

UNITED STATES OF AMERICA  
BEFORE THE  
NUCLEAR REGULATORY COMMISSION

Texas Utilities Electric )  
Company, et al. ) Docket Nos. 50-445A,  
Comanche Peak Steam Electric ) 50-446A  
Station, Units 1 and 2 )

TO: Director,  
Office of Nuclear Reactor Regulation

REQUEST OF  
CAP ROCK ELECTRIC COOPERATIVE, INC.  
FOR REEVALUATION OF THE DIRECTOR'S DETERMINATION  
THAT THERE HAVE BEEN NO SIGNIFICANT CHANGES IN  
LICENSEE'S ACTIVITY THAT WARRANT AN  
ANTITRUST REVIEW AT THE OPERATING LICENSE STAGE

Pursuant to 10 C.F.R. § 2.101(e)(2), Cap Rock Electric Cooperative, Inc. ("Cap Rock") hereby requests that the Director of the Office of Nuclear Reactor Regulation ("Director") reevaluate and reverse his determination that no significant changes have occurred in the licensee's activities subsequent to the antitrust review associated with the construction permit for Unit 1 of the Comanche Peak Steam Electric Station.<sup>1/</sup> Cap Rock submits that the Director's determination is based upon a misinterpretation of the Summer decision <sup>2/</sup> and factual conclusions that are contradicted by substantial and unrebutted evidence.

The overriding question is whether the willful abrogation of the Comanche Peak antitrust license conditions by Texas Utilities

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1/ The Director's finding was published at 54 Fed. Reg. 26865 (June 26, 1989).

2/ South Carolina Electric & Gas Co., et. al. (Virgil C. Summer Nuclear Station, Unit No. 1), 13 N.R.C. 862 (1981).

Electric Company ("TUEC") constitutes a significant change in TUEC's activities within the meaning of Section 105(c)(2) of the Atomic Energy Act, 42 U.S.C. § 2135(c)(2). Cap Rock believes that the nature of the violations, and the denigration of Commission jurisdiction that results from such violations, lead ineluctably to the conclusion that TUEC's abrogation of the license conditions is a significant change within the meaning of Section 105(c)(2).

The antitrust review instituted by the Commission in 1978 was terminated because, and only because, TUEC agreed to abide by the terms of the antitrust license conditions.<sup>3/</sup> TUEC's willful violation of the conditions, therefore, is necessarily a significant change in TUEC's activities. In 1980 TUEC agreed to abide by the conditions imposed by this Commission; now TUEC refuses to abide by and to honor those same conditions. TUEC's current violations are relevant to show that the anticompetitive practices that the conditions sought to preclude are, contrary to the Staff and Director findings, now being undertaken again by TUEC. Perhaps more importantly, TUEC's current violations are, themselves, new and independent evidence of ongoing TUEC anticompetitive conduct of precisely the nature of conduct the

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<sup>3/</sup> Houston Lighting & Power Company, et al. (South Texas Project, Units 1 and 2) and Texas Utilities Generating Company, et al., (Comanche Peak Steam Electric Station, Units 1 and 2), "Memorandum and Order Approving Settlement Agreements and Proposed Licensed Conditions and Dismissing Proceeding," 15 NRC 1143 (1982).

Commission explicitly sought to prevent in 1980 through institution of the license conditions.

Abrogation of the antitrust license conditions leaves TUEC's monopoly power and monopolistic proclivities unchecked, a situation that impelled the Department of Justice to recommend, and the Commission in 1978 to institute, an antitrust hearing.<sup>4/</sup> The apparent absence of effective antitrust license conditions, and the essentially unrebutted evidence of TUEC's anticompetitive activities presented by Cap Rock, necessitate that the Commission institute a full investigation and hearing into TUEC's conduct and fashion an effective remedy.<sup>5/</sup> The need for such Commission action is only heightened by TUEC's impenitent attitude and actions.<sup>6/</sup> Cap Rock submits that the failure to institute an

