

JOHN WORRALL, individually, and as representative of all others similarly situated; GLENN VAN SHELLLENBECK, individually and as representative of all others similarly situated; JOSEPH R. KRIER, individually and as representative of all others similarly situated; and LINDA G. EVANS, individually and as representative of all others similarly situated,
Plaintiffs

V.

PEDERNALES ELECTRIC COOPERATIVE, INC. (“PEC”); BENNIE R. FUELBERG, individually and in his capacity as General Manager and an officer of PEC and Treasurer of Envision Utility Software Corporation (“Envision”); WILL DAHMANN, individually and in his capacity as Assistant General Manager and an officer of PEC; W.W. “BUD” BURNETT, individually and in his capacities as President, Coordinator and a Director of PEC and President of Envision; E.B. PRICE, individually and in his capacities as Vice-President and a Director of the PEC; O.C. HARMON, individually and in his capacities as Secretary-Treasurer and a Director of PEC; R.B. FELPS, individually and in his capacities as Assistant Secretary-Treasurer and a Director of PEC; VAL SMITH, individually and in his capacity as a Director of PEC; VI CLOUD, individually and in her capacity as a Director of PEC; BARRY ADAIR, individually and in his capacity as a Director of PEC; KENNETH W. KENNEDY, individually and in his capacity as an Advisory Director-at-Large of PEC; LAMONT RAMAGE, individually and in his capacity as an Advisory Director-at-Large of PEC; LIBBY A. LINEBARGER, individually and in her capacity as an Advisory Director-at-Large of PEC; OLA

IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

353rd JUDICIAL DISTRICT

ARMSTRONG, individually and in her	§
capacity as an Advisory Director of PEC;	§
BLAS TENORIO, individually and in his	§
capacity as an Advisory Director of PEC;	§
RUSTY ALLEN, individually and in his	§
capacity as an Advisory Director of PEC;	§
STUART M. NUNNALLY, individually and	§
in his capacity as an Advisory Director of	§
PEC; DUWAN L. RUFF, individually and in	§
his capacity as an Advisory Director of PEC;	§
ROBERT A. REED, JR., individually and in	§
his capacity as an Advisory Director of PEC;	§
BARBARA A. SHAFFER, individually and	§
in her capacity as an Advisory Director of	§
PEC,	§
Defendants.	§

PLAINTIFFS' ORIGINAL PETITION

Plaintiffs, JOHN WORRALL, individually, and as representative of all others similarly situated; GLENN VAN SHELLLENBECK, individually and as representative of all others similarly situated; JOSEPH R. KRIER, individually and as representative of all others similarly situated; and LINDA G. EVANS, individually and as representative of all others similarly situated (collectively, “Plaintiffs”), file this Original Petition, complaining of PEDERNALES ELECTRIC COOPERATIVE, INC., a Texas nonprofit corporation organized as an electric cooperative corporation (“PEC”); BENNIE R. FUELBERG, individually and in his capacities as General Manager and an officer of the PEC and Treasurer of Envision Utility Software Corporation (“Envision”), a wholly-owned subsidiary of PEC (“Fuelberg”); WILL DAHMANN, individually and in his capacity as Assistant General Manager and an officer of the PEC (“Dahmann”); W.W. “BUD” BURNETT, individually and in his capacities as President, Coordinator, and a Director of the PEC and President of Envision (“Burnett”); E.B. PRICE, individually and in his capacities as Vice-President and a Director of the PEC (“Price”); O.C. HARMON, individually and in his capacities as Secretary-Treasurer of the PEC and a Director

of the PEC (“Harmon”); R.B. FELPS, individually and in his capacities as Assistant Secretary-Treasurer and a Director of the PEC (“Felps”) (together, Fuelberg, Dahmann, Burnett, Price, Harmon and Felps are “Officers” of the PEC); VAL SMITH, individually and in his capacity as a Director of the PEC (“Smith”); VI CLOUD, individually and in her capacity as a Director of the PEC (“Cloud”); BARRY ADAIR, individually and in his capacity as a Director of the PEC (“Adair”) (together, Burnett, Price, Harmon, Felps, Smith, Cloud, and Adair and are the “Board of Directors” or “Board” of the PEC); KENNETH W. KENNEDY, individually and in his capacity as an Advisory Director-at-Large of the PEC (“Kennedy”); LAMONT RAMAGE, individually and in his capacity as an Advisory Director-at-Large of the PEC (“Ramage”); LIBBY A. LINEBARGER, individually and in her capacity as an Advisory Director-at-Large of the PEC (“Linebarger”); OLA ARMSTRONG, individually and in her capacity as an Advisory Director of the PEC (“Armstrong”); BLAS TENORIO, individually and in his capacity as an Advisory Director of the PEC (“Tenorio”); RUSTY ALLEN, individually and in his capacity as an Advisory Director of the PEC (“Allen”); STUART M. NUNNALLY, individually and in his capacity as an Advisory Director of the PEC (“Nunnally”); DUWAN L. RUFF, individually and in his capacity as an Advisory Director of the PEC (“Ruff”); ROBERT A. REED, JR., individually and in his capacity as an Advisory Director of the PEC (“Reed”); and BARBARA A. SHAFFER, individually and in her capacity as an Advisory Director of the PEC (“Shaffer”) (together, Kennedy, Ramage, Linebarger, Armstrong, Tenorio, Allen, Nunnally, Ruff, Reed and Shaffer are referred to as the “Advisory Directors” of the PEC; collectively, Fuelberg, Dahmann, Burnett, Price, Harmon, Felps, Smith, Cloud, Adair, Kennedy, Ramage, Linebarger, Armstrong, Tenorio, Allen, Nunnally, Ruff, Reed and Shaffer are referred to as the “individual Defendants”; all Defendants are referred to as a group as “Defendants”).

I. DISCOVERY

1. Discovery is intended to be conducted under Level 3 pursuant to Rule 190.4 of the Texas Rules of Civil Procedure.

II. PARTIES

A. Plaintiffs

2. Plaintiff John Worrall, a resident of Hays County, Texas, brings this action on his own behalf and as a representative of the Plaintiff Class hereinafter described.

3. Plaintiff Glenn Van Shellenbeck, a resident of Travis County, Texas, brings this action on his own behalf and as a representative of the Plaintiff Class hereinafter described.

4. Plaintiff Joseph R. Krier, a resident of Bexar County, Texas, brings this action on his own behalf and as a representative of the Plaintiff Class hereinafter described.

5. Plaintiff Linda G. Evans, a resident of Hays County, Texas, brings this action on her own behalf and as a representative of the Plaintiff Class hereinafter described.

B. Defendants

6. Defendant Pedernales Electric Cooperative, Inc., a Texas nonprofit corporation organized as an electric cooperative corporation, has offices throughout central Texas and its headquarters in Johnson City, Blanco County, Texas, and service of process may be effected upon said Defendant by serving the registered agent of the corporation, Bennie R. Fuelberg, at its registered office, 201 South Avenue F, P.O. Box 1, Johnson City, Texas 78636.

7. Defendant Fuelberg is a resident of Hays County, Texas, and service of process may be effected upon said Defendant by serving him at his usual place of business at the PEC office at 201 South Avenue F in Johnson City or at his residence located at 701 Post Oak Drive, Dripping Springs, Texas 78620.

8. Defendant Dahmann is a resident of Blanco County, Texas, and service of process may be effected upon said Defendant by serving him at his usual place of business at the PEC office at 201 South Avenue in Johnson City or at his residence located at either 300 N. Avenue F, Johnson City, Texas 78636 or 477 Scenic Drive, Johnson City, Texas 78636.

