UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

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| Texas Utilities Electric Company, *et al.* | ) | Docket No. 50-445A |
| Comanche Peak Steam Electric Station, Units 1 and 2 | ) | 50-446A |

# RESPONSE OF TU ELECTRIC TO COMMENTS OF CAP ROCK ELECTRIC COOPERATIVE, INC.

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June 30, 1992

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## RESPONSE OF TU ELECTRIC TO COMMENTS OF CAP ROCK ELECTRIC COOPERATIVE, INC.

Texas Utilities Electric Company ("TU Electric") hereby responds to the Comments submitted by Cap Rock Electric Cooperative, Inc. ("Cap Rock") on March 25, 1992 ("March 1992 Comments") requesting the Nuclear Regulatory Commission (the "Commission" or "NRC") to institute operating license antitrust review proceedings. [March 1992 Comments at 7]. Cap Rock's March 1992 Comments are without any merit and represent yet a third attempt to cause regulatory delay in the licensing of Comanche Peak in order to obtain concessions to which Cap Rock is not entitled.[1]

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[1] Steven E. Collier, Cap Rock's Director of Power Supply and Regulatory Affairs, views himself as an expert at obtaining contractual concessions from TU Electric by using "leverage" in totally unrelated forums. For example, in an article entitled **"Co-op Drops its Attack on TU Nuclear Plant in Exchange for Supply Access"** appearing in the June 4, 1990 issue of "Electric Utility Week," Mr. Collier announced the negotiation of Cap Rock's new power supply agreement with TU Electric -- which Cap Rock characterized as a "major breakthrough." In exchange for the concessions obtained from TU Electric in that new agreement, Mr. Collier stated:

> Cap Rock has agreed to . . . a "standstill" in Cap Rock's state and federal interventions into rates and licensing for TU's . . . Comanche Peak nuclear plant.
>
> * * * On the federal level, [Cap Rock] launched a Comanche Peak license enforcement proceeding and an antitrust application at the Nuclear Regulatory Commission * * *. Cap Rock also filed a petition for review of Comanche Peak's NRC license at the U.S. Court of Appeals, D.C. Circuit, in Washington * * *.

(continued...)

For the reasons discussed below, Cap Rock's request should be denied.

## I.

## BACKGROUND

Cap Rock's March 1992 Comments constitute nothing more than a continuation of the same dispute presented in its August 1988 Comments[2] and its May 1989 request for enforcement[3] -- an attempt to circumvent Cap Rock's all-requirements contract with TU Electric. At the time of these earlier filings, the relationship between Cap Rock and TU Electric was governed by a 1963 Agreement for Purchase of Power (the "1963 Agreement"), pursuant to which TU Electric was required to sell, and Cap Rock was required to purchase, all of its power and energy requirements.[4] The 1963 Agreement, as amended, required three years' advance written notice by either party for termination;[5] it also permitted Cap Rock to

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[1](...continued)
* * * "It takes **leverage** for a transmission dependent utility, such as Cap Rock, to get these kinds of agreements [e.g., 'wide-open wheeling agreements']". . .

[Vol. IV, Tab 87 (emphasis supplied)] of the materials attached to the April 21, 1992 letter from M. D. Sampels to Joseph Rutberg, responding to the tendentious letter to the Director submitted on January 6, 1992, by Cap Rock. TU Electric's response included a "Documented Summary of Events" summarizing the principal facts relating to the TU Electric/Cap Rock dispute from its inception and attaching, in chronological order, four tabbed volumes containing the pertinent documents and pleadings in the matter. For the convenience of the Commission, an additional copy of that letter and the indexed volumes of the relevant documents are submitted herewith as Attachment 1.

[2]Comments of Cap Rock Electric Cooperative, Inc. Concerning Significant Changes in Licensee's Activity That Warrant an Antitrust Review at the Operating License Stage, dated August 9, 1988. [Vol. I, Tab 36].

[3]Request of Cap Rock Electric Cooperative, Inc. for an Order enforcing and Modifying Antitrust License Conditions, dated May 12, 1989. [Vol. II, Tab 47].

[4]Vol. I, Tab 1.

[5]Had Cap Rock given the three years' notice to terminate the 1963 Agreement, as Mr. Pruitt had advised TU Electric in October 1987 that it planned to do [see Vol. I, Tab 13], Cap Rock would now be free of any contractual obligation to purchase power from TU Electric and, therefore, fully entitled to commence its purchase of power from any other source it might choose, in that such termination would have been effective in late 1990. But Cap Rock chose not to pursue that course of action.

terminate the agreement on written notice given within 120 days of a change in TU Electric's rates.[6] But Cap Rock sought to enter into power supply arrangements with other suppliers without complying with the notice provisions of the 1963 Agreement and while still remaining a full-requirements customer of TU Electric. TU Electric declined to relinquish its contractual right to such advance notice, and insisted that Cap Rock live up to its commitments. Cap Rock -- as it does in its March 1992 Comments -- characterized TU Electric's position as a "refusal to wheel," and accused TU Electric of violating its existing Comanche Peak license conditions. In August 1988, Cap Rock asked the Commission to institute antitrust review proceedings and subsequently, in May 1989, filed a request for enforcement of the license conditions.[7]

TU Electric contested Cap Rock's request for enforcement, primarily on the grounds that neither the license conditions nor the antitrust laws require TU Electric to cancel, change or otherwise amend its full-requirements 1963 Agreement with Cap Rock in order to facilitate Cap Rock's purchase of power from other sources.

The Director of Nuclear Reactor Regulation (the "Director") twice carefully addressed the contentions made by Cap Rock in its

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[6]As a regulated electric utility, TU Electric's rates are subject to the jurisdiction of the Texas Public Utility Commission ("PUCT"); thus any change in TU Electric's rates, including the rate charged for power and energy sold to Cap Rock under the 1963 Agreement and the 1990 PSA, is subject to the approval of the PUCT.

[7]A summary of the correspondence and meetings between TU Electric and Cap Rock during the period 1987 - 1989 regarding these matters is attached to R. D. Sampels' letter of April 21, 1992, to Joseph Rutberg [Attachment 1 hereto].

August 1988 request for the institution of an antitrust review and held that the contractual dispute between Cap Rock and TU Electric was "not germane to the Commission's 'significant changes' review." [Vol. III, Tab 55]. Cap Rock appealed this finding to the D.C. Circuit Court of Appeals [Vol. III, Tab 58]. When Cap Rock persisted in pursuing its enforcement action, the NRC Staff encouraged the parties to resolve their differences and, to this end, scheduled a meeting for January 11, 1990. To aid in the deliberations, the NRC Staff announced its views on each party's position and urged Cap Rock and TU Electric to explore fully all avenues of settlement.

A further meeting with the NRC Staff was held on January 25, 1990, at which time separate settlement proposals[8] submitted by TU Electric and Cap Rock were discussed. At the end of the meeting, TU Electric and Cap Rock agreed to meet and discuss a power supply plan which Cap Rock indicated it had under consideration, and the NRC Staff indicated its willingness to delay the issuance of a decision on Cap Rock's enforcement request as long as the parties were negotiating in good faith toward a settlement. TU Electric and Cap Rock commenced negotiations in late February 1990.[9]

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[8] "Cap Rock Electric Cooperative Essential Power Supply Services to be Provided by TU Electric," January 23, 1990 [Vol. III, Tab 63]. "TU Electric's Settlement Proposal," January 24, 1990. [Vol. III, Tab 64].

[9] At a meeting held on February 23, 1990, representatives of TU Electric and Cap Rock discussed Cap Rock's five-point plan for meeting its future power supply needs upon termination of the full requirements 1963 Agreement with TU Electric. The NRC had encouraged Cap Rock to develop its optimal power supply plan as a point of departure for negotiations. Though broad in scope, that plan, as outlined by Cap Rock's Mr. Collier, showed that Cap Rock was seeking a complicated, multi-step arrangement, calling for a gradual transition by Cap Rock to partial requirements status and ultimately to independence. Cap Rock's power supply plan indicated that Cap Rock would seek to transfer approximately 20 - 30 MW of its load from TU Electric to a neighboring utility within two to three years. Mr. Collier also projected that Cap Rock would wish to purchase partial requirements power at some future date, and indicated that five years was not a sufficient time for Cap Rock's transition. [Vol. III, Tab 67].

At the core of such negotiations was the fundamental disagreement between Cap Rock and TU Electric regarding the notice Cap Rock would be required to give prior to becoming a partial requirements customer of TU Electric. TU Electric initially offered, upon termination of the 1963 Agreement, to "provide partial requirements power and energy to Cap Rock pursuant to Paragraph D.(2)(k) of the Comanche Peak License Conditions,"[10] which conditions TU Electric's obligation to sell full and partial requirements power and energy on, among other things, "reasonable advance notice." TU Electric's position was predicated on the fact that it must be able to reasonably predict and plan for the power and energy requirements it will be called upon to serve. Based on such planning, TU Electric builds generation facilities to meet the expected load or contracts to purchase power from reliable sources. The selection of options to meet such demand is based on the relative economics of the available power and the cost of constructing generation facilities. It is extremely important for TU Electric to have as much notice as possible when a large customer, such as Cap Rock, is planning to cease purchasing power. TU Electric had made a substantial investment in facilities and equipment in order to comply with its obligation to provide Cap Rock with all of its power requirements under the 1963 Agreement. Without such notice, TU Electric would have excess capacity which it must pay for without a market for the power from such capacity, to the detriment and at the expense of its other customers.

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[10] "TU Electric's Settlement Proposal," January 24, 1990. [Vol. III, Tab 64].

Cap Rock, on the other hand, insisted that it

> be entitled **immediately** to receive, and TU Electric . . . be obligated **immediately** to provide, such partial requirements service as requested by Cap Rock . . . after the existing all-requirements wholesale [1963 Agreement] between TU Electric and Cap Rock . . . is terminated, and at such time as Cap Rock begins to supply a portion of the power requirements at one or more wholesale points of delivery with other power purchases, generation or cogeneration.[11] (Emphasis supplied.)

Following further negotiations, Cap Rock and TU Electric, on May 15, 1990, reached a settlement and executed "Principles of Agreement"[12] which contained the fundamental terms to be embodied in a new power supply agreement to be effective immediately upon Cap Rock's termination of the 1963 Agreement. The Principles of Agreement included the following key provisions:

Paragraph 3(c) clearly contemplated that the power supply agreement would initially be a full requirements contract:

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

Paragraph 1 of the Principles of Agreement provided:

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

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[11] "Cap Rock Electric Cooperative Essential Power Supply Services to be Provided by TU Electric," January 23, 1990. [Vol. III, Tab 63].

[12] Vol. III, Tab 76.

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

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

Significantly, the Principles of Agreement (and ultimately the 1990 PSA) provided that, upon termination of the 1963 Agreement in accordance with its terms, Cap Rock would continue to purchase full requirements power and energy from TU Electric until such time as it gave the requisite notice(s) specified therein.

Cap Rock and TU Electric ultimately executed a new Power Supply Agreement, dated June 8, 1990 (the "1990 PSA").[13] The 1990 PSA, **which materially embodies the May 15, 1990 Principles of Agreement**, formed the basis for Cap Rock's withdrawal of its previous filings with the Commission.

Significantly, Cap Rock boasted at that time that the 1990 PSA was without parallel in the electric utility business -- it was a "landmark" agreement and "unprecedented" in the electric utility industry.[14] Cap Rock even urged others to sign similar

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[13]Vol. IV, Tab 91.

[14]For example, in a press release issued by Cap Rock on July 15, 1990, lauding the benefits of the 1990 PSA, Steve Collier stated:

> [Cap Rock] . . . has reached a **landmark** agreement with its current sole power supplier, [TU Electric] of Dallas, Texas. Under this **exceptional** new agreement, [Cap Rock] will be able to seek power from alternative suppliers * * *. (Emphasis supplied.)

(continued...)

agreements.[15] But less than a year later, Cap Rock reversed course and is now seeking to abrogate the 1990 PSA.

The reason for Cap Rock's sudden shift of position is no mystery -- it no longer wants that Agreement. After execution of the 1990 PSA, Cap Rock concluded that a better deal could be made with West Texas Utilities Company ("WTU") and Southwestern Public Service Company ("SPS") and decided to leave TU Electric and its

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[14](...continued)

The press release goes on to add under the heading "Unprecedented Purchase Options Granted" (emphasis in original):

> TU Electric . . . has agreed to allow [Cap Rock] to purchase power from other suppliers, and to transport that power over TU Electric lines * * *. TU Electric also has agreed to sell supplemental power and other coordinating services as necessary to allow [Cap Rock] to take advantage of this **remarkable** opportunity * * *. (Emphasis supplied.)
>
> * * * Only a few of the distribution cooperatives and municipal electric systems in the U.S. are in this position * * *.
>
> [Cap Rock] can continue to purchase the balance of its power supply requirements from TU Electric * * * . **This will be a 10-year contract, and it can be extended beyond that if both companies agree** * * *. (Emphasis supplied.

[Vol. IV, Tab A].

[15]Steve Collier corresponded with various other electric cooperative wholesale customers of TU Electric, lauding the benefits of the 1990 PSA and recommending that such cooperatives seek similar agreements. For example, in July, 1991, Mr. Collier advised Hunt-Collin Electric Cooperative of the very "desirable services and benefits" achieved by Cap Rock as a result of the 1990 PSA and suggested that Hunt-Collin terminate its existing all-requirements contract with TU Electric and attempt to secure a similar deal. In his letter, Mr. Collier stated, among other things:

> As you know, [Cap Rock] negotiated a new wholesale power supply contract with TU Electric last year. This new contract provides for a variety of very desirable services beyond the normal terms of an all-requirements contract. These services include transmission wheeling, partial requirements service, regulating power service, and a number of other desirable services and benefits.
>
> * * * It would be in your interest to terminate your existing all-requirements contract and negotiate a more favorable one such as the one that we have executed and that I have enclosed for your review. We will be taking advantage of this termination window to terminate our existing all-requirements contract to make the transition to our new power supply agreement.
>
> It is my understanding that your all-requirements wholesale power supply contract terminates in the near future. You should not give in to pressure by TU Electric to extend or renew that existing all-requirements contract given that better terms and conditions have been incorporated in their contracts with Cap Rock Electric . . . (emphasis in original).

[Vol. IV, Tab J].

other customers holding the bag[16] by attempting to abrogate the notice provisions of the 1990 PSA.[17]

Abrogation of the 1990 PSA with TU Electric and the purchase by Cap Rock of power and energy from WTU also had collateral value -- but not to Cap Rock. Abrogation would enable Steven E. Collier, Cap Rock's Director of Power Supply and Regulatory Affairs, David Pruitt, Cap Rock's General Manager and Chief Executive Officer, and other members of Cap Rock's "management team" to collect a "success fee." The scheme went this way -- if Cap Rock could get out of the 1990 PSA, Messrs. Collier and Pruitt would participate in sharing a "success fee" in the amount of 2% of the difference between the power costs under the 1990 PSA and the power costs under Cap Rock's contracts with WTU and SPS. Under the WTU "success fee" contract, these payments would equal over $30,000 per year to Steve Collier alone -- a handsome payment for abrogation of a contract signed a mere 12 months before! See also Section V below.

Thus, the central dispute is the same today as it was when Cap Rock's two previous requests were either denied or resolved; i.e., Cap Rock seeks to purchase power from other sources at a time when it is obligated to purchase all of its requirements from TU

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[16] As Henry Bunting of TU Electric testified at the injunction hearing in Texas state court (Cap Rock Electric Cooperative, Inc. v. Texas Utilities Electric Company, No. B38,879, 238th Judicial District Court of Midland County, Texas [the "Midland Litigation"]), TU Electric has contracted to purchase power and energy sufficient to serve Cap Rock's 100 megawatts of load at a cost of approximately $20 million per year -- a cost which TU Electric would be required to bear if Cap Rock is successful in abrogating its obligations under the 1990 PSA. [Attachment 2 at 245].

[17] The 1990 PSA is a full requirements contract unless and until Cap Rock gives the requisite notice to reduce the load supplied by TU Electric and that notice period has expired. The 1990 PSA explicitly requires Cap Rock to provide three years' notice (two years' notice under certain circumstances) of its intent to reduce load supplied by TU Electric. See Section II infra.

Electric. Again, one thing is certain -- Cap Rock's March 1992 Comments manifestly have no relation to any significant changes in the activities of TU Electric under the Comanche Peak license conditions.[18] Nevertheless, to put Cap Rock's latest contentions in focus, particularly its self-serving interpretation of the 1990 PSA which it asks this Commission to accept as meritorious, TU Electric provides below a detailed analysis of the events surrounding the filing of Cap Rock's March 1992 Comments.

## II.

## THE 1990 PSA IS A FULLY BINDING AND ENFORCEABLE ALL-REQUIREMENTS CONTRACT WHICH REQUIRES CAP ROCK TO PURCHASE ALL OF ITS POWER AND ENERGY REQUIREMENTS FROM TU ELECTRIC UPON THE EFFECTIVE DATE OF THE AGREEMENT UNTIL SUCH TIME AS CAP ROCK GIVES THE REQUISITE NOTICE(S) TO REDUCE LOAD

Cap Rock contends that it "has no obligation to purchase any power or energy from TU Electric," claiming that

> The choice as to whether, or how much, power Cap Rock would purchase during the transition period * * * is clearly Cap Rock's choice. * * * The 1990 [PSA] specifies no amount of partial requirements service that Cap Rock must purchase. Rather, Section 1.01 of the [1990 PSA] provides that [TU Electric] will sell Cap Rock the amount of power and energy (**expressed as Contract Demand**) **that "will be specified on Attachment A." Exhibit A to the 1990 Settlement is blank.**"

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[18] Furthermore, Cap Rock has chosen to infuse its March 1992 Comments not with any analysis of the issues under Section 105(c) (which it never even mentions), but rather with false accusations and vituperation of the most extreme sort. For example, Cap Rock opens its Comments with the irresponsible charge that in its response to Regulatory Guide 9.3, TU Electric "intended intentionally [sic] to mislead this Commission." March 1992 Comments at 2. A review of TU Electric's response to the Reg. Guide readily reveals the falsity of this accusation. The antitrust information submitted by TU Electric pursuant to Reg. Guide 9.3 accurately describes at some length the current renewal of the contractual dispute between TU Electric and Cap Rock. That response frankly apprises the Commission that TU Electric did not accede to Cap Rock's demands, and that TU Electric took the position that Cap Rock is required to adhere to its contractual commitments. Letter of December 5, 1991 from W.J. Cahill Jr. to S.C. Black, forwarding Response to Reg. Guide 9.3. As shown by the glaring inconsistencies between the statements made by Cap Rock contemporaneously with the execution of the 1990 PSA and its current position, the simple truth is that it is Cap Rock, not TU Electric, that is "intentionally" seeking to mislead the Commission.

[March 1992 Comments at 40-41 (emphasis supplied)]. Contrary to Cap Rock's contention, however, "Contract Demand" is **not** the amount of power and energy to be sold by TU Electric and purchased by Cap Rock. The amount to be purchased and sold is instead set forth in Sections 3.07(a), 3.01, 3.02 and 3.03 of the 1990 PSA.

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 supplied.)

Section 3.01 of the 1990 PSA 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 supplied.)

Section 3.02 provides that:

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

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.

Thus, Section 3.07(a) of the 1990 PSA expressly identifies the quantity of power and energy to be purchased by Cap Rock and sold

by TU Electric as the **"amounts"** specified in the full-requirements, partial requirements and load growth sections -- i.e., Sections 3.01, 3.02 and 3.03.

Furthermore, Section 3.05, which establishes the rate of charge for the power and energy to be purchased by Cap Rock expressly recognizes that such power and energy may be **"in excess of Contract Demand."**[19] Specifically, Section 3.05 states that:

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

Thus, under the 1990 PSA, service to Cap Rock is not curtailed if Cap Rock exceeds its "Contract Demand," as would be the case were "Contract Demand" the set "amount" of power to be purchased.

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[19] This issue was covered at length in the injunction hearings in the Midland Litigation. As TU Electric's witnesses testified, under TU Electric's tariff Rate WP Wholesale Power ("Rate WP"), which has the force and effect of law, the demand charges that TU Electric's requirements customers must pay to TU Electric are predicated on the actual kilowatt demands those customers place on TU Electric's system, not the "contract demand" specified in their power supply agreements. However, TU Electric's Rate WP does 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). This is the charge referred to in Section 3.05 of the 1990 PSA when it states that the "monthly rate of charge [includes] any charges for power and energy in excess of Contract Demand." The charge of $1.00 per kW 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. TU Electric's witnesses 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. [Attachment 2 at 161-162; 167-168; 289-295].

In short, the term "Contract Demand," as defined and used in the 1990 PSA, is merely a planning tool and in limited instances may be used as a billing tool.[20]

At the heart of Cap Rock's contentions regarding th alleged unenforceability of the 1990 PSA is the fact that Exhibit A to the Agreement is "blank." [March 1992 Comments at 41]. Cap Rock's contentions are wholly without merit. The physical completion of a piece of paper labeled "Exhibit A" is not a condition precedent to the obligations of either Cap Rock or TU Electric with respect to the **amount** of power to be sold and purchased under the 1990 PSA. As discussed above, those obligations are governed by Sections 3.07(a), 3.01, 3.02 and 3.03 of the Agreement.

The 1990 PSA does mandate, however, that Exhibit A be filled in on the effective date of the Agreement with the Points of Delivery, determined by applying the standard specified in Section 1.11,[21] and the Contract Demands projected by Cap Rock in

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[20]Contract Demand is defined in Section 1.01 of the 1990 PSA 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.

Section 3.08 of the 1990 PSA 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.

[21]The "Points of Delivery" at which Cap Rock is required to purchase power and energy from TU Electric, in the amounts specified in Sections 3.01, 3.02 and 3.03, are defined in Section 1.11 of the 1990 PSA:

> "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 supplied.)

(continued...)

accordance with Sections 1.01 and 3.08. Thus, Cap Rock and TU Electric both had an obligation to see that the proper information was "specified" on Exhibit A on the effective date of the 1990 PSA. When Cap Rock failed to abide by its obligation under the 1990 PSA to specify its Contract Demands and identify the proper Points of Delivery on Exhibit A, TU Electric specified the Contract Demands and Points of Delivery in a January 30, 1992 letter to Mr. Collier -- **namely, the Contract Demands and Points of Delivery that were existing and in effect under the 1963 Agreement on January 30, 1992, immediately prior to the February 1, 1992 effective date of the 1990 PSA.**[22] [Vol. IV, Tab 1].

In summary, the 1990 PSA is a fully enforceable and binding contract, which requires Cap Rock to purchase from TU Electric and

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[21](...continued)

To account for the ongoing consolidations and conversions of Cap Rock's points of delivery under the 1963 Agreement, future changes in contract demand under the 1963 Agreement due to load growth as well as such consolidations and conversions, and the fact that the date upon which Cap Rock would ultimately choose to terminate the 1963 Agreement was totally within Cap Rock's control, the parties agreed to identify what the Points of Delivery would be under the 1990 PSA by specifying the standard in Section 1.11.

When that standard is applied, the Points of Delivery under the 1990 PSA can be, and in fact have been, identified with absolute certainty. **Indeed, at no time has Cap Rock disputed, nor can it dispute, that the points of delivery which existed under the 1963 Agreement at the moment it was terminated by Cap Rock, effective at 12:01 a.m. on February 1, 1992, are the same Points of Delivery which existed at that same moment -- 12:01 a.m. on February 1, 1992 -- when the 1990 PSA became effective in accordance with the express terms of Section 2.01.**

[22]Cap Rock has also advised this Commission and attempted to argue in the Midland Litigation that it had made arrangements with WTU under which WTU had "agreed to take over control area responsibility for Cap Rock . . . beginning 12:01 AM, February 1, 1992, the effective date of the termination of Cap Rock's full requirements contract with [TU Electric]" [Vol. IV, Tab Y at 4], so that, on the effective date of the 1990 PSA, none of Cap Rock Electric's delivery points would have been in TU Electric's control area. Thus, according to Cap Rock, its delivery points would not have come within the definition of Points of Delivery in Section 1.11 of the 1990 PSA.

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 PSA during which Cap Rock could have effected such a move to WTU's control area. Indeed, Section 2.01 of the 1990 PSA states that:

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

[Vol. IV, Tab 91 at 5]. Second, even if such a gap existed -- which it does not -- as WTU's own witness testified, the arrangements Cap Rock was negotiating with WTU did not include moving the Cap Rock points into WTU's control area. <u>See</u> Attachment 3 hereto at 133; <u>see also</u> pp. 142-143.

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 years' notice under Section 2.04 and/or Section 2.05 to reduce load supplied by TU Electric or to terminate the contract, and the applicable notice period has expired.[23]

## III.

## CAP ROCK FULLY RECOGNIZED ITS OBLIGATIONS UNDER THE 1990 PSA WHEN THE AGREEMENT WAS EXECUTED

When the 1990 PSA was executed, Cap Rock fully recognized and understood its full-requirements and notice obligations under the contract. On June 11, 1990, three days after the Agreement was executed, Steve Collier reported to David Pruitt as follows:

> <u>THE GOOD NEWS IS THAT WE HAVE NEGOTIATED A DEFINITIVE PSA!</u>

[Vol. III, Tab 93, emphasis in original]. Mr. Collier further reported that:

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

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[23] Section 2.04 of the 1990 PSA requires Cap Rock to give three years' advance written notice in years one through five and five years' notice thereafter to reduce the load served by TU Electric.

Section 2.05, however, permits Cap Rock to remove up to 30 MW of load at one or more of nine specified Points of Delivery on only two years' advance written notice.

Significantly, Steve Collier's notes for his briefing of the Cap Rock and Lone Wolf Boards of Directors on the 1990 PSA states that one of the "CON's" of the contract, from Cap Rock's perspective, is that it "still has 3 yr notice." Steve Collier's briefing notes list the "PRO's" of the contract as follows: "better than we are now," "better than anyone else," and "workable." [Vol. IV, Tab 95].

Cap Rock, through its counsel John M. Adragna, also informed this Commission of the execution of the 1990 PSA and the workable nature of the contract. By letter dated June 28, 1990, to the Director [Vol. IV, Tab 97] withdrawing Cap Rock's 1989 request for enforcement, Mr. Adragna advised the Commission that:

> The [1990 PSA] provides a means by which Cap Rock will be able to engage in an **orderly transition from its current status as a full requirements customer of TU Electric, to a partial requirements customer of TU Electric** and, ultimately, to a separate and independent electric utility. **Cap Rock's transition, ultimately to independent status, will obviously be a complicated, multi-step process that will not occur overnight.** (Emphasis supplied).

Significantly, Cap Rock also expressly acknowledged, in its July 15, 1990 press release touting the benefits of the "landmark" 1990 PSA, that Cap Rock was required to give the two or three year notices specified in the Agreement before it had the right to begin purchasing part or all of its power and energy requirements from other suppliers:

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

[Vol. IV, Tab A (emphasis supplied)]. This press release, issued contemporaneously with the execution of the 1990 PSA, directly contradicts Cap Rock's current claims [see, e.g., March 1992 Comments at 40] that Cap Rock never intended to be a full-requirements customer of TU Electric after termination of the 1963 Agreement, except at its option.

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

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

[Attachment 4]. The "2 years' notice" clearly refers to Section 2.05 of the 1990 PSA which permits Cap Rock to remove all of the load, up to but not exceeding a total of 30 MW, at one or more of nine specified Points of Delivery on two years' advance written notice given in years one through five of the agreement. [Vol. IV, Tab 91 at 8-9].

The notice provisions under the 1990 PSA were also the topic of discussion during a meeting on October 19, 1990, between Steve Collier, David Pruitt and Rusty Jones of Cap Rock and Gary Gibson

and David Krupnick of SPS. Mr. Krupnick's notes from that meeting[24] read, in relevant part, as follows:

S.C. Looked at feasibility of all load

Power Agreement identified actual substations (2 year)

Current contract has three years notice

30 days to 3 yrs in 120 day window on rate change around final order

**2 years worse for 30 MW**

**3 years worse for all system**

[Attachment 6, emphasis added] Mr. Krupnick explained in his deposition that the initials "S.C." refer to Steve Collier [Attachment 5 at 100] and testified as follows regarding the statements "2 years worse [case] for 30 MW" and "3 years worse [case] for all system":

> [They] refer[] to the fact that if [Cap Rock] had to put all their delivery points on this new 1990 [PSA], if they couldn't have an interim supplier, then . . . two years would be the longest that they would have to wait to move 30 megawatts to [SPS]. * * *
>
> [And] they would have to wait the three years before they could move all of their system over to [SPS]. That was the notice requirement . . . for delivery points . . . not included in the two year notice.

[Attachment 5 at 103].

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[24] *See* Attachment 5 hereto at 98-103.

