

CAUSE NO. 2021CI04574

CPS ENERGY,	§	IN THE DISTRICT COURT OF
	§	
PLAINTIFF,	§	
	§	
V.	§	
	§	
ELECTRIC RELIABILITY COUNCIL	§	BEXAR COUNTY, TEXAS
OF TEXAS, BILL MAGNESS, JEYANT	§	
TAMBY, WOODY RICKERSON,	§	
MARK CARPENTER, LORI COBOS,	§	
ARTHUR D’ANDREA, KEITH	§	
EMERY, NICK FEHRENBACH,	§	
KEVIN GRESHAM, SAM HARPER,	§	
BOB KAHN, SHANNON McCLENDON,	§	
AND JULIE PARSLEY.	§	
	§	
DEFENDANTS	§	285th JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION AND APPLICATION FOR
TEMPORARY INJUNCTION AND PERMANENT INJUNCTION**

Plaintiff, CPS Energy (“CPS Energy”), a municipally owned gas and electric utility owned by the City of San Antonio (the “City”), files its Original Petition and Application for Temporary Injunction and Permanent Injunction against the Electric Reliability Council of Texas (“ERCOT”) and its directors and officers.

I. Summary.

1. CPS Energy sues ERCOT and its officers and directors, who are presiding over one of the largest illegal wealth transfers in the history of Texas. CPS Energy intends to conduct discovery in this matter under Level 3 of the Texas Rule of Civil Procedure 190.4.

2. CPS Energy, as a municipal utility that has served the citizens of San Antonio for 161 years, wants to protect its customers from excessive and illegitimate power and natural gas costs (that are a consideration for market pricing).

3. ERCOT has run up \$20 billion in charges for 5 days in mid-February from February 15 to February 19, 2021 during a winter storm (the “Winter Storm Event”), of which more than \$16 billion is an acknowledged error caused by ERCOT’s own mistake in not coming down from the System-Wide Offer Cap of \$9,000 per megawatt-hour (MWh), even when the scarcity that prompted this charge no longer existed on February 18 and 19, 2021, all as determined by the Independent Market Monitor for the Public Utility Commission of Texas (“PUCT”) (the “Overcharge”).¹ There has been a delay in correcting this Overcharge despite the tremendous burden that it would put on San Antonio and Texas customers (the total amount of \$20 billion including the \$16 billion Overcharge is referred to as “Excessive Prices.”).

4. CPS Energy needs protection for its customers against massive errors in ERCOT’s Excessive Prices, which will cause price spikes in monthly bills and a blatantly unlawful result.

5. ERCOT also wants CPS Energy to pay for the defaults of others in the market caused by ERCOT’s Excessive Prices, and CPS Energy will never be able to recover these monies as 22 market participants are projected to fail and the market is in peril.

6. ERCOT has not paid CPS Energy what it owes. ERCOT has short paid approximately \$2.5 billion to the market participants, and at least \$18 million is owed to CPS Energy for the Winter Storm Event.

7. This is a prior material breach as to CPS Energy under general contract principles and therefore excuses CPS Energy from performing under its Standard Form Market Participant Agreement (the “Market Agreement”). Nevertheless, CPS Energy will continue to pay all lawful, legitimate charges for electricity. CPS Energy has also met all of its obligations to ERCOT.

¹ The estimate for the Overcharge is currently in flux, but is still expected to be in the billions of dollars.

8. The Winter Storm Event is a disaster declared by the Governor of Texas, and a force majeure event, and ERCOT cannot declare CPS Energy in default under the Market Agreement for a force majeure event.

9. The Excessive Prices that ERCOT wants CPS Energy to cover through Short-Pays and Default Uplift Invoices (as defined in the ERCOT Protocols) related to the Winter Storm Event unlawfully extend the credit of CPS Energy in violation of the Texas Constitution.

10. CPS Energy will be immediately and irreparably harmed as it will never be paid back by these failed market participants.

11. CPS Energy needs a Temporary Injunction to prevent ERCOT from wrongfully declaring a default by CPS Energy based on (i) a force majeure event, and (ii) due to ERCOT's prior material breach. CPS Energy also needs a Temporary Injunction (iii) to prevent ERCOT from extending the credit of CPS Energy to pay for the defaults of others caused by the Excessive Prices during the Winter Storm Event in violation of the Texas Constitution, and with no prospect of repayment. CPS Energy further needs a Temporary Injunction (iv) to prevent ERCOT from charging CPS Energy for any Default Uplift Invoice resulting from the Excessive Prices during the Winter Storm Event, including the Overcharge.

12. CPS Energy seeks all further equitable and injunctive relief herein demanded. In addition, and in the alternative, pursuant to Tex. R. Civ. P. 47, CPS Energy seeks monetary relief to correct the Overcharge and Excessive Prices run up by ERCOT during the Winter Storm Event. CPS Energy and its customers should not have to pay for the insolvency of market participants caused by ERCOT's Overcharge and Excessive Prices during the Winter Storm Event.