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- 4/ Finding of No Significant Antitrust Changes ("Staff Finding"), p. 3. "Staff" is intended herein to have the same meaning as the term has when used by the Director in his finding of no significant changes. 54 Fed. Reg. at 26865.
  - 5/ As discussed in the following section, if the Director decides, as Cap Rock believes, that TUEC's anticompetitive conduct is already proscribed by the current license conditions, then the need to fashion a new remedy is obviated. But the fact that the Director may compel TUEC, through enforcement of the existing license conditions, to provide the services to which Cap Rock is entitled under the license conditions does not obviate the relevance of TUEC's willful violation of those license conditions as evidence of significant changes in TUEC's activities.
  - 6/ Indeed, Staff noted that TUEC's activities, as alleged by Cap Rock, "may represent recurrences of problems that were addressed and remedied during the antitrust construction permit review ...." Staff Finding, p. 31.

antitrust hearing in light of these facts would constitute reversible error.]

I. THE FACT THAT TUEC MAY BE COMPELLED TO HONOR ITS LICENSE CONDITIONS IN A COMPLIANCE PROCEEDING DOES NOT OBLIGATE THE COMMISSION'S OBLIGATIONS UNDER SECTION 105(c)(2).

The Director and Staff findings each suggest that the allegations raised and documented by Cap Rock may more appropriately be addressed in a compliance proceeding. The Director noted:

Although there have been allegations made recently by an electric cooperative power system in TU Electric's service area that TU Electric has not provided transmission and coordination services upon request, staff believes, in light of the Summer decision, that the issues raised by the cooperative are not germane to the Commission's "significant changes" review, but may be more appropriately addressed in the context of a compliance proceeding.

54 Fed. Reg. 26865, n. \*.8/

Cap Rock readily agrees that TUEC's actions are appropriately the subject of a petition to the Director to enforce the existing antitrust license conditions.9/ On May 12, 1989, Cap Rock filed a motion with the Director seeking

1/ Many of the findings concerning supposed changes in the Texas bulk power market and TUEC's supposed cooperation do not, in Cap Rock's view, comport with the realities of the electric utility industry in Texas. This request for reevaluation is nevertheless limited to the Director's treatment of the matters raised in Cap Rock's comments.

8/ See, also, Staff Finding, pp. 31-32.

9/ As discussed in the following section, Cap Rock believes that Staff has misinterpreted the Summer decision.

enforcement of the antitrust license conditions pursuant to Section 2.206 of the Commission's regulations.<sup>10/</sup> The fact that TUEC's actions may violate existing license conditions and therefore be subject to enforcement, however, does not negate the relevance of those actions to the Commission's "significant changes" determination. To the contrary, TUEC's willingness to persist in anticompetitive conduct in the face of express license conditions prohibiting that conduct is new and compelling evidence that TUEC is maintaining a situation inconsistent with the antitrust laws. Moreover, TUEC's flagrant disregard for the license conditions evidences a seemingly arrogant unconcern for its obligations under this Commission's license.

Cap Rock submits that Commission consideration of TUEC's ongoing violations of the existing license conditions is essential to the validity Commission's "significant changes" determination. For example, the Director found that "increased coordination and cooperation among bulk power suppliers has resulted in a more open market in the State of Texas" and that TUEC "has implemented numerous transmission and scheduling agreements which have enabled a variety of systems to shop for alternative power throughout the northern portion of the state."<sup>54 Fed. Reg. 26865.</sup> Yet it is uncontroverted that TUEC has refused to provide these services to Cap Rock and has refused to acknowledge an obligation to provide these services to Cap Rock

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<sup>10/</sup> Request Of Cap Rock Electric Cooperative, Inc. For An Order Enforcing And Modifying Antitrust License Conditions, May 12, 1989.

under the license conditions.<sup>11/</sup> The Director's finding is also belied by the findings and conclusions of a hearing examiner of the Public Utilities Commission of Texas ("PUCT"), which subsequently was approved by the PUCT, that:

According to Rayburn Country, having alternative economy energy arrangements creates competition among the power suppliers and provides alternative sources of power in the event of curtailments because of transmission limitations or other reasons. Unfortunately, Rayburn Country will probably not be able to negotiate additional economy energy arrangements, because TU Electric has refused to enter into any more scheduling-agent agreements for economy energy. [12/]

By declining to consider Cap Rock's allegations in the context of the changed circumstances determination, therefore, the Commission has blinded itself to unrebutted evidence that demonstrates that its factual findings are in error.