## IV.

## CAP ROCK'S SCHEME TO PURCHASE POWER FROM OTHER SOURCES IS IN DEROGATION OF ITS OBLIGATIONS UNDER THE 1990 PSA

Notwithstanding Cap Rock's recognition and thorough understanding of the notice requirements under the 1990 PSA, Cap Rock's management nevertheless devised a scheme and embarked on a course of conduct to purchase power and energy from WTU[25] and SPS [Attachments 7 and 8] in conscious derogation of Cap Rock's obligations to TU Electric under the 1990 PSA.[26]

During its negotiations with WTU and SPS, the Cap Rock management began to anticipate TU Electric's reaction, and the precise position TU Electric has taken, to any attempt by Cap Rock to begin purchasing power from another source upon termination of the 1963 Agreement without first complying with the notice provisions of the 1990 PSA. For example, in a June 19, 1991 report to David Pruitt regarding Cap Rock's proposed purchase of power from WTU, Mr. Collier stated that:

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[25] Despite the statements in the January 6, 1992 letter to the Director from John Michael Adragna, Cap Rock's counsel [Vol. IV, Tab Y] ("**Cap Rock has executed a contract with WTU pursuant to which WTU has agreed to take over control area responsibility for Cap Rock and to sell Cap Rock its full bulk power requirements, beginning 12.01 AM, February 1, 1992, the effective date of the termination of Cap Rock's full requirements contract with TUEC.**"); the sworn statements in Cap Rock's Original Petition; and the sworn testimony of Steve Collier to the contrary, there is not now, nor has there ever been, a contract between Cap Rock and WTU -- a fact which even Cap Rock now admits. [See, e.g., March 1992 Comments at 25].

[26] It was not until early 1991 that TU Electric first learned of the specific nature of some of Cap Rock's plans to purchase power from other sources from an article in the February 4, 1991 edition of "Electric Utility Week." The article stated that Cap Rock had "negotiated an agreement in principle to buy 40 MW of wholesale power from [SPS] for 10 years." [Vol. IV, Tab F]. As TU Electric's Henry Bunting testified, after reading the article, he called Steve Collier who advised Mr. Bunting that the announcement of an agreement in principle with SPS was "premature." [Attachment 2 at 249]. During this telephone call:

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

[Attachment 2 at 251, emphasis added; see also Vol. IV, Tab G]. Of course, that is not how Cap Rock chose to proceed.

> 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.

[Attachment 9].

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

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

[Attachment 8].

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

> As we discussed, TU Electric is not likely to be pleased . . . and can be expected to insist that we do not have the option of simply moving all of the load to WTU in making the transition from our current [1963 Agreement] to the new power supply agreement that we executed in June, 1991 [sic].

[Attachment 10].

Thus, knowing full well TU Electric would take the position that Cap Rock was required under the 1990 PSA to purchase full-requirements power and energy from TU Electric upon Cap Rock's termination of the 1963 Agreement -- as Cap Rock itself had recognized and publicly acknowledged when the contract was executed -- the Cap Rock management began to develop a strategy of calculated harassment of TU Electric for the express purpose of

attempting to gain leverage for its planned load transfers to WTU and SPS, which Cap Rock knew were in derogation of the 1990 PSA.

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

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

[Attachment 9 at 3-4]

In the fall of 1991, after having laid all the groundwork it thought necessary to carry out its plans -- while steadfastly keeping those plans secret from TU Electric -- Steve Collier contacted Darrell Bevelhymer and requested a meeting, which was held on October 22, 1991 with Mr. Bevelhymer and Mr. Bunting of TU Electric. [Attachment 2 at 251-52]. Mr. Bunting testified as follows regarding that meeting:

> Q. Could you describe what occurred at that meeting, sir?
>
> A. **Mr. Collier asked, or in fact he told us that he didn't need the 1990 Power Supply Agreement any longer, and that he intended to take all of his load over to WTU in January of 1991.**
>
> Q. What was your reaction to that, Mr. Bunting?

A. I was shocked.

Q. Why?

A. Because this was not my understanding of the 1990 Power Supply Agreement. I knew that we had negotiated this agreement over a number of months, that we had spent a long time negotiating this agreement, . . . which Cap Rock said was very important to them that gave them a lot of flexibility, and now for him to come up and make this statement did shock me.

[Attachment 2 at 252 (emphasis supplied)].

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

> When we first executed the [1990 PSA] with TU Electric . . ., we expected that the TU Electric rates would become final and that the special 120 day window for termination [of the 1963 Agreement] would come and go before we would be able to finish our alternative power supply arrangements. At that time, we thought it might be necessary to provide notice to terminate our existing all-requirements [1963 Agreement] and begin serving load under the new [1990 PSA] before we would be in a position to begin to serve load with alternative power supply resources. **However, we have been able to complete our power supply arrangements more quickly than we thought. . . . As a result, we now anticipate being able to terminate our [1963 Agreement] without having to serve any wholesale load temporarily under the new [1990 PSA].**
> * * *
>
> **We have . . . entered into a letter of intent with West Texas Utilities Company, and we anticipate completion and execution of a definitive contract within the next few weeks, to begin purchasing all of our wholesale power requirements from WTU as early as January, 1992.** (Emphasis supplied).

[Vol. IV, Tab K].

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

> TU Electric expects Cap Rock to fully comply with the 1963 and 1990 power supply agreements. To comply with those agreements, it will not be possible for you to

> purchase power elsewhere, including Cap Rock's proposed purchase from [WTU] . . . until the cancellation of the 1963 agreement and only then upon the expiration of the . . . notices provided for in the [1990 PSA] and compliance with all other terms of that contract.

[Vol. IV, Tab M].

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

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

[Attachment 11 (emphasis supplied)].

Another meeting between TU Electric and Cap Rock was then scheduled for November 19, 1991, but was cancelled at the last minute by Mr. Collier because, as TU Electric only learned during discovery in the Midland Litigation, Cap Rock had not yet completed its strategic planning for the litigation.

For example, by letter dated November 19, 1991, Steve Collier advised Gary Gibson of SPS that Cap Rock was scheduled to meet with TU Electric that afternoon "to discuss our disagreement and to attempt to identify a resolution." Mr. Collier further stated:

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

[Attachment 12]. However, the following day, November 20, 1991, Collier again wrote Mr. Gibson and informed him that:

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

[Attachment 13].

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

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

Subsequently, at the November 26, 1991 meeting of the Cap Rock Board of Directors, Steve Collier reported on his earlier discussions with TU Electric on October 22. The minutes of that Board meeting state that:

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

[Attachment 14].

Representatives of TU Electric and Cap Rock met again on December 12, 1991, but no resolution of the dispute was achieved. At that meeting, TU Electric informed Cap Rock that TU Electric would consider waiving the notification provisions of the 1990 PSA if Cap Rock was willing to make TU Electric and its customers whole, but Cap Rock declined to do so.

Therefore, consistent with the strategies developed by the Cap Rock management, lawyers and consultants on November 20, 1991 [Attachments 12 and 13] and discussed at the November 26, 1991 Cap Rock Board meeting [Attachment 14], Steve Collier, by letter dated December 19, 1991, notified Darrell Bevelhymer of TU Electric, among other things, of Cap Rock's termination of the 1963 Agreement "effective at 12:01 a.m. on February 1, 1992," and **demanded** that TU Electric sign a "wheeling agreement" to facilitate Cap Rock's proposed purchase of power from WTU. Steve Collier's letter also stated that:

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

(Vol. IV, Tab V).

On the next day, December 20, 1991, Cap Rock instituted the Midland Litigation asserting that the 1990 PSA is unenforceable, as

well as seeking mandatory injunctive relief requiring TU Electric to take action to permit Cap Rock to receive electric power from WTU.[27]

In addition to filing suit against TU Electric, Cap Rock implemented its planned strategy to "[k]eep [TU Electric's] name in the newspapers via PR campaign." [Attachment 14]. For example, Cap Rock announced the filing of the Midland Litigation in an article which appeared in the December 26, 1991 edition of the <u>Stanton Herald</u>. [Attachment 15]. Through various blatantly one-sided press releases, none of which even mentions the existence of the 1990 PSA but all of which tout the benefits of the non-existent WTU contract [<u>see</u> n. 25 <u>supra</u>], Cap Rock also informed the media of the commencement, on March 26, 1992, of the hearing on Cap Rock's request for a temporary injunction [Attachment 17 at 1-3].

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[27] Cap Rock's Original Petition instituting the Midland Litigation was filed at 9:55 a.m. on December 20, 1991. [Vol. IV, Tab W]. Also on December 20, 1991, at 2:39 p.m. prior to TU Electric's learning that Cap Rock's suit had been filed, TU Electric itself filed suit against Cap Rock in the 14th Judicial District Court in Dallas County, Texas for anticipatory repudiation and breach of contract, and seeking a declaratory judgment as to the meaning of the 1990 Power Supply Agreement. [Attachment 16]. After learning of the filing of Cap Rock's suit, TU Electric dismissed the Dallas County action against Cap Rock and, on January 13, 1992, filed a counterclaim against Cap Rock in the Midland Litigation seeking, among other things, a declaratory judgment that "the 1990 Power Supply Agreement becomes effective in accordance with its terms upon [Cap Rock's termination of the 1963 Agreement] and Cap Rock is required to purchase all of its power and energy requirements from TU Electric pursuant to the provisions of the 1990 Power Supply Agreement until such time as Cap Rock provides the requisite notice(s) to TU Electric as required by such Agreement." [Vol. IV, Tab Z].

Thus, at the time Cap Rock filed its March 1992 Comments with the Commission, it was well aware of TU Electric's counterclaim in the Midland Litigation and the specific nature of the declaratory relief being sought by TU Electric. However, that knowledge, characteristically, did not prevent Cap Rock from misleading the Commission, with a blatant falsehood, in its March 1992 Comments:

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

[March 1992 Comments at 4]. Of course, that is precisely what TU Electric had done in its counterclaim more than two months before the filing of Cap Rock's March 1992 Comments!

Numerous representatives of the local media were present throughout the injunction hearing.[28]

Similarly, in a newspaper article which appeared in the April 10, 1992 Midland Reporter-Telegram [Attachment 18], Cap Rock also announced the filing of its March 1992 Comments with this Commission.[29]

## V.

## THE WTU AND SPS "SUCCESS FEE" CONTRACTS ARE THE TRUE MOTIVATING FACTORS BEHIND CAP ROCK'S ATTEMPTS TO ABROGATE THE 1990 PSA

The Cap Rock management has vigorously attempted to convince its members, the general public, the Court and this Commission [Vol. IV, Tab Y; March 1992 Comments at 3, 13, 21] that the decision to contest the enforceability of the 1990 PSA was motivated solely by a desire to achieve a savings in power costs for the Cap Rock members.[30] However, another motivating factor is hardly that noble.

As TU Electric has only recently learned, both Steve Collier, Cap Rock's Director of Power Supply, and David Pruitt, Cap Rock's

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[28] On May 11, 1992, the Court denied Cap Rock's motion for a temporary injunction. TU Electric believes that it will ultimately prevail on the merits in the Midland Litigation and is currently seeking summary judgment relief from the Court. Copies of TU Electric's briefs will be furnished to the Commission when they are filed with the Court.

[29] Cap Rock's attempts to gain leverage over TU Electric were not, however, confined to the issuance of press releases and misleading statements to the press. In a obvious attempt to influence the general public and garner local support for its actions against TU Electric, Cap Rock also engaged in a massive letter writing campaign, which included letters to many individuals who are not even eligible to purchase electricity from Cap Rock. [Attachment 19].

[30] For example, a Cap Rock press release dated March 26, 1992 (the day before the hearing began on Cap Rock's request for injunctive relief) states that "Cap Rock Electric is seeking to stop [TU Electric] from interfering in the delivery of power to Cap Rock from [WTU]. * * * Cap Rock Electric can buy power for at least 20 percent less from WTU than it can from TU Electric. That savings will translate to about a 10 percent savings per year for Cap Rock Electric customers -- or about $3 million annually." [Attachment 17].

General Manager and Chief Executive Officer, knew that, if Cap Rock could avoid its obligation to purchase all of its requirements from TU Electric under the 1990 PSA, upon termination of the 1963 Agreement, and instead begin purchasing its power from WTU and SPS, Steve Collier and other members of the Cap Rock management team would be in a position to **immediately** garner significant, personal financial gain from a success fee contract tied to the WTU and SPS purchases.

On November 26, 1991, **two** "success fee" contracts (one for the proposed WTU contract and one for the SPS contract) were executed by David Pruitt and Russell Jones, Chairman of the Cap Rock Board. [Attachments 20, 21, 22 and 23]. Steve Collier executed the WTU and SPS success fee contracts on December 10, 1991 and December 11, 1991, respectively -- less than two weeks before filing the Midland Litigation on December 20, 1991. [Attachments 23 and 22].

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

> two percent (2%) of the net savings, where the net savings is defined as the amount by which WTU purchased power costs are less than the purchased power costs would have been had TU Electric remained the full-requirements power supplier. [Attachment 20 at 1].

The SPS success fee contract [Attachment 21] contains identical language, except that the "net savings" is the difference between the SPS and TU Electric purchased power costs.

Each of these success fee contracts provides that Steve Collier, as the "responsible individual," is to receive 50% of the success fees, with the remainder being apportioned among "other

management team members." At the injunction hearing, Steve Collier testified that, under the WTU success fee contract, he would have been able to supplement his salary by approximately $30,000 per year, representing an approximate 36% annual increase in his base salary. [Attachment 2 at 335-37]. Once the SPS success fee contract went into effect, Mr. Collier testified that the amount of the annual success fee he would receive would be approximately $40,000. [Attachment 2 at 336].

Significantly, the amount of the payments under the success fee contracts was to be based upon the net savings Cap Rock might achieve if it were able to purchase power from these alternate sources -- WTU or SPS -- as compared to purchasing full-requirements power from TU Electric under the 1990 PSA [Attachment 2 at 338-340, emphasis added], even though in both cases the rates for purchased power are regulated by the Federal Energy Regulatory Commission and set forth in a tariff filed by both WTU and SPS. It hardly takes a genius to purchase power from a regulated electric utility at the tariff rate! Therefore, Steve Collier and David Pruitt were to receive a fee for the successful abrogation of the 1990 PSA, not the successful negotiation of power supply arrangements with WTU and SPS.[31]

It is against this background of events that Cap Rock's March 1992 Comments requesting the institution of an antitrust review must be evaluated.

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[31] Cap Rock and Mr. Collier vigorously attempted to persuade TU Electric and the Court that no signed success fee agreements existed when, in fact, the existence of such signed contracts was known not only to Mr. Collier, but to Cap Rock's attorneys as well. These serious matters are the subject of TU Electric's pending Motion for Imposition of Sanctions in the Midland Litigation.

## ARGUMENT

## VI.

## NO BASIS EXISTS FOR A "SIGNIFICANT CHANGES" FINDING UNDER SECTION 105(c) OF THE ATOMIC ENERGY ACT

Congress did not intend for prospective nuclear plant licensees to undergo redundant antitrust reviews, one at the construction permit stage and one at the operating license stage. Houston Lighting & Power Co., CLI-77-13, 5 NRC 1303, 1316-17 (1977). This precept applies here with special force, for Comanche Peak has already undergone **two** antitrust reviews, including massive proceedings from 1978-80 in anticipation of its operating license.

As the Director made plain the last time Cap Rock raised the same arguments it now raises in its March 1992 Comments, under Section 105(c) of the Atomic Energy Act, operating license antitrust proceedings are appropriate only where there have been significant changes in the "activities under the license" which were not anticipated in the prior antitrust reviews, and which have "antitrust implications that would likely warrant some form of Commission remedy" beyond the existing license conditions. Reevaluation and Affirmation of No Significant Change Finding at 7; Texas Utilities Electric Company Notice of No Significant Changes. Accord South Carolina Electric & Gas Co. and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-80-28, 11 NRC 817, 835 (1980), CLI-81-13, 13 NRC 862, 871 (1981).

ap Rock's allegations totally fail to meet these criteria. Indeed, Cap Rock's March 1992 Comments merely resurrect the same contentions already addressed and rejected in the Director's previous "no significant changes" determination.

### A. Cap Rock Resurrects the Same Arguments Previously Rejected By the Director in His No Significant Change Determination.

#### 1. Cap Rock's Previous Comments Charged TU Electric With Violating Its Existing License Conditions.

When the Commission asked for antitrust comments in connection with the operating license for Comanche Peak Unit 1, Cap Rock's Comments provided precisely the same arguments it rehashes here now. In its Comments on August 9, 1988, Cap Rock, as it does again now, sought to circumvent the notice provisions in its full requirements 1963 Agreement with TU Electric. Specifically, Cap Rock complained that TU was unwilling to provide partial requirements or transmission service to Cap Rock until Cap Rock had complied with the notice of termination provisions in that contract. Cap Rock characterized this as a "direct violation" of the existing license conditions.[32] Cap Rock later reiterated these charges in asking the Director to reconsider his "No Significant Changes Findings," and accused TU Electric of "willful" violations.[33]

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[32] Comments of Cap Rock Electric Cooperative, Inc., Aug. 9, 1988 at 5, 24, Vol. I, Tab 36.

[33] Request of Cap Rock Electric Cooperative, Inc. for Reevaluation, July 26, 1989 at 1-2, Vol. III, Tab 54.

**2. The Director's Prior No Significant Change Determinations Hold That Operating License Review Proceedings Are Not A Proper Forum for Resolving Purported Disputes About Compliance With Existing License Conditions.**

The Director held, both in his initial "No Significant Change" finding and in his "Reevaluation and Affirmation of No Significant Change Finding," that Cap Rock's allegations did not warrant institution of operating license antitrust review proceedings. He stressed that under Section 105(c) of the Atomic Energy Act, operating license antitrust review is appropriate only where a complainant identifies significantly changed activities beyond the purview of the prior review and beyond the reach of any existing license conditions. Reevaluation and Affirmation of No Significant Change Finding at 4-6, 9-10; Notice of No Significant Antitrust Changes at 6 and accompanying Staff Analysis at 30-32.

Cap Rock alleged then (and alleges now) no such activities, but rather claimed that the existing license conditions were implicated. As the Director explained, even if accepted as true arguendo, Cap Rock's contentions could provide no justification for the institution of new antitrust review proceedings:

> If in fact the alleged "changed activities" represented new anticompetitive acts and practices, then the existing license conditions would not control or govern these activities. [Emphasis in original.]

Reevaluation and Affirmation of No Significant Change Finding at 5 [Vol. III, Tab 55].

Finding that "the central premise of Cap Rock's request is that TU Electric has not complied with its license conditions," the Director concluded that the issues raised by Cap Rock "are not

germane, i.e., they do not have a significant connection, to the antitrust operating license review process." Id. at 4, 10.

### 3. Cap Rock's Most Recent Comments Re-Allege the Same Purported Claims.

Cap Rock now raises precisely the same contentions all over again in its March 1992 Comments. The central premise of the March 1992 Comments, as stated on their second page, is precisely the same as before -- that TU Electric's insistence that Cap Rock comply with its contractual notice provisions "violates . . . [the existing] Comanche Peak license conditions."[34] March 1992 Comments at 2. The same analysis previously employed by the Director to reject these arguments applies squarely once again.

What is involved here is a contract dispute between TU Electric and Cap Rock, not any new type of activities or any new antitrust issues. Cap Rock implicitly admits this, when it charges TU Electric with violating the existing license conditions. Under these circumstances, even if Cap Rock's allegations were assumed meritorious arguendo -- and they are groundless -- Cap Rock would have alleged at most a potential enforcement matter involving the existing Comanche Peak license conditions. Under established law and the Director's prior rulings, no "significant changes" exist within the meaning of Section 105(c).

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[34] Indeed much of the March 25, 1992 filing is essentially cut and pasted from Cap Rock's prior rejected filings. For example, compare pages 10-35 of Cap Rock's March 1992 Comments with pages 8-32 of Cap Rock's August 9, 1988 Comments. See Vol. 1, Tab 36.

**B. The Current Contract Dispute Between TU Electric and Cap Rock Bears No Nexus to Any Activities Under License.**

Cap Rock's request for the institution of operating license antitrust proceedings is fatally deficient on another, independent ground. There is no "nexus" between Cap Rock's allegations and any licensed activities.

In order to trigger antitrust review proceedings under the Atomic Energy Act, "an intervenor must plead and prove a meaningful nexus between the activities under the nuclear license and the 'situations' alleged to be inconsistent with the antitrust laws." Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973) ("Waterford II"). Yet here, the only such "link" even hinted at by Cap Rock is that it seeks to avoid paying TU Electric's wholesale rate for power and energy "which includes the costs of Comanche Peak Unit Nos. 1 and 2." March 1992 Comments at 21. In Waterford II, the Commission specifically held that the mere fact that power from a nuclear plant is commingled with power from all of a utility's other generation does not authorize the Commission to review all of the utility's commercial practices. Waterford II, 6 AEC at 621. Thus, Cap Rock's assertions fail to meet the nexus requirement.

Nor can Cap Rock claim that a meaningful nexus exists merely because its claim relates to the existing Comanche Peak license conditions. This argument has already been flatly rejected. In Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), ALAB-665, 15 NRC 22 (1982) ("St. Lucie 2"), the Atomic Safety and Licensing Appeal Board held that a party seeking antitrust review must show

a meaningful nexus with activities under the license (i.e., with the actual operation of the nuclear plant), and not just with the license itself.

St. Lucie 2 involved a claim by a qualifying facility ("QF") that the St. Lucie Unit 2 License Conditions should be revised to require Florida Power & Light ("FPL") to wheel the QF's power. The petitioning QF argued that nexus existed by virtue of the fact that its claim was made pursuant to the license conditions. The Appeal Board rejected the QF's petition because it had not shown how the refusal of FPL to wheel its power was an "activity under the license" as required under Section 105(c). The Board concluded that:

> [T]he licensed activities must play some active role in creating or maintaining the anticompetitive situation. Put another way, the nuclear power plant must be an actor, an influence, on the anticompetitive scene. Wherever we have found the nexus requirement met, that fundamental linkage has existed.

St. Lucie 2, 15 NRC at 32 (emphasis supplied).

The argument that the QF made in St. Lucie 2 and the argument Cap Rock is making here are fundamentally the same: that the Commission should use the licensing of a nuclear plant as the occasion for inserting itself into a commercial dispute, despite the fact that the nuclear plant has no influence on that situation and the only tie between that situation and the plant is a claim based on the plant license conditions. As the Appeal Board stated in St. Lucie 2, this argument, and Cap Rock's position, "reads out the nexus requirement of Section 105c(5) in its entirety." Id. at 34.

**C. Cap Rock's Conclusory Allegations Regarding Tex-La and Rayburn Co-Ops Add Nothing and Show a Demonstrable Disregard for the Actual Facts.**

In its March 1992 Comments, Cap Rock purports to advise this Commission of the status of TU Electric's relationships with two other entities, each of which is totally unrelated to Cap Rock, viz., Tex-La Electric Cooperative, Inc. ("Tex-La") and Rayburn Country Electric Cooperative, Inc. ("Rayburn Country"). Cap Rock states that:

> [TU Electric] is also misleading the commission as to the status of its relationships with two other wholesale customers * * * Tex-La and * * * Rayburn Country. On February 5, 1992, [TU Electric] represented to this Commission that it was currently providing transmission and related scheduling services for Tex-La's and Rayburn Country's purchases of low cost hydroelectric power from the Denison Dam. * * * Those representations were true for less than two days.
>
> * * *
>
> [TU Electric] chose to conceal its actions from this Commission and to seek to have this Commission believe that it continued to transmit and to schedule Denison Dam power for Tex-La and Rayburn Country.

[March 1992 Comments at 5-6]. Not only are Cap Rock's statements completely false,[35] Cap Rock appoints itself both judge and jury of the law and facts surrounding the interpretation of certain provisions of TU Electric's Scheduling Agreements with Tex-La and Rayburn Country.[36]

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[35] Although TU Electric has notified Tex-La and Rayburn Country that TU Electric's obligations under the Scheduling Agreement have automatically terminated in accordance with the terms thereof, service by TU Electric under each of such Scheduling Agreements has nevertheless continued and is continuing on the date of this Response, without interruption.

[36] For example, Cap Rock asserts that:

> This notice [of TU Electric's termination of the Scheduling Agreements with Tex-La and Rayburn Country] was given without prior notice of the purported breaches and without affording Tex-La

(continued...)

In short, Cap Rock's conclusory allegations regarding TU Electric's relationships with Tex-La and Rayburn Country (who can "speak for themselves" if they so choose) -- add nothing and show a demonstrable disregard for the actual facts. As with the remainder of the statements in Cap Rock's March 1992 Comments, Cap Rock's gratuitous comments concerning Tex-La and Rayburn Country are inserted for the sole purpose of intentionally misleading this Commission in an effort to force TU Electric to accede to Cap Rock's demand for termination of the 1990 PSA without Cap Rock's first complying with the advance notice requirements of that Agreement.

## VII.

## THE LICENSE CONDITIONS DO NOT RELIEVE CAP ROCK OF ITS OBLIGATION TO COMPLY WITH AGREED-UPON CONTRACTUAL NOTICE PROVISIONS

The license conditions do not require TU Electric to cancel, change, or otherwise amend its full requirements contracts simply because the other party no longer wishes to abide by the agreed-upon terms of those contracts. Nonetheless, Cap Rock evidently seeks to have the Commission intervene in its contractual

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[36](...continued)
and Rayburn Country opportunities to cure the purported breaches. [March 1992 Comments at 5].

* * * Tex-La maintains that [TU Electric's] termination is ineffective because no breach of which Tex-La is aware occurred and, if a breach did occur, [TU Electric] did not give Tex-La the 90-day notice and opportunity to cure that is required by the Scheduling Agreement [March 1992 Comments, n. 12].

Cap Rock's "adjudication" of the propriety of TU Electric's "termination" of the Scheduling Agreement with Tex-La is particularly fascinating in view of the fact that on Friday, June 19, 1992, the state district court in Dallas County, Texas, in which Tex-La's suit for declaratory judgment is pending, denied the motions of both Tex-La and TU Electric for summary judgment on that very issue.

relationship with TU Electric, and do just that, by annulling the notice provisions of the 1990 PSA.[37] A review of the license conditions themselves, however, shows that it is Cap Rock's position that does violence to their terms.

Though Cap Rock repeatedly accuses TU Electric of violating the license conditions, it tellingly glosses over them in only a page and a half in its Comments. In so doing Cap Rock neglects to mention that the license conditions expressly contemplate that reasonable notice provisions will be included in TU Electric's contracts. Indeed, Cap Rock conveniently deletes from its quotation of the license conditions the very language that deals with advance notice.

Cap Rock relies on Paragraph 3.0.(2)(i) of the license conditions. That Paragraph is set forth in pertinent part below:

> The Applicants shall participate in and facilitate the exchange of bulk power by transmission over the Applicants' transmission facilities between or among two or more Entities in the North Texas Area with which the Applicants are connected, and between any such Entity(ies) and any Entity(ies) outside the North Texas Area between those facilities the Applicants' transmission lines and other transmission lines, including any direct current (asynchronous) transmission lines, form a continuous electrical path; provided, that (i) permission to utilize such other transmission lines has been requested by the proponent of the arrangement, (ii) the arrangements reasonably can be accommodated from a functional and technical standpoint, <u>and (iii) any Entity(ies) requesting such transmission arrangements shall have given Applicants reasonable advance notice of its (their) schedule and requirements</u> . . . . [Emphasis supplied.]

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[37]While Cap Rock states that it does not ask the Commission to "adjudicate the merits" of its contractual dispute with TU Electric, Cap Rock apparently wants the Commission to issue an order on the premise that its position is meritorious -- a result recently rejected by the state court in Midland, Texas, in denying Cap Rock's motion for a temporary injunction.

Similar provisions regarding advance notice appear in Paragraph 3.D.(2)(k) regarding the provision of partial requirements service.

In affirming the right of a utility to rely on such notice provisions, the license conditions are consistent with the general practice in the industry. It has long been recognized that notice of termination provisions are an integral and necessary element of full requirements contracts for power supply. For example in Kentucky Utilities Co., 23 F.E.R.C. ¶ 61,317 (1983), the Federal Energy Regulatory Commission, in a decision upholding 3-5 year notice provisions in a full requirements contract, elaborated on the reasons why such provisions are legitimate and necessary:

> One of the basic purposes of a notice provision is to enable utilities properly to plan their systems. Proper system planning requires utilities like Kentucky to commit to building necessary facilities well in advance of the time generating units are needed to meet customers' loads. In making their plans as to what type and size generating units to build, where to build them, and, most importantly, when to build them, utilities must rely on projections of load growth and future requirements. These projections have to be as accurate as possible. The consequences of error are too great for them not to be. The system may well be either less reliable than it should be or produce electricity at a higher cost than it could.
>
> Hence it is of vital importance to utilities to know who their customers will be and how much electricity they will need to provide. Notice of cancellation provisions aid utilities in their planning by giving them advance notice of decreases in the loads they will have to serve. Because of the importance of proper system planning to the efficient and reliable design and operation of electrical power systems, utilities should have adequate notice of decreases in their customers' requirements.
>
> What constitutes adequate notice varies, of course, with the circumstances. But at least as a starting point, an acceptable measure for an adequate notice period is certainly that it should roughly approximate the period between the time the utility makes major commitments of

> capital to building generating units to serve its customers' future requirements and the time the generating unit is completed.

Id. at 61,668 (footnotes omitted) (emphasis supplied).[38] To the same effect, see Arizona Public Service Co., 18 F.E.R.C. ¶ 61,197 (1982) (upholding seven year notice of termination provision as just and reasonable); Gulf States Utilities Co., 5 F.E.R.C. ¶ 61,066, at 61,098-99 (1978).

As noted earlier, there is no question here as to whether Cap Rock qualifies as an "Entity" under the license conditions. Nor is there any question whether TU Electric will provide wheeling service for Cap Rock when Cap Rock fulfills the notice requirements it agreed to in the 1990 PSA. This TU Electric has repeatedly committed it will do.

In short, there is absolutely no legitimate issue as to whether TU Electric is complying with its license conditions. It has complied with them, and it will continue to honor them fully in the future. The only real question raised by this dispute is whether Cap Rock will live up to its contractual commitments in the 1990 PSA. Nothing in the license conditions or the law requires TU to relinquish the right to insist that Cap Rock do so.

