FILED
9/22/2021 7:55 PM
Mary Angie Garcia
Bexar County District Clerk
Accepted By: Shaamid Gaitan
Bexar County - 407th District Court

Cause No. 2021-CI-05138

CPS Energy, Plaintiff–Counter-defendant, v. **Houston Pipe Line Company, LP** and **Oasis Pipeline, LP**, Defendants–Counterclaimants.	§ § § § § § § § § §	In the District Court of Bexar County, Texas 407th Judicial District

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

On Friday, February 12, 2021, Governor Greg Abbott declared a disaster for all 254 counties in the State of Texas due to the impending winter storm now referred to as Winter Storm Uri. The next day, temperatures in San Antonio dropped below freezing, where they would stay for almost all of the next six days. During that time, natural gas production in Texas reportedly fell by almost half. When significant amounts of power generation failed, ERCOT ordered utilities across the state, including plaintiff CPS Energy, to shed electric power distribution to their customers. Ultimately, over four million Texans lost power.

In the midst of this catastrophic disaster, defendants Houston Pipe Line Company, LP ("**HPL**") and Oasis Pipeline, LP ("**Oasis**," and together with HPL, the "**ET Pipelines**") saw an opportunity to exploit an emergency for profit. As the municipally owned gas and electric utility for millions of customers in and around San Antonio, CPS Energy required large volumes of natural gas to both run its gas-fired power plants and distribute to its residential and commercial gas customers. But when CPS Energy went to the ET Pipelines to purchase gas during this declared disaster, the ET Pipelines demanded prices as much as 15,000% higher than the prices they and other suppliers charged just days before the storm. Desperate for fuel to keep power on and gas flowing to furnaces and stovetops in its customers' homes, CPS Energy had no choice but to agree to these exorbitant prices. The end result was a $302 million bill from the ET Pipelines for just seven days' worth of natural gas.

While regular Texans were dealing with the disaster's enormous human and economic toll, the ET Pipelines' parent company, Energy Transfer, excitedly bragged to its investors about its ability to "benefit" from the "strong commodity prices." And benefit it did. On May 6, 2021, Energy Transfer announced that it reaped a **$2.4 billion windfall** from Winter Storm Uri. Almost all of these reported gains came from Energy Transfer's intrastate transportation and storage segment—the segment that includes the ET Pipelines. As San Antonio Mayor Ron Nirenberg has stated, permitting the ET Pipelines and other gas suppliers to reap such gains on the backs of regular Texans would result in one of the most massive wealth transfers in Texas history.

Fortunately for CPS Energy and its customers, well-established doctrines of Texas contract law forbid such a result. For well over a century, Texas law has recognized that unconscionable contract terms—i.e., grossly unfair terms extracted through an unequal bargaining process—are unenforceable. Further, a contract term that violates public policy is likewise void under Texas law, and Texas public policy has long prohibited taking advantage of a disaster to charge exorbitant or excessive prices for necessities. The ET Pipelines' blatant price gouging during the winter weather disaster fails both tests, and the outrageous prices the ET Pipelines demand are therefore unenforceable.

CPS Energy has already paid the ET Pipelines more than $46 million for the gas they delivered during the disaster, which reflects a 1,000% increase from the prices prevailing just days earlier. But CPS Energy will not pay the outrageous, excessive, and exorbitant prices the ET Pipelines demand just so they can further pad their profits at the expense of CPS Energy's customers. CPS Energy therefore brings this suit for declaratory judgment and respectfully asks the Court to declare that the prices the ET Pipelines demand in excess of the amount CPS Energy has already paid are unenforceable as unconscionable and/or void as against Texas public policy.

DISCOVERY CONTROL PLAN AND RULE 47(C) STATEMENT

1. CPS Energy intends to conduct discovery in this matter under Level 3 of the 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. Specifically, CPS Energy seeks declaratory relief, equitable 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 from time to time.

PARTIES

3. The City of San Antonio, acting by and through the City Public Service Board ("**CPS Energy**") is a municipally owned electric and gas utility that has a long history of service in the San Antonio area spanning more than 161 years.

