ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

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

COMMENTS OF CAP ROCK ELECTRIC COOPERATIVE, INC. CONCERNING SIGNIFICANT CHANGES IN THE ACTIVITY OF LICENSEE TEXAS UTILITIES ELECTRIC COMPANY THAT WARRANT AN ANTITRUST REVIEW BEFORE THE ISSUANCE OF AN OPERATING LICENSE

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Pursuant to this Commission's notice, published on February 24, 1992,1/ Cap Rock Electric Cooperative, Inc. ("Cap Rock"), hereby comments on significant changes in the activities of licensee Texas Utilities Electric Company ("TUEC") since the antitrust operating license review associated with Comanche Peak Unit No. 1, which was completed in August, 1989. TUEC is overtly exercising its monopoly power, in violation of its existing antitrust license conditions and applicable antitrust laws, anticompetitively to injure Cap Rock and other TUEC customers and competitors. Cap Rock submits that TUEC's ongoing activities create and maintain a situation inconsistent with the antitrust laws and warrant the institution by this Commission of an antitrust review and hearing at which the extent of TUEC's anticompetitive conduct can be established and the appropriate remedies fixed.

1/ 57 Fed. Reg. 6340 (February 24, 1992).

I.

SUMMARY

TUEC's February 5, 1992, response to Regulatory Guide 9.3 2/ misrepresents and, through material omissions, is apparently intended intentionally to mislead this Commission concerning TUEC's anticompetitive conduct toward its wholesale customers. As the Commission is conducting this antitrust review, TUEC is actively using its monopoly power over transmission and other essential services to prevent Cap Rock and other TUEC wholesale customers from purchasing bulk power from bulk power suppliers other than TUEC, thus forcing them to purchase higher cost TUEC power.

TUEC has refused to wheel wholesale bulk power from West Texas Utilities Company ("WTU") to Cap Rock. TUEC's refusal to wheel has been communicated orally to representatives of Cap Rock on several occasions, and in a letter dated January 30, 1992.3/ TUEC's refusal to wheel violates Paragraph 3.D.(2)(i) of the Comanche Peak license conditions, which require TUEC, inter alia, to wheel on behalf of Entities4/ like Cap Rock. See Section IV, infra. TUEC's putative justification for its refusal to

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2/ TU Electric Response to Regulatory Guide 9.3, dated February 5, 1992 ("TUEC Antitrust Response").

3/ Attachment A at 3-4. TUEC has confirmed its refusal to wheel on page 23 of its Antitrust Response.

4/ The term "Entity" is defined in Paragraphs 3.D.(1)(c) and (d) of the license conditions.

wheel is its contention that Cap Rock, which has legally terminated its 1963 full requirements contract with TUEC, nevertheless remains obligated to purchase its full requirements from TUEC. Under TUEC's apparent reasoning, its mer utterance of this contention to Cap Rock somehow entitles TUEC to violate its license conditions and the antitrust laws, to irreparably harm Cap Rock competitively, and to damage Cap Rock by more than $ 3,000,000 per year. Neither the license conditions nor the antitrust laws permit the monopolist to engage in "self help." To the contrary, the license conditions and antitrust laws are intended to prevent precisely this kind of "self help" (i.e., illegal use of monopoly power to foreclose competition).

TUEC has decided that TUEC may refuse to wheel (i.e., violate the antitrust laws) because TUEC interprets its 1990 settlement with Cap Rock5/ as preventing Cap Rock from purchasing power from TUEC competitors. This self-serving "interpretation" is entirely baseless (See Section IV.D). TUEC's putative interpretation is the immediate concern of, and is currently the subject of litigation before, the District Court of

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5/ Power Supply Agreement Between Texas Utilities Electric Company and Cap Rock Electric Cooperative, Inc., dated June 8, 1990 ("1990 Settlement"). TUEC and Cap Rock entered into the 1990 Settlement in settlement of, inter alia, the enforcement action instituted by the filing of the Request of Cap Rock Electric Cooperative, Inc. For An Order Enforcing And Modifying Antitrust License Conditions, dated May 12, 1989 ("Cap Rock Request for Enforcement").

Midland County, Texas.6/ Section 105(c) of the Atomic Energy Act, 42 U.S.C. § 2135(c), mandates that this Commission investigate and remedy TUEC's open and admitted exercise of monopoly power and violation of its license conditions before the Commission may grant TUEC an operating license for Comanche Peak Unit No. 2.

It must be emphasized what TUEC has not done. TUEC has not sought legal or equitable remedies to redress what it contends would be an illegal breach of contract by Cap Rock. For example, TUEC has not sought to test the merits of its "interpretation" in court by seeking a declaratory order confirming that interpretation. Instead, TUEC has done it the old fashioned way: it has refused to wheel and physically prevented Cap Rock from buying from TUEC's competitor. If TUEC did not have monopoly power over the sole transmission facilities which interconnect Cap Rock and WTU, Cap Rock would be purchasing power from WTU. TUEC's recourse in such a case, if it truly believed Cap Rock to be in breach of some agreement, would be to present its claim for breach of contract and damages in a court of competent jurisdiction. TUEC instead has chosen a course of action that

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6/ Cap Rock Electric Cooperative, Inc. v. Texas Utilities Electric, District Court of Midland County, 238th Judicial District, No. B38,879.

Persistence by TUEC in baseless legal claims, however, may itself be evidence of anticompetitive conduct that this Commission would be obligated to consider. See Section IV.C.3, infra.

has been recognized to violate Section 2 of the Sherman Act, 15 U.S.C. §2, since 1973.7/

TUEC is also misleading the Commission as to the status of its relationships with two other wholesale customers, Tex-La Electric Cooperative, Inc. ("Tex-La") and Rayburn Country Electric Cooperative, Inc. ("Rayburn Country"). On February 5, 1992, TUEC 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.8/ Those representations were true for less than two days. On February 7, 1992, TUEC informed Tex-La and Rayburn Country that it was terminating its Scheduling Agreements with them because TUEC asserted that each may have breached those agreements; TUEC stated that it would only consider the Scheduling Agreements effective through March 1, 1992.9/ This notice was given without prior notice of the purported breaches and without affording Tex-La and Rayburn Country opportunities to cure the purported breaches.10/ TUEC's notice was given with full recognition of the ramifications of such an action for Tex-La and Rayburn Country.

7/ Otter Tail Power v. United States, 410 U.S. 366 (1973).

8/ TUEC Antitrust Response, at 27-28 and 30. The Denison Dam is a federal hydroelectric project, the electrical output of which is marketed by the Southwestern Power Administration of the Department of Energy.

9/ Attachment B.

10/ Attachment C, at 1.

As alleged by Tex-La, termination of its Scheduling Agreement with TUEC will result in Tex-La and Rayburn Country having no way to make use of the output of the Denison Dam and loss to them of the entire economic value of the resource.11/

Notwithstanding the gravity of such actions to Tex-La and Rayburn Country, TUEC 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.

Cap Rock understands that after Tex-La filed suit in state court, TUEC may have agreed not to terminate scheduling services for an additional period time. Cap Rock further understands that, although Rayburn Country may submit comments to this Commission on this matter, Tex-La is precluded by its earlier settlement agreement with TUEC from filing comments before the Commission. The complaint and other public documents filed by Tex-La in the District Court, however, make it clear that TUEC's representations to this Commission as to its scheduling arrangements for Tex-La and Rayburn Country are plainly incorrect. As in the case of Cap Rock, TUEC has chosen to use a unilaterally asserted claim of contract right to mask a naked exercise of monopoly power.12/

11/ Attachment D at 12.

12/ As set forth in Attachment D, Tex-La maintains that TUEC's termination is ineffective because no breach of which Tex-La is aware occurred and, if a breach did occur, TUEC did not give Tex-La the 90-day notice and opportunity to cure that is required by the Scheduling Agreement.

The antitrust license conditions are intended to prevent TUEC from foreclosing competition through the exercise of its monopoly power to harm its competitors, like Cap Rock. TUEC is actively flouting the license conditions. If TUEC is able, based upon its unilateral assertion of a contract right, to refuse to wheel for Cap Rock, it can, with impunity, refuse to wheel for any Entity with which it currently has a contract. Cap Rock submits that TUEC's actions are in clear violation of the antitrust license conditions.

Cap Rock does not ask the Commission to adjudicate the merits of TUEC's claims under the 1990 Settlement; that question is currently being addressed in the action brought by Cap Rock in state court in Texas. Cap Rock seeks two things from this Commission. First, Cap Rock requests that the Commission institute a full and complete investigation into the ongoing anticompetitive conduct of TUEC. Cap Rock does not purport to know the circumstances of all entities which may be forced to do business with TUEC. Only an antitrust hearing, open to the public, can present this Commission with a complete picture of the ongoing anticompetitive conduct of TUEC. Secondly, Cap Rock seeks an unequivocal determination by the Commission that TUEC is obligated by its antitrust license conditions to wheel for Cap Rock and other similarly situated entities. Only such a clear pronouncement by the Commission can hope to avoid future anticompetitive actions by TUEC. It is time that TUEC is brought

to realize that its license conditions impose real and binding obligations on it.

In its August 9, 1988, comments concerning TUEC's application for an operating license for Comanche Peak Unit No. 1, Cap Rock asked the Commission to enforce the existing antitrust license conditions to, inter alia, require TUEC to wheel and to provide other services essential to permit Cap Rock to do business with bulk power suppliers other than TUEC. Cap Rock also asked the Commission to institute an antitrust hearing and to modify the license conditions as necessary to prevent TUEC from maintaining a situation inconsistent with the antitrust laws. Cap Rock repeated these requests in its 1989 request for an order enforcing and modifying the license conditions. Only after this Commission indicated its willingness to act on Cap Rock's request for enforcement did TUEC first begin to take seriously its obligations under the license conditions. Cap Rock ultimately accepted a settlement with TUEC that offered the prospect of an orderly transition off the TUEC system and which permitted TUEC to avoid final action on Cap Rock's request for enforcement by this Commission.

Cap Rock did not squander the opportunities presented by the 1990 Settlement. Cap Rock proceeded vigorously and expeditiously to search out and to obtain new sources of bulk power that would permit Cap Rock to become independent of TUEC. Cap Rock promised to engage in an orderly and systematic transition off the TUEC system. Cap Rock not only has kept that promise, it has bettered

that promise. Cap Rock is not only able to begin the transition off the TUEC system, but far sooner than anyone could have predicted, Cap Rock is in a position to complete that departure. In so doing, Cap Rock will require minimal coordination and cooperation from TUEC. The burden on TUEC will be virtually nonexistent. TUEC professed its willingness to assist Cap Rock in becoming an independent electric utility once Cap Rock terminated its full requirements contract with TUEC. Cap Rock has done that; TUEC cannot now legitimately complain that it did not really believe that Cap Rock could do it.

Barely two years after the 1990 settlement, Cap Rock is again being subjected to TUEC's anticompetitive refusals to wheel and efforts to prevent Cap Rock from obtaining alternative sources of bulk power. TUEC's monopoly power, and its apparent willingness to exercise it to the anticompetitive disadvantage of its competitors, have not changed in two years. TUEC's anticompetitive conduct toward Cap Rock (and others) is clear and intentional. Cap Rock urges the Commission to act definitively to preclude further abuses of monopoly power by TUEC; Section 105(c) of the Atomic Energy Act requires no less.

II.

FACTUAL BACKGROUND

A. CAP ROCK ELECTRIC COOPERATIVE, INC.

Cap Rock Electric Cooperative, Inc. is a distribution cooperative incorporated under the laws of the state of Texas, with its headquarters in Stanton, Texas. Cap Rock was organized in 1939 to serve in the counties of Howard, Martin, Midland, and Glasscock, and now provides service in those counties and eight additional counties in Northern Texas.13/ Cap Rock currently serves a peak load of approximately 100 MW with more than 20,000 customers in the service area of over 10,000 square miles located in 17 counties in Texas. Located in or near Cap Rock's service territory are two cities of approximately 90,000 to 120,00 population, one town of approximately 35,000 population, and two towns of 2,000 to 3,000 population. Cap Rock does not serve any of these municipalities, but has existing facilities around and near their corporate limits and has experienced considerable residential growth around municipalities such as the City of Midland, Texas.14/

In 1990, Cap Rock merged with the Lone Wolf Electric Power Cooperative, Inc., formerly a wholesale customer of TUEC. On

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13/ Cap Rock also provides service in Borden, Dawson, Ector, Upton, Reagan, Irion, Tom Green, and Sterling counties. All but Irion County are included as part of the "North Texas Area" as defined in Paragraph 3.D.(1)(b) of the antitrust license conditions.

14/ Cap Rock's large industrial load consist almost entirely of oil field pumps and cotton gins.

November 5, 1991, Cap Rock filed an application with the Public Utility Commission of Texas ("PUCT") to merge with Hunt-Collin Electric Cooperative, Inc. ("Hunt-Collin"), formerly a distribution cooperative member of Rayburn Country.15/ Since Hunt-Collin left Rayburn Country, TUEC has sold Hunt-Collin its full power requirements, even though Hunt-Collin has no service agreement with TUEC. TUEC has intervened in PUCT Docket No. 10726 and is opposing Cap Rock's proposed merger with Hunt-Collin.

By letter dated December 19, 1991, Cap Rock notified TUEC that, pursuant to the terms of the 1972 amendment to its 1963 service contract with TUEC, Cap Rock was terminating the service contract effective February 1, 1992. By that letter, Cap Rock provided the identical notice of termination for the service contract of Cap Rock's Lone Wolf Division (formerly Lone Wolf Electric Cooperative, Inc., a full requirements customer of TUEC with a service contract identical in all relevant respects to the 1963 Cap Rock/TUEC service contract). Cap Rock also confirmed its previous informal communications with TUEC that, as of February 1, 1992, the wholesale electric power needs of Cap Rock (and its Lone Wolf Division) would be served by WTU.16/ TUEC now concedes that the 1963 contract has been validly terminated, but contends that Cap Rock remains obligated to buy its full

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15/ Application for Sale, Transfer, or Merger of Cap Rock Electric Cooperative, Inc. and Hunt-Collin Electric Cooperative, Inc., PUCT Docket No. 10726.

16/ Attachment E.

November 5, 1991, Cap Rock filed an application with the Public Utility Commission of Texas ("PUCT") to merge with Hunt-Collin Electric Cooperative, Inc. ("Hunt-Collin"), formerly a distribution cooperative member of Rayburn Country.15/ Since Hunt-Collin left Rayburn Country, TUEC has sold Hunt-Collin its full power requirements, even though Hunt-Collin has no service agreement with TUEC. TUEC has intervened in PUCT Docket No. 10726 and is opposing Cap Rock's proposed merger with Hunt-Collin.

By letter dated December 19, 1991, Cap Rock notified TUEC that, pursuant to the terms of the 1972 amendment to its 1963 service contract with TUEC, Cap Rock was terminating the service contract effective February 1, 1992. By that letter, Cap Rock provided the identical notice of termination for the service contract of Cap Rock's Lone Wolf Division (formerly Lone Wolf Electric Cooperative, Inc., a full requirements customer of TUEC with a service contract identical in all relevant respects to the 1963 Cap Rock/TUEC service contract). Cap Rock also confirmed its previous informal communications with TUEC that, as of February 1, 1992, the wholesale electric power needs of Cap Rock (and its Lone Wolf Division) would be served by WTU.16/ TUEC now concedes that the 1963 contract has been validly terminated,

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15/ Application for Sale, Transfer, or Merger of Cap Rock Electric Cooperative, Inc. and Hunt-Collin Electric Cooperative, Inc., PUCT Docket No. 10726.

16/ Attachment E.

but contends that Cap Rock remains obligated to buy its full requirements from TUEC under the Settlement.

B. CAP ROCK IS IN DIRECT COMPETITION WITH TUEC.

Cap Rock competes with TUEC at retail and in the bulk power markets. Cap Rock's service territory is surrounded by the TUEC service territory. The PUCT permits dual and sometimes triple certification of service territories. In other words, two or more electric utilities may be authorized to compete to serve the electrical needs of customers within a single service territory. Approximately, 30-35 percent of the service territories in the state are dually or triply certified. Between 50 and 60 percent of Cap Rock's service territory is at least dually-certified with TUEC.17/ In other words, Cap Rock is in direct retail competition with TUEC in more than half of the territory in which Cap Rock is authorized to serve.

The foregoing facts concerning Cap Rock's retail competition with TUEC are essentially the same as in 1988, when Cap Rock filed comments concerning the need for an antitrust review of TUEC's activities before issuance of an operating license stage for Comanche Peak Unit No. 1,18/ and in 1989, when Cap Rock's filed its Request for Enforcement of the Comanche Peak antitrust

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17/ Some of Cap Rock's service territory is triply certified.

18/ 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.

license conditions. Cap Rock competition with TUEC for new retail load, however, has become even more direct and immediate. As previously noted, Cap Rock has merged with a former full requirements customer of TUEC, Lone Wolf, and Cap Rock has an application pending before the PUCT to merge with another full requirements customer of TUEC, Hunt-Collin. Cap Rock also continues actively to seek the lowest cost sources of bulk power. Cap Rock has executed an agreement with Southwestern Public Service Company ("SPS") under which Cap Rock will switch its entire load from the WTU system to the SPS system beginning in 1993. Under the SPS agreement, SPS will construct the necessary transmission directly to interconnect the SPS and Cap Rock systems, thus obviating the need for any transmission or other services from TUEC. The SPS agreement also affords Cap Rock the flexibility to purchase bulk power resources from suppliers other than SPS.

As a valuable bridge to the SPS arrangements, Cap Rock negotiated a contract with WTU pursuant to which WTU 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. It is estimated that this arrangement with WTU will save Cap Rock approximately $250,000 per month. All that is required from TUEC to permit Cap Rock's contract with WTU to go forward is for TUEC: (1) to coordinate with WTU so that, when WTU "ramps up" (i.e.,

increases) its generation to serve Cap Rock's load, TUEC back down its generation, and (2) to provide the necessary transmission service. TUEC has refused to cooperate. Instead, TUEC has informed Cap Rock that TUEC believes Cap Rock must continue to buy all of its bulk power needs from TUEC even after February 1, 1992, when Cap Rock's full requirements contract with TUEC is lawfully terminated. 19/

III.

LEGAL STANDARDS

A. STANDARDS APPLICABLE TO A "SIGNIFICANT CHANGES" DETERMINATION.

An antitrust review at the operating license stage is warranted if:

> the Commission determines such a review is advisable on the ground that significant changes in the licensees' activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

42 U.S.C. §2135(c)(2). "Significant changes" within the meaning of this provision have been defined by the Commission to mean:

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

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19/ Attachment A at 1-2.

3. Changes that are "significant" in the sense that the charge 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).20/ The Commission has stated that the third criterion requires assessment of whether the changes would likely warrant Commission remedy and the type of remedy.21/

TUEC's conduct is inconsistent with the antitrust principles applied by this Commission and is in direct violation of TUEC's obligation under the antitrust license conditions.22/ The TUEC anticompetitive conduct here discussed has occurred since November, 1991, principally within the past several months, well after the Commission completed the 1989 antitrust review associated with the grant of an operating license for Comanche Peak Unit No. 1. Moreover, TUEC's anticompetitive conduct continues unabated. Indeed, evidence of TUEC's anticompetitive conduct may be found in the misleading information which it filed with this Commission on February 5, 1992.

TUEC's ability to prevent Cap Rock from purchasing power from WTU is solely attributable to TUEC's monopoly power over transmission. The remedy for TUEC's conduct is well within the

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20/ 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).

21/ SCE&G, 13 NRC at 872.

22/ See Section IV.B, infra.

Commission's authority. The Commission should enforce the existing license conditions and impose such additional license condition as may be necessary to compel TUEC to honor its obligations to wheel and to make available under reasonable terms and conditions the services which it is required to make available by the license conditions.

B. APPLICABLE ANTITRUST PRINCIPLES.

The antitrust principles to which TUEC's conduct must conform are well established. This Commission's application of those principles to licensees before it is unchanged since the Commission's previous reviews of TUEC's anticompetitive activities between 1988 and 1990. The decisions of the Atomic Safety and Licensing Appeal Board in the Midland,23/ Davis-Besse,24/ and Farley 25/ cases remain the definitive articulations by the Commission of the application of the antitrust laws to licensees under the Atomic Energy Act.

23/ Consumers Power Company (Midland Plant, Units 1 and 2), 6 NRC 892 (1977).

24/ The Toledo Edison Company and the Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station Units 1, 2 & 3), 10 NRC 265 (1979).

25/ Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), 13 NRC 1027 (1981), aff'd Alabama Power Company v. Nuclear Regulatory Commission, 692 F.2d 1362 (11th Cir. 1982), cert denied 464 U.S. 816 (1983).

The antitrust laws embody fundamental national economic policy.26/ At their most basic level, the antitrust laws seek to prevent the unreasonable use of market power to gain additional market power;27/ they seek to dissipate the distortion that monopoly power can work on an otherwise competitive market. In its simplest terms, monopoly power is the power to control prices or to exclude competitors.28/ Violation of the antitrust laws, however, does not require the actual exclusion of competitors from a market. Rather, the antitrust laws proscribe the exercise of monopoly power to disadvantage competitors.29/

This Commission's authority is not limited to redressing actual violations of the antitrust laws or their underlying policies, but rather extends to remedying acts which constitute a reasonable probability of violation of those laws, or the policies underlying those laws.30/ The Commission is empowered to reach and to redress incipient anticompetitive conduct, and to halt anticompetitive conduct well before it violates the antitrust laws. Midland, 6 NRC at 912.

26/ Midland, 6 NRC at 896; Gulf States Utilities Company v. FPC, 411 U.S. 747, 759 (1973); Otter Tail Power Company v. United States, 410 U.S. 366, 372-75 (1973).

27/ Farley, 13 NRC at 1105.

28/ Farley, 13 NRC at 1073; United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); United States v. E.I. du Pont de Nemours and Co., 351 U.S. 377, 391 (1956).

29/ See, e.g., United States v. Griffith, 334 U.S. 100, 107-08 (1948).

30/ Midland, 6 NRC at 909; 926-27; Farley, 13 NRC at 1103.

TUEC is subject directly to the antitrust laws.31/ Those laws, and the policies underlying them, likewise apply to TUEC through the exercise by this Commission of its obligations pursuant to Section 105c of the Atomic Energy Act of 1954, 42 U.S.C. §2135(c). The analytical questions posed by the structure and characteristics of the electric utility industry are now well settled. An analysis of competition in the electric utility industry generally entails inquiry into three discrete product markets: the bulk power, coordination services and retail markets.32/ The relevant geographic market for the coordination and bulk power markets is limited to those areas in which the utility's smaller competitors practically can turn for alternative suppliers.33/ The geographical limits of the retail market are defined by the utility's service territory.34/

Cap Rock's ability to compete with TUEC in the bulk power, coordination and retail markets is dominated by one basic fact: TUEC's dominance and control of essential transmission and coordination services. The Commission has recognized that the ability to compete effectively in these markets is dependent substantially, if not entirely, upon access to necessary

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31/ Otter Tail Power Company v. United States, supra; Cantor v. Detroit Edison Company, 428 U.S. 579, 596 n.35 (1976).

32/ Midland, 6 NRC at p. 945-990; Farley, 13 NRC 1046-1068.

33/ Farley, 13 NRC at 1058.

34/ Midland, 6 NRC at 978-79; Farley, 13 NRC at 1066-67.

transmission services. In Farley, the Board found that Alabama Power Company owned and controlled the lion's share of generating capacity in its service territory and owned all transmission lines in the market above 115 KV and all transmission facilities that provided access to utilities outside the market area.35/ The Board concluded that this dominance, particularly the dominance over transmission facilities, "places the applicant in a unique position to control access to the market for coordination service." Id. In Midland, the Board found that, in order to engage in bulk power and coordination transactions, small utilities within the Consumers Power Company service territory had to obtain transmission wheeling services from Consumers.36/

Cap Rock efforts to obtain bulk power from sources other than TUEC are most directly intended to enable Cap Rock to compete more effectively with TUEC in the retail market. Such retail competition is entitled to full protection under the antitrust laws and by this Commission.37/ In both Midland and Farley, the Board rejected arguments that, because there was little likelihood of head-to-head competition at retail, competition in the retail market was somehow entitled to less protection. In this case, head-to-head competition is not only likely, but guaranteed by the dual certification scheme employed

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35/ 13 NRC at 1070.

36/ 6 NRC at 998.

37/ Midland, 6 NRC at 988; Farley, 13 NRC 1064-1066.

in the state of Texas. Cap Rock's merger with Lone Wolf and pending application to merge with Hunt-Collin are evidence of the viability and significance of that retail competition.

Every action taken by TUEC that disadvantages Cap Rock in the bulk power or coordination services market has an inevitable and adverse impact on Cap Rock's ability to compete with TUEC in the retail market. The Board acknowledged this fact in Farley:

> More importantly, applicant's dominance of transmission and generation facilities further bolsters the finding of monopoly power [in the retail market]. As the Board below noted, this dominance enables applicant to influence its present and potential competitors' access to the basic inputs necessary for the production and sales of reliable and economical firm bulk power. The dominance of what in essence constitutes certain factors of production in the industry, viewed in conjunction with applicant's high market shares and the high economic barriers facing new competitors, would ordinarily compel a finding of monopoly power in the retail market.