Staff's conclusion that, because Cap Rock's allegations may be addressed in a compliance proceeding they are irrelevant to its significant changes determination also presumes that which TUEC persistently denies: that its anticompetitive activities are proscribed by the existing antitrust license conditions. Cap Rock believes that there can not be, in good faith, any question that the antitrust license conditions obligate TUEC to sell Cap

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11/ See TU Electric Response to Comments of Cap Rock Electric Cooperative, Inc., dated October 21, 1988 ("TU Res."), p.2; Reply of Cap Rock Electric Cooperative, Inc. to Comments of Texas Utilities Electric Company, dated February 10, 1989 ("Cap Rock Reply"), pp.6-10.

12/ Supplement to Comments and Reply Comments of Cap Rock Electric Cooperative, Inc., dated March 10, 1989, Attachment B, p. 9 (emphasis supplied).

Rock the services that Cap Rock has requested. Nevertheless, in response to TUEC's obdurate refusal to recognize this fact, Cap Rock has demonstrated that TUEC's activities are clearly inconsistent with the antitrust laws.<sup>13/</sup> TUEC's anticompetitive activities are, therefore, new and independent evidence that refutes Staff findings and should have been considered and evaluated as part of the "significant changes" determination. Cap Rock submits that consideration of TUEC's ongoing anticompetitive activities as part of the "significant changes" determination would result in a finding of significant changes and would require the institution of an antitrust hearing before the issuance of an operating license.

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II. STAFF PROVIDED NO EXPLANATION WHY CAP ROCK'S ALLEGATIONS DO NOT FALL WITHIN THE SUMMER DECISION AND STAFF'S APPARENT INTERPRETATION OF THE SUMMER DECISION IS IN ERROR.

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Staff concluded that the issues raised by Cap Rock were not "within the scope of the Commission's Summer decision."<sup>14/</sup> Staff did not explain how it reached this conclusion, and the Director accepted this finding without comment. The logic and reasoning behind these findings are therefore inscrutable. Basic principles of administrative law require that an agency explain the bases and reasoning behind its decisions and, within those

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13/ Cap Rock Comments, pp. 13-34.

14/ Staff Finding, p. 31.

decisions, resolve factual conflicts on the record before it.<sup>15/</sup> Moreover, an agency may abuse its discretion by proceeding to a decision which the record before it will not sustain because the record raises fundamental questions for which the agency has adduced no reasoned answers.<sup>16/</sup>

Cap Rock has adduced substantial and unrebutted evidence of TUEC's refusals to honor the license conditions and actions otherwise inconsistent with the antitrust laws. As demonstrated above (*supra* at 5-6), many of TUEC's actions directly contradict findings made by Staff and the Director. Absent some reasoned explanation that resolves these factual conflicts, the findings cannot stand. As discussed below, TUEC's current anticompetitive activities fall well within the test established by the Commission in the Summer case.

Under the Summer test, "significant changes" exist that warrant institution of an antitrust hearing under Section 105(c)(2) if there are:

1. Changes that have occurred since the previous antitrust review of the licensee;
2. Changes that are reasonably attributable to the licensee in the sense that the licensee

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15/ Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 850-52 (D.C.Cir. 1970), cert. denied 403 U.S. 923 (1971); Portland Cement Association v. Ruckleshaus, 486 F.2d 375, 393-94 (D.C. Cir.), cert. denied 417 U.S. 921 (1973); Colorado Interstate Gas Co. v. FPC, 324 U.S. 581 (1945); City of Houston v. F.A.A., 679 F.2d 1184 (5th Cir., 1982).

