

50-446A

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May 6, 1992

VIA HAND DELIVERY

Joseph Rutberg, Esquire
Office of the General Counsel
11555 Rockville Pike, Room 15D19
U.S. Nuclear Regulatory Commission
Washington, D.C. 20854

Re: Texas Utilities Electric Company,
Comanche Peak Steam Electric Station, Unit No. 2,
Docket No. 50-446A.

Dear Mr. Rutberg:

Cap Rock Electric Cooperative, Inc., requests an opportunity to meet with you and other representatives of the Nuclear Regulatory Commission ("NRC") in order to respond to what we have only recently learned have been private and apparently extensive efforts by licensee Texas Utilities Electric Company ("TUEC") to discredit Cap Rock and the recent filings made by Cap Rock concerning TUEC's ongoing anticompetitive activities. Cap Rock was not informed of or invited to any meetings concerning its filings, nor has Cap Rock been served a copy of any of the voluminous TUEC filings. Cap Rock therefore requests a meeting with you in order to be apprised of and to respond to TUEC's allegations.

Cap Rock only recently learned that TUEC representatives met with you and members of your office in January, 1992, during which meeting you discussed the January 6, 1992, letter provided

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by the undersigned to the Director of Nuclear Reactor Regulation.^{1/} Cap Rock also only recently learned that, by letter of April 21, 1992, TUEC provided you with voluminous materials that it contends are relevant to its ongoing refusal to wheel power for Cap Rock (in violation of the Comanche Peak antitrust license conditions). We ask that TUEC be instructed to provide Cap Rock copies of all materials that it submits to the you or other Commission representatives with respect to the anticompetitive implications of TUEC's pending application for an operating license for Comanche Peak Nuclear Unit No. 2, as well as its current anticompetitive conduct toward Cap Rock.

As demonstrated in Cap Rock's March 25, 1992 comments, TUEC currently is refusing to wheel wholesale power from West Texas Utilities Company ("WTU") to Cap Rock, in violation of the Comanche Peak antitrust license conditions and Federal antitrust laws. TUEC has not attempted to address on the merits the proof of its refusal to wheel adduced by Cap Rock. Rather, it appears to Cap Rock that TUEC may have settled on a strategy of disinformation and innuendo. Cap Rock is confident that the Commission will recognize this strategy for what it is, but Cap Rock nevertheless wishes an opportunity to respond to TUEC's allegations, as well as to answer any questions that you or other NRC representatives may have about Cap Rock's current problems with TUEC.

Cap Rock very much would like the opportunity to respond to TUEC's repeated contention that Cap Rock is seeking to break the 1990 Settlement. This specious contention is repeated time and again by TUEC in the apparent belief that if it is repeated often enough this Commission and others may believe it. TUEC's contention is false. Cap Rock has sought to do nothing more than to exercise one of the rights that it understood it obtained in the 1990 Settlement. Cap Rock's suit in Midland District Court

^{1/} The letter apprised the Director of Cap Rock's current litigation with TUEC in Texas state court, as well as TUEC's current anticompetitive activities. Additional information concerning the state court proceeding was provided by letter of April 20, 1992.

is in response to TUEC's refusal to wheel and otherwise to permit Cap Rock to purchase power from WTU.^{2/}

Cap Rock is also concerned that TUEC may use any informal discussions with you in the same manner it has used the confidential negotiations before, and discussions with, you and other NRC representatives concerning Cap Rock's May 12, 1989 request for enforcement of the Comanche Peak antitrust license conditions. TUEC has presented documents and testimony to the Midland District Court which purport to summarize the views of the NRC Staff during confidential negotiations in 1989 and 1990. Counsel for TUEC unilaterally abrogated the confidentiality agreement which TUEC demanded Cap Rock agree to at the first meeting with you and other NRC representatives. When pressed that such information was subject to an agreement of confidentiality before the NRC, counsel for TUEC simply observed that the agreement was not written.

We are also troubled by the fact that TUEC has filed in the Midland District Court an internal and putatively confidential memorandum that it represents was prepared at the request of, and filed with, the NRC in July, 1990, which purports to summarize how the positions of Cap Rock and TUEC changed during the course of the 1990 negotiations. The undersigned was not aware of any such request, nor was such a request consistent with your practice during the negotiations of having each side present a summary of the negotiating positions.^{3/} TUEC's supposed summary

2/ On its face, TUEC's "breach of contract" argument is absurd. Cap Rock had the right to terminate its 1963 full requirements contract with TUEC and leave the TUEC system on thirty days notice upon the effectiveness of an increase in TUEC rates. Cap Rock, which is less than one-hundredth the size of TUEC, litigated before this Commission and the Court of Appeals, and before the Texas Public Utility Commission, for more than two years in order to obtain the freedom to leave the TUEC system. Yet TUEC now contends that, as part of the 1990 Settlement, Cap Rock agreed to remain a full requirements customer of TUEC for at least three more years.

3/ Nor is it readily apparent why the Commission would want a one-sided summary of one party's opinion of what was agreed to, particularly where the summarizing party has a multi-billion dollar stake in persuading the Commission that it has acted reasonably.

is an inaccurate and self-serving recitation of what it contends was agreed to during the negotiations, yet it has been offered to the court as parole evidence of the intent of the Cap Rock in entering into the 1990 Settlement. 4/ This tactic is consistent with TUEC's repeated (and false) public statements to the Midland District Court and others, and in internal company documents, that the NRC fully agreed with TUEC, and rejected Cap Rock's position, in 1989 and 1990.5/

As Cap Rock stated in its January 6, 1992 letter and in the comments which Cap Rock filed in this docket on March 25, 1992, concerning the "significant changes determination" currently before the Commission, Cap Rock is not asking this Commission to adjudicate the merits of its legal arguments concerning whether or not the 1990 Settlement constitutes a full requirements contract. TUEC is apparently attempting to introduce that issue before this Commission. As a consequence, Cap Rock will, in the near future, submit a document which summarizing its position as presented to the Midland District Court.

Cap Rock will respond to TUEC's April 21, 1992 filing once it has been able to obtain a copy of the entire document, with attachments, and Cap Rock has had an opportunity to review it.

4/ TUEC's filing of a summary of the settlement also violates an express understanding reached between counsel for TUEC and the undersigned on June 8, 1990, that the settlement was to speak for itself and that neither TUEC nor Cap Rock would file any summary or characterizations of the terms of the settlement with the NRC. Cap Rock kept its side of this bargain, TUEC did not.

5/ TUEC stated, in the sworn testimony of its witness Mr. Pitt Pittman, that the NRC found the allegations in Cap Rock's August, 1988 "significant changes" comments to be totally without merit. A review of this Commission's June 26, 1989 order (54 Fed. Reg. 26865) and the Staff report upon which the Commission decision is based (pages 30-33) prove that testimony to be false.

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In the interim, Cap Rock would appreciate a prompt response to this request for a meeting. Please do not hesitate to call me with any questions or to schedule the meeting.

Very truly yours,


John Michael Adagna

Attorney for Cap Rock Electric
Cooperative, Inc.

JMA/dm

cc: Mr. Thomas E. Murley (Via Hand-Delivery)
William Lambe (Via Hand-Delivery)
Merlyn Sampels, Esquire