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CAUSE NO. 2021CI05520

CPS ENERGY	§	IN THE DISTRICT COURT OF
	§	
	§	
Plaintiff,	§	
	§	
v.	§	BEXAR COUNTY, TEXAS
	§	
DCP MIDSTREAM MARKETING, LLC	§	
	§	
Defendant.	§	150th JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY RELIEF

Plaintiff CPS Energy, a gas and electric utility owned by the City of San Antonio, files its Original Petition for Declaratory Relief against DCP Midstream Marketing, LLC ("**DCP Midstream**" **or** "**Defendant**") and would respectfully show the Court as follows:

INTRODUCTION

In mid-February 2021, San Antonio endured a catastrophic winter storm that effectively broke the natural gas market. Governor Abbott declared a disaster for all 254 counties in the State of Texas in anticipation of the impending winter weather. In the days that followed, over four million Texans lost power as temperatures plunged to the single digits. As temperatures fell, the demand for natural gas rose so high and supply fell so low that normal market conditions collapsed. Natural gas prices quickly swung from lawful commercial terms to unlawful and unconscionable price gouging over a period of days.

Plaintiff CPS Energy is a municipally-owned gas and electric utility that purchases natural gas to meet the needs of its customers across Bexar County and beyond. As a public utility, CPS Energy had no choice but to continue to purchase natural gas to meet its customers' critical human needs during the disaster regardless of the price. This lawsuit seeks to protect CPS Energy's customers from the unlawful and unconscionable price gouging that occurred during the winter storm.

On February 10, 2021, prices in the next-day natural gas market for delivery on February 11, 2021 hit $3.25 per million British thermal units ("**MMBtu**"). Just two days later, coincident with Governor Abbott's disaster declaration, prices in the next-day market rose to unimagined levels for deliveries over the holiday weekend. Texas law prohibits profiteering from a declared disaster, making it unlawful for sellers to engage in price gouging to take advantage of high demand for essential goods like fuel.

While CPS Energy had no choice but to continue purchasing natural gas to meet the essential needs of its customers, Defendant chose to sell natural gas to CPS Energy during the 2021 winter disaster at exorbitant, unlawful, and unconscionable prices. Indeed, ***Defendant's price for natural gas swung by 6,036% in a single invoice.***

This led to CPS Energy receiving an unprecedented natural gas bill as recognized by the (now former) Commissioner of the Public Utility Commission of Texas: "San Antonio had some really big gas bills, a fairly large electric bill. They've got a lot of money. They're fine."[1] But charging a municipally-owned utility exorbitant prices that may ultimately have to be borne by its customers – the people of San Antonio and surrounding areas – is unacceptable and CPS Energy is bringing this suit to ensure its constituents are not left to foot the bill.

As of the filing of this Petition, in accordance with the express provisions of its contract with Defendant, CPS Energy has paid the lawful price for its natural gas purchases from Defendant during February 2021 and is disputing the remainder, which represents unlawful, unconscionable

[1] Loren Steffy, *Some on Wall Street Profited off Texas Blackouts*, TEXAS MONTHLY (Mar. 16, 2021) https://www.texasmonthly.com/news-politics/wall-street-profited-off-texas-blackouts/ (audio recording within the article at 17:30).

prices under Texas law. Indeed, ahead of the scheduled due date, CPS Energy paid Defendant for all charges up to a price of $38.83/MMBtu, which represents the outer reaches of any commercially justified price for natural gas (the "**Unlawful Price Threshold**"). Nothing more is due.

CPS Energy seeks relief from this Court in the event that Defendant elects to pursue an unlawful windfall over and above what it already has been paid.

DISCOVERY CONTROL PLAN

1. CPS Energy intends to conduct discovery in this matter under Level 3 of Texas Rule of Civil Procedure 190.4, and affirmatively pleads that this suit is not governed by the expedited-actions process in Texas Rule of Civil Procedure 169.

2. In accordance with Rule 47(c) of the Texas Rules of Civil Procedure, CPS Energy states that it seeks monetary relief over $1,000,000.00. CPS Energy seeks declaratory relief, equitable relief, injunctive relief, and attorneys' fees and costs. Nothing in this paragraph is intended to limit the scope of the relief sought in this Petition, as it may be amended.