4. Defendant HPL is a Delaware limited partnership doing business in Bexar County, whose principal office in the State of Texas is 8111 Westchester Drive, Suite 310, Dallas, Texas 75225. It owns and operates an intrastate natural gas pipeline system in Texas that buys, sells, and transports natural gas to utility and industrial customers across its system, and has direct physical interconnections with the facilities of CPS Energy for the delivery of natural gas supply. HPL has appeared in this action and may be served through its counsel.

5. Defendant Oasis is a Texas limited partnership doing business in Bexar County, whose principal office in the State of Texas is 8111 Westchester Drive, Suite 310, Dallas, Texas 75225. Like HPL, it also owns and operates an intrastate natural gas pipeline system in Texas that buys, sells, and transports natural gas to utility and industrial customers across its system, and has direct physical interconnections with the facilities of CPS Energy for the delivery of natural gas supply. Oasis has appeared in this case and may be served through its counsel.

JURISDICTION

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

VENUE

7. Venue is proper because all or a substantial number of facts giving rise to the dispute occurred in Bexar County.

FACTS

A. Background of the Parties and Their Relationship

1. CPS Energy

8. CPS Energy is the nation's largest municipally owned electric and gas utility. It 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. It serves more than 2,000,000 residents, 820,000 electric customers, and 345,000 natural gas customers in its service territory, which includes not only the City of San Antonio but also 31 other municipalities in and around the metropolitan area, all of Bexar County, and portions of seven adjacent counties.

9. As an electric and gas utility, CPS Energy buys and uses natural gas for two purposes: (1) to use as fuel for its gas-fired power plants, and (2) to distribute directly to its customers for use in the furnaces, water heaters, stove tops, and other burner tips in their homes and businesses. CPS Energy purchases this gas from a number of suppliers with which it has standing contracts based on industry-standard forms published by the North American Energy Standards Board ("**NAESB**"). These base contracts provide the general terms and legal framework for the parties' transactions, but they are not self-executing. Rather, they are given legal effect only if and when the parties enter into a transaction confirmation ("**Confirm**") for an actual sale or purchase of natural gas for an agreed quantity, price, term, and point of delivery. It is pursuant to those Confirms that the sellers then deliver the gas.

10. Some of the transactions CPS Energy enters into provide for delivery of a set volume of gas per day over an extended period of time, such as one or more months. The gas purchased under these longer-term arrangements is known as baseload gas. But the volume of gas that CPS Energy requires on any given day varies drastically due to a variety of factors that are difficult to accurately predict weeks or months ahead of time. For that reason, although CPS purchases significant volumes of baseload gas under those longer-term arrangements, it purchases most of its gas in the so-called spot market, where purchases are made one to a few business days before the date of delivery, when CPS Energy's needs are more predictable.

11. When CPS Energy purchases gas on the spot market, the price is usually set in one of two ways. First, the parties may agree to a fixed price, such as $3.00 per MMBtu. Second, the parties may agree to a price based on one of several daily indices published in Platts' *Gas Daily*. These daily indices are derived from the fixed-price transactions reported to Platts for each business day at certain delivery locations, including the Houston Ship Channel, Katy, and Waha hubs. Specifically, for each business day, Platts publishes a "midpoint" or index, also called the Gas Daily Average (GDA), for each reported location. This midpoint is simply the volume-weighted average of all transactions submitted to Platts for that location on that day. Platts also provides the number of transactions and the total volume of gas on which each daily index is based. For example, the *Gas Daily* sample provided on Platts' website shows the daily indices for April 3, 2019. For Houston Ship Channel, it provides a midpoint of $2.68 per MMBtu and states that this is based on 41 reported fixed-price transactions with a combined volume of 201,000 MMBtu.

12. CPS Energy employs a number of tools and practices to optimize its gas purchasing. For example, CPS Energy enters into gas transportation contracts under which it obtains capacity on gas pipelines to transport gas from different market hubs to its city gates and/or gas-fired power plants. This gives CPS Energy access to a broad range of suppliers in different locations, often allowing CPS Energy to take advantage of geographic price disparities between the various market hubs. CPS Energy also enters into gas storage agreements through which it obtains capacity in natural gas storage facilities connected to pipelines, which gives CPS Energy operational flexibility in balancing its daily gas volumes.

