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May 18, 1992

Mr. Joseph Rutberg
Office of the General Counsel
U. S. Nuclear Regulatory Commission
11555 Rockville Pike, Room 15D19
Rockville, Maryland 20854

Re: **Texas Utilities Electric Company,**
Comanche Peak Steam Electric Station,
Units 1 and 2, Docket Nos. 50-445A and 50-446A

Dear Mr. Rutberg:

This is in reference to the letter to you dated May 6, 1992, from John Michael Adragna, counsel for Cap Rock Electric Cooperative, Inc., in which he complains that Cap Rock has not been furnished with a copy of my letter to you of April 21, 1992. Although my April 21 letter was nothing more than a follow-up to TU Electric's informal meeting with you and others in January 1992[1] regarding Cap Rock's letter of January 6, 1992, to Mr. Murley,[2] and

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[1]I assume that Cap Rock's counsel does not imply any impropriety as a result of this meeting since it is TU Electric's understanding that Cap Rock has likewise had informal discussions with the NRC Staff from time to time on issues regarding TU Electric.

[2]Cap Rock's January 6 letter was not submitted pursuant to any of the NRC's rules or regulations and did not seek any Commission action but was apparently filed only to color the record concerning (continued...)

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while TU Electric has certainly not embarked upon a "strategy of disinformation and innuendo" (as Mr. Adragna alleges), in order to allay any possible concern or misconception regarding TU Electric's motives, I am providing Mr. Adragna with a copy of that letter and all attachments,[3] together with a copy of this letter.

The District Court in Midland, Texas has now denied Cap Rock's request for a mandatory temporary injunction to compel TU Electric to facilitate Cap Rock's proposed purchase of power and energy from West Texas Utilities Company.[4] TU Electric will shortly be filing a formal response to Cap Rock's Comments.[5] Nevertheless, I would like to respond to several of the false

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[2](...continued) the Texas litigation between Cap Rock and TU Electric. By its April 21 letter, all TU Electric did was to present its side of the story and furnish to the NRC a copy of the 1990 Power Supply Agreement as executed by the parties and certain other relevant information which Cap Rock neglected to provide with its letter. As indicated in note 3 below, virtually all of the other documents contained in TU Electric's April 21 letter had previously been furnished to the NRC.

[3]As Mr. Adragna will recognize, the vast majority of the documents contained in the four binders constitutes or relates to NRC filings during 1988 and 1989 in connection with the dispute that TU Electric believed was "settled" by the execution of the 1990 Power Supply Agreement between TU Electric and Cap Rock. These documents were provided on the assumption that the NRC had closed its files on the previous dispute between Cap Rock and TU Electric and that such documents were no longer available to the NRC Staff. All of the remaining documents were produced in discovery proceedings in the pending Midland litigation. Furthermore, the information contained in my letter of April 21, as well as the documented summary attached thereto, is merely reflective of the position taken by TU Electric in the Midland litigation (and previous proceedings before the NRC) and will certainly come as no surprise to Cap Rock.

[4]It is TU Electric's position that such purchase would violate the 1990 Power Supply Agreement between the parties.

[5]I indicated in my April 21 letter that TU Electric would file a formal response to Cap Rock's Comments in the above proceeding after the Midland Court had ruled on Cap Rock's request for a temporary injunction.

accusations and misleading statements made by Mr. Adragna in his letter of May 6.[6]

Among other things, Mr. Adragna accuses counsel for TU Electric of "unilaterally abrogat[ing]" the agreement regarding the confidential negotiations with the NRC Staff in 1989 and 1990. First of all, no such negotiations were held in 1989. Prior to the first meeting with the NRC Staff on January 11, 1990, TU Electric requested that Cap Rock execute a confidentiality agreement[7] which TU Electric had prepared and brought to the meeting. However, Cap Rock declined to sign the agreement and the negotiations proceeded on the basis that TU Electric's settlement proposals would not be disclosed or used for any purpose whatsoever "without the express written consent of TU Electric" (emphasis supplied).[8] The NRC Staff was not a party to any confidentiality agreement or understanding. Thus, as the party requesting the confidential treatment and the party whose consent was required for disclosure, TU Electric has not breached the confidentiality agreement. Furthermore, at the conclusion of those discussions, the parties consummated a settlement and executed a power supply agreement and general releases into which the confidentiality agreement was merged. The 1990 Power Supply Agreement contains an entireties clause which does not perpetuate any confidentiality agreement.

Cap Rock also claims that TU Electric's introduction into evidence at the injunction hearing in the Midland litigation of a "summary of the settlement"[9] violates a purported agreement between counsel for Cap Rock and counsel for TU Electric that "the settlement was to speak for itself and that neither [TU Electric] nor Cap Rock would file any summary or characterizations of the

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[6]I will not attempt in this letter to deal with the merits of Cap Rock's claims regarding the 1990 Power Supply Agreement as those issues will be fully covered in TU Electric's formal response to Cap Rock's Comments. However, as a matter of information, I am enclosing TU Electric's post-hearing brief in the Midland litigation.

[7]TU Electric requested that Cap Rock sign a confidentiality agreement to prohibit Cap Rock from making inaccurate and misleading public disclosures regarding the negotiations in the press and elsewhere, as Cap Rock had done on other occasions in an effort to discredit TU Electric.

[8]See Vol. III, Tab 64 of the attachments to my letter of April 21, 1992.

[9]The summary to which Mr. Adragna refers was furnished to the NRC in July of 1990 following execution of the 1990 Power Supply Agreement (see Vol. IV, Tab B, of the information furnished with my letter of April 21).

terms of the settlement with the NRC." As counsel for TU Electric, I am certainly not aware of any such agreement and, in fact, Mr. Adragna's letter of June 28, 1990, to the NRC, informing the Staff of the execution of the 1990 Power Supply Agreement, itself summarizes the key features of the settlement and is not inconsistent with the TU Electric summary. Mr. Adragna's letter of June 28, 1990, was furnished to the Midland Court at the same time as the TU Electric summary. Additionally, Mr. Adragna's letter of January 6, 1992, to Mr. Murley of the NRC (to which my April 21 letter informally responded) generally summarizes and characterizes Cap Rock's current interpretation of the settlement.[10]

Finally, Cap Rock strongly takes issue with Mr. Pitt Pittman's purported testimony in the Midland litigation to the effect that "the NRC found the allegations in Cap Rock's August, 1988 'significant changes' comments to be totally without merit." Although the transcript of the injunction hearing at which Mr. Pittman testified is not yet available to the parties and thus his verbatim testimony on this issue is unavailable at this time, the fact remains that the Director of Nuclear Reactor Regulation of the NRC found no significant antitrust changes in the activities of TU Electric as a result of the complaints of Cap Rock or otherwise and refused to change his finding upon consideration of Cap Rock's request for reevaluation. Mr. Pittman's notes of the January 1990 meetings with the NRC were also furnished to the Midland Court. Cap Rock does not challenge the accuracy of the NRC Staff's position as expressed in those meetings.

In his May 6 letter, Mr. Adragna also requested a meeting with you and other representatives of the Commission, which we understand will occur on Wednesday, May 20, 1992. Since TU Electric has not been given the opportunity to attend and participate in any such meeting (which is perfectly acceptable to TU Electric), it does respectfully request an informal meeting with the NRC Staff sometime during the week of May 25 or as early thereafter as convenient.

Very truly yours,

M. D. Sampels

MDS/mkm

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[10]It is interesting to note that Mr. Adragna's letter of January 6, 1992, to the NRC, which contains a totally inaccurate and misleading characterization of the 1990 Power Supply Agreement, predates Cap Rock's knowledge of the contemporaneous summary of the Power Supply Agreement furnished to the NRC by TU Electric in July of 1990, about which Cap Rock now complains.

Enclosures

cc: Mr. Wm. M. Lambe - With Enclosures to this letter only
John Michael Adragna, Esq. - With Enclosures:

1. Letter, dated April 21, 1992, from M. D. Sampels to Mr. Joseph Rutberg and attachments:

   (a) "TU Electric/Cap Rock Electric Cooperative, Inc. - Documented Summary of Events";

   (b) Four binders containing, among others, the documents referenced in the aforesaid "Documented Summary of Events"; and

2. "Defendant's Reply Brief in Opposition to Plaintiff's Request for Temporary Injunctive Relief," filed April 29, 1992, in the Midland litigation; and

3. Letter ruling, dated May 11, 1992, from the Hon. Judge John G. Hyde to Messrs. Richard C. Balough and M. D. Sampels, denying Cap Rock's request for injunctive relief in the Midland litigation.

JOHN G. HYDE
DISTRICT JUDGE
238TH JUDICIAL DISTRICT COURT
P. O. BOX 1922
MIDLAND, TEXAS 79702

TELEPHONE 915-688-1142
FAX 915-688-1218

May 11, 1992

Mr. Richard C. Balough
Attorney at Law
1403 West 6th Street
Midland, Texas 78703

Mr. M. D. Sampels
Attorney at Law
2001 Bryan Tower, Suite 3200
Dallas, Texas 75201

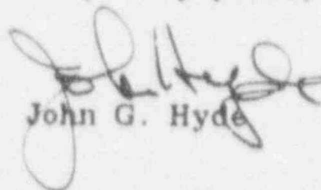
Re: Cause Numb-- B-38,879; Cap Rock Electric v. Texas Utilities

Gentlemen:

The evidence in this case does not establish irreparable harm which would justify the imposition of injunctive relief. Further, the evidence does not establish that the remedy at law is inadequate to provide appropriate redress for any damages established at trial.