PARTIES

3. San Antonio is the seventh-largest city in the United States and the second-most populous city in Texas. CPS Energy, its municipally-owned electric and gas utility, serves more than 2,000,000 residents, 820,000 electric customers, and 345,000 natural gas customers in its service territory. It is the nation's largest municipally-owned electric and gas utility. CPS Energy has a long history of service in the San Antonio area spanning more than 161 years. It is guided by an independent Board of Trustees. Its service area includes not only San Antonio but also 31 other municipalities in and around the metropolitan area encompassing all of Bexar County and portions of seven adjacent counties.

4. Defendant DCP Midstream Marketing, LLC is a Delaware Limited Liability Corporation with its principal place of business in Denver, Colorado. It was formerly known as

"DCP Midstream Marketing, LP." It may be served through its registered agent for service, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, TX 75201-3136.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction because CPS Energy is seeking an amount in excess of the minimum jurisdictional requirements of this Court.

6. Venue is proper because all or a substantial part of the events giving rise to the dispute occurred in Bexar County, Texas. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1). Further, the contract at issue in this lawsuit expressly provides that it is to be performed in Bexar County.

BACKGROUND

A. The February State Declared Disaster and Its Impact

7. In February 2021, the continental United States experienced a severe winter storm that meteorologists characterized as the most significant in terms of scope and duration since monitoring of these weather phenomena began in the 1950s. As a result of this winter storm, Texas experienced statewide, record-breaking cold weather, with San Antonio having three consecutive days of record low temperatures, during which the wind chills fell as low as -6 degrees Fahrenheit.

8. In anticipation of the winter storm, on February 12, 2021, Governor Abbott declared a state of disaster for all 254 counties within the State due to the prolonged freezing temperatures, heavy snow, and freezing rain statewide.[2] The worst of the winter storm event spanned February 13, 2021 through February 19, 2021 ("**February State Declared Disaster**"). The severe cold weather of the February State Declared Disaster began moderating by February 18.

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[2] Press Release, *Governor Abbott Issues Disaster Declaration, Continues to Deploy Resources As Severe Winter Weather Impacts Texas*, OFFICE OF THE TEXAS GOVERNOR (Sept. 26, 2019, 8:08 PM) https://gov.texas.gov/news/post/governor-abbott-issues-disaster-declaration-continues-to-deploy-resources-as-severe-winter-weather-impacts-texas.

9. The February State Declared Disaster was so extreme that it caused the market to stop functioning (*i.e.,* the price ceased impacting demand[3]) thereby creating an "opportunity" for willing gas suppliers and marketers to grossly inflate prices and then hold in place those exorbitant prices knowing full well that public utilities, such as CPS Energy, had no choice but to purchase gas regardless of how exorbitant the price in order to continue to serve their customers. Simply put, there is a point when scarcity pricing becomes unlawful price gouging – which is precisely what occurred with the natural gas prices charged by Defendant during the February State Declared Disaster.

B. CPS Energy's Contract with DCP Midstream

10. CPS Energy purchases natural gas from a variety of suppliers, including Defendant. That relationship is governed by the Base Contract for Sale and Purchase of Natural Gas that CPS Energy and Defendant entered on March 1, 2007, as amended (the "**Contract**"). The Contract itself does not set the price for CPS Energy's purchases of natural gas. Terms for individual transactions are memorialized in "Transaction Confirmations" that specify the quantity to be delivered by Defendant at a specified price, at a specified delivery point for a specified term. The price CPS Energy pays for natural gas is either a fixed price based on current market conditions or tied directly to a daily price index selected by the parties for pricing on a given day.

[3] At times of extreme demand and limited supply, scarcity pricing can occur. Scarcity pricing, in and of itself, is not a problem. It is, often-times, a sign that the market is working. In short, the market usually works when the framework within which the market operates has accounted for the circumstances of the day. However, when extraordinary circumstances arise that were not contemplated when the market rules were established – such as times of extreme demand and limited supply due to a severe weather crisis – it can lead to scarcity pricing elevated to such a degree that the market ceases to function.