13. Additionally, CPS Energy employs various hedging strategies to manage the risks associated with volatility in natural gas prices, pursuant to policies provided by CPS Energy's board under the Texas Public Funds Investment Act. Through these strategies, CPS Energy seeks to mitigate its exposure to adverse price volatility while still providing the flexibility to take advantage of favorable price movements. Under no circumstances, though, is CPS Energy permitted to engage in hedging strategies for purposes of speculation.

2. Energy Transfer and the ET Pipelines

14. The ET Pipelines' ultimate parent company, Energy Transfer, is a publicly traded energy infrastructure company. According to Energy Transfer's website, approximately 30% of the nation's natural gas and crude oil are moved through its more than 90,000 miles of pipelines and other infrastructure nationwide.

15. Among Energy Transfer's many business segments is its intrastate natural gas transportation and storage business in Texas, which includes more than 9,000 miles of pipelines. Energy Transfer claims that its intrastate natural gas system is the largest in the United States. The ET Pipelines own and/or operate two of Energy Transfer's major intrastate assets: the HPL System and the Oasis Pipeline.

16. The HPL System is composed of an extensive network of more than 3,920 miles of intrastate natural gas pipelines in and around southeast Texas, as well as the underground Bammel storage reservoir near Houston, among other assets. According to Energy Transfer, the HPL System is well situated to gather and transport gas in many of the major gas producing areas in Texas. The HPL System gives Energy Transfer a particularly strong presence in the key Houston Ship Channel and Katy Hub markets, which allows Energy Transfer to play an important role in the Texas natural gas markets.

17. The Oasis Pipeline is primarily a 36-inch natural gas pipeline that runs 750 miles from the Waha market hub in far west Texas to the Katy market hub near Houston. It has many interconnections with other pipelines, power plants, processing facilities, municipalities, and producers.

18. The ET Pipelines generate revenue in two primary ways. First, the ET Pipelines enter into transportation and storage agreements under which third parties purchase capacity to ship and store their own gas using the ET Pipelines' assets. Historically, the transportation and storage fees from such contracts have made up the largest component of Energy Transfer's earnings in its intrastate segment.

19. Second, and more relevant here, the ET Pipelines generate revenues and margin by selling natural gas that they own to third parties. The ET Pipelines acquire natural gas by purchasing it from producers at the wellhead or from other market participants, as well as by retaining it in kind as part of the compensation they charge for transportation and storage services. When the ET Pipelines purchase natural gas from producers, they generally do so at a discount to a specified index price.

20. Energy Transfer's control of its vast intrastate natural gas transportation and storage assets, including HPL and Oasis, gives it a dominant role as a seller of natural gas in many Texas market areas, especially the Houston Ship Channel and Katy. For example, Energy Transfer's sales have at times comprised 80 percent or more of total fixed-price gas sales at the Houston Ship Channel. And because Energy Transfer reports its fixed-price transactions to Platts, such an outsized share of fixed-price transactions at these locations, in turn, gives Energy Transfer the ability to influence, if not outright control, the daily indices for those locations.

3. The Parties' Relationship and Contracts

21. Until recently, CPS Energy and the ET Pipelines had a longstanding relationship. CPS Energy had in place a NAESB Base Contract for Sale and Purchase of Natural Gas (a "**NAESB Contract**") with each of the ET Pipelines. The NAESB Contract with HPL is dated February 1, 2012, and is attached hereto as Exhibit B. The NAESB Contract with Oasis is dated November 1, 2009, and is attached hereto as Exhibit C.[1] As noted above, the NAESB Contracts do not provide any actual transactions terms; when CPS Energy and one of the ET Pipelines would agree on a particular transaction, they would enter a Confirm with the quantity, delivery date(s), delivery point, and price. Notably, although the ET Pipelines are the counterparties to the NAESB Contracts and the related Confirms, CPS Energy dealt with San Antonio-based employees of Energy Transfer

[1] The counterparty to CPS Energy's NAESB Contract with Oasis was initially a different Energy Transfer affiliate, Texas Energy Transfer Company, Ltd. On January 17, 2011, Texas Energy Transfer Company assigned the NAESB Contract to Oasis Pipeline, L.P. The assignment is included in Exhibit C.

when buying gas from the ET Pipelines, and it was those Energy Transfer employees who executed the Confirms.

