwestern Bell Telephone Co. v. Rucker, 537 S.W.2d 326, 331 (Tex. Civ. App. -- El Paso 1976, writ ref'd n.r.e.).

TU Electric's Rate WP states that it is:

> Applicable, in the event that Company has entered into an Agreement for Electric Service with respect thereto, to **full requirements and partial requirements power and energy** sold by [TU Electric] to . . . rural electric distribution cooperatives for resale to ultimate consumers. . . .

[Def. Exh. 64, Application Section, emphasis added.] The monthly rate for such full and partial requirements power, as specified in Rate WP, is composed of a "Customer Charge", "Demand Charge" and "Energy Charge."[34] [Def. Exh. 64, Monthly Rate Section]

The demand (in kilowatts) for purposes of calculating the demand charge component of the monthly bill is determined under the Demand Determination Section of Rate WP.[35] Section 3.05 of the

---

[34] Mr. Houle testified that "the customer charge is designed to recover administrative billing type expenses and metering expenses, the energy charges are designed to recover the variable costs incurred by the company to provide electric service, and the demand charge recovers the fixed cost incurred by TU Electric in making service available to the customer, whether or not any energy is actually used. . . ." [April 14-15, 1992, Tr., p. 289]

[35] Specifically, the Demand Determination Section provides that:

"Demand for calculation of the monthly bill is the largest of:

1. Current month kW;
2. 80% of the on-peak kW;
3. 50% of the contract kW;
4. 50% of the annual kW."

(continued...)

1990 Power Supply Agreement expressly recognizes this section of Rate WP by providing that the monthly rate of charge will include "any demand determinations affecting billing demand." [Def. Exh. 11 at 15][36]

Yet, nowhere in Rate WP does the tariff provide that the quantity of full or partial requirements power and energy to be provided and charged for is the Contract Demand (also referred to as "Contract kW") specified in the applicable agreement for electric service. Instead, Rate WP bases the monthly rate of charge upon the wholesale customer's demand and its energy usage, as well as the customer charge. Thus, both the 1990 Power Supply Agreement and TU Electric's PUCT-approved Rate WP clearly demonstrate that Contract Demand is **not** required to calculate, and indeed has nothing to do with, the quantity of power and energy to be purchased and sold under the 1990 Power Supply Agreement.

The fact that Contract Demand is not a quantity term is further evidenced by Mr. Pittman's testimony that TU Electric does not curtail the electric power and energy it provides to its

---

[35](...continued)

[Def. Exh. 64, emphasis added.] The term "contract kW" is defined in the Definitions Section of Rate WP as the "maximum kW specified in the Agreement for Electric Service." [Def. Exh. 64] The definition of "Contract Demand" in Section 1.01 of the 1990 Power Supply Agreement likewise uses the term "contract kW". [Def. Exh. 11 at 2]

[36] Mr. Houle testified that the demand determinations under Rate WP allocate demand charges among wholesale customers in accordance with the demands that the customers place on TU Electric's system. [April 14-15, 1992, Tr., p. 290-91] As Mr. Houle explained, since TU Electric must plan to have in place sufficient generating capacity, transmission capacity and distribution capacity to serve what TU Electric expects will be the maximum demands of its customers in one peak hour of the year, as well as having additional generating capacity to protect itself against emergency loss of a generating unit or the shut down of a unit for maintenance, the demand charge under Rate WP is structured to impose a greater charge on the customers who contribute to TU Electric's system peak demand as opposed to those customers whose greatest requirements do not occur during that peak hour of the year. [April 14-15, 1992, Tr., p. 290-91]

wholesale customers if Contract Demand is exceeded, and that it is not unusual for wholesale customers, such as Cap Rock, to exceed Contract Demand at a point of delivery.

> Q. Is it unusual for a customer such as Cap Rock to exceed contract demand from time to time?
>
> A. Occasionally customers will exceed their contract demands.
>
> Q. Has TU Electric ever interrupted service to any customer because of some excess contract demand taken at a point of delivery?
>
> A. I am not aware of any such circumstances.
>
> * * *
>
> Q. Is it possible for TU Electric on a point of delivery basis to ration the amount of power that's to be supplied at a particular point or dole it out or hold it back?
>
> A. No, in our business, Your Honor, when a customer demands electric energy, we have to supply it instantaneously. There's no real way to store that energy, so it's really on demand. In other words, whatever the customer demands at the time, we have to stand ready to provide.

[April 14-15, 1992, Tr., p. 167-68] Mr. Houle similarly testified that Contract Demand is not a quantity term.

> Q. Does contract KW have anything at all to do with how much power, energy or capacity TU Electric is required to delivery to any particular customer?
>
> A. No, sir, the utility TU Electric will deliver as much power as is demanded by the customer, independent of whether there is a contract KW number listed.

[April 14-15, 1992, Tr., p. 294]

Nor is Contract Demand necessary to determine how Cap Rock will be billed, pursuant to TU Electric's Rate WP, under the 1990

Power Supply Agreement. Neither the customer charge nor the energy charges under Rate WP are based upon Contract Demand. As for the demand charge, the Demand Determination Section of Rate WP, as discussed above, merely uses Contract Demand as one of four factors, the largest of which is the demand used to calculate the monthly bill. If there were no Contract Demands specified at all under the 1990 Power Supply Agreement, TU Electric would still be able to calculate the appropriate demand charge for each month by using the largest of the remaining three factors -- namely, "current month kW", "80% of the on-peak kW" and "50% of the annual kW." [Def. Exh. 64, Demand Determination Section][37] Thus, as Mr. Houle testified:

> Q. . . . in order to bill Cap Rock Electric Company for all demand charges based upon rate WP and all energy charges, including fuel for rate WP, the amount of contract demand which may or may not be specified in [the] contract is irrelevant, is that my understanding?
>
> A. **That's correct.**

[April 14-15, 1992, Tr., p. 293, emphasis added]

The fact that Contract Demand is not a quantity term is also evidenced by TU Electric's Service Regulations [Def. Exh. 65], which, as Mr. Houle testified, are approved by the PUCT as a part of TU Electric's Tariff for Electric Service. [April 14-15, 1992, Tr., p. 297] Section 10.06 of the 1990 Power Supply Agreement

---

[37] The only impact the lack of Contract Demands under the 1990 Power Supply Agreement would have is that TU Electric might not be able to impose the $1.00 per kW surcharge discussed below, which is provided for under Rate WP for each kW of demand in excess of Contract Demand.

expressly provides that TU Electric's Service Regulations will govern the sale of power and energy by TU Electric under the contract:

> Except as otherwise specifically provided in this Agreement, **the sale of power and energy by TU Electric to Cap Rock under this Agreement shall be subject to the service regulations of TU Electric's Tariff for Electric Service** as same may from time to time be fixed and approved by the PUCT.

[Def. Exh. 11 at 48, emphasis added.]

Section 4.02 of the Service Regulations provides, in relevant part, that:

> If Customer refuses to sign or delays in signing the Agreement for Electric Service, **[TU Electric] may, by written notice to Customer, assign the maximum electrical load (contract kW) to be used for billing purposes** in accordance with the Tariff for Electric Service.

[Def. Exh. 65, Section 4.02, emphasis added.] Since the PUCT has expressly authorized TU Electric to assign Contract Demands to a wholesale customer to be used for billing purposes, it simply defies all logic to suggest, as Cap Rock does, that Contract Demand is the quantity of power and energy to be purchased and sold that TU Electric and its customers "bargain" for when negotiating agreements for electric service. Instead, as discussed below, Contract Demand, as defined and used in the 1990 Power Supply Agreement, is a planning tool and in limited instances may (but is not required to) be used as a billing tool.

2. Contract Demand under the 1990 Power Supply Agreement is a Planning Tool.

Mr. Pittman's testimony at the injunction hearing clearly established the planning function of Contract Demand, as that term is defined and used in the 1990 Power Supply Agreement.

> A. . . . contract demand itself is a term that we use or a number that we use as a projection, a reasonable projection by the customer of what it expects its requirements to be on its system at that particular point of delivery. It's -- we would hope that that customer would give us a reasonable good faith number, because we use that, we would like to use that in planning the facilities that we have to have in place at that particular location to take care of those requirements, in other words, the transformers, the power system components, transmission lines and the like.

[April 14-15, 1992, Tr., p. 161-62, emphasis added] Mr. Houle similarly testified that Contract Demand is a planning tool.

> Q. And the importance of contract KW to TU Electric is simply . . . to assist . . . in its planning process?
>
> A. Yes, sir, it's important to realize that all of our tariffs for electric service require contract KW to be specified on a point of delivery basis when customers get over a certain size. **It's a provision that is used in the planning process, without which our planning would be frankly less accurate, and the best information that we can get from the customer helps us secure the most efficient amount of resources to serve the load.**

[April 14-15, 1992, Tr., p. 293, emphasis added]

The planning function of Contract Demand is also clearly evident from the provisions of TU Electric's Rate WP. In addition to the customer, energy and demand charges discussed above, Rate WP includes an additional charge equal to "$1.00 per kW for each

current month kW in excess of the contract kW" (i.e., Contract Demand). [Def. Exh. 64.] This is the charge referred to in Section 3.05 of the 1990 Power Supply Agreement when it states that the "monthly rate of charge [includes] **any charges for power and energy in excess of Contract Demand.**" [Def. Exh. 11 at 15, emphasis added][38]

Mr. Houle testified that the charge of $1.00 per kilowatt in excess of Contract Demand is designed to impose a surcharge on a wholesale customer who fails to accurately estimate the power and energy requirements of its retail customers (i.e., members in the case of a cooperative such as Cap Rock) at a point of delivery. [April 14-15, 1992, Tr., p. 293] As Mr. Houle explained, requiring a wholesale customer to project the maximum demands of its retail customers at each point of delivery (in the form of the Contract Demand specified in the agreement for electric service), and then imposing a surcharge if Contract Demand is exceeded, provides an economic incentive for the wholesale customer to accurately project the maximum demands that will be imposed on TU Electric in order to assist TU Electric in its planning process.

