

MDL Master File No. 2022 CI 02879

	§	In the District Court of
	§	
In Re CPS Energy Gas Supplier Litigation	§	Bexar County, Texas
	§	
	§	407th Judicial District

Cause No. 2021 CI 05138

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

**CPS ENERGY’S RESPONSE IN OPPOSITION TO ENERGY
TRANSFER’S MOTION FOR SUMMARY JUDGMENT**

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The City of San Antonio, acting by and through its City Public Service Board (“CPS Energy”), files this response in opposition to the motion for summary judgment filed by defendants Houston Pipe Line Company, L.P. (“HPL”) and Oasis Pipeline, LP’s (“Oasis” and, together with HPL, “the ET Pipelines”) on their breach of contract claim.

INTRODUCTION

During the February 2021 winter storm disaster, temperatures plunged to the single digits, over four million Texans lost power, and Texas’s electrical grid came within four minutes and thirty-seven seconds of complete collapse. As the municipally owned gas and electric utility for millions of people 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. In the midst of this catastrophic disaster, the ET Pipelines and their parent company, Energy Transfer, saw an opportunity to exploit an emergency for profit.

At the height of the state-declared disaster and with full knowledge that CPS Energy had no option but to buy as much gas as possible, the ET Pipelines demanded that CPS Energy pay prices for natural gas that were as much as 15,000% higher than prevailing prices before the winter 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. While regular Texans were facing the disaster’s enormous human and economic toll, Energy Transfer excitedly bragged to its investors about its ability to “benefit” from “strong commodity prices.” Ultimately, Energy Transfer would reap a \$2.4 billion windfall from the winter storm, much of which it attributed to gas sales.

This lawsuit is about whether the prices the ET Pipelines charged CPS Energy for natural gas during a declared disaster are unconscionable and/or excessive or exorbitant in violation of public policy. 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 they demand are therefore unenforceable.

The prices the ET Pipelines charged CPS Energy during a state-declared disaster are shocking, and as every witness in this case testified, unprecedented. The prices alone are sufficient to raise a fact issue with respect to CPS Energy’s unconscionability and public policy defenses. The circumstances surrounding each transaction, including CPS Energy’s lack of alternatives, inability to bargain, and the backdrop of the statewide disaster only further emphasize the outrageousness of Energy Transfer’s blatant price gouging. The Court should deny the ET Pipelines’ motion for summary judgment.

SUMMARY JUDGMENT EVIDENCE

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A.	Declaration of David Shank
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A-37.	Excerpts from the deposition of CPS Energy Corporate Representative, Buck Guinn
A-38.	Platts Methodology and Specifics Guide, CPSE-MDL_000035497
A-39.	<i>Gas Daily</i> , Feb. 5, 2021, CPSE-MDL_000020017
A-40.	HPL Submission to Platts, Feb. 4, 2021, ETP_000027599
A-41.	Energy Transfer LP, Annual Report (Form 10-K), Feb, 12, 2021
A-42.	Excerpts from the deposition of Mario Rivera
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A-77.	Energy Transfer LP, Quarterly Report (Form 10-Q) (May 7, 2021)
A-78.	Energy Transfer LP, Quarterly Report (Form 10-Q) (May 11, 2020)
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A-144.	A. Irving et al. Text Thread, CPSE-MDL_000010372
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B.	Bruce Bordovsky Affidavit
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C.	Amber Irving Affidavit
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D.	Patrick Bergin Affidavit

FACTUAL BACKGROUND

A. Who is CPS Energy?

CPS Energy is the nation's largest municipally owned natural gas and electric utility company and has been serving San Antonio, Texas and the surrounding area for 164 years. Ex. A-1, CPSE-MDL_000008619, at 8623. CPS Energy supplies power to more than 930,000 electric customers and also supplies natural gas directly to over 381,000 natural gas customers in Bexar County and portions of seven adjacent counties. Ex. A-2, Bordovsky Dep. 356:5–357:18; Ex. A-3, Eugster Dep. 122:14–21. In addition to residents living in the greater San Antonio area, CPS Energy's customers include hospitals, nursing homes, police and fire stations and military bases. Ex. A-4, Barham Dep. 88:19-91:17; Ex. A-5 Perryman Dep. 42:25-43:6.