22. The NAESB Contracts require the ET Pipelines to invoice CPS Energy each month for all gas delivered and received in the preceding month. Payment of invoices is due on or before the 25th of the month or 10 days after receipt of the invoice, whichever is later. Under Section 7.4 of the NAESB Contracts, if CPS Energy disputes, in good faith, the amount of any invoice submitted, CPS Energy has the express contractual right to pay only the amounts that CPS Energy does not dispute and to withhold payment of any disputed amounts until the parties have an opportunity to resolve the amounts in dispute (the "**NAESB Dispute Resolution Procedures**").

23. In addition to the NAESB Contracts, CPS Energy was also party to transportation and storage agreements with the ET Pipelines, through which CPS Energy could transport natural gas purchased from other suppliers and store gas at HPL's Bammel storage facility.

B. The Winter Storm Disaster

24. Beginning on or about February 13, 2021, and continuing through February 19, 2021, the State of Texas experienced a statewide winter weather disaster in which more than four million Texas households ultimately lost power. In anticipation of the impending freeze, Texas Governor Greg Abbott issued a disaster declaration[2] on February 12, 2021, under Chapter 418 of the Texas Government Code, for all 254 Texas counties.[3] Governor Abbott's disaster declaration is attached hereto as Exhibit A.

25. Plunging temperatures during the winter storm caused significant increases in energy and natural gas demand across the state as Texans tried to warm their homes and businesses during the prolonged, bitterly cold weather. This, in turn, resulted in significantly increased demand for the purchase of natural gas by utilities like CPS Energy to provide fuel for their gas-fired generating fa-

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

[3] On February 19, 2021, President Biden would likewise declare the havoc wreaked by the severe winter storm a major disaster. https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/20/president-joseph-r-biden-jr-approves-texas-disaster-declaration/

cilities and to service the needs of their gas distribution customers. The natural gas required by utilities like CPS Energy during this winter storm was critical to meet essential human needs for residences and businesses, to save lives, and to prevent substantial damage to property.

26. Near the beginning of February, natural gas suppliers were selling gas to utilities at around $2.60/MMBtu. As the onset of the severe weather became more imminent and the forecasts came into clearer view, gas sellers began increasing natural gas prices. By Tuesday, February 9, CPS Energy was paying around $3.17/MMBtu for next-day gas. By Wednesday, February 10, next-day prices crept up further to around $3.25/MMBtu. On both days, CPS Energy bought significant volumes of gas.

27. On February 11, CPS Energy again set out to purchase significant amounts of gas from its suppliers, including the ET Pipelines. At around 7:00 AM, CPS Energy contacted Energy Transfer about buying gas from the ET Pipelines for both same-day and next-day delivery. Energy Transfer charged CPS Energy fixed prices of $13–$14/MMBtu for 100,000 MMBtu of gas to be delivered the same day, which CPS Energy accepted. For next-day (February 12) gas, Energy Transfer quoted CPS Energy $15/MMBtu for 100,000 MMBtu. When Energy Transfer refused to come down on that $15 price, CPS Energy asked if Energy Transfer would at least agree to lock in the same deal for each day through the upcoming long weekend and Tuesday, February 16. But Energy Transfer refused, saying that it was not offering any prices for gas to be delivered over the weekend until the next day, Friday, February 12. So CPS Energy was forced to purchase just the next-day gas at $15.00.

28. By the early afternoon of February 11, CPS Energy was still in need of additional same-day gas. When it contacted the same Energy Transfer trader as earlier in the day, Energy Transfer quoted a price of $30.00/MMBtu—more than double what it charged just hours earlier for the same volume at the same delivery point. Again, CPS Energy had little choice but to accept.

29. On Friday, February 12—the same day that Governor Abbott declared a statewide emergency—the ET Pipelines began demanding prices completely unhinged from any normal market forces. That morning, CPS Energy again set out to buy the significant volumes of natural gas

necessary to serve its customers' critical human needs. Because most trading in the spot market for natural gas is done only on weekdays, CPS Energy and other buyers typically secure their gas supplies for Saturday, Sunday, and Monday on the preceding Friday. In this instance, however, Monday was a holiday (President's Day), meaning that CPS Energy needed to secure gas for the next four days.