II. Jurisdiction and Venue.

13. This Court has jurisdiction because CPS Energy brings suit for an amount in excess of the minimum jurisdictional requirements of this Court.

14. Venue is proper because all or a substantial number of facts giving rise to the dispute occurred in Bexar County. Tex. Civ. Prac. and Rem. Code Sec. 15.002. No enforceable mandatory venue provision exists to preempt this general rule under the circumstances of this case.

III. Parties.

15. The City of San Antonio is the seventh-largest city in the United States and the second-most populous city in the State of Texas. CPS Energy, the municipally-owned electric and gas utility, serves more than 2,000,000 residents, and 820,000 and 345,000 natural gas electric customers in its service territory. It is the nation's largest municipally owned electric and gas utility company. The utility has a long history of service in the San Antonio area spanning more than 161 years. CPS Energy is guided by an independent Board of Trustees and subject to the San Antonio City Council's reserved powers in the areas of rates, municipal utility debt, and eminent domain. Its service area includes not only the City of San Antonio, but also 31 other municipalities in and around the metropolitan area, all of Bexar County as well as portions of seven adjacent counties.

16. ERCOT is a membership-based 501(c)(4) nonprofit corporation governed by its Board of Directors and subject to the oversight of the PUCT and the Texas Legislature. It is the Independent System Operator ("ISO") for all the transmission and generation facilities within the boundaries of ERCOT, which is located entirely within Texas. It may be served with process at its principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

17. Defendants, Mark Carpenter, Lori Cobos, Arthur D'Andrea, Keith Emery, Nick Fehrenbach, Kevin Gresham, Sam Harper, Bob Kahn, Bill Magness, Shannon McClendon, and Julie Parsley are members of the Board of Directors of ERCOT. These Defendants may be served with process at ERCOT's principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

18. Defendant Bill Magness is the departing Chief Executive Officer of ERCOT. Defendant Magness is sued in his official capacity. Defendant Magness may be served with process at ERCOT's principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

19. Defendant Jeyant Tamby is Senior Vice President and Chief Administrative Officer of ERCOT. Defendant Tamby is sued in his official capacity. Defendant Tamby may be served with process at ERCOT's principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

20. Defendant Woody Rickerson is Vice President, Grid Planning and Operations. Defendant Rickerson is sued in his official capacity. Defendant Rickerson may be served with process at ERCOT's principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

IV. Factual Background.

A. The Winter Storm Event.

21. By now, the Court is well aware of the humanitarian disaster that befell the State due to ERCOT's failure to prepare for the Winter Storm Event. After the Winter Storm Event, due to ERCOT's lack of preparation, millions of people were left without power. The basic elements of functioning society ground to a halt.

22. ERCOT did not ensure consistent weatherization compliance across the grid. As far back as 2011, ERCOT oversaw rolling outages after the 2011 winter storms. On August 16, 2011, the Federal Energy Regulatory Commission ("FERC") released a 357-page document titled "Report on Outages and Curtailments During the Southwest Cold Weather Event of February 1-5, 2011." (the "FERC Report", accessible here: <http://www.ferc.gov/sites/default/files/2020-04/08-16-11-report.pdf>). The FERC Report explained that a failure to winterize the Grid was a contributing factor.

23. On February 12, 2021, Governor Greg Abbott issued a Declaration of a State of Disaster for all counties in Texas.²

24. On or about February 14, 2021, the State of Texas began experiencing the severe cold weather. Temperatures plunged into the teens and single digits throughout the State. ERCOT failed to estimate and plan for the amount of power that would be required for the Winter Storm Event and failed to follow its own protocols in how it handled load forecasting, emergency operations plans, weatherization plans, and winter preparedness.

25. The demand for energy reached a high-water mark of 69,222 megawatts. The ERCOT power grid, which covers 90% of the State of Texas, regularly sees demand of over 70,000 megawatts and higher in the summer months (and has reached as high as 74,820 megawatts).

26. ERCOT disregarded the implications of their decisions to the end-customers. They did not respond constructively to concerns that customers would be negatively impacted by excessive and illegitimate energy costs.

B. The relationship between ERCOT and CPS Energy.

27. Defendant ERCOT is the ISO that operates the Texas Electrical Grid. It manages the dispatch of electric power over the transmission grid that distributes and supplies power to over 25 million Texas customers.