13 NRC at 1072-73 (footnote omitted).

TUEC's current actions violate these principles. TUEC avoided the application of these principles to its conduct in 1990 by entering into a settlement with Cap Rock, a settlement which it now seeks use as a means to excuse its illegal refusal to wheel. This Commission's obligations under Section 105(c), and the concomitant obligations of NRC licensees, are foreign to TUEC. TUEC pays attention to its license conditions only when forced to by this Commission. Cap Rock submits that only by a full application of the forgoing principles in a full evidentiary hearing that will produce the appropriate remedy will TUEC be

made to recognize the significance of its obligations under the antitrust laws and the Atomic Energy Act as a licensee.

IV.

TUEC'S REFUSAL TO WHEEL FOR CAP ROCK VIOLATES TUEC'S CURRENT LICENSE CONDITIONS AND THE APPLICABLE ANTITRUST LAWS

The intent of TUEC's current actions, although with certain new twists, remains what it was in 1988, 1989 and 1990: to deny Cap Rock access to sources of power that are lower cost than TUEC full requirements service. In Midland 38/, Davis-Besse 39/ and Farley 40/, the applicants sought to disable smaller utilities in and around their service territories by denying them access to the benefits of the relatively low cost power to be generated by nuclear projects licensed by this Commission. TUEC's goal is to accomplish the opposite, to disadvantage Cap Rock competitively by blocking Cap Rock's efforts to purchase lower cost supplies of bulk power, thereby forcing it to buy TUEC's much higher priced energy and capacity, which includes the costs of Comanche Peak Unit Nos. 1 and 2. TUEC is exercising its monopoly power over transmission by an admitted refusal to wheel,

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38/ Consumers Power Company (Midland Plant, Units 1 and 2), 6 NRC 892 (1977).

39/ The Toledo Edison Company and the Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station Units 1, 2 & 3), 10 NRC 265 (1979).

40/ Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), 13 NRC 1027 (1981), aff'd Alabama Power Company v. Nuclear Regulatory Commission, 692 F.2d 1362 (11th Cir. 1982), cert denied 464 U.S. 816 (1983).

in violation of the antitrust laws and the existing antitrust license conditions.

A. TUEC HAS REFUSED TO WHEEL FOR CAP ROCK.

There is no factual dispute over whether TUEC has refused to wheel power for Cap Rock from WTU. TUEC informed Cap Rock in writing of its refusal to wheel41/ and has confirmed its refusal to wheel to this Commission in the February 5, 1992 TUEC Antitrust Response.42/ The following is a brief summary of the events which produced TUEC's refusal to wheel.

After execution of the 1990 Settlement, Cap Rock began intensive efforts to obtain competitively priced sources of bulk power that were less costly than TUEC full requirements service. Cap Rock reached an understanding with WTU, and negotiated an agreement with WTU, pursuant to which WTU would supply Cap Rock's full power requirements for the period between the termination of

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41/ Attachment A at 3-4.

42/ At page 23 of the TUEC Antitrust Response, TUEC stated (emphasis supplied):

> TU Electric advised Cap Rock, [sic] that [after February 1, 1992] it would . . . 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 served by TU Electric. TU Electric also 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 terms thereof . . . .

Cap Rock's 1963 agreement with TUEC and the physical transfer of Cap Rock's load from the TUEC to the SPS transmission system in 1993.43/ Cap Rock and WTU agreed that service would begin on February 1, 1992.

On October 23, 1991, Cap Rock informed TUEC of its agreement with WTU and of its intention to terminate the 1963 agreement.44/ TUEC's reply provided the first indication of TUEC's determination to prevent the Cap Rock/WTU purchase from being consummated. Despite the plain meaning of the 1990 Settlement, TUEC maintained that, even if the 1963 agreement were terminated, Cap Rock could not purchase power from sources other than TUEC without giving three years notice.45/ TUEC refused to permit Cap Rock to receive power from WTU, thereby leaving Cap Rock with no way to receive that power. Accordingly, on December 18, 1991, Cap Rock filed suit against TUEC in state court in Texas to enforce its right to purchase power from WTU.

On December 19, 1991, Cap Rock gave TUEC written notice that it was terminating the 1963 agreement as of February 1, 1992. 46/ On January 13, 1992, TUEC filed an answer and counterclaim to Cap Rock's state court complaint. In its counterclaim, TUEC asserted, inter alia, that: (1) Cap Rock had failed to give proper notice of termination of the 1963 agreement

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43/ Attachments F and G.

44/ Attachment H.

45/ Attachment I.

46/ Attachment E.

and, (2) the 1990 Settlement requires Cap Rock to give three years notice before it may purchase power from any sources of bulk power other than TUEC (except with respect to certain Points of Delivery where two years notice was purportedly sufficient).

On January 30, 1992, TUEC admitted that Cap Rock's notice of termination under the 1963 agreement was proper and that it would terminate on February 1, 1992. 47/ TUEC made it clear, however, that it intended, through the exercise of its monopoly power over transmission, to force Cap Rock to continue to purchase from TUEC. TUEC stated:

> Your request for TU Electric to wheel power from West Texas Utilities Company to Cap Rock, beginning February 1, 1992, is denied 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. The 1990 Power Supply Agreement does not obligate TU Electric to wheel power or energy from West Texas Utilities, as requested, for Cap Rock without at least three years' (24 months to certain points of delivery) prior written notice.

Attachment A at 3-4. Hence, TUEC has denied Cap Rock the ability to wheel power, and cut Cap Rock off from all alternative sources of power supply.

TUEC efforts to prevent Cap Rock from purchasing power from WTU have not been limited to Cap Rock. As mentioned above, Cap Rock had negotiated an agreement with WTU for the purchase by Cap Rock of its full electric power requirements from WTU. On December 10, 1991, WTU mailed to Cap Rock three originals of the

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47/ Attachment A at 1.

final contract for Cap Rock's execution. Upon return of the contracts, WTU was to execute them and return "[o]ne completely executed set" to Cap Rock. 48/ Although Cap Rock returned its copies on January 2, 1992, 49/ the contract was never executed by WTU.

TUEC's threats and deliberate efforts to mislead WTU undeniably caused WTU to forego executing the contract which it had negotiated with Cap Rock. On December 19, 1991, TUEC claimed in a letter to WTU that Cap Rock was "obligated to acquire all of its power and energy from TU Electric. . . ." 50/ Moreover, TUEC clearly implied that it would sue WTU if WTU did not breach its contract with Cap Rock. Noting that the "knowledge" of Cap Rock's purported duties to TUEC put "an extra burden of responsibility" on WTU, TUEC threatened to "aggressively defend" itself "against any damages or losses" caused by purported "interference" with its contract with Cap Rock. 51/

As mentioned above, on January 2, 1992, Cap Rock returned its executed copies of the new contract to WTU. On February 18, 1992, WTU responded. Noting that it stood "ready, willing, and able to begin selling electric energy to Cap Rock," WTU nonetheless declined to finalize any agreement until "Cap Rock's relationship with TU Electric has ended." Clearly responding to

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48/ Attachment F.

49/ Attachment G.

50/ Attachment J.

51/ Attachment J.

TUEC's threat, WTU disavowed any intention to "interfere with the relationship between Cap Rock and TU Electric." 52/

The sole barrier to Cap Rock's purchase from WTU is TUEC. WTU stands "ready, willing, and able" to supply power to Cap Rock, just as soon as the instant dispute is resolved. TUEC's refusal to wheel and threats to WTU evidence a pattern of anticompetitive conduct intended to prevent Cap Rock from purchasing bulk power from any supplier other than TUEC. As demonstrated below, the license conditions and the antitrust laws do not permit a licensee before this Commission to engage in such illegal conduct.

B. TUEC IS OBLIGATED BY ITS LICENSE CONDITIONS TO WHEEL FOR CAP ROCK.

TUEC's obligations under the license conditions are to "Entities," as defined in Paragraphs 3.D.(1)(c) and (d).

Paragraph 3.D.(1)(c) defines an Entity as:

> an electric utility ... owning, operating or contractually controlling, or proposing in good faith to own, operate or contractually control, facilities for generation of electric power and energy, provided, however, that as used in [certain specified paragraphs, including Paragraph 3.D.(2)(i)], "Entity" means an electric utility which is a person, a private or public corporation, a governmental agency or authority, a municipality, a cooperative, or an association owning or operating, or proposing in good faith to own or operate, facilities for generation, transmission and/or

52/ Attachment K.

> distribution of electric power and energy. [emphasis supplied]

Cap Rock is a cooperative and currently owns and operates facilities for the transmission and distribution of electric power and energy. Cap Rock is an Entity under TUEC's license conditions.

Paragraph 3.D.(2)(i) of the Comanche Peak license conditions obligates TUEC to:

> 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 whose facilities the Applicants' transmission line and other transmission lines . . . form a continuous electrical path . . . .

Cap Rock is an "Entity" as defined in Paragraph 3.D(1)(c). Cap Rock is located and does business in the "North Texas Area" as defined in Paragraph 3.D.(1)(b), and is directly interconnected TUEC. WTU is directly interconnected with TUEC. TUEC is expressly obligated to provide the transmission services necessary to facilitate the exchange of bulk power between WTU and Cap Rock.53/

TUEC's refusal to wheel is unequivocal and in clear violation of TUEC's obligations under Paragraph 3.D.(2)(i). As

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53/ "Bulk Power" is defined as "electric power and/or electric energy supplied or made available at transmission or subtransmission voltages." Paragraph 3.D.(1)(e). This definition clearly encompasses the purchase by Cap Rock of wholesale bulk power from WTU.

demonstrated in the following section, that refusal to wheel is also in clear violation of the antitrust laws.

C. TUEC'S REFUSAL TO WHEEL POWER FOR CAP ROCK IS INCONSISTENT WITH THE ANTITRUST LAWS.

The Commission's authority and obligations under Section 105 are not limited to redressing actual violations of the antitrust laws or their underlying policies. The Commission's authority and obligations extend to remedying acts which constitute a reasonable probability of violation of those laws, or the policies underlying those laws.54/ As demonstrated above, TUEC's refusal to wheel for Cap Rock constitutes a clear violation of the TUEC's license conditions. It is equally clear that TUEC's conduct is inconsistent with the applicable antitrust laws.

1. TUEC Has Denied Cap Rock Access To An Essential Facility.

TUEC electrically surrounds Cap Rock (i.e., Cap Rock is electrically interconnected solely with TUEC). Cap Rock cannot receive power unless it is transmitted over TUEC's lines. Cap Rock is, therefore, entirely dependent upon the transmission facilities of TUEC, its principal competitor at retail, for the transmission service necessary to allow Cap Rock to purchase the power Cap Rock needs to compete with TUEC at retail. The only transmission facilities between Cap Rock and WTU are TUEC transmission facilities. It is simply not feasible for Cap Rock

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54/ Midland, 6 NRC at 909; 926-27; Farley, 13 NRC at 1103.

to duplicate the integrated TUEC transmission grid between Cap Rock and WTU. TUEC's transmission system, therefore, is an "essential facility." The essential facility or "bottleneck monopoly" doctrine of antitrust law imposes upon a monopolist who controls an essential facility the obligation to make that facility available to competitors on non-discriminatory terms. This doctrine ensures that "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications." Image Technical Services, 903 F.2d 612, 620 (9th Cir. 1990).

A monopolist which denies a competitor access to an essential facility is liable under Section 2 of the Sherman Act for monopolizing or attempting to monopolize trade or commerce. A party seeking to invoke the essential facilities doctrine must show:

> (1) control of the essential facility by a monopolist;
>
> (2) a competitor's inability practically or reasonably to duplicate the essential facility;
>
> (3) the denial of the use of the facility to a competitor; and
>
> (4) the feasibility of providing access to the facility.

MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983) (citations omitted).

TUEC's refusal to wheel for Cap Rock is a classic example of an abuse of monopoly power over essential facilities. TUEC has

unquestioned monopoly power over all transmission to Cap Rock. Cap Rock cannot feasibly duplicate the integrated TUEC transmission system that connects Cap Rock to WTU and the rest of the Economic Reliability Council of Texas ("ERCOT"); such an undertaking is beyond the economic means of Cap Rock (and virtually every other electric utility in Texas), inherently wasteful and inefficient and environmentally unsound. TUEC's transmission system is unique and, from Cap Rock's perspective, essential. TUEC has denied Cap Rock the use of its transmission facilities. At no point has TUEC contended that it is not feasible for it to provide such transmission service.55/

The obligations of a monopolist controlling an essential facility to provide non-discriminatory access can be traced back to U.S. v. Terminal Railroad Assoc., 224 U.S. 383 (1912). In that case, a consortium of railroads had gained control of every rail route feeding into St. Louis across the Mississippi River. The consortium had the power to exclude any competing railroad or to force that railroad to capitulate to any terms the consortium demanded. It was economically and geographically infeasible for a competitor to build another bridge. Therefore, the Supreme Court ruled that the consortium must allow competing railroads to

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55/ Lets we lose sight of the obvious, it bears remembering that not only is it perfectly feasible for TUEC to provide transmission for Cap Rock, but TUEC is unequivocally obligated by its license conditions to provide such transmission.

use its facilities on a non-discriminatory basis. Id. at 411.56/

The seminal essential facilities doctrine case involves a refusal to wheel. In United State v. Otter Tail Power Co., 331 F.Supp. 54 (D.Minn. 1971), aff'd 410 U.S. 366 (1973), Otter Tail Power Co., an investor owned public utility, refused to sell at wholesale or wheel electric power to several municipalities which were attempting to set up municipal power systems to compete with Otter Tail in the retail sale of power. The court held that under the bottleneck monopoly theory Otter Tail had violated section 2 of the Sherman Act, and enjoined Otter Tail from continuing its anti-competitive practices. The court found that Otter Tail's:

> control over transmission facilities in much of its service area gives it substantial effective control over potential competition from municipal ownership. By its refusal to sell or wheel power, defendant prevents that competition from surfacing.

Id. at 61. As the Supreme Court subsequently concluded, the record made "abundantly clear that Otter Tail used its monopoly power in the cities in its service area to foreclose competition or to destroy a competitor, all in violation of the antitrust laws." Otter Tail Power Co. v. U.S., 410 U.S. 366, 377 (1973). Like Otter Tail, TUEC has complete control over transmission to

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56/ TUEC is already obligated to provide nondiscriminatory access by its license conditions. It remains, however, for TUEC to obey, or to be compelled to obey, those license conditions.

its retail competitor and, like Otter Tail, TUEC is using that monopoly control to foreclose competition.

In a case which bears many similarities to a refusal to wheel electricity, AT&T was held to have violated the Sherman Act by refusing to interconnect MCI's long distance service with AT&T's local distribution facilities. The court found that AT&T had complete control over the local distribution facilities required by MCI and that MCI could not practicably duplicate the local facilities. Relying on Otter Tail, the court held that AT&T's local facilities were a natural monopoly and that AT&T was denying an essential facility to MCI. MCI, 708 F.2d at 1132-33.

In Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984), aff'd 472 U.S. 585 (1985), the defendant, Aspen Skiing Co., operated three of the four skiing facilities in Aspen, while plaintiff, Aspen Highlands operated the other. In the past, Aspen Skiing and Aspen Highlands, had jointly issued a multi-day ski lift ticket good at all four mountains. Then Aspen Skiing refused to issue the four-area ticket and began to issue a three-area ticket, good only at Aspen Skiing mountains. Following MCI, the court applied the four prong test. The court held that the four-area multi-day ticket was an essential facility controlled by the defendant. Aspen Highlands could not issue a ticket good at the other three Aspen areas, and week long vacationers with a choice between a multi-day three-area ticket and a one-area ticket would choose the three-area. The Supreme Court concurred that in this case "the

monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610 (1985).

TUEC's refusal to wheel is an extreme example of the kind of anticompetitive conduct proscribed by the essential facilities doctrine. TUEC's actions also run afoul of other fundamental principles which underlie Section 2 of the Sherman Act, 15 U.S.C. § 2.

2. TUEC Is Illegally Leveraging Its Monopoly Power Over Essential Transmission To Stifle Competition In The Bulk Power Sale And Retail Markets.

In Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), the Second Circuit held that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of §2 [of the Sherman Act], even if there has not been an attempt to monopolize the second market." This articulation of a Section 2 violation, often referred to as "monopoly leveraging," precisely describes TUEC's conduct towards Cap Rock. TUEC is exercising its monopoly power over transmission to: (1) preclude competition by Cap Rock for alternative sources of bulk power in the bulk power market, thereby forcing Cap Rock to buy TUEC's higher priced power, and thus (2) gaining an advantage over Cap Rock in the retail market. By denying Cap Rock access to more economical bulk power from utilities such as WTU, TUEC keeps Cap Rock's retail prices high,

allowing TUEC to more effectively compete at retail.57/ Moreover, TUEC gains an advantage in the market for wholesale power. By preventing WTU or other alternative power sources from supplying Cap Rock, TUEC levarages its control of transmission into complete domination of bulk power sales to Cap Rock.

Berkey Photo has its antecedents in United States v. Griffith, 334 U.S. 100 (1948). In that case, the Supreme Court found a Section 2 violation when a group of motion picture exhibitors with competitors in some localities refused to exhibit movies in localities in which they had monopoly power unless the distributor granted them exclusive showing rights in the contested markets. Id. at 108.

In Kerasotes Mich. Theaters v. National Amusements, 854 F. 2d 135 (6th Cir. 1988), National Amusements alleged that Kerasotes had used its monopoly and market power in other cities to coerce distributors into providing first-run films in the Flint, Michigan area, where Kerasotes competed with National. The court held this conduct violated Section 2 of the Sherman Act. Id. at 136-37.

TUEC has monopoly power over transmission and is using this power to leverage a superior position for itself in the market for bulk power by denying bulk power sellers access to captive bulk power purchases such as Cap Rock. TUEC is also exploiting

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57/ This ineluctable effect of the preclusion of competition in the bulk power market on the ability to compete at retail was expressly recognized by the Board in Farley, 13 NRC 1072-73.

its monopoly over transmission to gain an edge in the retail market by denying its competitors, such as Cap Rock, access to economical electricity. TUEC's conduct is inherently anticompetitive and impermissible for a licensee of this Commission.58/

3. TUEC's Assertion Of Its Interpretation Of The 1990 Settlement Does Not Make Its Refusal To Wheel Any Less Anticompetitive Or Any Less Illegal.

The possessor of monopoly power may not impose its contract (or any other) interpretation on its competitor through the unlawful exercise of its monopoly power. The antitrust laws and this Commission's antitrust license conditions are intended to prevent just such an exercise of monopoly power. Yet that is precisely what TUEC is doing to Cap Rock (and Tex-La and Rayburn Country). With no judicial or administrative determination that its interpretation is valid, or even colorable, TUEC is preventing Cap Rock from purchasing power from TUEC's competitor. TUEC benefits from its illegal actions in two ways: (1) it continues to make a sale that Cap Rock otherwise would have terminated, and (2) it impairs Cap Rock's ability to compete with TUEC at retail by forcing Cap Rock to purchase TUEC's higher cost power. TUEC is, by force of the exercise of its monopoly power over transmission service and abrogation of its obligations to wheel under the license conditions, forcing Cap Rock to purchase power from a supplier from which Cap Rock has chosen no longer to purchase.

58/ See Section III.B, supra.

TUEC could have sought legally to prevent Cap Rock from purchasing power from WTU by seeking a judicial declaratory order that TUEC's interpretation of the 1990 Settlement was valid. Although even a legal action may violate the antitrust laws if it is taken in furtherance of an effort to obtain or to maintain an illegal monopoly,59/ prior judicial review of TUEC's interpretation could have avoided the patently illegal use of monopoly power to which TUEC resorted. But TUEC has chosen not to voluntarily expose its interpretation to judicial scrutiny. Instead, TUEC has chosen to refuse to wheel for Cap Rock and force Cap Rock to sue TUEC.

TUEC has apparently settled on a strategy of seeking to immunize its illegal exercises of monopoly power from antitrust scrutiny by coupling its illegal actions with specious legal contentions which it will not voluntarily subject to legal scrutiny. TUEC will physically prevent a transaction like Cap Rock's purchase from occurring and force the victim of its illegal actions to sue it in court or before an administrative agency while the economic benefits of the transaction are dissipated. The linchpin of TUEC's strategy, however, remains the illegal use of monopoly power.

59/ Actions taken by those with dominance in the market may not be acceptable even though they might be legitimate if undertaken by those less powerful. Farley, 13 NRC at 1068; Midland, 6 NRC at 913. Even an otherwise lawful device may be used as a weapon in restraint of trade or commerce. Schine Chain Theaters v. United States, 334 U.S. 110, 119 (1948).

The antitrust license conditions do not contain an exception for those situations in which TUEC can conjure up an argument why it does not believe and Entity is entitled to wheeling service. Nor may TUEC legally create such an exception for itself. Yet that is precisely what TUEC purports to do.

TUEC's monopoly power enables it to employ the converse of a clearly prescribed strategy of monopolists -- the institution of baseless litigation to harm competitors. If TUEC instituted baseless litigation to prevent Cap Rock from purchasing from WTU, TUEC would be subject to antitrust liability. When litigation is a "mere sham," betraying a pattern of "baseless, repetitive claims," it is subject to antitrust attack. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (extending Noerr-Pennington antitrust immunity to administrative and judicial actions and outlining the "sham" exception). See Eastern Railroad Presidents Conference v. Noerr Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965). Even a single baseless lawsuit may fall within the "sham" exception to the Noerr-Pennington doctrine and subject the perpetrator to antitrust liability. MCI Communications v. American Telephone & Telegraph Co., 708 F.2d 1081, 1155 (7th Cir. 1983) ("bringing a baseless claim is devoid of the constitutional significance that warrants immunity from antitrust laws." Id. at 1158); Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982)("If the activity is not genuine petitioning activity, the antitrust laws are not

suspended . . . [and] will prohibit sham activity, whether that activity consists of single or multiple sham suits." Id. at 1256); Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386 (9th Cir. 1883). TUEC's anticompetitive conduct is even balder, as it does not even purport to employ legal process to obtain its illegal purpose.

In Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) on remand, 360 F.Supp. 451 (D.C. Minn. 1973), aff'd mem. 417 U.S. 901 (1974), the court held that a cause of action under the sham exception to the Noerr-Pennington doctrine was made out by defendant's sponsorship of litigation against several cities to frustrate the sale of revenue bonds to finance municipal power systems. The District Court in Otter Tail found that the use of litigation by Otter Tail "was designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly . . . ." Id. at 451-52. Otter Tail, 331 F. Supp. at 62, and on remand from the Supreme Court, 360 F. Supp. 451 (1973). Like Otter Tail, TUEC is deliberately forcing its competitors to engage in expensive and time consuming litigation in order to block their ability to secure alternative sources of electric power. TUEC's efforts to prevent competition are no more permissible under the antitrust laws than the conduct of Otter Tail.

D. TUEC'S INTERPRETATION OF THE 1990 SETTLEMENT IS BASELESS.

TUEC contends that Cap Rock must buy all of its bulk power requirements from TUEC even after February 1, 1992, when Cap

Rock's 1963 full requirements contract with TUEC lawfully terminated. TUEC's contentions are contrary to the plain language and obvious intent of the 1990 Settlement.

Cap Rock's request for enforcement of the Comanche Peak antitrust license conditions and related actions60/ sought to obtain for Cap Rock, under reasonable rates, terms and conditions, the partial requirements electric power, coordination and other essential services TUEC is obligated to provide an "Entity" like Cap Rock under the Comanche Peak antitrust license conditions. Cap Rock's goal at that time was, and remains, to end its total dependence upon TUEC, Cap Rock's principal competitor at retail and the owner of the only transmission facilities with which Cap Rock is interconnected, for all of the bulk power which Cap Rock must purchase in order to serve its member-consumers.

The purpose of the 1990 Settlement, as stated in its recitals,61/ was to facilitate Cap Rock's independence from TUEC. The 1990 Settlement, therefore, provides for a range of services that Cap Rock might need, for a limited period of from five to ten years, to facilitate Cap Rock moving its load off the TUEC system. The only terms under which TUEC was willing to

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60/ See Cap Rock Electric Cooperative, Inc. v. United States Nuclear Regulatory Commission, United States Court of Appeals for the District of Columbia Circuit, Case No. 89-1735, dismissed on motion of petitioner by unpublished order.

61/ Ex. A, p. 1 to Attachment L.

provide regulating, scheduling and other services, however, are so restrictive from business and operating perspectives that the only viable option for Cap Rock was the one it has followed: to remove its load from the TUEC system by obtaining its bulk power, control area and other essential services from an electric utility company other than TUEC.

One of the services essential to Cap Rock's ability to become independent of TUEC was the assured availability of full or partial requirements service from TUEC, to the extent required by Cap Rock, during the transition period. TUEC agreed to provide those wholesale power services in the amounts to be specified by Cap Rock upon termination of Cap Rock's full requirements contract with TUEC. Cap Rock needed such alternatives because, at the time of the 1990 Settlement, Cap Rock had no alternative sources of power under contract. The real possibility existed at that time that all or part of Cap Rock's load might have to be left on the TUEC system during the transition period, until Cap Rock finalized its alternative power supply arrangements. The choice as to whether, or how much, power Cap Rock would purchase during the transition period, however, is clearly Cap Rock's choice.

The plain language of the 1990 Settlement makes its clear that the election as to whether to purchase power from TUEC during the transition period, and the amount of such purchase, if any, is clearly Cap Rock's election. The 1990 Settlement specifies no amount of partial requirements service that Cap Rock

must purchase. Rather, Section 1.01 of the Settlement provides that TUEC 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. Cap Rock has no obligation to purchase any power or energy from TUEC.