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[38] In Kentucky Utilities Co. v. FERC, 766 F.2d 239, 250 (6th Cir. 1985), the Sixth Circuit remanded, finding no rational basis for smaller utilities to be allowed to terminate on three years' notice rather than five. On remand, FERC extended the five-year notice provision "across the board" to all full requirements customers. Kentucky Utilities Co., 37 F.E.R.C. ¶ 61,299 (1986).

## VIII.

### THE ANTITRUST LAWS DO NOT IMPOSE A DUTY ON UTILITIES -- EVEN THOSE WITH MONOPOLY POWER -- TO SURRENDER LEGITIMATE CONTRACT RIGHTS IN ORDER TO BENEFIT A COMPETITOR

Cap Rock contends that by opposing Cap Rock's litigation efforts to void the 1990 PSA as unenforceable, TU Electric has engaged in "self help". March 1992 Comments at 3. The logical vacuity of this argument is so apparent as to suggest that it was advanced tongue-in-cheek. It is Cap Rock, not TU Electric, that has initiated action to disown its contractual commitments. Cap Rock's argument boils down to the extraordinary notion that as soon as it challenged the enforceability of the 1990 PSA, TU Electric should have relinquished its full requirements contract rights and then gone to court to seek declaratory relief. This would require TU Electric to relinquish its contract rights the minute anybody raises a challenge to them. Cap Rock cites no authority for this proposition, and the law gives no such encouragement to contract violators.

Moreover, Cap Rock's argument displays a fundamental misunderstanding of the applicable antitrust principles. As recognized in a number of recent decisions, none of which Cap Rock mentions, the antitrust laws do not require a utility -- even one controlling essential facilities -- to surrender its requirements contracts in order to benefit a customer.

These decisions make it clear that even the owner of an essential facility is permitted to enter into lawful requirements contracts, and has no general duty "to abandon its contractual

rights at the behest of customers who are no longer happy with their bargain." E.g., Illinois v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1484 (7th Cir. 1991), cert. denied, 112 S. Ct. 1169 (1992).

In Panhandle, the Seventh Circuit held that the defendant natural gas pipeline's refusal to transport gas for local distribution company customers ("G tariff customers") who were contractually obligated to buy all of their gas from the defendant did not violate section 2 of the Sherman Act. After the FERC issued Order 436 permitting pipelines to transport gas purchased from other sources on a nondiscriminatory basis, Panhandle nonetheless refused to transport gas for its full requirements customers. The state of Illinois brought suit on behalf of these customers.

The court rejected plaintiff's monopolization and essential facilities claims, finding those claims meritless even assuming the defendant possessed essential facilities:

> What the state labels "monopolization" was nothing more than the enforcement of legitimate contracts designed to allocate risk between Panhandle and its customers; what the state asks us to do is reallocate those risks. We decline the invitation. Panhandle had incurred obligations itself in reliance on the G tariff [i.e., its full requirements contracts] and to satisfy its regulatory obligations to anticipate and meet future customer demand. [Panhandle's G tariff customers] were, in turn, obligated to buy their full requirements for gas from Panhandle. We do not believe that it was "anticompetitive" for Panhandle to hold them to that deal.

Id. at 1483-84 (emphasis supplied) (citations omitted). TU Electric is asking no more of Cap Rock than Panhandle asked of its

G tariff customers, namely to abide by the terms of a freely negotiated contract.

Similarly, in City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir. 1992), the Tenth Circuit rejected a claim by full requirements customers of Williams (a natural gas pipeline) that Williams' refusal to transport gas for them violated section 2 of the Sherman Act. Williams had agreed temporarily to transport gas for its all-requirements customers, but subsequently cancelled that program. The court found that Williams' desire to avoid liability under take-or-pay gas supply contracts it had entered into in anticipation of serving its requirements customers, coupled with its desire to avoid losing the business of its requirements customers, constituted a legitimate business justification for its actions.[39]

TU Electric must be able to rely on the contractual commitments of its requirements customers in its planning process. If TU Electric's wholesale customers were free to abandon their contractual obligations and could come and go at their whim, TU Electric's other customers would have to pay higher rates to cover the fixed costs of the capacity left stranded by the exiting wholesale customers. The Ninth Circuit has recently held in two separate cases that electric utilities are not required to provide firm transmission access to their wholesale customers if doing so would raise the utility's costs and hence the rates for the

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[39] Id. at 656. The court also held that Williams' supply of gas at FERC-approved rates provided the plaintiffs with "reasonable access to the pipeline." Id. at 649. This aspect of the decision is discussed below in the following section of this response.

utility's other customers. See City of Anaheim v. Southern California Edison Co., 955 F.2d 1373, 1381 (9th Cir. 1992) (it is a legitimate business justification to avoid imposing higher rates on existing customers); City of Vernon v. Southern California Edison Co., 955 F.2d 1361, 1367 (9th Cir. 1992) ("[T]he demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head.").

Cap Rock's reliance on United States v. Otter Tail Power Co., 331 F. Supp. 54 (D.Minn. 1971), aff'd, 410 U.S. 366 (1973) is misplaced. In Otter Tail, the defendant utility refused to either wheel or sell electricity to towns which sought to form their own municipal electric systems. As the district court stated in Panhandle (in language quoted in part in the court of appeals decision):

> Otter Tail may stand for the proposition that a utility cannot refuse to transport power it does not supply to a former long-term customer, but it does not stand for the proposition that a utility must renegotiate extant long-term service agreements to enable a customer to supplant the utility as its sole supplier.

Illinois v. Panhandle Eastern Pipe Line Co., 730 F.Supp. 826, 909 (C.D.Ill. 1990) (emphasis in original).

It is beyond dispute that TU Electric has a legitimate need for the reasonable advance notice reflected in its full requirements 1963 Agreement and in the 1990 PSA.[40] As the above

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[40] There can be no question that Cap Rock recognizes the legitimacy of such notice provisions. Indeed, both Cap Rock's purported full requirements power supply contract with WTU [Attachment F to March 1992 Comments] and its full requirements agreement with SPS [Attachment 7 hereto] provide for **five years' advance notice of termination** -- at least two years' more notice than Cap Rock is required to give TU Electric during the first five years of the 1990 PSA.

cases amply confirm, the antitrust laws clearly permit TU Electric to enforce its contractual notice requirements and certainly give Cap Rock no license to renege on them.

## IX.

## CAP ROCK'S OWN COMMENTS DEMONSTRATE THAT TU ELECTRIC'S TRANSMISSION SYSTEM IS NOT AN ESSENTIAL FACILITY

The discussion above shows that Cap Rock's antitrust arguments lack substance even assuming arguendo that TU Electric's facilities met the criteria for application of the so-called "essential facilities doctrine." Notably, Cap Rock, in its Comments, presupposes that TU possesses an essential facility without engaging in any analysis. The reason Cap Rock dodges such an analysis is not hard to discern. Cap Rock's own submissions demonstrate that TU Electric's transmission system is not an essential facility.

As Cap Rock correctly points out at page 29 of its March 1992 Comments, a party seeking to invoke the essential facilities doctrine must show, inter alia, that it could not practically or reasonably duplicate the facilities in question. MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir.), cert. denied, 464 U.S. 891 (1983). It is insufficient for a party to demonstrate that alternatives to the allegedly "essential" facility are inconvenient or involve some economic loss; "he must show that an alternative to the facility is not feasible." Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990).

Cap Rock's own submission shows just the opposite. According to Cap Rock, it has already executed an agreement with SPS whereby in one year SPS will construct the necessary transmission facilities to interconnect the SPS and Cap Rock systems directly while simultaneously disconnecting from TU Electric -- thus effectively duplicating the "essential" TU Electric transmission system.[41]

The decision of the Eighth Circuit in City of Malden v. Union Electric Co., 887 F.2d 157 (8th Cir. 1989) is particularly instructive. That case involved a claim by a wholesale customer that its utility power supplier violated the antitrust laws by refusing to wheel power from third-parties. In rejecting the plaintiff city's claim, the Eighth Circuit affirmed the district court's finding that the plaintiff city "could have economically provided for an alternative transmission system to convey electrical power." Id. at 161. Just as in the instant case, the plaintiff city had arranged for another utility to build an alternative transmission interconnection which would enable it to bypass the defendant utility's system.[42] It is disingenuous for Cap Rock to argue that TU Electric's transmission cannot be duplicated, while simultaneously arguing in Texas state court that it should be let out of its responsibility to purchase all of its

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[41]March 1992 Comments at 13. See Panhandle, 730 F.Supp. at 928 ("Duplication of the entire [Panhandle] system was not necessary because interconnects with adjacent pipelines could provide the benefits of Panhandle's system.")

[42]See also Panhandle, 935 F.2d at 1482 (Illinois' essential facilities argument fails, in part, because "it would have been economically feasible for competitors to duplicate much of Panhandle's system within central Illinois by means of interconnections between competing pipelines and the construction of new pipelines.")

electric requirements from TU Electric so that next year it can interconnect directly with SPS and bypass the TU Electric transmission system entirely.

The 1990 PSA provides for a reasonable and fair mechanism for Cap Rock's transition from its current status as a full requirements wholesale customer of TU Electric to a wholesale customer of other utilities. Under the 1990 PSA, Cap Rock has the opportunity to remove its load from the TU Electric system (with reasonable notice to TU Electric), as well as the opportunity to purchase partial requirements power from TU Electric if it so chooses. In the interim, TU Electric will supply Cap Rock with its electric requirements at regulated cost and wholesale rates.

The courts in both City of Chanute and City of Anaheim held that the facilities in question were not essential facilities because the plaintiff cities essentially had reasonable access to those facilities as a result of their existing power supply arrangements. City of Chanute, 955 F.2d at 649; City of Anaheim, 955 F.2d at 1380-81. For example, in City of Chanute, the Tenth Circuit ruled that, as a matter of law, the cities' supply of gas from Williams at FERC-approved prices provided them with reasonable access to the pipelines. Both courts held that the mere fact that the type of access requested by the plaintiff cities would have been less expensive was not enough to make the facilities in question essential.

In short, under a consistent series of recent antitrust decisions, Cap Rock cannot now attempt, under the guise of

Commission antitrust review, to sidestep the terms of a contract it freely entered in 1990 simply because it might be able to obtain less expensive power elsewhere.

## CONCLUSION

## X.

The only specific "relief" requested by Cap Rock in its March 1992 Comments is "an unequivocal determination by this Commission that TUEC is obligated by its antitrust license conditions to wheel for Cap Rock and other similarly situated entities." [March 1992 Comments at 7.] But there is no question that TU Electric is bound by its license conditions. TU Electric has and will continue to abide by all of the Comanche Peak license conditions. Indeed, TU Electric made a contractual arrangement with Cap Rock to wheel electric power and energy in a manner and under circumstances which went well beyond the requirements of the license conditions. As the Director's prior determinations in this matter recognized, TU Electric also currently provides substantial wheeling service for entities similarly situated to Cap Rock.[43]

There can be no question that TU Electric is entitled to reasonable advance notice of reductions in electric service to Cap Rock under the 1990 PSA. The license conditions do not remotely suggest that the Commission intended such conditions to interfere with the notice provisions in valid full requirements contracts --

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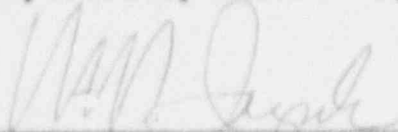
[43] _E.g._, _Reevaluation and Affirmation of No Significant Change Finding_ at 9 [Vol. III, Tab 55]; _Texas Utilities Electric Company Notice of No Significant Changes Finding_, June 30, 1989 at 3-4 [Vol. II, Tab 51].

in fact, as demonstrated above, the license conditions explicitly acknowledge that such notice is appropriate.

In summary, this dispute is not about whether TU Electric is in compliance with its license conditions. This dispute is strictly a contractual issue, involving Cap Rock's efforts to annul the reasonable notice provisions of the 1990 PSA -- an issue currently under consideration by a state district court in Midland County, Texas. Hence, the institution of proceedings by this Commission would not only be legally groundless under Section 105(c), but also pointless. If and when Cap Rock is not obligated to purchase all of its power and energy requirements from TU Electric and TU Electric refuses to comply with its license conditions, Cap Rock then has a remedy under the Atomic Energy Act to require such compliance.

For all of the foregoing reasons, Cap Rock's request for the institution of operating license antitrust review proceedings should be denied.

Respectfully submitted,



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ATTORNEYS FOR
TEXAS UTILITIES ELECTRIC COMPANY

DATED: June 30, 1992

ATTACHMENTS TO

RESPONSE OF TU ELECTRIC TO
COMMENTS OF
CAP ROCK ELECTRIC COOPERATIVE, INC.

| Description | Attachment No. |
|---|---|
| Letter dated April __, 1992, from M. D. Sampels to Joseph Rutberg, together with the "Documented Summary of Events" attached thereto. [The four-volume set of documents is being submitted separately.] | 1 |
| Excerpts from transcript of the April 14-15, 1992 injunction hearing in the Midland Litigation | 2 |
| Excerpts from Deposition of David L. Teeter in the Midland Litigation | 3 |
| Internal SPS memo dated June 21, 1990, from Dave Krupnick to Gary Gibson | 4 |
| Excerpts from the Deposition of David Andrew Krupnick in the Midland Litigation | 5 |
| David Krupnick's notes of meeting between SPS and Cap Rock on October 19, 1990 | 6 |
| "Southwestern Public Service Company Agreement for Wholesale Full Requirements Electric Power Service to Cap Rock Electric Cooperative, Inc.," dated July 3, 1991 | 7 |
| Letter dated July 15, 1991, from Steve Collier to David Pruitt re: Power Supply and Regulatory Report | 8 |
| Letter dated June 19, 1991, from Steve Collier to David Pruitt re: Power Supply and Regulatory Report | 9 |
| Letter dated June 12, 1991, from Steve Collier to Don Welch of WTU re: Anticipated Power Supply Arrangements | 10 |
| Internal Cap Rock memo, dated November 6, 1991, from David Pruitt to All Directors, et al | 11 |

Letter dated November 19, 1991, from Steve Collier to Gary Gibson of SPS re: Update on Dealings with TU Electric 12

Letter dated November 20, 1991, from Steve Collier to Gary Gibson of SPS 13

Minutes of Meeting of Cap Rock Board of Directors held on November 26, 1991 14

Article appearing in December 26, 1991 edition of the Stanton Herald, entitled "Co-op files against Giant" 15

Original Petition filed by TU Electric against Cap Rock in the 14th Judicial District of Dallas County, Texas on December 20, 1991 16

Cap Rock Press Releases dated March 26, 1992 17

Article appearing in April 10, 1992 edition of the Midland Reporter-Telegram, entitled "Cap Rock files antitrust complaint against TU" 18

Excerpts from the Deposition of David Pruitt in the Midland Litigation 19

"Success Fee Contract" between Cap Rock and Steve Collier relative to the "West Texas Utilities Company Contract 20

"Success Fee Contract" between Cap Rock and Steve Collier relative to the "Southwestern Public Service Company Contract" 21

Fully executed signature page of November 26, 1991 "Success Fee Contract" between Cap Rock and Steve Collier relative to the "Southwestern Public Service Company Contract" 22

Fully executed signature page of November 26, 1992 "Success Fee Contract" between Cap Rock and Steve Collier relative to the "West Texas Utilities Company Contract" 23

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April 21, 1992

Mr. Joseph Rutberg
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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 further reference to our January meeting in Washington regarding the January 6, 1992 letter from Cap Rock's counsel to Mr. Thomas E. Murley, Director, Office of Nuclear Reactor Regulation.[1] Rather than summarize the many misleading and incorrect claims in Mr. Adragna's letter, I am furnishing you a documented summary of TU Electric's dealings with Cap Rock from 1987 (when the dispute between Cap Rock and TU Electric first developed) to the present date. This summary demonstrates that there is no merit whatever to any of Cap Rock's claims and is yet

[1]On March 25, 1992, Cap Rock also filed Comments in the NRC's pending antitrust operating license review with respect to Unit No. 2 of TU Electric's Comanche Peak Steam Electric Station. TU Electric intends to file a formal response to Cap Rock's Comments after the issuance by the District Court of Midland County, Texas of an order on 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.

another illustration of Cap Rock's effort to attempt to use the NRC to "leverage" TU Electric to obtain concessions elsewhere. It is noteworthy that what Cap Rock now seeks is the abrogation of its 1990 Power Supply Agreement (the "1990 PSA") with TU Electric. That Agreement was negotiated over the course of several months following settlement conferences with the NRC Staff on January 11 and January 25, 1990, and formed the basis for Cap Rock's withdrawal of its request for enforcement.[2]

The central dispute between Cap Rock and TU Electric is the same today as it was in 1987; i.e., Cap Rock's insistence that it is entitled to purchase power from other sources at a time when it has an all-requirements contract with TU Electric. TU Electric has no objection to Cap Rock purchasing power from alternative sources. It does object to Cap Rock ignoring its contractual obligations to TU Electric.

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[2]By letter dated June 28, 1990, Cap Rock's counsel furnished the NRC with a copy of the 1990 PSA and moved to withdraw Cap Rock's request for enforcement, indicating, among other things, that

> The [1990] PSA . . . constitutes a settlement of the outstanding disputes between [Cap Rock] . . . and [TU Electric] . . ., including those differences that gave rise to the request for enforcement of the antitrust license conditions . . . filed with your office by Cap Rock on May 12, 1989.
>
> The [1990] PSA provides a means by which Cap Rock will be able to engage in an orderly transition from its current status as a full requirements customer of TU Electric, to a partial requirements customer of TU Electric and, ultimately, to a separate and independent electric utility. Cap Rock's transition, ultimately to independent status, will obviously be a complicated, multi-step process that will not occur overnight. Consequently, the [1990] PSA contemplates that many of the services that Cap Rock and TU Electric have agreed will be provided in the future will be provided pursuant to separate agreements, negotiated pursuant to the PSA.

See Vol. IV, Tab 9' of the accompanying materials.

TU Electric believed it had finally solved all of its problems with Cap Rock following execution of the 1990 PSA, which was to become effective upon Cap Rock's cancellation of its 1963 all-requirements contract. Although Cap Rock terminated the 1963 contract, effective February 1, 1992, it now claims that the 1990 PSA (which requires Cap Rock to give three years' notice ((two years in some instances)) before reducing load on TU Electric by purchasing power from other sources) is not binding upon Cap Rock. Cap Rock claims it is now free to shop elsewhere for its power without giving TU Electric any notice. This is completely contrary to the 1990 PSA.

This is all the more frustrating to TU Electric since Cap Rock not only insisted that TU Electric be bound to an all-requirements contract with Cap Rock for a period of 10 years, it also insisted that the 1990 PSA be negotiated before it terminated its 1963 all-requirements contract. Cap Rock asked that TU Electric make its decision to terminate the 1963 Agreement easier by providing the basis for various services (including wheeling and scheduling services) to provide for Cap Rock's transition from a full to a partial requirements customer. TU Electric agreed to do so. At no time was it contemplated that Cap Rock would be relieved of the requirement to provide TU Electric the two - three years' notice of its intent to reduce service from TU Electric.

The documents underlying the 1990 PSA make this absolutely clear. The representatives of TU Electric and Cap Rock on May 15, 1990, concluded negotiation of detailed "Principles of Agreement." These Principles of Agreement were submitted by TU Electric to the NRC. The <u>first principle</u> of the Principles of Agreement requires Cap Rock to provide appropriate written advance notice of its election to terminate or reduce service from TU Electric.[3]

The 1990 PSA incorporates these principles.[4] It provides that

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[3]See Vol. III, Tab 76 of the accompanying materials.

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

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

(continued...)

Cap Rock may purchase power elsewhere after giving TU Electric three years' notice (except under certain circumstances in which only two years' notice is required).[5] Despite having agreed to these modest notice provisions, Cap Rock has informed TU Electric that it has verbally agreed upon a full requirements contract with West Texas Utilities Company and is demanding that TU Electric immediately wheel power to Cap Rock from WTU -- a request which is not only contrary to the provisions of the 1990 PSA but would constitute the complete abrogation of that contract. TU Electric informed Cap Rock that its request was inconsistent with the 1990 PSA. Cap Rock then sued TU Electric in state court in Midland, Texas, seeking, among other things, to void the 1990 PSA on the ground that it was never enforceable. Cap Rock also requested the Court to issue a temporary mandatory injunction requiring TU Electric to facilitate Cap Rock's proposed purchase of power and energy from WTU.[6]

TU Electric believes that the 1990 PSA is a valid and binding contract. The position now taken by Cap Rock is not only directly contrary to the express provisions of the 1990 PSA but also to numerous admissions made by Cap Rock contemporaneously with, and for over a year after, the execution of that Agreement.

For example, on June 11, 1990, three days after Cap Rock and TU Electric executed the 1990 Power Supply Agreement, Steve Collier, Cap Rock's Director of Power Supply and Regulatory Affairs and the individual who verified Cap Rock's Original Petition in the

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[4](...continued)
**evaluated or achieved.** (Emphasis added.)

<u>See</u> Vol. III, Tab 74 of the accompanying material. The 1990 PSA is this "foundation" and "key piece to the puzzle" that Cap Rock now repudiates and would have the Court declare to be void and unenforceable.

[5]TU Electric offered to waive the notification provisions and terminate the 1990 PSA early to permit WTU to supply all of Cap Rock's needs if Cap Rock would make TU Electric whole with respect to the amount of power purchase obligations incurred by TU Electric to fulfill the 1990 PSA, but Cap Rock declined.

[6]Hearings on Cap Rock's request for a temporary injunction were held before the Court on March 26 - 27 and April 14 - 15, 1992. Testimony has now been concluded, with Cap Rock's post-hearing brief being due on April 23, 1992, and TU Electric's reply brief being due on April 29.

Midland suit, reported to David Pruitt, Cap Rock's Chief Executive Officer and General Manager as follows:

> THE GOOD NEWS IS THAT WE HAVE NEGOTIATED A DEFINITIVE POWER SUPPLY AGREEMENT! * * * (Emphasis in original).

Mr. Collier further reported that:

> I believe that the enclosed agreement represents a workable power supply agreement. While it is not the perfect agreement that we would write unilaterally, it does give us a reasonable opportunity to implement power supply alternatives. Interestingly, the definitive power supply agreement provides us with capabilities and benefits that go beyond the more constraining definitions in our initial settlement in principle. Even so, the power supply agreement term, notice requirements, and other constraints will pose significant limits as we attempt to develop our power supply alternatives. I will look forward to presenting the benefits and difficulties[7] of this agreement to the * * * [Board] sometime next week.

Cap Rock also publicly acknowledged and touted the benefits of the 1990 PSA in various press releases written by Steve Collier.[8] For example, in a press release issued on July 15, 1990,[9] Collier states:

> [Cap Rock] has reached a **landmark** agreement with its current sole power supplier, [TU Electric]. Under this exceptional new agreement, [Cap Rock]

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[7]In recommending approval by the Cap Rock Board of the 1990 PSA, Mr. Collier, Cap Rock's Bulk Power Manager and chief negotiator of the 1990 PSA, specifically recognized that one of the disadvantages of the 1990 PSA was the three-year notice provision. See Vol. IV, Tab 95 of the accompanying material.

[8]Steve Collier of Cap Rock also corresponded with various other electric cooperative wholesale customers of TU Electric, including Hunt-Collin Electric Cooperative, Inc., lauding the benefits of the 1990 PSA and recommending that such cooperatives seek similar agreements. See, e.g., Vol. IV, Tab J of the accompanying material.

[9]See Vol. IV, Tab A of the accompanying materials.

> will be able to seek power from alternative suppliers that could "save Cap Rock Electric's consumers millions of dollars over the next decade." (Emphasis supplied.)
>
> The new power supply arrangement is a breakthrough for the consumer-owned utility which currently must purchase all of its power requirements from TU Electric . . .
>
> TU Electric . . . has agreed to allow Cap Rock Electric to purchase power from other suppliers, and to transport that power over TU Electric lines . . . TU Electric has also agreed to sell supplemental power and other coordinating services as necessary to allow Cap Rock Electric to take advantage of this remarkable opportunity . .
>
> Under the new power supply agreement, TU Electric will, at Cap Rock Electric's choice, either schedule and deliver alternate power supplies, or provide regulating service to enable Cap Rock Electric to become a control area and schedule its own power supplies. . . Only one other distribution cooperative, located in Alaska, is currently a control area, [Collier] noted.
>
> Cap Rock Electric can continue to purchase the balance of its power supply requirements from TU Electric. "This will be a ten-year contract, and it can be extended beyond that if both companies agree," [Collier] reported.

Significantly, this press release, which was issued on July 15, 1990, directly contradicts Cap Rock's current claim that it never intended to be a full requirements customer of TU Electric after termination of the 1963 Agreement, except at its option, when it states:

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

On July 24, 1990, TU Electric furnished to the NRC, at its request, a copy of a summary of the major differences between the initial settlement proposals of Cap Rock and TU Electric and the

ultimate resolution of those differences, as incorporated in the 1990 PSA (Vol. IV, Tab B of the accompanying materials). With respect to the issue of notice, this summary indicates:

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

These documents, as well as others, are included in the attached binders.

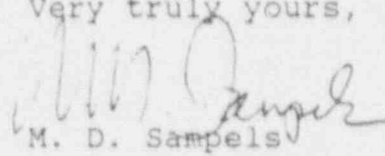
TU Electric intends to vigorously defend its position. It believes that it must be able to rely on the commitments of its wholesale customers. TU Electric has more than 50 such customers, who together purchase over 1200 MW annually. If TU Electric were to create a situation which would allow these customers to come and go at their whim, leaving in place, but unused, the capacity which TU Electric had allocated or acquired to serve their requirements, TU Electric's planning process would be put in a state of disarray and its remaining customers made to pay the bill.

I apologize for the volume of the attached information but wanted you to have the whole story in a usable form. After you have had the opportunity to review this material, we would again like to visit with you to answer any questions you may have.

As indicated, we will soon file a formal reply to the Comments recently filed by Cap Rock in the Commission's antitrust operating

license review with respect to Unit No. 2 of Comanche Peak Steam Electric Station.

Very truly yours,



M. D. Sampels

MDS/mkm

Enclosures

cc: Mr. Wm. M. Lambe

TU ELECTRIC/CAP ROCK ELECTRIC COOPERATIVE, INC.

## DOCUMENTED SUMMARY OF EVENTS[1]

### Events Leading up to the Execution by Cap Rock and TU Electric of the 1990 Power Supply Agreement

In February 1987,[2] Cap Rock Electric Cooperative, Inc. (Cap Rock), then a full requirements wholesale customer of TU Electric pursuant to a 1963 agreement for the purchase of power (the 1963 Agreement),[3] contacted TU Electric requesting information relating to the wheeling of power and energy from cogeneration facilities in the Dallas and Stanton, Texas, areas. TU Electric responded in March 1987,[4] describing the need for additional information and pointing out that the 1963 Agreement did not permit the transaction Cap Rock was considering. A draft agreement was forwarded as a possible framework for a successor agreement. A copy of the appropriate wheeling tariff was also supplied and certain technical issues were discussed with possible solutions noted.

In April 1987,[5] a meeting was held between representatives of TU Electric and Cap Rock to further discuss facilitating wheeling of the cogeneration supply. At that time Cap Rock noted that such supply was being proposed by Panda Energy Corporation (Panda). TU

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[1]Footnote document references are to documents contained in the attached binders.

[2]Vol. I, Tab 6.

[3]Vol. I, Tab 1.

[4]Vol. I, Tab 8.

[5]Vol. I, Tab 9.

Electric again pointed out that the 1963 Agreement would have to be terminated in accordance with its terms before electric service could be taken from Panda.

In May 1987,[6] Cap Rock indicated in a conversation with TU Electric that it was in the process of "crunching" some more numbers on the cogeneration options and would probably be coming back in the near future to discuss wheeling. TU Electric also learned at that time that the Cap Rock General Manager had resigned.

On October 29, 1987,[7] David Pruitt, Cap Rock's new General Manager, by letter to Jerry Farrington, Chairman and Chief Executive of Texas Utilities Company, noted that Cap Rock had only recently entered into a letter agreement with a cogenerator utilizing a Dallas area host (which TU Electric later learned was Panda's Rock-Tenn facility).[8] Mr. Pruitt also indicated that Cap Rock in the near future would formally give notice of termination of the 1963 Agreement.

On November 4, 1987,[9] TU Electric wrote Cap Rock, expressing its surprise that Cap Rock had signed a commitment letter for

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[6]Vol. I, Tab 10.

[7]Vol. I, Tab 13.

[8]In April 1987, Panda filed a petition with the Public Utility Commission of Texas (PUCT) requesting that TU Electric be ordered to enter into a long-term firm purchase power agreement with Panda and to cease and desist from entering into any contracts for the purchase of capacity and energy from any other qualifying facility pending the PUCT's ruling (Vol. 1, Tab 11). The PUCT dismissed Panda's petition on October 21, 1987 (Vol. I, Tab 12).

[9]Vol. I, Tab 14.

cogenerated power before discussing with TU Electric the detailed arrangements that would be necessary in order for TU Electric to transmit that power to Cap Rock. While TU Electric reassured Cap Rock that it would work with Cap Rock in this venture, it again pointed out some of the factors that had to be addressed, including cancellation of the 1963 Agreement in accordance with its terms, as well as wheeling arrangements and other considerations.