30. At 7:30 AM on Friday, CPS Energy contacted Energy Transfer and asked for a price quote for 150,000 MMBtu per day for delivery February 13–16. An hour and a half later, Energy Transfer's trader messaged CPS Energy back: "ok, are you sitting down?" and then quoted a price of \$150/MMBtu—ten times the price charged the previous morning for next-day gas. CPS Energy's employee responded, understandably, "Wow," and then asked for "one sec" to discuss the price with his superiors. But just nine minutes later—before CPS Energy could even respond to the \$150 offer—Energy Transfer withdrew the offer and raised its asking price to \$225/MMBtu. Unable to risk losing the much needed gas, CPS Energy had no choice but to accept. Later that day, CPS Energy would secure an additional 40,000 MMBtu per day from the ET Pipelines for the long weekend at \$150/MMBtu by accepting offers posted on the ICE trading platform.

31. All in all, the ET Pipelines charged CPS Energy a volume-weighted average price of **\$212/MMBtu** for gas to be delivered over the long weekend. Such prices were completely unprecedented. According to *Gas Daily*, prior to February 2021, the highest midpoint price experienced in the Texas intrastate gas market since October 1994 was \$24.96/MMBtu at Houston Ship Channel on February 26, 2003, which exceeded even the highest midpoint prices reported during a series of severe cold and polar vortex events in 2011 and 2014.

32. Throughout the long weekend, temperatures plummeted and freezing precipitation bore down on Texas. Widespread failures in electric power generation across the state led to critically low levels of reserve power. On the morning of February 15, ERCOT issued load-shedding requirements, ordering retail electric providers like CPS Energy to drastically reduce electricity distribution to their customers. The result was widespread blackouts across Texas.

33. When normal day-ahead gas trading resumed on Tuesday, February 16, as temperatures in San Antonio dipped to a record-low 12 degrees Fahrenheit and millions remained without power,[4] the ET Pipelines surged their prices to truly unimaginable levels. That morning Energy Transfer quoted CPS Energy a price of **$400/MMBtu** for next-day (i.e., February 17) gas. CPS Energy again implored Energy Transfer to lower the price, even reminding Energy Transfer that the gas was for human needs. The response? "No wiggle room… We **have to** hold at $400." Once again, CPS Energy had no choice but to accede.

34. The next day, on February 17, 2021, at the height of the declared statewide disaster, and after San Antonio had experienced 100-plus consecutive hours of below freezing temperatures, the ET Pipelines went even higher, charging their highest price for natural gas of the entire disaster period: **$500/MMBtu** for same-day gas, representing an increase of more than 15,000% over pre-event prices. To put that price in context, if gas stations and corner stores in Texas had increased the price of gasoline by the same degree, Texans would have been paying $425 a gallon and approximately $7,000 to fill up at the pump. Energy Transfer's price on February 17 for next-day gas, $300/MMBtu, was hardly better. But, again, CPS Energy had no choice but to agree, as temperatures in San Antonio were as cold as those in Anchorage, Alaska, and another round of freezing rain and snow was on the way.[5]

35. On that same day that Energy Transfer was charging CPS Energy unprecedented prices for the natural gas needed to keep the power on and gas flowing to its customers in San Antonio, Energy Transfer's co-chief executive was already bragging to investors about his company's ability "to benefit" from the disaster based on, as he put it, "strong commodity prices."[6]

36. Energy Transfer continued demanding such "strong" prices through the next day. On February 18, Energy Transfer charged CPS Energy a volume-weighted average price of approx-

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[4] This beat the previous record of 16 degrees set in 1895. https://www.nbcnews.com/news/weather/texans-battle-relentless-drastic-freezes-power-outages-record-cold-persist-n1258044

[5] https://www.expressnews.com/projects/2021/san-antonio-snow-timeline/

[6] *Fossil Fuel Executives Gloat About Profits, PR From Winter Storm Crisis,* THE INTERCEPT, Feb. 23, 2021.

imately $72/MMBtu for next-day gas. Although seemingly less egregious than the prices demanded over the previous few days, this still represented a 27-fold increase over pre-event prices.