9. Defendant Burnett is a resident of Hays County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 880 Burnett Ranch Rd., Wimberley, Texas 78676-4600.

10. Defendant Price is a resident of Burnet County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 1438 CR 210B, Bertram, Texas 78605.

11. Defendant Felps is a resident of Blanco County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 1738 Yeager Creek Rd., Johnson City, Texas 78636-0025.

12. Defendant Smith is a resident of Blanco County, Texas, and service of process may be effected upon said Defendant by serving him at his residence in Blanco; he receives mail at P.O. Box 279, Blanco, Texas 78606.

13. Defendant Cloud is a resident of Burnet County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 204 Villa Vista Way, Marble Falls, Texas 78654-5909.

14. Defendant Adair is a resident of Travis County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 11502 Boulder Lane, Austin, Texas 78726.

15. Defendant Harmon is a resident of Hays County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at Bells Springs Rd., P.O. Box 1315, Dripping Springs, Texas 78620-1315.

16. Defendant Kennedy is a resident of Travis County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 924 Porpoise, Austin, Texas 78734-4419.

17. Defendant Ramage is a resident of Hays County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 12631 Red Bud Trail, Buda, Texas 78610.

18. Defendant Linebarger is a resident of Hays County, Texas, and service of process may be effected upon said Defendant by serving her at her residence located at 901 W. 9th Street, Austin, Texas 78703-4630.

19. Defendant Armstrong is a resident of Comal County, Texas, and service of process may be effected upon said Defendant by serving her at her residence located at 1105 Twisted Oak Ct., Canyon Lake, Texas 78133.

20. Defendant Tenorio is a resident of Hays County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 401 W. Allan, Kyle, Texas 78640, or 714 S. Burlison Street, Kyle, Texas 78640.

21. Defendant Allen is a resident of Travis County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 21202 Kiowa Cove, Lago Vista, Texas 78645-6000.

22. Defendant Nunnally is a resident of Burnet County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 1010 Arbor Lane, Marble Falls, Texas 78654-4830.

23. Defendant Ruff is a resident of Hays County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 410 W. Bowie Street, Menard, Texas 76859 or 301 Laurel Hill, San Marcos, Texas 78666.

24. Defendant Reed is a resident of Hays County, Texas, and service of process may be effected upon said Defendant by serving him at his residence located at 350 Onion Creek Ranch Dr., Driftwood, Texas 78619.

25. Defendant Shaffer is a resident of Williamson County, Texas, and service of process may be effected upon said Defendant by serving her at her residence located at 117 Bluejack Place, Cedar Park, Texas 78613.

III. JURISDICTION AND VENUE

26. This court has jurisdiction over this matter pursuant to the Texas Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.001 et seq. and because the amount in controversy falls within the jurisdictional limits of this court.

27. As more particularly described below, the Plaintiffs are “members” of the PEC. Plaintiffs purchase electricity from the PEC for use at their homes in Travis, Hays and Comal Counties.

28. Each of the individual Defendants is a current officer, director, advisory director or advisory director-at-large of the PEC.

29. Each of the following individual Defendants’ residence at the time these causes of action accrued was in Travis County, Texas: Adair, Kennedy, Allen and Linebarger.

30. Venue is therefore proper in Travis County as to Defendants Adair, Kennedy, Allen and Linebarger, who were each residents of Travis County at the time these causes of action accrued, pursuant to Tex. Civ. Prac. & Rem. Code § 15.002(a)(2).

31. Venue is also proper as to the remaining Defendants pursuant to Tex. Civ. Prac. & Rem. Code § 15.005.

32. In addition, a substantial portion of the PEC's service area is in Travis County and a substantial number of PEC members reside in Travis County, and therefore, a substantial part of the events or omissions giving rise to the claims occurred in Travis County. As a result, venue is proper in Travis County pursuant to Tex. Civ. Prac. & Rem. Code § 15.002(a)(1).

IV. CLASS ACTION

33. This action is brought by the named Plaintiffs as a class action on behalf of themselves and on behalf of others similarly situated (the "Plaintiff Class"), under Tex. R. Civ. P. 42.

34. The exact number of the members of the Plaintiff Class is not known, but the PEC represents that there are more than 216,000 members.

35. There are common questions of law and fact that relate to or affect the rights and interests of each member of the Plaintiff Class in connection with his, her or its respective claims against the Defendants. By way of example, these include, but are not limited to:


- a. Whether the Defendants breached their fiduciary duties owed the Plaintiff Class in their operation, administration and management of the PEC;
- b. Whether the Defendants breached their fiduciary duties owed the Plaintiff Class in the accounting for and the management, investment, and

disposition of the Plaintiff Class's "Patronage Capital" and/or "Patron's Capital" discussed more particularly hereinafter;

- c. Whether the Defendants breached their fiduciary duties owed to the Plaintiffs and Plaintiff Class in excessively compensating the officers, directors and advisory directors of the PEC;
- d. Whether the Defendants breached their contractual obligations to the Plaintiffs and Plaintiff Class set out in the Articles of Incorporation of the PEC ("Articles") and Bylaws of the PEC ("Bylaws");
- e. Whether the Defendants breached their respective fiduciary duties, contractual obligations and the requirements of the Electric Cooperative Corporation Act, Tex. Util. Code Ann. § 161.001, et seq. (Vernon 1997) ("ECCA"); and
- f. Whether the Defendants breached their fiduciary duties, contractual obligations, and the requirements of the ECCA, Articles and Bylaws in maintaining and reporting financial information, accounting records and financial reports of the PEC.

36. Furthermore, the relief sought by these causes of action is common to the entire Plaintiff Class.

37. The claims of the Plaintiffs, who are representatives of the Plaintiff Class, are typical of the claims of the Plaintiff Class, in that the claims of all members of the Plaintiff Class, including Plaintiffs, depend on the showing of the acts or omissions of the Defendants giving rise to the right of the Plaintiffs and Plaintiff Class to the relief sought herein. There is no conflict as

between the individual named Plaintiffs and other members of the Plaintiff Class with respect to this action, or with respect to the claims for relief  forth herein.

38. The Plaintiffs are the representative parties for the Plaintiff Class, and they are able to fairly and adequately protect the interests of the Plaintiff Class. No conflict exists between Plaintiffs and Plaintiff Class. The attorneys for the Plaintiffs are experienced and capable in the type of litigation involved here.

39. This action is properly maintained as a class action because (i) the prosecution of separate actions by individual members of the Plaintiff Class would create the risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the Defendants, and adjudications with respect to individual members of the Plaintiff Class which would as a practical matter be dispositive of the interests of the other members of the Plaintiff Class, or would substantially impair or impede their ability to protect such interests; and/or (ii) questions of law and fact common to the Plaintiff Class predominate over any questions affecting only individual members.

40. All of the claims alleged by the Plaintiffs on behalf of themselves and the Plaintiff Class were caused by the action or omission of the Defendants.

41. This class action is superior to other available, alternative methods, if any, for the fair and efficient adjudication of these causes of action.

42. The Plaintiffs bring this action on behalf of themselves and on behalf of all others similarly situated. The Plaintiff Class is defined as:

All persons who are current or former “members” of the PEC, as that term is defined in section 161.002(5) of the Texas Electric Cooperative Corporation Act, Tex. Utilities Code, Chapter 161 (“ECCA”), and there is excluded from this class the undersigned Plaintiffs’ counsel, members of their immediate families and lawyers and staff at their law firms; Defendants and members of their immediate

families; and federal, state and local governmental entities and political subdivisions.