11. The Contract includes a disputed payment provision under Section 7.4 which gives the parties a contractual mechanism to challenge invoiced amounts. Specifically, Section 7.4 provides that:

> [I]f the invoiced party, in good faith, disputes the amount of any such invoice or any part thereof, such invoiced party will pay such amount as it concedes to be correct; provided, however, if the invoiced party disputes the amount due, it must provide supporting documentation acceptable in industry practice to support the amount paid or disputed.

Notably, a buyer's good faith dispute of the amount charged for gas in accordance with Section 7.4 does not constitute a failure to pay giving rise to a payment default under the Contract.

C. DCP Midstream's February State Declared Disaster Invoice

12. Under the Contract, Defendant is required to invoice CPS Energy for gas delivered in the preceding month, along with documentation acceptable in industry practice to support the amounts charged. CPS Energy must then remit payment for all conceded amounts on or before the later of the 25th of the month or 10 days after receipt of an invoice. Notably, the Contract expressly contemplates CPS Energy's right to dispute any amounts that are not conceded (as quoted above).

13. Defendant sent CPS Energy an invoice[4] for gas it delivered in February 2021 (the "**Invoice**"). The Invoice reflects transactions for gas delivered between February 1 and March 1 – with prices ranging from $2.52 to $154.62/MMBtu. That is a **6,036%** swing in Defendant's pricing in a single invoice.

[4] Invoice No. ALG5009368.

D. CPS Energy's Payments

14. On March 22, 2021, CPS Energy sent a letter to Defendant under Section 7.4 of the Contract disputing the Invoice. The Invoice covers multiple transactions throughout February. The following table reflects disputed transactions for which the gas delivered was invoiced at prices in excess of the Unlawful Price Threshold:

Dates Delivered	Price Defendant Charged (per MMBtu)
February 13-15	$154.62
February 19-20	$64.32

With respect to the listed transactions, CPS Energy tendered payment in the amount of $38.83/MMBtu. For other transactions where less than $38.83/MMBtu was charged, CPS Energy paid the full invoice price, yielding a total payment to Defendant in the amount of $7,140,862.47[5] before filing this Petition.[6]

15. CPS Energy is not required to pay for natural gas at commercially unreasonable, unconscionable, and unlawful prices. As such, CPS Energy conducted a comprehensive analysis, including a review of (i) the increases in pricing of natural gas during prior natural disasters in Texas; (ii) a review of the increases in pricing for other essential products during prior natural disasters; and (iii) a review of price gouging statutes of other states.

16. CPS Energy's payment of $38.83/MMBtu for natural gas purchased during the February State Declared Disaster is 1,095% more than the prevailing price of natural gas two days before Governor Abbott declared a state of disaster,[7] and 911% more than the price the day after

[5] CPS Energy's payment may be subject to volume related adjustment.

[6] CPS Energy's letter also provided documentation supporting the amounts paid for the Invoice.

[7] As listed on the Houston Ship Channel Index on February 10, 2021.

the storm ended.[8] Even so, the difference between what Defendant charged during the February State Declared Disaster and the $38.83/MMBtu CPS Energy paid Defendant under its Invoice is $9,772,779.20.

E. Protection Against Unlawful Prices

17. By any objective standard, the prices Defendant charged CPS Energy (and presumably expects CPS Energy to pass on to its customers) for the fuel necessary to heat homes and generate electricity during the February State Declared Disaster were excessive, exorbitant, gross, and shocking, and are therefore, unconscionable and amount to unlawful price gouging in violation of Texas public policy. Although the February State Declared Disaster was rare, the legal doctrines that guard against unlawful pricing and unconscionable market excesses are firmly rooted.

18. Texas, like 35 other states, has declared it illegal for the providers of essential goods and services to charge excessive prices during a declared disaster when businesses and consumers are at the mercy of those providers. Texas's public policy against price gouging during a declared disaster is reflected in its statutes. For instance, section 17.46 of the Texas Deceptive Trade Practices Act (the "**DTPA**") provides that it is unlawful to take advantage of a disaster declared by the Governor under Chapter 418 of the Government Code by: "(A) selling or leasing fuel . . . or another necessity at an exorbitant or excessive price; or (B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel . . . or another necessity." TEX. BUS. & COM. CODE § 17.46(b)(27).