All that is required from TUEC to permit Cap Rock to purchase power from WTU is for TUEC: (1) to coordinate with WTU so that, when WTU "ramps up" (i.e., increases) its generation to serve Cap Rock's load, TUEC will back down its generation, and (2) to provide the necessary transmission service. TUEC has refused to wheel or otherwise to cooperate.

CONCLUSION

For the reasons stated above, Cap Rock requests that the Commission promptly institute a hearing and investigation for the purpose of determining the extent to which TUEC's conduct has created a situation inconsistent with the antitrust laws and the appropriate remedy for such that situation. Cap Rock also requests that the Commission unequivocally declare TUEC's

obligation to wheel for Cap Rock and all similarly-situated Entities.

Respectfully submitted,

John Michael Adragna /cab

John Michael Adragna
Eric A. Bilsky

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March 25, 1992

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TUELECTRIC

Darrell Berdyman
Director of Bulk Power
Transmission

January 30, 1992

VIA FACSIMILE

Mr. Steven S. Collier
Director of Power Supply and
Regulatory Affairs
Cap Rock Electric Cooperative, Inc.
P.O. Box 10069
8140 Burnet Road
Austin, Texas 78766-1069

Dear Mr. Collier:

This is in response to your letter of December 19, 1991 regarding the Agreement for Purchase of Power, dated July 2, 1963, between TU Electric and Cap Rock, as amended ("1963 Agreement"), the Agreement for Purchase of Power, dated July 2, 1963, between TU Electric and Lone Wolf Electric Cooperative, Inc., now the Lone Wolf Division of Cap Rock, as amended ("Lone Wolf Agreement"), and the Power Supply Agreement, dated June 8, 1990, between TU Electric and Cap Rock ("1990 Power Supply Agreement").

1. TU Electric accepts your December 19, 1991 letter as notice of termination of the 1963 Agreement and the Lone Wolf Agreement, effective at 12:01 a.m. on February 1, 1992, at which time the 1990 Power Supply Agreement becomes effective, in accordance with the provisions of Section 2.01 thereof. Thereafter, TU Electric will supply Cap Rock's power and energy requirements (including the Lone Wolf requirements), in accordance with the provisions of the 1990 Power Supply Agreement, at the points of delivery and at the contract demands set forth below:

Cap Rock Points of Delivery	Contract Demand
Pembrook	13,000
Schwartz	9,000
Triangle	14,000
West Stanton	9,000
Cantrell	8,750
Tate	6,000
St. Lawrence	15,500
Stiles	13,000

Vealmoor	15,500
Eiland	4,000
McDonald	16,000
Phillips	10,500

Lone Wolf Points of Delivery	Contract Demand
Lake Thomas	3,800
Roscoe	2,100
China Grove	600
Colorado City	2,100
Mitchell County	1,100
Loraine	900
Brock-Hyman Morgan Street	650
Scurry County	2,400

2. TU Electric is presently serving all of Cap Rock's power and energy requirements at the foregoing points of delivery. The foregoing reflects the November 8, 1991 transfer of the load served by TU Electric from Cap Rock's Vincent point of delivery to the Lone Wolf Lake Thomas point of delivery, as requested by Cap Rock on October 8, 1991, which transfer is hereby agreed to by TU Electric. We are not aware of any changes being proposed in Cap Rock's points of delivery or contract demands before February 1, 1992.

3. The contract demands at the foregoing points of delivery reflect the changes in contract demands at ten Cap Rock points of delivery, as requested in Cap Rock's October 8, 1991 letter to TU Electric, which changes are hereby acceptable to TU Electric, effective with the October 1991 billing period. In that connection, TU Electric will issue a credit to Cap Rock for the charges, if any, resulting from application of the contract demand provisions in Rate WP based on the contract demands in effect prior to such changes. TU Electric will also issue a credit to Cap Rock for any charges made under the 1963 Agreement, associated with the contract demand minimums of Rate WP at the Vincent point of delivery, after such load was transferred to the Lone Wolf Lake Thomas point of delivery on November 8, 1991. Such credits will be reflected in your next billing.

4. Your December 19 letter also purports to give notice pursuant to Section 2.05 of the 1990 Power Supply Agreement to remove "all of the power and energy requirements of Cap Rock" at the seven points of delivery listed in your letter, as of February 1, 1994 -- namely Vealmoor, West Stanton, Triangle, McDonald, Phillips, Tate and Cantrell. TU Electric will only accept your December 19, 1991 letter as notice to reduce load pursuant to Section 2.05 of the 1990 Power Supply Agreement with respect to the Vealmoor and Cantrell points of delivery, effective February 1, 1994, provided Cap Rock otherwise complies with the provisions of the 1990 Power Supply Agreement, including without limitation

Section 2.05 thereof. Section 2.05 does not authorize Cap Rock to transfer load from the West Stanton, Triangle, McDonald, Phillips and Tate points of delivery on 24 months' notice.

Section 2.05 of the 1990 Power Supply Agreement provides that:

> "Subject to the limitations described below, all (but not part) of the power and energy requirements of Cap Rock's customers at nine Points of Delivery
>
> (Pembrook,
> St. Lawrence,
> Stiles,
> Knott,
> Ackerly,
> Vealmore [sic],
> Coahoma,
> La Mesa and
> Schwartz)
>
> may, during years one through five of this Agreement, be served by another electric utility, provided Cap Rock has first given TU Electric twenty-four months' advance written notice of such service . . . . The Contract Demand(s) at the Point(s) of Delivery for which notice is given pursuant to this Section 2.05 may not, in the aggregate, exceed 30 MW of Contract Demand (as specified on Exhibit A on the effective date of this Agreement). . . ."

As you must know, only Vealmoor and Cantrell (Cantrell was formerly Coahoma and La Mesa) coincide with the nine points of delivery specified in Section 2.05. In addition, the combined contract demand of the seven points of delivery you listed is 79,750 Kw, far in excess of the 30,000 Kw limitation in Section 2.05, whereas the combined contract demand of Vealmoor and Cantrell is 24,250 Kw, well within that limitation.

5. With regard to the notice given in your letter, pursuant to Section 2.04 of the 1990 Power Supply Agreement, "to remove all remaining delivery points from the TUEC's system as of February 1, 1995," TU Electric accepts your December 19, 1991 letter as notice that Cap Rock will disconnect all remaining Cap Rock and Lone Wolf points of delivery from TU Electric's system effective February 1, 1995 -- i.e., all of the points of delivery listed in paragraph 1 above, except Vealmoor and Cantrell -- pursuant to the provisions of the 1990 Power Supply Agreement.

6. Your request for TU Electric to wheel power from West Texas Utilities Company to Cap Rock, beginning February 1, 1992, is denied 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. The 1990 Power Supply Agreement does not obligate TU Electric to wheel power or energy from West Texas Utilities, as requested, for Cap Rock without at least three years' prior written notice and does not authorize Cap Rock to purchase power from another source without at least three years' (24 months to certain points of delivery) prior written notice.

Having responded to the specific requests and actions reflected in your December 19 letter, we take this opportunity to also express our disappointment that Cap Rock has taken the position that the 1990 Power Supply Agreement is somehow illusory, invalid or otherwise unenforceable. It was at your insistence that a new power supply agreement be in place <u>before</u> you made a decision to cancel the 1963 Agreement pursuant to Section 6, as amended. We spent months negotiating the 1990 Power Supply Agreement and each of our Boards of Directors approved not only that contract but a prior agreement in principle upon which the 1990 Power Supply Agreement was based. At that time, TU Electric and Cap Rock intended to be and were fully bound by that agreement. That Cap Rock would now attempt to escape its obligations for a perceived "better deal" is unacceptable to TU Electric. We are still bound by the 1990 Power Supply Agreement and Cap Rock is likewise.

As you know, a key point in the negotiation of the 1990 Power Supply Agreement was its term and the various notice periods to be given to convert the contract from a full requirements contract to a partial requirements contract or to completely eliminate the supplier/customer relationship between our two companies. Cap Rock insisted that TU Electric be committed to sell Cap Rock all of its power and energy requirements for a period of years. TU Electric agreed to a ten-year term. But Cap Rock did not want to be bound for such a long period of time. TU Electric finally agreed to permit Cap Rock to purchase power and energy from another source if it would give TU Electric at least three years' notice to reduce load. TU Electric also agreed to permit Cap Rock to remove up to 30 MW of load, at specified points of delivery, and permit service of such load by another electric utility upon two years' notice. These provisions accommodated Cap Rock's desire to have flexibility to shop for alternate sources of power. TU Electric also agreed in the 1990 Power Supply Agreement to provide a means for Cap Rock to gain access to such alternate power sources and ultimately become a self-sufficient electric utility with its own control area or become part of the control area of another electric utility. The 1990 Power Supply Agreement provided for an orderly transition for these goals on terms which both parties determined to be fair and reasonable. The orderly transition was largely based upon the notice provisions of that contract.

Finally, the 1990 Power Supply Agreement provided for the conditions under which Cap Rock could return to the TU Electric system if its search for alternate sources of power failed or its

sources became unavailable and the circumstances under which Cap Rock could purchase emergency power and related services from TU Electric.

The 1990 Power Supply Agreement is unique and, according to you, very beneficial to Cap Rock. But it was not structured with the view of your finding a perceived "better deal" the day after its execution -- the contract required mutual performance in accordance with its terms.

In addition, the execution of the 1990 Power Supply Agreement paved the way for the settlement of various disputes between our companies at both the Public Utility Commission of Texas and the Nuclear Regulatory Commission and provided for the execution of mutual releases of all claims and the settlement of all other disputes existing between our two companies.

Additionally, TU Electric has acquired the necessary capacity to serve the Cap Rock load and is required to pay the full cost of that capacity, whether or not the power is sold to Cap Rock under the 1990 Power Supply Agreement. It is not difficult to see that had Cap Rock not made a contractual commitment to purchase such power, TU Electric would not have made the commitment to acquire the capacity to fulfill that contract.

To suggest that we return to square one as if nothing had occurred, as you now propose, to us is, at best, an example of "buyer's remorse," which constitutes no legal justification for the disavowal of a contractual commitment. Therefore, anything less than full compliance with Cap Rock's obligations under both the 1963 Agreement and the 1990 Power Supply Agreement is unacceptable to TU Electric.

Very truly yours,

Darrell Eskhyme

cc: Mr. David W. Pruitt
Mr. David L. Taeter

TUELECTRIC

Darrell Hemelgarner
Director of Bulk Power
Transmission

February 7, 1992

VIA FACSIMILE
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John E. Butts
Manager
Tex-La Electric Cooperative
of Texas, Inc.
P.O. Box 631623
Nacogdoches, Texas 75963-1623

Mr. John Kirkland
President
Rayburn Country Electric Cooperative, Inc.
980 Sids Road
Post Office Box 37
Rockwall, Texas 75087

Gentlemen:

I have reviewed your letter of January 30, 1992. Information supplied to TU Electric indicates that the provisions of Section 1.11 (ii) and (iv) of the Tex-La Denison Dam Scheduling Agreement and Section 1.03 (ii) and (iv) of the Rayburn Country Denison Dam Scheduling Agreement may not have been satisfied since at least November 6, 1991. If this is correct, under the provisions of Section 3.02 (c) of the Scheduling Agreements, such Agreements have terminated with the consequences being those specified in subsections (c) and (d) of said Section 3.02.

Please supply TU Electric with accurate and reliable written information, no later than March 1, 1992, that the provisions of items (ii) and (iv) of Sections 1.11 and 1.03 of the Tex-La Denison Dam Scheduling Agreement, respectively, have, in fact, been satisfied since at least November 6, 1991 and are being satisfied at this time.

For your information, it is our understanding that Brazos, as the Denison Dam control agent, is not reporting the 70 MW of Denison Capacity as its load, as required by Sections 1.03(iv) and 1.11(iv), but rather a sale of 70 MW to Tex-La and Rayburn.

EXHIBIT
"C"

Further, it appears that Brazos, as the Denison Dam control agent, has not, since at least November 6, 1991, been carrying spinning reserves on the 70 MW of Denison capacity. Either of these events, if true, constitutes a breach of Sections 1.03 and 1.11 of the Scheduling Agreements, triggering the automatic termination provision of Section 3.02(a) after a failure to remedy the deficiency within 90 days as required by Section 3.02(b).

In addition, information available to us indicates that Brazos, in its capacity as the Denison Dam control agent, may be deficient in the maintenance of the installed reserves required by Sections 1.03(ii) and 1.11(ii) of the Scheduling Agreements. The CDR containing information filed by TNPP in January 1992 indicates a reserve for 1992 of 15.0% (the minimum required by the ERCOT Operating Guides) without providing the required reserves on the 70 MW of Denison capacity. Since the 70 MW of Denison capacity is not carried as Brazos' load, the CDR suggests that, since at least January 29, 1992, the Denison Dam control agent is reserve deficient by as much as 10.5 MW, also constituting a breach of Sections 1.03(ii) and 1.11(ii) of the Scheduling Agreements. A copy of the January 29, 1992 CDR is enclosed for your information.

In any event, and without waiving any rights, TU Electric is willing to treat the Scheduling Agreements as remaining in effect until March 1, 1992 to give you the opportunity to demonstrate compliance with Sections 1.03 and 1.11.

Until the foregoing issues are resolved, we are withholding further comment on the proposed Transmission Service Agreement relating to the 7 MW purchased from STEC. However, you should know that we are not prepared to agree to the changes proposed in Michael Moore's letter of January 30, 1992, except with respect to Sections 6.4(b), 6.5(a) (last paragraph only), 7.1(c) (with modifications) and 10.5. Also, we will have some further changes before such agreement is ready for execution by TU Electric.

Assuming for the moment that you can demonstrate that the Scheduling Agreements have not terminated, TU Electric will, in all likelihood, still require written assurance from Brazos that it will, in a manner satisfactory to TU Electric, fully back up the 70 MW of Denison capacity on behalf of Tex-La and Rayburn even if the 7 MW purchased from STEC is not available to Brazos.

Very truly yours,

Enclosure

cc: Mr. Hugh Baker
Mr. Michael Moore

RAYBURN ELECTRIC
Cooperative

Catt Bd
T. Le
(not to PUB)
Lee

February 13, 1992

VIA FACSIMILE AND CERTIFIED
MAIL RETURN RECEIPT REQUESTED

Mr. Darryl Bevelhymer
Director of Bulk Power Transactions
Texas Utilities Electric Company
400 North Olive Street, L.B. 81
Dallas, Texas 75201

RE: Denison/Whitney Dam Scheduling Agreements

Dear Mr. Bevelhymer:

We have received your letter dated February 7, 1992 stating your concerns over the Denison/Whitney Scheduling Agreement (SAs). Your letter declares that, if TU Electric's allegations concerning the performance of the Denison Dam Control Agent, Brazos Electric Power Cooperative, Inc. (Brazos), are correct, then TU Electric considers the SAs "terminated" pursuant to § 3.02(c) of the SAs.

TU Electric has not complied with § 3.02(b) of the SAs which require TU Electric to provide Tex-La and Rayburn notice and 90 days to cure an alleged failure to perform by Brazos. Only after the 90 day period has run without a cure by Tex-La and Rayburn may TU Electric terminate the SAs under § 3.02(c). TU Electric notice of a § 3.02(c) termination is not notice of a § 3.02(b) alleged Brazos breach and is thus ineffective as notice of anything. Therefore, the SAs remain in effect and no notice of default has been provided.

Given TU Electric's statement that it may cease to perform the SAs on March 1, 1992, Tex-La and Rayburn Country demand written assurances from TU Electric, whether or not the allegations prove true, that (i) the SAs are currently effective, (ii) the SAs will remain effective as of March 1, 1992 and until such time as properly terminated in accordance with their provisions, and (iii) TU Electric will fully perform its obligations under the SAs including specifically the § 3.02(b) notice provisions of the contracts.

If TU Electric believes that Brazos has not fully performed its obligation, then TU Electric should notify Tex-La and Rayburn to that effect under § 3.02(b) of the SAs. If TU Electric wishes a speedy resolution of the allegations, then it must supply Tex-

880 Sids Road • P.O. Box 37 • Rockwall, Texas 75087 • (214) 722-1336 • FAX (214) 722-8497

EXHIBIT
"D"

La and Rayburn more detailed information explaining the substance of the allegations. TU Electric's reliance upon unspecified "information supplied to TU Electric" and ERCOT CDR tables does not provide Tex-La and Rayburn sufficient information to determine the truth of the allegations. It is not a good faith effort to resolve a dispute. Therefore, Tex-La and Rayburn request that TU Electric promptly provide all facts known to TU Electric which support the allegations. In particular,

(1) Please provide records of all verbal and written communications between TU Electric and Brazos personnel since November 6, 1991 concerning all or any of TU Electric's allegations;

(2) For all hours during which TU Electric scheduled capacity pursuant to either the Tex-La or Rayburn SAs, please provide specific quantifiable evidence that Brazos did not have enough spinning reserves to cover both its native load and its obligations to Tex-La and Rayburn.

If TU Electric will be forthcoming with this information, then Tex-La and Rayburn will be able to work speedily and cooperatively with TU Electric to resolve this dispute, whether or not TU Electric chooses to give § 3.02(b) notice. Although Tex-La and Rayburn will work as diligently as possible, the March 1, 1992 cut-off date in TU Electric's February 7 letter is both arbitrary and not based on any provision of the SAs. Therefore, Tex-La and Rayburn will not be bound by this date.

The February 7 letter states that TU Electric will probably require written assurance from Brazos that it will back-up the 70 MW in a manner satisfactory to TU Electric. Considerable time and effort was expended by all parties in reaching the agreements embodied in the Pooling Agreement and the SAs. TU Electric has no right to unilaterally renegotiate these arrangements.

Finally, TU Electric's refusal to negotiate wheeling for the 7 MW reserve capacity until after the resolution of its allegations concerning the 70 MW of Denison Dam capacity has no basis. These issues are independent. Tex-La and Rayburn protest the unjustified linkage of the issues and urges TU Electric to reconsider. If TU Electric has a substantive response to Tex-La's and Rayburn's draft wheeling agreement, now is the time to provide it.

Tex-La and Rayburn await assurance of TU Electric's future performance of the SAs, the provision of all relevant information about TU Electric's allegations, and a counter-proposal from TU

Electric for wheeling of the STEC 7 MW reserve purchase.

Sincerely,

John H. Butts by Diane Gilmore
John H. Butts
Manager, Tex-La

John W. Kirkland
John Kirkland
President, Rayburn

cc: TU Electric Manager-Inter Utility Services
Richard McCaskill, Brazos
Jake Gage, SWPA
William K. Burchette, Esquire
Earnest Casstevens, Esquire
Michael Moore
Hugh D. Baker, Jr.

> mailed all

B-44th

No. 92-3020

TEX-LA ELECTRIC COOPERATIVE OF TEXAS, INC., Plaintiff, v. TEXAS UTILITIES ELECTRIC COMPANY, Defendant.	§	IN THE DISTRICT COURT DALLAS COUNTY, TEXAS ____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION FOR TEMPORARY AND PERMANENT INJUNCTION, DECLARATORY JUDGMENT AND DAMAGES

FILED
92 APR -4 AM 11:02

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Tex-La Electric Cooperative of Texas, Inc. ("Tex-La"), complains of defendant Texas Utilities Electric Company ("TU Electric") for the following reasons:

PARTIES

1. Plaintiff Tex-La is a rural electric cooperative incorporated under the Texas Electric Cooperative Corporation Act, Tex. Rev. Civ. Stat. Ann. art. 1528b, with its principal place of business in Nacogdoches, Nacogdoches County, Texas.

2. Defendant TU Electric is a Texas corporation with its principal place of business in Dallas, Dallas County, Texas. Service can be had on defendant TU Electric by serving its registered agent for process: Peter B. Tinkham, Texas Utilities Electric Company, 2001 Bryan Tower, Suite 1900, Dallas, Texas 75201.

BACKGROUND

3. Tex-La purchases wholesale electric power and energy for resale to its members, consisting of seven rural electric distribution cooperatives located in the State of Texas. Tex-La's members sell the electricity acquired from Tex-La and other suppliers to their approximately 159,000 retail customers/members in a 34 county region of northeast and east Texas.

4. TU Electric is engaged in the generation, purchase, transmission, distribution and sale of electric energy to approximately 91 counties in the north-central, eastern and western parts of Texas, providing retail service in 350 incorporated municipalities, the largest of which are Dallas, Fort Worth, Arlington, Irving and Waco. TU Electric also sells electricity at the wholesale level to Tex-La and others, including Rayburn Country Electric Cooperative Inc. ("Rayburn Country"), a rural electric cooperative headquartered in Rockwall, Texas.

5. TU Electric is part of a network of interconnected utilities operating in an area which covers most of Texas but which is electrically separate from the rest of the United States. These utilities have formed the Electric Reliability Council of Texas ("ERCOT") to facilitate coordinated operations within their area of operation. Utilities commonly refer to being located inside or outside of ERCOT. TU Electric operates entirely within ERCOT. Tex-La's member

cooperatives operate electrically split systems partly within and partly outside of ERCOT.

6. Since 1958, Tex-La and Rayburn Country have purchased from the Southwestern Power Administration ("SWPA") power generated at the Denison Dam Hydroelectric Project ("Denison Dam"), a federal project located at Lake Texoma at the northern edge of ERCOT on the Texas-Oklahoma border. SWPA, a regional power marketing agency under the jurisdiction of the United States Department of Energy, markets power generated at federal hydroelectric projects in Arkansas, Kansas, Louisiana, Missouri, Oklahoma and Texas pursuant to the requirements of the Flood Control Act of 1944, 16 U.S.C. § 825s. SWPA also markets the output of Whitney Dam Hydroelectric Project ("Whitney Dam"), located at Lake Whitney, on the Brazos River, to Brazos Electric Power Cooperative, Inc. ("Brazos").

7. Outside of ERCOT, SWPA typically markets power from federal hydroelectric projects on a "firm" basis, i.e., purchasers of the power are guaranteed delivery of the power purchased from SWPA on demand. SWPA is able to guarantee delivery of the power on a firm basis because: a) SWPA is able to assemble and coordinate the output of its hydroelectric project and purchases of thermal generation (e.g. coal, gas, or oil-fired generation) from other utilities to provide a dependable source of energy, b) SWPA owns transmission lines which can deliver the power to its customers, and c) SWPA is able to continuously and instantaneously match its electrical

supply with the electrical demands of its customers, operating what is commonly referred to in the industry as a "load control area." Because of the electrical separation of ERCOT from the remainder of the United States electrical grid, SWPA must sell the output of Denison Dam to Tex-La and Rayburn Country on an "isolated project basis," because SWPA is unable to guarantee delivery of the power from Denison Dam on a firm basis since it cannot coordinate the output of Denison Dam with its other generating resources. Additionally, SWPA owns no transmission lines in ERCOT, and thus is unable to deliver Denison Dam power directly to Tex-La and Rayburn Country. Finally, SWPA does not operate a load control area in ERCOT. SWPA also markets the output of Whitney Dam on an isolated project basis.

8. TU Electric owns the only electric transmission lines connecting Denison Dam (located at the edge of ERCOT) to ERCOT. Also, TU Electric operates the only load control area currently capable of scheduling power and energy to continuously match the loads of Tex-La and Rayburn Country. Tex-La and Rayburn Country do not operate their own load control areas, but operate within the load control area of TU Electric. Tex-La and Rayburn Country own no transmission or generation facilities within ERCOT. Therefore, Tex-La and Rayburn Country must rely on other utilities in ERCOT, including TU Electric, to provide firming, transmission and scheduling.

9. Beginning in 1958, the individual distribution cooperatives now comprising Tex-La and Rayburn Country entered into contracts with SWPA which provided for the delivery of firm power by one of TU Electric's predecessor companies to Tex-La and Rayburn Country in exchange for Denison Dam power provided to TU Electric by SWPA. (For ease of reference, TU Electric and its predecessor companies are referred to herein as "TU Electric.") Separate scheduling agent agreements set forth arrangements for scheduling, transmitting and firming of the Denison Dam power.

10. On February 1, 1990, in connection with their settlement of litigation relating to their joint ownership of the Comanche Peak nuclear power project, Tex-La and TU Electric entered into an Amended and Restated Power Supply Agreement (the "PSA") governing the sale of wholesale power by TU Electric to Tex-La. Section 4.8 of the PSA provides in relevant part:

> If Tex-La desires, TU Electric hereby agrees to negotiate in good faith an appropriate scheduling agent agreement pursuant to which TU Electric will serve as Tex-La's Scheduling Agent with respect to capacity and/or energy from Tex-La's entitlements from the Denison Dam Hydroelectric Project and/or the Whitney Dam Hydroelectric Project [to which Tex-La also has certain rights - see paragraph 13, below] following the termination of the [scheduling agent] agreement of October 30, 1984 among TU Electric, Tex-La and Rayburn Country Electric Cooperative, Inc., which scheduling agent agreement will contain no less benefits to Tex-La than those provided for in said agreement of October 30, 1984. Any such scheduling agreement will contain provisions which fully compensate TU Electric

> in accordance with the provisions of Sections 4.2, 4.3 and 4.4 hereof for serving as Tex-La's said Scheduling Agent and for delivering such capacity and/or energy to Tex-La, and shall specify the amount of capacity and energy from such resources to be applied under the terms of this Agreement.

The section further provides that, in return for Tex-La's providing firmed power from Denison Dam and/or Whitney Dam to TU Electric, to be scheduled by TU Electric to meet the electrical demands of the TU Electric system, TU Electric would provide a fixed 27.5 megawatts ("27.5 MW") of demand credit and an associated energy credit on TU Electric's power supply bills to Tex-La.