The Court finds that the underlying claim of the dispute can be properly addressed in a trial on the merits and, accordingly, I will deny the Plaintiffs' request for a temporary injunction.

Very truly yours,



John G. Hyde

JGH/ch

cc: Mr. Tom W. Gregg, Jr.
Mr. J. Brian Martin
Mr. Charles Tighe

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 REPLY BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST FOR TEMPORARY INJUNCTIVE RELIEF

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April 29, 1992

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NO. B-38,879

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

DEFENDANT'S REPLY BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST FOR TEMPORARY INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

Texas Utilities Electric Company ("TU Electric"), Defendant in the above-entitled and numbered cause, files this its Reply Brief in Opposition to Plaintiff's Request for Temporary Injunctive Relief, and for same would show the Court the following:

I.

INTRODUCTION

Cap Rock Electric Cooperative, Inc. ("Cap Rock") is asking the Court to enter an injunction restraining TU Electric from interfering with an alleged contract between Cap Rock and West Texas Utilities Company ("WTU") providing for Cap Rock to purchase all of its power and energy requirements from WTU. Cap Rock is also asking the Court to issue a mandatory injunction ordering TU Electric to reduce the output of its generators to allow WTU to sell all of Cap Rock's power and energy requirements to Cap Rock, and to wheel WTU's power and energy over TU Electric's transmission system to Cap Rock.

The evidence in this case demonstrates that Cap Rock has failed to carry its burden of proving that it is entitled to the injunctive relief it seeks, in that Cap Rock has failed, as a matter of law, to show a substantial likelihood of success on the merits or the existence of irreparable injury in the event the injunction is not granted. When read as a whole and not in isolated pieces taken out of context as Cap Rock has consistently done, the Power Supply Agreement, dated June 28, 1990, ("1990 Power Supply Agreement") [Def. Exh. 11] contains each and every essential term relating to the sale and purchase of power and energy necessary to make it a fully enforceable and binding contract. Specifically:

1. The 1990 Power Supply Agreement expressly defines 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;

2. Contract Demand, as used in the 1990 Power Supply Agreement is a planning and billing tool, not the quantity of power and energy to be purchased and sold under the agreement;

3. The 1990 Power Supply Agreement specifies in Section 1.11 the standard 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. The physical completion of a piece of paper labeled "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 two or three years' notice before it may reduce load supplied by TU Electric;

7. There was a meeting of the minds between TU Electric and Cap Rock on all essential terms of the agreement, as evidenced by the objective intent of the parties expressed in the writing itself as well as the public representations made by both parties shortly after the execution of the contract.

In addition, with regard to Cap Rock's alleged irreparable harm, none of the testimony presented by Cap Rock is sufficient to demonstrate the existence of irreparable injury in the event the injunction is not granted, since such testimony is either entirely speculative or relates to alleged injuries for which, if proven, Cap Rock would have an adequate remedy at law. Specifically:

1. Evidence that Cap Rock will pay more money for its electricity if it continues to buy power from TU Electric rather than WTU is not evidence of irreparable harm, since Cap Rock has an adequate remedy at law for any such damage;

2. Mr. Collier's testimony that higher power costs might cause Cap Rock to lose existing and potential customers or that higher power costs might cause financial harm to Cap Rock's customers cannot form a basis for injunctive relief because such testimony is purely speculative and, even if proven to exist, any such harm to Cap Rock's customers is not harm to Cap Rock -- the applicant for injunctive relief;

3. Cap Rock's complaint that it cannot go back in time and re-intervene in TU Electric's rate case has no relevance to its request for injunctive relief, since the requested injunction cannot restore Cap Rock to that position and

the injury that is to be prevented by an injunction must be injury that will occur in the future;

4. Assertions that Cap Rock's business reputation and relationship with WTU and other companies will be adversely affected if it is not permitted to enter into the proposed contract with WTU, even if true -- which they are not, do not demonstrate irreparable injury because Cap Rock has an adequate remedy at law for any such injury;

5. The testimony by Mr. Russell that uncertainty as to Cap Rock's power supply would prevent customers from considering Cap Rock as a potential power source does not support injunctive relief, since the testimony is purely conjectural and, even if true, Cap Rock would have an adequate remedy at law for any such injury.

Before addressing the specific requirements of injunctive relief and the evidence before the Court, it is instructive to examine precisely what Cap Rock is asking the Court to order -- an examination which reveals the truly extraordinary nature of the temporary injunction being sought by Cap Rock.

At the heart of Cap Rock's injunction request is its desire to immediately begin purchasing all of its power and energy requirements from WTU, prior to a final adjudication of the law and the facts in the underlying contractual dispute between Cap Rock and TU Electric regarding the enforceability of the 1990 Power Supply Agreement. However, even if the requested injunction were granted, the evidence before the Court demonstrates that the relief being sought by Cap Rock cannot be implemented because, as discussed in detail below, there is no contract between Cap Rock and WTU. Nor has Cap Rock introduced any evidence to prove that

WTU would be willing to sell any electric power and energy to Cap Rock until the underlying contractual dispute between Cap Rock and TU Electric has been finally adjudicated. In the absence of such evidence, any injunction order would be fruitless since WTU, not being a party to this case, cannot be simultaneously enjoined to sign a contract with Cap Rock and sell power and energy to Cap Rock.

Furthermore, even if one were to assume for the sake of argument that WTU would sell power and energy to Cap Rock merely on the basis of a temporary injunction order, Cap Rock has failed to put on any evidence to show how the wheeling service it is asking this Court to require TU Electric to provide is to be accomplished. Under what terms and conditions will TU Electric be required to wheel? At what price? For what period of time? Cap Rock does not say.

Cap Rock has also failed to introduce any evidence as to the specific manner in which the Court is supposed to order TU Electric to operate its generation and transmission system in order to cease supplying power and energy to Cap Rock and effect the transfer of power from WTU to Cap Rock. Does Cap Rock suggest that the Court take over the operation of TU Electric's control area, including the dispatching of its generation and the control of its transmission system, in order to ensure that the ultimate relief Cap Rock seeks (i.e., to obtain power from WTU) is accomplished?

Again, Cap Rock does not say. Nor does Cap Rock address the fact that, as its own expert testifed, wheeling is the transfer of power and energy from one control area to another control area. The evidence is clear that Cap Rock is not a control area. Therefore, for the transaction it proposes to be implemented, both TU Electric and WTU would be required to take affirmative action to effect the wheeling. However Cap Rock does not explain how that action by WTU could be mandated, since WTU is not before the Court. Indeed, in its pleadings, its evidence at the injunction hearing and its Brief, Cap Rock has completely ignored all of the details as to how the relief it seeks is to be accomplished.

Thus, without any supporting evidence, Cap Rock is, in essence, asking this Court to: (i) **form** a contract for the sale and purchase of power between Cap Rock and an entity which is not before the Court (i.e., WTU); (ii) **form** a contract between Cap Rock and TU Electric for wheeling service and mandate the specific terms of that service; and (iii) order TU Electric to alter the current operations of its generators and transmission system in a manner as yet unspecified by Cap Rock. There is simply no support in the record, nor any basis in law or equity, for using the extraordinary remedy of mandatory injunctive relief to accomplish these results.

Therefore, for these reasons and the reasons set forth below, as well as in TU Electric's Motion to Deny Plaintiff's Request for

Temporary Injunctive Relief, the Court should deny Cap Rock's request for a temporary injunction.

II.

ARGUMENT AND AUTHORITIES

A. Cap Rock's Request for Injunctive Relief

1. The Requirements of Injunctive Relief in Texas

In determining whether Cap Rock is entitled to the relief it requests, it is important to note that Cap Rock seeks not just injunctive relief, but **mandatory** injunctive relief. Mandatory injunctive relief does not simply maintain the status quo until the rights of the parties are finally adjudicated, but rather compels a party to take affirmative action which alters the status quo and the presently existing rights and obligations of the parties.

In order to demonstrate a right to the mandatory injunctive relief its seeks, Cap Rock must carry its burden of proof to show that:

1. Cap Rock has a substantial likelihood of success on the merits of the case;
2. There is a substantial threat of irreparable injury;
3. The threatened injury to Cap Rock outweighs the threatened harm which the injunction may cause TU Electric; and

4. The granting of the injunction will serve the public's interest.[1]

See e.g., Parks v. U.S. Home Corp., 652 S.W.2d 479, 485 (Tex. App. -- Houston [1st Dist.] 19 writ dism'd w.o.j.).

Even if Cap Rock were not seeking a mandatory injunction, its burden of proving the necessity for injunctive relief prior to a final adjudication on the merits would be difficult:

> An applicant for a temporary injunction seeks extraordinary relief. He seeks to immobilize the defendant from a course of conduct which it may well be his right to pursue.

Camp v. Shannon, 348 S.W.2d 517, 519 (Tex. 1961). However, because Cap Rock seeks mandatory injunctive relief, its burden is substantially higher. Before a mandatory injunction may be issued:

> The right of the complainant **must be clear and unmistakable on the law and the facts** and there must exist an urgent and paramount necessity for the issuing of the writ in order

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[1]The third and fourth requirements for injunctive relief and Cap Rock's inability to satisfy those requirements were thoroughly addressed in TU Electric's Motion to Deny Plaintiff's Request for Temporary Injunctive Relief at pages 44-45. That discussion will not be repeated here. However, with respect to the third element, TU Electric would point out the unrebutted testimony of Mr. Bunting at the injunction hearing which established that, shortly after the execution of the 1990 Power Supply Agreement, TU Electric added additional capacity to and extended its purchases under certain cogeneration purchase agreements, in order to have sufficient capacity available to meet its system load requirements, including Cap Rock's 100 megawatts of load. 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 far exceeds the threatened harm to Cap Rock which it quantified in its Original Petition, and a cost which TU Electric would be required to bear if Cap Rock abrogates its obligations under the 1990 Power Supply Agreement.