V. BACKGROUND AND FACTUAL ALLEGATIONS

A. PEC

43. The PEC is a Texas nonprofit corporation, organized as an electric cooperative corporation, and owned by its members. As a member-owned nonprofit electric cooperative, the PEC receives benefits from the government that for-profit electric utilities do not receive, including an exemption from federal income taxes pursuant to Section 501(c)(12) of the Internal Revenue Code of 1986 (“IRC”). On the flip side, the PEC and its Board of Directors owe duties to the PEC’s members that for-profit electric utilities do not owe their customers.

44. The PEC has a long and storied history. After then-Congressman Lyndon Baines Johnson successfully fought to extend the benefits of the Depression-era Rural Electrification Administration to his rural central Texas district, the PEC was formed as a Texas nonprofit corporation in 1938. From its humble beginnings in the Great Depression, the PEC has grown and expanded greatly, and now serves more than 216,000 members, more members than any other electric cooperative in the country, in an 8,100 square-mile service area, larger than the state of Massachusetts. Recent reports suggest that the PEC surpassed one billion dollars (\$1,000,000,000) in assets in 2006.

45. The PEC does not generate the power it distributes, but purchases virtually all of its electrical power from the Lower Colorado River Authority and delivers service to consumers through its transmission and distribution system, with the assistance of over 800 employees. The PEC is the LCRA’s single largest customer.

46. This class action lawsuit is not intended to harm the PEC or its service to its members, and neither is it aimed at the rank-and-file dedicated employees. Instead, this lawsuit

seeks to place responsibility on the officers, directors and advisory directors for a variety of wrongful practices, to recover on behalf of the member/owners for the damages caused by these wrongful practices, and to reform the organization so that it operates democratically, transparently, and in the best interest of its members, as originally envisioned by Lyndon Baines Johnson and the founders of the PEC.

47. In 2005, PEC's service area extended through twenty-four counties in the Central Texas region. 2005 Pedernales Electric Consolidated Financial Statements, note 1(a), p.6. ("2005 Financial Statements"). The PEC maintains 16 offices located in 14 cities throughout central Texas.

48. In 2002, PEC "...expect[ed] our membership to be 233,000 by 2007." Pedernales Electric 2002 Annual Report, unnumbered p.7. ("2002 Annual Report").

B. Members and Patrons

49. Under the ECCA, a "member" of PEC means: "an incorporator of an electric cooperative" or "a person admitted to membership in the [PEC] as provided by Section 161.065." ECCA § 161.002(5). Section 161.065 of ECCA provides generally that a person is eligible for membership if he, she or it "uses or agrees to use electric energy or the facilities, supplies, equipment or services furnished by the [PEC] at [his, her or its] dwelling, structure, apparatus, or point of delivery." ECCA § 161.065(a)(1).

50. These qualifications for membership are adopted by and incorporated in the PEC's Bylaws in Article I, section 1.

51. "Patrons" are members and nonmembers alike who receive benefits from the PEC and will through their patronage furnish capital for the PEC. Bylaws, Art. VIII § 1,2 p 6.

C. PEC's Articles of Incorporation and Bylaws

52. The PEC was formed, pursuant to the predecessor to ECCA, by filing Articles of Incorporation with the Texas Secretary of State in May of 1938. Its purpose was an appropriate nonprofit purpose: “[t]o engage in rural electrification” for the benefit of its members. The Texas Secretary of State issued a charter, confirming the legal existence of the PEC on May 18, 1938, almost sixty-nine (69) years ago. Having been formed pursuant to ECCA’s predecessor legislation, the PEC is bound by the ECCA to operate in accordance with its provisions. Thus, neither the Articles nor the Bylaws may be inconsistent with ECCA; if there are inconsistencies, ECCA’s provisions are binding and any conflicting Articles or Bylaws are void. (ECCA §161.005.) Similarly, if there are inconsistencies between the Articles and Bylaws, the Articles’ provisions are binding, and any conflicting Bylaws are void. (ECCA §161.064(b).)

53. Since its founding, the PEC’s Board of Directors has amended its Articles several times, most recently filing Amended and Restated Articles of Incorporation with the Secretary of State on June 20, 2006, a true and correct copy of which is attached hereto as Exhibit A and is incorporated herein for all purposes.

54. PEC has adopted Bylaws which provide for the regulation and management of the affairs of PEC, as required by the ECCA, § 161.064. The Bylaws have been amended from time to time by the Board. A true and correct copy of the current Bylaws is attached hereto as Exhibit B and is incorporated herein for all purposes.

55. The Bylaws provide, among other things, that:

The patrons of the [PEC], by dealing with the [PEC], acknowledge that the terms and provisions of the Articles of Incorporation and *Bylaws shall constitute and be a contract* between the [PEC] and each patron and both the [PEC] and patrons are *bound by such contract*, as fully as though each patron had individually signed a separate instrument containing such terms and provisions...” (*Emphasis added.*)

Bylaws, Art. VIII § 2, p.7.

56. While the Bylaws form a contract between the PEC and the Plaintiff Class, some of the terms and provisions of the Bylaws conflict with some of the terms and provisions of the ECCA and/or the Articles, in which case the terms and provisions of the ECCA and/or the Articles are valid and binding and the conflicting terms and provisions of the Bylaws are void and of no effect, as further explained *infra*. Similarly the Articles form a contract between the PEC and the Plaintiff Class, but some of the terms and provisions of the Articles conflict with terms and provisions of the ECCA, in which case the terms of the ECCA are valid and binding and the conflicting terms and provisions of the Articles are void and of no effect.

D. PEC's Officers and Directors

57. The Bylaws also provide that

The business and affairs of the [PEC] shall be managed by a Board of seven (7) Directors which shall exercise all of the powers of the [PEC] except such as are by law or by the Articles of Incorporation of the [PEC] or by these Bylaws conferred upon or reserved to the members. One (1) of such directors shall be a resident of each of the seven (7) districts established and designated by the Board of Directors as such districts may exist from time to time.

The [PEC] shall also have an advisory director elected from each of said seven (7) districts. Advisory directors shall perform such duties as may be prescribed by the Board of Directors from time to time but such advisory directors shall not have the right to vote as directors of the [PEC].

The [PEC] shall also have four (4) advisory directors-at-large. Advisory directors-at-large shall perform such duties as may be prescribed by the Board of Directors from time to time, but such advisory directors-at-large shall not have the right to vote as directors of the [PEC].

Bylaws, Art. III .§ 1, p.3.

58. The Bylaws also provide that

Directors and advisory directors shall not receive any salary for their services solely as a director or advisory director, but by resolution of the Board of Directors, a fixed sum and expenses of attendance, if any, may be allowed for attendance at each meeting of the Board of Directors.

Directors and advisory directors shall be allowed a reasonable per diem sum and all expenses for their attendance at state, regional and national cooperative meetings and for such other meetings as any member of the Board of Directors or advisory directors may be directed by the Board of Directors to attend.

Bylaws, Art. III § 5, p.4.