> Q. . . . could you explain to the Court what the function of contract KW is . . . to TU Electric. . . . * * *
>
> A. **Contract KW is primarily used by TU Electric as a planning tool,** and in some instances is used as a billing tool. For customers such as Cap Rock who

---

[38] Notably, Cap Rock did not elect to fill in Exhibit A by projecting zero Contract Demands as its Original Petition claims that it has the right to do. The reason for this is clear. Cap Rock knows that under Rate WP, as Mr. Houle explained, "[i]f a customer chose to select zero as a contract KW, [the] result would be that the bill would be increased by a dollar per KW per month." [April 14-15, 1992, Tr., p. 295]

are long standing customers, its primary use is a planning tool, and it provides an economic incentive based on the operation of the dollar per KW in the tariff for the customers to provide TU Electric the most accurate forecast of their demands at each point of delivery.

* * *

Q. . . . If a customer such as Cap Rock exceeded its . . . contract demand at a given point of delivery pursuant to rate WP, could you explain to the Court what the effect of that would be?

A. Yes, at any one point of delivery, if the current month demand or the meter demand exceeded the contract kW, the result would be the customer would be billed for an additional dollar per KW for each KW in excess of the stated contract KW.

* * *

Q. What is the purpose of it, sir?

A. **The purpose of this dollar per KW charge, as I previously stated, is to provide an economic incentive to the customer to accurately forecast his demand requirements at a particular point of delivery. Without such economic incentive, we have found that the forecasts are correspondingly less accurate.**

[April 14-15, 1992, Tr., p. 292-95, emphasis added]

Finally, Cap Rock makes the argument that the 1990 Power Supply Agreement cannot possibly be a full-requirements contract because, according to Cap Rock:

> 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.

Cap Rock Brief at 23. Cap Rock then attempts to distinguish the 1963 Agreement -- which Cap Rock necessarily admits was a full-requirements contract -- from the 1990 Power Supply Agreement

which it claims cannot be a full-requirements contract. Specifically, Cap Rock argues that, while the 1963 Agreement "had a billing provision for contract kW", that contract, unlike the 1990 Power Supply Agreement, did not define the term Contract Demand. Cap Rock Brief at 23.

Cap Rock's argument is fundamentally flawed because the summary judgment evidence conclusively establishes that Contract kW under the 1963 Agreement had precisely the same function as Contract Demand under the 1990 Power Supply Agreement. While it is true that the 1963 Agreement does not contain a specific definition of Contract Demand, it does include an "Exhibit A" which contains a column specifying the "Maximum kW of Power" -- i.e., the Contract Demand -- for each point of delivery. [Pl. Exh. 15, Exhibit A] Even Mr. Collier, Cap Rock's principal witness at the injunction hearing, admitted that under the 1963 Agreement **"there was a contract demand specified at each point of delivery."** [March 26, 1992, Tr., p. 142, emphasis added]

Since the 1963 Agreement was originally executed, the Contract Demand figures contained in Plaintiff's Exhibit 15 have been changed numerous times by the parties. Cap Rock's most recent request for changes in Contract Demand under the full-requirements 1963 Agreement was set forth in a letter dated October 8, 1991 from Mr. Mark Sullivan, Cap Rock's Engineering Manager, to Mr. Curtis Conkle of TU Electric. [Def. Exh. 46] Mr. Sullivan's letter specifically states that "We request that the following contract

demands be changed." [Def. Exh. 46, emphasis added.] Each of the changes requested in Mr. Sullivan's letter were increases in Contract Demand designed to avoid the $1.00 per kilowatt surcharge under TU Electric's Rate WP for each kilowatt taken by Cap Rock in excess of Contract Demand -- they were **not** increases in the quantity of power to be purchased by Cap Rock under the 1963 Agreement.

In light of the provisions of the 1963 Agreement, Mr. Collier's admission at the injunction hearing and Mr. Sullivan's letter, it is astounding that Cap Rock admits, on the one hand, that the 1963 Agreement is a full-requirements agreement, but then argues on the other hand that the 1990 Power Supply Agreement cannot possibly be a full-requirements contract because it contains provisions pertaining to Contract Demand. The fallacy in Cap Rock's argument is plain. Contract Demand had **exactly** the same function under the full-requirements 1963 Agreement as it does under the full-requirements 1990 Power Supply Agreement -- it was and is a planning tool, not a quantity term.

In summary, there is absolutely no support in the 1990 Power Supply Agreement, in the provisions of TU Electric's Rate WP and Service Regulations or in any other summary judgment evidence for Cap Rock's contention that Contract Demand is a missing quantity term which renders the contract unenforceable. To the contrary, the summary judgment evidence conclusively establishes that Contract Demand is a planning tool, with an associated billing

function which provides an economic incentive that assists TU Electric in having the most accurate demand forecasts for its planning process. Even if all references to Contract Demand were omitted from the 1990 Power Supply Agreement, there would be absolutely no impact on the obligations of the parties with respect to the quantity of power and energy to be purchased and sold under the contract, or the ability of TU Electric to bill Cap Rock for that power and energy. And, in that event, TU Electric would still have the right, under the provisions of its PUCT-approved Service Regulations, to assign Contract Demand to each of the Cap Rock Points of Delivery to be used for planning and billing purposes.

3. The 1990 Power Supply Agreement Specifies the Standard and Method to be Applied in Determining the Points of Delivery, thereby Fixing Their Identity with Absolute Certainty.

Cap Rock's argument that the 1990 Power Supply Agreement is unenforceable because, according to Cap Rock, it "contains . . . no points of delivery" [Cap Rock Brief at 2] and Cap Rock's assertion that it has the right to determine "which, if any, Points of Delivery, are to be included" under the agreement [Cap Rock Brief at 10] suffer from the same deficiencies as its arguments regarding Contract Demand. Cap Rock fails to read the contract as a whole and ignores the plain meaning of the words used in the agreement.

The Points of Delivery at which Cap Rock is required to purchase power and energy from TU Electric, in the amounts

specified in Sections 3.01, 3.02 and 3.03, are defined in Section 1.11 as follows:

> "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).

Cap Rock's contentions that the specific identification of the Points of Delivery is a determination left solely to the option of Cap Rock or is a matter which has yet to be negotiated by the parties [Cap Rock Brief at 10] is completely at odds with the plain wording of Section 1.11. Section 1.11 clearly states that the Points of Delivery are **all** points: (i) within TU Electric's control area; (ii) at which TU Electric maintains an electrical connection with Cap Rock; (iii) existing on the effective date of the agreement. Section 1.11 further mandates that "each of [such] Points of Delivery **shall** be specified on Exhibit A hereto." (Emphasis added).

Section 1.11 does **not** state that "Cap Rock **may** elect which of such Points of Delivery to specify on Exhibit A" or that "the Points of Delivery to be specified on Exhibit A **shall be negotiated** by the parties." But that is exactly what Cap Rock argues Section 1.11 means. Cap Rock would thus have this Court rewrite Section 1.11 and form a new contract between the parties -- one they did not negotiate themselves. This the courts uniformly refuse to do.

In General American Indemnity Co. v. Pepper, the Texas Supreme

Court reversed the judgments of both the trial court and the Court of Appeals which had interpreted the phrase "in an aircraft" as used in an insurance policy to cover an accident that occurred after the passenger had left the aircraft and was inside the air terminal. 339 S.W.2d 660 (Tex. 1960). Applying the plain meaning of the word "in", the Supreme Court held that the passenger "was not **in an aircraft** at the time her injuries were sustained." Id. at 661 (original emphasis). As the Supreme Court explained:

> To adopt the view of the respondents, as approved by the trial court and the Court of Civil Appeals, would be to make an entirely new contract between the parties. **A court is not at liberty to revise an agreement while professing to construe it.**

Id. (emphasis added); see also Anderson v. Badger, 693 S.W.2d 645 (Tex. App. -- Dallas 1985, writ ref'd n.r.e.).

In the case at hand, Section 1.11 of the 1990 Power Supply Agreement mandates -- through the use of the word "shall" -- that all of the Points of Delivery meeting the definition set forth in Section 1.11 are to be specified on Exhibit A. The word "shall" is "used to express a command or exhortation" and is "used in laws, regulations, or directives to express what is mandatory." Webster's Ninth New Collegiate Dictionary 1081 (1988). Thus, nothing is left to Cap Rock's option or to later negotiation by the parties.

The mere fact that, when executed, the 1990 Power Supply Agreement did not set forth a list of the names of the Points of Delivery on Exhibit A does not render the contract unenforceable.

It is well-recognized by the Texas courts that "[w]hen an agreement provides a **standard to be applied** in determining [an element of the contract], the contract is sufficiently definite to be enforceable." Penwell v. Barrett, 724 S.W.2d 902, 905 (Tex. App. -- San Antonio 1987, no writ)(emphasis added).

The "standard to be applied in determining" the Points of Delivery is unambiguously specified in Section 1.11. The Points of Delivery are **each and every** point: (i) within TU Electric's control area; (ii) at which TU Electric maintains an electrical connection with Cap Rock; (iii) existing on the effective date of the agreement.

Mr. Pittman explained at the injunction hearing [April 14-15, 1992, Tr. at 150-51] that the reason the parties agreed to a "standard" for determining the Points of Delivery, rather than listing them by name when the 1990 Power Supply Agreement was signed on June 8, 1990, was due to the circumstances surrounding the execution of the agreement.[39] Specifically, Mr. Pittman testified as follows:

> Q. . . . Could you explain to the Court why Exhibit A was not filled in at the time the contract was signed on June 8, 1990?
>
> A. Yes, sir. Your Honor, when we negotiated that agreement, it was represented to us at the time by Cap Rock that they were in the process of consolidating some of their points of delivery,

---

[39] As discussed in Section A. above, the Court is required to consider such surrounding circumstances when construing even an unambiguous contract. City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 519 (Tex. 1968). See also Parker Chiropractic Research F. v. Fairmont Dallas Hotel Co., 500 S.W.2d 196, 201 (Tex. Civ. App. -- Dallas 1973, no writ)("In construing a contract the court is to take the wording of the instrument and consider the same in the light of the surrounding circumstances . . . .").

converting some of their points of delivery to transmission points, and that there could be some changes as far as the points of deliveries themselves because of those consolidations and because of those changes from distribution to transmission voltage.

It was also at that time, it was unclear and uncertain as to exactly when the -- Cap Rock would terminate its 1963 Agreement pursuant to its terms, so that was a variable that was involved.

Not knowing those things and also recognizing that over time, as most utilities do, there can be changes in contract demand because of growth or for other reasons like consolidations, it was decided that that schedule [Exhibit A] would be left blank as an accommodation, but that it would be filled in on the effective date of the agreement.