> to prevent extreme or other serious damage which would ensue from withholding it.

Amarillo vs. Mutual Beneficial Association, 53 S.W.2d 329, 331 (Tex. Civ. App. -- Amarillo 1932, no writ) (emphasis added).

Because of the substantially higher burden of proof which accompanies the extraordinary relief afforded by a mandatory injunction, such an injunction is rarely granted prior to a final and complete hearing. Rhodia, Inc. v. Harris County, 470 S.W.2d 415, 419 (Tex. Civ. App. -- Houston [1st Dist.] 1971, no writ). A temporary mandatory injunction will be granted only with great caution and in cases of **extreme hardship**. Arvin Harrell Co. vs. Southwestern Bell Telephone Company, 385 S.W.2d 696, 697 (Tex. Civ. App. -- Austin 1964, no writ).

2. The Mandatory Injunctive Relief Sought by Cap Rock Would Disrupt the Status Quo, a Disfavored Result Contrary to the Purpose of an Injunction

The very purpose of a temporary injunction is to preserve the status quo pending trial. Keystone Life Ins. Co. v. Marketing Management, Inc., 687 S.W.2d 89 (Tex. App. - Dallas 1985, no writ). However, a mandatory temporary injunction changes the status quo and, therefore, is disfavored by the courts. See Haynie v. General Leasing Co., Inc., 538 S.W.2d 244 (Tex. App. - Dallas 1976, no writ).

As the Texas Supreme Court has explained, "[t]he status quo [in an injunction case] is the last actual, peaceable, noncontested

status which preceded the pending controversy . . . ." Big Three Industries, Inc. v. Railroad Com'n, 618 S.W.2d 543, 548 (Tex. 1981). In this case, the "last actual, peaceable, noncontested status which preceded the pending controversy" was the situation in which TU Electric sells to Cap Rock, and Cap Rock purchases from TU Electric, all of Cap Rock's power and energy requirements.

TU Electric has been Cap Rock's full requirements power and energy supplier for the past fifty years. Cap Rock's Original Petition at 3. When Cap Rock filed the instant lawsuit on December 20, 1991, it was purchasing all of its power and energy requirements from TU Electric under the Agreement for Purchase of Power executed by the parties in 1963 ("1963 Agreement"). By letter dated December 19, 1991, Cap Rock terminated the 1963 Agreement effective at 12:01 a.m. on February 1, 1992 [Def. Exh. 20], at which instant the 1990 Power Supply Agreement immediately became effective in accordance with the provisions of Section 2.01. [Def. Exh. 11]

Although the enforceability of the 1990 Power Supply Agreement is the subject of the underlying dispute in this case, it is undisputed that TU Electric has continued to supply all of Cap Rock's power and energy requirements since February 1, 1992. Thus, at all times since the initiation of this litigation by Cap Rock through the present date (and indeed for the past fifty years), the status quo has been the situation in which TU Electric sells to Cap

Rock, and Cap Rock purchases from TU Electric, all of Cap Rock's power and energy requirements.

It is therefore truly astounding that Cap Rock would argue in its Brief that the status quo is the termination of the 1963 Agreement. Cap Rock Brief at 34-36. Simply put, Cap Rock's argument is that its attempt to **change** the status quo (i.e., Cap Rock's status as a full-requirements customer of TU Electric) constitutes the status quo to be preserved in this case pending trial.

Nothing could be further from the truth. In fact, the injunction order Cap Rock seeks would significantly disrupt the status quo by requiring TU Electric to take affirmative action to reduce its generation of power, cease supplying all of Cap Rock's power and energy requirements and wheel power from WTU through TU Electric's transmission system to Cap Rock. Such an order would, in essence, allow Cap Rock to repudiate its contractual obligations under the 1990 Power Supply Agreement, prior to a final adjudication of the law and the facts in this case.

Thus, any injunctive relief, mandatory or otherwise, which would require TU Electric to act or refrain from acting would drastically alter the status quo. Cap Rock has failed to prove that its requested injunctive relief is necessary to preserve the status quo and, as discussed in the following section, Cap Rock has

failed to prove that it will suffer extreme hardship if the mandatory temporary injunction it seeks is not granted.

3. Cap Rock has Failed to Prove that it will suffer Extreme Hardship if the Injunction is not Granted, because there is no Contract between Cap Rock and WTU

Cap Rock's allegations and arguments regarding its alleged "contract" with WTU have taken many shapes and forms throughout this proceeding, varying as needed to meet whatever immediate factual and legal obstacle Cap Rock is seeking to overcome at the moment. In its Original Petition, Cap Rock premised its request for injunctive relief upon the existence of a contract between Cap Rock and WTU. Cap Rock stated in its Original Petition, without equivocation, that:

> Cap Rock [has] entered into a contract with West Texas Utilities (WTU). Under the WTU contract, Cap Rock will buy its full requirements for electricity for its entire system from WTU. * * * The WTU purchase will begin on 12:01 a.m. February 1, 1992.

[Def. Exh. 22 at 6.] Mr. Collier, who, under oath, verified the statements in Cap Rock's Original Petition [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.] In addition, WTU's designated representative, David Teeter, testified in his oral deposition in this case that there is no WTU contract:

> Q: So, there -- there is no contract between WTU and Cap Rock, is there?
>
> A: **That is correct.**

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

The fact that there is not now, nor has there ever been, a contract between Cap Rock and WTU is further supported by Cap Rock's own admissions. For example, despite Mr. Collier's assertions at the injunction hearing that he "believed" Cap Rock had a contract with WTU, Mr. Collier admitted that as far as he knows WTU has not executed the proposed 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.][2] Cap Rock also admitted in its March 25, 1992 Comments filed at the Nuclear Regulatory Commission ("NRC") that:

> Although Cap Rock returned its copies [of the proposed WTU contract] on January 2, 1992, the contract was never executed by WTU.

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[2]The document Cap Rock has represented to be the WTU contract [Def. Exh. 38], while signed by Cap Rock, is not signed by WTU.

[Def. Exh. 52 at 25.][3] 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 does such a contract exist at the present time.

The fact that there is no WTU contract is significant because the right to equitable relief must be determined as such right may or may not exist **at the time of the hearing.** Hammon vs. Wichita County, 290 S.W.2d 545, 546 (Tex. Civ. App. -- Fort Worth 1956, no writ). At the time Cap Rock filed this suit and asked for injunctive relief, it did not have a contract with WTU. At the time of the temporary injunction hearing, Cap Rock did not have a contract with WTU. Cap Rock does not have a contract with WTU today. The lack of a WTU contract is also significant because it shows that Cap Rock cannot meet its burden of proving that the facts upon which its request for mandatory injunctive relief are based are clear and unmistakable. Amarillo vs. Mutual Beneficial

[3]This statement to the NRC is particularly revealing because it shows that, even though Cap Rock stated in its Original Petition filed on December 20, 1991 that Cap Rock had "entered into a contract" with WTU -- a statement Mr. Collier swore in his verification was "true and correct" [Def. Exh. 22 at 14] -- Cap Rock did not even return to WTU the copies of the proposed WTU contract that Cap Rock had signed until January 2, 1992, thirteen days after the Original Petition was filed in which Mr. Collier swore to the existence of that contract.

Association, 53 S.W.2d 329, 331 (Tex. Civ. App. -- Amarillo 1932, no writ).

Furthermore, while Cap Rock argues that "if there is no valid contract between Cap Rock Electric and TU Electric, WTU will provide electricity to Cap Rock Electric as planned" [Cap Rock Brief at 25], Cap Rock has not introduced **any** evidence that, if the injunction were granted, WTU would be willing to execute the proposed contract and begin selling power to Cap Rock before this litigation between Cap Rock and TU Electric is finally resolved. In fact, the February 18, 1992 letter from Mr. Welch, WTU's Vice-President of Operations, to Mr. Collier, **written after Cap Rock had filed this lawsuit**, [Pl. Exh. 9] suggests that WTU would be unwilling to sell any power and energy to Cap Rock until this legal dispute comes to an end. For example, Mr. Welch states that WTU is only willing to sell power and energy to Cap Rock "once Cap Rock's relationship with TU Electric has **ended**." [Pl. Exh. 9, emphasis added]. In that same letter, Mr. Welch also stated:

> As you know, . . . unless and until Cap Rock has validly terminated its relationship with TU Electric . . . WTU cannot finalize any agreement to sell electricity to Cap Rock.

[Pl. Exh. 9][4]

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[4]The fact that WTU has taken such a position after receiving notification that TU Electric contests Cap Rock's interpretation of the 1990 Power Supply Agreement is irrelevant to the issue of whether Cap Rock has a contract with WTU. As the evidence in this case clearly shows, Cap Rock did not have a contract with WTU on the date it filed this lawsuit.

Such evidence makes it clear that WTU is not willing to finalize a contract with Cap Rock for the sale of power until the contractual dispute between Cap Rock and TU Electric has come to an end -- an end that will not come at the conclusion of the temporary injunction hearing.