11. Pursuant to Section 4.8 of the PSA, Tex-La and TU Electric entered into a new scheduling agreement dated June 27, 1990 (the "Scheduling Agreement"), under which, subject to certain terms and conditions, TU Electric agreed to schedule the Denison Dam power into its system based on TU Electric's system need. A copy of the Scheduling Agreement is attached as Exhibit "A," and is incorporated by reference.

12. Section 1.11 of the Scheduling Agreement requires that Tex-La's 27.5 MW of capacity and associated energy from Denison Dam and/or Whitney Dam be

> delivered to TU Electric on a firm basis, meaning that 27.5 MW (i) is available to TU Electric at all times, irrespective of hydrological conditions, upon demand by TU Electric in accordance with Section 3.03 hereof, (ii) is fully backed up by the Denison Dam Control Agent through the maintenance of the minimum installed and spinning generation reserves required by the ERCOT Operating Guides, (iii) is of a level

> of firmness not less than that furnished by the Denison Dam Control Agent to its native load customers; . . . and (iv) is recognized by the Denison Dam Control Agent as its firm load obligation in all planning information furnished to ERCOT.

13. On June 28, 1990, Tex-La, Rayburn Country and Brazos entered into a Denison Dam/Whitney Dam Pooling Agreement (the "Pooling Agreement") under which Brazos pooled its entitlement to power sold by SWPA from Whitney Dam with Tex-La's and Rayburn Country's entitlements to power sold by SWPA from Denison Dam. A copy of the Pooling Agreement is attached as Exhibit "B," and is incorporated by reference. Brazos agreed to act as Pooling Agent for the pooled Denison/Whitney hydropower, firm Tex-La and Rayburn Country's allocated share of the pooled power (27.5 MW for Tex-La), and deliver the firmed power to TU Electric, the Scheduling Agent of Tex-La and Rayburn Country. In connection with the firming of the pooled power, Brazos agreed in Section 3.5 of the Pooling Agreement

> to provide the ERCOT required minimum installed reserve capacity and spinning reserves to support the Firm Capacity Allocations to Pool Members, provided however, this responsibility shall only be in effect if Rayburn and Tex-La have made arrangements for the delivery of seven (7) megawatts of capacity to the System of Brazos Electric . . . .

14. Tex-La and Rayburn Country made arrangements for the delivery of 7 megawatts of capacity to Brazos and have delivered such capacity as required. The Denison/Whitney Pool began operation on July 1, 1990 and, effective that date,

Tex-La began receiving its billing credit from TU Electric for Tex-La's share of Denison/Whitney power delivered to TU Electric's system. Since July 1, 1990, TU Electric has, in every hour it requested such, received an uninterrupted and continuous supply of generating capacity pursuant to the Scheduling Agreement and the Pooling Agreement.

15. Section 3.02 of the Scheduling Agreement provides in relevant part:

> (a) In the event the Denison Dam Control Agent fails, for any reason, in the undertakings provided for in (ii), (iii) or (iv) of Section 1.11 hereof, Tex-La agrees to make other arrangements to fully back up the Tex-La capacity with Brazos or a successor Denison Dam Control Agent, in a manner and under such conditions as are satisfactory to TU Electric and as are otherwise consistent with this Agreement.
>
> (b) Tex-La shall be permitted up to 90 days to fully back up the Tex-La Capacity should the same fail to meet the criteria provided for in Section 1.11(ii), (iii) and (iv) hereof, and Tex-La shall nevertheless be entitled to receive the demand credit in accordance with Section 3.01(c) hereof to the extent the Tex-La Capacity is actually delivered to TU Electric when scheduled in accordance with Section 3.03 hereof . . . .
>
> (c) In the event Tex-La fails to make the arrangements provided for in (b) above within such 90 day period: (i) this Agreement shall thereupon terminate and be of no further force or effect and Tex-La agrees that all of TU Electric's obligations with respect to any demand credits for the Tex-La Capacity, including its obligations under Section 4.8 of the Tex-La PSA, shall be deemed to be fully satisfied and of no further force or effect . . . .

16. Section 8.03 of the Scheduling Agreement provides:

> A Party shall give written notice of a Default to the Party in Default. The Party in Default shall have thirty (30) days from the date of receipt of such notice in which to cure such Default. If the Default is cured within the applicable period, the Default specified in such notice shall cease to exist.

17. By letter of February 7, 1992, a copy of which is attached as Exhibit "C" and incorporated by reference, TU Electric purported to terminate the Scheduling Agreement because of an alleged failure of Brazos, at least 93 days prior to February 7, in certain undertakings provided for in Section 1.11 of the Scheduling Agreement.

18. By letter of February 13, 1992, a copy of which is attached as Exhibit "D" and incorporated by reference, Tex-La and Rayburn Country advised TU Electric that such notice of termination was ineffective, that TU Electric's attempted notice of breach was in default of the Scheduling Agreement, and demanded adequate assurance of TU Electric's performance of Section 3.02 of the Scheduling Agreement.

19. By letter of February 18, 1992, a copy of which is attached as Exhibit "E" and incorporated by reference, TU Electric reiterated its notice of termination and failed to address Tex-La's and Rayburn Country's demand for adequate assurance of TU Electric's performance of Section 3.02 of the Scheduling Agreement.

20. By letter of February 26, 1992, a copy of which is attached as Exhibit "F" and incorporated by reference, TU

Electric again stated that the Scheduling Agreement was terminated and that on March 1 it would cease scheduling and giving credit for the Denison Dam power, subject only to a possible 16 day voluntary extension by TU Electric conditioned upon Tex-La's agreeing to renegotiate the Denison Dam arrangements.

21. At a meeting with Tex-La on February 28, 1992, TU Electric reiterated its position that the Scheduling Agreement was terminated. TU Electric agreed to postpone, from March 1 to March 17, 1992, the date on which it would cease scheduling and giving credit for the Denison Dam power in accordance with the Scheduling Agreement.

JURISDICTION

22. This Court has jurisdiction over plaintiff's claim for declaratory and protective relief pursuant to the general jurisdiction and powers of district courts and by virtue of Chapter 37 of the Civil Practice and Remedies Code.

23. This Court has jurisdiction to grant such ancillary injunctive relief as is necessary and appropriate to preserve the status quo, to prevent irreparable harm to plaintiff and the public, and to preserve the subject matter of this suit.

VENUE

24. Venue in Dallas County is proper because TU Electric's principal office is situated there.

REQUEST FOR TEMPORARY INJUNCTION

25. Tex-La repeats and realleges paragraphs 1 through 24 as though set forth here in full.

26. In its February 7, 18, and 26 letters and at the February 28, 1992 meeting, TU Electric stated its intention to terminato its scheduling of the Denison/Whitney Hydropower against TU Electric system loads, offered to consider allowing Tex-La to schedule the hydropower against Tex-La loads under the PSA, or, if the hydropower failed to qualify under the PSA in TU Electric's opinion, then to terminate scheduling the hydropower entirely. TU Electric indicated at the February 28, 1992 meeting that it would not schedule the Denison/Whitney power in accordance with the Scheduling Agreement beyond March 16, 1992. Tu Electric's actions constitute a flagrant breach of the Scheduling Agreement, and will cause Tex-La and Rayburn Country to suffer irreparable harm.

27. Hydropower is particularly valuable to electrical utilities since it is both low in cost and, unlike thermal generation, instantaneously available to meet electrical loads. Because of TU Electric's control over the resources necessary to firm, transmit, and schedule the output of generating resources, the arrangements governed by the Pooling Agreement and the Scheduling Agreement constitute the most efficient use of the output of Denison Dam and Whitney Dam. If TU Electric refuses to schedule the Denison Dam/Whitney Dam

hydropower against its own loads (which includes Tex-La's loads) pursuant to the Scheduling Agreement, and forces Tex-La to schedule the power against Tex-La loads, then part of the economic value of the resource will be lost. If TU Electric terminates scheduling of the hydropower from Denison Dam/Whitney Dam hydropower entirely, then Tex-La and Rayburn Country will have no way to make use of the output of Denison Dam/Whitney Dam and the entire economic value of the resource will be lost. If TU Electric terminates scheduling of the hydropower from Denison Dam/Whitney Dam entirely and refuses to transmit the output to Tex-La and Rayburn Country (or their agent), then water will fall from the dam without generating power and the energy that could have been generated will be irreparably lost forever unrecoverable, and available to no one.

28. Moreover, if TU Electric refuses to schedule the Denison/Whitney hydropower against its own loads, the public interest, as defined by the Flood Control Act of 1944, 16 U.S.C. § 825s, for preference customers to receive low-cost hydropower will have been thwarted.

29. Finally, Tex-La and TU Electric explicitly recognized and agreed in section 8.05 of the Scheduling Agreement that damages caused by a breach may be

> impossible to measure in terms of money the damages which may or will accrue by reason of a Default under this Agreement and for that reason, among others, TU Electric and Tex-La agree that, in case of any such Default, the non-defaulting Party will be irreparably

> damaged if this Agreement is not specifically enforceable and further no adequate remedy at law will exist. Accordingly, TU Electric and Tex-La agree that the non-defaulting Party shall be entitled to specific performance and/or injunctive relief, in addition to any other remedies which may exist at law or in equity. If the non-defaulting Party institutes any proceedings in accordance with this section, the defaulting Party hereby waives any claim or defense that an adequate remedy at law exists.

(Emphasis added.) TU Electric's refusal to schedule the Denison/Whitney hydropower as required by the Scheduling Agreement constitutes a default under said agreement.

30. As described above, Tex-La's rights are in imminent danger of harm by defendant's conduct and irreparable injury will result to Tex-La unless an injunction is issued. No adequate remedy at law exists. An injunction is necessary in order to preserve the status quo.

31. Tex-La requests that upon a hearing, a temporary injunction be issued, enjoining TU Electric, its agents, servants and employees, from terminating the scheduling of Denison/Whitney power and energy by TU Electric against TU Electric's system load, or denying Tex-La a credit for supplying such power to TU Electric.

FIRST CAUSE OF ACTION

32. This is a cause of action for anticipatory repudiation and breach of the Scheduling Agreement. Tex-La repeats and realleges paragraphs 1 through 23 and 26 through 28 hereof as though set forth here in full.

33. Upon information and belief, Brazos has fully carried out all undertakings provided for in Section 1.11 of the Scheduling Agreement to back up the Denison Dam power.

34. TU Electric's purported termination of the Scheduling Agreement without cause and notwithstanding the full performance by Tex-La of all undertakings provided thereunder constitutes an anticipatory repudiation and breach of the Scheduling Agreement.

35. By reason of the breach Tex-La has been damaged in an amount in excess of the jurisdictional limits of this Court.

SECOND CAUSE OF ACTION

36. This is a cause of action for anticipatory repudiation and breach of the Scheduling Agreement. Tex-La repeats and realleges paragraphs 1 through 23 and 26 through 28 as though set forth here in full.

37. TU Electric's purported termination of the Scheduling Agreement without notifying Tex-La of the alleged default or permitting Tex-La the 90 days provided in the Scheduling Agreement to make other arrangements to fully back up the Denison Dam power constitutes an anticipatory repudiation and breach of Sections 3.02 and 8.03 of the Scheduling Agreement.

38. By reason of the breach Tex-La has been damaged in an amount in excess of the jurisdictional limits of this Court.

THIRD CAUSE OF ACTION

39. This is a cause of action, in the alternative, for equitable estoppel. Tex-La repeats and realleges paragraphs 1

through 22 and 25 through 27 hereof as though set forth here in full.

40. Until its February 7, 1992 letter to Tex-La, Tex-La reasonably relied upon TU Electric's representations to Tex-La by word and conduct that (1) Tex-La could resolve TU Electric's concerns with the performance of Brazos by informal consultation with Brazos and TU Electric rather than by formal notice of default and invocation of the 90 day period under Section 3.02(b) of the Scheduling Agreement, and that (2) TU Electric had not decided that the performance of Brazos was insufficient.

41. TU Electric first raised the issue of reserves for the Denison/Whitney power in a December 23, 1991 TU Electric-proposed transmission agreement for the 7 megawatts of capacity Tex-La and Rayburn Country delivered to Brazos. Section 10.16 of that proposal demanded that Brazos sign the transmission services agreement warranting that Brazos will supply the reserves required by Section 3.5 of the Pooling Agreement and that Brazos will back up the backup power.

42. In a December 27, 1991 conference call among Brazos, TU Electric, Tex-La and Rayburn Country, Brazos explained to TU Electric that Tex-La and Rayburn Country had satisfied their Section 3.5 obligations and that Brazos would honor its reserve obligation. In a January 24, 1992 letter from TU Electric to Tex-La and Rayburn Country, TU Electric raised its "strong concerns" with the ERCOT reporting of Brazos.

requested that Tex-La and Rayburn Country "provide sufficient evidence to TU Electric that will clearly demonstrate that the necessary installed reserves are being provided in accordance with the Denison Dam Scheduling agent agreements," and suggested how Brazos should report the Denison Dam capacity to ERCOT.

43. In a January 30 telephone call between TU Electric and Tex-La, TU Electric advised that it was not sure if Brazos was complying with its Denison Dam obligations. Not until TU Electric's February 7 termination letter did TU Electric advise Tex-La that this on-going process of investigation and discussion was unacceptable to TU Electric and that TU Electric had reached a decision on Brazos' compliance with the Pooling Agreement.

44. Even if TU Electric had no affirmative obligation to notify Tex-La of Brazos' alleged failure of performance prior to the 90 day period provided in the Scheduling Agreement for curing any such failure, TU Electric is equitably estopped from claiming that any such failure occurred prior to February 7, 1992 because of TU Electric's affirmative representations to Tex-La, by word and conduct prior to such date, that TU Electric had not determined that Brazos' performance was deficient and that informal consultation was an acceptable means to TU Electric to resolve any possible deficiency.

45. By reason of Tex-La's reasonable reliance upon TU Electric's representations concerning Brazos' performance,

Tex-La has been damaged in an amount in excess of the jurisdictional limits of this Court.

FOURTH CAUSE OF ACTION

46. This is a cause of action for a declaratory judgement pursuant to Sections 37.001-.011 of the Texas Civil Practice and Remedies Code. Tex-La repeats and realleges paragraphs 1 through 23, 26 through 28 and 40 through 44 hereof as though set forth here in full.

47. Actual controversies exist between Tex-La and TU Electric with respect to the matters set forth in this petition. Tex-La contends and requests the court to declare (a) that Brazos has fully carried out all undertakings provided for Tex-La in Section 1.11 of the Scheduling Agreement to arrange back up Denison Dam power; (b) that the Scheduling Agreement requires TU Electric to give notice to Tex-La of any failure of the Denison Dam Control Agent (i.e. Brazos) to perform the undertakings provided for in Section 1.11 of the Scheduling Agreement; (c) that the Scheduling Agreement provides Tex-La 90 days from such notice to resolve or cure any such alleged failure by the Denison Dam Control Agent, and prohibits TU Electric from terminating the agreement if such failure can be resolved or cured by Tex-La within such 90 day period; (d) that TU Electric's February 7, 18 and 26, 1992 notices of termination of the Scheduling Agreement under Section 3.02(c) do not constitute a notice of a Tex-La default of its obligations under Section 1.11, nor do

they cause the 90 day period under Section 3.02(b) to begin running; (e) that to provide an effective notice of default, TU Electric must state the basis of its allegation with sufficient particularity and provide sufficient supporting information to enable Tex-La to refute or cure the alleged default; (f) that TU Electric has not stated the basis of its allegation with sufficient particularity and provided sufficient supporting information to enable Tex-La to refute or cure the alleged default; and (g) in the alternative, that TU Electric is equitably estopped from claiming that Brazos' alleged failure of performance in backing up Denison power occurred prior to February 7, 1992.

WHEREFORE Tex-La requests that TU Electric be cited to appear herein and that Tex-La be awarded judgment:

1. for a temporary and permanent injunction enjoining TU Electric, its agents, servants and employees, from terminating its scheduling of Denison/Whitney power and energy against TU Electric's system load and terminating its obligation to provide Tex-La a credit for supplying the power to TU Electric;

2. for damages suffered by Tex-La by reason of TU Electric's anticipatory repudiation and breach of the Scheduling Agreement;

3. declaring the matters set forth in Paragraph 47 above;

4. awarding to Tex-La pre- and post-judgment interest, costs of court and Tex-La's reasonable attorneys' fees

pursuant to Sections 37.009 and 38.011 of the Texas Civil Practice and Remedies Code; and

5. awarding to Tex-La such other and further relief to which it is justly entitled.

Respectfully submitted,

William H. Burchette
Foster De Reitzes
A. Hewitt Rose

JORDEN SCHULTE & BURCHETTE
1025 Thomas Jefferson St., N.W.
Suite 400 East
Washington, D.C. 20007
(202) 965-8100
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James S. Ramsey
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David C. Godbey
State Bar No. 08049500

of HUGHES & LUCE, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
(214) 939-6100 (Telecopy)

By: Original Signed By DAVID C. GODBEY

ATTORNEYS FOR PLAINTIFF
TEX-LA ELECTRIC
COOPERATIVE OF TEXAS, INC.

VERIFICATION

STATE OF GEORGIA)
COUNTY OF COBB)

BEFORE ME, the undersigned Notary Public, on this day personally appeared Hugh D. Baker, Jr., who being by me duly sworn on oath deposed and said that he is the duly authorized agent for plaintiff Tex-La Electric Cooperative of Texas, Inc., in the above-entitled and numbered cause; that he has read the above and foregoing Plaintiff's Original Petition For Temporary and Permanent Injunction, Declaratory Judgement and Damages, and that every statement contained therein is within his personal knowledge and is true and correct.

Hugh D. Baker, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME on the 3rd day of March, 1992, to certify which witness my hand and official seal.

[Seal]

Claire S. Davis
Notary Public in and for
the State of Georgia
My Commission expires
March 13, 1995

CAP ROCK ELECTRIC

P.O. BOX 10069

8140 BURNET ROAD • AUSTIN, TEXAS 78768-1069 • 512-451-6077

December 19, 1991

Darrell Bevelhymer
Texas Utilities Electric Company
Skyway Tower
400 N. Olive Street, LB-81
Dallas, Texas 75201

SUBJECT: Notice of Termination of 1963 Contract

Dear Darrell:

Pursuant to the 1972 amendment to the Texas Electric Service Company contracts with Cap Rock Electric Cooperative, Inc. ("Cap Rock") and Lone Wolf Electric Cooperative, Inc. (now the Lone Wolf Division of Cap Rock), Cap Rock does hereby notify you of the cancellation of both contracts. The cancellation for both the Cap Rock and Lone Wolf contracts is to be effective at 12:01 a.m. on February 1, 1992. As of that date, Cap Rock and its Lone Wolf Division will purchase all of its wholesale power requirements from West Texas Utilities Company ("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. Without waiving any rights under the lawsuit, in the unlikely event that a court should agree with your interpretation that the 1990 document is in any way binding, Cap Rock does hereby give notice to remove as of February 1, 1994 under Section 2.05 of the 1990 document, all of its power and energy requirements of Cap Rock at the following delivery points:

Vealmoor
West Stanton (Grady) - NE/4 S 24 B
Triangle Substation - Martin Co.
McDonald Substation - 1 S FM 715
Phillips Substation - 1140/250 E
Tate Substation, Andrews Hwy.
Cantrell Meter PT. Salem Rd.

Please note that the names and configurations of our delivery points and substations have changed substantially since certain points were named in Section 2.05 of the 1990 document.

Cap Rock by this letter further gives notice under Section 2.04 of the 1990 document to remove all remaining delivery points from the TUEC's system as of February 1, 1995.

Since beginning on February 1, 1992, WTU will be wheeling power to Cap Rock over TUEC's system, we will need to execute with you a wheeling agreement. While you have thus far refused our request for a wheeling contract, you indicated at our meeting on December 12, 1991, that a wheeling agreement would substantially take the form of the Tex-La agreement. Unless you first provide a wheeling agreement, Cap Rock will prepare a wheeling agreement for your signature using the Tex-La agreement as a guide. I expect you to sign the agreement prior to February 1, 1992 when the wheeling will begin.

Sincerely,

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

SEC/REC:taa/mja

WTU WEST TEXAS UTILITIES COMPANY
GENERAL OFFICE: P.O. BOX 841 / ABILENE, TEXAS 79604 / (915) 674-7663

David L. Teeter, P.E.
Director
Operations Services

December 10, 1991

Mr. Steven E. Collier, P.E.
Director of Power Supply
and Regulatory Affairs
Cap Rock Electric Cooperative, Inc.
P. O. Box 9589
Austin, Texas 78766

DEC 11 1991

Dear Steven:

Enclosed are three originals of the Cap Rock Electric Cooperative and West Texas Utilities "Service Agreement" for Rate Schedule TR-1 that have been prepared for your execution. These Service Agreements contain all the changes we have discussed and agreed upon in my letters of October 9 and November 5, 1991.

Please have these Service Agreements signed by the appropriate Cap Rock representative and returned to my attention. Upon receipt and execution by WTU I will attach to the Service Agreement the Rate Schedule TR-1 "Terms and Conditions" currently on file at the FERC. One completely executed set will be returned for Cap Rock's internal use.

Once we have completed the final review and execution of the Exhibit A's, these can be distributed along with the Exhibit B and made a part of the total agreement between Cap Rock and WTU to be filed with the FERC. Currently we continue to work closely with both John Edwards and Mark Sullivan to finalize this agreement.

If you have any questions concerning these Service Agreements, please let me know.

Sincerely,

David Teeter

DT/pw
enclosures (3)

"SERVICE AGREEMENT"

BETWEEN

WEST TEXAS UTILITIES COMPANY

AND

This agreement made and entered into this 1st day of January, 1992, by and between WEST TEXAS UTILITIES COMPANY (hereinafter referred to as "Company,") and CAP ROCK ELECTRIC COOPERATIVE, INC. (hereinafter referred to as "Customer"),

W I T N E S S E T H:

That in consideration of the mutual covenants and agreements herein contained, the parties hereto covenant and agree with each other as follows:

ARTICLE I

Company shall sell and deliver to Customer, and Customer shall purchase and receive from Company, all the electric power and energy that Customer may require during the term of this agreement for the operation of those portions of its electric system that are or shall be connected to any point of delivery specified in Exhibit A attached hereto and made a part hereof, or on any successor or supplementary sheets to Exhibit A which shall be attached hereto and made a part of Exhibit A by agreement of the parties hereto. A DELIVERY POINT AND SERVICE SPECIFICATIONS sheet shall be executed for each such point of delivery and each such sheet shall become a part of Exhibit A attached hereto. Customer shall operate the points of delivery described on Exhibit A as part of Company's control area by means of telemetering. Exhibit B attached hereto and made a part hereof describes the respective obligations of Company and Customer as to the installation and maintenance of such telemetering equipment and sets forth the procedures to be followed by Company in preparing billings for service.

ARTICLE II

Electric service shall be furnished to Customer in accordance with Company's "Terms and Conditions" and the applicable rate schedule. Said "Terms and Conditions" and applicable rate schedule are attached hereto and made a part of this Service Agreement to the same extent as if fully set out herein. The Company reserve the right, under this Service Agreement, unilaterally to file with the Federal Energy

Regulatory Commission, or any successor or other agency having jurisdiction ("Commission"), for a change in rates and charges, pursuant to Section 205 of the Federal Power Act ("Act"), and the Commission's rules and regulations promulgated thereunder. In addition, changes made in Exhibit A hereto pursuant to the provisions of paragraphs 1(b) and 9 of said "Terms and Conditions" and changes in "Terms and Conditions" mutually agreed upon by Customer and Company may be similarly filed by Company with the Commission pursuant to Section 205 of the Act. Otherwise, either party to this Service Agreement shall have the right to make application to the Commission pursuant to Section 206 of the Act for a change in other "Terms and Conditions." In the event rehearing is sought of the Commission's disposition of such application, any change sought pursuant to application under Section 206 shall not become effective until issuance of the final Commission Order on Rehearing or the time for the issuance of such an order has passed.

ARTICLE III

Bills shall be rendered monthly for power and energy supplied hereunder and such bills shall be payable at Company's General Office in Abilene, Texas, within fifteen (15) days from the date thereof, or the date of mailing, whichever is later. All billing and payments shall be in accordance with the provisions of paragraph 7 of the "Terms and Conditions" and the applicable rate schedule.

ARTICLE IV

This Service Agreement shall become effective when signed and approved by the authorized representatives of the Customer and Company, and, unless otherwise agreed, shall remain in effect until five (5) years after written notice of termination is given by either party. If Customer is terminating total requirements service to participate in generation facilities owned by Company, the five (5) year notice period shall not apply. Deliveries under this Service Agreement shall commence upon a date agreed upon by Customer and Company, provided the Customer shall have made all arrangements with Texas Utilities Electric Company and other Electric Reliability Council of Texas ("ERCOT") utilities necessary for the performance of this Service Agreement on terms that are acceptable to Company.

If Customer gives such notice of termination of this Service Agreement and thereafter requests partial requirements and transmission wheeling service, the Customer and Company shall, upon request of the Customer, enter into negotiations regarding the rates, terms and conditions for such services. Any request of Customer for partial requirements and transmission wheeling services shall specify the

nature of the services requested including, without limitation, the date on which such services are to commence and in the case of transmission wheeling service, specification of the quantities of power to be wheeled, the times at which such power is to be wheeled, the points on Company's transmission system where Company is to take delivery of such power and the points to which Company is to deliver such power.