In November 1987,[10] at the request of Cap Rock's new General Manager,[11] TU Electric forwarded to Mr. Pruitt the same information that had been furnished in March 1987 to Cap Rock's former General Manager. TU Electric acknowledged Cap Rock's intent, as stated in Mr. Pruitt's October 29 letter to Mr. Farrington, to formally terminate the 1963 Agreement, pursuant to which Cap Rock was a full requirements customer, and also agreed to a meeting on Cap Rock's cogeneration plan.

In April 1988, TU Electric again met with Cap Rock, at Cap Rock's request, to discuss Cap Rock's plans for the procurement of alternative energy sources, including its proposed purchase of economy energy from Houston Lighting & Power Company (HLP). By a follow-up letter dated April 8, 1988,[12] Cap Rock, ignoring the provisions of Cap Rock's 1963 Agreement with TU Electric and TU Electric's offer to renegotiate that contract to convert Cap Rock to a partial requirements status, asserted, among other things, Cap

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[10]Vol. I, Tab 15.

[11]Vol. I, Tab 16.

[12]Vol. I, Tab 18.

Rock's rights to "generate, manufacture, purchase, acquire, transmit, distribute, furnish, sell and dispose of . . . electricity." Cap Rock also renewed its request that TU Electric provide transmission and scheduling services to facilitate Cap Rock's purchase of economy energy from HLP, which TU Electric had declined to do until the 1963 Agreement had been terminated in accordance with its terms.

On May 19, 1988,[13] Cap Rock notified TU Electric that it had formally executed a 15-year contract with Panda for the purchase of 35 MW of capacity and associated energy, indicating that Panda would be contacting TU Electric directly to initiate arrangements for wheeling and scheduling of this power.

Between May and August of 1988, various meetings and communications occurred among representatives of Cap Rock, Panda and TU Electric, including Steven E. Collier of C. H. Guernsey & Company (Guernsey), who was acting as a consultant to both Cap Rock and Panda, regarding Cap Rock's examination of bulk power alternatives and TU Electric's efforts to accommodate Cap Rock once the 1963 Agreement had been terminated in accordance with its terms.[14]

On August 2, 1988, another meeting occurred between representatives of TU Electric and Cap Rock, including Steve

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[13]Vol. I, Tabs 21-22.

[14]Vol. I, Tabs 2, 23-26, 28-31.

Collier of Guernsey.[15] In this meeting, as in a previous meeting,[16] Cap Rock demanded proposals and projections for future rates and charges. On August 4, 1988,[17] Cap Rock delivered a letter to TU Electric which inaccurately reflected the substance of the August 3 meeting; three days later, without waiting for a reply, Cap Rock filed its Comments with the Nuclear Regulatory Commission (the "Commission" or "NRC") in the pending Comanche Peak Antitrust Operating License Review,[18] complaining, among other things, that TU Electric was interfering with Cap Rock's ability to purchase power and energy from HLP, Panda and other sources, in violation of the License Conditions.

On October 20, 1988,[19] contemporaneously with the filing of its reply[20] to Cap Rock's Comments in the Antitrust Operating License Review, TU Electric responded to Cap Rock's letter of August 4. TU Electric advised Cap Rock, among other things, that when and if the 1963 full requirements Agreement with Cap Rock terminated, TU Electric would continue to discharge all its legal obligations to Cap Rock, whether in Cap Rock's capacity as a wholesale customer or an electric utility company (provided it was

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[15]In July 1989, Mr. Collier also became Director of Power Supply for Cap Rock (Vol. III, Tab 52).

[16]Vol. I, Tab 20.

[17]Vol. I, Tab 35.

[18]Vol. I, Tab 36.

[19]Vol. I, Tab 37.

[20]Vol. I, Tab 38.

fully equipped to procure, receive and dispatch its own generation). TU Electric pointed out that these obligations did not include the making of economic decisions for Cap Rock, the providing of scheduling, energy banking or similar services, as Cap Rock had requested, or the rendering of any service which imposed a disproportionate share of TU Electric's costs on its customers for the benefit of Cap Rock.

On February 10, 1989, Cap Rock filed with the Commission its reply comments[21] to TU Electric's response in the Comanche Peak Antitrust Operating License Review. Supplemental comments[22] were filed by Cap Rock on March 20, 1989.

On May 5, 1989,[23] TU Electric, in an attempt to clarify various recent communications[24] between the parties regarding Cap Rock's efforts to examine bulk power alternatives, communicated its position to Cap Rock that TU Electric would not be an impediment to Cap Rock's goals of becoming a fully self-sufficient electric utility or purchasing power from others or self-producing all or a part of its requirements, provided Cap Rock first terminated its 1963 Agreement with TU Electric in accordance with its terms and placed itself in the position of being able to take delivery of power obtained from other sources by becoming a control area or obtaining that service from a third party. However, recognizing

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[21]Vol. I, Tab 41.

[22]Vol. I, Tab 42.

[23]Vol. II, Tab 45.

[24]Vol. II, Tabs 43-44, 49-50.

that power purchase alternatives might become available to Cap Rock before it could become a fully functioning control area, TU Electric offered, after the termination of the 1963 Agreement in accordance with its terms, to enter into a short-term scheduling arrangement with Cap Rock on terms that would fully compensate TU Electric for its costs plus a reasonable return on investment. TU Electric also offered, after the termination of the 1963 Agreement in accordance with its terms, (a) to provide necessary partial requirements bulk power at rates approved by the PUCT; (b) to provide transmission service pursuant to PUCT Substantive Rules 23.66 and 23.67, if applicable, or under such other arrangements as may be mutually agreeable and which would fully compensate TU Electric for its costs plus a reasonable return on investment; and, (c) to the extent then being offered, schedule short-term economy energy from third-party suppliers on Cap Rock's behalf under terms which would fully compensate TU Electric for its costs plus a reasonable return on its investment.

On May 9, 1989,[25] Cap Rock rejected TU Electric's May 5 offer, claiming that TU Electric's position constituted a violation of the Comanche Peak License Conditions and informing TU Electric of its intention immediately to file a request with the Commission to obtain enforcement and modification of the License Conditions. Such a request was filed by Cap Rock on May 12, 1989,[26] and was

[25]Vol. II, Tab 46.

[26]Tab II, Tab 47.

contested by TU Electric,[27] primarily on the grounds that neither the License Conditions nor the antitrust laws required TU Electric to cancel, change or otherwise amend its full requirements 1963 Agreement with Cap Rock in order to facilitate Cap Rock's purchase of power from other sources.

On June 20, 1989,[28] the Commission issued its finding of "No Significant Antitrust Changes" in the Comanche Peak Antitrust Operating License Review. On July 26, 1989,[29] Cap Rock sought reevaluation of that determination. The Commission affirmed its finding on August 28, 1989,[30] and on November 30, 1989,[31] Cap Rock appealed the decision to the U.S. Court of Appeals for the District of Columbia Circuit. On December 29, 1989, TU Electric intervened in Cap Rock's appeal.[32]

In January 1990, the Commission Staff scheduled a meeting for January 11 with representatives of Cap Rock and TU Electric for the purpose of encouraging settlement discussions.[33] At that meeting, the Commission's probable decision concerning Cap Rock's request for enforcement was announced, which included findings that TU Electric was not obligated to provide any of the services requested

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[27]Vol. III, Tab 53.

[28]Vol. II, Tab 51.

[29]Vol. III, Tab 54.

[30]Vol. III, Tab 55.

[31]Vol. III, Tab 58.

[32]Vol. III, Tab 59.

[33]Vol. III, Tab 62.

by Cap Rock as long as Cap Rock remained a full requirements customer of TU Electric pursuant to the 1963 Agreement, that TU Electric should not be required to speculate on its future rates and that it was not unreasonable for TU Electric to require Cap Rock to become a control area. After a discussion of the issues and the parties' respective positions, the Commission Staff indicated its willingness to continue meeting with the parties if it would facilitate settlement. Cap Rock and TU Electric each agreed to outline separately a proposal to settle their dispute for submission to the Commission Staff at the next settlement meeting which was scheduled for January 25, 1990.

At the January 25 meeting with the Commission Staff, the settlement proposals submitted by TU Electric[34] and Cap Rock[35] were discussed. At the end of the meeting, TU Electric agreed to meet with Cap Rock to discuss a power supply plan which Cap Rock had under consideration, and the Commission Staff indicated its willingness to delay the issuance of a decision in Cap Rock's enforcement proceeding as long as the parties were negotiating in good faith toward a settlement.[36]

On February 23, 1990,[37] representatives of TU Electric and Cap Rock met pursuant to the agreement reached with the Commission Staff at the January 25 meeting. At that meeting, Steve Collier of

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[34]Vol. III, Tab 64.

[35]Vol. III, Tab 63.

[36]Vol. III, Tab 65.

[37]Vol. III, Tab 67.

Cap Rock outlined a five-point plan to meet Cap Rock's future power supply requirements upon termination of its full requirements contract with TU Electric. The meeting was cordial, and Mr. Collier indicated that it was productive and that progress had been made. Mr. Pittman of TU Electric remarked that Mr. Collier's plans were very general and not sufficiently definitive to enable TU Electric to predicate any firm commitments. Mr. Pittman indicated, however, that, when Cap Rock's plans became more definite, TU Electric was prepared to discuss Cap Rock's requests in more detail. A report on this meeting was delivered to the Commission Staff by TU Electric on March 1, 1990.[38]

On March 6, 1990,[39] Cap Rock wrote TU Electric in further reference to the February 23, 1990 meeting. Cap Rock advised TU Electric, among other things, that it was representing to the NRC that the parties had a productive meeting and that he "was encouraged by the concept . . . in which Cap Rock Electric would become an independent control area through the purchase of regulating services from TU Electric." Cap Rock also advised TU Electric that, to the extent the parties were able to settle the power supply arrangements in the context of the NRC license enforcement proceeding, "we can obviously avoid litigating those issues in [TU Electric's] TPUC rate application" in Docket No. 9300.

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[38]Vol. III, Tab 67.

[39]Vol. III, Tab 68.

On April 3, 1990,[40] representatives of Cap Rock and TU Electric again met, at which time Mr. Pittman of TU Electric delivered a draft of proposed "Principles of Agreement" to Mr. Collier. The proposed "Principles of Agreement" were reviewed by Mr. Collier and on April 10, 1990, the parties again met and discussed each of Mr. Collier's comments thereon. At that time, Mr. Collier indicated that he considered the proposal to constitute significant progress; however, the Board of Directors of Cap Rock would have to approve any agreements that were made. Following the meeting on April 10, 1990, TU Electric modified the "Principles of Agreement" in an attempt to respond to Mr. Collier's legitimate concerns and delivered a revised draft to Cap Rock.

On April 12, 1990, TU Electric reported to the Commission on the status of its negotiations with Cap Rock,[41] attaching a copy of the revised "Principles of Agreement." TU Electric indicated that it believed the offers which had been made to Cap Rock, including the regulating services offered to Cap Rock to enable it to qualify as a control area within the meaning of the ERCOT Operating Guides, went well beyond TU Electric's legal obligations and its obligations under the License Conditions. TU Electric also advised the Commission that Mr. Collier had advised Mr. Pittman that he was optimistic that an agreement could be reached and all disputes resolved, including those pending in PUCT Docket No. 9300.

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[40]Vol. III, Tab 70.

[41]Vol. III, Tab 70.

On April 20, 1990,[42] the Commission Staff acknowledged receipt of the April status reports of TU Electric and Cap Rock on the settlement negotiations and indicated they were "pleased to see that the parties are making what appears to be progress on several substantive issues." The Staff encouraged the parties to continue discussion in an effort to resolve their differences and consummate a settlement agreement in the near future.

On May 1, 1990,[43] Cap Rock wrote TU Electric, commenting on TU Electric's latest draft of the "Principles of Agreement," indicating that "it would appear that we are extremely close to a final settlement

Following further meetings between representatives of TU Electric and Cap Rock, on May 15, 1990,[44] the parties reached an agreement in principle and executed "Principles of Agreement" which, together with other mutually satisfactory provisions, were to be incorporated into a power supply agreement pending approval by the respective Boards of Directors of TU Electric and Cap Rock. Such approval was forthcoming, and on May 16, 1990,[45] TU Electric delivered a copy of the executed "Principles of Agreement" to the Commission Staff.

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[42]Vol. III, Tabs 71-72.

[43]Vol. IV, Tab 73.

[44]Vol. III, Tab 76; Vol. IV, Tabs 77-79.

[45]Vol. IV, Tab 77.

In a memorandum[46] to the Directors of Cap Rock, seeking approval of the Principles of Agreement at a Cap Rock Board meeting scheduled for May 17, 1990, David Pruitt advised the Cap Rock Board of the importance of the definitive agreement contemplated by the Principles of Agreement, stating that:

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

Cap Rock and TU Electric thereafter commenced intensive negotiations,[47] which culminated in the execution, on June 8, 1990, of a Power Supply Agreement (the 1990 Power Supply Agreement)[48]

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[46]Vol. III, Tab 74.

[47]Vol. IV, Tabs 81-83, 86, 88-90.

[48]Vol. IV, Tab 91.

On July 24, 1990 (Vol. IV, Tab B), a copy of an "Executive Summary of the 1990 Power Supply Agreement," together with a copy of a summary of the major differences between the initial settlement proposals of Cap Rock and TU Electric and the ultimate resolution of those differences, as incorporated in the 1990 Power Supply Agreement, were furnished by TU Electric to the Commission at its request. With respect to the issue of notice, the summary of major differences indicates:

> TU Electric initially offered to sell partial requirements power and energy, upon termination of the [1963 full requirements] Agreement, pursuant to Paragraph D.(2)(k) of the Comanche Peak License Conditions . . . which conditions its obligation to sell full and partial requirements power and energy on, among other things, "reasonable advance notice." Cap Rock sought to purchase such power and energy "immediately" upon termination [of] the [1963] Agreement and at such time as it begins to supply a portion of its requirements with power from other sources.

(continued...)

between the parties, which embodied the May 15, 1990 Principles of Agreement in all material respects.

On the basis of the 1990 Power Supply Agreement, on June 28, 1990,[49] Cap Rock withdrew its May 12, 1989 request for a Commission order enforcing and modifying the License Conditions,[50] as well as its appeal from the Commission's finding of no significant antitrust changes,[51] advising the Commission, among other things, that:

> The [1990 Power Supply Agreement] provides a means by which Cap Rock will be able to engage in an orderly transition from its current status as a full requirements customer of TU Electric, to a partial requirements customer of TU Electric and, ultimately, to a separate and independent electric utility. Cap Rock's transition, ultimately to independent status, will obviously be a complicated, multi-step process that will not occur overnight. Consequently, the PSA contemplates that many of the services that Cap Rock and TU Electric have agreed will be provided in the future will be provided pursuant to separate agreements negotiated pursuant to the PSA.

As required by the 1990 Power Supply Agreement, Cap Rock likewise withdrew from participation in TU Electric's rate case

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[48](...continued)

> The parties finally agreed that Cap Rock will purchase full requirements power and energy from TU Electric under the [1990 Power Supply Agreement] until and to the extent it gives three years notice in years one through five, and five years notice thereafter, to reduce load to be supplied by TU Electric. * * *

[49]Vol. IV, Tab 97.

[50]Cap Rock's withdrawal of its request for enforcement was accepted on August 22, 1990 [Vol. IV, Tab C].

[51]On Cap Rock's motion, its appeal was dismissed on July 5, 1990 [Vol. IV, Tabs 99-100].

then pending in PUCT Docket No. 9300 and executed a release of any and all claims it had or may have had against TU Electric up to the date thereof.[52]

On June 11, 1990, three days after Cap Rock and TU Electric executed the 1990 Power Supply Agreement, Steve Collier, Cap Rock's Director of Power Supply and Regulatory Affairs, reported to David Pruitt, Cap Rock's Chief Executive Officer and General Manager, as follows:[53]

> THE GOOD NEWS IS THAT WE HAVE NEGOTIATED A DEFINITIVE POWER SUPPLY AGREEMENT! * * * (Emphasis in original).

Mr. Collier further reported that:

> I believe that the enclosed agreement represents a workable power supply agreement. While it is not the perfect agreement that we would write unilaterally, it does give us a reasonable opportunity to implement power supply alternatives. Interestingly, the definitive power supply agreement provides us with capabilities and benefits that go beyond the more constraining definitions in our initial settlement in principle. Even so, the power supply agreement term, notice requirements, and other constraints will pose significant limits as we attempt to develop our power supply alternatives. I will look forward to presenting the benefits and difficulties[54] of this agreement to the * * * [Board] sometime next week.

Cap Rock also publicly acknowledged and touted the benefits of the 1990 Power Supply Agreement in various press releases written

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[52]Vol. IV, Tab 91.

[53]Vol. IV, Tab 93.

[54]In recommending approval by the Cap Rock Board of the 1990 PSA, Mr. Collier, Cap Rock's Bulk Power Manager and chief negotiator of the 1990 Power Supply Agreement, specifically recognized that one of the disadvantages of the 1990 PSA was the three-year notice provision. See Vol. IV, Tab 95.

by Steve Collier.[55] For example, in a press release issued on July 15, 1990,[56] Collier states:

> [Cap Rock] has reached a **landmark** agreement with its current sole power supplier, [TU Electric]. Under this exceptional new agreement, [Cap Rock] will be able to seek power from alternative suppliers that could "save Cap Rock Electric's consumers millions of dollars over the next decade." (Emphasis supplied.)
>
> The new power supply arrangement is a breakthrough for the consumer-owned utility which currently must purchase all of its power requirements from TU Electric . . .
>
> TU Electric . . . has agreed to allow Cap Rock Electric to purchase power from other suppliers, and to transport that power over TU Electric lines . . . TU Electric has also agreed to sell supplemental power and other coordinating services as necessary to allow Cap Rock Electric to take advantage of this remarkable opportunity . . .
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> Under the new power supply agreement, TU Electric will, at Cap Rock Electric's choice, either schedule and deliver alternate power supplies, or provide regulating service to enable Cap Rock Electric to become a control area and schedule its own power supplies. . . Only one other distribution cooperative, located in Alaska, is currently a control area, [Collier] noted.
>
> Cap Rock Electric can continue to purchase the balance of its power supply requirements from TU Electric. "This will be a ten-year contract, and it can be extended beyond that if both companies agree," [Collier] reported.
>
> The agreement becomes effective when Cap Rock Electric terminates its current power supply contract with TU Electric, Collier said. **The new contract requires two or three years notice by Cap Rock to begin serving load with other power supplies, Collier explained.** (Emphasis supplied.)

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[55]Vol. IV, Tabs 80, 85, 87 and A.

[56]Vol. IV, Tab A.

Steve Collier also corresponded with various other electric cooperative wholesale customers of TU Electric, lauding the benefits of the 1990 Power Supply Agreement and recommending that such cooperatives seek similar agreements. For example, in July, 1991, Steve Collier advised Hunt-Collin Electric Cooperative of the very "desirable services and benefits" achieved by Cap Rock as a result of the 1990 Power Supply Agreement with TU Electric[57] and suggested that Hunt-Collin terminate its existing all-requirements contract with TU Electric and attempt to secure a similar deal. In his letter, Collier stated, among other things:

> As you know, [Cap Rock] negotiated a new wholesale power supply contract with TU Electric last year. This new contract provides for a variety of very desirable services beyond the normal terms of an all-requirements contract. These services include transmission wheeling, partial requirements service, regulating power service, and a number of other desirable services and benefits.
>
> * * * We are expecting a final order from the Public Utility Commission of Texas regarding new rates for TU Electric for Comanche Peak Unit No. 1 sometime this summer. As a result, the window for termination of the existing contract will be open. It would be in your interest to terminate your existing all-requirements contract and negotiate a more favorable one such as the one that we have executed and that I have enclosed for your review. We will be taking advantage of this termination window to terminate our existing all-requirements contract to make the transition to our new power supply agreement.
>
> It is my understanding that your all-requirements wholesale power supply contract terminates in the near future. **You should not give in to pressure by TU Electric to extend or renew that existing all-requirements contract given that better terms and conditions have been incorporated in their**

[57]Vol. IV, Tab J.

contracts with Cap Rock Electric . . . (emphasis in original).

**The Current Dispute between Cap Rock and TU Electric regarding the 1990 Power Supply Agreement**

In February, 1991, TU Electric learned, from an article appearing in "Electric Utility Week,"[58] that Cap Rock had negotiated an agreement in principle to purchase 40 MW of wholesale power from Southwestern Public Service Company (SPSCO) for a 10-year term. In light of the fact that Cap Rock had not yet noticed termination of the 1963 Agreement and the 1990 Power Supply Agreement had not yet become effective, TU Electric contacted Steve Collier of Cap Rock regarding the agreement discussed in the article. Mr. Collier informed TU Electric that the announcement was premature, admitting, however, that Cap Rock and SPSCO were in the process of exchanging drafts. Mr. Collier volunteered that as soon as he had some definitive plans, he intended to discuss them with TU Electric so that TU Electric would not be "blindsided."[59]

Thereafter, in October 1991, at the request of Steve Collier, officials of TU Electric met with Mr. Collier to discuss Cap Rock's plans for new power supply arrangements. Mr. Collier informed TU Electric that Cap Rock had an agreement with West Texas Utilities Company (WTU) to begin purchasing all of its wholesale power requirements from WTU as early as January 1992. Mr. Collier also indicated that Cap Rock intended to transfer most or all of its

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[58] Vol. IV, Tab F.

[59] Vol. IV, Tab G.

system load requirements to SPSCO beginning in June 1993. By letter to TU Electric, dated October 23, 1991,[60] Mr. Collier indicated that Cap Rock anticipated canceling its 1963 contract with TU Electric "without [TU Electric] having to serve any wholesale load temporarily under the new power supply agreement" and confirmed its arrangements with WTU and SPSCO. Cap Rock requested, among other things, that TU Electric provide it with a draft wheeling contract so that Cap Rock could begin to make the necessary arrangements for the wheeling of power from WTU to Cap Rock over TU Electric's system.

On November 4, 1991,[61] TU Electric, by letter to Mr. Collier, informed Cap Rock, among other things, that TU Electric expected Cap Rock to comply fully with the 1963 and 1990 Power Supply Agreements and that, in order to comply with those agreements, 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.[62] A meeting was

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[60]Vol. IV, Tab K.

[61]Vol. IV, Tab M.

[62]The 1990 Power Supply Agreement became effective at 12:01 a.m. on February 1, 1992, the time specified by Cap Rock for the termination of the 1963 Agreement (Vol. IV, Tab V) and, among other things, provides for Cap Rock to purchase from TU Electric all of Cap Rock's power and energy requirements until such time as Cap Rock provides the requisite notice(s) to reduce load. Under the 1990 Power Supply Agreement, if Cap Rock wishes to reduce load supplied by TU Electric to Cap Rock for any reason, Cap Rock is (continued...)

scheduled on November 19, 1991, to discuss the contract issues but was cancelled by Mr. Collier.[63]

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

A week later, by letter dated December 19, 1991,[64] Cap Rock formally gave TU Electric notice of termination of the 1963 full requirements Agreement, effective at 12:01 a.m. on February 1, 1992, and again requested that TU Electric furnish a draft wheeling agreement covering the transfer of power from WTU to Cap Rock over TU Electric's system.

The next morning, December 20, 1991, Cap Rock filed suit[65] in the District Court of Midland County, Texas against TU Electric, seeking, among other things, a declaratory judgment that the 1990 Power Supply Agreement is not enforceable, as well as mandatory

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[62](...continued) required to give at least three years' prior written notice to TU Electric (except in certain instances in which two years' notice is required).

[63]Vol. IV, Tabs R, S and T.

[64]Vol. IV, Tab V.

[65]Vol. IV, Tab W.

injunctive relief requiring TU Electric to take all requisite action to permit Cap Rock to receive electric service from WTU.[66]

On January 6, 1992,[67] Cap Rock's counsel wrote Mr. Thomas E. Murley, Director of the Office of Nuclear Reactor Regulation, setting forth Cap Rock's position that the 1990 Power Supply Agreement is neither binding nor enforceable. While the letter did not request any relief, Cap Rock's counsel stated that Cap Rock had been able to make arrangements for alternative power supply sources much earlier than it had anticipated when the 1990 Power Supply Agreement with TU Electric was negotiated (citing Cap Rock's arrangements with WTU and SPSCO), indicating that, under such circumstances, to require Cap Rock to make purchases from TU Electric under that Agreement would somehow be inconsistent with the Comanche Peak License Conditions.

On January 13, 1992,[68] TU Electric filed an Answer and Counterclaim in the Midland litigation, denying all of the allegations in Cap Rock's Original Petition and seeking a judgment declaring, among other things, that the 1990 Power Supply Agreement is binding and enforceable.

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[66]However, by letter dated February 18, 1992, WTU advised Steve Collier that the negotiations between WTU and Cap Rock had not resulted in a contract between WTU and Cap Rock. See Vol. IV, Tab 3.

[67]Vol. IV, Tab Y.

[68]Vol. IV, Tab Z.

Thereafter, by letter dated January 30, 1992,[69] TU Electric informed Cap Rock that it accepted Cap Rock's December 19, 1991 letter as notice of termination of the 1963 Agreement, effective at 12:01 a.m. on February 1, 1992. TU Electric advised Cap Rock, that it would thereafter supply all of Cap Rock's power and energy requirements, in accordance with the provisions of the 1990 Power Supply Agreement, at Cap Rock's points of delivery presently served by TU Electric, specifically setting forth each such point of delivery and the then current contract demand at each such point. TU Electric denied Cap Rock's request for TU Electric to wheel power from WTU to Cap Rock, beginning February 1, 1992, until the 1990 Power Supply Agreement has been terminated in accordance with its terms or a wheeling request is made pursuant to the provisions thereof, pointing out that the contract does not obligate TU Electric to wheel power or energy from WTU, as requested, without at least three years' prior written notice. TU Electric stated that it intended to comply fully with the provisions of the 1990 Power Supply Agreement and expected Cap Rock to do likewise.

On January 31, 1992,[70] Cap Rock responded, advising TU Electric of its assumption that "nothing short of a court order will stop" TU Electric from enforcing its view of the "1990 document."

At 12:01 a.m. on February 1, 1992, the 1990 Power Supply Agreement became effective, and TU Electric began serving Cap

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[69]Vol. IV, Tab 1.

[70]Vol. IV, Tab 2.

Rock's requirements at all of the points of delivery previously served under the 1963 Agreement.[71]

Discovery proceedings ensued in the Midland litigation during the months of January, February and March 1992. On March 24, 1992, TU Electric filed a motion in that action to deny Cap Rock's request for temporary injunctive relief.[72]

On March 25, 1992, Cap Rock filed Comments[73] in the NRC's pending antitrust operating license review with respect to Unit No. 2 of TU Electric's Comanche Peak Steam Electric Station. Cap Rock's claims in its March 25, 1992 Comments are essentially identical to those contained in its 1988 Comments with respect to the antitrust operating license review for Unit No. 1 of Comanche Peak; that is, Cap Rock is entitled to purchase power from other sources at a time when it has an all-requirements contract with TU Electric. The relief sought is also essentially identical. Cap Rock requests this Commission to "promptly institute a hearing and investigation for the purpose of determining the extent to which [TU Electric's] conduct has created a situation inconsistent with the antitrust laws and . . . unequivocally declare [TU Electric's] obligation to wheel for Cap Rock and all similarly-situated Entities."

Hearings on Cap Rock's request for a temporary mandatory injunction to compel TU Electric to facilitate Cap Rock's proposed

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[71]Vol. IV, Tab 1.

[72]Vol. IV, Tab 4.

[73]Vol. IV, Tab 5.

purchase of power and energy from WTU were held before the Court in Midland, Texas on March 26 - 27 and April 14 - 15, 1992. Testimony has now been concluded, with Cap Rock's post-hearing brief being due on April 23, 1992, and TU Electric's reply brief being due on April 29, 1992.

TU Electric intends to file a formal response to Cap Rock's March 25 Comments following issuance of the Court's order on Cap Rock's request for a temporary injunction.

Copy



1 NO. B-38,879

2

3 CAP ROCK ELECTRIC COOPERATIVE, INC. > IN THE DISTRICT COURT

4

5 VS. > 238TH JUDICIAL DISTRICT

6

7 TEXAS UTILITIES ELECTRIC COMPANY > MIDLAND COUNTY, TEXAS

8

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11 S T A T E M E N T O F F A C T S

V O L U M E I I I

12 April 14, 1992

13

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14

15

A P P E A R A N C E S:

16

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San Angelo, Texas 76902

24

25

1 those points of delivery and those contract demands are
2 identical, essentially identical to those identified in a
3 draft of a proposed agreement with West Texas Utilities
4 Company and Cap Rock?
5 A. I understand that they are. I have not done
6 that personally.
7 Q. Okay. Thank you, sir.
8 Could you explain at the time you're
9 negotiating this agreement with Mr. Collier what the
10 purpose was for having Exhibit A under the Power Supply
11 Agreement at all?
12 A. Exhibit A, Your Honor, is basically to
13 enumerate for administrative purposes, as much as
14 anything else, what are the points of delivery to Cap
15 Rock Electric. We have people in accounting, we have
16 people that are working with reading meters, we have
17 people that are in rates that have an interest in that
18 kind of information and like to see it in some sort of
19 summary form in one place, and that's helpful to them.
20 However, contract demand itself is a term that
21 we use or a number that we use as a projection, a
22 reasonable projection by the customer of what it expects
23 its requirements to be on its system at that particular
24 point of delivery. It's -- we would hope that that
25 customer would give us a reasonable good faith number,

1 because we use that, we would like to use that in
2 planning the facilities that we have to have in place at
3 that particular location to take care of those
4 requirements, in other words, the transformers, the power
5 system components, transmission lines and the like.
6 However, as far as the amount of power that we
7 are obligated to supply that customer, those obligations
8 are spelled out in this agreement in the sections that I
9 referred you to previously, in other words, 307, 301,
10 302, those define the amounts of power that we're to
11 supply at those points, so I would also, Your Honor,
12 refer you to Section 3.05 in this agreement. This is on
13 Page 15 of the agreement. 3.05, and I quote, is the rate
14 schedule, and it says "it is distinctly understood and
15 agreed that the monthly rate of charge, including any
16 charges for power and energy in excess of contract demand
17 and any demand determinations affecting billing demand
18 for all power and energy which Cap Rock shall purchase
19 from TU Electric and TU Electric is required to sell to
20 Cap Rock under this agreement shall be pursuant to TU
21 Electric's rate WP wholesale powe[illegible]r its successor, as
22 same may from time to time be fi[illegible] approved by the
23 PUCT," in other words, Public Utility Commission of
24 Texas.
25 Now -- excuse me.