59. The General Manager and the chief operating officer of the PEC is Bennie Fuelberg, who has held that office for more than thirty (30) years. The office of general manager is appointed by the PEC Board and has duties and authority required and vested by the PEC. Bylaws, Art V, § 9 p.6. On information and belief, Fuelberg is in control of every aspect of PEC's operations and receives virtually no oversight from the Directors, Advisory Directors or Advisory Directors-at-Large, each of whom has been paid levels of compensation that are excessive and intended to buy their loyalty to the General Manager, rather than the membership;

60. Although Fuelberg is an officer and is undoubtedly a "key employee" of the PEC under any definition of that term, and although the IRC requires that nonprofit corporations such as the PEC report the compensation of its officers, directors and key employees on its Form 990, Return of Organization Exempt from Income Tax, the IRC's required annual information return for nonprofit corporations ("990"), the PEC does not report Fuelberg's compensation on its 990s. Based on information and belief, Fuelberg's compensation and other benefits he has received from the PEC have not been made public during all or most of the time during which he has served as General Manager. Also on information and belief, Fuelberg's compensation and

benefits are excessive, and are not reasonable in relation to the services provided, as required by the IRC.

61. Although Dahmann is, according to filings in the Texas Secretary of State's office, the Assistant General Manager and an officer of the PEC, and is undoubtedly a key employee, and as such, his compensation should be included in the PEC's 990s, it is not. Also on information and belief, Dahmann's compensation and benefits are excessive, and are not reasonable in relation to the services provided, as required by the IRC.

62. The President of PEC is W.W. "Bud" Burnett. Burnett has served on the PEC Board as a Director for almost forty (40) years, and has served as President for more than twenty-five (25) years. According to the Bylaws, the "President shall . . . be the principal executive officer of the [PEC] and shall preside at all meetings of the members and of the PEC of Directors." *Bylaws*, Art. V § 5(a) p.5

63. According to recent 990s filed by the PEC, Burnett is also the "Empl. Coor." and works some forty-three (43) or forty-four (44) hours per week for the PEC. The "Coordinator" of the PEC is defined in the Bylaws. *Bylaws*, Art. V § 9 p. 7. On information and belief, Burnett does not actually work 43 – 44 hours per week for the PEC, and does not have an office at the PEC headquarters.

64. In 2005, PEC paid Burnett \$188,730 in compensation and \$9,963 in contributions to employee benefit plans. Pedernales Electric Cooperative, Inc., 2005 IRS Form 990, Part V, statements 12. ("2005 Form 990"). On information and belief, this amount is many multiples of the compensation paid other similar persons working in similar positions for similar organizations, and therefore is not reasonable as required by the IRC, but is excessive. In addition, this compensation appears to violate the Bylaws, Art. III, § 5, p. 4.

65. The Vice-President of the PEC is E.B. Price. In 2005, the PEC paid Price \$36,152 in compensation and \$10,354 in contributions to employee benefit plans, for working three (3) hours per week. *Id.* On information and belief, this amount is many multiples of the compensation paid other similar persons serving in similar positions for similar organizations, and therefore is not reasonable as required by the IRC, but is excessive. In addition, this compensation appears to violate the Bylaws, Art. III, § 5, p. 4.

66. The Secretary-Treasurer of the PEC is O.C. Harmon. In 2005, the PEC paid Harmon \$36,000 in compensation and \$4431 in contributions to employee benefit plans, for working four (4) hours per week. *Id.* On information and belief, this amount is many multiples of the compensation paid other similar persons working in similar positions for similar organizations, and therefore is not reasonable as required by the IRC, but is excessive. In addition, this compensation appears to violate the Bylaws, Art. III, § 5, p. 4.

67. In addition to Burnett, Price and Harmon there are four (4) other Directors on the PEC Board. The seven (7) Directors are required by the Bylaws to be residents of each of the seven (7) districts established and designated by the Board. (Bylaws, Art. III, § 1, 2a, p. 3.) However, it does not appear that the seven (7) Directors include residents of each of the seven (7) PEC districts. In fact, of the twenty-four (24) counties that the PEC serves, Board members live in only four (4) of such twenty-four (24) counties.

68. Other than Burnett, Price and Harmon, in 2005 the remaining four Directors, were paid as follows: Adair was paid \$24,766 in compensation, plus \$8,029 contributions to employee benefit plans for one (1) hour per week; Cloud was paid \$36,000 in compensation plus \$4,360 in contributions to employee benefit plans for one (1) hour per week; Smith was paid \$35,497 in compensation and \$8,294 in contributions to employee benefit plans for two (2) hours per week;

and Charles F. Winters, now deceased, but formerly the Assistant Secretary-Treasurer and a Director, was paid \$6,000 in compensation and \$3,268 in contributions to employee benefit plans for two (2) hours per week during the portion of 2005 prior to his death. *Id.* On information and belief, these amounts are many multiples of the compensation paid other similar persons working in similar positions for similar organizations, and therefore are not reasonable as required by the IRC, but are excessive. In addition, this compensation appears to violate the Bylaws, Art. III, § 5, p. 4.

69. In 2005 the seven (7) Advisory Directors were paid for two (2) hours of work each week, \$34,747, \$35,264, \$35,250, \$36,152, \$35,287, \$34,747, and \$35,284 respectively as compensation and \$10,354, \$7,535, \$6,347, \$10,354, \$13,503, \$10,251, and \$13,503 respectively as contributions to employee benefit plans. *Id.* On information and belief, this amount is many multiples of the compensation paid other similar persons working in similar positions for similar organizations, and therefore is not reasonable as required by the IRC, but is excessive. In addition, this compensation appears to violate the Bylaws, Art. III, § 5, p. 4.

70. In 2005, the four (4) Advisory Directors-at-Large were paid \$34,747, \$37,402, \$33,835, and \$37,497 respectively in compensation and \$10,237, \$10,354, \$13,503, and \$10,308 respectively as contributions to employee benefit plans. *Id.* On information and belief, this amount is many multiples of the compensation paid other similar persons working in similar positions for similar organizations, and therefore is not reasonable as required by the IRC, but is excessive. In addition, this compensation appears to violate the Bylaws, Art. III, § 5, p. 4.

71. In 2005, the total compensation received by the PEC's Directors, Advisory Directors and Advisory Directors-at-large was \$753,358 plus \$164,947 in contributions to employee benefit plans or \$918,305. Not only were these amounts unreasonable, excessive and

paid in violation of the IRC's requirements and the Bylaws, but they constituted a waste of the PEC's assets, and a self-dealing transaction by the PEC's Directors, Advisory Directors and Advisory Directors-at-large.

72. A true and correct copy of PEC's 2005 Form 990 Part V, statement 12, is attached hereto as Exhibit C and is incorporated herein by reference for all purposes.

73. Based on the compensation and benefits reported on the PEC's 990s for 2004 and 2005 and the time which was reported that they devoted to PEC business, the directors, advisory directors and advisory directors-at-large were paid approximately \$700 per hour, which amounts are excessive, unreasonable and appear to violate the IRC as well as the spirit and letter of the Bylaws.

E. Envision

74. Envision was incorporated in New Mexico in approximately 1986 as a for-profit corporation. It operated in Santa Fe, New Mexico, creating and maintaining software for the utility industry. The PEC was one of Envision's clients, and used Envision's billing software. In 1990, the PEC acquired a fifty percent (50%) ownership interest in Envision.

75. On information and belief, in late 1994, Fuelberg became interested in having the PEC purchase a controlling interest in Envision, and sent a "due diligence" team to Santa Fe in order to review the company's books and records before reaching a final decision about the acquisition. On information and belief, all three lead members of the due diligence team, a PEC-employed CPA, an outside lawyer representing the PEC, and an outside CPA who was a manager for a large accounting firm which worked for the PEC, recommended against the acquisition. Fuelberg apparently ignored the expert advice, fired the outside accounting firm,

and went forward with the acquisition against professional advice, so that as of 1995, the PEC owned seventy-five per cent (75%) of Envision.