[April 14-15, 1992, Tr., p. 150-51] Mr. Henry Bunting similarly testified as to the reason the Points of Delivery were not listed on Exhibit A when the 1990 Power Supply Agreement was signed.

A. . . . the reason we didn't fill out Exhibit A was precisely the fact that those points could change, those points could be combined, the demands might change, and the reason we didn't fill it out was precisely that fact, that we wanted to put the proper names and the proper demands on the exhibit at the time of the effective date.

[April 14-15, 1992, Tr., p. 260]

Thus, to account for the ongoing consolidations and conversions of Cap Rock's points of delivery under the 1963 Agreement, future changes in Contract Demand under the 1963 Agreement due to load growth, consolidations and conversions, and the fact that the date upon which Cap Rock would ultimately choose to terminate the 1963 Agreement after a change in TU Electric's rates was totally within Cap Rock's control, the parties agreed to

identify what the Points of Delivery would be under the 1990 Power Supply Agreement by specifying the standard in Section 1.11.

When that standard is applied, the Points of Delivery under the 1990 Power Supply Agreement can be, and in fact have been, identified with **absolute certainty.** The points in existence on the effective date of the 1990 Power Supply Agreement -- i.e., the points in existence upon termination of the 1963 Agreement -- are the Points of Delivery under the 1990 Power Supply Agreement.

Their identity is so readily determinable that even Cap Rock has not disputed that the points identified by TU Electric during the testimony of its witnesses at the injunction hearing, and in writing prior to the hearing, are the Points of Delivery at which TU Electric supplied all of Cap Rock's power and energy requirements upon the effective date of the 1990 Power Supply Agreement -- February 1, 1992 -- and continues to supply all of its requirements today.

At the injunction hearing, TU Electric's witness Mr. Henry Bunting identified the Points of Delivery in TU Electric's control area at which TU Electric supplied Cap Rock's power and energy requirements, excluding the Lone Wolf division of Cap Rock, as of February 1, 1992, on the map introduced into evidence as Defendant's Exhibit 50.[40] [April 14-15, 1992, Tr., p. 255-56] Mr.

---

[40] Mr. Bunting also identified, on the map introduced into evidence as Defendant's Exhibit 49, the Cap Rock points of delivery under the 1963 Agreement which were in existence on June 8, 1990, the date the 1990 Power Supply Agreement was executed. [April 14-15, 1992, Tr., p. 256]

(continued...)

Bunting similarly identified the Points of Delivery in TU Electric's control area at which TU Electric supplied power and energy to the Lone Wolf division of Cap Rock, as of February 1, 1992, on the map introduced into evidence as Defendant's Exhibit 63. [April 14-15, 1992, Tr., p. 256-57]

The summary judgment evidence is undisputed that the foregoing Points of Delivery were "within TU Electric's Control Area at which TU Electric maintain[ed] an electrical connection with Cap Rock . . ." on February 1, 1992, the "effective date" of the 1990 Power Supply Agreement. Thus, all of the requirements of Section 1.11 were met. However, TU Electric also took the extra, but unnecessary, precaution of specifically identifying each such Point of Delivery in writing to Cap Rock.

By letter dated January 30, 1992 to Steve Collier [Def. Exh. 21] TU Electric informed Cap Rock that TU Electric accepted Cap Rock's December 19, 1991 letter [Def. Exh. 20] as notice of termination of the 1963 Agreement effective at 12:01 a.m. on February 1, 1992, and, as provided for in Section 2.01 of the 1990 Power Supply Agreement, advised Cap Rock that:[41]

> Thereafter, TU Electric will supply Cap Rock's power and energy requirements . . ., in accordance with the provisions of the 1990 Power Supply Agreement, at the

---

[40](...continued)
A comparison of Defendant's Exhibits 49 and 50 readily reveals the differences between the Cap Rock points of delivery on June 8, 1990 and February 1, 1992, which resulted from the consolidations and conversions of the Cap Rock points to which Mr. Pittman testified. [April 14-15, 1992, Tr., p. 150-51]

[41] As discussed below, Section 2.01 of the 1990 Power Supply Agreement provides that "This Agreement shall become effective, with respect to Cap Rock, from and after Cap Rock's termination of the [1963 Agreement]." [Def. Exh. 11 at 5]

points of delivery and at the contract demands set forth below:

[Cap Rock] Points of Delivery	Contract Demand
Pembrook	13,000
Schwartz	9,000
Triangle	14,000
West Stanton	9,000
Cantrell	8,750
Tate	6,000
St. Lawrence	15,500
Stiles	13,000
Vealmoor	15,500
Eiland	4,000
McDonald	16,000
Phillips	10,500
. . . .	
Lake Thomas	3,800
Roscoe	2,100
China Grove	600
Colorado City	2,100
Mitchell County	1,100
Loraine	900
Brook-Hyman Morgan Street	650
Scurry County	2,400

[Def. Exh. 21 at 1-2].

TU Electric thus identified each of the Points of Delivery, with the same names depicted on Defendant's Exhibits 50 and 63, by applying the standard under Section 1.11 of the 1990 Power Supply Agreement. In addition, due to Cap Rock's failure to abide by its obligation under the 1990 Power Supply Agreement to specify its Contract Demands on the effective date of the contract, TU Electric's January 30, 1992 letter assigned Contract Demands to each of these Points of Delivery as TU Electric expressly has the right to do under Section 4.02 of its PUCT-approved Service Regulations. [Def. Exh. 65] The Contract Demands assigned by TU Electric were those in effect under the 1963 Agreement on January

30, 1992, immediately prior to the February 1, 1992 effective date of the 1990 Power Supply Agreement. Mr. Pittman specifically testified, regarding Defendant's Exhibit 21 that "the latest contract demands that [TU Electric] had were specified, spelled out in this letter. . . ." [April 14-15, 1992, Tr., p. 157]

At no time has Cap Rock disputed, nor can it dispute, that the points of delivery which existed under the 1963 Agreement at the moment it was terminated by Cap Rock, effective at 12:01 a.m. on February 1, 1992, are the same Points of Delivery which existed at that same moment -- 12:01 a.m. on February 1, 1992 -- when the 1990 Power Supply Agreement became effective in accordance with the express terms of Section 2.01.

4. There is No Gap or Moment in Time between the Termination of the 1963 Agreement and the Effectiveness of the 1990 Power Supply Agreement during which Cap Rock could have removed its points from TU Electric's control area.

Cap Rock also attempts to argue that it had made arrangements with WTU under which the Cap Rock delivery points were to be moved to WTU's control area effective February 1, 1992 [Cap Rock Brief at 24], so that, on the effective date of the 1990 Power Supply Agreement, "none of Cap Rock Electric's delivery points would have been in TU Electric's control area." Cap Rock Brief at 25. Thus, according to Cap Rock, its delivery points would not have come within the definition of Points of Delivery in Section 1.11.

This argument fails for two simple reasons. First, there is no gap or moment in time between the termination of the 1963

Agreement and the effectiveness of the 1990 Power Supply Agreement during which Cap Rock could have effected such a move to WTU's control area. Second, even if such a gap existed -- which it does not -- the arrangements Cap Rock was negotiating with WTU did not include moving the Cap Rock points into WTU's control area.

Section 2.01 of the 1990 Power Supply Agreement states that:

> This Agreement shall become effective, with respect to Cap Rock, from and after Cap Rock's termination of [the 1963 Agreement].

[Def. Exh. 11 at 5][42] Mr. Collier admitted at the injunction hearing that Section 2.01 is the section of the contract which "says when one becomes effective and the other one ceases to be effective." [March 26, 1992, Tr., p. 156].

However, despite repeated opportunities to do so, Mr. Collier was unable to point to a single provision in the 1990 Power Supply Agreement which states that there is a gap or a moment in time between the termination of the 1963 Agreement and the effectiveness of the 1990 Power Supply Agreement during which Cap Rock has the right to move its points out of TU Electric's control area, thereby avoiding the Section 1.11 mandate that "all points within TU Electric's Control Area . . . existing on the effective date" of the 1990 Power Supply Agreement are the Points of Delivery which "shall be specified on Exhibit A." [Def. Exh. 11 at 4] Nor does

---

[42] Section 2.01 contains a similar provision with respect to Lone Wolf Electric Cooperative [Def. Exh. 11 at 5], which merged with Cap Rock after the execution of the 1990 Power Supply Agreement, and the termination of the full-requirements Agreement for Purchase of Power, dated July 2, 1963, between Lone Wolf and TU Electric.

Cap Rock point to any such provision in its Brief. The reason it has not done so is clear. No such provision exists.[43]

What Cap Rock did argue in its Brief was that, if there is no "instant in time", then "Cap Rock Electric could never leave the TU Electric system." Cap Rock Brief at 23. That argument is a complete falsehood, which demonstrates not only Cap Rock's failure to read the 1990 Power Supply Agreement as a whole, but its consistent willingness to mislead the Court and misrepresent material facts regarding the terms of the 1990 Power Supply Agreement.

The 1990 Power Supply Agreement affords Cap Rock any number of opportunities to "leave the TU Electric system" by reducing the load to be supplied by TU Electric or terminating the agreement in its entirety -- **on the giving of proper notice to TU Electric.** What the 1990 Power Supply Agreement does not do is permit Cap Rock to "leave the TU Electric system" without giving the notice it agreed to give when it signed the contract, precisely what Cap Rock is attempting to do through this litigation.

The fact that there is no "moment in time" is further evidenced by the admissions of Steve Collier, Cap Rock's principal negotiator of the 1990 Power Supply Agreement, during the negotiations of the contract and after it was executed. In a memorandum dated May 23, 1990 from Steve Collier to David Pruitt,

---

[43] Furthermore, as Mr. Pittman pointed out during cross-examination at the injunction hearing [April 14-15, 1992, Tr., p. 187-88], had Cap Rock attempted to move its points of delivery out of TU Electric's control area prior to its termination of the 1963 Agreement, Cap Rock would have been in breach of what it admits was a full-requirements contract.

Jerry Dover, John Adragna, Earnest Casstevens, Tom Gregg and Michael Moore, Mr. Collier stated as follows:

> I am writing to ask you to consider the best approach for terminating our current all-requirements [1963 Agreement] with TU Electric. **The draft power supply agreement that we are negotiating is currently worded so as to become effective upon termination of the all-requirements [1963 Agreement].**
>
> **There would be some advantage to having the current all-requirements contract terminated prior to the time that the new power supply agreement becomes effective. If it were, it might be possible to remove some load from the power supply agreement immediately without the two or three year notice otherwise provided for in the power supply agreement.** However, given our current circumstances, it does not appear that this will be possible.