28. CPS Energy and ERCOT entered into the Market Agreement on June 9, 2011. The Market Agreement is governed in part by the ERCOT Protocols, which contain “the scheduling, operating, planning, reliability, and Settlement (including Customer registration) policies, rules, guidelines, procedures, standards, and criteria of ERCOT.” ERCOT Protocols at Section 1.1(1). The ERCOT Protocols are available at the following website: <http://www.ercot.com/mktrules/>

² <https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-continues-to-deploy-resources-as-severe-winter-weather-impacts-texas>

[nprotocols/current](#). Under the Market Agreement, CPS Energy is a Load Serving Entity (LSE) and a Resource Entity (RSE). In other words, CPS Energy not only provides power to its consumers (Load/Demand), but it also generates power (Resource) for use and distribution throughout the State. CPS Energy therefore buys and sells power through ERCOT. CPS Energy and ERCOT will settle the amount owed by each side and pay each other accordingly. These “Settlement” payments have happened without incident for years.

29. But that all changed in February 2021.

C. ERCOT has failed to pay CPS Energy, which is a Prior Material Breach.

30. Through this “Settlement” process, ERCOT has short paid the market at least \$2.5 billion. ERCOT has also short paid CPS Energy at least \$18 million since the Winter Storm Event.

31. As a consequence, ERCOT has now materially breached its obligations under the Market Agreement. This prior material breach excuses the performance of CPS Energy under general contract principles. Nevertheless, CPS Energy continues to perform by paying all legitimate, legal prices for electricity.

D. ERCOT places an undue burden on its solvent market participants to pay for Short-Pays and Default Uplift Invoices.

32. ERCOT’s Protocols also pass the burden to pay any monetary shortfalls to market participants like CPS Energy. For example, if 5 entities each contributed \$20 to a pool, but one entity drops out, the remaining 4 entities now have to pay \$25 to make up the difference. This is problematic as ERCOT’s excessive and illegitimate charges have forced entities out of the market. A Short-Pay is where a market participant does not pay their Settlement in full. *See*, ERCOT Protocol Section 9.19(1). A Default Uplift Invoice is the collection of total Short-Pay amounts in a month. *See*, ERCOT Protocol Section 9.19.1. Short-Pay amounts and Default Uplift Invoice are collectively referred to as “Default Uplift Invoice.”

33. But here, it is not just one entity dropping out, it's not just a \$100 pool, and the price increase is not just \$5 per remaining entity. Rather, when there was not enough power due to ERCOT's failure to prepare, the PUCT and ERCOT raised prices from \$30 per MWh to \$9,000 per MWh and held them there for an extended period of time, which was a 300-fold increase in energy prices. That was compounded by the addition of ERCOT's excessive ancillary services prices, which reached \$25,000 per MWh, rather than \$9,000 per MWh.

34. Moreover, ERCOT issued instructions to the market to curtail more than 10,000 megawatts (MW) of prior load on February 15, 2021.³ The PUCT issued an Order on February 15 and a second Order on February 16, 2021, noting that energy prices across the system are clearing at less than \$9,000, which is the System-Wide Offer Cap and that “[e]nergy prices should reflect scarcity of the supply.”⁴ If customer load is being shed, scarcity is at its maximum, and the market price for energy needed should be at its height according to the PUCT. But according to the Independent Market Monitor for the PUCT on March 4, 2021,⁵ “ERCOT recalled the last of the firm load shed instructions at 23:53 on February 17, 2021.”⁶ Therefore, in order to comply with the Commission Order on February 15, 2021, the pricing intervention that raised prices to the System-Wide Offer Cap of \$9,000 “should have ended immediately at that time.”⁷ However, ERCOT continued to hold market prices at the System-Wide Offer Cap of \$9,000 MWh “for an additional 32 hours through the morning of February 19.”⁸ The Independent Market Monitor went

³ Potomac Economics, “PUCT Project No. 51812, Issues Related to the State of Disaster for the February 2021 Winter Weather Event,” dated March 4, 2021. http://interchange.puc.texas.gov/Documents/51812_61_1114183.PDF Last accessed March 9, 2021.

⁴ PUCT Docket No. 51617, “Order Directing ERCOT to take Action and Granting Exception to Commission Rules,” dated February 21, 2021.

⁵ PUCT Project No. 51812.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

on to say, “This decision resulted in \$16 billion in additional costs to ERCOT’s market, of which roughly \$1.5 billion was uplifted to load-serving entities to provide make-whole payments to generators for energy that was not needed or produced.”⁹ Finally, the Independent Market Monitor noted that these make-whole payments are “particularly harmful” and recommended that ERCOT “correct the real-time prices from 0:00 February 18, 2021, to 09:00 [a.m.] February 19, 2021, to remove the inappropriate pricing intervention that occurred during that time period.”¹⁰ As a result of ERCOT’s mismanagement, CPS Energy now expects Default Uplift Invoices in connection with these Excessive Prices, including the Overcharge, from the Winter Storm Event. This Overcharge is in flux, but remains in the billions of dollars. Additionally, the PUCT’s Independent Market Monitor has reaffirmed on March 11, 2021, that ERCOT’s “decision resulted [in] overpriced energy in ERCOT’s real-time market by \$16 billion.”¹¹

35. Other entities similarly-situated to CPS Energy have or will receive similar invoices. These extreme confiscatory prices have caused many providers within the ERCOT system to become insolvent. On Monday, March 1, 2021, Brazos Electric Power Cooperative, Inc. filed for Bankruptcy protection. Predictions are that as many as 22 market participants could fail.