CPS Energy is the sole entity responsible for providing electric and natural gas services to all the residents and businesses within its service area. Ex. A-2, Bordovsky Dep. 356:5-357:18. CPS Energy is neither a natural gas producer nor a natural gas marketer. Ex. A-6, Skaer Dep. 40:23. As a municipal utility, CPS Energy exists and operates solely for the benefit of the residents in its service area. Ex. A-7, Kuchinsky Dep. 12:9–18, 44:22–23, 95:8–11.

CPS Energy purchases natural gas to warm and power its customers' homes either by (1) distributing natural gas directly to its natural gas customers, or (2) using natural gas to generate electricity for its electric customers. Ex. A-6, Skaer Dep. 108:18–109:5, 109:16–20. Natural gas is the largest

single source of CPS Energy’s generating capacity for electricity generation. *See* <https://www.cpsenergy.com/en/about-us/powering-our-communitys-future.html>. Demand for electric power and natural gas distribution can vary widely day-to-day, and CPS Energy’s natural gas needs can therefore vary considerably even during relatively normal conditions. Ex. A-6. Skaer Dep. 109:6–15. Further, and importantly, CPS Energy is not structured to sell excess natural gas back to the market. Ex. A-8. Bayazitoglu Dep. 93:12-19; Ex. A-6, Skaer Dep. 40:22–23.

The costs CPS Energy incurs in purchasing natural gas for the benefit of its customers are passed on to, and ultimately paid by, those customers. Ex. A-7, Kuchinsky Dep. 44:16–45:18. CPS Energy’s customers are particularly cost sensitive. In 2022, approximately 18% of San Antonio residents were living in poverty compared to 14.2% of Texans and 12.8% of Americans. *See* City of San Antonio, Dep’t of Hum. Serv., *Status of Poverty in San Antonio 2022*, at 3 (2022), available at <https://www.sanantonio.gov/Portals/0/Files/HumanServices/Poverty/2022PovertyReport.pdf>. CPS Energy is committed to, and proud of, its long and storied history of providing low-cost energy to its residents. *See Who We Are*, CPS Energy, <https://www.cpsenergy.com/en/about-us/who-we-are.html> (last visited Feb. 16, 2024). With the average monthly income for single households in San Antonio totaling approximately \$1,122 in 2022, every dollar counts. *See* City of San Antonio, Dep’t of Hum. Serv., *Status of Poverty in San Antonio 2022*, at 3 (2022), available at <https://www.sanantonio.gov/Portals/0/Files/HumanServices/Poverty/2022PovertyReport.pdf>.

B. How CPS Energy Obtains Natural Gas

1. NAESB Base Contracts and Specific Transaction Confirmations

To serve its customers, CPS Energy typically purchases natural gas from a number of different suppliers with which CPS Energy has entered into standard form contracts produced by the North American Energy Standards Board (“**NAESB Contract**”). *See* Ex. A-9, CPSE-HPL NAESB Contract (ETP_000000689); Ex. A-10 CPSE-Oasis NAESB Contract (ETP_000000020 &

ETP_000000036)¹. The NAESB Contracts provide the general terms and legal framework for the relationship between CPS Energy and its suppliers, but they do not effectuate any actual gas transactions. The parties later effectuate specific gas transactions and the terms thereof—including price, quantity, delivery point, and period of delivery—orally or via electronic communication, and those terms are then memorialized in a Transaction Confirmation. *See* Ex. A-2, Bordovsky Dep. 28:10–24; Ex. A-9, CPSE-HPL NAESB § 1.2; Ex. A-10, CPSE-Oasis NAESB § 1.2; Ex. A-6, Skaer Dep., at 78:1–79:15. Terms of transactions therefore vary considerably from transaction to transaction.