[Def. Exh. 41 at 1, emphasis added.] Plaintiff's Exhibit 16 is a draft power supply agreement dated May 21, 1990 -- two days before Mr. Collier wrote this memorandum. Significantly, the first paragraph of Section 2.01 in the May 21, 1990 draft is **identical** to the wording in the first paragraph in Section 2.01 of the 1990 Power Supply Agreement. The notice provisions to reduce load in Sections 2.03 and 2.04 of the May 21, 1990 draft are also virtually **identical** to the notice provisions in Sections 2.04 and 2.05 of the 1990 Power Supply Agreement.

Clearly, when Mr. Collier wrote the May 23, 1990 memorandum he recognized that, because the draft agreement "become[s] effective upon termination of the all-requirements [1963 Agreement]", there was no gap or moment in time in which to "remove some load from the power supply agreement immediately without the two or three year notice otherwise provided for in the power supply agreement."

[Def. Exh. 41] Just as there was no gap in the May 21, 1990 draft, there is no gap in the 1990 Power Supply Agreement which the parties executed on June 8, 1990.

That fact was also clearly recognized and publicly acknowledged by Steve Collier, Cap Rock's primary witness, shortly thereafter when, in a July 15, 1990 press release, Cap Rock announced the execution of the "LANDMARK" 1990 Power Supply Agreement and explained that:

> **The agreement becomes effective when Cap Rock Electric terminates it [sic] current power supply contract with TU Electric, Collier said. The new contract requires two or three years notice by Cap Rock to begin serving load with other power supplies, Collier explained.**

[Def. Exh. 15 at 2, emphasis added.]

Thus, the implication in Cap Rock's Brief at page 18 that Mr. Collier has always taken the position that Cap Rock had the right to make a "one-time option to leave the TU Electric system immediately upon the Effective Date" of the 1990 Power Supply Agreement is directly contradicted by Mr. Collier's own words, as shown in Defendant's Exhibit 15, and is plainly false.

The **true** reason Cap Rock has now developed the fanciful "moment in time" theory is twofold. First, Cap Rock wishes to abrogate its contractual obligations to TU Electric in order to immediately avail itself of allegedly more economical power supply alternatives, without giving TU Electric the two or three year notices it agreed to when it signed the 1990 Power Supply Agreement. However, the Texas Courts uniformly refuse to allow a

party to a contract to avoid its contractual obligations simply because performance is not economically advantageous or has become more burdensome than anticipated.[44] Cap Rock should not be permitted to do so here.

Second, as discussed above, Steve Collier and the other Cap Rock management team members wish to garner significant personal financial benefits through "success fees" tied to the immediate savings in power costs associated with Cap Rock's proposed purchase of power from WTU. Those benefits are possible only if Cap Rock successfully avoids its obligations under the 1990 Power Supply Agreement.

Finally, regardless of Cap Rock's novel "moment in time" theory, WTU's designated representative has testified that Cap Rock's points were never to be moved to WTU's control area under the proposed contract between WTU and Cap Rock. In stark contrast to Steve Collier's testimony at the injunction hearing and the arguments in Cap Rock's Brief, David Teeter testified in his deposition on behalf of WTU as follows:

> Q. Mr. Teeter, let me ask you this question. Under the proposed contract between Cap Rock and WTU, is Cap Rock to become a part of WTU's control area?
>
> A. No.
>
> Q. Are they to remain a part of TU Electric's control area?

---

[44] Valero Transmission Co. v. Mitchell Energy Corp., 743 S.W.2d 658, 663 (Tex. App. -- Houston [1st Dist] 1987, no writ); Alamo Clay Products, Inc. v. Gunn Tile Company of San Antonio, Inc., 597 S.W.2d 388 (Tex. Civ. App. -- San Antonio 1980, writ ref'd n.r.e.); Mahrer v. Mahrer, 510 S.W.2d 402, 405 (Tex. Civ. App. -- Dallas 1974, no writ).

A. Yes.

[Def. Exh. 72 at 133; see also pp. 142-143]. Consequently, even if Cap Rock were correct in its "moment in time" theory (which it is not) and even if Cap Rock did have a contract with WTU (which it does not)[45] its Points of Delivery would still have been located in TU Electric's control area on the effective date of the 1990 Power Supply Agreement and thus would come within the scope of Section 1.11.

And, perhaps more importantly, as earlier pointed out, all of the Points of Delivery were, in fact, located within TU Electric's Control Area on the effective date of the 1990 Power Supply Agreement, namely February 1, 1992, a date carefully selected in advance by Cap Rock. It is undisputed that, from and after February 1, 1992, Cap Rock has continued to purchase from TU Electric all of its customers' power and energy requirements at each of the Points of Delivery. As even Mr. Collier admitted at the injunction hearing, once a Cap Rock Point of Delivery becomes a full-requirements Point of Delivery under the 1990 Power Supply Agreement, Cap Rock is required to give the notices specified in the contract before it may reduce the load supplied by TU Electric and begin purchasing power from another supplier. [March 26, 1992, Tr., p. 120, 211, and 240]

---

[45] As discussed in detail above, the summary judgment evidence conclusively demonstrates that, despite the sworn statements in Cap Rock's Original Petition and the sworn testimony of Steve Collier to the contrary, there is not now, nor has there ever been, a contract between Cap Rock and WTU -- a fact which even Cap Rock now admits. Cap Rock Brief at 34 (stating that Cap Rock does not have a "signed contract with WTU today.").

5. Exhibit A is not required for the 1990 Power Supply Agreement to be an Enforceable Contract.

At the heart of Cap Rock's contentions regarding the alleged unenforceability of the 1990 Power Supply Agreement is the fact that Exhibit A to the agreement was not filled out when the agreement was executed on June 8, 1990. Cap Rock's contention that Exhibit A is necessary in order for the 1990 Power Supply Agreement to be an enforceable contract is wholly without merit. The physical completion of a piece of paper labeled "Exhibit A" is not a condition precedent to the obligations of either party with respect to the amount of power to be sold and purchased under the 1990 Power Supply Agreement. As discussed above, those obligations are governed by Sections 3.07(a), 3.01, 3.02 and 3.03 of the agreement.

Thus, the existence of Exhibit A is not a necessary prerequisite for determining the amount of power to be sold and purchased under those Sections or for the enforceability of the 1990 Power Supply Agreement. Neither party can avoid its obligations to sell and purchase full-requirements power and energy under the 1990 Power Supply Agreement on the effective date merely by reason of the fact that Exhibit A was not "filled in" when the contract was signed.

As Mr. Pittman testified [April 14-15, 1992, Tr., p. 161], the physical "filling in" of Exhibit A is an administrative process that is helpful in contract administration.

Q. . . . Could you explain at the time you're negotiating this agreement with Mr. Collier what the purpose was for having Exhibit A under the Power Supply Agreement at all?

A. **Exhibit A, Your Honor, is basically to enumerate for administrative purposes, as much as anything else, what are the points of delivery to Cap Rock Electric. We have people in accounting, we have people that are working with reading meters, we have people that are in rates that have an interest in that kind of information and like to see it in some sort of summary form in one place, and that's helpful to them.**

[April 14-15, 1992, Tr., p. 161, emphasis added]

Since the "filling in" of Exhibit A is not an act that is necessary in order to ascertain the obligations of the parties, even if Exhibit A were disregarded entirely and there were no Points of Delivery identified and no Contract Demands to be applied, the parties' obligations with respect to the sale and purchase of power and energy under the contract can still be readily determined from the four corners of the agreement and easily enforced by the Court. This is particularly evident in light of the fact that the Points of Delivery were in existence on the February 1, 1992 effective date of the contract and were well-known to both parties for some time preceding such date.

Cap Rock, however, argues that "execution of Exhibit A, relating to points of delivery and hence quantity, is a condition precedent to the parties' obligations" which has not been fulfilled, thereby nullifying any right to performance. Cap Rock Brief at 2. Again, Cap Rock fails to read the 1990 Power Supply Agreement as a whole and, with this argument, again attempts to

read into the agreement terms which do not exist and to which TU Electric would never have agreed. Contrary to Cap Rock's assertions, Exhibit A is not a separate contract regarding the Points of Delivery, or the quantity of power Cap Rock is to purchase from TU Electric, which the parties left to be agreed upon in the future. Nowhere in the 1990 Power Supply Agreement did the parties state that Exhibit A was to be "executed" or "negotiated" at some future date. Cap Rock does not point to such a provision because none exists.

What the 1990 Power Supply Agreement does provide is a mandate that Exhibit A be filled in on the effective date of the contract with the Points of Delivery determined by applying the standard specified in Section 1.11 and the Contract Demands projected by Cap Rock in accordance with Sections 1.01 and 3.08.[46] Exhibit A, far

---

[46] As discussed above, Cap Rock is obligated under Sections 3.08 and 1.01 of the agreement to specify the Contract Demands for each Point of Delivery. And, in fact, as clearly reflected by the notes taken at the June 4, 1990 meeting between Cap Rock and TU Electric by Angela Agee Hatton [Def. Exh. 78] and John Michael Adragna [Def. Exh. 79], Mr. Collier was well aware at the time the 1990 Power Supply Agreement was being negotiated that the Contract Demands he would specify would be the same contract demands that existed under the 1963 Agreement on the date it was eventually terminated by Cap Rock.

Defendant's Exhibit 78 states, in relevant part:

> C — . . . also re: Exh A, he's assuming when its filled out 1st time, on day 1, its whatever contract KW is on today's full req'ments K (Ray Rhodes has schedule
>
> MDS — - might not fill in Exh A until effective date of this K (MDS pt'd out p 4 it should say in def of POD "effective date" and C. said right)
>
> C — - agreed good idea to say effective date on page 4 1.11 -- that avoids problem of changes between now & then

Defendant's Exhibit 79 similarly states, in relevant part:

> S.C.: Exh. A -- the column for "Contract Demand" would be the current
>
> Ray Rhodes has a schedule under which, eg. "Knott & Ackerly becomes Reed, etc.
>
> M.S.: You wouldn't actually need to fill out Exhibit A p. 4 -- Section 1.11 -- change "existing on the date hereof" to the "effective date hereof"

(continued...)

from being blank, as Cap Rock contends, contains column headings for the name, Contract Demand and voltage of each Point of Delivery and states that this "[i]nformation [is] to be Specified on the Effective Date of this Agreement." Thus, whether to "fill in" Exhibit A by specifying the Points of Delivery and Contract Demands was not left to the discretion or option of either party. Nor can either party avoid its obligations under the 1990 Power Supply Agreement by refusing to "fill in" Exhibit A, as Cap Rock seeks to do here.