1 to Cap Rock in the event its customers at any point of
2 delivery exceeded any contract demand that might be
3 specified by Cap Rock at that point?
4 A. No, we did not.
5 Q. Is it unusual for a customer such as Cap Rock
6 to exceed contract demand from time to time?
7 A. Occasionally customers will exceed their
8 contract demands.
9 Q. Has TU Electric ever interrupted service to
10 any customer because of some excess contract demand taken
11 at a point of delivery?
12 A. I am not aware of any such circumstances.
13 Q. Has any of its contracts ever permit that to
14 occur?
15 A. I can't say any of its contracts, but none
16 that I'm aware of.
17 Q. Well, okay. Are you responsible for
18 administering the wholesale supply contracts of all TU
19 Electric's wholesale customers during the time you were
20 vice president of the Special Project group?
21 A. Most of our activity during that time, Mr.
22 Sampels, was involved in negotiating contracts, though we
23 worked very closely with our wholesale power group who
24 administered some of the whole sale contracts, we
25 administered others.

1 Q. Is it possible for TU Electric on a point of
2 delivery basis to ration the amount of power that's to be
3 supplied at a particular point or dole it out or hold it
4 back?
5 A. No, in our business, Your Honor, when a
6 customer demands electric energy, we have to supply it
7 instantaneously. There's no real way to store that
8 energy, so it's really on demand. In other words,
9 whatever the customer demands at the time, we have to
10 stand ready to provide.
11 Q. There's been a suggestion by Mr. Collier, Mr.
12 Pittman, that Exhibit B, which is also not filled in,
13 somehow makes the Power Supply Agreement of 1990
14 defective. Could you explain by showing the Court the
15 provisions of the 1990 Power Supply Agreement that
16 Exhibit B is supposed to facilitate?
17 A. Your Honor, if you will refer to Exhibit B in
18 the 1990 Power Supply Agreement, Exhibit 11, in that
19 particular exhibit, it's entitled "Cap Rock Power Supply
20 Resources." Again columns headed Name and Location of
21 Power Supply Resource Control Area, Firm Capability in
22 Megawatts, Term in Years, Beginning Date and Ending Date,
23 then bracketed on six lines in that exhibit, the
24 statement "to be specified pursuant to Section 2.03 of
25 this agreement," so if you then will go to Page 6 of

1

2 Q. (By Mr. Sampels) After execution of the power
3 -- 1990 Power Supply Agreement, did you have sufficient
4 capacity without taking some action to serve the Cap Rock
5 load?
6 A. We didn't have sufficient capacity to serve
7 our system load requirements plus the hundred megawatts
8 of Cap Rock load, and we extended those agreements in
9 September of 1990.
10 Q. And what is the cost to TU Electric to
11 purchase the hundred megawatts of capacity under those
12 agreements, Mr. Bunting?
13 A. This cost would fit in the neighborhood of
14 $20,000,000.00 a year to TU.
15 Q. So for three years, $60,000,000.00?
16 A. $20,000,000.00 a year times three years would
17 be about $60,000,000.00.
18 Q. And will Texas Utilities be required to
19 purchase that capacity whether Cap Rock repurchases it
20 from TU Electric or not?
21 A. Yes, sir, absolutely they will.
22 Q. After the 1990 Power Supply Agreement was
23 executed, when did you next become involved with Cap
24 Rock, do you recall?
25 A. I read an article in the Trade Press, I think

1 A. Yes, sir, this is the article that is dated
2 February 25, 1991, Mr. Erle Nye, Jerrell Gibbs and Pitt
3 Pittman from myself.
4
5 MR. SAMPELS: Your Honor, we offer
6 Defendant's Exhibit 60.
7 MR. BALOUGH: No objection, Your Honor.
8 THE COURT: 60 is admitted.
9
10 (Defendant's Exhibit No. 60
11 was received in evidence)
12
13 Q. (By Mr. Sampels) And does that record the
14 essence of your conversation with Mr. Collier?
15 A. Yes, sir, it does.
16 Q. Did Mr. Collier assure you in that
17 conversation that he did not intend to take any action
18 inconsistent with the 1990 Power Supply Agreement?
19 A. Yes, sir.
20 Q. Did he indicate that there existed no
21 agreement with SPS?
22 A. He said that the agreement in principle was
23 premature, that as you can read in the first -- the
24 paragraph and they were exchanging drafts.
25 Q. And did he confirm to you that the points of

1 what was in my mind, that was my concern. They had a
2 1963 full requirements agreement, and I was concerned
3 that they were going to take actions which would violate
4 certain provisions of the 1990 Power Supply Agreement, so
5 our conversation was in regard to the 1990 Power Supply
6 Agreement.
7 Q. Did Mr. Collier assure you that he was not
8 going to do so?
9 A. He assured he wasn't going to take any action
10 that would be contrary to that agreement.
11 Q. And that he would not blind side TU Electric
12 about when he might take even 30 megawatts of load off?
13 A. Mr. Collier said that when he got down to the
14 point where he had his -- had this worked out, that he
15 would sit down with TU Electric, and because he didn't
16 want, and I quoted, he didn't want to blind side us about
17 things he was working on.
18 Q. Following that conversation, what was the --
19 when did you next have contact with Mr. Collier?
20 A. My next contact with Mr. Collier was in
21 October, 1991?
22 Q. Could you describe the circumstances of that
23 meeting, sir?
24 A. Mr. Collier called Mr. Darrell Bevelhymer, who
25 was Director of Bulk Power Transactions, and asked to

1 schedule a meeting. Mr. Bevelhymer asked me to be
2 present at that meeting.
3 Q. Do you recall when that meeting -- did I ask
4 you when that meeting occurred?
5 A. No, you did not, but it occurred on October
6 22, 1991.
7 Q. And yourself, Steve Collier and Darrell
8 Bevelhymer were present at that meeting?
9 A. Yes, the three of us.
10 ( Could you describe what occurred at that
11 meeting, sir?
12 A. Mr. Collier asked, or in fact he told us that
13 he didn't need the 1990 Power Supply Agreement any
14 longer, and that he intended to take all of his load over
15 to WTU in January of 1991.
16 Q. What was your reaction to that, Mr. Bunting?
17 A. I was shocked.
18 Q. Why?
19 A. Because this was not my understanding of the
20 1990 Power Supply Agreement. I knew that we had
21 negotiated this agreement over a number of months, that
22 we had spent a long time negotiating this agreement, this
23 was agreement which Cap Rock said was very important to
24 them that gave them a lot of flexibility, and now for him
25 to come up and make this statement did shock me.

1 Q. That he didn't need the 1990 Agreement any
2 more?
3 A. That's correct.
4 Q. What happened next, Mr. Bunting?
5 A. I -- of course, the meeting adjourned, and the
6 next -- I wanted to go and review the agreement in more
7 detail. We received a letter dated October 23rd from Mr.
8 Collier --
9 Q. Is that what --
10 A. -- stating what his interpretation was and the
11 results of the meeting.
12 Q. Has that been introduced in evidence here
13 Defendant's Exhibit 17?
14 A. Yes, sir, that's correct.
15 Q. Then what happened, Mr. Bunting?
16
17 THE COURT: Mr. Sampels, I do not show
18 that 17 has been admitted.
19 MR. SAMPELS: I'm sorry, Your Honor.
20 Your Honor, it is Plaintiff's 10, I'm sorry.
21 THE COURT: Plaintiff's 10 shows to be the
22 Principles of Agreement.
23 MR. SAMPELS: Your Honor, in your
24 Defendant's Exhibit book premarked under Tab 17.
25 THE COURT: I have it before me.

1 the exhibit itself, how it works and functions.

2 THE COURT: The objection is overruled.

3

4 A. Rate WP contains three basic type of charges.
5 These are the customer charge, the demand charge and the
6 energy charge, and each charge is designed to recover
7 specific costs incurred by TU Electric in providing a
8 service.

9 For example, the customer charge is designed
10 to recover administrative billing type expenses and
11 metering expenses, the energy charges are designed to
12 recover the variable costs incurred by the company to
13 provide electric service, and the demand charge recovers
14 the fixed cost incurred by TU Electric in making service
15 available to the customer, whether or not any energy is
16 actually used or not.

17 Q. Could you elaborate upon the function of the
18 demand charge?

19 A. Yes.

20 Q. And before we get far on that, the demand
21 charge that you're speaking of in the tariff, does that
22 have any relationship to what has been termed in this
23 courtroom as contract KW?

24 A. No, sir, it does not.

25 Q. Okay. Please go ahead.

1 A. The demand charges in the tariff are
2 particularly critical, because in providing electric
3 service to the customer, TU Electric must plan and
4 install and make available sufficient resources to
5 provide the maximum load expected to occur by the
6 customer in the company's on-peak period, which is
7 typically June through September during the hours of
8 12:00 noon through 8:00 p.m. TU Electric must stand
9 ready to provide this service upon demand based on that
10 customer's maximum demand, even though that demand may
11 only be used one hour one month or a short period of time
12 and not used the rest of the year.
13 This type of effort requires that we incur
14 fixed costs for generation, transmission and distribution
15 that are fixed in nature over a period of a year or two
16 years, and TU Electric is obligated to pay the fixed cost
17 associated with these facilities.
18 The demand charges are designed to recover
19 specifically from those customers causing TU Electric to
20 incur certain types of demand charges. As you can see,
21 they're designed to recover more dollars from customers
22 who use their maximum demand for electricity in the
23 summer rather than in the winter, that is because it is
24 relatively more expensive to provide peaking capacity
25 than off-peak capacity.

1 The charges also through the demand
2 determination also provide for various adjustments to the
3 demand charge, which also reflect usage by the customer.
4 Q. These demand charges that you speak of, you
5 determine that by looking at the meter itself at a given
6 point of delivery?
7 A. Yes, sir. In going through the -- what is
8 actually charged to the customer at the point of
9 delivery, we first -- we look at all the items contained
10 under the demand determination provision. First item is
11 the current month KW, which is defined as the maximum
12 demand that's metered at a particular point of delivery
13 in the month. The rest of the items depend on what the
14 demands are at the point of delivery during various other
15 times.
16 For example, the 80 percent of the on-peak KW
17 recovers the cost of the capacity used to provide on-peak
18 service during the months of June through September.
19 Fifty percent of the contract KW and 50 percent of the
20 annual KW serve two purposes. First, they provide a cost
21 recovery for facilities that are incurred during the
22 off-peak periods, plus they provide an incentive for the
23 customers to accurately project their load requirements
24 so that we can get proper cost recovery.
25 In that regard, that 50 percent of the

1 contract KW provision works in concert with the dollar
2 per KW excess provisions.
3 Q. Now, to bill for the demand charge, as I think
4 you testified earlier, it's not necessary that you have
5 some term called contract KW that's been discussed in
6 this case, is there?
7 A. No, sir, that's correct.
8 Q. And could you explain to the Court what the
9 function of contract KW is insofar as any -- to TU
10 Electric, what is the function of contract KW as you
11 understand it?
12
13 MR. BALOUGH: Your Honor, I object to
14 contract KW as a term in the contract, it's not on rate
15 WP. He's here to talk about rate WP, and this doesn't
16 say he's an expert and knows anything about the contract
17 and now he's trying to talk about the contract.
18 MR. SAMPELS: Your Honor, I'm trying to
19 find out if this witness knows the function to TU
20 Electric, how TU Electric uses information that is termed
21 contract demand.
22 THE COURT: The objection is overruled.
23
24 A. Contract KW is primarily used by TU Electric
25 as a planning tool, and in some instances is used as a

1 billing tool. For customers such as Cap Rock who are
2 long standing customers, its primary use is a planning
3 tool, and it provides an economic incentive based on the
4 operation of the dollar per KW in the tariff for the
5 customers to provide TU Electric the most accurate
6 forecast of their demands at each point of delivery.
7 Q. And in order to bill Cap Rock Electric Company
8 for all demand charges based upon rate WP and all energy
9 charges, including fuel for rate WP, the amount of
10 contract demand which may or may not be specified in
11 contract is irrelevant, is that my understanding?
12 A. That's correct.
13 Q. And the importance of contract KW to TU
14 Electric is simply that to assist us in its planning
15 process?
16 A. Yes, sir, it's important to realize that all
17 of our tariffs for electric service require contract KW
18 to be specified on a point of delivery basis when
19 customers get over a certain size. It's a provision that
20 is used in the planning process, without which our
21 planning would be frankly less accurate, and the best
22 information that we can get from the customer helps us
23 secure the most efficient amount of resources to serve
24 the load.
25 Does contract KW have anything at all to do

1 with how much power, energy or capacity TU Electric is
2 required to deliver to any particular customer?
3 A. No, sir, the utility TU Electric will deliver
4 as much power as is demanded by the customer, independent
5 of whether there is a contract KW number listed.
6 Q. Could you -- hold on just a second.
7 If a customer such as Cap Rock exceeded its
8 demand, exceeded the contract demand at a given point of
9 delivery pursuant to rate WP, could you explain to the
10 Court what the effect of that would be?
11 A. Yes, at any one point of delivery, if the
12 current month demand or the meter demand exceeded the
13 contract KW, the result would be the customer would be
14 billed for an additional dollar per KW for each KW in
15 excess of the stated contract KW.
16 Q. That's to provide an incentive for a customer
17 to give you accurate projection with respect to its
18 requirements at a given point of delivery?
19
20 MR. BALOUGH: Your Honor, I'm going to
21 object to the question as to what its purpose is.
22
23 Q. (By Mr. Sampels) What is the purpose of it,
24 sir?
25 A. The purpose of this dollar per KW charge, as I

1 previously stated, is to provide an economic incentive to
2 the customer to accurately forecast his demand
3 requirements at a particular point of delivery. Without
4 such economic incentive, we have found that the forecasts
5 are correspondingly less accurate.
6 Q. There's been testimony in this case, Mr.
7 Houle, that Cap Rock would have the right and the ability
8 to put zero in the contract demand column of Exhibit A,
9 and therefore escape any obligation it had to purchase
10 power from TU Electric. Is that your understanding, sir?
11
12 MR. BALOUGH: Your Honor, I'm going to
13 object to that question.
14 MR. SAMPELS: Let me ask it this way.
15
16 Q. (By Mr. Sampels) Would you please tell me
17 what the effect of that action would be in the
18 application of rates and charges to Cap Rock under rate
19 WP?
20 A. If a customer chose to select zero as a
21 contract KW, that result would be that the bill would be
22 increased by a dollar per KW per month.
23 Q. And give the Court an example of what that
24 might mean in terms of total dollars to Cap Rock?
25 A. For a load such as Cap Rock, that would be an

1 how it's calculated. I'll withdraw my objection.

2

3 Q. (By Mr. Balough) Okay. Mr. Collier, I'll
4 agree with Mr. Sampels, when you're going through it,
5 tell us how it's calculated and what the amount is,
6 please?
7 A. If the success fee that we've talked about and
8 that is represented in these documents were to be in
9 effect and if we were to buy power from WTU or SPS, and
10 if, after the fact, after a year it is determined that
11 the net cost of power is less than it would have been had
12 we bought that power from Texas Utilities Electric
13 Company, then the success fee is calculated as one
14 percent, my success fee is calculated as up to one
15 percent of that amount, of that net savings.
16 Now, we have been doing quite a bit of
17 thinking about the WTU and the SPSCO power supply
18 arrangements, and we have tried to project what they
19 might say. If, for example, the WTU power purchase saved
20 $3,000,000.00 a year, one percent of $3,000,000.00 is
21 $30,000.00. That would be the maximum that my success
22 fee would be for that calculation, that would represent a
23 20 percent savings, and I think that's probably on the
24 outside the most we could expect to save in power costs.
25 The same thing is done on the SPS Agreement.

1 However, it's important to note that those two success
2 fees are not additive. We can't serve that load from WTU
3 and SPSCO. If we're serving it from WTU, it hasn't been
4 moved to SPS yet. If it's been moved to SPS, it's not
5 being served from WTU.
6 If when load is moved to SPS it also saves us
7 [illegible]0 percent on our power bill and that is $3,000,000.00,
8 that success fee would be $30,000.00. If it saved us
9 $4,000,000.00, that success fee would be $40,000.00, so I
10 would expect if I am able to persuade my management to
11 allow me to receive a success fee on this basis at some
12 point in the future of this form, that my bonus would be
13 on the order of a total of 30 to $40,000.00 in each year,
14 assuming that we saved up to 20 percent on our power
15 bill.
16 Q. Mr. Collier, even though we've had your amount
17 redacted from your employment agreement, I think it's now
18 important to put all this into perspective, so I'm going
19 to ask you what your base salary amount is at Cap Rock?
20 A. My base salary today is approximately
21 $[illegible],000.00. I don't know to the penny, because it's an
22 [illegible] number because of the way it raises, the percentages
23 [illegible]k out. In the employment arrangement, it began at 65
24 and moved to 75 and now I'm at 83 for base salary.
25 Q. Mr. Collier, in your experience in the

1 industry in which you have made your professional living,
2 is a salary plus a bonus a usual way of compensation in
3 your experience?
4 A. Yes, sir.
5 Q. And if I can calculate, which I always try not
6 to do, but let's say there was a $30,000.00 success fee,
7 and based on your salary, about what percentage would
8 that be of bonus salary, salary bonus, however that
9 works?
10 A. Excuse me a minute. I'm trying to make the
11 calculation. It looks to me like it would be about 36
12 percent of my base salary.
13 Q. Okay. Mr. Collier, when you were at Guernsey,
14 you were receiving base salary plus a bonus?
15 A. Yes, sir.
16 Q. Is a bonus of 36 percent in line with what you
17 were receiving?
18 A. Yes, sir, the target amount of the bonus at C.
19 H. Guernsey & Company was 35 percent of salary, and if
20 the company was extraordinarily profitable or my
21 department or division was extraordinarily profitable, it
22 could be in excess of that.
23
24 MR. BALOUGH: Pass the witness, Your
25 Honor.

1 THE COURT: Mr. Sampels.

2

3 RECROSS-EXAMINATION

4

5 BY MR. SAMPELS:

6

7 Q. Mr. Collier, you've indicated that your
8 success contract was based upon a percentage of savings
9 and power costs?
10 A. Yes, sir.
11 Q. You've indicated that the savings in the --
12 that there was about a 20 percent savings in power costs
13 to -- under the SPS contract?
14 A. When we've tried to calculate power bills
15 under first TU's tariff and under WTU's tariff and
16 estimate what might be subtracted from that for wheeling,
17 it appears to be to be on the order of 20 percent.
18 That's an estimated, not done in detailed calculations.
19 Q. I was asking you with respect to the SPS
20 contract?
21 A. I'm very sorry.
22 Q. You said there was approximately 20 percent
23 savings to Cap Rock under the SPS contract?
24 A. Well, I used that as a similar example. We
25 haven't been able to project exactly what the savings

1 are, because we're having to build some transmission, and
2 there'll be cost of that transmission that I believe will
3 affect the net savings.
4 Q. Is it fair to say it may be approximately 20
5 percent of this?
6 A. It could be as much as 20 percent.
7 Q. Compared to what? 20 percent savings to Cap
8 Rock compared to what?
9 A. Compared to what we would have paid for power
10 had we continued to buy it from Texas Utilities Electric
11 Company.
12 Q. In other words, compared to what you've had to
13 pay had you remained at a full requirements customer of
14 TU Electric under 1990 Power Supply Agreement, right?
15 A. Yes, sir, even compared to what -- in the
16 situation in which I didn't move the load to WTU, but I
17 moved it in sections the SPS, there might be a year in
18 which part of the load was moved, and it would be the
19 total bill, part served by SPS, part by TU, compared to
20 the total load served by TU.
21 Q. Under the Power Supply Agreement?
22 A. Yes, sir.
23 Q. Your testimony in this case, Mr. Collier, is
24 you don't have any obligation to buy any power from TU
25 Electric, is that not true?

1 A. Yes, sir.
2 Q. Well, why do you want to compare your savings
3 and your bonus to what you would have had to pay under
4 the 1990 Power Supply Agreement? Why don't you compare
5 it the way you could have got it from some other supplier
6 such as WTU?
7 A. The approach that we've taken is that had we
8 not negotiated the agreements and made the arrangements,
9 we would have continued to buy our power from Texas
10 Utilities Electric Company.
11 Q. And if you don't -- you're not able to
12 successfully abrogate that contract through this Court,
13 that's exactly what you'll have to do, isn't it, Mr.
14 Collier?
15
16 MR. BALOUGH: Your Honor, I'm going to
17 object to the abrogating. I would ask that it be
18 rephrased.
19 THE COURT: Objection is overruled.
20
21 Q. (By Mr. Sampels) Isn't that right, Mr.
22 Collier?
23 A. If we are not successful in being allowed by
24 this Court to purchase our power from WTU, there will be
25 no savings from purchasing power from WTU.

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 |

## TU ELECTRIC'S DESIGNATION OF PORTIONS OF DEPOSITION OF DAVID L. TEETER

| | TEETER DEPOSITION | BRIEF DESCRIPTION |
|---|---|---|
| 1. | Page 65, lines 5-13 | No contract between Cap Rock and WTU |
| 2. | Page 119, lines 15-25<br>Page 120, Lines 1-25 | No contract between Cap Rock and WTU when Collier gave notice of termination to TU Electric |
| 3. | Page 133, lines 8-15 | Cap Rock not to become p[illegible] WTU's control area, to remain in TU Electric's control area |
| 4. | Page 134, lines 15-25<br>Page 135, lines 1-2 | If Cap Rock becomes part of WTU's control area, would need interchange agreement with TU Electric that don't have right now |
| 5. | Page 142, lines 24-25<br>Page 143, lines 1-3 | Cap Rock not to become part of WTU's control area under proposed contract with WTU |
| 6. | Page 164, lines 20-25<br>Page 165, lines 1-16 | TU Electric would need to do some physical things and install additional equipment to facilitate proposed contract with WTU and Cap Rock |
| 7. | Page 166, lines 20-24 | WTU knows its wholesale customer's points of delivery |

[illegible] teeter dep

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7
8 MR. DAVIS: Q Mr. Teeter, let me ask
9 you this question. Under the proposed contract between Cap
10 Rock and WTU, is Cap Rock to become a part of WTU's control
11 area?
12 THE WITNESS: A No.
13 Q. Are they to remain a part of TU Electric's control
14 area?
15 A. Yes.
16
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23
24 Q. Am I cor[illegible], when you were responding to so[illegible]
25 questions, if the proposed agreement between Cap Rock and [illegible]

1 as it now exists, would be finalized Cap Rock would not

2 become part of the WTU control area; is that correct?

3 A. That is correct.

Cap Rock

# INTER-OFFICE CORRESPONDENCE

SOUTHWESTERN PUBLIC SERVICE COMPANY

SUBJECT: Cap Rock Electric Cooperatives

LOCATION: Amarillo, Texas

DATE: June 21, 1990

MEMORANDUM TO: Gary Gibson

I spoke to Steve Collier today and sent him our projected fuel factors for the 90's. He indicated they 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. He does not believe the wheeling agreement with TU will facilitate power from the SWPP through Oklaunion.

Dave Krupnick

DK/db

SPS DOCUMENTS

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CAUSE NO. B-38,879

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

DESIGNATION BY CAP ROCK ELECTRIC COOPERATIVE
OF DEPOSITION OF
DAVID ANDREW KRUPNICK

| FROM | | TO | |
|---|---|---|---|
| Page | Line | Page | Line |
| 6 | 6 | 6 | 10 |
| 8 | 10 | 13 | 9 |
| 16 | 21 | 19 | 8 |
| 40 | 11 | 47 | 9 |
| 49 | 6 | 53 | 23 |
| 55 | 17 | 56 | 11 |
| ☆ 58 | 14 | 62 | 22 |
| 64 | 2 | 65 | 4 |
| 67 | 9 | 68 | 13 |
| 86 | 6 | 87 | 17 |
| 98 | 17 | 103 | 9 |
| 128 | 3 | 130 | 4 |

1 MR. WILFONG: Do you want to get
2 some lunch?
3 MR. DAVIS: Well, maybe we should.
4 (Whereupon a recess was had)
5 Q. by Mr. Davis) I think this is where we left
6 off, Mr. Krupnick. Let me hand you what I'll call
7 Exhibit No. 4. It is dated 10-19-90. Are those your
8 notes? We haven't talked about this one, have we?
9 A. No.
10 Q. Okay. Good.
11 MR. GREGG: Excuse me. I'm getting
12 confused. I thought all of these had
13 been marked as Exhibit 3.
14 MR. DAVIS: Yes.
15 MR. GREGG: You referred to it as
16 Exhibit 4.
17 MR. DAVIS: I meant document number
18 four in Exhibit 3.
19 Q. by Mr. Davis) Are those your handwritten
20 notes again?
21 A. Yes, sir, they are.
22 Q. And they're dated October 19, 1990; is that
23 right?
24 A. Yes, sir.
25 Q. Okay. And does this reflect an in-person

1 meeting?
2 A. Yes, it does.
3 Q. All right. And who was present at this
4 meeting?
5 A. Steve Collier, Rusty Jones, David Pruitt,
6 Gary Gibson and myself.
7 Q. All right. Let me ask you about these
8 initials. Is that "G.G."?
9 A. Yes, sir, it is.
10 Q. And that stands for Gary Gibson?
11 A. Yes, sir.
12 Q. And what is that language beside his name?
13 What does that say?
14 A. "Reviewed cost comparisons."
15 Q. And what is that referring to?
16 A. That refers to some information provided
17 between Cap Rock and Southwestern, the cost of
18 electricity.
19 Q. What was being compared?
20 A. The cost of different options that Cap Rock
21 might pursue.
22 Q. Was that a written cost comparison?
23 A. I don't remember.
24 Q. Did it include information on the price of
25 electricity if Cap Rock were to purchase electricity from

1 TU Electric?

2 A. I don't remember if that refers to the cost

3 of power or the cost of transmission extensions. I don't

4 remember what reference that was to.

5 Q. You just don't know?

6 A. I don't remember.

7 Q. And then we have the initials "S.C.", which I

8 again assume that is referring to Steve Collier?

9 A. Yes, sir, it does.

10 Q. And then this first sentence says, "Looked at

11 feasibility of all load." Do you know what you meant

12 when you wrote that, what you're referring to?

13 A. It probably refers to all of the load of

14 Cap Rock's system.

15 Q. The next line says, "Power Agreement

16 identified actual substation (2 year)." What is that

17 statement referring to?

18 A. He was reiterating that comment referred to

19 in the earlier memo that there were certain substations

20 in the new TU agreement that were identified that would

21 require two years' notice if they were placed on the

22 contract.

23 Q. So that the power agreement referred to in

24 that third line refers to the 1990 Power Supply Agreement

25 between TU and Cap Rock; is that right?

1 A. Yes, sir, I believe it does.
2 Q. And it's your understanding that the rest of
3 that line, which it says, "Identified actual substation
4 (2 year)," you're referring to those nine points of
5 delivery that were specifically identified in the 1990
6 agreement between Cap Rock and TU; is that correct?
7 A. It was referring to those substations. I
8 don't remember the number nine or any particular -- but
9 it referred to the ones that had two years' notice.
10 Q. Now, what relationship did that sentence have
11 with the one before it?
12 MR. WILFONG: Excuse me just a
13 minute. I need to make a phone call.
14 (Whereupon a recess was had)
15 Q. by Mr. Davis) All right. Mr. Krupnick,
16 we're going back to these first two lines attributable to
17 Steve Collier in this memo dated October 19, 1990. I was
18 asking whether there was any relationship between the
19 second line there which talks about "Power Agreement
20 identified actual substation (2 year)." And the first
21 line that says, "Looked at flexibility of all load."
22 A. I think that's "feasibility of all load."
23 Q. Feasibility.
24 A. I don't think those were related in that
25 conversation.

1 Q. In other words, as far as you recall, it
2 wasn't talking about that perhaps all of Cap Rock's load
3 could be served by the two substations that were
4 identified in the 1990 Power Supply Agreement between TU
5 and Cap Rock?
6 A. No, that's not what it referred to.
7 Q. Okay.
8 A. I think "all load" refers to all of their
9 load as opposed to all of the nine substations, if that
10 was the question.
11 Q. Okay. Well, no, my question was -- I'm
12 wondering if, for example, there's a relationship between
13 those two lines such that it was discussed that SPS might
14 serve all of Cap Rock's load through the substations
15 identified in the agreement which had a two year
16 termination notice?
17 A. No, that was not the topic of discussion.
18 Q. The next line says, "Current contract has
19 three years' notice." What was that referring to?
20 A. That was referring to their existing contract
21 which we've been calling today, I think, the 1963
22 contract.
23 Q. Skipping down a couple lines to -- what is
24 that line there that I'm pointing to? It looks like "two
25 years," and then what does it says?