37. In sum, throughout the winter-weather disaster, CPS Energy faced a Hobson's choice: Pay an exorbitant price for gas or run out of the gas supply it needed to (i) generate electricity already in critically short supply, and (ii) serve its gas customers' critical human needs. At the mercy of the ET Pipelines and with no other alternative, CPS Energy assented to the ET Pipelines' demands. The Confirms for CPS Energy's transactions with HPL during the declared disaster are attached hereto as Exhibit D, and the Confirms for the transactions with Oasis are attached hereto as Exhibit E.

C. Unconscionability, Public Policy, and the Unlawful Price Threshold

38. The ET Pipelines' conduct is not only offensive to standard notions of decency, it is anathema to Texas law. The ET Pipelines' outrageous prices are unenforceable under at least two long-standing doctrines of Texas contract law.

39. First, the ET Pipelines' prices are unconscionable. 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."); 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 349. To determine unconscionability, courts must examine the contract or clause's "commercial setting, purpose and effect," TEX. BUS. & COM. CODE § 2.302, as well as the "entire atmosphere in which the agreement was made," *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). In determining whether a contract provision is unconscionable, courts examine procedural and substantive aspects of the agreement. Factors courts consider in determining procedural unconscionability include (i) the presence of deception, overreach-

ing, 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.

40. Second, the ET Pipelines' prices are void as against public policy. Texas courts will not enforce contract provisions that are against public policy. And taking financial advantage of a statewide disaster is contrary to Texas public policy. 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. Specifically, 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). Although CPS Energy does not bring a cause of action under the DTPA, this provision is nevertheless a legislative declaration that price gouging is unlawful and against public policy in Texas.[7]

41. The prices that the ET Pipelines extracted from CPS Energy are unenforceable under either doctrine. As detailed above, in the midst of a declared statewide disaster, when homes and businesses were at their mercy and CPS Energy had no bargaining power, the ET Pipelines charged CPS Energy natural gas prices that were more than 15,000% of prevailing prices before the winter

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[7] Communications from the Texas Attorney General's Office further highlight that price gouging or otherwise 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." Indeed, the Attorney General's office has issued civil investigative demands for information about natural gas prices during the storm, and has expanded the scope of its investigation into price gouging related to the storm to include the natural gas industry.

storm. A spreadsheet showing the excessive and unconscionable amounts charged by the ET Pipelines is attached hereto as Exhibit F. By any objective standard, the prices the ET Pipelines charged CPS Energy (and thereby its consumers) for the fuel necessary to heat homes and generate electricity during the February 2021 declared disaster were "excessive," "exorbitant," gross, and shocking, and are, therefore, unconscionable and amount to unlawful price gouging in violation of Texas public policy.

42. Based upon a review of (i) the increases in pricing of natural gas during prior natural disasters, (ii) the increases in pricing for other essential products during prior natural disasters, and (iii) the price gouging statutes of other states, it is clear that ET Pipelines' unprecedented natural gas prices during the disaster crossed the line between legal pricing and unlawful and unconscionable price gouging beginning with deliveries for February 13, 2021, and continued to remain across that line through February 19, 2021. CPS Energy is conducting a good-faith analysis to determine the precise point at which the ET Pipelines' natural gas prices during the February 2021 disaster crossed the line from legitimate commercial pricing to unconscionable, unlawful price gouging (the "Unlawful Price Threshold"). Although CPS Energy's analysis is ongoing, its initial analysis to date, based on historical precedent, finds that the Unlawful Price Threshold is at or near $38.83/MMBtu (the "Estimated Unlawful Price Threshold"), and that any price during the February 2021 disaster in excess of that amount is prima facie unconscionable and contrary to Texas's declared public policy against price gouging.

43. CPS Energy disputes all amounts charged for natural gas delivered to CPS Energy in excess of the Unlawful Price Threshold (the "Unlawful Price Amounts"). The basis of that dispute is that the ET Pipelines charged exorbitant, excessive, and unlawful prices to profit from a declared disaster in violation of Texas public policy and the prohibition on unconscionable contracts. This Court should declare any attempt by ET Pipelines to collect prices for natural gas sold to CPS Energy during the disaster in excess of the Unlawful Price Threshold to be unenforceable.

44. CPS Energy has timely paid all undisputed amounts due to ET Pipelines under its NAESB Contracts (i.e., all amounts that do not exceed the Unlawful Price Threshold), and has only

withheld amounts that it disputes in good faith (i.e., the Unlawful Price Amounts) as expressly permitted by the NAESB Dispute Resolution Procedures.