Company and Customer agree to provide each other during the course of negotiations, with such relevant data and other information as may be reasonably requested by the other for purposes of preparing or evaluating discussion drafts of rates, terms and conditions for the transmission wheeling and partial requirements services requested by Customer; provided, however, that neither Company nor Customer shall be required under the terms of this Service Agreement to provide the other with data, documents or information of (1) a kind to which a privilege would attach under Texas law or under Rule 501 of the Federal Rules of Evidence, (2) the kind described in Rule 26(b) (3) or (4) of the Federal Rules of Civil Procedure, (3) a kind constituting trade secrets, (4) a kind constituting commercial of financial information obtained from a third person on a privileged or confidential basis, or (5) the kind of information, commonly known as "insider information," including without limitation, any forecast financial or operating information not then generally available to the public, the selective release of which could result in a violation of the Securities Act of 1933, as amended, of the Securities Exchange Act of 1934, as amended, or the rules and regulations of the Securities and Exchange Commission promulgated under such acts.

After receipt of Customer's request to negotiate rates, terms and conditions for partial requirements and transmission wheeling services and upon receipt from Customer of all information necessary for the formulation thereof, Company will present to Customer the methodology which Company believes to be the appropriate basis for developing such rates; provided, however, that Company shall not be required to present to Customer such methodology any earlier than 30 months prior to the proposed commencement date of the requested services.

Company agrees to join with Customer, at Customer's request, in seeking an informal conference with the Staff of the regulatory body having jurisdiction 18 months prior to such commencement date for purposes of discussing the design of rates for the requested services.

Company further agrees to file as a change in rate 12 months prior to the proposed commencement date of the services requested by Customer the rates, terms and conditions

under which Company is willing and able to commence providing partial requirements and transmission wheeling services to Customer with the regulatory body having jurisdiction, and Company shall join with Customer in seeking expeditious treatment of such filing. Nothing in this Article IV shall be construed to prohibit Company from unilaterally filing superseding changes in such rates, terms or conditions.

Article V

This Service Agreement may not be assigned by either party without the prior written consent of the other party. Consent to assignment shall not be unreasonably withheld. Nothing expressed or mentioned or to which reference is made in this Service Agreement is intended or shall be construed to give any person or corporation other than Company or Customer any legal or equitable right, remedy or claim under or in respect of this Service Agreement or any provision herein contained, expressly or by reference, this Service Agreement and all conditions and provisions hereof being intended to be and being for the sole and exclusive benefit of Company and Customer, and for the benefit of no other person or corporation.

IN WITNESS WHEREOF, Company and Customer have caused this Service Agreement to be executed in duplicate in their names by their respective duly authorized representatives, as of the date of year first above written.

CAP ROCK ELECTRIC COOPERATIVE, INC.

ATTEST:

_____ By: _____

Chief Executive Officer and
General Manager
"Customer"

WEST TEXAS UTILITIES COMPANY

ATTEST:

_____ By: _____

Vice President
"Company"

Effective Date: January 1, 1992

CAP ROCK ELECTRIC

P.O. BOX 10069

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

January 2, 1992

Mr. David Teeter
West Texas Utilities Company
P.O. Box 841
Abilene, Texas 79604

SUBJECT: Executed Service Agreement

Dear David:

On behalf of Cap Rock Electric, I am pleased to enclose three executed copies of the Service Agreement for Rate Schedule TR-1. You will notice that we had to do some editing of the signature page since David Pruitt is CEO and General Manager, not Executive Vice President. If this is a problem, we would be happy to re-execute new signature pages.

I have forwarded the exhibits A to David Pruitt. He will execute them and forward them directly to you.

As we have previously discussed, I am including in this cover letter confirmation of certain matters that we have discussed with regard to the implementation of the Service Agreement. Given the nature of our wholesale power purchase arrangement, we understood and concurred with your desire to avoid, as much as possible, the complexities and delays that would be caused by extensive deviations from your standard Service Agreement and rate schedule language. If any of the following items are incorrect or unacceptable, please contact me at your earliest convenience.

(1) Exhibit B

It is my understanding that language for Exhibit B is still being finalized. Because of the nature of this exhibit (i.e., a standard operating procedure), it does not seem to be a problem to exchange executed copies of the contract without this exhibit finalized. In any event, this exhibit may need to be modified from time to time as operating arrangements, ERCOT guidelines, metering requirements, etc. dictate.

(2) Commencement of Deliveries

As we discussed on the telephone today, we have given official, written notice to TU Electric of cancellation of our full-requirements wholesale power contract effective February 1, 1992. In that notice, we inform them of our intent to begin purchasing all of our wholesale power requirements from WTU. However, as you know, TU Electric is disputing our right to do this.

We have filed a contract dispute action in state district court in Midland, Texas. Since we probably cannot begin deliveries from the WTU control area through the TU Electric transmission system until they agree to do so, commencement of deliveries under our WTU Service Agreement will likely be contingent upon the outcome of this state district court case or negotiation with TU Electric. It is my understanding that Cap Rock Electric will have no obligations to make any payments under the Service Agreement until such time as deliveries actually commence.

We would be interested in visiting with you about any actions that WTU might be willing to take to assist us in forcing TU Electric to allow the deliveries to commence. We are proceeding to negotiate contracts for wheeling with the impacted third-party utilities. We are also drafting a wheeling agreement after the fashion of Tex-La's wheeling agreement with TU Electric to sign and submit to TU Electric so that they cannot claim that the lack of a wheeling contract prevents them from beginning wheeling. Nonetheless, until TU Electric is willing to ramp its generation down to allow WTU to ramp its generation up to serve our load, deliveries cannot commence under our WTU Service Agreement.

(3) Term of Service Agreement and Exhibits A

The Service Agreement, on Page 2, Article IV, states that the Service Agreement shall remain in effect until five (5) years after written notice of termination is given by either party. Most of the Exhibits A provide for the possibility of termination earlier than five years, and without advance written notice. It is my understanding that, even though the Service Agreement may have a term of five years, the terms stated in each Exhibit A has precedence to the extent that it allows for a term of less than five years.

(4) Interconnection Between WTU and TU Electric

It is my understanding that WTU currently has sufficient interconnection capacity with TU Electric to accommodate the wholesale power purchases contemplated under the Service Agreement. That is, transmission system additions or improvements will not be required by TU Electric or WTU to facilitate the wholesale power purchases contemplated in the Service Agreement.

(5) "Up and Down Cost" Does Not Apply

The terms and conditions in Rate Schedule TH-1, Sheet No. 22, Item 9.(b), references up and down costs associated with termination of service at a delivery point. It is my understanding as per our discussions, that since WTU is not constructing or dedicating any transmission or distribution facilities to serve Cap Rock Electric delivery points, that such up and down charges do not apply.

(6) Miscellaneous Additional Matters

We have discussed with you several additional matters which did not seem appropriate to include in the Service Agreement, but which we will want to continue to discuss with you. When the time is right, we will want to negotiate appropriate terms and conditions for the following items:

(a) Substitution of Hunt-Collin Load

In the event that it proves to be possible for WTU to serve the load at what will be our Hunt-Collin division we will want to substitute that load for a portion of the "20 megawatt minimum" that is currently made up by our Lone Wolf division delivery points and the Stanton division Schwarts and Eiland delivery points.

(b) Lease Assignment

As we have discussed, we have executed a lease-back of certain transmission facilities and other system improvement expenses that we have incurred in order to facilitate our alternative power supply arrangements. We negotiated the lease to be assignable so that we might assign it to a

wholesale supplier. This would enable us to pass the lease cost through in our PCRF as they are charged to us by our wholesale supplier rather than having to go through a full rate case at the PUC to obtain rate base treatment for these expenses. Our Chief Financial Officer, John Parker, will be contacting you to further discuss this matter, and we would like to pursue the assignment of this lease to WTU at such time as deliveries commence under the Service Agreement. Of course, we would expect to hold WTU harmless for any liability or economic or other risk under this lease pass-through arrangement.

(c) WTU Assistance

This Service Agreement pretty clearly makes all of the wheeling and other arrangements solely Cap Rock Electric's responsibility. However, we have taken comfort from your verbal assurance that WTU will exert significant effort to assist us in making the necessary arrangements. Given the unusual nature of the control area arrangement that we contemplate, and given the likely continued interference and obstruction by TU Electric, this assistance will undoubtedly be needed if deliveries are to commence under the Service Agreement.

Again, if any of the above items is incorrect or unacceptable, please let me know at your earliest convenience. We are surely looking forward to our business relationship with West Texas Utilities Company. Again, thank you for all of your efforts in our behalf.

Sincerely,

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

SEC:ma
Enclosure
cc David Pruitt

CAP ROCK ELECTRIC

EXHIBIT 8

October 22, 1991

Mr. Darrell Beverhymer
Director of Bulk Power Transactions
TU Electric
Lock Box 81
Dallas, Texas 75201

Dear Darrell:

Thank you for taking the time to meet with me in your office yesterday. I was glad to have the opportunity to discuss with you and Henry Bunting the plans that we are making at Cap Rock Electric for new power supply arrangements.

When we first executed the new power supply agreement with TU Electric in May, 1990, we expected that the TU Electric rates would become final and that the special 120 day window for termination 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 agreement and begin serving load under the new power supply agreement before we would be in a position to begin to serve load with alternative power supply resources. However, we have been able to complete our power supply arrangements more quickly than we thought, and the 120 day window will open and close much later than we thought due to repeated delays in the final change of the TU Electric rates. As a result, we now anticipate being able to take advantage of the 120 day window to provide notice to terminate our existing all-requirements agreement without having to serve any wholesale load temporarily under the new power supply agreement.

As we discussed, Cap Rock Electric has entered into a contract with Southwestern Public Service Company to transfer most or all of our system load requirements out of ERCOT into the Southwest Power Pool beginning in June, 1993. This will require both completion of new transmission lines by SPSCO and completion of internal transmission system integration improvements by Cap Rock Electric.

We have also 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. WTU has agreed to electronically incorporate our load into their control area, and we will be served under their standard wholesale tariff.

As we further discussed, the new TU Electric rates became final on September 19, 1991, providing Cap Rock Electric with a window of 120 days beginning that same date to provide notice of termination of our existing all-requirements wholesale power contract. We expect to be providing such notice before the end of the 120 day window. We are currently attempting to ascertain the exact requirements and timing of the telemetry and control area arrangements as well as the wheeling arrangements. This will enable us to provide notice with an effective date that is as soon as practical.

Finally, as we discussed, there are a couple of action items that we would like to pursue. First, Scott Moore of WTU will be contacting TU Electric representatives for the appropriate telemetry and control area coordination. Second, we would like to receive a draft wheeling contract from TU Electric so that we can begin to make the necessary wheeling arrangements. WTU is currently performing the load flow studies to assess wheeling impacts on utilities other than TU Electric and WTU, and we will pursue any other wheeling contracts that prove necessary as a result of those assessments.

One additional item which I failed to discussed with you but which we should pursue has to do with the coordination of our construction of the necessary transmission facilities. As you know, Cap Rock Electric has, for some time, been actively proceeding with transmission improvements and additions with the ultimate goal of integrating our various substations and transmission facilities. Not only will we continue with these activities in order to facilitate the SPS contract, but SPS will also be constructing two transmission lines to our area. Sometime in the next few weeks it would be helpful if representatives of SPSCO, Cap Rock Electric and TU Electric could meet to discuss our transmission construction plans and arrange for any coordination that may be necessary, especially as regards any line crossings or traversal of any TU Electric service area.

I am looking forward to working with you as Cap Rock Electric takes this big step in its power supply arrangements. Please call me if you have any questions or if I can provide any additional information.

Sincerely,

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

SEC:ma
cc David Pruitt
Mark Sullivan
Gary Gibson-SPSCO
Don Welch - WTU

TUELECTRIC

Henry A. Bowling, P.E.
Manager — Inter-Utility Services

November 4, 1991

Mr. Steven E. Collier
Director of Power Supply
and Regulatory Affairs
Cap Rock Electric Cooperative, Inc.
8140 Burnet Road
Austin, Texas 78766-1069

Dear Steve:

This is in response to your letter of October 23, 1991, in which you indicated that Cap Rock anticipates cancelling its current contract with TU Electric, dated July 2, 1963, as amended, "without having to serve any wholesale load temporarily under the new power supply agreement."

We attempted to reach you by phone on Friday and again this morning. After meeting with you on October 22 and after reviewing your October 23 letter, we reviewed our power supply agreements with Cap Rock in detail. As you are aware, the 1963 agreement calls for Cap Rock to purchase its full power and energy requirements from TU Electric. The new Cap Rock Power Supply Agreement executed on June 8, 1990, itself a full-requirements contract initially, automatically becomes effective for a term of 10 years, upon cancellation of the 1963 full-requirements contract. Under the 1990 agreement, Cap Rock may supply a part of its power and energy requirements from other sources or may purchase all of its requirements elsewhere by complete termination of that agreement -- in either case, upon three years' notice during years one through five and upon five years' notice thereafter. Upon 24 months' notice during years one through five of the 1990 agreement, Cap Rock may purchase up to 30 MW of power and energy from other sources at nine specified points of delivery. All purchases by Cap Rock of power and energy from sources other than TU Electric are subject to other provisions of the 1990 Power Supply Agreement and the negotiation of satisfactory wheeling agreements.

We wish to advise you 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 West Texas Utilities Company "as early as January, 1992,"

until the cancellation of the 1963 agreement and only then upon expiration of the foregoing notices provided for in the 1990 agreement and the compliance with all other terms of that contract.

Please let us know the cancellation date of Cap Rock's 1963 power supply agreement. Should you have any questions, please call.

Very truly yours,

Henry A. Bunting

HAB/mkm

cc: Darrell Bevelhymer
David Pruitt
Mark Sullivan
Gary Gibson - SPSCO
Don Welch - WTU

TU ELECTRIC

December 19 19'

Darrell Brockmeyer
Director of Bulk Power
Transactions

Mr. David Peeler
West Texas Utilities
P. O. Box 841
Abilene, TX 79604

Dear David:

I have recently received a copy of an inquiry regarding wheeling services Cap Rock seeks from other ERCOT control area utilities for power supplied to Cap Rock by WTU beginning January 1992. I feel that it is important to clearly communicate to you and your management that Cap Rock is obligated to acquire all of its power and energy from TU Electric under one of two existing contracts which I have enclosed for your review.

I must apologize that with knowledge of the existence of these agreements, this obviously puts an extra burden of responsibility on you and your company to avoid any interference with this contractual relationship. As I'm sure you would do in a similar situation, we will aggressively defend TU Electric against any damages or losses incurred from any type of interference.

Please feel free to give me a call at any time on this issue.

Yours very truly,

Darrell Brockmeyer

c: Terry Dennis

WTU WEST TEXAS UTILITIES COMPANY
GENERAL OFFICE: P.O. BOX 841 / ABILENE, TEXAS 79604 / (915) 674-7613

February 18, 1992

Don Welch
Vice President

Mr. Steven E. Collier, P.E.
Director of Power Supply
and Regulatory Affairs
Cap Rock Electric Cooperative, Inc.
8140 Burnet Road
Austin, Texas 78756

FEB 20 1992

Re: Cap Rock's Proposed Purchase of Electric Energy from WTU

Dear Steven:

In response to your letters of January 2, 6, and 10, 1992, please be assured that WTU stands ready, willing, and able to begin selling electric energy to Cap Rock. As you know, however, unless and until Cap Rock has validly terminated its relationship with TU Electric and has fulfilled all of its contractual obligations to TU Electric and TU Electric has agreed to the necessary wheeling and scheduling agreements, on terms acceptable to WTU, WTU cannot finalize any agreement to sell electricity to Cap Rock.

WTU's negotiations with Cap Rock, which have not resulted in a contract between WTU and Cap Rock, have proceeded based upon the premise that Cap Rock had the intention and the legal right to terminate its relationship with TU Electric while obtaining TU Electric's cooperation in the wheeling and transmission of electric energy. While WTU has expressed its willingness to sell electricity to Cap Rock once Cap Rock's relationship with TU Electric has ended, WTU has avoided and must continue to avoid any activities that would interfere with the relationship between Cap Rock and TU Electric. WTU is interested in establishing a relationship with Cap Rock, but WTU has not and cannot provide any assistance or support to Cap Rock in connection with Cap Rock's termination of its relationship with TU Electric.

We hope that Cap Rock will be able to proceed with the establishment of a relationship between WTU and Cap Rock. Please let us know when Cap Rock has obtained TU Electric's cooperation in this proposed venture.

Yours very truly,

Don Welch

DW/plw

NO. B35,579

9 55 am

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

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

Cap Rock Electric Cooperative, Inc., (Cap Rock) complains of Texas Utilities Electric Company (TUEC) as follows:

I. Parties and Venue

Cap Rock is an electric cooperative corporation, incorporated under the Texas Electric Cooperative Corporation Act, Tex. Rev. Civ. Stat. Ann. art. 1528b. Its headquarters is in Stanton, Martin County, Texas.

TUEC is a Texas Corporation. It has a division office in Midland, Texas, located in Midland County.

TUEC's registered agent for service is Mr. Peter B. Tinkham, at 2001 Bryan Tower, Suite 1900, Dallas, Texas, 75201.

Venue is proper in Midland County under Texas Civil Practice & Remedies Code Sec. 15.036.

II. Factual Background

Cap Rock is an electric distribution cooperative. Cap Rock currently owns no electric generating facilities. It buys electricity at wholesale and resells the electricity to its end-use, member customers. Cap Rock serves over 20,710 meters. Its service area covers 10,000 square miles in all or parts of Andrews, Borden, Dawson, Ector, Fisher, Glasscock, Howard, Irion, Martin, Midland, Mitchell, Nolan, Reagan, Scurry, Upton, Sterling and Tom Green counties. As a cooperative corporation, Cap Rock is owned by its consumer-members. Any profit made by the cooperative ultimately is either invested in the cooperative or returned as cash or lower rates to its consumer-members. Cap Rock's annual electric revenues are about $35 million. Over 70 per cent of these revenues goes to pay its wholesale power supplier. Cap Rock's net plant investment is about $75 million.

TUEC is the fifth largest electric utility company in the United States. It is a wholly-owned subsidiary of Texas Utilities. TUEC, by any means of measurement, is by far and away the largest electric utility in Texas. TUEC serves a vast portion of Texas. Its service area covers 87 counties ranging from Tyler on the east, to Van Horn on the west, Oklahoma on the north and Austin on the south. TUEC serves over 5.2 million customers.

another utility builds transmission lines into Cap Rock's service area, any new power supplier for Cap Rock initially must wheel over TUEC's system.

TUEC's costs of constructing and operating Comanche Peak have increased TUEC's costs, including rates TUEC charges Cap Rock. Any future increase in TUEC's rates likewise will increase the cost of power for Cap Rock and its retail customers. To keep its rates low and to remain competitive, in the late 1980s Cap Rock began to seek other sources of wholesale electricity. Cap Rock found short term sources of power other than TUEC at a cost lower than TUEC's rates. One such source was a cogeneration project. Cap Rock was unable to complete the arrangement with the cogenerator due to TUEC's unwillingness to offer stand-by power and scheduling services. Another source was the purchase of "economy energy" from Houston Lighting & Power Co. Cap Rock requested that TUEC wheel this economy energy under similar terms and conditions that TUEC was wheeling economy energy for other TUEC customers. TUEC refused to wheel, thereby denying Cap Rock's customers lower cost electricity.

Because of TUEC's failure to wheel and because of TUEC's discrimination, Cap Rock started two separate actions at the NRC. The first was in 1988. Cap Rock filed comments with the NRC concerning whether there had been significant changes in TUEC's activities that would warrant a new antitrust review. The NRC declined to find a change in conditions under Cap Rock's 1988 filing. Cap Rock appealed this decision to the U.S. Court of Appeals in Washington, D.C. Second, in 1989, Cap Rock requested an order from the NRC enforcing and modifying TUEC's nuclear license antitrust conditions. While these actions were pending, Cap Rock and TUEC negotiated a resolution of the disputes in 1990. The settlement allows Cap Rock to get a new power supplier. It also allows Cap Rock to determine what, if any, services Cap Rock would purchase from TUEC.

Cap Rock and TUEC signed a document entitled "Power Supply Agreement Between Texas Utilities Electric Company and Cap Rock Electric Cooperative, Inc., dated as of June 8, 1990" (the 1990 Document). A copy is attached to this Petition as Exhibit "A" and incorporated herein. The 1990 Document purports to govern the relationship between Cap Rock and TUEC while Cap Rock gained access to other power suppliers. In fact, the 1990 Document is a menu of services that TUEC is to offer Cap Rock. The terms and conditions for the menu remain open. For example:

1. The 1990 Document allows Cap Rock to buy electricity at certain "Points of Delivery" with TUEC "existing on the effective date hereof, each of which Points of Delivery shall be specified on Exhibit A hereto. . . ." Exhibit "A" also required the listing of the amount of "Contract Demand"; that is, the amount of power and energy to be bought. Exhibit "A" of the 1990 Document states: "Information to be Specified on the Effective date of this Agreement." Exhibit "A" remains blank and to be negotiated. Without further negotiation and agreement, there is no way of knowing what, if any, are the Points of Delivery nor what is the "Contract Demand."

2. The 1990 Document allows for Cap Rock to have other "Power Supply Resources" for electricity. These resources "shall be identified on Exhibit 'B'" of the 1990 Document. Section 2.03. Exhibit "B" of the signed 1990 Document states: "To be specified pursuant to Section 2.03 of this Agreement." Exhibit "B" is blank and remains to be negotiated. Without further negotiation and agreement, there is no way of knowing which third party power sources are covered by the 1990 Document.

3. Cap Rock is to develop "a mutually acceptable curtailment plan" at least six months prior to Cap Rock taking power from a firm power resource via TUEC's scheduling

as provided in the 1990 Document. Section 4.03. This curtailment plan will then become Exhibit "D" to the 1990 Document. Exhibit "D" is blank.

4. TUEC is to provide to Cap Rock regulation power and energy "pursuant to a mutually acceptable regulation services agreement." Section 6.01 (a). This agreement remains to be negotiated.

5. TUEC is to provide on a transaction specific basis wheeling services to Cap Rock "pursuant to a mutually acceptable wheeling agreement(s)." Section 7.01. Cap Rock has requested a draft agreement and TUEC has refused to provide one. This agreement remains to be negotiated.

6. When Cap Rock becomes a "control area", TUEC is to provide firm wheeling services "for a term and in accordance with mutually acceptable interconnection and transmission wheeling agreement(s)." Section 7.02(a). This agreement remains to be negotiated.

After signing the 1990 Document and consistent with Cap Rock's understanding of the document, Cap Rock sought alternate power suppliers. As a result of its search, Cap Rock entered into a contract with West Texas Utilities (WTU). Under the WTU contract, Cap Rock will buy its full requirements for electricity for its entire system from WTU. Cap Rock will save about 20 per cent by buying the electricity from WTU. The savings averages about $250,000 per month. Cap Rock's end use customers will receive these savings immediately after Cap Rock begins buying WTU electricity. The WTU purchase will begin on 12:01 a.m. February 1, 1992.

Cap Rock has timely told TUEC that Cap Rock will end the 1963 Contract as of 12:01 a.m., February 1, 1992.

TUEC electrically surrounds Cap Rock. At present, any electricity from a utility other than TUEC must flow on TUEC's transmission lines connected to Cap Rock's substations.

Electricity must be used at the instant it is generated. It can not be stored. TUEC's cooperation is essential for the WTU purchase since TUEC can physically prevent WTU's electricity from reaching Cap Rock. TUEC must reduce its generation to the same degree and at the same instant that WTU increases its generation to meet Cap Rock's requirements. Otherwise, WTU cannot cause electricity to be delivered to Cap Rock and that incremental electricity will be disbursed throughout the other electric systems in Texas.

TUEC has informed Cap Rock that TUEC expects to continue as Cap Rock's full requirements supplier after the termination date of the 1963 Contract. TUEC has refused to negotiate as to the content of Exhibits "A" and "B" as well as the other agreements contemplated in the 1990 Document. TUEC has refused to cooperate in providing metering and telemetry for third party suppliers, and other normal control area procedures to allow the transaction to occur. TUEC also has stated it will not back down its generation to allow WTU to furnish electricity to Cap Rock.

III. Request for Declaratory Judgment

First Cause of Action

Under the Uniform Declaratory Judgments Act (Declaratory Judgments Act), Chapter 37 of the Texas Civil Practice and Remedies Code, Cap Rock requests that the court find the 1990 document is not enforceable not binding since essential condition precedents required to make the document complete have not been negotiated and executed.

The execution of Exhibits "A" and "B" are essential to the formation of a complete and binding agreement between Cap Rock and TUEC. The 1990 Document is incomplete without these exhibits. There is no way to determine the Points of Delivery and the Contract Demand within the four corners of the document without completed Exhibits "A" and "B." Since the exhibits remain to be negotiated and executed, there is no binding or enforceable contract.

Therefore, Cap Rock requests an order from this court finding the 1990 Document is neither binding nor enforceable.

Second Cause of Action

In the alternative, without waiving the above, but insisting on the same, Cap Rock requests under the Declaratory Judgments Act that the 1990 Document is not a valid or binding contract. On its face, the 1990 Document is illusory. It lacks the necessary and essential terms and conditions required for its enforcement.