[8] As listed on the Houston Ship Channel Index on February 20, 2021. To put that in perspective, just last week, the State of Texas filed a price gouging lawsuit against a hotel for increasing rates by 169% during the February State Declared Disaster.

19. Communications from the Texas Attorney General's Office further highlight that profiteering from scarcity during a declared disaster violates Texas public policy. The Attorney General's website, for example, declares price gouging during a statewide disaster "illegal," and states that "if a disaster has been declared by the Governor of Texas or the President, and businesses raise the price of their products to exorbitant or excessive rates to take advantage of the disaster declaration, then it is quite likely that price gouging is taking place."[9]

20. More fundamentally, unconscionable contracts have long been unenforceable under Texas law. *See In re Poly-Am., L.P.*, 262 S.W.3d 337, 349 (Tex. 2008) ("[U]nconscionability…has been recognized and applied by this Court for well over a century."); *see also* TEX. BUS. & COM. CODE § 2.302. A contract term is unconscionable and, thus, unenforceable if "given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *In re Poly Am.*, 262 S.W.3d at 348. To determine unconscionability, courts must examine the contract or clause's "commercial setting, purpose and effect," as well as the "entire atmosphere in which the agreement was made." TEX. BUS. & COM. CODE § 2.302(b); *Aalok Anita, Inc. v. Shell Oil Co.*, No. 14-95-00682-CV, 1996 WL 544424, at *3 (Tex. App.—Houston [14th Dist.] Sept. 26, 1996, no writ).[10]

21. Here, during the February State Declared Disaster, CPS Energy had no bargaining power – it had to pay Defendant's outrageous prices in order to keep the lights and heat on in

[9] *How to Spot and Report Price Gouging*, KEN PAXTON ATTORNEY GENERAL OF TEXAS, https://www.texasattorneygeneral.gov/consumer-protection/disaster-and-emergency-scams/how-spot-and-report-price-gouging (last visited March 20, 2021).

[10] A contract provision is unenforceable if it is both procedurally and substantively unconscionable. Factors courts consider in determining procedural unconscionability include (i) the presence of deception, overreaching, or sharp business practices; (ii) the absence of a viable alternative; and (iii) the non-bargaining ability of one party. Substantive unconscionability focuses on the fairness of the contract provision and asks whether it is sufficiently shocking or gross to justify court intervention.

homes in its service area and to continue delivering natural gas to its customers. When homes and businesses were at Defendant's mercy, it charged CPS Energy natural gas prices that were unconscionable and reflect nothing more than opportunistic price gouging.

CAUSE OF ACTION

COUNT I – DECLARATORY JUDGMENT

22. CPS Energy realleges and incorporates each allegation set forth above.

23. As CPS Energy explained in correspondence to Defendant, CPS Energy would not seek any of the relief requested in this Petition if Defendant promptly confirmed its acceptance of CPS Energy's payment in full satisfaction of the subject Invoice. However, as of this filing, Defendant has made no such confirmations. As such, it appears Defendant intends to pursue the stated invoiced amounts (over and above the amount CPS Energy has already paid), and CPS Energy will be forced to vigorously protect its rights under Texas law in order to protect its customers from unconscionable and unlawful prices.

24. Accordingly, CPS Energy respectfully asks for the following declarations:

a. CPS Energy is only required to pay prices for fuel obtained pursuant to the Contract and any Transaction Confirmation that are conscionable and lawful.

b. CPS Energy disputes, in good faith, a portion of the amount stated in the Invoice under Section 7.4 of the Contract, thereby initiating Section 7.4's dispute resolution process.

c. A good faith dispute under Section 7.4 of the Contract does not constitute a default under the Contract.

CONDITIONS PRECEDENT

25. All conditions precedent to CPS Energy's claim for relief have been performed or have occurred.

JURY DEMAND

26. Plaintiff hereby demands a trial by jury.

CONCLUSION AND PRAYER

27. For these reasons, CPS Energy asks that Defendant be cited to appear and answer, and that CPS Energy be awarded the following relief against Defendant:

a. Declaratory judgments;

b. Court costs;

c. Reasonable attorneys' fees; and

d. All other relief, general or special, at law or in equity to which CPS Energy may be justly entitled.

Dated: March 24, 2021

Respectfully submitted,

/s/Lauren A. Valkenaar

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