1 A. "Two years worse for 30 megawatts."

2 Q. What --

3 A. It says "worse" but it should be "worst."

4 Q. What does that mean?

5 A. That refers to the fact that if they had to

6 put all their delivery points on this new 1990 contract,

7 if they couldn't have an interim supplier, then it would

8 be -- two years would be the longest that they would have

9 to wait to move 30 megawatts to Southwestern.

10 Q. And then the next line?

11 A. It says that if they did that, then they

12 would have to wait the three years before they could move

13 all of their system over to Southwestern. That was the

14 notice requirement if they put -- for delivery points

15 that were placed on that not included in the two year

16 notice.

17 Q. And why were these significant to you? Why

18 did you write these comments down?

19 A. I don't know if there had been other

20 face-to-face meetings regarding their new June agreement

21 and what may have been involved in that. So they may

22 have been relating that to explain to us if that had any

23 effect on what we were negotiating and to familiarize us

24 with that.

25 Q. Is it accurate to say that this line which

② Caprock
Caprock 10/19/90

Caprock

Steve Collier
Rusty Jones - Board Pres.
David Pruitt

Gary Gibson
Dave Kaymark

GG. Reviewed Cost Comparison
SC. - looked at feasibility of all load
Our Agreement identified actual substation (2 years)
Current contract has three years notice
30 days to 3 yrs - in 120 day window on rate change
around final order
2 years worse for 30 mw
3 years worse for all system
Feb..

DEFENDANT'S EXHIBIT 26

SPS DOCUMENTS

(2)

– S.C. – We have [from CSW (STNP)] a proposal for 53 MW firm for 5 years at 2.00/kw month + incremental fuel

SPU DOCUMENTS

SOUTHWESTERN PUBLIC SERVICE COMPANY
WHOLESALE FULL REQUIREMENTS SERVICE
RATE SCHEDULE

The utility supplying service:

Southwestern Public Service Company

The utility receiving service:

Cap Rock Electric Cooperative, Inc.
FERC Rate Schedule No.

Description of service to be rendered:

Sale of firm electric power and energy, for distribution and resale by the full requirements customer.

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CAP ROCK

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SOUTHWESTERN PUBLIC SERVICE COMPANY
AGREEMENT FOR
WHOLESALE FULL REQUIREMENTS ELECTRIC POWER SERVICE
TO CAP ROCK ELECTRIC COOPERATIVE, INC.

The Parties to this agreement ("Agreement") are Southwestern Public Service Company, a New Mexico corporation ("SPS"), and Cap Rock Electric Cooperative, Inc., a Texas corporation ("Customer"). SPS and Customer are also referred to in this Agreement as "Party" or "Parties".

RECITALS

SPS is an electric utility engaged in the business of generating, purchasing, transmitting, and distributing electric power and energy to customers within the States of Texas, New Mexico, Oklahoma and Kansas.

Customer is a cooperative corporation engaged in the business of transmitting and distributing purchased electric power and energy to retail customers within the State of Texas.

Customer desires to purchase electric power and energy for resale, and SPS is willing to sell and deliver to Customer electric power and energy for such purposes.

SPS and Customer recognize that all of Customer's substations are now physically connected with the Electric Reliability Council of Texas ("ERCOT"). In order for SPS to sell and Customer to buy power and energy, it is necessary for Customer to disconnect from ERCOT and connect with the Southwest Power Pool ("SPP"). The physical connection of Customer's substations with the SPP requires the construction of additional transmission facilities by both SPS and Customer.

Accordingly, in consideration of the benefits to be realized by the Parties, their mutual promises, and the specific considerations set forth in this Agreement, the Parties agree as set forth below.



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ARTICLE I.

Points of Delivery - Service Specifications

The location of the point or points of delivery ("Delivery Point") of the electric power and energy to be sold hereunder to Customer for its requirements at each Delivery Point, together with certain additional information regarding the service at each Delivery Point, are shown on Exhibit A to this Agreement.

Changes to Exhibit A, including additions or deletions of Delivery Points, may be made by written agreement of the Parties and shall be made a part of this Agreement by amendment of Exhibit A.

All terms and conditions contained in this Agreement shall apply to any and all additional Delivery Points which may be established during the term of this Agreement with the same force and effect as they do to the initial Delivery Points specifically set forth in Exhibit A.

SPS shall make available delivery of power and energy to Customer through no fewer than two transmission (230 kv or higher voltage) lines, one of which shall originate in the vicinity of Lubbock County, Texas and another shall originate in the vicinity of Lea County, New Mexico. The lines shall be located to permit Customer to receive power and energy at 138 kV through new SPS interchanges at Customer's Vealmoor and Tate substations.

It is the intent of the Parties that all power and energy delivered hereunder will be primarily delivered through the Vealmoor delivery point, with the Tate delivery point as a secondary or backup delivery point. It may be necessary from time to time for either Party to temporarily take its transmission lines out of service for maintenance, upgrades, or other reasons, and the Parties shall, through their operations personnel develop operating procedures for notice of such outages and operation of the systems in conformance with standard electric utility practices. However, if due to SPS system operations, SPS requests Customer to operate its system closed, such that power and energy is delivered through both delivery points, SPS shall utilize the coincident peak demand





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established at the two delivery points as the measured demand for purposes of Article VI of this Agreement. Title to electric power and energy transferred into a Party's system shall pass to that Party at the Delivery Point.

Customer agrees that, during the term of this Agreement, SPS will have the right to transmit power and energy from any Delivery Point shown in Exhibit A over Customer's system to any other Delivery Point shown in Exhibit A at no cost to SPS, except that SPS shall compensate Customer for energy losses. Customer shall provide this service to SPS only to the extent the service does not unreasonably interfere with Customer's system operations. Such right to transmit with compensation only for losses shall not apply to SPS transmission of power and energy directly to any wholesale or retail customer that is served by Customer or that is located in Customer's certificated service area or that is interconnected with Customer's system.

SPS compensation for energy losses shall be in accordance with the terms of a written agreement with Customer. SPS and Customer shall proceed to negotiate such an agreement upon execution of this Agreement, and, if a written agreement is not executed by both Parties by January 1, 1993, Customer shall, on or before that date, file rates and terms and conditions for review and approval by the Federal Energy Regulatory Commission.

Customer agrees that, within a reasonable time after Customer gives notice to terminate this Agreement, Customer will provide SPS with an agreement specifying terms and conditions for SPS to continue to transmit power and energy from one Delivery Point shown in Exhibit A over Customer's system to other Delivery Points shown in Exhibit A. Such terms and conditions shall provide for such transmission service at fully allocated, embedded costs, or such other cost basis as may be mutually acceptable. If Customer and SPS do not reach agreement on transmission service terms and

conditions prior to the effective date of termination of this Agreement, Customer will, on or before such date, file complete terms and conditions for review and approval by the Federal Energy Regulatory Commission.

ARTICLE II.

Customer's Installation

Any and all apparatus on Customer's facilities, except SPS's metering equipment, required to properly control the flow of electric energy beyond the Delivery Points, and to transform it to the voltage desired by Customer, shall be furnished, installed, maintained and operated by and at the expense of Customer, subject to the specifications as to the type and capacity of such apparatus as may be prescribed by standard engineering practice.

Customer shall, as far as reasonably possible, maintain a power factor on its system of ninety-five percent (95%) during times of peak load. Customer shall control the character and installation of apparatus on lines (whether owned by Customer or by any of its customers) so that the apparatus or the nature of its operation will not produce undue electrical disturbance on SPS's system. If the apparatus or installation on the Customer's side of the Delivery Point produces undue electrical disturbance on, or damage to, SPS's system, Customer shall, at its expense, take such action as is required to eliminate the problem.

Under no circumstances shall Customer connect SPS's lines through Customer's lines with any other supplier of electric power and energy without: (a) the prior written approval of SPS, and (b) engineering coordination to ensure that SPS's system will not be jeopardized by the interconnections.

ARTICLE III.

Contract Power

Subject to the terms of this Agreement, SPS shall provide and Customer shall purchase all electric power and energy required by Customer at the Delivery Points set forth in Exhibit A, and at such



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CAP ROCK

other Delivery Points as may be agreed upon.

The maximum commitment of SPS to deliver electric power and energy at each Delivery Point is shown on Exhibit A. Customer shall have the right from time to time to request an increase in such commitment of SPS, provided that Customer shall give SPS reasonable notice in writing of its desire to increase its requirements from SPS, specifying the Delivery Point(s) and the date(s) on which the increase will be needed. Subject to the terms and limitations of this Agreement, SPS will make such additional electric power and energy available to Customer at the specified Delivery Points and on the dates specified, provided that SPS has sufficient capacity in its existing facilities. The terms and conditions required to make such additional electric power and energy available shall be negotiated by the Parties.

In the event that SPS is unable to provide the additional capacity requested by Customer, Customer may, notwithstanding any other provision of this Agreement, shift load, interconnect with other suppliers, and install or purchase such power supply resources as may be necessary for Customer to meet such additional requirements; provided that, Customer must comply with the notice and coordination provisions of the last paragraph of Article II.

## ARTICLE IV.

### Metering

Electric power and energy supplied by SPS to Customer shall be metered at the Delivery Points and voltages shown in Exhibit A.

The meters and metering equipment required for the measurement of electric power and energy delivered to Customer shall be owned, installed, operated and maintained by SPS.

Periodic tests shall be made on the metering equipment by SPS at approximately 12-month intervals after original installatio Prior notice of each periodic test shall be given to Customer a. an opportunity afforded Customer to have a representative presenc to witness the test. If, as a result of the test, the metering



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equipment is found to be inaccurate, SPS will restore the metering equipment to a condition of accuracy. If the inaccuracy exceeds two percent of 100 percent registration, the readings of the meters taken during the period of 90 days preceding the test (or during such shorter period as may have intervened since the previous test) shall be corrected and payments adjusted accordingly. In no event will corrections be made for a period beyond 90 days or the date of the last preceding test, whichever is the shorter period.

In addition to the regular periodic tests, Customer or SPS, upon request in writing given by one to the other, may call for a special test of the metering equipment. The meter or meters involved in the request shall be tested by SPS as soon as reasonably practical with representatives of the Parties present. In the event that the special tests requested by Customer shall show the meter or meters to be registering within two percent of 100 percent registration, Customer shall bear the expense of the tests. If the tests show greater than two percent of error, SPS shall bear the costs of the tests.

If the meters installed by SPS wholly fail to register the electric power or energy during any period of time, the amount of electric power or energy delivered during the period shall be measured by means of check meters as may have been installed by Customer. If Customer has not installed check meters, or if check meters have wholly failed to register the electric power or energy during this period of time, the amounts of electric power or energy so delivered will be estimated according to the amounts previously delivered under substantially similar conditions.

ARTICLE V.

Connection to Qualifying Facilities

In accordance with and subject to the Public Utility Regulatory Policies Act of 1978 and the Federal Energy Regulatory Commission and state jurisdictional regulations thereunder, Customer is obligated to purchase power and energy from qualifying facilities ("Qualifying Facility"). Customer shall give SPS



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reasonable notice of its intention to connect Customer's system to a Qualifying Facility. Customer also shall give SPS reasonable notice before the initial energizing or start-up testing of the Qualifying Facility so that SPS may have a representative present at the test.

Customer shall furnish SPS such information concerning any Qualifying Facility to which Customer proposes to connect Customer's system as SPS may require. The provision of such information to SPS does not relieve Customer from any liability, nor does it guarantee the adequacy of any Qualifying Facility to which Customer proposes to connect its system to perform its intended functions.

Customer shall cause to be installed at no expense to SPS facilities or equipment which SPS shall specify as necessary to protect SPS's system from faults, disturbances or overload conditions resulting from the interconnection of Customer's system to a Qualifying Facility and require an operating agreement for conditions related to technical and safety aspects of parallel generation. Such facilities and equipment shall be installed prior to the connection of Customer's system to a Qualifying Facility. CUSTOMER AND SPS DISCLAIM ANY AND ALL REPRESENTATIONS AND WARRANTIES, WHETHER WRITTEN OR ORAL, EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, DESIGN, OR SUITABILITY, AND ARISING BY CONTRACT OR STATUTE, RELATING TO ANY PROTECTIVE FACILITIES OR EQUIPMENT THAT SPS MAY SPECIFY FOR INSTALLATION.

If, in the sole judgment of SPS, the connection of Customer's system to a Qualifying Facility results in an unsafe condition, SPS shall have the right to disconnect Customer's facilities from SPS's system. Any generation from a Qualifying Facility that produces harmonics of a magnitude or frequency that could interfere with communications equipment or SPS's system voltage shall be discontinued until corrective measures have been taken by the Customer or the owner of the Qualifying Facility.

Consistent with Article XI, Customer shall supply or shall



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arrange for the Qualifying Facility to supply, at no cost to SPS, a suitable location on Customer's or Qualifying Facility's system for SPS to install, operate, maintain, repair, replace, and remove all of its metering equipment and facilities to be used for determining the amount of power and energy supplied by the Qualifying Facility. Customer or the Qualifying Facility shall provide SPS reasonable means of access to its metering equipment and facilities.

Electric power and energy delivered by the Qualifying Facility to Customer shall be metered by SPS in accordance with Article IV and charged to Customer by SPS in accordance with Article VI. The measured demand for Customer's Delivery Point beyond which the Qualifying Facility is interconnected to Customer, shall be the maximum simultaneous sum recorded during the billing cycle of: (a) Customer's purchased power on the SPS meter at the Delivery Point, and (b) the Qualifying Facility deliveries to Customer recorded on the SPS meter at the Qualifying Facility. SPS shall credit Customer with an amount determined in accordance with SPS's avoided costs approved by the Public Utility Commission of Texas. The cost of metering required for the Customer's interconnection with a Qualifying Facility shall be borne by the Customer.

At its sole expense, Customer shall obtain all permits and licenses, and comply with all fees, rules, regulations, ordinances, inspections, and other requirements relating to the interconnection of its system to a Qualifying Facility that may be imposed by any federal, state, county, city, municipal, or other governmental agency.

ARTICLE VI.

Rates

Customer shall pay SPS for electric power and energy delivered by SPS to Customer at the rate and on the terms and conditions set forth in its Wholesale Full Requirements Rate Schedule on file with the Federal Energy Regulatory Commission, a copy of which is attached as Exhibit B. The sum of the monthly billing demands for



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Customer in any calendar year starting with the first whole calendar year of service, shall not be less than the amount shown in Column (2) of Exhibit C (Minimum Calendar Year Billing Demand). If in any calendar year, Customer has not paid for at least the Minimum Calendar Year Billing Demand, then SPS will bill Customer for the difference between the Minimum Calendar Year Billing Demand and the billing demand actually paid. Customer will pay the additional amount billed subject to Article IX, provided, however, that if the additional amount billed is in excess of $25,000, Customer may, at its option, spread payment of the additional amount with interest calculated using the same rate of interest provided in Article IX over a period not to exceed twelve months, with monthly installments of no less than $25,000.

ARTICLE VII.

Exceptions To Minimum Demand Billing Units

Customer agrees to use its best efforts, including diligent pursuit of all necessary regulatory approvals and construction of any required transmission facilities, to transfer to SPS all of Customer's load now served from Customer's transmission level substations. This load now represents approximately eighty five (85) megawatts of peak demand. In consideration for Customer's agreement to use its best efforts to transfer all transmission level substations to SPS, the obligation of Customer to pay for the Minimum Calendar Year Billing Demand shall not begin if events beyond the control of Customer, including, without limitation, inability to obtain regulatory approvals, prevent Customer from completing the transmission facilities necessary to shift enough of Customer's load from ERCOT to SPS to avoid the application of Minimum Calendar Year Demand billing unit charges. It is understood, that if at any time the Customer's actual billing demand equals or exceeds the Minimum Calendar Year Billing Demand, this exception shall terminate.

The Minimum Calendar Year Billing Demand also shall not apply unless and until SPS has placed in service the transmission



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interconnections described in Article I of this Agreement.

ARTICLE VIII.

Conservation And Load Management Measures

To the extent SPS implements time-of-use pricing or load management programs for other SPS full requirements wholesale customers, SPS will offer to Customer the same rates and programs under the same terms and conditions applicable to the other full requirements wholesale customers. Furthermore, SPS and Customer shall cooperate in developing and implementing such other conservation and load management measures as may be practicable and mutually beneficial.

ARTICLE IX.

Payment of Bills

SPS shall bill Customer monthly for electric power and energy at supplied during the billing cycle, and Customer shall make payment at the main office of SPS in Amarillo, Texas, in accordance with the terms provided on Exhibit B. In case a portion of any bill is in dispute, the undisputed portion shall be paid by its due date. After the dispute is resolved, if Customer is found to owe all or a portion of the disputed amount, Customer shall promptly pay SPS the amount found owing, together with interest at the lesser of one and one-half percent per month or the base rate announced by Bank-One N.A. as of the last business day of the month in which the bill was originally due. If Bank-One, N.A. (or any substitute index bank) no longer announces a base rate or ceases to exist, SPS may designate a new index bank by notifying Customer of the selection and the designation shall be effective as of the date the notice is delivered. A substitute index bank must be a national banking association that has capital and undivided profits of at least $100 million and is located in a metropolitan area of the United States of America that has a population greater than 500,000. All statements, billings and payments shall be subject to correction of any errors, except meter errors, for two (2) years after rendition.

## ARTICLE X.

Termination of Agreement For Breach

Should either Party violate any material provision of this Agreement, the other Party may terminate this Agreement by giving written notice that this Agreement will terminate in thirty (30) days unless the defaulting Party commences remedying the violation in that time and thereafter diligently pursues the cure of the violation. Any other remedy or remedies available under the law for any violation of the terms of this Agreement shall not be limited in any way because of this provision or the exercise of the right conferred in this provision.

## ARTICLE XI.

Access

Customer shall provide, at no cost to SPS, a suitable place (including means of support) on and access to Customer's property for SPS to install, maintain, operate, repair, replace, and remove all equipment and facilities that SPS reasonably deems necessary to perform its obligations under this Agreement. Customer shall use reasonable diligence to protect all SPS equipment located on Customer's property.

## ARTICLE XII.

Force Majeure

A Party shall not be in breach because of a failure to perform (other than a failure to pay when due), if the failure is caused by force majeure. Force majeure is something beyond a Party's control, and includes, but is not limited to, acts of God, governmental acts (whether or not within the power of the government or governmental agency), acts of the public enemy, floods, epidemics, quarantine restrictions, strikes, labor slowdowns, labor troubles, freight embargoes, and breakdowns or damages to equipment (including emergency outages of equipment or facilities used for making repairs to avoid breakdown, damage, or imminent danger). A Party claiming force majeure shall promptly

notify the other of the occurrence of the event of force majeure, and shall exercise reasonable business efforts to remove the event of force majeure. Nothing in this article shall require a Party to settle or resolve any labor dispute if it deems the settlement to be contrary to its best interests.

ARTICLE XIII.

Liability

Each Party shall defend, indemnify, and hold the other Party harmless from and against any and all claims and damages for injury to or death of any person or damage to or loss of the indemnitee's property arising out of, relating to, or attributable, directly or indirectly, to the ownership, operation, or maintenance of the indemnitor's electrical system. As an indemnitor, SPS's electrical system shall not include the segments constructed by SPS on Customer's electrical system pursuant to Articles XXII and XXIII. The indemnifying obligation created by this Article shall also include the obligation to indemnify against reasonable attorney's fees and other costs of defense. In no event shall the indemnitor be liable to the indemnitee for special, consequential, or incidental damages for loss of profits or revenue or the loss of use of either, costs of replacement power or capital, or claims of customers of the indemnitee relating to loss of power supply, or other special, consequential, or incidental damages whatsoever.

ARTICLE XIV.

Assignment

Either Party may assign this Agreement with the other Party's prior written consent, which consent shall not be unreasonably withheld. Except as otherwise agreed in writing by the Parties, no assignment shall relieve the assigning Party of any liability arising out of or resulting from this Agreement. Subject to the foregoing, this Agreement shall be binding on and inure to the benefit of the Parties and their respective successors and assigns.



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ARTICLE XV.

Approval

This Agreement and any amendments to this Agreement are subject to approval or acceptance by the Federal Energy Regulatory Commission. If the Commission should require material modification of this Agreement prior to acceptance, either Party may withdraw from the Agreement at that time.

ARTICLE XVI.

Effective Date and Term

This Agreement shall become effective on the date allowed to become effective by the Federal Energy Regulatory Commission.

This Agreement shall remain in effect until December 31, 2013, and year to year thereafter until cancelled by either Party, with the termination being effective at the end of a calendar year, by giving notice of termination at least five years prior to December 31, 2013, or any extension therefrom.

During the period beginning January 1, 2004 and ending December 31, 2013, Customer may elect to terminate this Agreement early, effective at the end of any calendar year, by giving SPS at least five years notice before the proposed termination date. However, because Customer has required and SPS has agreed to construct additional SPS transmission facilities to make the sales of power and energy contemplated herein, Customer agrees upon early termination to make additional payments in support of such transmission investment in accordance with the schedule shown in Column (4) of Exhibit C.

ARTICLE XVII.

Conversion To Partial Requirements Service

In the event that Customer elects to convert to partial requirements service under this Article, such partial requirements service shall be provided in accordance with the terms and conditions of a separate partial requirements agreement between the Parties that is approved or accepted for filing by the Federal



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Energy Regulatory Commission, provided that any such partial requirements service agreement shall incorporate the minimum firm capacity provisions contained in this Article.

SPS and Customer shall proceed to negotiate a partial requirements agreement upon receipt by SPS of Customer's notice to convert to partial requirements service. Even if the Parties have not executed a partial requirements agreement, SPS shall file, no later than one year in advance of the effective date of Customer's conversion to partial requirements service, complete partial requirements service rates, terms and conditions for review and approval by the Federal Energy Regulatory Commission.

Customer may elect to become a partial requirements customer effective as of January 1, 2004, or at the commencement of any calendar year thereafter, upon three years' prior notice, provided that Customer commits to purchase firm capacity during the first two years that Customer is a partial requirements customer at a demand level equal to or greater than the level shown in Column (3) of Exhibit C for the corresponding years. If Customer's commitment to purchase firm capacity is less than a demand level equal to or greater than the level shown in Column (3) of Exhibit C for such years, but is more than eighty percent (80%) of same, Customer must provide four years' prior notice. If Customer's commitment to purchase firm capacity is less than eighty percent (80%) of such demand level, Customer must provide five years' prior notice. Unless a minimum purchase is required as a result of notice of less than five years, Customer's purchase obligation for any year shall be determined in accordance with the partial requirements service agreement between Customer and SPS.

If Customer elects to become a partial requirements customer and desires to avoid payment in support of SPS transmission investment, it shall commit to purchase firm capacity in each calendar year through the year 2013 at a demand level not below the partial requirements class minimum firm power commitment shown in Column (3) on Exhibit C. If Customer elects to become a partial requirements customer and commits to purchase firm capacity in a

calendar year at a demand level below the partial requirements class minimum firm power commitment shown in Column (3) on Exhibit C, then Customer shall pay a payment equal to the amount of demand below the partial requirements class minimum firm power commitment times the payment amount shown in Column (5) of Exhibit C for the respective year the purchased firm power is below the partial requirements class minimum firm power commitment. Upon payment, the partial requirements class minimum firm power commitment for subsequent years as shown in Column (3) of Exhibit C shall be reduced by the amount of demand for which a payment has been made.

ARTICLE XVIII.

Modifications

The Parties may modify or amend this Agreement only by signing a written amendment. However, nothing contained herein shall be construed as affecting in any way (a) the right of the Party furnishing or causing to be furnished service under this Agreement to unilaterally make application to the Federal Energy Regulatory Commission or other governmental body having jurisdiction for a change in rates and charges under Section 205 of the Federal Power Act, or successor statute, and pursuant to the Commission's Rules and Regulations promulgated thereunder, and (b) the right of Customer to protest, object to or intervene concerning any such application by SPS or to make complaint before any governmental body having jurisdiction or petition for an investigation under Section 206 of the Federal Power Act, or successor statute, concerning rates and charges, classification or service, or any provision, term, rule, regulation, condition or contract relating thereto.

ARTICLE XIX.

Governing Law

This Agreement shall be governed by the laws of the State of Texas excluding conflicts of laws provisions, and is performable in Potter County, Texas.

ARTICLE XX.

Cumulative Remedies

Pursuit by either Party of any remedy available for default or breach of this Agreement shall not constitute a forfeiture or waiver of any amount due by the defaulting Party or of any damages occurring by reason of the violation of any of the terms, provisions, or conditions of this Agreement. No waiver of any violation shall be deemed or construed to constitute a waiver of any other violation or breach of any of the terms, provisions, or conditions of this Agreement. Forbearance to enforce one or more of the remedies available on an event of default or breach shall not constitute a waiver of that or any subsequent default or breach.

ARTICLE XXI.

Notice

Any notice to be given by the Parties shall be in writing and shall be sufficient if delivered in person, sent by U.S. mail, postage prepaid, other delivery services, or communicated electronically to the following addresses:

Southwestern Public Service Company
Vice President Marketing
601 S. Tyler (Zip 79101)
P. O. Box 1261
Amarillo, TX 79170

and to:

Cap Rock Electric Cooperative, Inc.
General Manager
West Highway 80
P.O. Box 700
Stanton, Texas 79782



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The designation of address of either Party may be changed at any time by notice to the other Party.

ARTICLE XXII.

Additional Customer Facilities

SPS understands that additional facilities are necessary on Customer's system to enable SPS to sell and deliver electric power and energy to Customer. Upon request by Customer, SPS or its designee shall assist Customer in the acquisition, construction and operation of these additional facilities. The assistance requested may include financing arrangements, design, construction, operation and maintenance. Customer agrees that it will repay to SPS the costs incurred in providing the assistance upon the terms and over the period as may be mutually agreed. Any such arrangements shall be pursuant to separately negotiated written agreements.

ARTICLE XXIII.

Lease of Facilities

SPS and Customer agree that it may be mutually beneficial for SPS, or its designee, to lease certain facilities or rights to facilities of Customer. Under such terms as are agreed, Customer may lease facilities or rights to facilities, or assign leased facilities, to SPS or its designee, and SPS may charge Customer for its costs, including but not limited to operations maintenance, and lease costs. Any such arrangements shall be pursuant to separately negotiated written agreements.

SPS and Customer agree that it may be mutually beneficial for Customer to lease certain facilities owned or controlled by SPS in order for Customer to purchase capacity and energy from SPS. Any such arrangements shall be pursuant to separately negotiated written agreements.



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## ARTICLE XXIV.

Mutual Assistance

SPS and Customer agree to render mutual assistance as necessary to effect the construction of transmission facilities required for the purchases and sales of electric power and energy contemplated by this Agreement. Such mutual assistance shall include, without limitation, support of applications for regulatory approvals necessary for the construction of such facilities.

## ARTICLE XXV.

Other Agreements

During the term of this Agreement, SPS agrees not to, without the prior written approval of Customer, seek ownership or control of Customer, or any of Customer's assets or affiliates, or to advise, assist or encourage any other entity seeking ownership or control of Customer, or any of Customer's assets or affiliates without the prior written consent of Customer.

SPS agrees during the term or at termination of this Agreement to offer Customer at comparable prices and on comparable terms any electric utility service that SPS may be providing to any other wholesale customer to which Customer is similarly situated in relevant respects, and provided it is economically beneficial to both Parties and it is technically feasible to do so. However, SPS shall not be required by this commitment to waive or reduce any obligations that Customer has under this Agreement.

SPS recognizes that Customer may increase its wholesale power requirements through mergers, acquisitions, or other joint ventures and will cooperate with Customer, to the extent feasible and practicable, to arrange mutually beneficial wholesale power supply arrangements for such additional loads.

The Parties recognize the authority of the Public Utility Commission of Texas and its jurisdiction over certificated service areas and neither Party will seek to acquire new certificated service areas in the existing certificated service areas of the other Party without the prior written agreement of the other Party.



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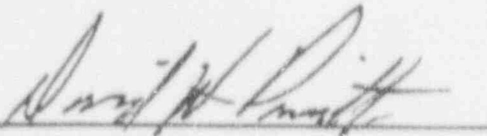
ARTICLE XXVI.

Entirety

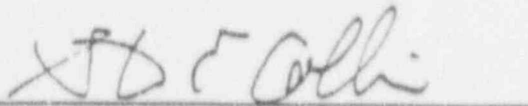
This Agreement contains the entire agreement of the Parties with respect to its subject matter. No other agreement, statement, or promise made by any Party, or by any officer, employee, or agent of any Party, that is not contained in this Agreement shall be binding or valid unless in writing and signed by both Parties. Provisions of this Agreement shall be construed as a whole according to their common meaning, and not strictly for or against either Party.

Duly and fully authorized representatives of the Parties have signed and delivered this Agreement as of 3, July, 1991.

CAP ROCK ELECTRIC COOPERATIVE, INC.