The facts stated above show, at best, the 1990 Document is an "agreement to agree" in the future on a series of material issues. Such agreements are neither binding nor enforceable in Texas. Therefore, Cap Rock requests an order from this court finding the

1990 Document is neither a binding contract nor does it have any force and effect between Cap Rock and TUEC.

Third Cause of Action

In the alternative, without waiving the above, but insisting on the same, Cap Rock requests under the Declaratory Judgments Act that the court find the 1990 Document is not enforceable since it violates the Statute of Frauds.

Fourth Cause of Action

In the alternative, without waiving the above, but insisting on the same, Cap Rock requests under the Declaratory Judgments Act that the court find the 1990 Document not to be a binding contract. There was no meeting of the minds of the parties to the essential terms of the document.

As explained above, the 1990 Document Exhibits "A" and "B" are to be specified on the effective date.

Cap Rock informed TUEC that for Exhibit "A," Cap Rock will specify no Points of Delivery and will only require wheeling services from TUEC. The purchase Contract Demand will be zero. TUEC's interpretation is that all of the Points of Delivery under the 1963 Contract shall be incorporated onto Exhibit "A" as of the effective date. This is contrary to the 1990 Document itself which in Section 10.02 that states the 1963 Contract will "continue until terminated in accordance with their respective terms, at which time said agreements shall have no force or effect whatsoever." TUEC's interpretation would make the contract a full requirements contract. The ability of Cap Rock to specify the Points of Delivery, if any, on Exhibit "A" is a material term and condition of the 1990 Document. Without this option, Cap Rock would not have signed the 1990 Document.

There is no meeting of the minds on this and other material and essential matters of the 1990 Document. It cannot be a binding contract. Cap Rock requests the Court to enter an order finding the 1990 Document not to be a contract because of the failure to reach agreement on material matters.

Fifth Cause of Action

In the alternative, without waiving the above, but insisting on the same, Cap Rock requests under the Declaratory Judgments Act, that if the court finds the 1990 Document to be a binding contract, that the court declare it not to be a full requirements contract.

As explained above, TUEC has taken the position that the 1990 Document is a full requirements contract. Cap Rock believes the 1990 Document allows Cap Rock to specify the number, if any, of the Points of Delivery and the amount, if any, of Contract Demand.

Cap Rock requests the Court to enter an order finding that if the 1990 Document is a binding contract, that Cap Rock can enter any, or none, of its Delivery Points on Exhibit "A" and can enter another resource to meet all of Cap Rock's needs on Exhibit "B."

IV. Request for Temporary Restraining Order, Temporary and Permanent Injunction

Cap Rock has timely notified TUEC of Cap Rock's intent to terminate the 1963 Contract. Cap Rock informed TUEC of Cap Rock's intent to take all of its electric requirements from WTU at the end of the 1963 Contract. TUEC told Cap Rock that TUEC will not provide metering and telemetry points, will not provide normal control area services, will not reduce its generation to allow WTU to increase to serve Cap Rock and will not allow WTU to wheel its electricity over TUEC's transmission lines.

TUEC's refusal to back down its generation and to prohibit wheeling violates the last peaceable status quo--the termination of the 1963 Contract. TUEC's action will cause irreparable harm to Cap Rock and its end-use customers. Cap Rock, and, in turn, its member-customers, will pay more for electricity than what it would pay if WTU provides the electricity. Cap Rock also faces the possibility that the Public Utility Commission of Texas will disallow the pass through to Cap Rock's customers of TUEC's excessive cost of power. This excessive TUEC power cost places Cap Rock at a disadvantage to compete for customers in the dually certified areas. It also places Cap Rock at a disadvantage to attract new customers to its service area. Cap Rock has no adequate remedy at law. The damages are continuing and incalculable.

Cap Rock requests the court to grant Cap Rock a temporary restraining order **without notice** to TUEC. The order (i) would restrain TUEC, its agents, servants and employees, from directly or indirectly interfering with the contract between WTU and Cap Rock, (ii) would require TUEC to reduce its generation to allow WTU to provide electricity to Cap Rock and (iii) would require TUEC to wheel WTU's electricity to Cap Rock. Cap Rock shall, in turn, pay TUEC a proper wheeling fee.

Upon hearing, Cap Rock requests the court to enter an order making the temporary restraining order and injunction permanent.

V. Prayer for Relief

Cap Rock requests that TUEC be cited to appear and answer and after final hearing the court enter an order:

1. Finding that essential conditions precedent to the 1990 Document have not been met and that there is no binding contract.

2. In the alternative, finding that the 1990 Document is illusory and not a binding contract and is of no force and effect on either Cap Rock or TUEC.

3. In the alternative, finding that the 1990 Document is not enforceable since it violates the Statute of Frauds.

4. In the alternative, finding that the 1990 Document fails to set forth sufficient material and essential terms and conditions and that the 1990 Document is not a binding contract and is of no force and effect on either Cap Rock or TUEC.

5. In the alternative, finding that if the 1990 Document is a binding contract, that Cap Rock can enter any number, including none, as the Delivery Points on Exhibit "A" and can enter WTU as another resource to meet all of Cap Rock's electric requirements on Exhibit "B".

Cap Rock further requests this court to enter an order granting Cap Rock's request for temporary restraining order, temporary injunction and permanent injunction to prevent TUEC from taking any action to interfere or prevent Cap Rock from receiving electricity from WTU.

Cap Rock further requests this court grant such other and further relief to which Cap Rock shows itself entitled to receive either at law or in equity.

Respectfully submitted,

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VERIFICATION

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Steven E. Collier, who, being by me duly sworn on oath deposed and said that he is the director of power supply and regulatory affairs for Cap Rock Electric Cooperative and that he has been duly authorized by Cap Rock Electric Cooperative, Inc., to be its agent in the above styled and numbered cause; that he has read the above and foregoing Plaintiff's Original Petition; and that every statement contained therein is within his personal knowledge and is true and correct.

STEVEN E. COLLIER

SUBSCRIBED AND SWORN TO BEFORE ME, on the 13th day of December, 1991, to certify which witness my and and official seal.

THERESA ANN ALBA
Notary Public, State of Texas
My Commission Expires Aug. 16, 1995

Notary Public in and for the State of Texas
My commission expires: 8-16-95

EXHIBIT "A"

POWER SUPPLY AGREEMENT

BETWEEN

TEXAS UTILITIES ELECTRIC COMPANY

AND

CAP ROCK ELECTRIC COOPERATIVE, INC.

DATED AS OF JUNE 8, 1990

POWER SUPPLY AGREEMENT
BETWEEN
TEXAS UTILITIES ELECTRIC COMPANY
AND
CAP ROCK ELECTRIC COOPERATIVE, INC.

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POWER SUPPLY AGREEMENT

BETWEEN

TEXAS UTILITIES ELECTRIC COMPANY

AND

CAP ROCK ELECTRIC COOPERATIVE, INC.

This Power Supply Agreement ("Agreement") is made and entered into as of the 8th day of June, 1990, by and between Texas Utilities Electric Company ("TU Electric"), a Texas corporation, and Cap Rock Electric Cooperative, Inc. ("Cap Rock"), a Texas cooperative corporation, (each hereinafter sometimes referred to individually as "Party" or both referred to collectively as the "Parties").

WITNESSETH:

WHEREAS, Cap Rock is a full requirements wholesale customer of TU Electric; and

WHEREAS, Cap Rock desires to develop alternative power supply arrangements, including the purchase of power from suppliers other than TU Electric, as well as construction of Cap Rock's own generation and transmission, and obtaining the necessary regulatory approvals in connection therewith; and

WHEREAS, Cap Rock intends to pursue development of control area arrangements; and

WHEREAS, Cap Rock expects to make such power supply arrangements for Lone Wolf Electric Cooperative, Inc. ("Lone Wolf") delivery points in the event that Cap Rock and Lone Wolf merge or otherwise consolidate;

NOW, THEREFORE, in recognition of the foregoing, the Parties hereby agree as follows:

ARTICLE I. DEFINITIONS

The following terms, when used herein and in the Exhibits attached hereto, shall have the meaning specified below, except as may otherwise be expressly set forth in this Agreement:

1.01 **"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.

1.02 **"Control Area"** shall mean an area within ERCOT which has contractually and electrically prescribed boundaries at transmission voltages whose nominal operating voltage is at least 60,000 volts when measured phase-to-phase, is capable of instantaneously matching generation and load within such area and is established and operated in accordance with prudent electric utility practices, including all provisions of the ERCOT Operating Guides.

1.03 **"Cost of Service Study"** shall mean that study undertaken by TU Electric to allocate its system cost to its rate classes as most recently approved by the Public Utility Commission of Texas ("PUCT") in a general rate case.

1.04 **"Default"** shall mean the failure of Cap Rock or TU Electric to make any payment or perform any obligation in the time and

manner provided in this Agreement.

1.05 **"ERCOT"** shall mean the Electric Reliability Council of Texas or its successor(s).

1.06 **"ERCOT Operating Guides"** shall mean those operating guides prepared and adopted by the Operating Subcommittee of ERCOT and approved by the Technical Advisory Committee of ERCOT, the purpose of which is to outline the mutually agreed upon practices to be followed in operation of the interconnected systems of the member utilities of ERCOT.

1.07 **"Firm Capability"** shall mean the maximum capacity expressed in megawatts (exclusive of installed and spinning reserves) for each Firm Power Resource specified on Exhibit B.

1.08 **"Firm Power Resource"** shall mean a Power Supply Resource fully backed up by an electric utility member of ERCOT, other than TU Electric which (i) is available at all times, even under adverse conditions, (ii) includes both installed and spinning reserves, and (iii) is of a level of firmness not less than the ERCOT utility's firm native load customers.

1.09 **"Metered Demand"** shall mean the total metered demand at a Point of Delivery (adjusted for losses, if any, between the metering point and the Point of Delivery), excluding demand at subtract meter points, if any, serving TU Electric customers.

1.10 **"Metered Energy"** shall mean the total metered energy at a Point of Delivery (adjusted for losses, if any, between the metering point and the Point of Delivery), excluding energy at subtract meter points, if any, serving TU Electric customers.

1.11 **"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.

1.12 **"Points of Interconnection"** shall mean each point at which TU Electric maintains an electrical connection with Cap Rock's Control Area, at a nominal voltage level of at least 60,000 volts when measured phase-to-phase (except at such points and for such periods as provided in Section 7.02 hereof).

1.13 **"Power Supply Resources"** shall mean Cap Rock's Firm Power Resources and/or economy energy resources specified from time to time on Exhibit B hereto pursuant to the provisions of this Agreement.

1.14 **"Schedule Period"** shall mean a period of one (1) calendar day unless such day is not a Working Day, in which event the Schedule Period shall be all consecutive days which are not Working Days plus the first following Working Day.

1.15 **"TU Electric Capacity"** shall mean that amount of capacity which TU Electric will provide to Cap Rock as defined in Section 3.02(a) hereto pursuant to the provisions of this Agreement.

1.16 **"TU Electric Energy"** shall mean that amount of energy which TU Electric will provide to Cap Rock as defined in Section 3.02(b) hereto pursuant to the provisions of this Agreement.

1.17 **"Working Day"** shall mean any day from Monday through Friday

which is not a holiday recognized by TU Electric, which holidays shall be specified by TU Electric within 30 days after the execution of this Agreement, such holidays to be subject to change by TU Electric upon reasonable advance written notice.

ARTICLE II. EFFECTIVE DATE, TERM AND NOTICES

2.01 Effective Date

This Agreement shall become effective, with respect to Cap Rock, from and after Cap Rock's termination of its full requirements Agreement for Purchase of Power, dated June 2, 1963, as amended, in accordance with its terms.

This Agreement shall become effective, with respect to Lone Wolf, from and after the termination of Lone Wolf's full requirements Agreement for Purchase of Power dated July 2, 1963, as amended, in accordance with its terms; provided, however, that in the event Cap Rock and Lone Wolf do not consolidate within the time specified in Section 3.07(b)(iv) hereof, all Cap Rock's rights and TU Electric's obligations with respect to Lone Wolf provided for herein shall terminate and be of no further force or effect.

2.02 Term

The term of this Agreement will be 10 years. Cap Rock will have the right to terminate this Agreement on three years' written notice in years one through five and on five years' written notice thereafter.

TU Electric will have the right to terminate this Agreement

on notice equal to the balance of the ten-year term in years one through five, and on five years' notice thereafter.

After the expiration of the fifth full year, this Agreement will be automatically extended from year to year unless terminated as provided above.

2.03 Power Supply Resources

All Power Supply Resources shall be identified on Exhibit B, which shall include, in addition to the other information specified therein, the Firm Capability of each Firm Power Resource. None of the characteristics of the Power Supply Resources may be changed, nor shall any Power Supply Resource be added or deleted from Exhibit B, except as specifically authorized by this Section 2.03, or Sections 2.04, 3.15(a)(i) or 5.01(b) hereof.

Cap Rock may, notwithstanding the notice requirements of Section 2.04, replace a Firm Power Resource with another Firm Power Resource so long as the replacement has a term no longer than the remaining term of the replaced Firm Power Resource, has the same Firm Capability as the Firm Power Resource so replaced, is substantially identical with respect to, among other things, the direction and pattern of flow of the power and energy, loadings on TU Electric's transmission facilities, and impacts on its generation dispatch, and such replacement is otherwise satisfactory to TU Electric. The Firm Power Resource so replaced shall be deleted from Exhibit B. Cap Rock may not, without the notices required by Section 2.04 hereof, substitute Firm Power Resources or increase the Firm Capability to be taken under each such Firm

Power Resource.

The number of Power Supply Resources shall never exceed six at any one time and shall not be scheduled or delivered without the giving of the notices provided for in Section 2.04.

Cap Rock shall provide a copy of all Firm Power Resource agreement(s) or generation ownership/entitlement agreement(s) to TU Electric no less than 60 days prior to the date it wishes to begin receiving power from such Firm Power Resource. Cap Rock may redact such portions of the foregoing agreements as is necessary to avoid the disclosure of confidential information, if any; provided, however, that such redaction shall not prevent TU Electric from having access to such information as it may reasonably require to insure that the power being purchased and/or generation ownership/entitlement agreement(s) meet the requirements of this Agreement; provided further that if such information includes confidential information, TU Electric will agree not to use the same for any other purpose and not to disclose such confidential information to any other person without Cap Rock's consent, unless required to do so by a court or regulatory authority of competent jurisdiction.

2.04 **Notices for Changes in Purchases of Power and Energy**

Cap Rock will have the right to reduce load supplied by TU Electric under this Agreement on three years' advance written notice in years one through five, inclusive, and on five years' advance written notice thereafter. After year five, Cap Rock may, upon the giving of three years' advance written notice, reduce or

increase, by not more than plus or minus 10%, the Firm Capability supplied by a Firm Power Resource (and thereby increase or reduce respectively its load supplied by TU Electric), under a previously given notice. All demand determinations under TU Electric's Rate WP Wholesale Power, or its successor, associated with and resulting from usage prior to the date upon which such reduction is effective will be waived for each load reduction at each such Point of Delivery associated with and following the expiration of the foregoing Cap Rock notice(s); otherwise such billing demand determinations shall apply.

TU Electric will have the right to reduce load to be supplied under this Agreement upon advance written notice equal to the balance of the ten-year term in years one through five, inclusive, of this Agreement and upon five years' advance written notice thereafter.

All notice(s) not associated with the addition of a Firm Power Resource given by either Party to the other pursuant to this section shall specify the Point(s) of Delivery at which such reduction is to occur and, for each such Point(s) of Delivery, the amount of such reduction.

2.05 **Removal of Specified Points of Delivery**

Subject to the limitations described below, all (but not part) of the power and energy requirements of Cap Rock's customers at nine Points of Delivery (Pembrook, St. Lawrence, Stiles, Knott, Ackerly, Vealmore, Coahoma, La Mesa and Schwartz) may, during years one through five of this Agreement, be served by another electric

utility, provided Cap Rock has first given TU Electric twenty-four months' advance written notice of such service to one or more of the Points of Delivery identified above by such other electric utility and such service at any such Point(s) of Delivery has commenced prior to June 1 in the year of such notice, in which event the demand determinations from TU Electric's Rate WP Wholesale Power, or its successor, shall not be imposed from and after the commencement of such service at the Point(s) of Delivery for which Cap Rock has given the required notice. The Contract Demand(s) at the Point(s) of Delivery for which notice is given pursuant to this Section 2.05 may not, in the aggregate, exceed 30 MW of Contract Demand (as specified on Exhibit A on the effective date of this Agreement). If required by the provisions of Section 3.12 or Article IX hereof, Cap Rock will disconnect each such Point of Delivery from TU Electric.

ARTICLE III. SALE OF POWER AND ENERGY BY TU ELECTRIC AND PURCHASE BY CAP ROCK

3.01 Full Requirements Power and Energy

Except as otherwise permitted by this Agreement, Cap Rock shall purchase from TU Electric and TU Electric will sell to Cap Rock all of Cap Rock's power and energy requirements, including normal load growth, at each of the Points of Delivery for resale to Cap Rock's customers. Cap Rock may, upon reasonable advance written notice, elect to retain one or more of its Points of Delivery (having voltage levels of less than 60,000 volts) which

exist on the effective date of this Agreement as full requirements Points of Delivery pursuant to this Section 3.01 (notwithstanding the purchase of partial requirements power pursuant to Section 3.02 below at Cap Rock's remaining Points of Delivery), in which event, upon the giving of the notices required by Section 2.04 hereof, Cap Rock may, from time to time, convert one or more of such Points of Delivery to partial requirements Points of Delivery under the provisions of Section 3.02 hereof.

3.02 **Partial Requirements Power and Energy**

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. Partial requirements power and energy shall be determined as follows:

(a) "TU Electric Capacity" shall mean capacity equal to the difference between the Metered Demand during the billing interval on each of the metering points at each Point of Delivery (except the Retained Full Requirements Points of Delivery) delivering power and energy to Cap Rock

for resale and a portion (CP_i) of the Firm Capability of Cap Rock's Firm Power Resources, if any.

The quantity CP_i shall have the following definition:

$$CP_i = AF_i \times FPSR_t \times [(1/TL_d) \text{ or } (1/DL_d)]^*$$

where,

AF_i = The Metered Energy for each Point of Delivery (except the Retained Full Requirements Points of Delivery) during each hour of the current billing month divided by the sum of the Metered Energy for all Cap Rock's Points of Delivery (except the Retained Full Requirements Points of Delivery) during said hour.

$FPSR_t$ = The capacity (MW) of Cap Rock's Firm Power Resources actually scheduled and delivered to TU Electric's transmission system during a given clock hour on behalf of Cap Rock, in accordance with the terms of this Agreement, coincident with the Metered Demand at the Point of Delivery during the same hour of the billing month.

TL_d = The TU Electric transmission system demand loss factor as contained in TU Electric's Cost of Service Study most recently approved by the PUCT. At the time of execution of this Agreement, this factor is 1.03063139 as shown in Exhibit C attached hereto and made a part hereof.

DL_d = The TU Electric primary system demand loss factor as contained in TU Electric's Cost of Service Study most recently approved by the PUCT. At the time of execution of this Agreement, this factor is 1.05802362 as shown in Exhibit C attached hereto and made a part hereof.

(b) "TU Electric Energy" shall mean energy, at each

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*The factor "$(1/TL_d)$" shall be used for Points of Delivery at nominal voltages greater than or equal to 60 Kv. The factor "$(1/DL_d)$" shall be used for Points of Delivery at voltages less than 60 Kv.

Point of Delivery (except the Full Requirements Points of Delivery), equal to hourly Metered Energy less the sum of: (i) a portion (EPH_{ECON}) of the energy scheduled and delivered pursuant to any economy energy scheduling agent agreements entered into between the Parties and (ii) a portion (EPH_t) of the energy from Cap Rock's Firm Power Resources, if any.

The quantities EPH_{ECON}, and EPH_t shall have the following definitions:

EPH_{ECON} = $AF_l \times ECONH_t \times [(1/TL_e)$ or $(1/DL_e)]^*$

EPH_t = $AF_l \times FPSRH_t \times [(1/TL_e)$ or $(1/DL_e)]^*$

where,

AF_l shall have the same meaning as such factor in the preceding sub-section 3.02 (a).

TL_e = The average transmission energy loss factor as used in the determination by the PUCT of TU Electric's fuel factors then currently in effect for transmission voltage line losses. At the time of the execution of this Agreement, this factor is equal to 1.024789 as shown in Exhibit C attached hereto and made a part hereof.

DL_e = The average distribution energy loss factor used in the determination by the PUCT of TU Electric's fuel factors then currently in effect for primary voltage line losses. At the time of the execution of this Agreement, this factor is equal to 1.051741 as shown in Exhibit C attached hereto and made a part hereof.

$ECONH_t$ = The scheduled generation (MWH) actually scheduled and delivered on behalf of Cap Rock, as provided in any economy energy

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*For Points of Delivery at nominal voltages equal to or greater than 60 Kv, the factor "$(1/TL_e)$" shall be used. For Points of Delivery at nominal voltages less than 60 Kv, the factor "$(1/DL_e)$" shall be used.

scheduling agent agreements entered into between the Parties, during said hour.

$FPSRH_t$ = The energy (MWH) associated with Cap Rock's Firm Power Resources actually scheduled and delivered on behalf of Cap Rock in accordance with the terms of this Agreement during said hour.

When Cap Rock becomes a Control Area pursuant to Section 6.01 hereof, the partial requirements power and energy to be purchased by Cap Rock and sold by TU Electric shall be all of Cap Rock's power and energy requirements as provided in this Agreement, less the amounts being supplied from a source other than TU Electric for which notice has been given pursuant to Section 2.04 hereof, the accounting for which shall be determined pursuant to a mutually satisfactory procedure. Such power and energy shall be delivered by TU Electric to Points of Interconnection under a mutually acceptable schedule, at such times and at such capacity factors, ramp rates, and other factors as are mutually agreeable and consistent with good utility practices within ERCOT. The foregoing shall not apply to regulation power and energy provided by TU Electric pursuant to the provisions of Section 6.01 hereof or to the full requirements power and energy delivered to Cap Rock Points of Delivery, if any, remaining in TU Electric's Control Area.

In the event Cap Rock moves one or more of its Points of Delivery (other than a former Point of Delivery served by another electric utility pursuant to Section 2.05 hereof) from the Control Area of TU Electric to the Control Area of another electric utility, TU Electric will (if there is no load reduction as a consequence thereof), upon reasonable advance notice, continue to

sell such wholesale power and energy to Cap Rock for such Point(s) of Delivery in accordance with the provisions of a mutually acceptable power supply agreement at Rate WP Wholesale Power, or its successor, notwithstanding the provisions of Special Condition No. 1, or its equivalent, of TU Electric's proposed Rate WP Wholesale Power pending before the PUCT in Docket No. 9300 on the date hereof.

3.03 Load Growth

TU Electric Capacity and TU Electric Energy supplied hereunder shall include normal load growth for each Point of Delivery specified in Exhibit A hereto.

3.04 Unintentional Energy

In the event that, in any hour, the total energy scheduled and delivered to TU Electric from Cap Rock's Power Supply Resources is in excess of the Metered Energy at any Point of Delivery in that hour, TU Electric shall compensate Cap Rock for said excess, up to but not more than three percent (3%) of the Metered Energy in that hour, by way of credit, in TU Electric's sole discretion:

(a) as a direct replacement of TU Electric Energy purchased by Cap Rock under Rate WP Wholesale Power during the monthly billing period in which said hour occurs, or

(b) in an amount equal to ninety-five percent (95%) of TU Electric's actual avoided energy cost in that hour, against Cap Rock's bill for TU Electric Energy purchased by Cap Rock under Rate WP Wholesale Power during the monthly period in which said hour occurs.

Otherwise TU Electric shall have no responsibility or obligation to pay or otherwise compensate Cap Rock, directly or indirectly, for any energy scheduled to any Point of Delivery during any hour which is in excess of the Metered Energy at such Point of Delivery during such hour.

3.05 Rate Schedule

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.

3.06 Characteristics of Power and Energy

The power and energy TU Electric is required to deliver to Cap Rock under this Agreement will be of the character commonly described as three-phase, 60 hertz, at a voltage for each Point of Delivery as specified on Exhibit A, and with reasonable variation in voltage and frequency to be allowed.

3.07 Points of Delivery

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

(b) Subject to the provisions of Section 3.11 hereof,

Exhibit A shall be amended from time to time (upon the execution of the supplemental agreement provided for in Section 3.08) to : (i) add new points of delivery required by reason of normal load growth in the certificated service areas of Cap Rock (and Lone Wolf, if Cap Rock and Lone Wolf are consolidated within the time specified in Section 3.07(b)(iv) below), as established by the PUCT as of June 8, 1990; (ii) add and/or delete Points of Delivery resulting from the consolidation of existing Cap Rock Points of Delivery and/or those new points of delivery, if any, added to Exhibit A pursuant to (i) above; (iii) delete Points of Delivery moved to the Control Area of Cap Rock or another electric utility; (iv) add points of delivery served by Lone Wolf on the date hereof provided that all corporate action necessary to approve such consolidation has been taken by Lone Wolf and Cap Rock within 90 days after May 15, 1990, applications are filed for approval by the PUCT and the Rural Electrification Administration ("REA") within 120 days after May 15, 1990, and the transaction is finally consummated and approved by all regulatory agencies having jurisdiction thereover within one year from the date of filing of the aforementioned applications (unless extended by mutual agreement of the Parties); provided, however, that if approved by the PUCT and otherwise consummated within 12 months following such filing date, failure of the REA to approve the consolidation, if otherwise consummated, shall not constitute a breach of the foregoing provision; and (v) add Points of Delivery permitted by Section 3.15(a)(ii). Any load reductions or increases resulting

from the foregoing shall be subject to the applicable notice provisions of this Agreement.