76. Effective March 1, 2002, PEC acquired the remaining twenty-five per cent (25%) interest in Envision for \$1,697,000. Pedernales Electric Consolidated Financial Statements, December 31, 2002 and 2001, note (9), p.16. (“2002 Financial Statements”) Envision is now wholly-owned by the PEC, and is currently authorized to conduct business in Texas, although it continues to have offices in New Mexico as well as in Texas.

77. Envision’s principal office is located at 2204 Brothers Road, Santa Fe, New Mexico, 87505. Exhibit C, 2005 Form 990, Part IX, Statement 11.

78. In 2005, PEC reported to the IRS that Envision had a \$4,799,537 loss in total income and ending assets of only \$3,492,971. *Id.* Thus in 2005, Envision's losses exceeded the total value of its assets at year end by \$1,306,566.

79. Based on information and belief, Envision has never produced a profit during the time the PEC has owned it. For example, in 2004 PEC reported a total income loss of \$3,501,747 against assets valued at \$2,641,328. Pedernales Electric Cooperative, Inc. 2004 IRS Form 990, Part IX, statement 11. (“2004 Form 990”, a true and correct copy of which is attached hereto as Exhibit D, and is incorporated herein by reference).

80. Based on information and belief, PEC has invested vast amounts of money in Envision which have not been reported to members. In fact, it is believed that during extended periods of time the PEC infused one million dollars (\$1,000,000) per month or more in Envision to prevent it from going under.

81. In short, it appears that Envision was not a successful investment for the PEC, that professionals advised against its purchase, and that the continued ownership and operation of

Envision by the PEC for approximately seventeen (17) years since its initial investment has been a waste of the PEC's assets.

82. The financial information relating to Envision confirms that by any reasonable standard the Board's investment in Envision was, and continues to be, a disastrous one for the members of PEC. While this is an obvious conclusion, in 2001, the PEC, through its legal counsel, filed an *amicus curiae* brief with the Supreme Court of Texas which stated the opposite. *Hilco Electric Coop., Inc. v. Midlothian Butane Gas Co.*, 111 SW 3d 75 (Tex. 2002), *Amicus Curiae Brief of Pedernales Electric Cooperative, Inc.* Throughout its brief, the PEC painted an unrealistic picture of its investment in Envision.

83. As stated in its brief, "[T]hrough its ownership stake in Envision, [PEC] has undertaken to reduce the operating expenses otherwise attributable to its billing software..." and "[a]ny Envision-derived revenues would thus be utilized to fulfill [PEC's] statutory obligations." *Id.*, at 5, 6. One cannot help but wonder what "Envision-derived" losses of \$4.8 million in 2005 would be used to "fulfill."

84. Nor is it possible to comprehend how the PEC's lawyers could honestly represent to the Texas Supreme Court, "...the investment [in Envision] was the result of a reasoned business decision," that the PEC's Board "...made a sound business decision to invest..." in Envision and "[i]n short, [PEC's] investment in Envision was a sound exercise of its powers in furtherance of its lawful purpose." *Id.* p.3.

85. In addition to the foregoing, and in addition to the compensation paid by PEC, on information and belief, Fuelberg and Burnett and possibly others receive compensation and benefits from Envision, above and beyond the compensation and benefits they receive from the PEC, which amounts are not disclosed on the PEC's 990s nor publicly reported elsewhere, and

which amounts, when added to amounts which are already unreasonable and excessive, create even greater amounts of excessive compensation, in violation of the IRC and the PEC's Bylaws, and create even greater waste of the PEC's assets.

F. Required Operation Pursuant to ECCA and the PEC's Articles of Incorporation

86. Texas law requires the nonprofit operation of electric cooperatives. Specifically, the ECCA requires:

- (a) An electric cooperative shall operate without profit to its members.
- (b) The rates, fees, rents, and other charges for electric energy and other facilities, supplies, equipment, or services furnished by the cooperative must be sufficient at all times to:
 - (1) pay all operating and maintenance expenses necessary or desirable for the prudent conduct of its business;
 - (2) pay the principal of and interest on the obligations issued or assumed by the cooperative in performing the purpose for which the cooperative was organized; and
 - (3) create reserves.
- (c) The cooperative shall devote its revenues:
 - (1) first to the payment of operating and maintenance expenses and the principal and interest on outstanding obligations;
 - (2) then to the reserves prescribed by the board for improvement, new construction, depreciation, and contingencies.
- (d) **The cooperative shall periodically return revenues not required for the purposes prescribed by Subsection (c) to the members in proportion to the amount of business done with each member during the applicable period.** The cooperative may return revenues:
 - (1) in cash, by abatement of current charges for electric energy, or in another manner determined by the board; or
 - (2) through a general rate reduction to members.

ECCA §161.059 (emphasis added.)

87. The PEC's current Articles, as amended and restated, provide, in relevant part:

Subject to the provisions of any mortgage or deed of trust given by the [PEC] and within sixty (60) days after the expiration of each fiscal year **the Board of Directors, after paying or providing for the payment of all operating and maintenance expenses of the [PEC]** including an amount for prospective operating and maintenance expenses for a reasonable period, and all interest and installments on account of the principal of notes, bonds or other

evidences of indebtedness of the [PEC] which shall have become due and be unpaid, or which shall have accrued at the end of the fiscal year just ended but which shall not be then due, and after paying or making provision for the payment of all taxes, insurance and all other non-operating expenses which shall have become due and be unpaid and all taxes, insurance and all other non-operating expenses which shall have accrued at the end of the fiscal year just ended but which shall not be then due, **shall apply the revenues and receipts of the [PEC] remaining thereafter for the following purposes and in the following order of priority:**

1. **the establishment and maintenance of a reserve for the payment of interest on and principal of all outstanding notes, bonds or other evidences of indebtedness of the [PEC] in an amount which shall equal the amount of principal and interest required to be paid in respect of such notes, bonds or other evidences of indebtedness during the ensuing fiscal year;**
2. **the establishment and maintenance of a general reserve fund for working capital, insurance, taxes, improvements, new construction, depreciation, obsolescence, and contingencies in an amount which the Board of Directors shall deem reasonable;**
3. **and all revenues and receipts not needed for the foregoing purposes shall be returned from time to time to the members on a prorata basis** according to the amount of business done with each during the period either in cash, abatement of current charges for electric energy or otherwise as the Board of Directors shall determine; but such return may be made by way of general rate reduction to the members if the Board of Directors so elects; provided, however, that in no case shall any such refunds be paid to any member who is indebted to the [PEC] until such indebtedness is paid or arrangements in respect thereof satisfactory to the Board of Directors shall have been made.

Amended and Restated Articles of Incorporation, Article VIII, section 1 (emphasis added.)

88. To the extent that the provisions of Article VIII, section 1, of the PEC's Articles, above, conflict with or are interpreted in conflict with the terms of ECCA §161.059, the terms of ECCA §161.059 are binding, and the terms or interpretation of the terms in Article VIII, section 1 of the Articles are void and unenforceable. To the extent that any term or provision of the PEC's Bylaws are or are interpreted in conflict with the terms of ECCA §161.059, the terms of

ECCA §161.059 are binding, and any conflicting term or provision of the Bylaws is void and unenforceable.