David W. Pruitt
Chief Executive Officer and General Manager



Steven E. Collier
Director of Power Supply and Regulatory Affairs

SOUTHWESTERN PUBLIC SERVICE COMPANY

Coyt Webb
President and Chief Operating Officer

Gary L. Gibson
Vice President, Marketing



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# SOUTHWESTERN PUBLIC SERVICE COMPANY
# EXHIBIT "A"

DELIVERY POINT NO. 1 - Vealmoor

At a point located in Section 12, Block 33, T-3-N, T&P RR Co. Survey, Borden County, Texas
at three phase 60 cycles, and approximately 138,000 volts
up to a maximum capacity of 100,000 KVA (Substation capacity various KVA)
Metering point located in Section 12, Block 33, T-3-N, T&P RR Co. Survey, Borden County, Texas
at 138,000 volts.

DELIVERY POINT NO. 2 - Tate (Backup delivery point)

At a point located near the boundary of Sections 8 and 17, Block 40, T-1-S, T&P RR Co. Survey, Midland County, Texas
at three phase 60 cycles, and approximately 138,000 volts
up to a maximum capacity of * KVA (Substation capacity various KVA)
Metering point located near the boundary of Sections 8 and 17, Block 40, T-1-S, T&P RR Co. Survey, Midland County, Texas
at 138,000 volts. *There is no additional capacity for the Tate Delivery Point. However, any portion of the Vealmoor capacity may be taken through Tate as system conditions allow.

DELIVERY POINT NO. ______

At a point ______
at three phase 60 cycles, and approximately ______ volts
up to a maximum capacity of ______ KVA (Substation capacity ______ KVA)
Metering point ______
at ______ volts.

DELIVERY POINT NO. ______

At a point ______
at three phase 60 cycles, and approximately ______ volts
up to a maximum capacity of ______ KVA (Substation capacity ______ KVA)
Metering point ______
at ______ volts.

DELIVERY POINT NO. ______

At a point ______
at three phase 60 cycles, and approximately ______ volts
up to a maximum capacity of ______ KVA (Substation capacity ______ KVA)
Metering point ______
at ______ volts.

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EXHIBIT B

SOUTHWESTERN PUBLIC SERVICE COMPANY

WHOLESALE FULL REQUIREMENTS SERVICE

RATE SCHEDULE

AVAILABILITY: Available in the territory in which SPS operates, to full requirements Wholesale Customers for resale and distribution. Service under this rate schedule is subject to the terms and conditions specified in the contract for electric service in effect between the Parties as of the effective date of this rate schedule.

CHARACTER OF SERVICE: Service under this rate schedule shall be firm, and shall be 3 phase, 60 hertz electric energy at the available standard transmission voltage, 69 kV or above.

MONTHLY RATE:

Customer Charge: $178.00 per delivery point and

Demand Charge: $6.00 per kW for all kW of billing demand and

Energy Charge: 0.34 cents per kWh for all energy used.

MEASUREMENT OF DEMAND: The measured kW demand on transmission delivery points shall be shall be the maximum thirty (30) minute period of Customer use during the month at each delivery point.

The measured kW demand on distribution delivery points (service voltage below 69 kV) shall equal 1.074 times the maximum thirty (30) minute period of use during the month at each such delivery point.

DETERMINATION OF BILLING DEMAND: The billing demand for Customer shall be the sum of the non-coincident measured demands from all delivery points, but not less than 65 percent of the highest sum of the non-coincident measured demands established in the preceding eleven months.

DETERMINATION OF ENERGY FOR DISTRIBUTION POINTS OF DELIVERY: The kWh use for billing purposes for all distribution system points of delivery (service voltage below 69 kV) shall equal 1.032 times the measured kWh delivery at each such delivery point.

FUEL COST ADJUSTMENT: The above energy charges will be increased per kWh of sales equal to the estimated fuel cost per kWh of sales in the current month and adjusted for the preceding month's estimate error. The energy charge adjustment shall be calculated in compliance with the formula and conditions set forth in the Wholesale Fuel Cost Adjustment Clause contained in Attachment 1 to this Rate Schedule. Base period fuel cost per kWh of net generation is equal to zero cents.

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TAX ADJUSTMENT: Billings under this schedule may be increased by an amount equal to the sum of the taxes payable under federal, state and local sales tax acts, and of all additional taxes, fees or charges, (exclusive of ad valorem, state and federal income taxes) payable by the utility and levied or assessed by any governmental authority on the public utility services rendered, or on the right or privilege of rendering the service, or on any object or event incidental to the rendition of service as the result of any new or amended laws after January 1, 1990.

MINIMUM BILL: The customer charge and the demand charge for the month.

PAYMENT: SPS shall bill the Customer monthly for electric power and energy supplied during the previous billing cycle, and the Customer shall make payment at the main office of SPS in Amarillo, Texas, or by wire transfer, within fifteen (15) days after the bill is mailed or otherwise transmitted to Customer.

Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under Section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

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WHOLESALE FUEL COST ADJUSTMENT CLAUSE

1. The charges for actual wholesale service rendered during the current billing period shall be increased or decreased by an adjustment amount, per kilowatt-hour of sales (to the nearest 0.0001c), equal to the difference between the estimated fuel cost (eF) per kilowatt-hour of estimated sales (eS) in the current, or billing, period (m) and the base period (b), as adjusted to allow for wholesale losses (L), with the total charges adjusted by a dollar amount to correct for prior wholesale over or under collections:

$$\text{Adjustment Factor} = \left[\frac{eFm}{eSm} - \frac{eFb}{eSb}\right] (L)$$

2. Fuel costs (F) shall be the cost of:

   (i) Fossil and nuclear fuel consumed in Company's own plants, and Company's share of fossil and nuclear fuel consumed in jointly owned or leased plants.

   (ii) Plus, the actual identifiable fossil and nuclear fuel costs associated with energy purchased for reasons other than identified in (iii) below. Included therein shall be the portion of the cost of purchases from Qualifying Facilities at or below Company's avoided variable energy cost.

   (iii) Plus, the net energy cost of energy purchases, exclusive of capacity or demand charges (irrespective of the designation assigned to such charges), when such energy is purchased on an economic dispatch basis. Included therein may be such costs as:

   (1) charges incurred for economy energy purchases and

   (2) charges incurred as a result of scheduled outages,

   all such kinds of energy being purchased by the Company to substitute for its own higher cost energy.

   (iv) Less, the cost of fossil and nuclear fuel recovered through inter-system sales, including the fuel costs recovered from economy energy sales and other energy sold on an economic dispatch basis.

3. Sales (S) shall be equated to:

   (i) the sum, measured at the bus-bar or interconnection point, of (1) generation, (2) purchases, and (3) interchange-in,

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(ii) less (1) inter-system sales, as referred to in 2.(iv) above, and (2) inter-system losses.

4. "L", the adjustment for wholesale losses, determined at the wholesale delivery points, shall be equal to:

$$1.039 = \frac{1}{1 - 3.754\%}$$

5. The current month adjustment for prior wholesale over or under collections shall be calculated as:

(i) the first prior month's (p) actual fuel costs (aF) divided by actual sales (aS),

(ii) minus that month's (p) estimated fuel costs (eF) divided by estimated sales (eS),

(iii) times the wholesale loss adjustment (L),

(iv) times actual wholesale sales (W) in that month (p) for each customer.

$$\text{Adjustment Amount} = \left[\frac{aFp}{aSp} - \frac{eFp}{eSp}\right] (L)\ (Wp)$$

The adjustment amount shall be debited or credited to the current month's billing.

6. (i) The fuel cost adjustment factor calculation shall not include:

(1) the net energy cost of electric energy purchased from Celanese Corporation and,

(2) the kilowatt-hours generated at the Celanese Corporation chemical plant, not to exceed the amount of electric energy consumed at that plant.

(ii) The fuel cost adjustment factor calculation shall include both the net energy cost of energy purchased from Celanese, and the kWh generated at its plant, for any amount of energy which does exceed the amount consumed at that plant.

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EXHIBIT B
ATTACHMENT 2

SOUTHWESTERN PUBLIC SERVICE COMPANY

WESTERN SYSTEMS POWER POOL
EXPERIMENTAL SALES BENEFITS CREDIT RIDER

To credit seventy-five percent of the benefits derived from transactions under the Western Systems Power Pool (WSPP) Experiment, the total billings for wholesale requirements service rendered during each billing month shall be decreased by a dollar amount calculated as follows using actual data from the month just prior to the current billing month.

$$\text{WSPP Credit} = \left[\frac{.75\ (B-A)}{S}\right] * L * W_c$$

Where:

B = the actual benefits from WSPP transactions for the prior month defined as WSPP sales revenues less WSPP sales fuel cost, variable supervision and engineering maintenance expense (account 510) of .10 mills/kWh, variable boiler plant maintenance expense (account 512) of .35 mills/kWh, and variable electric plant expense (account 513) of .25 mills/kWh;

S = the total actual applicable Sales for the prior month is defined as the sum of generation, purchases, and interchange-in less intersystem sales, with losses, and energy generated at the Celanese Corporation chemical plant.

A = the actual out-of-pocket administrative expenses incurred in the prior month because of Southwestern's participation in the WSPP Experiment. This expense shall include applicable filing fees, outside services fees and direct expenses paid to the WSPP for data processing, interconnection fees, report preparation, etc. If administrative expenses exceed the benefits of sales in the month, no credit will be given and expenses above benefits will be accrued and applied in subsequent months to preclude application of negative credits.

L = the loss adjustment factor for wholesale level losses equal to 1.039; and

$W_c$ = the wholesale requirements customer's total kilowatt-hours of purchases for the prior month.

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EXHIBIT C

# MINIMUM DEMAND AND EARLY TERMINATION PAYMENT

| (1) Calendar Year | (2) FRC Minimum Calendar Year Billing Demand (kW) | (3) PRC Minimum Firm Power Commitment (kW) | (4) Early Contract Termination Payment ($) | (5) PRC Sub-Minimum Commitment Payment ($/kW) |
|---|---|---|---|---|
| 1994 | 530,000 | - | - | - |
| 1995 | 636,000 | - | - | - |
| 1996 | 743,000 | - | - | - |
| 1997 | 743,000 | - | - | - |
| 1998 | 743,000 | - | - | - |
| 1999 | 743,000 | - | - | - |
| 2000 | 743,000 | - | - | - |
| 2001 | 743,000 | - | - | - |
| 2002 | 743,000 | - | - | - |
| 2003 | 743,000 | - | - | - |
| 2004 | 743,000 | 63,000 | 10,000,000 | 158.73 |
| 2005 | 743,000 | 59,000 | 9,000,000 | 152.54 |
| 2006 | 743,000 | 56,000 | 8,000,000 | 142.86 |
| 2007 | 743,000 | 52,000 | 7,000,000 | 134.61 |
| 2008 | 743,000 | 49,000 | 6,000,000 | 122.45 |
| 2009 | 743,000 | 45,000 | 5,000,000 | 111.11 |
| 2010 | 743,000 | 42,000 | 4,000,000 | 95.24 |
| 2011 | 743,000 | 38,000 | 3,000,000 | 78.95 |
| 2012 | 743,000 | 35,000 | 2,000,000 | 57.14 |
| 2013 | 743,000 | 31,000 | 1,000,000 | 32.26 |
| 2014 | -0- | -0- | -0- | -0- |

(1) Col. (1) represents the calendar year of the Agreement beginning with the first whole calendar year of service, 1994.

(2) Col. (2) represents Customer's minimum calendar year total billing demand under full requirements class (FRC) service.

(3) Col. (3) represents the minimum calendar year firm power commitment Customer must contract for if it converts to partial requirements class (PRC) service after year ten of the Agreement.

(4) Col. (4) represents the amount Customer must pay SPS if Customer terminates the Agreement after year ten and does not convert to partial requirements class service.

(5) Col. (5) represents the amount per kW Customer must pay SPS for the amount of Customer's firm power purchase below the PRC Minimum Firm Power commitment in Col. (3).

CAP ROCK

301546

CAP ROCK ELECTRIC

P.O. BOX 9589 8140 BURNET ROAD • AUSTIN, TEXAS 78766 • 512-454-0311

CONFIDENTIAL

July 15, 1991

Mr. David W. Pruitt
CEO and General Manager
Cap Rock Electric Cooperative, Inc.
P.O. Box 700
Stanton, Texas 79782

SUBJECT: Power Supply and Regulatory Report

Dear David:

I am writing to provide you with a written summary of my power supply and regulatory activities since the June 25, 1991 board meeting. I missed that board meeting because I had to be in Oklahoma City to testify for Smith Cogeneration Management at the Oklahoma Corporation Commission. My last written report was provided in my letter dated June 19, 1991.

We have great news! We have reached agreement with Southwestern Public Service Company on a twenty-year power supply agreement. More about this is given below.

D16

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Southwestern Public Service Company

We reached complete agreement with Southwestern Public Service Company on a new twenty-year power supply contract on July 3, 1991. A copy of the final contract is attached for your review.

Bob O'Neil and I had spent June 27 in Washington drafting a complete revision of the contract that SPSCO had provided several weeks ago. Our revised draft contract was provided to SPSCO on June 28. John Parker and I met with Gary Gibson, SPSCO VP, and David Krupnick, SPSCO wholesale customer representative, in Austin during the day and again during the evening on July 1.

The SPSCO representatives returned to Amarillo on Tuesday to discuss our requirements on some unresolved issues with SPSCO management. I provided SPSCO with written comments on a few contract provisions on Tuesday. SPSCO provided us with some revised contract language about mid-day on Wednesday. I reached agreement with SPSCO on the final issues by telephone conversation with Gary and David late Wednesday. We received executed copies from SPSCO on Saturday.

We did exceptionally well in the final phase of the contract negotiations. You will recall the list of issues that I included in my last power supply report. We obtained agreement from SPSCO on essentially every one of these issues! In fact, in the rapid pace of the negotiations, and because of the quibbling by SPSCO attorneys and staff (which mightily irritated Gary Gibson and caused him to side with us on several issues), some last minute changes were worded in a way that is more favorable to us.

The only significant concession we made was to commit in writing to use our best efforts to transfer all of our present transmission level load to SPSCO. We did this in exchange for a contract provision relieving us of minimum demands if events beyond our control (e.g., inability to obtain CCN's from the PUCT, etc.) prevent us transferring load to SPSCO.

The basic terms and conditions of the contract are essentially the same as described in my summary in the May 1991 power supply report. I will give an overview of the contract at the board meeting on July 23. Unlike the hard-

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fought contract with TU Electric, this contract has very few undesirable provisions.

I will strongly recommend to the board that this contract be approved. We are waiting to execute it until we have official board approval. I will prepare an appropriate board resolution for the July 23 meeting. Waiting to sign the contract until that time also maintains the urgency for SPSCO to finalize our financing arrangements and contracts.

Not only will SPSCO be financing and constructing some or all of the new transmission and substation facilities that we will need, they will also be "leasing back" some existing facilities to repay the investment that we have made in negotiations, litigation, studies and facilities. This will provide some $5 million in immediate cash flow to be repaid over the next ten years. The repayment will be automatically included in our PCRF.

Our next step is to finalize our transmission plans and file jointly with SPSCO at the PUCT for the necessary CCN's. This will involve negotiating appropriate contracts with SPSCO and its affiliates for financing, construction, operations, leasing, etc.

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

West Texas Utilities Company

We have received a draft letter of intent from West Texas Utilities Company for negotiation of a contract to serve all of our wholesale load beginning as soon as possible. You have received a copy under separate cover. We have a few problems with the letter since it makes Cap Rock Electric solely responsible for the cost and effort of the necessary wheeling and scheduling arrangements. The power supply arrangement will have us be an all-requirements customer of WTU, so we have responded in writing that the costs and effort are more properly WTU's.

John Edwards has calculated that this arrangement should save us 20% to 25% on our power bill even with wheeling. Thus, we have a lot of flexibility to negotiate. I would recommend proceeding with this arrangement even if the savings were zero since it would handily get us out of TU Electric's sticky grasp.

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

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## Miscellaneous Power Supply Contacts

We have been contacted by [redacted] 4 about buying power, buying some or all of a power plant, and participating in a control area. The [redacted] e. As a result, they are now really interested in the matters that we have been proposing to them for many months.

The [redacted] 10 has been successfully refinanced, and its financial viability is again good. They are most interested in proceeding with a cogeneration project. I am to meet with them and their chosen third-party developer in the next few weeks.

I have been in contact with another developer who is planning one or more desalination projects in our service area. These will produce pure water as well as rare metals (e.g., $MgCl_2$). These folks have all of the problems of naivety and disorganization that we have encountered in countless others, but they may be on to something big. We are staying in touch with them.

We have no new information on the [redacted] 11 project [redacted]. [redacted] has not been optimistic about the prospects of the [redacted]

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Sincerely,

Steven E. Collier, P.E.
Director of Power Supply
and Regulatory Affairs

Enclosures

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CAP ROCK ELECTRIC

P.O. BOX 9589 8140 BURNET ROAD • AUSTIN, TEXAS 78766 • 512-454-0311

June 19, 1991

Mr. David W. Pruitt
CEO & General Manager
Cap Rock Electric Cooperative, Inc.
P.O. Box 700
Stanton, Texas 79782

SUBJECT: Power Supply and Regulatory Report

Dear David:

I am writing to provide you with a written summary of my power supply and regulatory activities since the April 23, 1991 board meeting. My last written power supply report was on May 14, 1991.

DEFENDANT'S EXHIBIT 29

30120

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Southwestern Public Service Company

Steve Collier and David Pruitt met with Coyt Webb, president, Doyle Bunch, executive vice president, Gary Gibson, vice president, and David Krupnick, manager wholesale and agricultural marketing, in Midland on May 23, 1991. The purpose of the meeting was to discuss the NWR venture and to continue discussions of the power supply agreement. SPSCO provided a draft power supply agreement at that meeting.

Representatives of Cap Rock Electric and SPSCO have met together, talked by phone, and corresponded on various occasions since that meeting to continue to discuss and develop contract language. Most recently, Steve Collier provided SPSCO with a list of the remaining issues to be resolved in developing final contract language. A list of those issues is attached to this report.

Some additional negotiations will be required to resolve these issues. It should still be possible to develop contract language and reach agreement on a final definitive power supply agreement by July.

Given our ongoing NWR activities and our power supply contract negotiations with WTU, it will be desirable to leave ourselves a little bit of flexibility to consider our options before we actually execute an agreement with SPSCO.

West Texas Utilities

Steve Collier met with representatives of West Texas Utilities in Austin on June 12, 1991. The purpose of the meeting was to discuss WTU's proposal to supply power to Cap Rock Electric. They have proposed to electronically incorporate Cap Rock Electric into their control area and serve the load under their standard all-requirements tariff. The proposal would allow for specific delivery points to be "backed-out" as the necessary SPS transmission arrangements are completed.

This proposal by WTU is extremely attractive for at least three key reasons:

(1) it can provide significant power supply savings beginning as early as this year,

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(2) it can remove all of our load from the direct control of TU Electric beginning as soon as this year, and

(3) it can be a source of firm power supply for any portion of our load that is not transferred to SPSCO.

In addition to these key benefits, Cap Rock Electric will represent a much larger proportion of WTU's total load than is currently our circumstance with TU Electric. As a result, Cap Rock Electric will have much greater negotiating leverage. In addition, we are not, nor are we likely to be, retail competitors with WTU, thereby removing an otherwise significant potential area of conflict.

WTU provided us with draft electric service agreements which are currently being reviewed by us, our attorneys, and our consultants. The action items resulting from the meeting were described in a separate letter from Steve Collier to Don Welch, WTU vice president, dated June 13, 1991, a copy of which is attached to this report.

We will anticipate terminating our existing TU Electric all-requirements power contract in late summer or early fall, such termination to be effective during the coming winter or spring, depending on how quickly the necessary control area and wheeling arrangements can be made. You will recall that we have discussed this matter extensively in prior meetings and correspondence. 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 current all-requirements power contract to the new power supply agreement which we executed last year.

TU Electric

The PUCT Hearing Examiner's report is out on the TU Electric rate case. It is possible that a final order could be issued by the Commission within about one month. Under the Hearing Examiner's report, the effective increase could be even larger than TU Electric has filed for, although the official base rate increase is slightly smaller.

Some information has been received which suggests that TU Electric may file for the Comanche Peak Unit No. 2 rate increase as early as December of this year. This would be timely, as Cap Rock Electric's intervention in such a case would strengthen its bargaining position in the WTU and SPSCO load transfers.

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TU Electric has also filed a notice of inquiry (NOI) application at the PUCT for some new combined cycle gas generation. The NOI proceeding is a precursor to an application for a certificate of convenience and necessity. Cap Rock Electric will be intervening in the NOI proceeding to: (i) receive valuable information on TU Electric load forecasts and resource plans, (ii) take reasonable steps to protect its consumers in light of the wholesale rate impact that this could ultimately have, and (iii) begin to build a negotiating position for the WTU and SPSCO load transfers.

[redacted] has reported that the low heating value gas reserves near [redacted] may not be as desirable as we first thought. Apparently, the exploration data is old and limited, and little or no actual production ever took place in the field. We are currently awaiting a more definitive assessment by [redacted] and his geologist consultant before deciding on the next best step.

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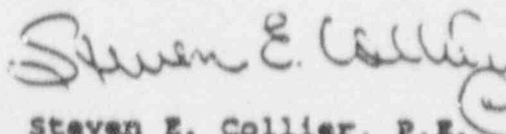
Sincerely,



Steven E. Collier, P.E.
Director of Power Supply
and Regulatory Affairs

SEC:ma
Enclosures

file CAPROCK

CAP ROCK ELECTRIC

P.O. BOX 9589 8140 BURNET ROAD • AUSTIN, TEXAS 78766 • 512-454-0311

June 12, 1991

Mr. Don Welch
Vice President
West Texas Utilities
P.O. Box 841
Abilene, Texas 79604

SUBJECT: Anticipated Power Supply Arrangements

Dear Don:

Thank you for taking the time to come with David Teeter and Scott Moore to visit me in Austin yesterday. I am especially delighted with the proposal that you have made to provide electric power service to Cap Rock Electric by means of incorporating our loads into your control area. I am currently reviewing the draft service agreement that you provided, and I have forwarded it to our attorneys and consultants for their review as well. We will provide you with our comments and any requested revisions as soon as possible.

As we discussed during our meeting, I have enclosed with this letter a copy of our base case power cost forecasts for TU Electric and Southwestern Public Service Company. As you are aware, we are currently contemplating transferring most of our load to SPSCO by 1996. We are currently in the advanced stages of contract negotiations that would require us to transfer at least 50 megawatts of load in 1994, 60 megawatts in 1995, and 70 megawatts in 1996. We are anticipating this move for two principal reasons: (i) we project SPSCO wholesale power costs to be considerably less than TU Electric wholesale power costs over the next ten to twenty years, primarily because SPSCO has extremely efficient generation and is not planning any new generation projects for at least a decade, and (ii) SPSCO is willing to assist us in the construction of local transmission facilities to integrate our system with repayment facilitated through the wholesale power contract. In addition, we find in SPSCO a much more cooperative and customer-friendly supplier than has been our experience over the years with TU Electric.

CSW 0136

DEFENDANT'S EXHIBIT 28

We are currently trying to complete our contract negotiations for a target date of July 1, 1991 to execute the final contract. If WTU can provide electric power service with economics better than or at least similar to SPSCO over the next ten to twenty years, we would be willing to visit with you about doing that instead of our anticipated transfer to SPSCO. However, we are on quite a fast track with SPSCO, and we would need to know of the prospects for long-term WTU power service very quickly.

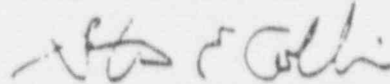
As we also discussed during the meeting, we are expecting you to provide a draft letter of intent for our consideration. This letter of intent would contemplate WTU wholesale power service for all of Cap Rock Electric's transmission and distribution delivery points, with provision for backing out certain load for service by SPSCO starting in 1993 as described above. Provided that we are able to reach agreement and execute a letter of intent, we will immediately verbally notify TU Electric of our intent to make the transition to WTU shortly after the PUCT enters a final order in the TU Electric Comanche Peak Unit No. 1 rate case as provided for in our existing wholesale power contract.

As we discussed, TU Electric is not likely to be pleased with this prospect and can be expected to insist that we do not have the option of simply moving all of the load to WTU in making the transition from our current all-requirements wholesale power supply agreement to the new power supply agreement that we executed in June, 1991.

I suggest that Scott Moore and David Teeter work directly with Mark Sullivan at Cap Rock Electric in Stanton regarding the requirements for telemetry, the identification of delivery points for Schedule A of the service agreement, and other facilities and operations matters. Of course, I remain available to assist in any way that I can in these matters.

Again, we are delighted with the prospect of wholesale electric power service by WTU. We look forward to working with you to our mutual benefit.

Sincerely.



Steven E. Collier, P.E.
Director of Power Supply
and Regulatory Affairs

SEC:ma
Enclosure
cc David Pruitt - Cap Rock Electric
Mark Sullivan - Cap Rock Electric
David Teeter - WTU
Scott Moore - WTU
Terry Dennis - CSW

*****CONFIDENTIAL*****
MEMORANDUM

TO: All Directors
John Parker
Nolan Simpson
Ulen North
Kenneth Rogers
Steve Collier

DATE: November 6, 1991

FROM: David

SUBJECT: Correspondence from TU Electric on Power Supply Agreement

The enclosed letter from TU Electric, Henry Bunting, who was one of the final negotiators in our contract that we signed with TU in June of '90, stated the position that I have all along felt TU would take. It's kind of their Declaration of War. They are taking a very hard line approach. They are trying to scare off SPS and WTU. They are rattling their saber and in many respects declared war.

This might be their way of punishing us for doing the Hunt-Collin deal or CoPower. But what they said to us verbally and what they have said to us now formally in writing are vastly different. We feel they will do <u>anything possible</u> to keep us from leaving and will do <u>nothing</u> to keep us from leaving. Sounds like a contradiction but they are not going to do any kind of special power supply deals other than Rate "WP" with us and they are going to make it extremely difficult for us to leave.

I feel we need to do whatever it takes in the news media, in the courthouse, interventions, make them sue us, etc. We need to develop a strategy so the "giant" (T.U.) has to stop us versus us trying to make the giant move.

As I said before, I expected it all along. T.U., two months ago, led us to believe that it might be a lot simpler; however, now it is obvious that they are going to fight and make it as hard as they can but <u>we will win</u>. It might take longer with WTU than we planned.

We do not have a course of action yet. We will keep you posted. Expect anything. You as a director expect it from the most unanticipated directions, be it from a member, from a neighboring co-op, expect reaction and rumors and false statements and be prepared. We expect T.U. to claim as they do in this letter we are breaching our contract with them which is not true. They will call us non-professional, unethical, lairs, frauds, etc. <u>Expect this</u>. Please report to me any conversations, any rumors that you hear concerning this particular issue or any issue. Communication among ourselves is critical.

Thank you. I will keep you posted as events develop.

DEFENDANT'S EXHIBIT 34

CAP ROCK ELECTRIC

P.O. BOX 10069

8140 BURNET ROAD • AUSTIN, TEXAS 78766-1069 • 512-451-6077

November 19, 1991

Mr. Gary Gibson
Vice-President
Southwestern Public Service Company
P.O. Box 1261
Amarillo, Texas 79170

SUBJECT: Update on Dealings with TU Electric

Dear Gary:

Please find enclosed with this letter a copy of my most recent correspondence with TU Electric regarding our contract dispute. We are scheduled to meet with them at 2:00 this afternoon to discuss our disagreement and to attempt to identify a resolution.

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

Please be assured that we will spare no effort to proceed with the arrangements for which we have contracted with Southwestern Public Service Company. Even in the highly unlikely event that TU Electric prevails entirely in their view of their contract, we would still be able to move the delivery points in the northern part of our system by late 1993 and the remainder of the load by late 1994. I must say that TU Electric simply will not prevail in their view of the contract because it is not correct.

Please call me if you have any questions or comments.

Sincerely,

Steven E. Collier, P.E.
Director of Power Supply
and Regulatory Affairs

SEC:ma
Enclosure
cc David Pruitt
Dave Krupnick

D19

DOCUMENTS

NOV-20-91 WED 9:01 STEVEN E COLLIER FAX NO. 1 512 451 6619 P.02

CAP ROCK ELECTRIC

P.O. BOX 10069 8140 BURNET ROAD • AUSTIN, TEXAS 78766-1069 • 512-451-6077

c.c. Bill Helton
C Webb
K. Ladd
D. Wills

November 20, 1991

Mr. Gary Gibson
Vice President
Southwestern Public Service Company
P.O. Box 1261
Amarillo, Texas 79170

Dear David:

I am just writing you a brief note to let you know that we did not actually meet with TU yesterday as we had originally planned. Upon advice of my attorneys, we cancelled the meeting at the last minute. This is because we did not have our legal strategy finalized, and so did not have in hand those filings that we would make in court and the accompanying press releases. We were concerned that, if we met with TU Electric, and the meeting resulted in seeming permanent polarization of the parties, that TU Electric might take the initiative and file some action in a court. We would much rather be the plaintiff than the defendant in any court action resulting in a declaratory order on our contract. Therefore, we will wait a week or two to meet with TU Electric until we have our legal strategy and the resulting filings in hand.

We will keep you updated on our strategy and action. As I have told you before, we intend to prevail in this matter that is so important to us and I believe also quite important to you. Call me if you have any questions.

Sincerely,

Steven E. Collier

Steven E. Collier, P.E.
Director of Power Supply
and Regulatory Affairs

SEC:ma
cc David Pruitt
David Krupnick

DEFENDANT'S EXHIBIT 31

SPS DOCUMENTS

MINUTES OF BOARD MEETING
CAP ROCK ELECTRIC COOPERATIVE, INC.