3.08 Contract Demand

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.

Contract Demand at any Point of Delivery may be decreased on Exhibit A by Cap Rock contemporaneously with the expiration of the notice period provided for in Section 2.04.

Contract Demand at any Point of Delivery may be increased on Exhibit A as a result of purchases of power and energy pursuant to the provisions of Section 3.15(a)(i) or (iii) hereof, contemporaneously with the expiration of the notice periods provided for therein.

Contract Demand may be established on Exhibit A for a Point of Delivery which has been added pursuant to Section 3.07(b)(v) hereof at the expiration of the notice period provided for in Section 3.15(a)(ii) hereof and for Points of Delivery added pursuant to Section 3.07(b)(iv) hereof.

Contract Demand at any Point of Delivery may, if there is no load reduction, be changed simultaneously with the addition or

deletion of a Point of Delivery as permitted by Section 3.07(b)(ii) hereof.

Each change in Contract Demand on Exhibit A as provided above shall be subject to the execution of a supplement to this Agreement containing mutually satisfactory provisions, including any necessary changes in facilities at each Point of Delivery resulting therefrom as required by Section 3.11 hereof.

3.09 Idled Facilities

Cap Rock will pay TU Electric for each transmission and distribution-related facility(ies) which is rendered idle by reason of the reduction in any load covered by this Agreement. A facility(ies) is rendered idle if such facility(ies) (i) is no longer being used for the delivery of power and energy on behalf of Cap Rock and is not, or no longer has any reasonable prospect of, being used on behalf of any other TU Electric customer for the delivery of power and energy; or (ii) is so underutilized by an existing TU Electric customer(s) (including Cap Rock) as to require, using prudent utility practices, its removal for use elsewhere on the TU Electric system. Cap Rock agrees to pay TU Electric for each idled facility(ies) the replacement cost new (RCN) less an allowance for age and condition, plus removal costs, less salvage value; provided, however, for a facility(ies) removed for use elsewhere on the TU Electric system pursuant to (ii) above, Cap Rock agrees to pay only the costs of removal and the costs of installation of any facility(ies) replacing said removed facility(ies). Such charges shall be reduced by the amounts, if

any, previously paid by Cap Rock (pursuant to the provisions of Section 3.11 hereof and the provisions of any wheeling agreement(s) executed by the Parties as provided in Section 7.01 hereof) for such idled facilities. In lieu of paying TU Electric for the idled facilities as required above, Cap Rock may, at the sole option of TU Electric, purchase the idled facilities or pay TU Electric annually the reasonable carrying cost of the idled facilities; Cap Rock shall not be required to purchase or lease the idled facility(ies).

3.10 Change of Voltage

TU Electric will provide power and energy to Cap Rock at each Point of Delivery at the delivery voltage specified in Exhibit A as long as such delivery voltage is available. If TU Electric converts its facilities providing power and energy at any Point of Delivery to a different operating voltage, Cap Rock agrees to take power and energy at the changed voltage then available or bear all costs to transform the voltage from the changed voltage to that which Cap Rock may require. TU Electric will give Cap Rock written notice at least two years in advance of such voltage change. TU Electric will support Cap Rock in obtaining any Certificate of Convenience and Necessity ("CCN") necessary for Cap Rock to effect such conversion, and will not terminate service at the existing voltage to Cap Rock at the Point of Delivery until the CCN is granted and Cap Rock's conversion can be completed.

Cap Rock may, at its option, upgrade its facilities at any Point of Delivery to a higher delivery voltage then available from

TU Electric at such Point of Delivery; provided, however, that: (i) Cap Rock pays for all modifications to TU Electric's facilities that are necessary to provide power and energy to Cap Rock at such higher delivery voltage, (ii) Cap Rock gives TU Electric reasonable written notice of its desire to take delivery at such higher voltage, and (iii) TU Electric will not be required to provide delivery at such higher voltage until all required modifications to TU Electric's facilities can be completed.

3.11 Facilities at Points of Delivery

Any new or upgraded transmission and distribution-related facilities reasonably required by TU Electric in connection with service to Cap Rock shall be at Cap Rock's sole cost and expense.

3.12 Interconnection or Parallel Operations with Other Suppliers

Cap Rock agrees that no portion of its transmission and distribution system interconnected with TU Electric will be electrically interconnected or operated in parallel with any part or parts of a system being supplied through connection with any other supplier of electric energy, nor shall any Points of Delivery be interconnected by such transmission and distribution system; provided, however, that, subject to the execution of a mutually acceptable interconnection agreement, the foregoing limitation shall not apply to any Point of Delivery which is moved to Cap Rock's Control Area or the Control Area of another electric utility.

3.13 Foracasts

On January 15 of each year during the time this Agreement

remains in effect, Cap Rock will provide TU Electric by Point of Delivery and otherwise with such forecast(s) (in such form as TU Electric may reasonably require) of (i) total power and energy requirements, (ii) power and energy required from TU Electric, (iii) changes in Power Supply Resources, (iv) changes in transmission and distribution facilities, (v) changes in transmission service arrangements and (vi) such other information as may be reasonably required by TU Electric. Upon the furnishing of any such information, Cap Rock will appropriately designate those portions thereof which it considers to be confidential. TU Electric will use reasonable diligence to maintain in confidence all such designated information which has not otherwise become publicly available. TU Electric may furnish the foregoing information to the PUCT or to any other person if ordered to do so by any court or regulatory agency having jurisdiction and, to the extent required, to ERCOT for planning purposes only. Information supplied to TU Electric pursuant to this Section 3.13 shall be for planning purposes only and shall not constitute a notice of load reduction or load increase by Cap Rock under any provision of this Agreement.

3.14 **Right of Access**

Each Party shall give all necessary permission to the other to enable the agents of the other Party to carry out this Agreement and shall give the other the right by its fully authorized agents and employees to enter the premises of the other at all reasonable times for the purposes of reading or checking meters, for

inspecting, testing, repairing, renewing or exchanging any or all of its equipment which may be located on the property of the other, and for performing any other work incident to rendering the services provided for in this Agreement; provided, however, that neither Party hereto shall have any duty to inspect the equipment, lines and facilities of the other.

3.15 Changes in the Provision of Power and Energy

(a) If, during the term hereof, Cap Rock wishes to: (i) purchase power and energy from TU Electric previously supplied from a Firm Power Resource; (ii) add a Point of Delivery previously moved from the TU Electric Control Area to the Control Area of another electric utility other than Cap Rock; or (iii) otherwise increase the amount of power and energy to be supplied by TU Electric at any Point of Delivery specified on Exhibit A hereto (other than normal load growth at such Points of Delivery or increases occasioned by the consolidation of two or more existing and/or new Points of Delivery), TU Electric will, on three years' advance written notice, subject to the limitations of Sections 5.07 and 5.08 hereof, sell to Cap Rock full and partial requirements power in accordance with Rate WP Wholesale Power, or its successor, pursuant to the provisions of this Agreement.

(b) If Cap Rock or TU Electric cancels this Agreement pursuant to Section 2.02 hereof, or if Cap Rock causes one or more of its Points of Delivery (other than a former Point of Delivery served by another electric utility pursuant to Section 2.05 hereof) to become a part of another Control Area (other than Cap Rock's

Control Area) and, if there is a load reduction in connection therewith, gives the notice required by Section 2.04 hereof, TU Electric will: (i) on three years' (or five years' in the case of those Points of Delivery becoming full requirements points of delivery in accordance with Sections 5.08 and 7.02(b) hereof) advance written notice, sell to Cap Rock full and partial requirements wholesale power in accordance with the provisions of Rate WP Wholesale Power, or its successor, pursuant to a mutually acceptable agreement for electric service (which shall not include the sale of scheduling or regulation services), provided that TU Electric has sufficient bulk power available and provided the sale would not impair its ability to render adequate and reliable service to its customers or its ability to discharge prior commitments; and (ii) provide firm transmission wheeling, on a transaction specific basis, in accordance with mutually acceptable interconnection and transmission wheeling agreement(s) on terms that fully compensate TU Electric for its costs plus a reasonable return on investment, together with all costs for any additions or modifications necessary to accommodate each wheeling transaction, provided TU Electric has adequate transmission and distribution capacity available (if distribution wheeling services are then being offered) and the transaction would not unreasonably impair TU Electric's system reliability or emergency transmission capacity.

ARTICLE IV. BACKUP, STANDBY, EMERGENCY AND SCHEDULED MAINTENANCE POWER

4.01 Loss of Firm Power Resource

TU Electric will not provide any backup or standby service, including installed or spinning reserves, nor will it plan for or shall it be obligated to serve any of Cap Rock's requirements not expressly specified or provided for in this Agreement, including the sale of power previously supplied from a Firm Power Resource. In the event a Firm Power Resource being scheduled as provided in Article V hereof is not delivered for any reason, Cap Rock shall, subject to the sale of emergency power provided in Section 4.02 hereof, immediately curtail load (in accordance with a curtailment plan reasonably acceptable to TU Electric), in amounts equal to such undelivered Firm Power Resource unless Cap Rock makes arrangements (satisfactory to TU Electric) to replace such undelivered Firm Power Resource with another Firm Power Resource (which shall be deemed to be a source or resource for the purposes of Sections 4.03, 5.01, 5.04 and 5.06 hereof); provided, however, that in instances where the Firm Power Resource is not delivered due solely to an emergency caused by the failure of TU Electric's transmission facilities or an emergency caused by the failure of transmission facilities of another member system of ERCOT (other than the supplier of the undelivered Firm Power Resource), Cap Rock may (if satisfactory to TU Electric) use a source to replace such undelivered Firm Power Resource other than that provided for in Section 5.01(a) at a level of firmness other than that required by Section 5.01(b), provided Cap Rock agrees in advance to execute a

scheduling agent agreement on the terms provided for in Section 5.06 and a mutually satisfactory short-term wheeling agreement. Anything in this Agreement to the contrary notwithstanding, TU Electric shall not be required to deliver any power replacing such undelivered Firm Power Resource for a period of more than four consecutive days or the length of the emergency, whichever is less, and in any event for more than three such emergencies during any 12-month period, except in cases where the emergency is due solely to an emergency caused by the failure of TU Electric's transmission facilities, in which event the period of such delivery shall continue for the entire length of the emergency and the number of such emergencies for which such delivery shall be made will not be limited.

4.02 Emergency Power

Before Cap Rock becomes a Control Area and during the period(s) in which TU Electric may be required to schedule Firm Power Resources pursuant to Article V hereof, and in the event a Firm Power Resource being scheduled as provided under Article V hereof is not delivered due to no fault of Cap Rock, and TU Electric has power and energy available therefor, TU Electric will sell emergency power to Cap Rock in an amount equal to such undelivered Firm Power Resource for a period not to exceed ten hours at the rate specified in Rate WP Wholesale Power, or its successor, including the demand determinations under Rate WP Wholesale Power specified therein; provided, however, if the Firm Power Resource is not delivered due solely to an emergency caused

by the failure of TU Electric's transmission facilities or the failure of facilities at Texas Utilities System Operating Center ("TUSOC"), TU Electric will sell or continue to sell such emergency power to Cap Rock for an additional four-day period at the same rate as aforesaid, including the demand determinations.

4.03 Curtailment Plan

No later than six months prior to the date Cap Rock first begins taking power from a Firm Power Resource in accordance with the provisions of this Agreement, Cap Rock shall develop and deliver to TU Electric a mutually acceptable curtailment plan, and TU Electric agrees to cooperate with Cap Rock in the development of said curtailment plan, identifying load equal to the capacity of such Firm Power Resource to be curtailed and the means by which said curtailment plan is to be implemented in accordance with the provisions of Section 4.01 hereof. The curtailment plan shall thereupon be added as an amendment to this Agreement and set forth in Exhibit D hereto.

The curtailment plan may be amended from time to time by mutual agreement of the Parties, provided that, upon the addition of, or any increase or reduction in Firm Capability of, any Firm Power Resource pursuant to Section 2.04 hereof and by no later than ten (10) Working Days prior to the date upon which Cap Rock desires to begin taking power from such Firm Power Resource, Cap Rock shall develop, in cooperation with TU Electric, and deliver to TU Electric a mutually acceptable revised curtailment plan, to be added to this Agreement as an amendment to Exhibit D hereto.

identifying load equal to the capacity of such Firm Power Resource and the means by which the amended curtailment plan is to be implemented.

4.04 Scheduled Maintenance Power

Before Cap Rock becomes a Control Area and during the period(s) in which TU Electric may be required to schedule Firm Power Resources pursuant to Article V hereof, and if Cap Rock owns or controls its own generation (located within TU Electric's interconnected system), TU Electric shall sell scheduled maintenance power to Cap Rock, if available, on mutually satisfactory terms and conditions, at Rate WP Wholesale Power or its successor, including the demand determinations specified therein.

4.05 Limitations on Emergency and Scheduled Maintenance Power

TU Electric shall not be required to sell emergency or scheduled maintenance power if to do so would result in the curtailment of its native load customers, the inability to discharge prior commitments or otherwise impair its ability to render adequate and reliable electric service.

4.06 Other Power and Energy

Any power and energy taken by Cap Rock from TU Electric as a result of Cap Rock's presence in the TU Electric Control Area, not permitted by this Agreement and not resulting from TU Electric's interruption of firm transmission service, will, among all other consequences provided for herein, including the Default provisions hereof, be paid for by Cap Rock at TU Electric's Rate

WP Wholesale Power, or its successor, plus the demand determinations specified therein.

ARTICLE V. SCHEDULING

5.01 Scheduling of Power Supply Resources

(a) TU Electric will schedule power from up to six Power Supply Resources (determined by source and not control area, i.e., an electric utility generating plant, an electric utility company (other than TU Electric) or a qualifying facility) specified on Exhibit B hereto so long as not more than three of which resources (at least one of which shall be a Firm Power Resource) are scheduled during any 24-hour period.

(b) TU Electric's obligation to schedule will be limited to Firm Power Resources (except when it has elected to schedule economy energy and a mutually satisfactory scheduling agent agreement has been executed). In the event TU Electric agrees to schedule economy energy, any such scheduling agent agreement(s) shall be subject to cancellation by either Party on 30 days' written notice and shall provide for charges in the same manner as set forth in Section 5.06 hereof.

5.02 Cap Rock Notice of Schedules to TU Electric

Cap Rock shall notify TU Electric in writing by facsimile communication to TUSOC, at the number set forth in Section 10.07 hereof, no later than 12:00 noon on the Working Day prior to the Schedule Period during which Cap Rock desires to receive power and

energy from any Firm Power Resource, which written notice shall specify the amount of energy (MWH) that Cap Rock desires TU Electric to schedule on its behalf during each hour of the Schedule Period from each Firm Power Resource.

5.03 Changes in Delivery Rate

Unless TU Electric agrees otherwise, no notice given by Cap Rock pursuant to Section 5.02 hereof shall contain more than four changes in the delivery rate (two up and two down) in any twenty-four hour period for each Firm Power Resource being scheduled pursuant to the provisions of this article, it being understood and agreed by the Parties that such changes will be accomplished at a ramp rate of not less than two megawatts/minute nor more than ten megawatts/minute.

5.04 Backup Resources

Any backup resource scheduled through the Control Area (excluding the TU Electric Control Area) in which the original Firm Power Resource is located and in lieu of the original Firm Power Resource, together with such original Firm Power Resource, shall be considered a single resource. In all other cases, a backup resource shall be considered a separate resource.

5.05 TU Electric Execution of Schedules

Subject to the provisions of this Agreement and the execution of mutually acceptable wheeling agreement(s) as provided in Section 7.01 hereof, TU Electric will execute the schedules in accordance with the notices received by TU Electric pursuant to Section 5.02 hereof. The scheduling of power replaced by Cap Rock

pursuant to the provisions of Section 4.01 shall, to the extent practicable, be scheduled without such notice period. In addition to any other remedies provided for in this Agreement, TU Electric shall not be obligated to execute such schedules in the event:

(a) Cap Rock does not give TU Electric advance notice of its schedule in accordance with Section 5.02 hereof;

(b) Cap Rock's Firm Power Resource supplier fails, for any reason, to deliver during all or any portion of any Schedule Period the amount of power and energy for Cap Rock's account that TU Electric attempts to schedule on behalf of Cap Rock;

(c) service cannot be functionally or technically accommodated;

(d) TU Electric is prevented from providing such service by any cause beyond its reasonable control, including, but not limited to, storm, flood, lightning, earthquake, fire, explosion, failure or threat of failure of facilities, civil disturbance, strike or other labor disturbance, sabotage, war, or restraint by court or public authority; or

(e) Cap Rock is in Default of any material obligation under this Agreement.

5.06 **Scheduling and System Modification Charges**

Cap Rock will pay TU Electric for scheduling services for each Firm Power Resource a scheduling charge of $1.00/Mwh, but in

no event less than $10,000 nor more than $20,000 per month per Firm Power Resource; provided, however, that such charges shall not be applicable to a Firm Power Resource not scheduled during any calendar month. The aforesaid sums shall be increased beginning January 1, 1991, in accordance with the following:

(a) the percentage inflation which occurred during the calendar year preceding January 1 of each year that this Agreement is in effect shall be determined from the Bureau of Labor Statistics the United States Department of Labor Transportation and Public Utilities Electric Services average hourly earnings, said average hourly earnings numbers to be taken from SIC Code 491 (or if said SIC Code 491 is discontinued, from such other statistics of the Bureau of Labor Statistics of the United States Department of Labor that are most nearly comparable to SIC Code 491 and as agreed by TU Electric and Cap Rock);

(b) The sum of the integer 1 plus the percentage inflation expressed as a decimal determined in accordance with (a) above shall be multiplied by each of the aforesaid sums (i.e., $1.00/Mwh, $10,000 and $20,000) and the product of that multiplication shall be the sums applicable during the calendar year 1991, except that the period to be used for calculation of the percentage of inflation for 1990 shall be from July 1, 1990, through December 31, 1990.

(c) for years subsequent to calendar year 1991, the percentage inflation expressed as a decimal determined in accordance with (a) above for the preceding calendar year shall be summed with the integer 1, and that sum multiplied by the sums applicable during the preceding year to derive the sums applicable for the following year, and so on during the term of this Agreement.

In addition, so long as any Firm Power Resource is being scheduled by TU Electric pursuant to this Agreement, Cap Rock will pay to TU Electric the cost of additional or replacement computer hardware and software changes or the addition of personnel and other costs incident to the implementation and administration of schedules and the continuation of scheduling services under this Agreement, not to exceed $150,000 during any 36-month period. Charges imposed upon Cap Rock pursuant to the foregoing sentence shall be made with reasonable written notice specifying the reasons therefor.

5.07 Term of Scheduling

Scheduling will be limited to two years from the date TU Electric is first required to commence the scheduling of a Firm Power Resource. In the event Cap Rock, due to no fault of its own, fails to become a Control Area within said two-year period, TU Electric will, subject to the provisions of Section 6.01 hereof, schedule power and energy for a maximum of five years from the date it is first required to commence the scheduling of a Firm Power Resource as aforesaid.

5.08 **Full Requirements Points of Delivery after Scheduling**

After the expiration of the period(s) provided in Section 5.07 hereof, all Points of Delivery remaining in TU Electric's Control Area will be full requirements Points of Delivery pursuant to Section 3.01 hereof, and TU Electric will not be required to schedule power and energy to any such Points of Delivery in the future.

Cap Rock may terminate full requirements service at any such Point of Delivery upon the same five-year notice as provided in Sections 2.02 and/or 2.04 hereof, in which event TU Electric shall not, subject to the provisions of Section 3.15(b) hereof, be obligated to provide any service to Cap Rock at any such Points of Delivery.

ARTICLE VI. REGULATION SERVICES, AVAILABILITY OF EMERGENCY AND SCHEDULED MAINTENANCE BULK POWER AND DELIVERY OF POWER AND ENERGY

6.01 **Regulation Services**

(a) TU Electric will provide Cap Rock not more than 15 MW of regulation power and energy, plus associated services, pursuant to a mutually acceptable regulation services agreement (which shall contain mutually acceptable terms and conditions consistent with good utility practices within ERCOT) for the purpose of facilitating the creation of a Cap Rock Control Area; provided, however, that should Cap Rock elect to purchase regulation services and becomes a Control Area, all scheduling

arrangements, if any, in effect at that time shall thereupon terminate and provided, further, that TU Electric shall not be required to furnish regulation services for a total of more than five years less such number of years TU Electric has scheduled Firm Power Resources pursuant to Article V hereof. Charges (plus the initial implementation fee) for the sale of regulation services, together with the power and energy included therewith, shall be mutually satisfactory. Cap Rock shall be solely responsible for securing Control Area status from the member utilities of ERCOT (which shall include all costs associated with becoming a Control Area), failing in which TU Electric shall not be responsible for the sale of any regulation services to Cap Rock. Within the context of this Agreement, TU Electric will support Cap Rock's discussions with the ERCOT member utilities.

(b) If, due to no fault of Cap Rock, unanticipated delays in the construction or certification of generation facilities delay Cap Rock in its efforts to continue its qualification as a Control Area after the time within which TU Electric is required to provide regulation services under the provisions of this section, TU Electric will provide such regulation services for the period of such unanticipated delay, but in no event for more than 18 months.

6.02 Availability of Emergency and Scheduled Maintenance Bulk Power

TU Electric will, when Cap Rock becomes a Control Area, cooperate, in its capacity as a member of ERCOT, in making available to Cap Rock emergency and scheduled maintenance bulk

power in accordance with the provisions of the ERCOT Operating Guides.

ARTICLE VII. TRANSMISSION WHEELING AND DISTRIBUTION SERVICES

7.01 Wheeling in Connection with Scheduling

TU Electric will, on a transaction specific basis, provide wheeling services to both transmission and distribution Points of Delivery in connection with the scheduling of a Firm Power Resource pursuant to mutually acceptable wheeling agreement(s). Such wheeling service will be provided at fully allocated embedded costs plus a reasonable return on investment; together with the payment of all costs for any additions or modifications necessary to accommodate each wheeling transaction which can be forecasted by TU Electric at the time such wheeling agreement(s) are executed. Upon the payment of the foregoing costs, Cap Rock shall be entitled to firm transmission service for the entire term of such wheeling agreement(s). A Firm Power Resource which has replaced a Firm Power Resource pursuant to Section 2.03 hereof may be wheeled pursuant to the wheeling agreement covering the Firm Power Resource so replaced.

7.02 Wheeling After Cap Rock Becomes a Control Area

(a) At such time as Cap Rock becomes a Control Area pursuant to the provisions of Section 6.01 hereof or otherwise, TU Electric will, during the term of this Agreement: (i) provide firm transmission wheeling (for firm power and energy purchased by Cap Rock from other sources) to Points of Interconnection, on a

transaction specific basis, for a term and in accordance with mutually acceptable interconnection and transmission wheeling agreement(s); and (ii) for a period of two years after Cap Rock becomes a Control Area pursuant to the provisions of Section 6.01 hereof or otherwise, TU Electric will provide distribution wheeling service pursuant to a mutually acceptable distribution service agreement only to those Points of Interconnection (notwithstanding that the voltage at such Points of Interconnection is less than 60,000 volts)for which Cap Rock has demonstrable plans to supply at transmission voltages within said two-year period, the identity and plans for which shall be furnished to TU Electric within a reasonable period of time prior to the date Cap Rock becomes a Control Area.

(b) All Points of Interconnection receiving such distribution services will be supplied by Cap Rock at transmission voltages on or before the expiration of said two-year period, failing in which said Points of Interconnection shall revert to TU Electric full requirements Points of Delivery pursuant to Section 3.01 hereof.

(c) Wheeling services will be provided at fully allocated embedded cost, plus a reasonable return on investment; together with all costs for any additions or modifications reasonably necessary to accommodate each wheeling transaction (which can be forecasted by TU Electric at the time such wheeling agreement(s) are made) over the term of any such agreement. Subject to the execution of such interconnection and transmission

wheeling agreement(s) and upon the payment of the foregoing costs, Cap Rock shall be entitled to firm transmission service for the term of the wheeling agreement(s).

7.03 **Transmission Arrangements with Third Parties**

TU Electric's obligations to schedule or wheel power and energy shall be subject to Cap Rock's making and maintaining arrangements, including third party transmission arrangements, for the delivery of all resources; with respect to Firm Power Resources such transmission arrangements will be for firm transmission service.

ARTICLE VIII. BILLINGS AND DEFAULT

8.01 **Billings and Payments**

Bills for sums due hereunder shall be rendered on approximate 30 day intervals, monthly or upon occurrence, as may be convenient for TU Electric. All bills rendered shall be due and payable within sixteen (16) days after the invoice date. The failure of Cap Rock to pay the total amount of any bill within such 16-day period shall constitute a Default hereunder. If not paid within thirty (30) days after the invoice date, interest shall accrue on the amount due from the due date until paid at the rate of nine and one-half percent (9-1/2%) per annum, compounded monthly, but not to exceed the maximum rate which may lawfully be charged.

8.02 **Billings and Payments Subject to Correction**

Billings and payments will be subject to correction, for a period not to exceed three years from the date thereof, as may be appropriate as a result of reviews or audits made for the purpose of verification or otherwise.