Cap Rock and TU Electric both had an obligation to see that the proper information was "specified" on Exhibit A on the effective date of the 1990 Power Supply Agreement. When Cap Rock failed to abide by its obligation under the 1990 Power Supply Agreement to specify its Contract Demands and identify the proper Points of Delivery on Exhibit A, TU Electric specified the Contract Demands and identified the Points of Delivery in its January 30, 1992 letter to Mr. Collier. [Def. Exh. 21] Thus, to the extent Exhibit A is required at all under the 1990 Power Supply Agreement, Defendant's Exhibit 21 completed Exhibit A by identifying each

---

[46](...continued)

Cap Rock makes what can at best be described as a convoluted argument in its Brief that "[t]hese notes have nothing to do with whether or how Exhibit A should be filled out" and that they pertain only to the Points of Delivery in Section 2.05 of the agreement. [Cap Rock Brief at 26] While part of the discussion at the June 4, 1990 meeting involved Section 2.05, these Exhibits speak for themselves and clearly reveal that Mr. Collier was referring to Exhibit A in its entirety -- not merely as it related to the Points of Delivery named in Section 2.05.

That fact was corroborated by the testimony at the injunction hearing of Mr. Pittman and Mr. Bunting who were both present at the June 4, 1990 meeting. [April 14-15, 1992, Tr., p. 153-54; 260] Yet rather than take the opportunity to have Mr. Adragna testify at the injunction hearing to rebut Mr. Pittman's and Mr. Bunting's testimony and what Mr. Adragna's own notes say, Cap Rock waited until its Brief to argue that Mr. Adragna's notes mean something other than what they plainly say.

Point of Delivery, determined in accordance with the standard in Section 1.11, and assigning to each Point of Delivery, pursuant to Section 4.02 of TU Electric's PUCT-approved Service Regulations, the Contract Demands that were in effect under the 1963 Agreement on January 30, 1992, immediately prior to the February 1, 1992 effective date of the 1990 Power Supply Agreement.

6. The 1990 Power Supply Agreement is a fully Enforceable Contract which Requires Cap Rock to purchase from TU Electric all of its power and energy requirements upon the effective date of the agreement.

For all of the reasons set forth above, the 1990 Power Supply Agreement, as a matter of law, is a fully enforceable and binding contract. Moreover, as is abundantly evident from the four corners of the contract, the 1990 Power Supply Agreement unambiguously requires Cap Rock to purchase from TU Electric and TU Electric to sell to Cap Rock **all** of the power and energy requirements of Cap Rock's customers upon the effective date of the agreement, until such time as Cap Rock gives the requisite notice to reduce load supplied by TU Electric or to terminate the contract, and the applicable notice period has expired.

Section 3.01 of the 1990 Power Supply Agreement expressly requires that:

> **Except as otherwise permitted by this Agreement,** Cap Rock shall purchase from TU Electric and TU Electric will sell to Cap Rock **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. 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 (notwithstanding the purchase of partial requirements power pursuant to Section 3.02 below at Cap Rock's remaining Points of Delivery), in which event, upon the giving of the notices required by Section 2.04 hereof, Cap Rock may, from time to time, convert one or more of such Points of Delivery to partial requirements Points of Delivery under the provisions of Section 3.02 hereof. (Emphasis added).

As discussed above, there is no gap or "moment in time" between the termination of the 1963 Agreement and the effective date of the 1990 Power Supply Agreement which would permit Cap Rock to remove any of its Points of Delivery from TU Electric's control area or otherwise "elect" not to take full-requirements power and energy from TU Electric upon the effective date of the contract.

Furthermore, the **only** provisions in the 1990 Power Supply Agreement which give Cap Rock the right to reduce load supplied by TU Electric are set forth in Sections 2.04 and 2.05. Those provisions require specific notices, **given after the agreement becomes effective**, before Cap Rock may reduce the load supplied by TU Electric. The fact that notice, and the expiration of the notice period, is required before Cap Rock may purchase power from another supplier is clearly evidenced in Section 3.02 of the agreement, which provides that:

> **In the event and to the extent Cap Rock gives the requisite notice pursuant to Section 2.04 hereof** and during the period(s) that TU Electric may be required to schedule under Article V hereof, **Cap Rock shall purchase from TU Electric and TU Electric will sell to Cap Rock,** at each of the Points of Delivery (except Points of Delivery which are retained as full requirements Points of Delivery pursuant to Section 3.01 above (the "Retained

> Full Requirements Points of Delivery"), unless and until such Points of Delivery become partial requirements Points of Delivery as permitted therein), **partial requirements power and energy for resale to Cap Rock's customers.** (Emphasis added)

Cap Rock argues in its Brief at pages 21-22 that TU Electric's reliance on Section 3.01 is misplaced because the second sentence of that section permits Cap Rock to:

> **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** (notwithstanding the purchase of partial requirements power pursuant to Section 3.02 below at Cap Rock's remaining Points of Delivery). . . . (Emphasis added)

In an incredible leap of logic, Cap Rock contends that this sentence must mean the 1990 Power Supply Agreement is not a full-requirements contract on day one, because otherwise there would have been no need for Cap Rock to give notice to "retain" Points of Delivery as full-requirements points. The plain meaning of the word "retain" is the complete answer to Cap Rock's argument. To "retain" means "to keep in possession or use." Webster's Ninth New Collegiate Dictionary 1006 (1988). Thus, to "keep" Points of Delivery "in . . . use" as full requirements Points of Delivery necessarily means that they were full requirements Points of Delivery to begin with -- i.e., on the effective date of the agreement.[47]

---

[47] Cap Rock's argument that the introductory clause of Section 3.01, which reads "Except as otherwise permitted by this Agreement", means that it can elect not to purchase full-requirements power from TU Electric on the effective date of the agreement is likewise unfounded. Cap Rock relies on the fact that early drafts of the agreement expressly referred to Section 3.02 in this introductory language. Cap Rock Brief at 21. For (continued...)

The fact that the 1990 Power Supply Agreement is a full-requirements contract on the effective date is further demonstrated by the summary judgment evidence of the circumstances surrounding the negotiation and execution of the agreement, evidence which -- even in an unambiguous contract -- the Court is required to consider, along with the wording of the instrument itself, in construing the meaning of the writing. City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 519 (Tex. 1968); Parker Chiropractic Research F. v. Fairmont Dallas Hotel Co., 500 S.W.2d 196, 201 (Tex. Civ. App. -- Dallas 1973, no writ).

As Mr. Pittman testified at the injunction hearing [April 14-15, 1992, Tr., p. 128-30], when the parties began the negotiation of the 1990 Power Supply Agreement in January 1990, Cap Rock wanted TU Electric bound for a long term to supply all of its requirements, but Cap Rock did not want to be similarly bound -- instead, it wanted the freedom to purchase its requirements elsewhere without giving any notice to TU Electric. TU Electric,

---

[47](...continued)
example, the introduction to Section 3.01 in the draft contained in Plaintiff's Exhibit 17 states: "Until Cap Rock commences the purchase of partial requirements power and energy in accordance with the requirements of Section 3.02 hereof . . . ."

There is no mystery here. The answer lies in reading the 1990 Power Supply Agreement as a whole, not in isolated pieces as Cap Rock consistently attempts to do. Such a reading reveals that there are circumstances in which Cap Rock is required to purchase full-requirements power and energy from TU Electric after it has begun purchasing partial requirements power and energy under Section 3.02. For example, Section 5.08 of the Power Supply Agreement states that "After the expiration of the [scheduling] period(s) provided in Section 5.07 hereof, all Points of Delivery remaining in TU Electric's Control Area will be full requirements Points of Delivery pursuant to Section 3.01 hereof. . . ." (Emphasis added.) Therefore, unlike the language in the early drafts, the final language in Section 3.01 does not limit the applicability of Section 3.01 to just the period from the effective date until Cap Rock begins purchasing partial requirements power and energy, but encompasses situations such as that anticipated in Section 5.08.

on the other hand, was unwilling to be put in the position of having Cap Rock move on and off its system at will, because of the problem that would present with regard to the resource planning for, and reliability of, the TU Electric system. Mr. Pittman explained TU Electric's concerns, and the reasons for the notice requirements in the 1990 Power Supply Agreement, as follows:

> Q. . . . you've already testified that Cap Rock wanted TU Electric to be on the string, I think as you've indicated. Did that cause TU Electric any concern?
>
> A. Yes, sir, it did, primarily because Cap Rock is a very large customer of TU Electric, one of largest in fact, approximately a hundred megawatts of [load], and when you get a customer that's that size, it becomes a big factor in your planning process.
>
> Cap Rock in essence was asking TU, "be prepared to serve all of our load, some of our load or none of our load," and to serve it essentially upon no notice to TU Electric.
>
> What difficulty this raises for us is that when we plan for our system, we look at the total load requirements, not only of our retail customers, but our wholesale customers as well, we project those out into the future, we look at . . . what kind of power resources, whether they be generation that we own or power that we purchase elsewhere, we attempt to match those up so that there's sufficient generation to take care of the peak load requirements.
>
> In addition, we have to plan for contingency situations, and so we have to have a reserve, and that reserve is to cover things such as the weather may be much hotter than normal, for example, like in 1980 when we went through a sustained period of extremely high temperatures, which was totally unexpected.
>
> Also, for other situations that might crop up that are outside the ordinary, such as the failure of one of our generating units. We would love to

be able to predict that, but we can not with certainty determine when we may lose a unit, so we have to plan for reserve to take care of that.

In the case of a customer the size of Cap Rock, if Cap Rock expected to, at any point in time, to be able to say "we found a better deal elsewhere, TU, we're leaving you right away," then we could face the potential of having a hundred megawatts of capacity or purchase power . . . that is idle. . . . In other words, we're not collecting any revenue through our rates to offset the cost of that particular power. . . .