36. To make up for this shortfall, ERCOT is employing its Short-Pay and Uplift procedures and asking the still-surviving entities to pay not only the surged pricing, but the Short-Pay and Uplift Invoices, too. Under the Protocols, a Default Uplift Invoice cannot exceed more than \$2.5 million per month. That would be bad enough, but in relying on a recent PUCT Order entered on February 21, 2021, ERCOT has been authorized with virtually unfettered power to

⁹ *Id.*

¹⁰ *Id.*

¹¹ PUCT Project No. 51812, “Issues Related to the State of Disaster for the February 2021 Winter Weather Event,” dated March 11, 2021. https://interchange.puc.texas.gov/Documents/51812_149_1115720.PDF. Last accessed March 11, 2021.

charge Short-Pays and Uplift amounts.¹² Here, ERCOT has already implemented Short-Pays. Based on this same Order by the PUCT, ERCOT has been authorized to lift the \$2.5 million limit for Default Uplift Invoices per month, indicating that accelerating default charges are imminent. Because the system is now in peril with as many as 22 market participants that may be financially ruined by ERCOT's unpreparedness for the Winter Storm Event, ERCOT is trying to place the inequitable burden of these failures on CPS Energy and its customers.

37. Not only are the amounts of these Short-Pays and Default Uplift Invoices abhorrent, but they are in violation of the Texas Constitution because a city-owned utility cannot be asked to unlawfully extend its credit under these circumstances. Tex. Const. Art. III, Sec. 52. ERCOT cannot extract Excessive Prices from CPS Energy to help settle the debts of other entities, especially where CPS Energy has no chance of being paid back.

E. CPS Energy Declares a Force Majeure Event.

38. Under the parties' Market Agreement, CPS Energy has sent Notice of a Force Majeure event on March 1, 2021, in connection with the Winter Storm Event. Under the Market Agreement, if CPS Energy is found to be in breach, the declaration of Force Majeure "shall not result in a Default." Market Agreement at Sec. 8.A(5). The Winter Storm Event is clearly a Force Majeure event and ERCOT cannot declare CPS Energy to be in default.

F. ERCOT is expected to send CPS Energy a Notice of Default

39. Despite CPS Energy sending ERCOT a Notice of Force Majeure, ERCOT has not disputed this and has remained silent. Any moment now, ERCOT may declare CPS Energy in default of its obligations even though it cannot properly do so for a Force Majeure event like the Winter Storm Event. ERCOT is even seeking to include the Overcharge as part of this alleged

¹² PUCT Docket No. 51617.

default. ERCOT is also seeking to make CPS Energy pay for the defaults of others due to ERCOT's Excessive Prices in violation of the Texas Constitution, and with no prospect of repayment.

V. Causes of Action.

40. All facts herein stated are reasserted in support of each of the causes of action of CPS Energy.

Count 1 — Breach of Contract

41. ERCOT breached the Market Agreement when it failed to implement its protocols in a way to ensure the integrity of its system. Specifically, on information and belief, ERCOT breached the handling of Load Forecasting, Submission of Emergency Operations Plans, Weatherization Plans, and Winter Weather Preparedness, as it received warnings of the Winter Storm well in advance of same and failed to take reasonable precautions to meet its load projections expected as a result of its Winter Storm Event. These actions resulted in damages to CPS Energy.

42. ERCOT also intentionally frustrated the purposes of the Market Participation contract by its wrongful decision not to enforce winterization of all the energy-producing sources in the grid, thereby making it financially impossible for CPS Energy to perform as a willing buyer. In addition, Section 8(D) of the Market Agreement also requires both parties to mitigate damages, and ERCOT has not done so by simply passing on the entirety of these excessive and illegal charges to CPS Energy and all the other market participants.

Count 2 — Negligence, Gross Negligence, and Negligence *per se*

43. ERCOT, as the manager of the flow of power to about 90% of the Texas power grid, had a duty to take reasonable care in estimating and planning for the amount of power that would be required for the 2021 Winter Storm Event. ERCOT, its regulators and the legislature should have mandated stronger reliability and resilience measures across the State.

44. The amount of system-wide power that could be needed and the need for the upgrade of facilities of ERCOT market participants should have been anticipated from prior catastrophic winter storm events in Texas, including in 1989 and 2011.