8.03 Notice of Default

A Party shall give written notice of a Default to the Party in Default. The Party in Default shall have thirty (30) days from the date of receipt of such notice in which to cure such Default. If the Default is cured within the applicable period, the Default specified in such notice shall cease to exist.

8.04 Failure to Cure Default

A Default which is not cured as provided in Section 8.03 above shall entitle the Party not in Default to immediately cancel this Agreement and be relieved of any further obligation hereunder and to recover from the Party in Default twice all amounts due hereunder, including all other damages to which it is entitled at law or in equity.

8.05 Specific Performance and Injunctive Relief

TU Electric and Cap Rock agree that it may be impossible to measure in terms of money the damages which may or will accrue by reason of a Default under this Agreement and for that reason, among others, TU Electric and Cap Rock agree that, in case of any such Default, the non-defaulting Party will be irreparably damaged if this Agreement is not specifically enforceable and further no adequate remedy at law will exist. Accordingly, TU Electric and Cap Rock agree that the non-defaulting Party shall be entitled to

specific performance and/or injunctive relief, in addition to any other remedies which may exist at law or in equity. If the non-defaulting Party institutes any proceedings in accordance with this section, the defaulting Party hereby waives any claim or defense that an adequate remedy at law exists.

8.06 No Waiver

The failure of a Party to this Agreement to insist, on any occasion, upon strict performance of any provision of this Agreement, including, without limitation, the provisions of this article pertaining to Default, shall not be considered to waive the obligations, rights and/or duties imposed upon the Parties hereto.

8.07 Indemnification

It is understood that Cap Rock assumes full responsibility for electric energy furnished or delivered to Cap Rock at and past the Points of Delivery or Points of Interconnection (as the case may be) and will indemnify and hold TU Electric, its affiliates, and its or their directors, officers, employees, agents and independent contractors harmless from and against all claims for damages including but not limited to injuries to any persons, including death resulting therefrom, and damages to property occurring upon the premises of Cap Rock arising from electric power and energy delivered by TU Electric whether or not caused by the negligence of TU Electric except when the negligence of TU Electric or its agent or agents was the sole proximate cause of such injuries, death of persons or damages to property.

Without limiting the foregoing, TU Electric is not and shall

not be liable to Cap Rock for damages occasioned by: (A) irregularities or interruptions (of any duration), or failure to commence electric or other service, caused in whole or in part by (1) governmental or municipal action or authority, litigation, public enemies, strikes, acts of God (including weather and its resulting consequences), (2) an order of any Court or Judge granted in any bona fide adverse legal proceeding or action or any order of any commission or tribunal having jurisdiction in the premises, (3) interruptions in electric or other service to Cap Rock when, in TU Electric's sole judgment, such interruption: (a) will prevent or alleviate an emergency threatening to disrupt the operation of TU Electric's system, or (b) will lesson or remove possible danger to life or property, or (c) will aid in the restoration of electric service, or (d) is required to make necessary repairs to, tests of, or changes in TU Electric's facilities, or (e) when such interruption is authorized elsewhere in TU Electric's Tariff for Electric Service; (4) the absence, inadequacy or failure of protective devices which are the responsibility of Cap Rock, (5) inadequacy or failure of generation or transmission facilities, or (6) any other act or thing reasonably beyond the control of TU Electric or as may be authorized elsewhere in TU Electric's Tariff for Electric Service; or (B) any interruption of electric or other service not occasioned by situations or conditions described in (A) above that has not existed continuously for beyond a reasonable period of time after notice to TU Electric, which reasonable period shall under no

circumstances be less than twenty-four (24) hours or any interruption of service of greater than a reasonable duration if TU Electric has used reasonable diligence in attempts to restore electric or other service after TU Electric is notified of such interruption.

TU Electric may perform voluntary or emergency acts to electric facilities which are the responsibility of Cap Rock but shall have no liability for damages or injuries resulting from said acts except to the extent that said damages or injuries are proximately caused by acts or omissions of TU Electric which are found to be wanton or willful with the intent to cause injury.

Cap Rock may perform voluntary or emergency acts to electric facilities which are the responsibility of TU Electric but shall have no liability for damages or injuries resulting from said acts except to the extent that said damages or injuries are proximately caused by acts or omissions of Cap Rock which are found to be wanton or willful with the intent to cause injury.

In any claim or cause of action relating to the provision of electric or other service asserted by Cap Rock or any other person against TU Electric, TU Electric shall not be liable for any consequential, special, or non-direct damages, including but not limited to loss of use of equipment, extra expense due to the use of temporary or replacement equipment, loss of electronic data or program, loss of business revenue, costs of capital, or any cost not part of necessary repair to or reasonable replacement of electric equipment whether the claim or cause of action is based

upon contract, tort, negligence, products liability, or any other theory of recovery.

TU Electric makes no warranties whatsoever with regard to the provision of electric or other service and disclaims any and all warranties, express or implied, including but not limited to warranties of merchantability or fitness for a particular purpose.

8.08 Bankruptcy

Either Party shall have the right to cancel and terminate this Agreement, upon written notice to the other Party, if the other Party shall:

(a) apply for or consent to the appointment of a receiver, trustee, or liquidator of all or substantially all of its assets, or

(b) be adjudicated bankrupt or insolvent or file a voluntary petition in bankruptcy or admit in writing its inability to pay its debts as they become due, or

(c) make a formal assignment for the benefit of its creditors, or

(d) file a petition or answer seeking reorganization or arrangement with creditors or taking advantage of any insolvency law, or

(e) file an answer admitting the material allegations of or consenting to, or default in answering, a petition filed against it in any bankruptcy, reorganization, or insolvency proceeding, or

(f) if, in any legal action instituted in a court of competent jurisdiction by someone other than the other Party, an order, judgment, or decree shall be entered approving a petition seeking reorganization of such Party or appointing a receiver, trustee, or liquidator of such Party or of all or substantially all of such Party's assets and such order, judgment, or decree shall continue unstayed for a period of one hundred twenty (120) days.

8.09 Non-Exclusive Remedy

The remedies set forth in this article are in addition to any other right or remedy provided in this Agreement or now or hereafter existing at law or in equity or by statute and the exercise of said remedies shall not be deemed a waiver or relinquishment by said nondefaulting Party of its right to recover any damages resulting from the other Party's breach.

ARTICLE IX. INTRASTATE OPERATIONS

9.01 Interstate Commerce

Except in compliance with the Orders of the Federal Energy Regulatory Commission (the "FERC") in FERC Dockets Nos. EL-79-8 and E-9558 issued on October 28, 1981, November 5, 1981, and January 29, 1982, and the Order issued in FERC Docket No. EL-79-8-002 on July 23, 1987, TU Electric and Cap Rock represent and warrant to each other that they do not, either directly or through connections

with other entities (who are either directly or indirectly interconnected with facilities owned or operated by TU Electric), transmit electric energy in interstate commerce or sell electric energy in interstate commerce or own or operate any facilities therefor and TU Electric and Cap Rock each agrees that it will not, except in compliance with such Orders, hereafter engage, directly or through other entities, in any such interstate activities or operate, establish, maintain, modify, or utilize, directly or through other entities, any connection or facility used or to be used for the sale or transmission of electric energy in interstate commerce without one year's prior written notice to the other Party; provided further, that such Party desiring to commence interstate operation agrees to file an application with, and use its best efforts to obtain an order from, the FERC, applicable to the other Party (unless such other Party agrees in writing that such application need not be filed), under Sections 210, 211 and 212 of the Federal Power Act, requiring the establishment, maintenance, modification, or utilization of any such connection which may be involved; provided, however, that compliance with such Orders shall not require further notice to the Parties or application to the FERC pursuant to this article.

9.02 **Failure to Comply**

It is understood and agreed that the failure of the Party electing to commence interstate operations to comply with any provision of this article or said Orders shall entitle the other Party to disconnect its facilities.

9.03 **Specific Performance**

TU Electric and Cap Rock agree that it will be impossible to measure in terms of money the damages which may or will accrue by reason of any breach of the representation and warranty above set forth, or any failure in the performance of any of the obligations contained in this article and, for that reason, among others, TU Electric and Cap Rock agree that, in case of any such breach or failure, the non-breaching Party will be irreparably damaged if this Agreement is not specifically enforceable, and accordingly, TU Electric and Cap Rock agree that the non-breaching Party is entitled to specific performance of the provisions of this article, in addition to any other remedies which may exist.

9.04 **Bona Fide Emergencies**

Nothing contained in this article shall preclude the utilization of connections for the transmission of electric energy in interstate commerce under bona fide emergencies pursuant to the provisions of Section 202(d) of the Federal Power Act.

ARTICLE X. MISCELLANEOUS PROVISIONS

10.01 **Amendment**

This Agreement may be amended only upon mutual agreement of the Parties hereto, which amendment shall not be effective until reduced to writing and executed by the Parties.

10.02 **Entirety of Agreement and Prior Agreements Superseded**

This Agreement, including all Exhibits attached hereto which

are hereby expressly made a part hereof for all purposes, constitutes the entire agreement and understanding between the Parties with regard to the subject matter hereof. The Parties shall not be bound by or liable for any statement, representation, promise, inducement, understanding or undertaking of any kind or nature (whether written or oral) with regard to the subject matter hereof not set forth or provided for herein.

This Agreement replaces all prior agreements and undertakings, oral or written, between the Parties with regard to the subject matter hereof, including without limitation the Principles of Agreement, dated May 15, 1990, between the Parties and all such agreements and undertakings are agreed by the Parties to no longer be of any force or effect; provided, however, that this Agreement shall not replace, supersede or otherwise affect Cap Rock's Agreement for Purchase of Power dated June 2, 1963, as amended, or the Agreement for Purchase of Power between Lone Wolf and TU Electric, dated July 2, 1963, as amended, such agreements to continue until terminated in accordance with their respective terms, at which time said agreements shall have no force or effect whatsoever.

10.03 **Successors and Assigns**

This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns, each of whom shall agree to be bound by all terms and conditions of this Agreement and the Mutual Release executed contemporaneously herewith, provided that this Agreement may be assigned by either

Party only upon the written consent of the other and provided further that any such assignment shall not relieve either Party of their respective obligations nor shall TU Electric's obligations be enlarged, in whole or in part, by reason thereof. Such consent will not be unreasonably withheld, provided that either Party will not be required to consent to any assignment which would in its sole judgment, among other reasons, subject it to additional federal or state regulation, subject it to the plenary jurisdiction of the Federal Energy Regulatory Commission, result in the imposition of additional costs of administration which Cap Rock does not agree to reimburse, or in any way diminish the reliability of its system, enlarge its obligations or otherwise create or maintain an unacceptable condition. The respective obligations of TU Electric and Cap Rock under this Agreement may not be changed, modified, amended or enlarged, in whole or in part, by reason of the sale, merger or other business combination of either Party with any other person or entity (other than Lone Wolf), nor may TU Electric be required to sell power and energy by reason thereof other than that specifically provided for in Sections 3.01 and 3.02 hereof.

10.04 **Taxes**

All present or future federal, state, municipal or other lawful taxes (other than federal income taxes) applicable by reason of the sale of power and energy, the services performed by TU Electric, or the compensation paid to TU Electric hereunder shall be paid by Cap Rock.

10.05 Agreement to Control

It is distinctly understood and agreed that the full and partial requirements power and energy sold to Cap Rock pursuant to this Agreement will be at Rate WP Wholesale Power as approved by the PUCT. It is expressly understood and agreed that all other terms and conditions of sale and the terms, conditions and charges for all other services (including but not limited to regulation power and energy and associated services) provided by TU Electric to Cap Rock hereunder shall be governed by this Agreement, notwithstanding the provisions of said Rate WP Wholesale Power or any other tariff of TU Electric which may hereafter be fixed and approved by the PUCT.

TU Electric and Cap Rock agree that neither of them shall petition any regulatory authority to review the terms of this Agreement or to change the charges established from time to time pursuant to this Agreement or the accounting set forth herein.

10.06 Service Regulations

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

10.07 Governing Law and Venue

This Agreement was executed in the State of Texas and shall in all respects be governed by, interpreted, construed and enforced in accordance with the laws thereof. The venue of any legal

proceeding relative to this Agreement shall be in Dallas County, Texas.

10.08 **Notices**

Notices of an administrative nature, including but not limited to notice of termination, limitation on access or request for amendment shall be given as provided herein to the designates listed below and shall be deemed to have been duly delivered if hand delivered or sent by United States certified mail, return receipt requested, postage prepaid, to:

(a) If to TU Electric:

Texas Utilities Electric Company
Attn: Pitt Pittman, Vice President
Skyway Tower
400 North Olive Street, L.B. 81
Dallas, Texas 75201

(b) If to Cap Rock:

Cap Rock Electric Cooperative, Inc.
Attn: Steve Collier, Director of Power Supply
P. O. Box 9589
Austin, Texas 78765-9589

All other notices required to be given by Cap Rock to TU Electric under this Agreement shall be in writing and telecopied to:

Texas Utilities System Operating Center
at 214/330-4598,

and sent by United States mail, postage prepaid, to:

Texas Utilities Electric Company
Attn: Manager, Inter-Utility Services
31st Floor, Skyway Tower
400 North Olive Street, L.B. 81
Dallas, Texas 75201

All other notices required to be given by TU Electric to Cap Rock under this Agreement shall be in writing and telecopied to:

Cap Rock Electric Cooperative, Inc.
at (512) 454-4221, Attn: Steve Collier,

and sent by United States mail, postage prepaid, to:

Cap Rock Electric Cooperative, Inc.
Attn: Steve Collier, Director of Power Supply
P. O. Box 9589
Austin, Texas 78765-9589

The above-listed names, titles, addresses, and telephone numbers of either Party may be changed by written notification to the other.

10.09 Interruption of Service

The Parties agree that TU Electric may interrupt any service it is required to provide under this Agreement to make repairs, to change equipment or to install new equipment, but only for such periods as may be reasonably unavoidable. TU Electric agrees to provide reasonable advance notice of such interruptions to Cap Rock if, in TU Electric's sole discretion, the nature of the situation permits.

10.10 No Third-Party Beneficiaries

This Agreement is not intended to and shall not create rights, remedies or benefits of any character whatsoever in favor of any persons, corporations, associations or entities other than the Parties hereto, and the obligations herein assumed are solely for the use and benefit of the Parties hereto, their successors in interest and, where permitted as provided herein, their assigns.

10.11 Multiple Counterparts

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all shall constitute one and the same instrument.

10.12 Headings

The descriptive headings of the various Articles and sections of this Agreement have been inserted for convenience of reference only and shall be afforded no significance in the interpretation or construction of this Agreement.

10.13 Severability

In the event any of the terms, covenants, or conditions of this Agreement, or any application thereof, is finally determined to be invalid, illegal or unenforceable by any court or regulatory authority having jurisdiction all other terms, covenants, and conditions of this Agreement shall not be affected thereby and shall remain in full force and effect; provided, however, that if either Party determines, in its sole discretion, that there is a material change in this Agreement by reason of any provision or application being finally determined to be invalid, illegal or unenforceable that Party may terminate this Agreement on three (3) days' prior written notice to the other Party.

10.14 Agreements to be Negotiated in Good Faith

All mutually acceptable agreements and procedure required or permitted by this Agreement shall be negotiated by the Parties in good faith. The inability to reach a mutually acceptable agreement or procedure shall not itself constitute any evidence that either Party failed to negotiate in good faith.

therein.

(b) Subject to the provisions of Section 10.18 hereof, Cap Rock will, on the basis of the settlement provided for herein, move for dismissal of its appeal in Cap Rock Electric Cooperative, Inc. v. United States Nuclear Regulatory Commission, and the United States of America, No. 89-1735, pending in the United States Court of Appeals for the District of Columbia Circuit, and move to withdraw its "Request for an Order Enforcing and Modifying Antitrust License Conditions," filed May 12, 1989, in Texas Utilities Electric Company (Comanche Peak Steam Electric Station). Cap Rock and TU Electric agree that any order of dismissal may refer to the Agreement and this Mutual Release provided that in no event will TU Electric be required to admit or indicate, nor shall Cap Rock assert, that TU Electric has at any time or in any manner been in violation of the License Conditions for Comanche Peak Steam Electric Station Units 1 and 2 ("License Conditions") or any other law or regulation promulgated by any government agency or entity, or taken any action inconsistent therewith. Nor shall the Agreement constitute any amendment of, addition to or interpretation of the License Conditions and Cap Rock and TU Electric agree that the Nuclear Regulatory Commission shall have no jurisdiction to enforce, directly or indirectly, any provision of the Agreement, its enforcement jurisdiction being limited to the License Conditions.

10.18 Conditions Precedent

This Agreement is subject to approval by the respective

Boards of Directors of Cap Rock, TU Electric and Lone Wolf on or before Thursday, June 21, 1990, pursuant to resolutions satisfactory in form and substance to the Parties hereto, failing in which the same shall, in all things, terminate and be of no force or effect.

EXECUTED on the date and year first above written.

TEXAS UTILITIES ELECTRIC COMPANY

BY: _____
Pitt Pittman

TITLE: Vice President

ATTEST:

_____
Secretary

CAP ROCK ELECTRIC COOPERATIVE, INC.

ATTEST:

_____
Secretary

BY: _____
David Pruitt

TITLE: President and Chief Executive Officer

BY: _____
Russell Jones

TITLE: President of the Board

BY: _____
Steven E. Collier

TITLE: Director of Power Supply

LONE WOLF ELECTRIC COOPERATIVE, INC.

BY: Hubert F Dacon

TITLE: President of the Board

ATTEST:

Robert A Wilson
Secretary

EXHIBIT A

Cap Rock Electric Cooperative, Inc.

Points of Delivery

Name	Contract Demand (kW)	Voltage (kV)

[Information to be Specified on
the Effective Date of this Agreement]

EXHIBIT

Cap Rock Power Supply Resources

Name and Location of Power Supply Resource	Control Area	Firm Capability (MW)	Term (Years) Beginning Date	Term (Years) Ending Date
1. [To be specified pursuant to Section 2.03 of this Agreement]				
2. [To be specified pursuant to Section 2.03 of this Agreement]				
3. [To be specified pursuant to Section 2.03 of this Agreement]				
4. [To be specified pursuant to Section 2.03 of this Agreement]				
5. [To be specified pursuant to Section 2.03 of this Agreement]				
6. [To be specified pursuant to Section 2.03 of this Agreement]				

TU ELECTRIC COST OF SERVICE STUDY
PUCT DOCKET NO. 5640

ROW	COINCIDENT DEMAND FACTORS		NAMES	LOAD FACTOR	KW METER	LOSS FACTOR	KW SOURCE	FACTOR
WP	PRI	WHOLESALE POWER	1,922,825	0.54784180	468,811	1.05802362	424,868	0.82629849
WPTV	TRN	WHOLESALE POWER-TRANSMISSION	2,759,385	0.56710980	555,478	1.03863139	572,485	0.87549176

TU Electric Fuel Cost Factor Filing
PUCT Docket No. 7209

TU ELECTRIC LOSS CALCULATIONS
BASED ON
ESTIMATED kWh SALES AND SYSTEM INPUT BY VOLTAGE LEVEL

	ESP SALES	SYSTEM INPUT	LOSS RATIO	MULTIPLIER
PRIMARY	11,366,573,980	12,480,537,885	1.051741	0.982436
TRANSMISSION	9,349,384,581	9,581,142,956	1.024789	0.957260

EXHIBIT D

CAR Rock Curtailment Plan

[This Exhibit to be developed as provided in Section 4.03]

EXHIBIT E

Mutual Release

For and in consideration of the premises and mutual agreements set forth herein and the agreements, undertakings, promises, and covenants set forth in the Power Supply Agreement, of even date herewith, (hereinafter referred to as the "Agreement") by and between CAP ROCK ELECTRIC COOPERATIVE, INC., ("Cap Rock") and TEXAS UTILITIES ELECTRIC COMPANY ("TU Electric"), Cap Rock, Lone Wolf Electric Cooperative, Inc. ("Lone Wolf") and TU Electric do hereby covenant and agree as follows:

Cap Rock, Lone Wolf and TU Electric, each on behalf of itself and on behalf of any person or entity, private or governmental, claiming by, through or under it, including without limitation, to the extent it has the standing and right under law to do so, its present and past customers, predecessors, parents, shareholders, officers, directors, agents servants, employees, insurers, subsidiaries, affiliates, divisions, consultants, attorneys, successors, assigns and legal representatives (which, together with Cap Rock, Lone Wolf and TU Electric are referred to herein collectively as "Releasing Parties"), hereby absolutely, unconditionally and completely releases and discharges forever and for all purposes and in all respects, the other and the other's present and past customers, predecessors, parents, shareholders, officers, directors, agents, servants, employees, insurers, subsidiaries, affiliates, divisions, consultants, attorneys, successors, assigns and legal representatives (which, together with Cap Rock, Lone Wolf and TU Electric are referred to herein

collectively as "Released Parties"), or any of them, jointly and severally, from any and all claims, demands, actions, causes of action, suits, and damages, including attorneys' fees and related disbursements, of any kind or nature whatsoever, direct or consequential, fixed or contingent, and the consequences thereof, existing at, or at any time prior to and including, the date hereof, arising out of or in any way incident to any allegation made, or which could have been made, in any judicial, administrative (except Federal Energy Regulatory Commission Docket Nos. EL79-8, ER82-545-000, et al. and EL79-8-002) or legislative proceeding (federal, state, municipal or otherwise) in which Cap Rock is, was or could have been a party, an intervenor or a witness, or has, had or could have had any other interest, including, but not limited to, PUCT Docket Nos. 9300 and 5640, Nuclear Regulatory Commission Docket Nos. 50-445A and 50-446A, and Cause No. 89-1735 pending in the United States Court of Appeals for the District of Columbia Circuit, except, however, any claims, liabilities or obligations arising after the date hereof out of or in any way relating to the Agreement or any agreement or instrument executed and delivered pursuant thereto; that certain Agreement for Purchase of Power between Cap Rock and TU Electric, dated June 2, 1963, as amended; that certain Agreement for Purchase of Power between Lone Wolf and TU Electric, dated July 2, 1963, as amended; or this Mutual Release (hereinafter collectively referred to as the "Released Claims"); provided, however, that nothing herein is intended to be, or shall constitute, a release, waiver or discharge

of any claim, defense or counterclaim asserted, or which could be asserted, by any of the respective Releasing Parties against any person, firm, corporation or other entity other than any of the respective Released Parties.

Cap Rock, Lone Wolf and TU Electric each hereby agrees to indemnify, defend and hold harmless the other and its present and past customers, predecessors, parents, shareholders, officers, directors, agents, servants, employees, insurers, subsidiaries, affiliates, divisions, consultants, attorneys, successors, assigns and legal representatives, or any of them, jointly and severally, from and against and with respect to any and all past, present and future obligations, liabilities, claims, losses, demands, actions, causes of action, suits, damages, interest, penalties, deficiencies, judgments (and costs and expenses in connection therewith, including, without limitation, attorneys' fees and related disbursements) in any way arising out of or otherwise relating to any of the Released Claims.

Cap Rock, Lone Wolf and TU Electric each hereby covenants and agrees that it will forever refrain from instituting, maintaining, prosecuting or continuing to prosecute or maintain any suit, action or proceeding of any kind, or collecting from or proceeding against the other or the other's present and past customers, predecessors, parents, shareholders, officers, directors, agents, servants, employees, insurers, subsidiaries, affiliates, divisions, consultants, attorneys, successors, assigns and legal representatives, or any of them, jointly or severally, or any other

person, firm or corporation, based upon any of the Released Claims.

EXECUTED in multiple counterparts on this, the _____ date of _____, 1990.

TEXAS UTILITIES ELECTRIC COMPANY

BY: _____
Pitt Pittman

TITLE: Vice President

ATTEST:

_____
Secretary

CAP ROCK ELECTRIC COOPERATIVE, INC.

ATTEST:

BY: _____
David Pruitt

_____
Secretary

TITLE: President and Chief Executive Officer

BY: _____
Russell Jones

TITLE: President of the Board

BY: _____
Steven E. Collier

TITLE: Director of Power Supply

LONE WOLF ELECTRIC COOPERATIVE, INC.

BY: _____

TITLE: _____

ATTEST:

_____
Secretary

EXHIBIT F

DOCKET NO. 9300

APPLICATION OF TEXAS UTILITIES ELECTRIC COMPANY FOR AUTHORITY TO CHANGE RATES	§ § §	BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS

NOTICE

CAP ROCK ELECTRIC COOPERATIVE, INC. ("Cap Rock") and LONE WOLF ELECTRIC COOPERATIVE, INC. ("Lone Wolf"), by and through their attorney of record, hereby give notice that they (i) have reached a settlement of their disputes with TEXAS UTILITIES ELECTRIC COMPANY ("TU Electric") in this proceeding; (ii) hereby cease all participation, directly or indirectly, in this proceeding; (iii) no longer desire, directly or indirectly, to prosecute their intervention or take any position adverse to the position of TU Electric in this proceeding; (iv) hereby withdraw all testimony, motions, objections and other pleadings heretofore filed in this proceeding on behalf of Cap Rock and Lone Wolf; and (v) hereby support TU Electric's proposed cost allocation and rate design in this proceeding.

Respectfully submitted,

EARNEST CASSTEVENS
901 Mopac South
400 Barton Oaks Plaza Two
Austin, Texas 78746
(512) 328-3610

By: _____
EARNEST CASSTEVENS
State Bar No. 03980400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all parties of record to this proceeding by mail or hand delivey on this the _____ day of June, 1990.

_____
EARNEST CASSTEVENS