45. As reflected on the spreadsheet attached as Exhibit F, the ET Pipelines' charges for the sales in February 2021 total approximately $308,872,569—$116,789,070 for HPL and $192,083,499 for Oasis. Had all of the sales for which Defendants charged exorbitant and unconscionable prices been made at the Estimated Unlawful Price Threshold, the charges would total approximately $51,950,243.92—$19,654,610.96 for HPL and $32,295,632.96 for Oasis—and CPS Energy has paid the ET Pipelines these amounts. Thus, if the Unlawful Price Threshold derived from CPS Energy's final analysis conforms exactly to the Estimated Unlawful Price Threshold, the Unlawful Price Amounts will equal approximately $256,922,325.08.

46. Paying the ET Pipelines a price equal to the Unlawful Price Threshold is no bargain. The Estimated Unlawful Price Threshold, $38.83/MMBtu, is 1,000% greater than the price of the same commodity two days before commencement of the gubernatorially declared disaster, 50% more than the highest midpoint price ever reported in 2003, and substantially more than the midpoint prices reported for the same commodity in similar cold weather events occurring in 2011 and 2014. For the ET Pipelines to instead insist that CPS Energy pay prices that are as much as 1,200% higher than this Estimated Unlawful Price Threshold is unequivocally shocking.

47. CPS Energy must seek to protect its customers from unconscionable and unlawful prices. The only mechanism available to CPS Energy, as a municipally owned utility, to recover the costs it incurs in providing electricity and natural gas service is from the customers it serves. This includes all costs for procurement of natural gas that is used to both generate power and as a source of fuel in homes and businesses for cooking and other critical human needs. CPS Energy functions as a pass-through entity, meaning the recovery from customers must include the full cost of operations, including fuel. CPS Energy does not have a mechanism (like corporate shareholders) to spare customers from these costs. Thus, it is CPS Energy's customers who will ultimately bear the cost if ET Pipelines are permitted to extract these unlawful and unconscionable prices from CPS Energy.

D. Energy Transfer's Unprecedented Profits

48. Energy Transfer's February 17 prediction that it stood to "benefit" from the prices it was demanding during the winter weather disaster would prove to be a vast understatement. According to Energy Transfer's public filings and statements, it reaped a **$2.4 billion windfall** from the disaster, and almost all of those gains were attributable to its intrastate transportation and storage segment—the segment that includes the ET Pipelines. In particular, for the first quarter of 2021, Energy Transfer's intrastate segment reported $1.07 billion in margin from natural gas sales alone. By comparison, Energy Transfer reported just $88 million in such margin for the first quarter of 2020, and $317 million for the entire year of 2020. In other words, Energy Transfer extracted more than three years' worth of intrastate gas-sales margin in just a matter of days.

49. The aftermath of a declared statewide disaster should not be a jackpot for gas sellers like the ET Pipelines. Absent action by this Court to nullify the ET Pipelines' price gouging, the ET Pipelines and Energy Transfer will be incentivized to view future gubernatorially declared disasters as opportunities for profit. Further, it will render future disaster declarations meaningless relative to their statutorily prescribed purpose of protecting Texans from predatory pricing.

E. The ET Pipelines' Attempts to Coerce Payment of the Unlawful Amounts

50. Likely motivated by the prospect of such record profits, the ET Pipelines and Energy Transfer have taken a number of actions meant to compel CPS Energy to pay the Unlawful Amounts. For starters, on February 23, 2021, just days after the snow finally melted, Energy Transfer sent an email to CPS Energy demanding that CPS Energy provide "adequate assurance" in the form of a letter of credit or cash for the full amount of its unlawful and unconscionable charges, which it estimated to be $317,500,000. The email reads as follows:

> "Due to the unprecedented weather event over the past 10 days, the price of natural gas rose dramatically. As a result, our credit exposure to CPS Energy has risen accordingly. Therefore, Houston Pipe Line Company LP (HPL) and Oasis Pipeline, LP (Oasis) is requesting Adequate Assurance in the form of an irrevocable standby letter of credit or cash to cover our unsecured credit exposure of approximately $317.5MM (HPL = $124.6MM; Oasis = $192.9MM). Please review and advise."