89. The PEC, unlike every other electric cooperative that operates in Texas, does not periodically return revenues to its members. Each of the other electric cooperatives in Texas returns some portion of excess revenues to its members in the form of rebates or “dividends”, sometimes paid in December, prior to the holidays when extra funds are especially appreciated by members. To the extent that any term or provision of the PEC’s Bylaws and/or Articles or interpretations thereof permit the PEC Board to fail or refuse to return any revenues to its members, such terms or provisions or interpretations thereof conflict with the ECCA and any such term(s), provision(s) or interpretations of the Bylaws and/or Articles are void and of no effect.

G. Treatment of Excess Revenues as “Patronage Capital” by the PEC

90. The terms “Patronage Capital” and/or “Patron’s Capital” as used by the PEC “represents PEC’s accumulated retained excess of revenues over expenses that have been allocated annually to its members based upon a member’s total annual purchases of electricity to total annual PEC sales of electricity, in accordance with PEC’s bylaws.” 2005 Financial Statement, note (1)(n), p.9; Bylaws, Art. I, § 3, p.1; Art. VIII, § 2, p.6. In other words, the PEC classifies excess revenues paid by its members, as Patronage Capital or Patron’s Capital.

91. “[I]t is expressly understood that amounts paid for electric and other services in excess of the cost of these services are furnished by members as capital and each member shall be credited with the capital so furnished as provided in these Bylaws.” Bylaws, Art. I § 3 p.1; see ECCA § 161.059. In other words, Patron’s Capital belongs to the members, not the PEC. By virtue of the contractual relationship created by the Bylaws, the PEC holds the Patronage

Capital in trust for the benefit of the patrons. Under this arrangement, the PEC and officers and directors of the PEC are the trustees of that trust.

92. “The books and records of the [PEC] shall be set up and kept in such a manner that at the end of each fiscal year the amount of capital, if any, so furnished by each patron is clearly reflected and credited in an appropriate record to the capital account of each patron [“Patron Capital Account”], and the [PEC] shall within reasonable time after the close of the fiscal year notify each patron of the amount of capital so credited to his account.” Bylaws, Art. VIII § 2, p.7.

93. In 2005, PEC reported one hundred sixty-four million, three hundred ninety-two thousand, four hundred eighty-seven dollars (\$164,392,487) in Patronage Capital. 2005 Financial Statement, p.3. It also reported a reserve fund of thirty-three million dollars (\$33,000,000), and a contingency fund of nine million dollars (\$9,000,0000) for 2005. Id. at p.2. A true and correct copy of the 2005 Financial Statement is attached hereto as Exhibit E, and is incorporated herein by reference.

94. In 2004, PEC reported one hundred forty-four million, four hundred sixty nine thousand, four hundred ninety-one dollars (\$144,469,491) in Patronage Capital. (Pedernales Electric Consolidated Financial Statements December 31, 2004 and 2003, p.3 [“2004 Financial Statements”]). For the year 2004, it also reported a reserve fund of thirty-three million dollars (\$33,000,000), and a contingency fund of nine million dollars (\$9,000,0000). Id. at p.2. A true and correct copy of the 2004 Financial Statement is attached hereto as Exhibit F, and is incorporated herein by reference.

95. In 2003, PEC reported \$123,814,967 in Patronage Capital. Pedernales Electric Consolidated Financial Statements December 31, 2003 and 2002. p.3. (“2003 Financial

Statements”). For the year 2003, it also reported a reserve fund of thirty-three million dollars (\$33,000,000), and a contingency fund of nine million dollars (\$9,000,0000). *Id.* at p.2. A true and correct copy of the 2003 Financial Statement is attached hereto as Exhibit G, and is incorporated herein by reference.

96. In 2002, PEC reported \$121,968,244 in Patronage Capital. 2002 Financial Statements. p.3. A true and correct copy of the 2002 Financial Statement is attached hereto as Exhibit H, and is incorporated herein by reference.

H. PEC’s Failure to Retire Patrons’ Capital

97. “If, at any time prior to dissolution or liquidation, the [PEC] shall determine that the financial condition of the [PEC] will not be impaired thereby, the capital then credited to patrons’ accounts may be retired in full or in part.” *Id.*

98. PEC has not annually reported, published or given notice of individual patron’s capital account to which each patron or member is entitled by the Bylaws.

99. Based on information and belief, PEC has never retired a patron’s capital account in whole or in part as contemplated by the Bylaws and required by law. *Id.* Nor has PEC ever returned any revenue to members as required by law, despite carrying substantial reserve and contingency funds on its books at the same time it carried enormous amounts of Patronage Capital, in violation of ECCA § 161.059(d).

100. Based on information and belief, PEC has never reported, published or otherwise divulged to its members how the hundreds of millions of dollars retained in PEC’s Patronage Capital account is invested, managed, utilized, or disposed of, or why it is not returned to members as required by ECCA.

101. To the extent any term or provision of the PEC's Bylaws or Articles or an interpretation thereof permit the PEC to avoid returning any excess revenue to members as required by ECCA §161.059, the term or provision or interpretation of the Bylaws or Articles is void and the requirements of ECCA are binding and enforceable.

I. Accounting and Reporting

102. The PEC is required at the close of each fiscal year "to cause to be made a full and complete audit of the accounts, books and financial condition of the [PEC] as of the end of such fiscal year. Such audit reports shall be submitted to the members at the following annual meeting." Bylaws, Art. V § 7 p. 4,5. The PEC has failed and continues to fail to provide such audit reports to each of its members as required by the Bylaws, although on information and belief, a one-page summary of the audit reports is provided to members at the PEC's annual meeting.

103. As stated *supra*, the PEC is also obligated to annually credit each patron's capital to his capital account and to notify him of the amount so credited. *Id.*, Art. VIII § 2, p.6,7. PEC has failed to annually notify each patron of the amount or status of his, her or its Patron's Capital Account as required by the Bylaws.

104. At some date prior to December 31, 2001, the PEC caused the books, records and financial statements of PEC to be consolidated with those of its subsidiary, Envision. 2002 Financial Statements, p.16. Consolidation makes it impossible for the members of PEC to discover the true financial activities and condition of Envision.

VI. CAUSES OF ACTION

COUNT ONE: DECLARATORY RELIEF

105. Plaintiffs incorporate each of paragraphs 1 through 104, *supra*, by reference and for all purposes.

106. Plaintiffs assert this action on behalf of themselves and on behalf of Plaintiff Class as a suit for declaratory judgment against the Defendants pursuant to the Texas Uniform Declaratory Judgment Act, Chapter 37 of the Civil Practice & Remedies Code (“TUDJA”). Tex. Prac. & Rem. Code Ann. § 37.00 et seq.

107. Under section 37.003 of the TUJDA, this Court is empowered to “declare rights, status, and other legal relations whether or not further relief is or could be claimed,” *Id.* at 37.003(a), and the “declaration may be either affirmative or negative in form and effect,” and the declaration has the force and effect of a final judgment or decree.” *Id.* at 37.003(b).

108. In as much as the Plaintiffs bring this action on behalf of themselves and on behalf of Plaintiff Class, *inter alia*, for the purposes of determining their rights, duties, obligations and interests in the Bylaws, Articles and the ECCA, which are adverse to and in conflict with those of the Defendants, there presently exists a live, actual, real and ripe dispute among the parties. As a matter of law, therefore, a justiciable controversy exists and invokes this Court’s subject matter jurisdiction over the matters that are made the basis of the Plaintiffs’ action for declaratory relief.