[I]n addition . . ., that cost would have to be spread among our other customers, therefore making the cost of our product more expensive to these other customers. * * *

Q. Well, you've heard a lot of discussion about the two or three year notice provisions in the 1990 Power Supply Agreement Mr. Pittman. Is that the reason, as you have just explained, that you wanted notice requirement, that's the reason you insisted that they go into the 1990 Power Supply Agreement?

A. **Yes, sir, we did. We felt like that if we were going to be required to provide full requirement service, partial requirement service or no service, that the only way that we were going to be willing to be committed to do something like that is to have some reasonable notice. We felt it was a matter of just prudent business practice to do that, so that if Cap Rock wanted to move [off] of our system, having been a full requirements customer . . . we did not object. All we wanted was sufficient notice, and so that's the way we ended up with the two to three year notice requirement in the [1990 Power Supply Agreement].**

[April 14-15, 1992, Tr., p. 124-27, emphasis added]

The compromise regarding notice that ultimately resulted in the specific notice provisions in the 1990 Power Supply Agreement was further explained by Mr. Pittman as follows:

Q. Could you describe for the Court the key compromise that made it possible to conclude the negotiation of the 1990 Power Supply Agreement?

A. Yes. . . . Cap Rock wanted . . . TU Electric to be in a position to provide full requirements service to it for an extended period of time, and yet have the ability, the flexibility to be able to move off TU Electric and purchase power from other resources, . . ., and do it with **essentially no notice.**

However, TU Electric was not willing to bind itself to a long term agreement and not have sufficient notice in order for that to occur, so the compromise that we reached was that TU Electric would be bound for a period of 10 years to provide full requirements service to Cap Rock, with certain exceptions which would allow Cap Rock with three years notice in years one through five and five years notice thereafter to move portions, if not all, of its load off of TU Electric's system, and there was also provision in our agreement that with two years notice, Cap Rock could move up to 30 megawatts of load off of TU Electric, all that load off of TU Electric on to some other electric utility.

[April 14-15, 1992, Tr., p. 129-30, emphasis added]

Q. Do you recall any conversation, sir, of any character with Mr. Collier or any other representative of Cap Rock in the negotiation of the 1990 Power Supply Agreement that suggested or would have given Cap Rock any right to take any power from any other source until two or three years notice was given under the 1990 Power Supply Agreement that was executed?

A. No, sir, I do not.

Q. Mr. Pittman, would TU Electric or you on behalf of TU Electric sign . . . an agreement that would permit Cap Rock to take power from other sources without the two or three year notice provided for in the 1990 Power Supply Agreement?

A. No, sir, we would not, and as I've explained earlier, the notice requirements were something

> that was absolutely fundamental to TU Electric in negotiation of [the 1990 Power Supply Agreement].

[April 14-15, 1992, Tr., p. 139]

Mr. Pittman's testimony regarding the early conflicting positions of the parties is corroborated by the two position papers prepared by the parties at the beginning of the negotiations of the 1990 Power Supply Agreement. [Def. Exh. 7, Cap Rock's "Essential Power Supply Services To Be Provided by TU Electric"; and Def. Exh. 8, "TU Electric's Settlement Proposal"] Defendant's Exhibit 7 reflects the following position taken by Cap Rock:

> Cap Rock Electric shall be entitled **immediately** to receive, and TU Electric will be obligated **immediately** to provide, such partial requirements service as requested by Cap Rock Electric after the existing all-requirements wholesale contract between TU Electric and Cap Rock Electric is terminated, and at such time as Cap Rock begins to supply a portion of the power requirements at one or more wholesale points of delivery with other power purchases, generation or cogeneration.
>
> Cap Rock Electric shall be able to continue to receive all-requirements service under all-requirements rates and terms for any or all wholesale points of delivery until such time as Cap Rock Electric begins to supply a portion of the power requirements at such points of delivery with other power purchases or generation.

[Def. Exh. 7 at 2-3, emphasis added]

TU Electric's position, on the other hand, is reflected in Defendant's Exhibit 8 as follows:

> 1. [TU Electric] will provide partial requirements power and energy to Cap Rock pursuant to Paragraph D.(2)(k) of the Comanche Peak License Conditions ("License Conditions"). . . .

[Def. Exh. 8 at 2] The referenced provision of the License Conditions expressly provides that TU Electric's obligation to sell

"full and partial requirements bulk power" is conditioned upon the receipt of "reasonable advance notice." [Pls. Exh. 2, Paragraph 11 at 5]

From these initial positions, as Mr. Pittman testified, the parties ultimately compromised and reached the agreement embodied in the 1990 Power Supply Agreement, with its two and three year notice requirements.[48] [April 14-15, 1992, Tr., p. 129-30]

That compromise and agreement is further evidenced by Defendant's Exhibit 57 ("Summary Of Settlement Discussions between Texas Utilities Electric Company and Cap Rock Electric Cooperative, Inc."). Mr. Pittman explained that this Summary was prepared by TU Electric, at the request of the NRC, and was transmitted to the NRC "on or about July 24th of 1990," shortly after the execution of the

---

[48] The 1990 Power Supply Agreement incorporates the understandings and agreements reached by the parties in the "Principles of Agreement" executed on May 15, 1990. [Def. Exh. 10] Significantly, the Principles of Agreement, which contained the fundamental terms to be incorporated in a definitive power supply agreement as provided for in Paragraph 18 thereof, clearly evidenced the intention of the parties that the new power supply agreement would initially be a full-requirements contract. Specifically, Paragraph 3(c) of the Principles of Agreement provided that:

> The power and energy supplied by TU Electric shall (except in the event that Cap Rock commences the scheduling of firm resources or becomes an ERCOT control area as provided for herein) constitute all of Cap Rock's power and energy requirements at all such points of delivery. (Emphasis added)

Paragraph 1 of the Principles of Agreement also states that:

> The term of the power supply agreement will be 10 years. Cap Rock will have the right to terminate the power supply agreement or reduce load supplied by TU Electric thereunder on three years' written notice in years 1 through 5, and on five years' written notice thereafter. . . . (Emphasis added)

Paragraph 2, however, permitted removal by Cap Rock of a limited amount of load with less notice:

> With respect to nine points of delivery (Pembrook, St. Lawrence, Stiles, Reed, Russell, Buchanan, Grady, Tate and Phillips) covering up to approximately 30 MW of load, Cap Rock may, during years one through five of the power supply agreement, disconnect one or more of these delivery points from TU Electric and connect same to another electric utility without the imposition of the demand determinations after load removal, provided Cap Rock has first given TU Electric 24 months' notice of such removal and such removal occurs prior to June 1 in the year of removal. (Emphasis added)

1990 Power Supply Agreement. [April 14-15, 1992, Tr., p. 130-31]

Significantly, the Summary states that:

> TU Electric initially offered to sell partial requirements power and energy, upon termination of the [1963] Agreement, pursuant to Paragraph D.(2)(k) of the Comanche Peak License Conditions . . . which conditions its obligation to sell full and partial requirements power and energy on, among other things, "reasonable advance notice." Cap Rock sought to purchase such power and energy "immediately" upon termination of the [1963] Agreement and at such time as it begins to supply a portion of its requirements with power from other sources.
>
> **The parties finally agreed that Cap Rock will purchase full requirements power and energy from TU Electric under the [1990 Power Supply Agreement] until and to the extent it gives three years notice in years one through five, and five years notice thereafter, to reduce load to be supplied by TU Electric.**

[Def. Exh. 57 at 1, emphasis added.]

But TU Electric was not the only party to so characterize the notice provisions of the 1990 Power Supply Agreement after it was executed. As discussed above, in the July 15, 1990 press release in which Cap Rock announced the execution of the "LANDMARK" 1990 Power Supply Agreement, Cap Rock itself similarly explained that:

> **The agreement becomes effective when Cap Rock Electric terminates it [sic] current power supply contract with TU Electric, Collier said. The new contract requires two or three years notice by Cap Rock to begin serving load with other power supplies, Collier explained.**

[Def. Exh. 15 at 2, emphasis added.]

Cap Rock now argues, however, that, if the Court finds the 1990 Power Supply Agreement to be an enforceable contract, the Court should construe it as permitting Cap Rock, at its sole option, to purchase all, part or none of its power and energy

requirements from TU Electric beginning on the effective date of the contract. Significantly, this is precisely the kind of agreement Cap Rock wanted, but did not get, both before the NRC and in its negotiations with TU Electric. When the negotiations of the 1990 Power Supply Agreement were completed, Steve Collier informed David Pruitt that the contract "is not the perfect agreement that we would write unilaterally." [Def. Exh. 12] On cross-examination at the injunction hearing, Steve Collier admitted the same thing:

> Q. Well, did you get everything you wanted in the 1990 Power Supply Agreement?
>
> A. No, sir.

[March 26, 1992, Tr., p. 239]

One of the things Cap Rock wanted was the right to "immediately" receive, at Cap Rock's option, full or partial requirements service from TU Electric upon termination of the 1963 Agreement. [Def. Exh. 7] TU Electric was not willing, and did not agree, to give Cap Rock that right. So Cap Rock now seeks from this Court what it did not get in its negotiations with TU Electric. Cap Rock would thus have this Court rewrite the 1990 Power Supply Agreement and form a new contract the parties did not make for themselves -- namely, the "perfect agreement that [Cap Rock] would write unilaterally." This is something the Court is "not at liberty" to do. General American Indemnity Co. v. Pepper, 339 S.W.2d 660, 661 (Tex. 1960).

It is also important to note that, consistent with its obligation to continue to supply, and Cap Rock's obligation to

continue to purchase, full-requirements power and energy under the 1990 Power Supply Agreement once Cap Rock chose to terminate the 1963 Agreement, TU Electric added additional capacity to and extended its purchases under certain cogeneration purchase agreements, shortly after the 1990 Power Supply Agreement was executed, in order to have sufficient capacity available to meet its system load requirements, including Cap Rock's 100 megawatts of load. As Mr. Bunting testified:

> Q. What action did Texas Utilities take to be in a position to supply the Cap Rock load after execution of the 1990 Power Supply Agreement, sir?
>
> A. The action we took, knowing that we now had this contract which we were obligated to serve Cap Rock under this Power Supply Agreement, then we took action to extent [sic] and add capacity to one short term cogeneration agreement which we were purchasing under, and we extended another short term cogeneration agreement in order to have the resources available to supply this load under that contract.
>
> Q. . . . why did you take that action . . . ?
>
> A. Well, we took that action because we were obligated to provide those resources as part of our system planning and our resource planning process. One reason that we have notices and one reason we have an orderly transition when you go from a full requirements to a partial requirements agreement is that we need to plan to serve that load at all times which we're required to serve that load, so it's very important that we have proper notice and we have an orderly transition so that we can input this into our resource planning process.
>
> * * *
>
> Q. . . . After execution of the . . . 1990 Power Supply Agreement, did you have sufficient capacity without taking some action to serve the Cap Rock load?