Therefore, because the overwhelming weight of the evidence demonstrates that WTU has no contractual obligation to sell power to Cap Rock, nor is it willing to enter into such a contract with Cap Rock until the underlying contractual dispute between TU Electric and Cap Rock is finally resolved, Cap Rock has failed to establish that it would suffer "extreme hardship" through its inability to immediately begin purchasing power from WTU if the requested injunction is not granted. Arvin Harrell Co., 385 S.W.2d at 697.[5]

B. Cap Rock Has Failed to Carry its Burden of Proof Necessary for a Mandatory Injunction

1. Cap Rock has Failed to Show Why the Situation is So Extraordinary that a Mandatory Temporary Injunction Should be Granted, Since Cap Rock has Failed to Show a Substantial Likelihood of Success on the Merits

Cap Rock has also failed to carry its burden of proving a clear and compelling right of recovery on the merits. Amarillo vs.

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[5]In addition, since there is no contract between Cap Rock and WTU, there can be no "substantial threat of irreparable injury" to Cap Rock if the injunction it seeks is not granted -- a necessary prerequisite for injunctive relief. Parks vs. U.S. Home Corp., 652 S.W.2d 479, 485 (Tex. App. -- Houston [1st Dist.] 1983, writ dism'd. w.o.j.).

Mutual Beneficial Association, 53 S.W.2d at 331 (Before a temporary mandatory injunction will issue, "[t]he right of the complainant must be clear and unmistakable on the law and the facts.").

The ultimate relief being sought by Cap Rock in this case is a declaratory order that the 1990 Power Supply Agreement is unenforceable. Cap Rock's entire legal argument as to the "unenforceability" of the 1990 Power Supply Agreement is based upon the theories that the agreement "contains no quantity term (and no points of delivery) and specifically authorizes Cap Rock Electric to determine the quantity of electric power, if any, to be taken from TU Electric." Cap Rock Brief at 2. Cap Rock bases its theory of a "missing quantity term" upon the fundamentally erroneous premise that "Contract Demand", as defined in Section 1.01 of the 1990 Power Supply Agreement, is the quantity of power and energy to be purchased by Cap Rock and sold by TU Electric under that contract. Cap Rock's theory that the Points of Delivery are somehow "missing" from the 1990 Power Supply Agreement is likewise based upon the erroneous premise that Cap Rock has the right 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.

Cap Rock attempts to support these theories by looking solely to a few of the provisions of the 1990 Power Supply Agreement,

taken in isolation and out of context, thus breaking one of the cardinal rules of contract law -- 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).[6] As the Texas Supreme Court stated in Southland Royalty Co. v. Pan American Petroleum Corp., 378 S.W.2d 50, 53 (Tex. 1964):

> 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.

When the provisions of the 1990 Power Supply Agreement are examined "as a whole" and "construed together" as required, the multiple flaws in Cap Rock's arguments become evident. Such a

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[6]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, no writ)(the courts presume that the parties intended every clause to have some effect).

reading reveals that the 1990 Power Supply Agreement contains all of the essential terms necessary to be an enforceable contract and requires Cap Rock to purchase from TU Electric and requires TU Electric to sell to Cap Rock all of Cap Rock's power and energy requirements upon the effective date of the agreement, until such time as Cap Rock gives the requisite two or three year notice to reduce load supplied by TU Electric.[7] Thus, as shown from the four corners of the contract and the virtually uncontested testimony of TU Electric's witnesses, the 1990 Power Supply Agreement is initially a full-requirements contract and, as recognized in Cap Rock's Brief, is therefore a fully enforceable, binding agreement. Cap Rock Brief at 1.[8]

a. The 1990 Power Supply Agreement does not Lack a Quantity Term

It is clear from the four corners of the 1990 Power Supply Agreement that "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. That quantity is instead set forth in Sections 3.07(a), 3.01, 3.02 and 3.03.

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[7]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 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.

[8]"[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**. (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 Deliver 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 foregoing 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., 339 S.W.2d at 662. Here there is no indication 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." That meaning of the word "amount" is "a quantity." Webster's New Universal Unabridged Dictionary 60 (2nd ed. 1983).

Thus, far from lacking a "quantity" term as Cap Rock contends, the 1990 Power Supply Agreement **expressly** identifies, in Section 3.07(a), the quantity of power and energy to be purchased by Cap Rock and sold by TU Electric as being 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 "Contract Demand." Instead, as discussed in the following section, the term "Contract Demand," as defined and used in the 1990 Power Supply Agreement, is a tool used for planning and billing purposes.

b. Contract Demand is a Planning and Billing Tool, not the Quantity of Power and Energy to be Purchased by Cap Rock and Sold by TU Electric

Contract Demand is defined in Section 1.01 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.[9]

The rate of charge for the power and energy to be purchased by Cap Rock under the 1990 Power Supply Agreement (in the amounts specified in Sections 3.01, 3.02 and 3.03) is set forth in Section 3.05 which provides as follows:

> 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.)

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[9]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.

The fact that Section 3.05 expressly recognizes that the power and energy to be purchased by Cap Rock under the 1990 Power Supply Agreement may be "in excess of Contract Demand" is further evidence that Contract Demand was not intended by the parties to express the "quantity" of power and energy that the parties agreed would be purchased and sold under the 1990 Power Supply Agreement.

That fact is also evidenced by the provisions of the TU Electric tariff applicable to the 1990 Power Supply Agreement as provided for in Section 3.05 thereof -- i.e., Rate WP, Wholesale Power [Def. Exh. 64].

As Mr. Houle testified at the injunction hearing[10], Rate WP is the tariff approved by the Public Utility Commission of Texas ("PUCT") pursuant to which TU Electric sells wholesale power and energy. The approved tariffs of regulated public utilities, such as TU Electric, "are . . . recognized as having the force and effect of law." Southwestern Bell Telephone Co. v. Rucker, 537 S.W.2d 326, 331 (Tex. Civ. App. -- El Paso, 1976, writ ref'd n.r.e.). "[T]hese tariffs carry the dignity of statutory law." Southwestern Bell Telephone Co. v. Vollmer, 805 S.W.2d 825, 829 (Tex. App. -- Corpus Christi 1991, writ denied).

TU Electric's Rate WP states that it is:

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[10]The transcript for the continuation of the injunction hearing on April 14 and 15, 1992 is not yet available and, therefore, citations to that transcript cannot be made at this time.

> 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 the [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." [Def. Exh. 64, Monthly Rate Section.][11]

The customer's demand (in kilowatts) for purposes of calculating the monthly bill is determined under the Demand Determination Section of Rate WP.[12] Section 3.05 of the 1990 Power

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[11]Mr. Houle testified at the injunction hearing that the customer charge recovers the cost of metering and billing. The energy charges, including fuel, recover variable costs incurred by TU Electric in providing a kilowatthour of energy. The demand charge recovers the fixed cost of facilities (i.e., the cost of installed generation and other facilities) required to make electric service available in the amount required by the customer.

[12]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."

[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]

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] 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.[13] 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 (or Contract kW) specified in the applicable agreement for electric service. Rate WP bases the monthly rate of charge upon the customer's demand and its energy usage, as well as the customer charge.

Rate WP does, however, include 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**

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[13]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.

for power and energy in excess of Contract Demand." [Def. Exh. 11 at 15][14]

Mr. Houle testified that the charge of $1.00 per kilowatt in excess of Contract kW is designed to impose a surcharge on a wholesale customer who fails to accurately estimate its expected (i.e., projected) power and energy requirements at a point of delivery. Requiring a customer to project its maximum demand 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 customer to accurately project its maximum demands. Mr. Pitt Pittman and Mr. Houle testified that these projections assist TU Electric in its **planning** process so it can have the necessary capacity available to meet its customers' maximum demands. Therefore, as both Mr. Houle and Mr. Pitt Pittman testified, Contract Demand is primarily a planning tool -- it is not a quantity term.

The planning and billing function of Contract Demand is further evidenced by TU Electric's Service Regulations [Def. Exh. 65], which, as Mr. Houle testified, are approved by the PUCT as a

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[14]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, the result would be a monthly surcharge of $1.00 per kilowatt of actual metered demand in excess of zero.

part of TU Electric's Tariff for Electric Service just as every individual tariff, including Rate WP, is approved. Section 4.02 of the Service Regulations provides, in pertinent 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.]

Section 10.06 of the 1990 Power Supply Agreement expressly provides that:

> Except as otherwise specifically provided for 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.]

Since the PUCT has expressly authorized TU Electric to assign contract kW (Contract Demand) to a customer "for billing purposes" and without regard to whether the customer is purchasing all or partial requirements power and energy, 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. There is absolutely no support in the 1990 Power Supply Agreement, or in the provisions of TU Electric's Rate WP and

Service Regulations which expressly govern the sale of power under the 1990 Power Supply Agreement, for concluding anything other than the fact that Contract Demand functions merely as a billing and planning tool.[15]

This is further evidenced by Mr. Pittman's testimony that TU Electric does not curtail the electric power and energy it provides to its full or partial requirements wholesale customers just because they exceed their Contract Demands and that, in fact, it is not unusual for wholesale customers, such as Cap Rock, to exceed their Contract Demands.

Finally, Cap Rock makes the astounding 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 admits was a full-requirements contract -- from the 1990 Power Supply Agreement by arguing that, while the 1963 Agreement "had a billing provision for contract kW", it did not define the term Contract Demand. Cap Rock Brief at 23.

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[15]Significantly, Cap Rock's Brief completely ignores the evidence introduced at the hearing by TU Electric and the testimony of Mr. Pittman and Mr. Houle regarding Contract Demand, as well as TU Electric's approved Rate WP and Service Regulations.