109. Moreover, a dispute exists between the Plaintiffs and the Defendants regarding the whether certain terms and provisions of the Bylaws conflict with those in the Articles and/or provisions of the ECCA; whether certain terms and provisions of the Articles conflict with those

in the ECCA; and the respective rights, duties and obligations of Plaintiffs and Plaintiff Class on the one hand, and Defendants, on the other, under each of them.

110. Also, a dispute exists between the Plaintiffs and the Defendants regarding the Defendants' interpretation, application and operation of certain terms and provisions of the Bylaws, Articles and the ECCA, and/or regarding certain conflicts between and among the terms and provisions of the Bylaws, Articles and the ECCA.

111. In accordance with TUJDA § 37.001 et seq.; the Plaintiffs seek:

- (1) A judicial declaration by this Court that:
 - (a) The Bylaws and Articles constitute a binding and enforceable contract between the PEC and the PEC Board on the one hand and the PEC members and certain non-members (i.e., patrons) on the other;
 - (b) The Bylaws and Articles are contemplated by and as a matter of law must not be inconsistent or in conflict with each other, or inconsistent or in conflict with or in violation of the ECCA, or interpreted in such a way as to be inconsistent with, in conflict with or in violation of the ECCA;
 - (c) To the extent any terms or provisions of the Bylaws or Articles or interpretations thereof are in conflict with or in violation of the ECCA, such conflicting terms or provisions of the Bylaws, Articles and/or interpretations thereof are void and unenforceable, and the terms and provisions of ECCA prevail and are binding and enforceable; and to the extent any provisions or terms of the

Bylaws and Articles or interpretations thereof are in conflict with each other, the conflicting provisions or terms of the Bylaws are void and unenforceable, and the provisions of the Articles or interpretations thereof prevail and are binding and enforceable;

(d) In their application and/or interpretation of certain terms of the Bylaws and Articles and concomitant operation and management of the PEC, the Defendants have intentionally and maliciously violated their contractual and legal obligations with respect to:

i) The compensation and benefits of PEC officers, directors, advisory directors and advisory directors-at-large, which are unreasonable, excessive and in violation of the Bylaws and the IRC;

ii) The failure to provide annually to each member the full and complete accounting and reports of the PEC's financial condition; the activities, investments and operations of the PEC; the financial conditions and operations of Envision; the status of and amount credited to each patron's capital account; and the use and operation of Patron's Capital;

iii) The PEC's failure to retire Patron's Capital and/or return any excess revenue received from the members;

(e) Under the relevant provisions of the Bylaws, a trust is created with respect to Patron's Capital, under which the Defendants are trustees for the benefit of the member and non-member patrons and

by which Defendants are held to the highest standard of fiduciary duty owed to the Plaintiffs and Plaintiff Class;

(f) The Plaintiffs and Plaintiff Class are entitled to an accounting of the Patron's Capital accounts; and

(g) The Defendants' conduct, acts, and omissions constitute the breach of their contractual obligations and their fiduciary duties contained in the Bylaws, Articles, the ECCA and other applicable Texas law; and

(2) An award of reasonable and necessary attorneys' fees to the undersigned attorneys for their prosecution of this declaratory judgment.

COUNT TWO: BREACH OF FIDUCIARY DUTY

112. Plaintiffs incorporate each of paragraphs 1 through 111, *supra*, by reference and for all purposes.

113. In their respective capacities as a nonprofit membership organization, current and former officers, directors, advisory directors and advisory directors-at-large of the PEC, the Defendants owe a fiduciary duty to the Plaintiffs and Plaintiff Class created:

(a) By the Bylaws and Articles as a matter of contract;

(b) By law under the ECCA; and

(c) By the common law of this state.

114. Specifically, the PEC is not subject to any statutory authority that limits the duties that it or its officers and directors owe to its members, as it would, for example, if the Texas Nonprofit Corporation Act applied. (*See*, ECCA § 161.005.) Thus, the PEC and the Defendants

who are officers, directors, advisory directors and advisory directors-at-large of the PEC owe the Plaintiffs and Plaintiff Class the following fiduciary duties:

- (a) Of loyalty and utmost good faith;
- (b) Of candor;
- (c) To refrain from self-dealing;
- (d) To act with integrity of the strictest kind;
- (e) Of fair, honest dealing; and
- (f) Of full disclosure.

115. As trustees for the benefit of the Plaintiffs and Plaintiff Class in the management and investment of the trust assets i.e., the Patron's Capital, the Defendants have specific fiduciary duties as a matter of law including:

- (a) The use of the skill and prudence that an ordinary, capable, and careful person would use in the conduct of his or her own affairs;
- (b) Loyalty to the beneficiaries of the trust;
- (c) Of good faith, fair dealing, and fidelity over the trust's affairs and its principal;
- (d) To make the assets of the trust productive while at the same time preserving the assets;
- (e) To disclose all material facts known to the trustee that might affect the beneficiaries' rights;
- (f) To account to the beneficiaries for all trust transactions;
- (g) To properly manage, supervise and safeguard trust funds; and
- (h) To refrain from self-dealing in trust assets.

116. Included among their duties was a duty to make sure that the PEC complied with all applicable laws, including the IRC, which, *inter alia*, requires that the PEC pay no more than reasonable compensation to its officers, directors, advisory directors and advisory directors-at-large.

117. The Defendants' actions, conduct, omissions, breaches of contract and violations of the ECCA described *supra* each constitute a breach of fiduciary duty or duties owed by the Defendants to Plaintiffs and Plaintiff Class.

118. The Defendants' flagrant breaches of fiduciary duties have gone on uninterrupted for decades. Such unabashed, arrogant and longstanding behavior must have been, and continues to be malicious, fraudulent, grossly negligent, and intentional or deemed to be by imputation.

119. The Plaintiffs and Plaintiff Class have suffered injury as a result of the Defendants' breaches of fiduciary duties. As compensation, therefore, Plaintiffs seek monetary damages on behalf of themselves and the Plaintiff Class from the PEC of the return of the revenue wasted on Envision and other wasteful and self-dealing expenditures; the return of excess revenues – in an amount not less than their patron's capital; and monetary damages from the individual Defendants in an amount at least equal to the total excessive compensation and benefits paid by PEC to the individual Defendants.

120. The wrongs done by the PEC and each individual Defendant appear to have been aggravated by the kind of malice for which the law allows the imposition of exemplary damages. The conduct by the PEC and each individual Defendant, when viewed objectively from his standpoint at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to the Plaintiffs and Plaintiff Class. Moreover, it appears that the PEC and each individual Defendant had actual, subjective awareness of the risk

involved but nevertheless proceeded with conscious indifference to the welfare of the PEC members, Plaintiffs and the Plaintiff Class. The Defendants' conduct, acts and omissions resulting in their breaches of fiduciary duties were performed with malice, fraud and/or gross negligence, and as a result, the Plaintiff Class entitled to recover exemplary and/or punitive damages.

121. Additionally, Plaintiffs request that the Court place a constructive trust on all proceeds, funds or property obtained by the Defendants as a result of their breaches of fiduciary duty, to protect the rights and interests of the Plaintiffs and Plaintiff Class in them, and return such proceeds, funds or property to Plaintiffs and Plaintiff Class.