A. We didn't have sufficient capacity to serve our system load requirements plus the hundred megawatts of Cap Rock load, and we extended those agreements in September of 1990.

[April 14-15, 1992, Tr., p. 243-45]

Mr. Bunting further testified that the cost to TU Electric of purchasing power and energy sufficient to serve 100 megawatts of load is approximately $20 million per year -- a cost which TU Electric will nevertheless be required to bear if Cap Rock is successful in abrogating its obligations under the 1990 Power Supply Agreement.

Q. And what is the cost to TU Electric to purchase the hundred megawatts of capacity under those agreements, Mr. Bunting?

A. This cost would fit in the neighborhood of $20,000,000.00 a year to TU.

Q. So for three years, $60,000,000.00?

A. $20,000,000.00 a year times three years would be about $60,000,000.00.

Q. And will Texas Utilities be required to purchase that capacity whether Cap Rock repurchases it from TU Electric or not?

A. Yes, sir, absolutely they will.

[April 14-15, 1992, Tr., p. 245]

In summary, the plain meaning of the 1990 Power Supply Agreement, as corroborated by the contemporaneous representations and actions of the parties, demonstrates, as a matter of law, that the agreement is a full-requirements contract, which requires Cap Rock to purchase all of its power and energy requirements from TU

Electric until it gives the requisite notice to reduce load or to terminate the agreement and the notice period has expired.

Such full-requirements contracts, Cap Rock itself admits,[49] are fully enforceable in Texas. Pace Corporation v. Jackson, 284 S.W.2d 340 (Tex. 1955). Professor Corbin explains the meaning of a full-requirements contract as follows:

> It is true that the amount to be delivered or paid for can not be determined at the time the contract is made; but the terms of the promise give a sufficiently definite objective standard to enable a court to determine the amount when the time comes for enforcement. **It is not a promise to buy all that the buyer wishes or may thereafter choose to order; the amount is not left to the will of the promisor himself.**
>
> * * *
>
> It is true that by such a promise as this, the promisor may not undertake to continue a business on its present scale or even to run the business at all. It is true that the amount that will be needed or required will vary with the scale on which the business is run. Much, therefore, is left to the judgment of the promisor, even to his will and desire; but not everything is thus left. **The promise contains one very definite element that specifically limits the promisor's future liberty of action; he definitely promises that he will buy of no one else. If he needs or requires or uses any of the name commodity, he must buy it of the one specified.**

1A A. Corbin, Corbin on Contracts § 156 at 30-32, 33 (1960) (footnotes omitted, emphasis added). When it signed the 1990 Power Supply Agreement, Cap Rock agreed that, until such time as it gives the requisite notice and the notice period has expired, Cap Rock "will buy [electric power and energy] of no one else." That agreement can, and must, be enforced.

---

[49] Cap Rock Brief at 1.

7. There was a Complete Meeting of the Minds between TU Electric and Cap Rock on the terms of the 1990 Power Supply Agreement.

Cap Rock also argues in its Brief that, if the Court rejects its contentions as to the unenforceability of the 1990 Power Supply Agreement, the evidence at the injunction hearing nonetheless "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." Cap Rock Brief at 4. In Cap Rock's view, the "evidence [at the injunction hearing] abundantly shows that the parties attributed vastly different meanings to the 1990 [Power Supply Agreement], that they never shared a common understanding of their rights and obligations under the purported contract." Cap Rock Brief at 4. Cap Rock bases its contention on Mr. Collier's testimony that he "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 [Power Supply Agreement]." Cap Rock Brief at 17.

Again, Cap Rock misstates basic contract law as it applies to the "meeting of the minds" doctrine. It is not sufficient for one party to a contract, sometime after its execution, to merely allege: "This contract does not say what I meant it to say and so, therefore, there was no meeting of the minds." Were that the law, any party who wished to be relieved of its contractual obligations could easily avoid those obligations by an after-the-fact

allegation of its subjective intent, as Mr. Collier attempts to do here. That is not the law.

The determination as to whether the parties to a contract have a "meeting of the minds" is based on an **objective standard of what the parties said and did in the contract.** This objective standard determines the true intentions of the contracting parties. Adams v. Petrade International, Inc., 754 S.W.2d 696 (Tex. App.--Houston [1st Dist.] 1988, writ denied).

The Restatement of Contracts describes meeting of the minds as the "manifestation of mutual assent". Restatement (Second) of Contracts, Chap. 3, § 17, comment c. Manifestation of mutual assent requires only that each party either make a promise or agree to render a performance. Id. § 18.

In Adams, the Court was faced with determining whether there was a meeting of the minds between the parties on the terms of a contract for the sale of gasoline. 754 S.W.2d at 717. Finding that a meeting of the minds did exist, the Court stated:

> The determination of whether there was a meeting of the minds must be based on objective standards of what the parties said and did and **not on their alleged subjective states of mind.**

Id. (emphasis added); see also, Slade v. Phelps, 446 S.W.2d 931, 933 (Tex. Civ. App. -- Tyler 1969, no writ).

When ascertaining the objective intent of the parties to a contract the express language of the agreement cannot be overlooked. Enos v. Leediker, 214 S.W.2d 694 (Tex. Civ. App. -- Galveston 1948, no writ). This rule is consistent with the often

cited rule that a court called on to construe the meaning of a contract must ascertain and give effect to the intention of the parties as revealed by the language of the instrument. R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517 (Tex. 1980). An agreement is to be viewed as of the time it was made and not in light of subsequent events, First Nat. Bank v. Kinabrew, 589 S.W.2d 137 (Tex. Civ. App. -- Tyler 1979, writ ref'd n.r.e.), and the objective intent of the parties, as expressed in the instrument, controls. Vanguard Ins. Co. v. Stewart, 593 S.W.2d 736 (Tex. Civ. App. -- Houston [1st Dist.] 1979) aff'd, 603 S.W.2d 761 (Tex. 1980).

The impact of these rules of construction is that Cap Rock cannot be permitted to alter the meaning of the 1990 Power Supply Agreement based on its current subjective intent, or claim to have had a different interpretation at the time the 1990 Power Supply Agreement was executed, in an attempt to show there was no meeting of the minds. Instead, the express terms of the writing itself must be examined to determine the objective intent of the parties and the consequent legal effect of the instrument. Such an examination reveals that the 1990 Power Supply Agreement clearly identifies a meeting of the minds between TU Electric and Cap Rock on each of the subject matters addressed by the agreement, including not only Cap Rock's obligation to purchase from TU Electric and TU Electric's obligation to sell to Cap Rock full-requirements power until the expiration of the proper notice

period, but the wheeling and scheduling of power for Cap Rock as well as the supply of regulation services. The many months of negotiations between TU Electric and Cap Rock resulted in not only a full-requirements contract initially, but a contract that allows Cap Rock the ability to acquire its power requirements from third parties along with other associated rights, **provided** Cap Rock gives the requisite notice. The 1990 Power Supply Agreement contains each and every term necessary for the enforceability of such rights.

In Vise v. Foster, the Court of Appeals considered a contract for the sale of oil. 247 S.W.2d 274 (Tex. Civ. App. -- Waco 1952, writ ref'd n.r.e.). The Court stated that:

> **a careful reading of the contract in suit shows that the minds of the parties met on the material matters relating to the sale and delivery of 100,000 barrels of oil.** We find that the contract was dated; that it named the parties; that it set forth the authority of the parties to make the contract; it described the commodity and the volume to be bought and sold and the consideration to be paid therefor; the rate of delivery as well as the time of payment was each specified and the mode and manner of transporting and delivering the commodity was agreed upon. * * *
>
> * * * **Since each and every material element of the contract with reference to the sale was mutually agreed to and set forth and nothing of any material nature was left out to be agreed upon, we think the contract was binding.**

Id. at 277, 278 (emphasis added). Such is exactly the case here.[50]

---

[50] Accordingly, Cap Rock's statute of frauds argument must also fail. The statute of frauds, Tex. Bus. & Com. Code § 26.01(a) (Vernon 1987), is satisfied, with respect to agreements defined therein, if there is a "written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement . . . ." Cohen v. McCutchin, 565 S.W.2d 230, 232 (Tex. 1978). Every "material detail" and all the "essential elements" necessary to enforce the 1990 Power Supply Agreement are set (continued...)

Finally, Steve Collier's testimony during cross-examination at the injunction hearing included a particularly damning admission regarding Cap Rock's intentions and its knowledge of TU Electric's intentions at the time the 1990 Power Supply Agreement was executed.

> Q. [D]id you ever tell Mr. Pittman, "Now, Pitt, I want to tell you right now that when I terminate my '63 Contract and when this '90 Contract comes into existence, I may not buy any power from you," did you ever tell him that?
>
> A. It's my recollection that **we discussed on at least one occasion or more the possibility of not putting all the delivery points in, putting some of the delivery points in, and it raised quite an uproar.**
>
> * * *
>
> **. . . We did not pursue the development of any additional language in that regard, and we signed the contract as it was proposed,** which we believed gave us that right. (Emphasis added)

[March 26, 1992, Tr., p. 215-16]

Even assuming Mr. Collier was testifying truthfully when he said that, at the time Cap Rock signed the 1990 Power Supply Agreement, he "believed" Cap Rock had the right to not purchase any power from TU Electric on the effective date of the agreement, his "belief" is immaterial in determining the meaning and effect of the 1990 Power Supply Agreement. As discussed above, it is the objective intent of the parties as expressed in the writing that

---

[50](...continued)
forth in the contract, which has also clearly been signed by the authorized representatives of Cap Rock and TU Electric.

controls -- not one party's subjective intent. Furthermore, "[t]he secret intention of one party [to a contract] not made known to the other party is immaterial." Allais v. Lynch, 489 S.W.2d 342, 345 (Tex. Civ. App. -- Houston [1st Dist.] 1972, writ ref'd n.r.e.) (citing Corbin on Contracts, 1960 Ed., § 538).