The fundamental flaw in Cap Rock's argument -- and what it fails to point out to the Court -- is that, while the 1963 Agreement does not contain a specific definition of contract kW or contract demand, it **does** include an "Exhibit A" which contains a column specifying the "Maximum kW of Power" -- i.e., the contract kW or contract demand -- for each point of delivery. [Pl. Exh. 15, Exhibit A]

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 were 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 are increases in contract demand, increases clearly designed to avoid the potential of Cap Rock being charged the $1.00 per kilowatt surcharge for each kilowatt in excess of contract demand under TU Electric's Rate WP.

Thus, in light of the provisions of the 1963 Agreement and Mr. Sullivan's letter, it is truly amazing that Cap Rock would admit, on the one hand, that the 1963 Agreement is a full-requirements agreement, but then argue 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 1963 Agreement as it does under the 1990 Power Supply Agreement -- it was and is a planning and billing tool, not a quantity term.

c. The 1990 Power Supply Agreement Specifies the Standard 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 "contains . . . no points of delivery" [Cap Rock Brief at 2] and that Cap Rock has the right to determine "which, if any, Points of Delivery, are to be included" under the agreement [Cap Rock Brief at 10] suffers from the same fatal flaws 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, and TU Electric is required to sell, power and energy 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 contention 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" 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.

In the case at hand, Section 1.11 of the 1990 Power Supply Agreement mandates -- through the use of the word "shall"[16] -- that all of the Points of Delivery meeting the definition set forth in Section 1.11 are to be specified on Exhibit A. Nothing is left to Cap Rock's option or to later negotiation by the parties.

The mere fact that the 1990 Power Supply Agreement, when executed by the parties on June 8, 1990, did not contain a list of the names of the Points of Delivery on Exhibit A does not render the contract unenforceably uncertain as Cap Rock contends. 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

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[16]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).

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 clearly specified in Section 1.11. 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.[17]

When that standard is applied, the Points of Delivery under the 1990 Power Supply Agreement can be, and have been, identified

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[17]As Mr. Pittman testified at the injunction hearing, 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 surrounding circumstances, which the Court is required to consider 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 . . . ."). When the 1990 Power Supply Agreement was negotiated and for some time thereafter, Cap Rock was in the process of consolidating various of its points of delivery under the 1963 Agreement and converting certain points from distribution voltages to transmission voltages. The parties agreed that the 1990 Power Supply Agreement, as set forth in Section 2.01 thereof, was not to become effective until Cap Rock's termination of the 1963 Agreement, but Mr. Pittman explained that no one knew exactly when that would be. Therefore, to account for the ongoing consolidations and conversions of Cap Rock's points of delivery under the 1963 Agreement, the parties agreed to identify the Points of Delivery under the 1990 Power Supply Agreement by specifying the standard in Section 1.11. Under that standard, 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.

with **absolute certainty**. In fact, their identity is so readily determinable that even Cap Rock has not disputed that the points identified by TU Electric during testimony 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 (the effective date of the 1990 Power Supply Agreement) on the map introduced into evidence as Defendant's Exhibit 50. Mr. 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.

In a letter dated January 30, 1992 from Mr. Darrell Bevelhymer of TU Electric to Steve Collier, TU Electric listed each of these Points of Delivery, by the same names depicted on Defendant's Exhibits 50 and 63 and with the current Contract Demands. [Def. Exh. 21] Mr. Bevelhymer's letter informed Cap Rock that it

accepted Cap Rock's December 1991 letter as notice of termination of the 1963 Agreement, effective at 12:01 a.m. on February 1, 1992 and that:

> 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 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][18]

At no time has Cap Rock disputed that the points of delivery which existed under the 1963 Agreement at the moment it was

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[18]Mr. Bevelhymer's letter further states that "TU Electric is presently serving all of Cap Rock's power and energy requirements . . . at the foregoing points of delivery." [Def. Exh. 21 at 2]

terminated are the same Points of Delivery which existed on February 1, 1992 -- the date when the 1990 Power Supply Agreement became effective.[19]

d. 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

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[19] In fact, Cap Rock's alleged "contract" with WTU [Def. Exh. 38] identifies the exact same points of delivery as those listed in Mr. Bevelhymer's January 30, 1992 letter to Mr. Collier [Def. Exh. 21].

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[19]In fact, Cap Rock's alleged "contract" with WTU [Def. Exh. 38] identifies the exact same points of delivery as those listed in Mr. Bevelhymer's January 30, 1992 letter to Mr. Collier [Def. Exh. 21].

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][20] 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

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[20]Section 2.01 contains a similar provision with respect to Lone Wolf Electric Cooperative [Def. Exh. 11 at 5], which was merged with Cap Rock after the execution of the 1990 Power Supply Agreement.

Cap Rock point to any such provision in its Brief. The reason it has not done so is clear. No such provision exists.[21]

What Cap Rock does say in its Brief, however, is 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 Cap Rock would make such an argument is truly astounding. The 1990 Power Supply Agreement affords Cap Rock various opportunities to reduce the load to be supplied by TU Electric or to terminate the agreement entirely -- **on the giving of the proper notice.** 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.

The fact that there is no "moment in time" is further evidenced by Steve Collier's own admissions during the negotiation of the 1990 Power Supply Agreement and after the agreement was executed. In a memorandum dated May 23, 1990 from Steve Collier to David Pruitt, 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 wholesale power contract with TU Electric. **The draft power supply agreement that we are negotiating is currently worded so**

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[21]Furthermore, as Mr. Pittman pointed out during cross-examination at the injunction hearing, 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.

> as to become effective upon termination of the all-requirements contract.
>
> 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 contract", 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 clearly recognized by Cap Rock's Mr. Collier 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 Pock 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.[22]

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[22]Such facts are but one example of Mr. Collier's willingness to testify under oath to whatever facts are believed necessary at a given point in time in order to lend credence to the baseless positions advanced by Cap Rock. TU Electric suggests that the weight to be accorded to all of Mr. Collier's testimony should be determined in light of Mr. Collier's demonstrated propensity to disregard the truth when the facts do not support the position he chooses to advance.

Cap Rock also asserts in its Brief, in connection with the testimony regarding Mr. Collier's contract to monetarily benefit in the event that Cap Rock successfully abrogates the 1990 Power Supply Agreement, that "Cap Rock voluntarily corrected a potential (continued...)

The **true** reason Cap Rock has now developed the fanciful "moment in time" theory is that it wishes to abrogate its contractual obligations to TU Electric in order to avail itself of more economical power supply alternatives, without having to give TU Electric the two or three year notices to which it committed when it signed the 1990 Power Supply Agreement. The Texas Courts

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[22](...continued)
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 the Court that no signed success fee agreements existed when in fact the existence of such signed agreements was known not only to Mr. Collier but to Cap Rock's attorneys as well. The Court will also undoubtedly recall that Mr. Collier later testified that he had a direct financial interest in the outcome of this case.

TU Electric will not undertake an exhaustive review of each of the many inconsistencies and contradictions between Mr. Collier's testimony and the other evidence introduced at the hearing. However, TU Electric would point out that a request for injunctive relief is based in equity and it is fundamental that a party seeking equity must come to the Court with "clean hands." Foxwood Homeowners Association v. Ricles, 673 S.W.2d 376 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.); see also Truly v. Austin, 744 S.W.2d 934, 938 (Tex. 1988) ("[i]t is well-settled that a party seeking an equitable remedy must do equity and come to court with clean hands"). 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 lack of credibility regarding the 1990 Power Supply Agreement due to his significant and direct financial interest in the outcome of this case. While these serious matters have yet to be dealt with, it is nonetheless clear that Cap Rock's and Mr. Collier's actions and misrepresentations are hardly the conduct of a party with clean hands.

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.[23] Cap Rock should not be permitted to do so here.

Finally, regardless of Cap Rock's novel "moment in time" theory, WTU 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 Cap Rock's Brief, WTU's designated representative, David Teeter, testified in his oral deposition 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?
>
> 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

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[23] Valero Transmission Co. v. Mitchell Energy, 743 S.W.2d 658, 663 (Tex. Civ. 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).

does not) 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.

e. The Physical Completion of 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 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 has failed to read the 1990 Power Supply Agreement "as a whole" and, with this argument, again attempts to read into the agreement a provision which does not exist. Contrary to Cap Rock's assertions, Exhibit A is not a separate "agreement", regarding the Points of Delivery or the quantity of power which Cap Rock is to purchase p[illegible]er 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.

What the 1990 Power Supply Agreement does provide is a mandate that Exhibit A be filled in on the effective date 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.[24] Exhibit A, far from

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[24]To assist TU Electric in its planning process, Cap Rock is obligated under Sections 3.08 and 1.01 of the agreement to specify "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." 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.

(continued...)

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 complete Exhibit A by specifying the Points of Delivery and Contract Demands was not left to the discretion or option of either party.

In addition, TU Electric's Service Regulations [Def. Exh. 65, Section 4.02] give TU Electric the right to assign Contract kW for billing purposes if a customer refuses to specify its Contract Demands. Due to Cap Rock's failure to recognize and abide by its obligations under the 1990 Power Supply Agreement, this is precisely what TU Electric did in Mr. Bevelhymer's January 30, 1992

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[24](...continued)

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"

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 he 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. 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.

letter to Mr. Collier. [Def. Exh. 21]. Defendant's Exhibit 21 "completed" Exhibit A by specifying each Point of Delivery, determined in accordance with the standard in Section 1.11, and assigning to each Point of Delivery the Contract Demands that were in effect under the 1963 Agreement on January 30, 1992.