122. In addition, Plaintiffs request that the Court order the Defendants to provide an accounting of:

- (a) All compensation and benefits paid to the Defendants, and to any other employees, officers, directors, advisory directors, advisory directors-at-large, agents or representatives;
- (b) The Patrons' Capital;
- (c) The financial status, profits, losses, revenues and expenses, amounts and liabilities of Envision;
- (d) All compensation paid to its employees, officers, directors, advisory directors, advisory directors-at-large, agents, or representatives by Envision;
- (e) All compensation paid to PEC's outside consultants, public relations representatives, accountants, auditors, legal counsel, lobbyists, investment

counselors, broker dealers, securities analysts, or other agents or representatives; and

- (f) All political donations made by PEC or Envision or on behalf of PEC or Envision by Defendants.

123. Plaintiffs request that the Court order the Defendants to account for and disgorge any assets, revenue and/or profit the Defendants received as a result of their breaches of fiduciary duties, which in the case of the individual Defendants, would include an amount at least equal to the total excessive compensation and benefits paid by PEC to the individual Defendants.

124. Plaintiffs requests that the Court order that each individual Defendant be removed as a PEC officer, director, advisory director and/or advisory director-at-large of the PEC and appoint new PEC officers, directors, advisory directors and advisory directors-at-large in a manner the Court deems practicable and in accordance with the spirit of the Bylaws and the ECCA, so that democratically elected officers, directors and advisory directors may take office and act in the best interest of the PEC's members.

COUNT THREE: NEGLIGENCE AND GROSS NEGLIGENCE

125. Plaintiffs incorporate each of paragraphs 1 through 124, *supra*, by reference and for all purposes.

126. In their respective capacities as current and former officers, directors, advisory directors and advisory directors-at-large of the PEC, the Defendants owe a duty to exercise reasonable and ordinary care in serving the PEC's members, including Plaintiffs and Plaintiff Class.

127. In their acts and omissions described *supra*, the Defendants, at a minimum violated their duty of care and were negligent, and grossly negligent.

128. The Plaintiffs and Plaintiff Class have suffered injury as a result of the Defendants' breaches of duties of care. As compensation, therefore, Plaintiffs seeks monetary damages on behalf of herself and the Plaintiff Class from the PEC of the return of the revenue wasted on Envision and other wasteful and self-dealing expenditures; the return of excess revenues – in an amount not less than their patron's capital; and the Plaintiffs and Plaintiff Class seek monetary damages from the individual Defendants in an amount at least equal to the total excessive compensation and benefits paid by PEC to the individual Defendants.

129. The wrongs done by the PEC and each individual Defendant appear to have been aggravated by the kind of gross negligence for which the law allows the imposition of exemplary damages. The conduct by the PEC and each individual Defendant, when viewed objectively from his standpoint at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to the Plaintiffs and Plaintiff Class. Moreover, it appears that the PEC and each individual Defendant had actual, subjective awareness of the risk involved but nevertheless proceeded with conscious indifference to the welfare of the PEC members, Plaintiffs and the Plaintiff Class. Thus, the Plaintiff seeks, on behalf of herself and Plaintiff Class, to recover exemplary and/or punitive damages from the PEC and individual Defendants.

COUNT FOUR: BREACH OF CONTRACT

130. Plaintiffs incorporate each of paragraphs 1 through 129, *supra*, by reference and for all purposes.

131. The Bylaws, by their explicit terms, constitute a valid, enforceable contract (at least those terms and provisions that are not declared void as a result of conflicts with ECCA and/or the Articles of Incorporation). Bylaws, Art. VIII § 2, p.7. The Articles also, according to

the common law of this state, constitute a contract between the PEC and its members, to the extent the terms and provisions are not declared void as a result of conflicts with ECCA.

132. The Plaintiffs and Plaintiff Class, as members and patrons of the PEC, are parties to the contract evidenced by the Bylaws and Articles and thus have standing to sue for its breach.

133. The Plaintiffs and Plaintiff Class have performed and continue to perform their contractual obligations under the Bylaws and Articles.

134. The PEC, by the conduct of Defendants described *supra*, has breached its contractual obligations under the Bylaws and Articles.

135. The breaches of the Bylaws and Articles have been uninterrupted and longstanding, continuing for decades.

136. The breaches of the Bylaws and Articles have caused injury to the Plaintiffs and Plaintiff Class.

137. The Plaintiffs seek actual, compensatory damages on behalf of themselves and the Plaintiff Class for the injury caused by the breaches of the Bylaws and Articles of the return of the revenue wasted on Envision and other improper uses, which otherwise would have been included in their patrons' capital accounts, as well as the return of excess revenues that actually were credited to their patrons' capital accounts.

138. Plaintiffs have been required to retain the services of the undersigned attorneys to bring this cause of action.

139. Plaintiffs are entitled to recover their reasonable and necessary attorneys' fees under Tex. Civ. Prac. & Rem. Code. Ann. §§ 37.009, 38.001 (8) (Vernon 1997) and on equitable grounds.

140. If, as and when the Plaintiff Class is certified as requested *infra*, Plaintiffs request attorneys' fees and costs authorized by law or by agreement of the parties under the procedures set out in Tex. R. Civ. P. 42 (h)(i).

RELEVANT TIME PERIOD

141. As used herein the "Relevant Time Period" means that period of time that any Defendant breached a fiduciary duty and/or a contractual obligation to any member or former member of the PEC.

142. Any relevant statute of limitations and/or doctrine of laches, waiver or estoppel are, and have been, deferred until the filing of this petition because the Defendants have, and continue to, deceitfully concealed their wrongdoing and fraudulently concealed their unlawful conduct in order to avoid liability for it.

VII. REQUEST FOR JURY TRIAL

143. Plaintiffs request a jury trial and have paid the appropriate jury fee.

VIII. PRAYER

144. Plaintiffs, on behalf of themselves and the Plaintiff Class, respectfully request that the Court:

- 1) Certify the Plaintiff Class as described herein and that the Plaintiffs are representative of the Plaintiff Class and appoint the undersigned attorneys as class counsel for the Plaintiff Class;
- 2) Enter judgment that all Defendants jointly and severally are liable for actual damages, including, but not limited to, (i) all excessive compensation and benefits and all improper expenditures paid by PEC during the Relevant Time Period and (ii) the patronage capital which

should have been distributed or retired to the Plaintiffs and Plaintiff Class during the Relevant Time Period;

- 3) Enter judgment that all Defendants, jointly and severally, are liable for exemplary damages based on malice and/or malfeasance in an amount sufficient to punish Defendants for their intentional malicious acts and breaches of fiduciary duty;
- 4) Order disgorgement of all amounts misappropriated by the Defendants and impose a constructive trust on such amounts to be held solely for the members and patrons of PEC;
- 5) Enter judgment that Defendants have breached their contractual obligations, covenants, agreements and duties set out in the Bylaws;
- 6) Order removal of all Defendants who are officers, directors, advisory directors or advisory directors-at-large of PEC and replace them in a manner determined by the Court which is consistent with the Bylaws, Articles, and ECCA;
- 7) Enter judgment declaring the rights, duties, interests and status of the Plaintiffs and Plaintiff Class under the Bylaws and the ECCA as set out in paragraphs 108(1)(a) – (g), *supra*.
- 8) Award Plaintiffs and Plaintiff Class pre-judgment and post-judgment interest, as permitted by law, on all damages;
- 9) Award Plaintiffs and Plaintiff Class their reasonable and necessary attorneys' fees, expenses and costs of court; and

- 10) Award Plaintiffs and Plaintiff Class such further relief at law and equity to which they are entitled.

Respectfully submitted,

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