2. Transaction Date and Delivery Period: Monthly Baseload vs. Daily Spot

When it comes to transaction and delivery timing, CPS Energy enters into primarily two types of transactions: monthly baseload and daily spot transactions. In a monthly baseload transaction, CPS Energy buys a set quantity of gas per day at a particular delivery point for every day of a month. Ex. A-2, Bordovsky Dep. 362:11–23; Ex. A-11, Irving Dep. 15:12–21. CPS Energy enters into these baseload transactions near the end of the month preceding the delivery month. Ex. A-2, Bordovsky Dep. 362:11–23; Ex. A-11, Irving Dep. 15:12–21.

CPS Energy also purchases gas through the daily “spot market.” In a daily spot transaction, the buyer purchases gas for delivery on a single day or a few consecutive days. Ex. A-2, Bordovsky Dep. 100:6–20; Ex. A-11, Irving Dep. 15:12–21. The most common spot transactions are “next-day” transactions in which the buyer purchases gas for delivery on the day following the date of the transaction. Ex. A-2, Bordovsky Dep. 100:6–20. For example, when parties enter into a next-day transaction on a Monday, they are transacting for gas to be delivered on Tuesday. Because there is limited-to-no trading activity on Saturdays and Sundays, next-day deals entered into on Friday are generally for gas to be delivered on Saturday, Sunday, and Monday. [REDACTED] And when Monday is a legal holiday—as it was during the long-weekend of Winter Storm Uri—those “next-day” weekend transactions will generally extend through Tuesday. [REDACTED]

¹ CPS Energy’s NAESB Contract with Oasis was originally with a company called Texas Energy Transfer Company (TETC). TETC later assigned the NAESB Contract to Oasis. *See* Ex. A-12, Notice of Assignment of NAESB (CPSE-MDL_000028613).

Though the majority of spot transactions are next-day transactions, participants in the spot market can also enter into same-day transactions, in which, as the name suggests, parties transact for gas that is to be delivered on the same day as the transaction. Ex. A-2, Bordovsky Dep. 100:17–20.

3. Means of Transacting: Direct Deals vs. ICE Trading Platform

There are two means of consummating spot market transactions. First, in what are sometimes referred to as “direct” or over-the-counter (“OTC”) transactions, two counterparties communicate directly—usually via instant-message, text, or phone—to enter into a transaction. *See* [REDACTED]. Because these transactions are conducted solely between the parties, these transactions are generally not visible to the rest of the market while they are happening. *See id.* [REDACTED]

The other common method for trading physical natural gas on the spot market is the electronic Intercontinental Exchange (“ICE”) platform. *See* [REDACTED]. Potential buyers post “bids” to buy and sellers post “offers” to sell certain volumes of natural gas delivered to certain popular delivery points known as “hubs” at specified prices. [REDACTED] Although all market participants on the ICE platform can see all posted bids, offers, and closed transactions for the day, parties can only accept the offers or bids of counterparties with which they have an enabling agreement in place, such as a NAESB contract. [REDACTED] Notably, however, the identity of the parties who have posted bids and offers is unknown to other market participants; only after a transaction closes will the parties to that transaction know who they have just transacted with. *See* [REDACTED]

4. Sale Points and Transportation: Hubs vs. Delivered Gas

Every natural gas transaction will specify the point where the gas is tendered from the seller to the buyer. The NAESB Contracts call this the Delivery Point, *see* Ex. A-9, CPSE-HPL NAESB

² Confusingly, the instant messenger application that most gas traders now use to conduct direct deals is owned by ICE and is called ICE Chat. *See* [REDACTED]. But this instant messaging application is not to be confused with the separate ICE trading platform; direct deals over ICE Chat are distinct from the trading that happens over the ICE platform.