Furthermore, 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. Those obligations are governed by Sections 3.07(a), 3.01, 3.02 and 3.03 of the agreement. Thus, neither party can avoid its obligations to sell and purchase full requirements power under the 1990 Power Supply Agreement on the effective date by refusing to fill in Exhibit A. As Mr. Pittman testified, the physical "filling in" of Exhibit A is an administrative mechanism that is helpful in administering the contract. It 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 Contract Demands to be applied for planning and billing purposes, the parties' obligations with respect to the sale and purchase of power and energy under the 1990 Power Supply Agreement can still be determined from the face of the agreement.

If, however, the Court were to find that the specification of Contract Demands on Exhibit A is a missing term of the agreement

that needs to be completed, the Court, acting as the finder of fact, may supply reasonable Contract Demands. A finder of fact may supply reasonable terms of an agreement, so long as they do not form the "essence" of the contract. Hydro-Line Mgf. Co. v. Pulido, 674 S.W.2d 382, 387 (Tex. App. -- Corpus Christi 1984, writ ref'd n.r.e.). In Hydro-Line, the Court held that a joint venture agreement clearly guaranteed the appellee employment but omitted certain terms of employment, such as salary. Id. at 387. Since the "essence of the contract was the joint venture agreement", the finder of fact was permitted to supply a "reasonable salary and other terms." Id. at n. 4.; see also Bendalin v. Delgado, 406 S.W.2d 897, 900 (Tex. 1966)("Where the parties have done everything else necessary to make a binding agreement for the sale of goods or services, their failure to specify the price does not leave the contract so incomplete that it cannot be enforced. In such a case it will be presumed that a reasonable price was intended.")

In this case, the "essence of the contract" was the purchase and sale of full-requirements power and energy and, upon the giving of the requisite notices, partial requirements power and energy. The Court can therefore, if necessary, supply a reasonable Contract Demand for each Point of Delivery at which such power and energy will be delivered to be used for billing and planning purposes. The most reasonable Contract Demand terms to supply are those which were in effect at each Point of Delivery immediately prior to the

effective date of the 1990 Power Supply Agreement (i.e., those specified in Mr. Bevelhymer's January 30, 1992 letter to Mr. Collier, Def. Exh. 21).

f. The 1990 Power Supply Agreement is a fully Enforceable Contract which Requires Cap Rock to purchase 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 is a fully enforceable and binding contract which contains all of its essential terms. Moreover, as is evident from the four corners of the writing, the 1990 Power Supply Agreement requires Cap Rock to purchase from TU Electric and TU Electric to sell to Cap Rock **all** of Cap Rock's power and energy requirements upon the effective date of the agreement, until such time as Cap Rock gives the requisite two or three year notice to reduce load supplied by TU Electric.

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 permits 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 when the 1990 Power Supply Agreement becomes effective.

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.[25] 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

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[25] Section 2.04 requires the giving of "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.

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 Deliver 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 from day one, because otherwise there would have been no need for Cap Rock to give notice to "retain" a Point of Delivery as a full requirements point. 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 plainly means that they were full requirements Points of Delivery to begin with -- i.e., on the effective date of the agreement.[26]

The fact that the 1990 Power Supply Agreement is a full-requirements contract on the effective date thereof is further

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[26]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 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.

demonstrated by the 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, when the parties began the negotiation of the 1990 Power Supply Agreement in January 1990,[27] 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 their requirements elsewhere without giving any notice to TU Electric. TU Electric, 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 presents with regard to the planning of resources for TU Electric and the reliability of TU Electric's system. These positions of the parties are fully set forth in Defendant's Exhibit 7 (Cap Rock's "Essential Power Supply Services to be Provided by TU

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[27]The events leading up to the negotiation of the 1990 Power Supply Agreement are fully detailed in TU Electric's Motion to Deny Plaintiff's Request for Temporary Injunctive Relief and will not be repeated here.

Electric") and Defendant's Exhibit 8 ("TU Electric's Settlement Proposal").[28]

Mr. Pittman testified that the parties finally resolved this fundamental difference in positions by compromising and agreeing that, for a period of ten years, TU Electric would commit to sell to Cap Rock all of its requirements and that with two or three year's notice in the first five years, Cap Rock would be entitled to purchase power from other sources. That is the compromise and agreement embodied in the 1990 Power Supply Agreement.

This 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.) which, as Mr. Pittman testified, was transmitted by TU Electric to the NRC in July 1990 after the execution of the 1990 Power Supply Agreement. This 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 obligations 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.

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[28]Cap Rock's characterization of Mr. Pittman's testimony at page 17 of its Brief is completely incorrect, as shown by Defendant's Exhibit 7.

> **The parties finally agreed that Cap Rock will purchase full requi.ements 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.]

Shortly after the execution of the 1990 Power Supply Agreement, Cap Rock, quoting Mr. Collier, similarly characterized its obligations under the agreement in the July 15, 1990 press release in which 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 s pplies, Collier explained.**

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

In sum, the plain meaning of the 1990 Power Supply Agreement, as corroborated by the contemporaneous expressions of the parties, confirms 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 notices to reduce load. Such full-requirements contracts, as Cap Rock itself admits, are fully enforceable in Texas. Pace Corporation v. Jackson, 284 S.W.2d 340 (Tex. 1955).

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

Cap Rock 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 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 o the minds between parties to a contract for the sale of gasoline. 754 S.W.2d at 717. The seller brought suit against the buyer for its failure to honor the agreement and purchase gasoline in accordance with the contract. Id. at 704. The buyer argued that because the contract did not specifically state when payment under the contract would be made, there was no meeting of the minds on an essential term of the agreement. Id. at 717. The buyer contended that the industry standard for time of payment was payment upon invoice and receipt of delivery confirmation documents; however, the buyer alleged that the seller expected

payment before delivery thus negating mutual assent. Id. at 717. The Court found that there was a meeting of the minds on the essential terms of the contract and 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. at 717 (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. Leeuiker, 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. 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. 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 should not be allowed to alter the meaning of the 1990 Power Supply Agreement based on its current intent, or claim to have had a

different interpretation at the time the 1990 Power Supply Agreement, was executed in order to attempt to show a lack of meeting of the minds. Instead, the express terms of the agreement must be examined to determine its legal effect and the objective intent of the parties. 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 full requirements power until the proper notice is given, but the wheeling and scheduling of power for Cap Rock as well as the supply of regulation services. The many months of negotiat 's 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 provides each and every essential 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.[29]

Finally, it should not be forgotten that, shortly after the execution of the 1990 Power Supply Agreement, Cap Rock held itself out to the public as having acquired extremely desirable services from TU Electric in the contract, and yet admitting that "the new contract requires two or three years notice by Cap Rock to begin serving load with other power supplies. . . ." [Def. Exh. 15 at 2] -- views that are entirely consistent with the very position taken by TU Electric in this case and by both parties immediately after the execution of the agreement, as discussed above.

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[29]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 forth in the contract, which has also clearly been signed by Cap Rock and TU Electric.

The fact that Cap Rock was fully aware at all times of its obligations under the 1990 Power Supply Agreement is further evidenced by the fact that Mr. Collier informed David Krupnick of the Southwestern Public Service Company on June 21, 1990 [Def. Exh. 13] that:

> [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. (Emphasis added.)

[See also, Def. Exh. 43, Mr. Collier's notes for Briefing the Cap Rock and Lone Wolf Boards of Directors regarding the 1990 Power Supply Agreement in which he states that one of the "con's" of the contract is that it "still has 3 yr notice."]

However, notwithstanding Cap Rock's recognition of its contractual obligations to TU Electric, Cap Rock nevertheless embarked on a course of conduct entirely inconsistent with those obligations, knowing full well that TU Electric would take the position that the 1990 Power Supply Agreement requires Cap Rock to purchase full-requirements power and energy from TU Electric upon Cap Rock's termination of the 1963 Agreement, until proper notice is given.

For example, in a June 19, 1991 report to David Pruitt, Cap Rock's General Manager [Def. Exh. 29], 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.

In a July 15, 1991 report to David Pruitt [Def. Exh. 16] regarding the power supply negotiations with WTU, Steve Collier also stated 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 or three years notice given to serve load from WTU. (Emphasis added).

Mr. Collier similarly informed Mr. Welch of WTU, by letter dated June 12, 1991 [Def. Exh. 28], 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.

In actions that clearly do not reflect the "clean hands" required of an applicant seeking equitable relief, Foxwood Homeowners Association v. Ricles, 673 S.W.2d 376 (Tex. App. -- Houston [1st Dist] 1984, writ ref'd n.r.e.), Cap Rock did not seek

a judicial determination of its rights earlier, but instead consciously "hid behind the log" and waited until the last moment to present TU Electric and the Court with what Cap Rock hoped would be final arrangements regarding Cap Rock's proposed purchase of power from WTU and to request that the Court grant it the extraordinary relief of a mandatory injunction to implement those arrangements. In fact, Cap Rock waited until the fall of 1991 before informing TU Electric that it had no intention of abiding by the 1990 Power Supply Agreement.

By letter dated October 23, 1991 [Pl. Exh. 10], Mr. Collier informed Mr. Bevelhymer that:

> we . . . anticipate being able to . . . terminate [the 1963 Agreement] without having to serve any wholesale load temporarily under the new [1990] power supply agreement * * * [and that Cap Rock would] begin purchasing all of [its] wholesale power requirements from WTU as early as January, 1992.