45. ERCOT further (a) failed to take reasonable corrective action when it became clear that its own projections showed insufficient capacity to meet forecast demand. The Texas Utilities Code provides rules applicable to ERCOT. *See*, Tex. Util. Code. Ch. 25.361, *et seq.* ERCOT is required by law to “perform the functions of an independent organization under the Public Utility Regulatory Act (PURA) § 39.151 to ensure access to the transmission and distribution systems for all buyers and sellers of electricity.” Tex. Util. Code § 39.151(b). ERCOT had to “ensure the reliability and adequacy of the regional electric network.” *Id.* Among other things, and without waiver of other disputes, CPS Energy also asserts that ERCOT was negligent in failing to reduce the System-Wide Offer Cap from the maximum amount of \$9,000 MWh on February 18 and 19, 2021. It has been determined by an Independent Market Monitor that market participants were also paying for an Overcharge when there was no scarcity. The Overcharge is still in flux, but will negatively impact CPS Energy and its customers.

46. This action and inaction were breaches of ERCOT’s duties. Those breaches have proximately caused damage to CPS Energy.

47. ERCOT’s acts also constitute gross negligence. ERCOT’s acts and omissions, when viewed objectively at the time of their occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and ERCOT had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

48. ERCOT's acts are in violation of the Texas Utilities Code and constitute negligence *per se*.

49. ERCOT's officers and directors have acted negligently and in an *ultra vires* fashion with respect to the Winter Storm Event, and by failing to timely address the market issues in the face of an acknowledged Overcharge created by ERCOT's own mistake. The inexcusable delays by ERCOT have injected uncertainty into the market. This negligence is also gross negligence as the Overcharge has driven market participants into insolvency. These officers and directors have a duty to use ordinary care in managing ERCOT's affairs. They have breached that duty thereby causing CPS Energy damages. Their actions are also willful and have caused devastating consequences to market participants, which in turn will spill over onto CPS Energy and its customers.

Count 3 — Violations of the Texas Constitution

50. ERCOT's acts also constitute an unjust taking of property in violation of Article 1, section 17 of the Texas Constitution against ERCOT. The taking of CPS Energy's goods and services without just compensation is a due process violation.

51. Also, the Texas Constitution limits the power of local governmental entities to transfer funds to any other entity or otherwise lend its credit. A party cannot require CPS Energy to pay funds and lend its credit to cover private debts. Specifically, the Short-Pays and Default Uplift Invoices in connection with the Winter Storm Event here are forcing CPS Energy to pay the debts of others who have defaulted on their obligations, and constitute an unlawful extension of credit by CPS Energy in violation of provisions in the Texas Constitution. Specifically, Article XI, Section 3 provides that "[n]o county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit." Tex. Const. art. XI, Sec. 3. In like manner, the

Texas Constitution also makes clear that “the Legislature shall have no power to authorize any county, city town or political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever.” Tex. Const. art. III, Section 52(a). The illegal charge of Short-Pays and Default Uplift Invoices making CPS Energy pay the debts of others who have defaulted in connection with the Winter Storm Event that ERCOT failed to properly anticipate or prepare for violates the Texas Constitution provisions cited herein and avoids any sovereign immunity defense.

Count 4 — Declaratory Judgment

52. CPS Energy seeks a Declaratory Judgment pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code.

53. CPS Energy seeks a Declaratory Judgment that ERCOT’s failure to pay the \$18 million-plus it is rightfully owed is a prior material breach of the Market Agreement. As a result of ERCOT’s prior material breach, CPS Energy seeks a Declaratory Judgment that it is excused from performing any duties under the Market Agreement other than paying legal, legitimate charges.

54. CPS Energy further seeks a Declaratory Judgment that prevents ERCOT from declaring a default based on a force majeure event.

55. In addition, CPS Energy seeks a Declaratory Judgment that CPS Energy should not have to pay for the defaults of others based on the Excessive Prices in violation of the Texas Constitution.

56. CPS Energy also seeks a Declaratory Judgment that it should not have to pay any part of the Overcharge.

57. CPS Energy further seeks recovery of its attorneys’ fees under §37.001 et al. of the Texas Civil Practices and Remedies Code.

Count 5 — Verified Application for Temporary Injunction

58. CPS Energy has a probable right of recovery and no adequate remedy at law. First, ERCOT has committed a material breach of the Market Agreement by not paying CPS Energy millions of dollars that it owes to CPS Energy, and therefore CPS Energy is excused from performing under the Market Agreement under general contract principles, although CPS Energy will continue to pay all legal, legitimate charges. Second, the Winter Storm Event was a force majeure event under the Market Agreement, and ERCOT cannot declare a default on the part of CPS Energy for any alleged failure to pay the Excessive Prices ERCOT now seeks to charge for the Winter Storm Event under Section 8.A(5) of the Market Agreement. Third, ERCOT's attempt to extend CPS Energy's credit to pay for the defaults of others through Default Uplift Invoices based on the Excessive Prices violates the Texas Constitution. Fourth, CPS Energy should not have to pay any Default Uplift Invoice resulting from the Excessive Prices incurred during the Winter Storm Event, including the Overcharge that ERCOT seeks to collect due to its negligence in failing to reduce the System-Wide Offer Cap from the maximum amount of \$9,000 MWh on February 18 and 19, 2021, which has resulted in an Overcharge as determined by an Independent Market Monitor. CPS Energy will be irreparably harmed in the absence of this injunctive relief as it will never be able to recover the money it pays for the other market participants who have failed due to ERCOT's Excessive Prices, and it has no adequate remedy at law.