Contract §§ 4.1, 8.1, but for clarity CPS Energy refers to this as the “sale point” in this response. CPS Energy purchases gas at two basic types of sale points: (1) commonly used trading points known as “hubs,” and (2) the gates or inlets of CPS Energy’s own natural gas system or power plants. *See* [REDACTED]

Hubs. Hubs are usually locations where two or more pipelines intersect. *See* [REDACTED] [REDACTED] These hubs include Katy Oasis (a point on the Oasis pipeline in Katy, Texas), HSC HPL Pool (several pooled interconnection points on HPL in the Houston Ship Channel region), Enterprise South Texas Map Point (a point on one of Enterprise’s pipelines in South Texas), and Waha Hub (several delivery points in West [REDACTED] Ex. A-16, ICE, North American Physical Gas Hubs. Parties can transact for gas at hubs either directly or via the ICE platform. [REDACTED] Because natural gas is usually neither produced nor ultimately used by purchasers at trading hubs, most sellers and buyers must enter into transportation contracts with pipelines to ship natural gas to and from the sale point. *See* [REDACTED]

[REDACTED] The sale point where the buyer takes possession of the gas is known as the “receipt point” under a transportation contract, and the point where that buyer transports the gas to is known as the “delivery point.” *See, e.g.*, Ex. A-17, CPSE-HPL Firm Intrastate Transportation Agreement §§ 2.1, 2.2 (CPSE-MDL_000026189).

During the relevant time period, CPS Energy had transportation contracts in place with three different pipeline companies: Energy Transfer (via HPL and Oasis), Enterprise Texas Pipeline LLC, and [REDACTED] *See* [REDACTED]

[REDACTED] Ex. A-25- A-30; CPSE-Enterprise Texas Pipeline Transport Agreements; [REDACTED] [REDACTED] CPS Energy’s transportation contracts with each of these companies focused on receipt points in different geographic areas. Specifically, CPS Energy’s transportation agreements with HPL and Oasis allowed CPS Energy to transport gas primarily from the Katy and HSC hubs in southeast Texas, with small volumes from South Texas as well. *See*

[REDACTED]

[REDACTED] The agreements with Enterprise Texas Pipeline allowed CPS Energy to transport gas from hubs in West Texas (such as Waha) and South Texas (such as South Texas Map). *See* Exs. A-25 – A-30, CPSE-Enterprise Transport Agreements. And the agreement with [REDACTED] permitted CPS Energy to transport gas from [REDACTED] in South Texas. *See* [REDACTED]

The transportation agreements also varied with respect to the delivery points on CPS Energy's systems. CPS Energy's gas distribution system and most of its power plants receive gas through three primary delivery points: (1) North Gate, located in Comal County at the inlet to CPS Energy's North Pipeline and provides gas exclusively for distribution purposes; (2) South Gate, located in Karnes County at the inlet to CPS Energy's South Pipeline and provides gas for both distribution and generation purposes, and (3) CPS Energy's Pooling Point or Aggregation Point, an amalgamation of a number of different interconnections between CPS Energy's system and Enterprise Texas Pipeline. Ex. B, Bordovsky Aff. ¶ 4. Additionally, CPS Energy owns and operates the Rio Nogales power plant in Guadalupe County, which is separate from CPS Energy's distribution system and other power plants. Ex. A-6, Skaer Dep. 239:20-25. CPS Energy's transportation agreements with Energy Transfer allowed CPS Energy to transport gas to North Gate, South Gate, and to Rio Nogales. [REDACTED]

[REDACTED] Ex. B, Bordovsky Aff. ¶¶ 7–9. The agreements with Enterprise Texas Pipeline permitted CPS Energy to transport gas exclusively to the CPS Pooling Point. Exs. A-25 – A-30, CPSE-Enterprise Transport Agmts. And the agreements with [REDACTED] permitted CPS Energy to transport gas exclusively to [REDACTED]

Importantly, the transportation agreements with each pipeline company imposed limits on the overall volumes that CPS Energy could transport per day, as well as daily volumetric limits on specific receipt and delivery points. For example, the transportation agreements with Energy Transfer imposed a maximum daily quantity of [REDACTED] across all receipt and delivery points. [REDACTED]