TU Electric responded by letter dated November 4, 1991 [Def Exh. 18] informing Cap Rock that TU Electric expected Cap Rock to comply fully with the 1963 Agreement and the 1990 Power Supply Agreement and, in order to comply with those contracts, it would not be possible for Cap Rock to purchase power elsewhere, including Cap Rock's proposed purchase from WTU, until the cancellation of the 1963 Agreement and upon expiration of the notice periods provided for in the 1990 Power Supply Agreement and compliance with all other terms of that contract.

Thus it is clear that Cap Rock's current position is nothing more than a contrivance developed for the purpose of attempting to avoid its obligations under the 1990 Power Supply Agreement. In light of the express terms of the 1990 Power Supply Agreement embodying the objective intent of the parties, and the actions of the parties contemporaneous with the execution of the agreement, it defies reason for Cap Rock to now claim that there was no meeting of the minds concerning the fundamental terms of the 1990 Power Supply Agreement, and is but another example of the unreliability of the testimony of Mr. Collier.

h. 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 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. 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 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 which will nullify one or more of the contractual provisions. Benge v. Scharbauer, 259 S.W.2d 166 (Tex. 1953); Ex[illegible] Corp. v. Eastman Kodak Co., 589 S.W.2d 473 (Tex. App. -- Texarkana 1979), rev'd on other grounds, 603 S.W.2d 208 (Tex. 1980).

1. Conclusion: Cap Rock cannot show any possible likelihood of success on the merits.

None of the evidence that Cap Rock presented at the hearing on its request for injunctive relief and nothing Cap Rock has asserted in its Brief can establish that Cap [illegible] has even a remote chance of success on the merits, much less a substantial likelihood of ultimately proving that the 1990 Power Supply Agreement is unenforceable or that there was a no "meeting of the minds" of the parties. Because Cap Rock has not shown, by any standard and certainly not by the standard required for mandatory injunction relief, that it has any likelihood of prevailing on the merits in this case, the Court should deny Cap Rock's request for injunctive relief.

2. Refusal to Grant the Injunctive Relief Requested will not Result in Irreparable Injury.

It is well established in Texas that it is an abuse of discretion to grant an injunction unless it is clearly established by the evidence that the party seeking such relief is threatened with an actual, irreparable injury if the injunction is not granted. Dallas General Drivers v. Wamix, Inc., 156 Tex. 405, 295 S.W.2d 873, 879 (1956). In his testimony during the injunction hearing, Mr. Collier articulated the following reasons why Cap Rock would be irreparably harmed if Cap Rock's request for an injunction was not granted:

1. Cap Rock would pay more money for its electricity if it continues to buy power from TU Electric rather than WTU;

2. The higher cost for power **might** cause Cap Rock to lose existing and potential new customers;

3. The higher cost **might** cause financial harm to Cap Rock's customers,

4. Cap Rock cannot go back in time and re-intervene in TU Electric's past rate case; and

5. Cap Rock's business reputation and relationship with WTU and other companies will be adversely affected.

As the following sections demonstrate, none of the foregoing testimony is sufficient to demonstrate irreparable harm.

a. Evidence that Cap Rock will pay more money for its electricity if it continues to buy power from TU Electric rather than WTU is not evidence of irreparable harm, since Cap Rock has an adequate remedy at law for any such damages.

In its Original Petition, Cap Rock asserts that if it does not obtain the requested injunctive relief, it "will pay more for electricity" than what it would pay if WTU were to provide Cap Rock's power and energy requirements.[30] At the hearing, in an attempt to prove irreparable harm, Mr. Collier testified that:

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[30]In **fact**, in **its sworn** Petition, Cap Rock **set** out the measure of such **damages** through its specific allegations regarding the difference in power costs between TU Electric and WTU. Incredibly, Cap Rock **asserts** in its Brief, in a section entitled "Cap Rock has Proven Damages are Incalculable", the **specific amount** of savings that would result if Cap Rock were granted injunctive relief. Cap Rock Brief at 28.

> . . . as we have pointed out . . . in some of our pleadings, the power that we're buying from TU Electric is more expensive than the power that we would be buying from WTU . . . .

[March 26, 1992, Tr., at 136-137]

It is fundamental that an injunction will not be granted where there is an adequate remedy at law. Story v. Story, 176 S.W.2d 925 (Tex. 1944); Home Savings Ass'n v. Ramirez, 600 S.W.2d 911 (Tex. Civ. App. -- Corpus Christi 1980, writ ref'd. n.r.e.). Specifically, loss of income and financial distress, because they can be remedied by an award of damages, are not irreparable injuries. Sampson Murray, 415 U.S. 61, 90, 94 S.Ct. 937, 953 (1974); Hunt v. Bankers Trust Co., 646 F.Supp. 59, 64 (N.D. Tex. 1986).

Any difference in price between TU Electric's power and WTU's power can, as Cap Rock has done, be measured in dollars and cents and, therefc as a matter of law, cannot support a request for injunctive rel . Krenek v. South Texas Electrical Cooperative, Inc., 502 S.W.2d 605 (Tex. App. -- 1973, no writ) (if adequate relief may be granted by an award of damages, no injunction will issue); Bank of Southwest v. Harlingen National Bank, 662 S.W.2d 113 (Tex. App. -- Corpus Christi 1983, no writ) (reversible error committed as a matter of law by granting a temporary injunction when the damages were capable of calculation and the defendant was solvent); Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecutoriana, 762 F.2d 464, 471-73 (5th Cir. 1985) (An

injury is irreparable only if it cannot be undone through monetary remedies)

b. **Testimony that higher power costs might cause Cap Rock to lose existing and potential customers or that higher power costs might cause financial harm to Cap Rock's customers cannot form a basis for injunctive relief.**

[illegible]er also testified that the purchase of more expensive power [illegible] Electric might cause Cap Rock to lose existing or poten[illegible] customers and might possibly cause detriment to those customers.

> Now, to what extent the higher price that now exists than would have existed under the WTU arrangement causes us not to obtain a customer that we **might** have otherwise obtained or to lose a customer that we **may** have or to have a customer that we have experience some reversal or setback to not drill an oil well, to not plant a field of cotton, to not do this or that, to go out of business because of the power costs, you know, how do you ever get back to that point?

(March 26, 1992, Tr. at 137, emphasis added.)

Such testimony cannot, as a matter of law, support Cap Rock's request for injunctive relief, and certainly not its request for mandatory injunctive relief, because: (i) a temporary injunction is an inappropriate remedy to address a potential loss of revenues since damages are available; (ii) such testimony is purely speculative; and (iii) even if proven to exist, the potential harm will result to someone other than Cap Rock, the applicant for the injunction.

A significant reason wh such testimony is insufficient to support a request for injunctive relief is that it is purely speculative. In order to justify injunctive relief, an alleged irreparable injury must be real and immediate, not based on surmise or conjecture. Camp v. Shannon, 348 S.W.2d 517, 519 (Tex. 1961); Frey v. DeCordova Bend Estates Owner's Association, 647, S.W.2d 246 (Tex. 1983). See also Carter v. Orleans Parish Public Schools, 725 F.2d 261, 263 (5th Ci 1984) (injunctive relief is inappropriate when sought to preve... injury that is speculative at best). Consequently, Mr. Collier's testimony of what "may" or "might" happen in the future is far too speculative to support a request for a temporary injunction. The right to equitable relief must be determined as such right may or may not exist at the time of the hearing. Hammon v. Wichita County, 290 S.W.2d 545, 546 (Tex. Civ. App. -- Fort Worth 1956, no writ). Testimony as to an applicant's fear, apprehension or the possibilities of some asserted harm is insufficient to establish any injury, "let alone irreparable injury." Mother and Unborn Baby Care of North Texas, Inc. v. Doe, 689 S.W. 33t, 338 (Tex. App. -- Corpus Christi 1985, writ dism'd.). Even assuming that the evidence showed that Cap Rock may lose customers if it is unable to obtain injunctive relief, the loss of such revenues can be measured in dollars, and, thus, injunctive relief is not permitted. Bark of Southwest v. Harlingen National Bank, 662 S.W.2d 113 (Tex. App. -- Corpus Christi 1983, no writ).

Cap Rock's assertions with regard to the speculative, unknown effects of an inability to buy power from other than TU Electric cannot support Cap Rock's application for injurctive relief.

In his testimony, Mr. Collier additionally claims that Cap Rock will be irreparably harmed if it does not obtain injunctive relief because such failure "might" cause financial harm to persons located in its service area. Such testimony cannot support an injunction for two reasons. First an applicant for injunctive relief must show that the issuance of the injunction is necessary for the protection of a right which is an existing right vested in the applicant, not some third party. Hammon v. Wichita County, 290 S.W.2d 545 (Tex. Civ. App. -- Fort Worth 1956, no writ). Furthermore, as already pointed out the alleged irreparable injury must be real and immediate, and cannot be based on surmise or conjecture. Camp, 348 S.W.2d at 519.

c. Cap Rock's complaint that it cannot go back in time and re-intervene in TU Electric's rate case has no relevance to its request for injunctive relief, since the requested injunction cannot restore Cap Rock to that position.

Mr. Collier further testified that, in his opinion, Cap Rock would be irreparably harmed if its request for injunctive relief is not granted because in 1990, as required by the 1990 Power Supply Agreement, Cap Rock withdrew its intervention in TU Electric's then pending rate case:

> . . . we'll never be able to go back and do that [intervene]. It's a **past opportunity** never to be regained.