59. For the reasons stated herein, including but not limited to ERCOT's failure to pay CPS Energy resulting in a prior material breach excusing CPS Energy from performance of the Market Agreement, for the Excessive Prices being passed on to CPS Energy during the Winter Storm Event in violation of the Texas Constitution, for ERCOT's failure to acknowledge CPS Energy's Notice of Force Majeure under the Market Agreement preventing the declaration of a Default, and for ERCOT's Overcharge due to its own mistake, CPS Energy seeks the following

relief in equity. CPS Energy has no adequate remedy at law. CPS Energy will not be able to recover anything it pays for Default Uplift Invoices, or for Overcharges due to ERCOT not coming down fast enough on its Excessive Prices, because the market is in peril and at least 22 market participants are predicted to fail due to ERCOT's failure to adequately prepare for the Winter Storm Event. Thus, CPS Energy will be immediately and irreparably harmed if it is made to pay the Default Uplift Invoices in connection with the Overcharge and Excessive prices during the Winter Storm Event.

60. CPS Energy seeks injunctive relief against ERCOT on the grounds that:

- CPS Energy is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to CPS Energy;
- ERCOT is performing acts relating to the subject of pending litigation, in violation of the rights of CPS Energy, and those acts would tend to render the judgment in this litigation ineffectual; and
- Immediate and irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

61. CPS Energy asks this Court to grant a Temporary Injunction to prevent immediate, irreparable harm and preserve the status quo by enjoining ERCOT, its officers, directors, agents, servants, and employees from:

- a) Declaring CPS Energy in default in violation of the Market Agreement for a Force Majeure Event like the Winter Storm Event and because of ERCOT's prior material default;
- b) Requiring CPS Energy to pay any Default Uplift Invoice resulting from the Overcharge and the Excessive Prices during the Winter Storm Event, which inequitably burdens CPS Energy in violation of the Texas Constitution;
- c) Accepting payment from CPS Energy as payment for any Default Uplift Invoice resulting from the Overcharge, and Excessive Prices during the Winter Storm Event;

- d) Applying any funds otherwise due and owing to CPS Energy for the payment of any Default Uplift Invoice resulting from the Overcharge, and Excessive Prices during Winter Storm Event;
- e) Requiring the collateralization of CPS Energy's alleged obligation for any Default Uplift Invoice resulting from the Overcharge and the Excessive Prices during the Winter Storm Event;
- f) Restricting CPS Energy's access to the wholesale electric market, including the day-ahead or real-time markets for any reason connected with the Winter Storm Event; or
- g) Taking any action against CPS Energy for non-payment of any Default Uplift Invoice resulting from the Overcharge, or any other charges associated with the Excessive Prices during the Winter Storm Event.

62. CPS Energy will suffer immediate and irreparable injury, irrespective of any remedy at law, as it will not be able to claw back or recover its payments from other market participants who have failed or gone out of business, nor will the resulting defaults in the market allow CPS Energy to be repaid in the future for its payments in connection with the Winter Storm Event. This request for injunctive relief is supported by the Declaration of Frank Almaraz, attached hereto as Exhibit "A."

63. CPS Energy and its customers need this equitable relief with respect to ERCOT before the trial of this case. Specifically, ERCOT may declare CPS Energy in default of its obligations, which could restrict CPS Energy's ability to deliver energy to its customers.

64. CPS Energy is willing to post a bond in support of this Application for Temporary Injunction and believes that the bond should be in a nominal amount as it is a governmental entity who has met all of its payment obligations to ERCOT.

65. CPS Energy further asks this Court to set its request for a permanent injunction for a full trial on the merits and, after trial, issue a permanent injunction against ERCOT and its members for the same relief requested in its application for Temporary Injunction.

66. In addition, or in the alternative, CPS Energy seeks to recover damages, including without limitation the \$18 million it is owed by ERCOT, and damages in the form of repricing for the Overcharge caused by ERCOT's own error.

VI. Defendants do not have sovereign immunity.

67. Sovereign immunity does not bar claims that allege constitutional violations or that seek equitable remedies. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995). ERCOT's confiscatory and Excessive Prices and Overcharge in connection with the Winter Storm Event are a violation of the Texas Constitution. CPS Energy also seeks injunctive relief.