16/ Natural Resources Defense Council v. Nuclear Regulatory Commission, 547 F.2d 633, 646 (D.C. Cir. 1976), rev'd on other grounds Vermont Yankee Power Corp. v. N.R.D.C., 435 U.S. 519 (1978).

has sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review; and

3. Changes that are "significant" in the sense that the change has antitrust implications that would likely warrant Commission remedy.

South Carolina Electric & Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit No. 1), 13 NRC 862, 871-72 (1981).<sup>17/</sup> The Commission has stated that the third criterion requires assessment of whether the changes would likely warrant Commission remedy and the type of remedy.<sup>18/</sup>

TUEC's current anticompetitive activities clearly fall within this test. Each anticompetitive activity for which Cap Rock has adduced evidence either has occurred since 1986, well after the last antitrust investigation in 1974, or is still occurring.<sup>19/</sup> The activities for which Cap Rock seeks remedy are obviously attributable to TUEC and TUEC alone. The activities are clearly significant, as they are precisely the kind of

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<sup>17/</sup> See also, South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit No. 1), 11 NRC 817 (1980); Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), 14 NRC 787 (1981).

<sup>18/</sup> Summer, 13 NRC at 872.

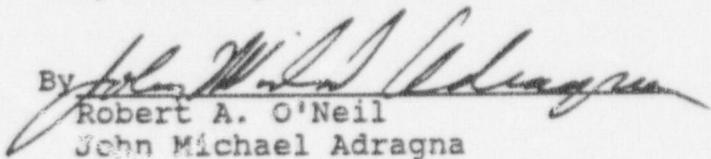
<sup>19/</sup> Notwithstanding recent TUEC protestations (in its June 30, 1989 response to Cap Rock's request for an order enforcing the license conditions) that it is now willing to sell Cap Rock partial requirements and some other necessary services, Cap Rock still does not have a contract for those services and has not received any written or other communication about this subject. Nor has TUEC quoted Cap Rock the rates, terms and conditions for those services. Moreover, TUEC persists in its position that it has no obligation to provide Cap Rock these services under the license conditions.

activities that the Commission sought to remedy through the license conditions, and the remedy is obvious: strict enforcement of the existing license conditions assuming they are found already to proscribe TUEC's conduct, or amendment and enforcement of the license conditions to cure TUEC's anticompetitive conduct. Under the circumstances, Cap Rock believes that the apparent Staff conclusion that TUEC's current anticompetitive activities need not be considered in the context of this "significant changes" determination is incorrect and should be reversed.

CONCLUSION

For the reasons stated above and in earlier pleadings in this matter, Cap Rock requests that the Director reevaluate his June 26, 1989 determination, find that significant changes in TUEC's activities within the meaning of Section 105(c)(2) have occurred, and institute an antitrust investigation and hearing.

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By   
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July 26, 1989

UNITED STATES OF AMERICA  
BEFORE THE  
NUCLEAR REGULATORY COMMISSION

Texas Utilities Electric Company, et al. ) Docket Nos. 50-445A  
Comanche Peak Steam Electric Station, Units 1 and 2 ) 50-446A

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Request of Cap Rock Electric Cooperative, Inc. For Reevaluation of The Director's Determination That There Have Been No Significant Changes In Licensee's Activity That Warrant An Antitrust Review At The Operating License Stage" was served by hand delivery to:

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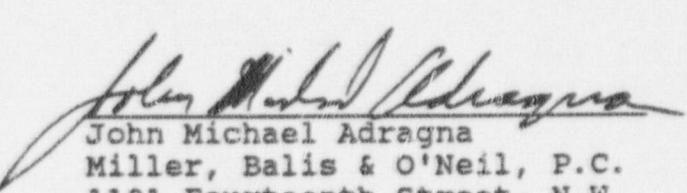
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