51. This was clearly a bad-faith attempt by the ET Pipelines to effectively accelerate collection of their outrageous prices from CPS Energy and to preempt CPS Energy's rights under Section 7.4 of the NAESB Contracts to withhold payment of the disputed Unlawful Price Amounts until any dispute between the parties as to the unlawful nature of such charges can be resolved. Further, by making a baseless request for adequate assurance, the ET Pipelines were also attempting to manufacture grounds to declare an Event of Default under the NAESB Contracts to use as leverage against CPS Energy.

52. Following receipt of Energy Transfer's February 23 demand for adequate assurance, CPS Energy responded with a request for justification. CPS Energy also furnished Energy Transfer with financial information establishing CPS Energy's ability to meet all of its lawful obligations as they become due. Notwithstanding that fact, after learning that CPS Energy was not willing to accede to what amounted to a baseless demand for advance payment, Energy Transfer retaliated by instructing its traders to no longer sell natural gas to CPS Energy. The natural gas Energy Transfer refused to continue selling to CPS Energy was a source of supply for CPS Energy's electric generation facilities serving its customer base.

53. When that did not work, Energy Transfer increased the frequency and urgency of its demands for adequate assurance. As a result, CPS Energy filed this suit and obtained a temporary restraining order (TRO) that temporarily prohibited the ET Pipelines from declaring CPS Energy in default of its gas purchase contracts based on CPS Energy's lawful exercise of its contractual right to withhold payment of disputed portions of their natural gas charges. With the time provided by the TRO, CPS Energy was able to mitigate the risk that the ET Pipelines' unilateral declaration of default would endanger its compliance (or, more accurately, its perceived compliance) with certain "cross-default" covenants in its various credit agreements and, thus, its access to the essential financial liquidity that those credit agreements provide. As a result, when the ET Pipelines later unilaterally declared the Court's TRO void and took the vary actions the TRO prohibited, CPS Energy was able to avoid the intended harm.

54. But Energy Transfer's and the ET Pipelines' attempts at retaliation did not stop there. Despite their status as gas utilities under the Texas Utilities Code and their corresponding duties not to discriminate in the services they provide or rates they charge, the ET Pipelines refused to renew the transportation and storage agreements that CPS Energy had in place with them (which expired on June 30) or otherwise offer transportation and storage services to CPS Energy. And Energy Transfer made no attempt to hide their retaliatory motives: Energy Transfer's representatives stated that the ET Pipelines would not offer any services to CPS Energy unless and until it agreed to drop its dispute over the $256 million Unlawful Price Amounts.

55. CPS Energy will not be intimated by Energy Transfer's sharp practices. Leveraging an unprecedented disaster to wrest enormous profits from ordinary Texans is wrong and, fortunately, unlawful. And CPS Energy, for its customers, will have its day in court.

CAUSE OF ACTION—DECLARATORY JUDGMENT

56. CPS Energy hereby repeats and re-alleges each of the preceding paragraphs set forth herein.

57. CPS Energy seeks a declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code.

58. CPS Energy seeks a declaratory judgment that (a) the amounts charged to CPS Energy by ET Pipelines under their NAESB Contracts and related Confirms in excess of the Unlawful Price Threshold (*i.e.*, the Unlawful Price Amounts) are unenforceable because they are unconscionable and/or violate Texas public policy, (b) CPS Energy has no liability to Defendants under its NAESB Contracts and related Confirms to pay Defendants the Unlawful Price Amounts, and (c) CPS Energy's withholding payment of the Unlawful Price Amounts as permitted by, and in accordance with, the NAESB Dispute Resolution Procedures, is in compliance with said contracts.

59. Attorney Fees. CPS Energy has engaged counsel. 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 Section 37.009 of the Texas Civil Practice and Remedies Code.

CONDITIONS PRECEDENT

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

CONCLUSION AND PRAYER

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

a. Declaratory judgment;

b. Court costs;

c. Reasonable attorneys' fees; and

d. All other relief to which CPS Energy is entitled.

Dated: September 22, 2021

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CERTIFICATE OF SERVICE

I certify that on September 22, 2021, I served a copy of the foregoing on the parties through electronic service.

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