68. Further, this *ultra vires* action against ERCOT's defendant officers and directors does not implicate that immunity. In attempting to collect unconstitutional sums from CPS Energy, the defendant officers and directors are acting outside of their legal authority and should be enjoined from taking such *ultra vires* actions.

69. Finally, ERCOT's statutory violations are negligence *per se* and are not subject to claims of sovereign immunity.

VII. Conditions Precedent

70. Pursuant to Rule 54 of the Texas Rules of Civil Procedure, all conditions precedent to the filing of this lawsuit have been performed or have occurred.

VIII. Attorneys' Fees

71. CPS Energy has engaged counsel. Pursuant to the Texas Civil Practices and Remedies Code, CPS Energy is entitled to, and hereby seeks, recovery of its reasonable and necessary attorneys' fees incurred in the prosecution of its claims herein under Sections 37.001 and 38.001 of the Texas Civil Practices and Remedies Code.

IX. Conclusion and Prayer

72. CPS Energy prays that ERCOT, its Officers, and Directors be cited to appear and answer herein, that CPS Energy have and recover the temporary injunction herein requested to preserve the *status quo* and prevent immediate and irreparable harm until time of trial, and that upon final trial, CPS Energy be awarded judgment against ERCOT for a permanent injunction, a Declaratory Judgment, or in the alternative damages, attorneys' fees, costs, and pre-judgment and post-judgment interest at the highest rate allowed by law. CPS Energy further prays for all other relief to which it may be justly entitled.

[Signature Block to Follow]

Dated: March 12, 2021.

Respectfully submitted,

DENTONS US LLP

By: /s/ Glenn A. Ballard, Jr.

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COUNSEL FOR CPS ENERGY

CAUSE NO. _____

CPS ENERGY,	§	IN THE DISTRICT COURT OF
	§	
PLAINTIFF,	§	
	§	
V.	§	BEXAR COUNTY, TEXAS
	§	
ELECTRIC RELIABILITY COUNCIL	§	
OF TEXAS, et al.,	§	
	§	
DEFENDANTS	§	____ JUDICIAL DISTRICT

DECLARATION OF FRANK ALMARAZ

State of Texas §
 §
 Bexar County §

My name is Frank Almaraz. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this Declaration are within my personal knowledge and are true and correct.

1. I am the Chief Power, Sustainability, & Business Development Officer for CPS Energy.

2. I have reviewed Plaintiff's Original Petition and Application for Temporary Injunction and Permanent Injunction against the Electric Reliability Council of Texas and its directors and officers (the "Petition"). The facts stated in this Declaration are within my personal knowledge and are true and correct.

3. Defendant Electrical Reliability Council of Texas ("ERCOT") is the Independent System Operator that operates the majority of the Texas electrical grid. ERCOT distributes electrical power to over 25 million Texas customers.

4. The City of San Antonio is the seventh-largest city in the United States and the second-most populous city in the State of Texas. CPS Energy, the municipally-owned electric and gas utility, serves more than 2,000,000 residents, 820,000 electric customers, and 345,000 natural gas in its service territory. It is the nation's largest municipally owned electric and gas utility company. The utility has a long history of service in the San Antonio area spanning more than 161 years. CPS Energy is guided by an independent Board of Trustees and subject to the San Antonio City Council's reserved powers in the areas of rates, municipal utility debt, and eminent domain. Its service area includes not only the City of San Antonio, but also 31 other municipalities in and around the metropolitan area, all of Bexar County as well as portions of seven adjacent counties.

5. CPS Energy and ERCOT entered into a Standard Form Market Participant Agreement on June 9, 2011 (the "Market Agreement"). The Market Agreement is governed in part by the ERCOT Protocols, which contain "the scheduling, operating, planning, reliability, and Settlement (including Customer registration) policies, rules, guidelines, procedures, standards, and criteria of ERCOT." ERCOT Protocols at Section 1.1(1). The ERCOT Protocols are available at the following website: <http://www.ercot.com/mktrules/nprotocols/current>. Under the Market Agreement, CPS Energy is a Load Service Entity (LSE) and a Resource Entity (RSE). In other words, CPS Energy not only provides power to its consumers (Load/Demand), but it also generates power (Resource) for use and distribution throughout the State. CPS Energy therefore buys and sells power through ERCOT.

6. ERCOT has run up at least \$20 billion in charges for 5 days from February 15-19, 2021 during a winter storm (the "Winter Storm Event"), of which more than \$16 billion is an acknowledged error by the Independent Market Monitor for the Public Utility Commission of Texas ("PUCT") due to ERCOT's own mistake in not coming down from the System-Wide Offer

Cap of \$9,000 per megawatt hour (MWh), even when the scarcity that prompted this charge no longer existed on February 18 and 19, 2021 (the “Overcharge”). It is my understanding that the Overcharge may be in flux, but is still in the billions of dollars. There has been a delay in correcting this Overcharge despite the tremendous burden that it put on San Antonio and Texas customers (the total amount of \$20 billion including the Overcharge is referred to as the “Excessive Prices”). The PUCT and ERCOT raised prices from \$30 per MWh to \$9,000 per MWh and held them there for an extended period of time, which was a 300-fold increase in energy prices. That was compounded by the addition of ERCOT’s excessive ancillary services prices, which reached \$25,000 per MWh, rather than \$9,000 per MWh. ERCOT should not be able to declare a default for any failure to pay these erroneous Excessive Prices.