[March 26, 1992, Tr. at 136, emphasis added]

It is precisely because Cap Rock's opportunity at such participation is a "past opportunity" never to be regained that such facts cannot support Cap Rock's request for injunctive relief. A mandatory injunction requires that the irreparable injury to be prevented by the injunction **will occur in the future**. Piwonka v. Hall, 376 S.W.2d 912 (Tex. Civ. App. -- Amarillo 1964, writ ref'd. n.r.e.). See also Los Angeles v. Lyons, 461 U.S.95, 75 L. Ed. 675, 103 S.Ct. 1160 (1983). This Court's decision to grant or deny Cap Rock's request cannot affect or remedy Cap Rock's "past opportunity" to participate in TU Electric's prior rate case. The refusal to grant the injunction will most certainly not cause Cap Rock **future irreparable injury**. Therefore, as a matter of law, such testimony cannot provide a basis for injunctive relief.

d. Assertions that Cap Rock's business reputation and relationship with WTU and other companies will be adversely affected if it is not permitted to enter into the proposed contract with WTU do not demonstrate irreparable injury.

Mr. Collier's testimony regarding alleged irreparable injury to Cap Rock's business reputation was as follows:

> Furthermore, by having to continue to buy power from TU Electric, we have been -- I don't know how to say it, estranged, alienated

> from our business partner. We go through a long negotiation, negotiate an agreement, and then we're prevented from going through with it, and it affects our relationships with that business partner, as is evidenced I think in my view by the letter that they sent us in February, and other business partners that we might do business with who would conclude, you know, how can you do business with Cap Rock? They sign contracts with you, but TU doesn't let them go through with them, and so the opportunities that we may have to do business with others I think are severely and profoundly affected.

[March 26, 1992, Tr., at 136]

First, and most importantly, Mr. Collier's testimony regarding the allegedly strained relations with WTU is simply untrue. WTU's Vice-President of Operations, Don Welch, has informed Cap Rock, in writing in evidence introduced by Cap Rock and in fact referenced by Mr. Collier in his testimony, that WTU "stands ready, willing and able to begin selling electric energy to Cap Rock . . . once Cap Rock's relationship with TU Electric has ended . . . ." [Pl. Exh 9] Therefore, in the unlikely event Cap Rock were to ultimately prevail on the merits in this case, there simply has been no injury to Cap Rock regarding its potential business relationship with WTU.

The other deficiency with such testimony is that the asserted harm is of Cap Rock's own making. Until this lawsuit comes to a final conclusion, it is disputed whether Cap Rock even had the right to enter into the proposed contract with WTU. If the final determination of this Court is that the 1990 Power Supply Agreement

is enforceable in accordance with TU Electric's view of the parties' obligations, Cap Rock has only itself to blame for publicly misrepresenting its rights under the 1990 Power Supply Agreement and wrongfully entering into negotiations with WTU at a time when it was obligated to purchase all of its power supply from TU Electric. Such testimony therefore cannot constitute a basis for injunction relief in this case.

Further, even if Mr. Collier's testimony were true, it is well-settled that Cap Rock would have the right to pursue a cause of action for any harm to its business reputation or interference with its relationship with WTU. See e.g., Light v. Transport Insurance Company, 469 S.W.2d 433, 438-39 (Tex. Civ. App.--Tyler 1971, writ ref'd n.r.e.). Accordingly, the existence of an adequate remedy at law precludes any such damage which might be shown to exist from constituting irreparable harm.

Finally, Mr. Collier's above-quoted testimony is insufficient to support a request for temporary injunction because a relative deterioration of competitive position does not satisfy the requirement of inadequacy of compensatory damages. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. E. F. Hutton & Co., Inc., 403 F.Supp 336 (E.D. Mich. 1975).

e. The testimony of Whitfield Russell that uncertainty as to Cap Rock's power supply would prevent customers from considering Cap Rock as a potential power source does not support the relief requested.

Cap Rock argues in its Brief that irreparable harm was demonstrated by the testimony of Whitfield Russell to the effect that a large industrial customer would not consider Cap Rock as a potential source of power as long as the dispute with TU Electric was ongoing.[31] Notably, Mr. Russell's testimony was purely conjectural in that he did not refer to a single specific instance where such a "potential" industrial customer had elected not to do business with Cap Rock. Thus, it is not proof of irreparable harm. Camp, 348 S.W.2d at 519.

Even more significantly, even if Cap Rock could show the existence of such a potential customer, and if Cap Rock could show that the 1990 Power Supply Agreement is unenforceable, Cap Rock would have the right to seek damages for any harm to its business resulting from actions of TU Electric. Light, 469 S.W.2d at 438-

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[31] Cap Rock attempts to attribute significance in its Brief to the fact that TU Electric did not put on evidence at the hearing to rebut the testimony of Mr. Collier and Mr. Russell regarding Cap Rock's purported irreparable harm. Since such testimony was, at the time of the hearing, obviously insufficient in light of the authorities set forth in TU Electric's Motion to Deny Plaintiff's Request for Temporary Injunctive Relief, it would simply have been an injudicious use of the Court's time to put on evidence regarding these issues when it was clear that Cap Rock had failed to carry its burden of proof as a matter of law.

39. Therefore, Mr. Russell's testimony does not demonstrate irreparable injury.

f. Conclusion: Cap Rock has completely failed to carry its burden of proof to show that the refusal to grant injunctive relief would result in irreparable harm to Cap Rock.

As set forth above, Cap Rock wholly failed to put forth any evidence that the refusal of this Court to grant Cap Rock the requested injunctive relief will result in irreparable harm. Each and every part of Cap Rock's testimony on this element of its application fails to even remotely meet the significant burden of proof required for a mandatory injunction. In fact, the absence of any such evidence is even more clearly demonstrated by the fact that Cap Rock's Brief fails to cite even one case which provides any authority to support Cap Rock's claim that its evidence is sufficient for an injunction.[32] Accordingly, in the face of an

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[32]Apparently recognizing the lack of proof on this element, Cap Rock makes the ridiculous assertion that, as a result of Section 8.05 of the 1990 Power Supply Agreement, TU Electric has "admitted" that damages are incalculable. Cap Rock Brief at 27. Such an argument hardly warrants a reply since, as Cap Rock admits in its Brief, Section 8.05 addresses only the incalculability of damages in the event of a "Default" under the 1990 Power Supply Agreement and the agreement of the parties that a non-Defaulting party is entitled to specific performance. The existence of such a provision has absolutely no relevance here since Cap Rock's asserted right to injunctive relief is not based upon an alleged "Default" under the 1990 Power Supply Agreement.

obvious lack of proof of irreparable injury, Cap Rock's request for injunctive relief must be denied.[33]

III.

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 upon Cap Rock's termination of the 1963 Agreement as TU Electric maintains, Cap Rock must purchase

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[33] Cap Rock inexplicably argues in its Brief that the antitrust laws, and particularly the "essential facilities" doctrine, are somehow relevant to the Court's determination of Cap Rock's injunction request. Cap Rock Brief at 29-30. TU Electric would point out that Cap Rock's Original Petition fails to set forth any basis for the applicability of the antitrust laws in this case. Nor did Cap Rock put on any evidence at the hearing on its request for an injunction that has any relationship to the arguments set forth in Cap Rock's Brief related to these issues. The simple fact is that Cap Rock is not seeking any relief in this case under the federal antitrust laws. Such arguments are, therefore, entirely irrelevant to the question of whether Cap Rock has carried its burden of proving that it is entitled to injunctive relief.

In any event, the issues related to the applicability of the antitrust laws to Cap Rock's attempts to obtain wheeling from TU Electric for power from other suppliers, while Cap Rock is a contractual full-requirements customer of TU Electric, were the very subject of the proceedings before the NRC which the execution of the 1990 Power Supply Agreement was intended to settle. TU Electric's position before the NRC is set forth in Defendant's Exhibit 5 (Response of TU Electric to Request of Cap Rock for an Order Enforcing and Modifying Antitrust License Conditions). In that proceeding, as evidenced in Defendant's Exhibit 6, the NRC Staff announced to TU Electric and Cap Rock that TU Electric was not obligated to provide any of the services requested by Cap Rock, including the wheeling of power from other sources, "as long as Cap Rock remains a customer of TU Electric pursuant to the terms of its full requirements contract with TU Electric". [Def. Exh. 6]

all of its power and energy requirements from TU Electric pursuant to that agreement, until it gives the requisite notice to reduce load supplied by TU Electric or to terminate the agreement.

Cap Rock has located a potential source of power at a cost lower than that provided for by the 1990 Power Supply Agreement. Thus Cap Rock is attempting to avoid its obligations under the 1990 Power Supply Agreement simply in order to avail itself of a more economical source of power, to the detriment of TU Electric and its other customers, and to allow its principal witness to collect a "success fee" for facilitating the abrogation of Cap Rock's obligations under 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 and Cap Rock should not be permitted to do so here.

With regard to Cap Rock's request for injunctive relief, as discussed in this Brief and in TU Electric's Motion to Deny Plaintiff's Request for Temporary Injunctive Relief, Cap Rock simply has not, and cannot, satisfy its burden of proving even one of the four elements required before the granting of mandatory injunctive relief is appropriate. Accordingly, TU Electric prays that this Court deny Cap Rock's request for temporary injunctive relief during the pendency of the trial of this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has, this 29th day of April, 1992, been sent to the following counsel for Cap Rock in the manner indicated:

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