However, Mr. Collier's testimony is nonetheless highly significant for the precise reason that, even if true, it reveals a secret and hidden intent by Cap Rock to avoid the plain meaning of the express provisions of the 1990 Power Supply Agreement, which alone would defeat Cap Rock's attempt to avoid its contractual obligations. Section 538 of Corbin on Contracts, which was cited by the Court of Appeals for its holding in Allais, explains that:

> **The court will not interpret the words of an agreement so as to hold one party bound in accordance with the wholly unexpressed intentions and meanings and understandings of the other. A contractor is bound in accordance with the meaning that he induces another to understand and act upon, if he knows or has reason to know that the other will so understand and act.** And in determining whether or not he has reason to know, the court should be advised of all the surrounding circumstances; of the meaning that is given to the language of the agreement by common usage, by usage in the trade or business or profession of the parties; of communications between the parties during preliminary negotiations and during the execution of the writing; and of subsequent interpretations and practical application by either party that is assented to or acted upon by the other.
>
> * * *
>
> Why is it that statements are so often made that a party's actual intention is immaterial, . . ., and that he is bound in accordance with the interpretation that would be given to the words of the contract by a reasonable man under the same circumstances? It is because the court believes that in the case before it the

> other party gave the words that meaning and that the first party had reason to know it. **If A used or understood the words in a particular sense and B in fact knew that he did, it is regarded as "fraudulent" for B to try to hold A in accordance with a different meaning,** however "normal" or common that meaning may be.

3 A. Corbin, Corbin on Contracts § 538 at 67-69, 73 (1960) (footnotes omitted, emphasis added).

Thus, Mr. Collier's testimony of his secret and hidden intent, even if true, comes squarely within the holding in Allais and the foregoing discussion from Corbin on Contracts. His own words reveal that Cap Rock **knew**, from the "uproar" caused by Mr. Collier's suggestion, that TU Electric understood the language used in the 1990 Power Supply Agreement to mean, and it did mean, that Cap Rock would purchase all of its power and energy requirements from TU Electric at all of Cap Rock's Points of Delivery on the effective date of the contract and that TU Electric was bound to sell such power at each of such Points of Delivery. Yet, although Cap Rock claims to have harbored a different **secret and "wholly unexpressed intention[] and meaning[] and understanding[]"** [Id.] of the writing, Cap Rock signed the contract, in Mr. Collier's words, "as it was proposed" and without "pursu[ing] the development of any additional language." [March 26, 1992, Tr., p. 216]

Thus, at best, Cap Rock knowingly induced TU Electric to understand and act upon a specific meaning of the 1990 Power Supply Agreement -- namely, that it is a full-requirements contract from the effective date until expiration of the applicable notice

period.[51] Cap Rock now disavows that meaning and asks this Court to legitimize Steve Collier's deception and interpret the agreement in accordance with its different, secret and hidden intentions. This "fraudulent" conduct cannot and should not be sanctioned. Cap Rock "is bound in accordance with the meaning [of the 1990 Power Supply Agreement] that it induce[d] [TU Electric] to understand and act upon" and the Court should so hold.

At worst, Mr. Collier's testimony is simply another example of his consistently overzealous efforts to find some basis of support for Cap Rock's position, without regard to the truth. Mr. Collier has given new meaning to the old expression "lying behind a log." His problem is that the law does not sanction such conduct.

8. The Texas Courts Favor the Presumption that Contracts are Enforceable.

Finally, it is important to note that the Texas Courts have long presumed that when parties make an agreement they intend it to be effectual, not inoperative. Contracts will always be construed in favor of mutuality. Texas Gas Utilities Company v. Barrett, 460 S.W.2d 409 (Tex. 1970). Further, parties to a contract are presumed to intend that it will be enforced, not that they

---

[51] As discussed above, in September 1990, shortly after the 1990 Power Supply Agreement was executed, TU Electric acted upon its understandings of the parties' obligations under the contract -- understandings which Cap Rock knowingly induced -- by adding additional capacity to and extending its purchases under two cogeneration purchase agreements in order to have sufficient capacity available to meet its system load requirements, including Cap Rock's 100 megawatts of load under the 1990 Power Supply Agreement once Cap Rock terminated the 1963 Agreement. As Mr. Bunting testified, the cost of such power and energy to serve 100 megawatts of load is approximately $20 million -- a cost TU Electric must bear if Cap Rock is successful in abrogating its obligations under the 1990 Power Supply Agreement. [April 14-15, 1992, Tr., p. 243-45]

deliberately executed an invalid agreement. Woods v. Sims, 154 Tex. 59, 273 S.W.2d 617 (1954).

In this case, Cap Rock is advancing the implausible argument that it executed an unenforceable contract. The presumption of enforceability strikes at the very heart of Cap Rock's contentions. Contracts must be construed so as to render them effective, instead of ineffective. Walker v. Temple Trust Co., 80 S.W.2d 935, 936 (Tex. Comm'n App. 1935)(in dealing with a usury issue and holding that ". . . when the contract by its terms, construed as a whole, is doubtful, or even susceptible of more than one reasonable construction, the court will adopt the construction which comports with legality").

Thus, if a contract is susceptible of two constructions, and only one of those will render the agreement valid and effective, the construction which results in validity will be adopted in order to render the contract valid. Temple-Eastex, Inc. v. Addison Bank, 672 S.W.2d 793 (Tex. 1984) (holding that if two constructions of a writing are possible, construction which renders contract possible of performance will be preferred to one that renders its performance impossible or meaningless); Harris v. Rowe, 593 S.W.2d 303 (Tex. 1979); Sumrall v. Navistar Financial Corp., 818 S.W.2d 548, 559 (Tex. App. -- Beaumont 1991, writ requested); Borg-Warner Accept. v. Tascosa Nat. Bank, 784 S.W.2d 129 (Tex. App. -- Amarillo 1990, writ denied). The Harris court held that if two constructions exist, the one which would validate the contract must

prevail. Id. at 306. Put another way, a court must reject any interpretation of a contract, such as that advanced by Cap Rock in this case, which will nullify one or more of the contractual provisions. Benge v. Scharbauer, 259 S.W.2d 166 (Tex. 1953); Exxon Corp. v. Eastman Kodak Co., 589 S.W.2d 473 (Tex. Civ. App. -- Texarkana 1979), rev'd on other grounds, 603 S.W.2d 208 (Tex. 1980).

IV.

CONCLUSION

The motivation for the position taken by Cap Rock and its principal witness in this suit is clear. If the 1990 Power Supply Agreement is binding on the parties as TU Electric maintains, Cap Rock must purchase all of the power and energy requirements of its customers from TU Electric pursuant to that agreement -- from the February 1, 1992 effective date until the expiration of the requisite notice period for the reduction in load supplied by TU Electric or termination of the contract.

But Cap Rock has now located a potential source of power at what it claims is a lower cost than that provided for under the 1990 Power Supply Agreement.[52] Cap Rock's management also created substantial personal financial benefits for themselves under "success fee" contracts tied to the savings in power costs Cap Rock

[52] Interestingly enough, Cap Rock did not present any evidence that its power costs under the proposed WTU contract and the SPS contract would result in lower costs to the Cap Rock customers after all associated capital costs are calculated.

hopes to realize by reason of its abrogation the 1990 Power Supply Agreement. When TU Electric refused to permit Cap Rock to simply "walk away" from its contract with TU Electric, Cap Rock filed this lawsuit in a transparent effort to avoid its obligations, to the detriment of TU Electric and its other customers, and allow its principal witness and other management team members to collect their "success fees" for facilitating the abrogation of the 1990 Power Supply Agreement.

The Texas Courts uniformly refuse to allow a party to a contract to avoid its contractual obligations simply because performance is uneconomical. Cap Rock should not be permitted to do so here.

Nothing Cap Rock has asserted in its Brief or its Motion for Summary Judgment and none of the summary judgment evidence can establish that the 1990 Power Supply Agreement is unenforceable or that the contract gives Cap Rock the right, at its sole option, to purchase all, part or none of its power and energy requirements from TU Electric on the effective date of the agreement. On the contrary, the summary judgment evidence conclusively establishes that there is absolutely no issue of material fact, and certainly no genuine issue of material fact, as to the enforceability of the 1990 Power Supply Agreement. That agreement is a valid, binding and enforceable contract. The plain meaning of the agreement, as shown by the four corners of the writing and corroborated by the summary judgment evidence, requires Cap Rock to purchase

full-requirements power and energy from TU Electric until Cap Rock gives the requisite notice to reduce load supplied by TU Electric or to terminate the agreement and the notice period has expired.

Accordingly, the Court should (i) deny Cap Rock's Motion for Summary Judgment; (ii) grant TU Electric's Motion for Summary Judgment; (iii) and enter its order declaring the 1990 Power Supply Agreement to be a fully binding and enforceable contract which requires Cap Rock to purchase all of its power and energy requirements from TU Electric, until notice is given by Cap Rock, in accordance with the express terms of the agreement, to reduce load supplied by TU Electric or to terminate the agreement and the applicable notice period has expired.

Respectfully submitted,

COTTON, BLEDSOE, TIGHE & DAWSON

By: _____
Charles L. Tighe
State Bar No. 20024000
Rick D. Davis, Jr.
State Bar No. 05537700

500 W. Illinois, Suite 300
Midland, Texas 79702
(915) 684-5782

WORSHAM, FORSYTHE, SAMPELS & WOOLDRIDGE

By: _____
M. D. Sampels
State Bar No. 17557000
Angela Agee Hatton
State Bar No. 09231050
David P. Poole
State Bar No. 16123750

2001 Bryan Tower, Suite 3200
Dallas, Texas 75201
(214) 979-3000
(214) 880-0011 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Support of TU Electric's Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment has, this 8 day of July, 1992, been mailed by certified mail, return receipt requested, to the following counsel for Cap Rock:

Mr. Richard C. Balough
1403 West 6th Street
Austin, Texas 78703
(512) 477-8657 (Fax)

Mr. J. Brian Martin
Lone Star Abstract & Title
600 North Loraine
P.O. Drawer 1490
Midland, Texas 79702
(915) 683-2217 (Fax)

Tom W. Gregg, Jr.
219 S. Koeningheim Street
P. O. Drawer 1032 (76902)
San Angelo, Texas 76903
(915) 655-9180 (Fax)

James Boldrick
Boldrick & Clifton
1801 West Wall Street
Midland, Texas 79701