7. CPS Energy needs protection for its customers against massive errors in ERCOT’s Excessive Prices, which would cause price spikes in monthly bills and a blatantly unlawful result.

8. The Governor of the State of Texas issued a Declaration of a State of Disaster for all counties in the State on February 12, 2021, in connection with the Winter Storm Event, and CPS Energy declared a Force Majeure as a result of the Winter Storm Event on March 1, 2021. Section 8.A(5) of the Market Agreement states the declaration of a Force Majeure “shall not result in a Default.”

9. ERCOT has also repeatedly short-paid the market totaling almost \$2.5 billion and has short-paid CPS Energy at least \$18 million following the Winter Storm Event. Nevertheless, CPS Energy has met all of its payment obligations with ERCOT.

10. ERCOT is relying on CPS Energy’s credit to pay the debts of other failed market participants caused by ERCOT’s Excessive Prices as it is an unlawful extension of CPS Energy’s credit. This is a violation of the Texas Constitution. *See, inter alia*, Article I, section 17, Article

III, Section 52(a), and Article XI, Section 3 of the Texas Constitution. Two companies, Brazos Power and Electric Cooperative, Inc.,¹ and Just Energy,² have already gone into bankruptcy as a result of the Overcharge and Excessive Prices. In fact, 22 market participants are projected to fail.

11. For the reasons stated herein, including but not limited to ERCOT's failure to pay CPS Energy resulting in a prior material breach excusing CPS Energy from performance of the Market Agreement, for the Excessive Prices being passed on to CPS Energy during the Winter Storm Event in violation of the Texas Constitution, for ERCOT's failure to acknowledge CPS Energy's Notice of Force Majeure under the Market Agreement preventing the declaration of a Default, and for ERCOT's Overcharge due to its own mistake, CPS Energy seeks the following relief in equity. CPS Energy has no adequate remedy at law. CPS Energy will not be able to recover anything it pays for Default Uplift Invoices, or for Overcharges due to ERCOT not coming down fast enough on its Excessive Prices, because the market is in peril and at least 22 market participants are predicted to fail due to ERCOT's failure to adequately prepare for the Winter Storm Event. Thus, CPS Energy will be immediately and irreparably harmed if it is made to pay the Default Uplift Invoices in connection with the Overcharge and Excessive prices during the Winter Storm Event.

12. CPS Energy has satisfied all of its payment obligations to ERCOT, but does not want to pay for the insolvency of other market participants. CPS Energy will never be paid back. The threat to CPS Energy and to its customers of paying for the insolvency of other market participants is imminent. By Order dated February 21, 2021, the PUCT has authorized ERCOT to suspend the rule limiting the repayment of Default Uplift Invoices to \$2.5 million per monthly cap

¹ See, Voluntary Petition for Non-Individuals Filing for Bankruptcy, In re Brazos Electric Power Cooperative, Inc., Case No. 21-20725 filed on March 1, 2021 in the United States Bankruptcy Court for the Southern District.

² See, Chapter 15 Petition for Recognition of a Foreign Proceeding, *In re Just Energy (BC) Partnership*, Case No. 21-30854 filed on March 9, 2021 in the United States Bankruptcy Court for the Southern District.

(ERCOT Protocol 9.19.1(4). Accelerated and unfettered Default Uplift Invoices forcing CPS Energy to pay for the defaults of other market participants who failed because of ERCOT's Excessive Prices is an imminent threat to CPS Energy.

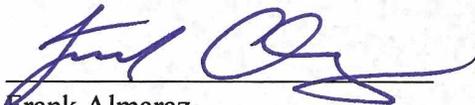
13. Immediate and irreparable injury, loss, or damage will result to CPS Energy and its customers if ERCOT seeks payment for any Default Uplift Invoices resulting from the Overcharge and Excessive Prices during the Winter Storm Event. CPS Energy has no adequate remedy at law.

14. CPS Energy is prepared to post a bond in support of its application for injunctive relief and believes a nominal amount would be adequate security for purposes of this application for injunctive relief as CPS Energy has met all of its obligations to ERCOT.

JURAT

Again, my name is Frank Almaraz. My date of birth is August 27, 1978 and my address for purposes of this Declaration is 500 McCullough Ave, San Antonio, Texas 78215. I declare under penalty of perjury that the foregoing statements are true and correct.

Executed in Bexar County, Texas on March 11, 2021.



Frank Almaraz
Declarant