The regular monthly meeting of the Board of Directors of Cap Rock Electric Cooperative, Inc. was held November 26, 1991 at the Cooperative office in Stanton, Texas at 9:30 a.m.

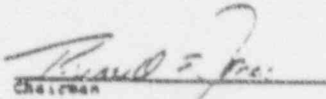
The meeting was called to order by Russell Jones, Chairman. Alfred Schwartz, Secretary, reported the following members present:

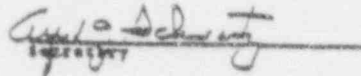
| | | | |
|---|---|---|---|
| Russell Jones | Hubert Dunn | Roger Lange | Teddy Stewart |
| Sammie Buchanan | Carlos Dusek | A. D. Reed | Newell Tate |
| Alfred Schwartz | Robert Holman | Ray Russell | |

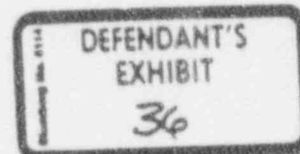
said persons being all of the Directors and quorum. David Pruitt--CEO, Tom W. Gregg, Jr.--Corporate Counsel, Kenneth Rogers, Nolan Simpson, Ulen North, Steve Collier, John Parker, and Sharon Hoelscher were also present for all or part of the meeting.

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

There being no further business to come before the Board of Directors, the meeting was adjourned at approximately 12:[illegible] p.m. by unanimous consent until the next regularly scheduled Board meeting.


Chairman


Secretary




CAP ROCK
200012 CR

# Co-op files against Giant

HERALD STAFF REPORT

Cap Rock Electric, Inc., a customer-owned electric utility which serves about 20,000 customers in 17 West Texas counties, recently filed a Texas District Court challenge in its dispute with TU Electric, the largest utility in Texas and fifth largest in the country, with over 5 million customers.

At issue is Cap Rock's right to purchase and receive wholesale power from companies other than TU Electric, who for many years has been the company's only wholesale supplier and principal retail competitor.

At stake is the opportunity for Cap Rock Electric to immediately begin purchasing power from West Texas Utilities Company (WTU) for 20 percent less than the cost from TU Electric.

This represents about $250,000 per month in savings to the customers of Cap Rock, said Steve Collier, the company's director of power supply and regulatory affairs.

"This $250,000 a month represents about a ten percent decrease in monthly bills, no small matter for our customers," he said.

Cap Rock Electric began seeking other suppliers as a result of TU Electric's rapidly increasing costs, due mainly to the huge expense of the Comanche Peak Nuclear plant.

In an announcement in October, Cap Rock said it had reached a poower supply agreement with Southwestern Public Service Company (SPS) based in Amarillo, to begin buying power in 1993.

Cap Rock has since finalized an agreement with WTU to serve all of its load until the SPS transfer is complete.

TU Electric has indicated, however, that it will not allow the WTU transaction to proceed, insisting that it continue to supply all Cap Rock's wholesale power.

TU Electric specifically is refusing to "wheel" such power, or deliver it to Cap Rock over its transmission system.

Collier noted that TU Electric had refused in 1989 to deliver cheap energy Cap Rock had contracted for with Houston Lighting and Power, costing Cap Rock's customers more than a million dollars.

"It's pretty obvious that TU wants to continue to keep our customers captive to their high rates for as long as possible, even though we represent less than one percent of their total load," Collier continued.

David Pruitt, Cap Rock's Chief Executive Officer, confirmed Collier statements.

"TU Electric is like Goliath; it does what it wants, when it wants and how it wants. We have no choice but to play David to their Goliath. Our customers' livelihoods are at stake.

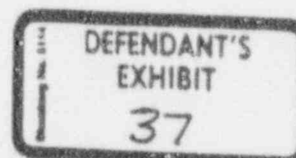
"We may be small, but we've got West Texas grit and we're going to fight for what's right."

Pruitt further said Cap Rock's customers need a break in utility costs.

"We're talking about people with their backs against the wall. Given the current economic conditions, these people could really benefit from lower electric costs."

Cap Rock Electric has become known for its aggressiveness and innovation in improving service and pursuing economy for its customer-owners. It recently announced mergers with two other electric utility cooperatives, explaining that such joint ventures further the company's strategic plan to become a more diverse and economical business.

CAP ROCK




200024 CR

NO. 91-15109 A-14th

| | | |
|---|---|---|
| TEXAS UTILITIES ELECTRIC COMPANY, | § | IN THE DISTRICT COURT |
| PLAINTIFF, | § | |
| VS. | § | DALLAS COUNTY, TEXAS |
| CAP ROCK ELECTRIC COOPERATIVE, INC. | § | |
| DEFENDANT. | § | _____ JUDICIAL DISTRICT |

**PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff TEXAS UTILITIES ELECTRIC COMPANY complaining of CAP ROCK ELECTRIC COOPERATIVE, INC., and for cause of action would show the following:

**PARTIES**

1. Plaintiff TEXAS UTILITIES ELECTRIC COMPANY ("TU Electric") is a Texas corporation with its principal place of business in Dallas, Dallas County, Texas.

2. Defendant CAP ROCK ELECTRIC COOPERATIVE, INC. ("Cap Rock") is a corporation with its principal place of business in Stanton, Martin County, Texas.

**BACKGROUND**

3. TU Electric is an electric utility engaged in the generation, purchase, transmission, distribution and sale of electric energy in the north central, eastern and western parts of the State of Texas. Cap Rock is a Texas cooperative corporation,



DEFENDANT'S EXHIBIT 70

engaged in the distribution and sale of electric energy in west Texas.

4 TU Electric and Cap Rock are parties to that certain "Agreement for Purchase of Power," dated on or about July 2, 1963 (the "1963 Agreement"), and that certain Power Supply Agreement, dated June 8, 1990 (the "1990 Agreement"), copies of which are attached hereto as Exhibits A and B, respectively, and made a part hereof. Section 2.01 of the 1990 Agreement provides that such agreement shall become effective, with respect to Cap Rock, from and after Cap Rock's termination of the 1963 Agreement, in accordance with its terms.

5. By letter dated October 23, 1991, from Steven E. Collier of Cap Rock to Darrell Bevelhymer of TU Electric, attached hereto as Exhibit C and made a part hereof, Cap Rock informed TU Electric of its intent to begin purchasing all of its wholesale power and energy requirements from another party as early as January, 1992, and thereby disavowing its obligations under the 1963 and 1990 Agreements with TU Electric.

6. A controversy has developed between TU Electric and Cap Rock as to whether (i) under the provisions of the 1963 Agreement, Cap Rock is required to purchase all of its power and energy requirements from TU Electric; and (ii) under the provisions of the 1990 Agreement, Cap Rock is required to purchase all of its power and energy requirements from TU Electric until such time as Cap Rock provides TU Electric the required notices to reduce load

supplied by TU Electric under the 1990 Agreement, as provided for therein.

7. All conditions precedent to each of TU Electric's causes of action asserted herein have been performed or have occurred.

VENUE

8. The 1990 Agreement between TU Electric and Cap Rock provides that the venue of any legal proceeding relative to said agreement shall be in Dallas County, Texas.

FIRST CAUSE OF ACTION

9. This is a cause of action against Cap Rock for anticipatory repudiation and breach of contract.

10. TU Electric realleges and incorporates by reference herein paragraphs 1 through 8 hereof.

11. Cap Rock has anticipatorily repudiated and breached the 1990 Agreement by, *inter alia*, renouncing, without just excuse, its obligations to purchase its power and energy requirements from TU Electric in accordance with the provisions thereof.

12. By reason of this breach, TU Electric has been damaged in an amount in excess of the jurisdictional limits of this Court.

SECOND CAUSE OF ACTION

13. This is a cause of action against Cap Rock for a declaratory judgment pursuant to Sections 37.001-.011 of the Texas Civil Practices and Remedies Code.

14. TU Electric realleges and incorporates by reference herein paragraphs 1 through 8 hereof.

15. Actual controversies exist between TU Electric and Cap Rock with respect to the matters set forth in paragraph 6 hereof.

16. TU Electric contends, and requests the Court to declare, (a) that Cap Rock is required to purchase all of its power and energy requirements from TU Electric pursuant to the 1963 Agreement until said Agreement is terminated in accordance with its terms; and (b) that immediately upon Cap Rock's termination of the 1963 Agreement in accordance with its terms, Cap Rock is required to purchase all of its power and energy requirements from TU Electric pursuant to the provisions of the 1990 Agreement until such time as Cap Rock provides the requisite notices to TU Electric as provided for in such Agreement; and (c) that Cap Rock has anticipatorily breached the 1990 Agreement.

THIRD CAUSE OF ACTION

17. TU Electric realleges and incorporates by reference herein the allegations of paragraphs 1 through 16 hereof.

18. Pursuant to Sections 37.009 and 38.001 of the Texas Civil Practice and Remedies Code, TU Electric is entitled to recover its costs and reasonable attorneys' fees incurred in bringing this action.

WHEREFORE, PREMISES CONSIDERED, TU Electric prays that Cap Rock be cited to appear herein and that on final hearing TU Electric be awarded judgment against Cap Rock:

1. for the damages suffered by TU Electric by reason of Cap Rock's anticipatory repudiation and breach of the 1990 Agreement;

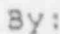
2. declaring the matters set forth in paragraph 16 above;

3. awarding to TU Electric pre- and post-judgment interest, costs of court and its reasonable attorneys' fees; and

4. awarding TU Electric such other and further relief to which it is justly entitled.

Respectfully submitted,

WORSHAM, FORSYTHE, SAMPELS
& WOOLDRIDGE



By: ______________________
M. D. Sampels
State Bar No. 17557000

3200 - 2001 Bryan Tower
Dallas, Texas 75201
(214) 979-3000

ATTORNEYS FOR PLAINTIFF,
TEXAS UTILITIES ELECTRIC COMPANY

CAP ROCK ELECTRIC

P.O. BOX 9589 8140 BURNET ROAD • AUSTIN, TEXAS 78766 • 512-454-0311

March 26, 1992

CAP ROCK ELECTRIC V. TU ELECTRIC
SUMMARY

Cap Rock Electric is seeking to stop Texas Utilities Electric Co. (TU Electric) from interfering in the delivery of power to Cap Rock from West Texas Utilities, based in Abilene.

Cap Rock Electric, which buys power wholesale and distributes it to 20,000 customer-members in 17 West Texas counties, entered into a purchase agreement with WTU in November, 1991. Previously, TU Electric, based in Dallas, had been Cap Rock's sole supplier of wholesale power.

Cap Rock Electric can buy power for at least 20 percent less from WTU than it can from TU Electric. That savings will translate to about a 10 percent savings per year for Cap Rock Electric customers -- or about $3 million annually.

Today's hearing is on Cap Rock Electric's request for a temporary injunction against TU Electric. The case is being heard by Judge John Hyde of the 238th District Court.

Attorneys for Cap Rock Electric are J. Brian Martin and Tom Gregg, of Midland, and Richard Balough and Mark Yudof of Austin.

<u>FOR MORE INFORMATION contact Teresa Kelly, for Cap Rock Electric, Austin, 1-512-328-4276, or Peggy Luxton, Cap Rock Electric in Stanton, 1-800-442-8688.</u>

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CAP ROCK ELECTRIC

P.O. BOX 9589 8140 BURNET ROAD • AUSTIN, TEXAS 78766 • 512-454-0311

ECONOMIC IMPACT OF PURCHASING POWER
THROUGH WEST TEXAS UTILITIES (WTU)

Cap Rock Electric estimates that purchasing wholesale power from West Texas Utilities, based in Abilene, would save Cap Rock Electric customers approximately 10 percent per year off electric bills over a 12-month period. The savings would vary by rate classification and from month-to-month.

Annualized rate savings projections are as follows:

* Oil companies in the Permian Basin, where Cap Rock Electric is the largest co-op supplier of electricity, would realize an annual savings of more than $1.7 million.

* Residential customers would save a total of $1 million per year.

* All other classes of customers would save a combined $300,00 annually.

* Altogether, the 20,000 customers served by Cap Rock Electric in the 17-county service area would save about $250,000 each month, or about $3 million per year.

Implementation of this rate-saving contract is contingent on the outcome of a lawsuit filed by Cap Rock Electric against its current wholesale supplier, TU Electric, in 238th District Court in Midland in December. A hearing is scheduled for March 26, before Judge John Hyde.

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FOR MORE INFORMATION contact Peggy Luxton, Cap Rock Electric, 1-800-442-8688. 2/18/92

CAP ROCK ELECTRIC

P.O. BOX 9589 8140 BURNET ROAD • AUSTIN, TEXAS 78766 • 512-454-0311

March 26, 1992

LAWSUIT MAY BRING RAY OF HOPE
TO COST-CONSCIOUS OIL INDUSTRY

MIDLAND, TX -- A district court hearing began here today on a request by Cap Rock Electric Co. for a temporary injunction to keep Texas Utility Electric Co. from interfering in a wholesale power supply contract that could result in a 10 percent electric bill reduction for Cap Rock's 20,000 customers in West Texas.

If the lawsuit against Texas Utility Electric Co. is successful, Cap Rock Electric's oil company customers will save a combined $1.7 million and residential customers will save a combined $1 million annually in lower electric bills, said Steve Collier, Cap Rock Director of Power Supply and Legislative Affairs.

Cap Rock Electric, based in Stanton, TX, filed suit against TU Electric in District Court in Midland in December. At issue is how soon Cap Rock Electric may begin buying wholesale power from companies other than TU Electric, which has been Cap Rock's sole wholesale supplier since 1963.

West Texas Utilities (WTU) in Abilene has agreed to immediately begin selling Cap Rock Electric wholesale power at rates 20 percent less than TU Electric, but TU Electric has refused to transmit the power to Cap Rock distribution points.

Cap Rock Electric's long-range plan is to build transmission lines that will allow it to receive power from Southwestern Public Service Co. of Amarillo, which is forecast to have significantly cheaper power than TU Electric over the next decade, according to Collier.

"Our mission statement makes it clear that we have a responsibility to our customer-members to seek the lowest and best wholesale power price and pass that savings on," Collier said. "TU Electric, while a fine company, has not been competitive price-wise for a long time."

Collier blamed TU Electric's high prices on construction of the Comanche Peak Nuclear Plant and the need to meet stockholder expectations.

Cap Rock Electric is the sixth largest electric cooperative in Texas, with 20,000 customers in 17 counties.

Section B
Midland Reporter-Telegram
Friday, April 10, 1992

# Cap Rock files antitrust complaint against TU

■ Action is an attempt to escape a contract, TU officials say.

By Michael Kashgarian
Staff Writer

In a "power" play against TU Electric, Cap Rock Electric — which wants to buy power from an alternate source — hopes to convince the Nuclear Regulatory Commission that the larger electric company has violated antitrust rules. Such a violation could possibly hamper licensing for Unit 2 of the Comanche Peak nuclear plant.

But, according to TU Electric officials, by Cap Rock to get out of a contract between the two electric companies. Cap Rock buys all of its power from TU Electric, and has since 1963.

Cap Rock contends that TU Electric the action is just one of on-going attempts agreed to transmit power to Cap Rock if power was purchased elsewhere.

TU Electric maintains the contract specifies two years notification to get 30 percent of the power supply from an alternate source and three years for the remainder.

The contract has been disputed in Judge John Hyde's 238th District Court, where Cap Rock seeks a temporary injunction against TU for allegedly blocking delivery of power from a third source. That hearing is scheduled to resume Tuesday.

In an attempt to pressure TU Electric to allow an alternate power source, Cap Rock recently asked the NRC to review TU Electric's antitrust status because of TU Electric's refusal to transmit power on demand from other sources.

"We're pretty little and they're pretty big, so we try to take advantage of every avenue to get a handle on this," said Steve Collier, Austin-based director of power supply for Cap Rock.

The NRC reviews comments, such as those from Cap Rock, before giving the go-ahead to operate a nuclear plant, like Unit 2 of Comanche Peak, which TU Electric hopes to start up at the end of this year.

Cap Rock expects to receive a reply on its 150-page report within a couple of months, Collier said.

"In the extreme, they (the NRC) could hold up the operating license, but that's not very likely ... More likely, they could hold an antitrust hearing," Collier said.

"What we really wish is that TU Electric will transmit our cheaper power," Collier said.

TU Electric officials — confident in the terms of the contract — said the company is willing to transmit power, but with proper notification.

As for the attempt to apply pressure through federal regulators, TU Electric officials said Cap Rock pulled the ploy unsuccessfully once before.

"This is nothing new — the same song, second verse," said Dick Ramsey, the Dallas-based director of communications for TU Electric.

In 1989, prior to Unit 1 start-up of Comanche Peak, the NRC, in response to a Cap Rock inquiry, stated the antitrust issue did not deem additional review, Ramsey said.

"They've tried everything to get out of the conditions of our contract," Ramsey said.

TU Electric has similar contracts with other companies and departing from the agreement would be a disservice to other customers and eventually cause an increase in rates, officials said.

Cap Rock officials said an alternate source would save their customers about 10 percent. Cap Rock serves about 29,000 customers in a 17-county area.

Def's Ex 76

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 |

**DEPOSITION EXCERPTS FROM DAVID ~~L. TEETER~~'S DEPOSITION**

Page 272, Lines 9 - 25

Page 273, Lines 1 - 25

Page 274, Lines 1 - 25

Page 275, Lines 1 - 7

1
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9 Q. Did y'all do a letter writing campaign?
10 Did y'all send letters to individuals throughout the
11 Permian Basin regarding this dispute?
12 A. Yes.
13 Q. And were all of the people that received
14 that letter, were they members of Cap Rock
15 Cooperative?
16 A. I don't know.
17 Q. Isn't it true that you do know that some
18 of the letters were sent to people who weren't
19 members of Cap Rock Cooperative?
20 A. Yes, the general public, there are many
21 that aren't members.
22 Q. And I am talking about letters that were
23 sent to certain individuals. You understand that
24 that's what I am talking about?
25 A. Yes.

1 Q. And isn't it true that Cap Rock sent
2 letters about this dispute to people who were not
3 being served by Cap Rock Electric?
4 A. Yes.
5 Q. Why?
6 A. To make them aware of our attempts to
7 reduce electric costs in the Permian Basin.
8 Q. Why would you send letters about this
9 dispute to people who aren't being served by
10 Cap Rock Electric?
11 A. They were and are people that we felt
12 needed to know our efforts.
13 Q. Why? If they weren't being served by
14 Cap Rock, why did these individuals need to know
15 about your efforts?
16 A. In our opinion they were individuals that
17 needed to be made aware of what we were attempting
18 to do.
19 Q. Some of these individuals lived in --
20 Isn't it true that some of these individuals that
21 received these letters lived in places where
22 Cap Rock couldn't give them electricity even if they
23 wanted to be served by Cap Rock. Isn't that true?
24 A. I would think that would be true.
25 Q. Well, wasn't this letter writing

1 campaign, as I am referring to it, wasn't it
2 designed to persuade public opinion in favor of
3 Cap Rock regarding this dispute?
4 A. It was our effort to make those people
5 that received the letter aware of our efforts.
6 Q. Okay. And why do you want to make people
7 aware of your efforts when they are not being served
8 by Cap Rock and cannot be served by Cap Rock
9 regardless of what happens in this dispute?
10 A. They're opinion makers, and we wanted
11 them to have the facts of the dispute, that they
12 might hear about it some other way.
13 Q. Were you hoping that the people that
14 received that letter would tell others about the
15 facts as Cap Rock presented it in the letter?
16 A. If they were asked we would hope they
17 would.
18 Q. And were you -- well then, you were
19 hoping that they would tell Cap Rock's story to
20 others the way Cap Rock told it in that letter,
21 correct?
22 A. Yes.
23 Q. And you hoped that they would talk to
24 others about the facts that Cap Rock put in its
25 letter, right?

A. If asked about that subject, I would think they would talk about it.

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

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

Success2.Collier

DRAFT CONFIDENTIAL

CAP ROCK ELECTRIC
Success Fee Contract

West Texas Utilities Company Contract

In accordance with Cap Rock Electric Cooperative, Inc. ("Cap Rock Electric") Board Policy # 142, this contract provides for calculation and payment of incentive compensation in the form of a percentage of net power cost savings resulting from the West Texas Utilities Company ("WTU") power supply contract.

(1) Responsible Individual:

Steven E. Collier, Director of Power Supply and Regulatory Affairs.

(2) Amount of Success Fee:

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

(3) Calculation of the Savings:

The net savings will be calculated as the difference between the sum of the power bills that would have applied under the standard TU Electric wholesale tariff and the power bill that actually occurs under the WTU tariff.

(4) Term of Success Fee:

The success fee will be paid until the sooner of the termination of the WTU contract or five years.

(5) Payment of the Success Fee:

The Success Fee will be paid after the end of each calendar year based on the above-referenced calculation for that calendar year after review and approval by the General Manager and Board of Directors of this contract and the annual approval of the above-referenced calculation by the General Manager.

The Success Fee will be paid in cash to each eligible individual in a lump sum unless the amount exceeds $10,000.00, in which case Cap Rock



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**DRAFT CONFIDENTIAL**

Electric will have the option to spread the payment over as many months as necessary so that any one monthly payment does not exceed $10,000.00. The lump-sum payment or series of payments, if applicable, will be made as provided in Board Policy # 142 and with cash availability and overall cash flow of the Cooperative considered.

The eligible individual shall have the option to elect some or all of the payment to be made to such deferred compensation plans as may be maintained by the individual or Cap Rock Electric.

(6) Conditions and Consideration for Payment:

Except upon becoming eligible for benefits under any Cap Rock Electric retirement plan, either early or regular, the Success Fee will be payable to the recipients listed below in para. (7) without regard to the continued employment of those individuals by Cap Rock Electric or an affiliate or subsidiary thereof, provided that, unless otherwise agreed by Cap Rock, each individual agrees that he will not voluntarily terminate his employment by Cap Rock Electric or any affiliate or subsidiary of Cap Rock Electric for the shorter of three years following the date of initial payment under this contract or until power deliveries have started and then ceased under the WTU contract, during the first five (5) years of said contract. Further, each individual agrees that he will keep the terms of this contract, as well as the terms of the transaction causing the awarding and payment of the Success Fee, confidential.

(7) Sharing with Other Individuals:

In recognition of the necessary contribution of the entire management team to the continued success of Cap Rock Electric and the successful implementation of the lease-purchase financing arrangements, the Success Fee will be shared among the Responsible Individual and the other management team members as follows:

Responsible Individual -- 50%

CONFIDENTIAL DRAFT

Except for the confidentiality and retirement provisions, the conditions for payment described above in para. (6) are not applicable to those persons identified and listed above as "Other Individuals". It is further understood and agreed that such conditions for payment as set out in para. (6) are applicable subject to the amount of such Success Fee total payment being commensurate and equitable with the conditions placed upon the recipients by the acceptance of such Fee.

In the event the Responsible Party should violate the terms of this Agreement, the right to receive future payments under this Agreement shall immediately cease and such interest or right to future payments shall revert to Cap Rock Electric. In the event any individual named herein by the Chief Executive Officer and Board of Directors as a part of the Management Team shall violate the terms of this agreement, die, retire, or terminate their employment with Cap Rock Electric for any reason, the right to receive future payments under this contract shall immediately cease and the Chief Executive Officer shall have the right to allocate such share among those named individuals or others as he may deem in the best interests of the Cooperative.

Witness our hands on this the ____ day of November, 1991.

| | |
|---|---|
| Responsible Individual | Date |
| Chief Executive Officer | Date |
| Chairman | Date |

SuccessFee.Collier CONFIDENTIAL

DRAFT

CAP ROCK ELECTRIC
Success Fee Contract

Southwestern Public Service Company Contract

In accordance with Cap Rock Electric Cooperative, Inc. ("Cap Rock Electric") Board Policy # 142, this contract provides for calculation and payment of incentive compensation in the form of a percentage of net power cost savings resulting from the Southwestern Public Service Company power supply contract.

(1) Responsible Individual:

Steven M. Collier, Director of Power Supply and Regulatory Affairs.

(2) Amount of Success Fee:

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

Since a portion of the savings will result from the diversity of the various delivery points that were served under noncoincident peak billing by TU Electric and which will be served as a single point of delivery under the terms negotiated with SPSCo, and since Cap Rock Electric would have eventually combined the delivery points into one or two in any event, the portion of the savings resulting from diversity will be imputed only for the first five years of the success fee or until TU Electric implements coincident peak billing, whichever is sooner.

(3) Calculation of the Savings:

The net savings will be calculated as the difference between the sum of the power bills that would have applied under the standard TU Electric wholesale tariff and the power bill that actually occurs under the SPSCo tariff.

Since the various substations that would have been separate delivery points under the TU Electric noncoincident billing approach will be combined into one delivery point for SPSCo, actual noncoincident demand billing units may not be



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CONFIDENTIAL DRAFT

conveniently available. If this is the case, the coincident demand of the load served by SPSCo will be converted to an equivalent noncoincident demand for calculation of the TU Electric benchmark bill using the average demand diversity that existed among the relevant delivery points for the two years prior to transfer to SPSCo.

(4) Term of Success Fee:

The Success Fee will be paid until the sooner of the termination of the SPSCo contract or ten years.

(5) Payment of the Success Fee:

The Success Fee will be paid after the end of each calendar year based on the above-referenced calculations for that calendar year after review and approval by the General Manager and Board of Directors of this contract and the annual approval of the above-referenced calculation by the General Manager.

The Success Fee will be paid in cash to each eligible individual in a lump sum unless the amount exceeds $10,000.00, in which case Cap Rock Electric will have the option to spread the payment over as many months as necessary so that any one monthly payment does not exceed $10,000.00. The lump-sum payment or series of payments, if applicable, will be made as provided in Board Policy # 142 and with cash availability and overall cash flow of the Cooperative considered.

The eligible individual shall have the option to elect some or all of the payment to be made to such deferred compensation plans as may be maintained by the individual or Cap Rock Electric.

(6) Conditions and Consideration for Payment:

Except upon becoming eligible for benefits under any Cap Rock Electric retirement plan, either early or regular, the Success Fee will be payable to the recipients listed below in para. (7) without regard to the continued employment of those individuals by Cap Rock Electric or an affiliate or subsidiary thereof, provided that, unless otherwise agreed by Cap Rock, each individual agrees that he will not voluntarily terminate his employment by Cap Rock Electric or any affiliate or subsidiary of Cap Rock Electric

CONFIDENTIAL DRAFT

for the shorter of three years following the date of initial payment under this contract or until power deliveries have started and then ceased under the SPSCo contract, during the first ten (10) years of said contract. Further, each individual agrees that he will keep the terms of this contract, as well as the terms of the transaction causing the awarding and payment of the Success Fee, confidential.

(7) Sharing with Other Individuals.

In recognition of the necessary contribution of the entire management team to the continued success of Cap Rock Electric and the successful implementation of the lease-purchase financing arrangements, the Success Fee will be shared among the Responsible Individual and the other management team members as follows:

Responsible Individual -- 50%

Except for the confidentiality and retirement provisions, the conditions for payment described above in para. (6) are not applicable to those persons identified and listed above as "Other Individuals". It is further understood and agreed that such conditions for payment as set out in para. (6) are applicable subject to the amount of such Success Fee total payment being commensurate and with the conditions placed upon the recipients by the acceptance of such Fee.

In the event the Responsible Party should violate the terms of this Agreement, the right to receive future payments under this Agreement shall immediately cease and such interest or right to future payments shall revert to Cap Rock Electric. In the event any individual named herein by the Chief Executive Officer and Board of Directors as a part of the Management Team shall violate the terms of this agreement, die, retire, or terminate their employment with Cap Rock Electric for any reason, the right to receive future payments under

CONFIDENTIAL DRAFT

this contract shall immediately cease and the Chief Executive Officer shall have the right to allocate such share among those named individuals or others as he may deem in the best interests of the Cooperative.

Witness our hands on this the _____ day of November, 1991.

| | |
|---|---|
| Responsible Individual | Date |
| Chief Executive Officer | Date |
| Chairman | Date |

this contract shall immediately cease and the Chief Executive Officer shall have the right to allocate such share among those named individuals or others as he may deem in the best interests of the Cooperative.

Witness our hands on this the 26th day of November, 1991.

| | |
|---|---|
| Responsible Individual | 12-11-91 Date |
| Chief Executive Officer | 11-26-91 Date |
| Chairman | 11-26-91 Date |

DEFENDANT'S EXHIBIT 88

Except for the confidentiality and retirement provisions, the conditions for payment described above in para. (6) are not applicable to those persons identified and listed above as "Other Individuals". It is further understood and agreed that such conditions for payment as set out in para. (6) are applicable subject to the amount of such Success Fee total payment being commensurate and equitable with the conditions placed upon the recipients by the acceptance of such Fee.

In the event the Responsible Party should violate the terms of this Agreement, the right to receive future payments under this Agreement shall immediately cease and such interest or right to future payments shall revert to Cap Rock Electric. In the event any individual named herein by the Chief Executive Officer and Board of Directors as a part of the Management Team shall violate the terms of this agreement, die, retire, or terminate their employment with Cap Rock Electric for any reason, the right to receive future payments under this contract shall immediately cease and the Chief Executive Officer shall have the right to allocate such share among those named individuals or others as he may deem in the best interests of the Cooperative.

Witness our hands on this the 26th day of November, 1991.

Responsible Individual — Date: 12-10-91

Chairman of the Board — Date: 11-26-91

Chief Executive Officer — Date: 11-26-91

DEFENDANT'S EXHIBIT 89