[REDACTED] The Katy and HSC receipt points were limited to

██████████ per day, the North Gate delivery point was limited to ██████████ per day, the Rio Nogales delivery point was limited to ██████████ per day, and the South Gate delivery point was limited to ██████████ per day. ██████████ Similarly, although one of the intrastate transport agreements with Enterprise Texas Pipeline permitted CPS Energy to transport a maximum of 85,000 MMBtu per day, intrastate receipts at the West Texas Map sale point were limited to 30,000 MMBtu per day. Ex. A-33, CPSE-Enterprise West Texas Intrastate Transport (CPSE-MDL_000001517).

During the relevant period, CPS Energy also had natural gas storage agreements with Enterprise and HPL. Ex. A-34, CPSE-MDL_000028821 (Master Storage Agreement). Those storage agreements worked in conjunction with the transportation agreements CPS Energy had with Enterprise and Energy Transfer, giving CPS Energy operational flexibility by automatically correcting any daily transportation imbalances up to certain daily limits. Ex. A-35, Guinn Dep. 84:16-85:4.

Delivered Gas. In addition to buying gas at hubs and then using transportation contracts to transport it to CPS Energy's delivery points, CPS Energy can also purchase gas sold at one of its actual delivery points—such as North Gate, South Gate, or Rio Nogales—thereby eliminating the need to transport that gas. Ex. A-2, Bordovsky Dep. 367:23–368:12; ██████████

██████████ But CPS Energy's delivery points are not available sale points for most gas suppliers; instead, only the pipelines that interconnect with those delivery points can offer delivered gas there. Ex. A-2, B. Bordovsky Dep. 367:23–368:12; Ex. B, Bordovsky Aff. ¶ 7. This is because the pipelines generally do not offer other suppliers transportation contracts that permit delivery to CPS Energy's delivery points. *Id.* Thus, if CPS Energy needed to purchase delivered gas at Northgate, its only option was to purchase it from Energy Transfer. Ex. A-6, Skaer Dep. 240:18-241:1; Ex. A-2, Bordovsky Aff. ¶ 11. Similarly, if CPS Energy needed to purchase delivered gas at Rio Nogales, its only possible options were to purchase from Energy Transfer or DCP Midstream (whose Guadalupe pipeline also connected to Rio Nogales). Ex. A-37, CPS Energy Corp. Rep. Dep. 276:16-277:8. And if CPS Energy needed to purchase delivered gas at Southgate in Karnes County, its only possible options were to purchase it from Energy Transfer or Targa. Ex. B,

Bordovsky Aff. ¶ 9. Of course, if any one of these pipelines could not sell CPS Energy delivered gas on a particular day due to limited supply or operational problems, the options narrowed even further.

5. Transaction Price: Fixed Price vs. Index-Based Price

Finally, the last necessary term of any natural gas transaction is price. Natural gas may be traded, whether on or off the ICE platform, using a fixed price or a price tied to a published index.

████████████████████ A fixed-price transaction specifies an exact price per MMBtu that the supplier will charge for the natural gas delivered. ██████ For example, a gas transaction priced at \$2.75 per MMBtu is a fixed-price transaction.

In an index-based transaction, however, the parties agree not to a fixed price but to a price tied to a specified natural gas index published by a third party, usually S&P Platts. ██████████

████████████████████ Ex. A-6, Skaer Dep. 32:20–33:13. Each of the various indexes that Platts publishes is simply the volume-weighted average price of the fixed-price transactions at delivery points within specific geographic areas in a particular time period that are reported to Platts. *See* ██████

████████████████████ Ex. A-38 Platts Methodology and Specifics Guide (CPSE-MDL_000035497). For example, on every trading day of a month, Platts publishes daily indexes for more than 60 geographic areas. *See, e.g.*, Ex. A-39, *Gas Daily*, Feb. 5, 2021 (CPSE-MDL_000020017).³ One of those indexes is for the Houston Ship Channel (HSC) area an “industrial area extending from the east side of Houston to Galveston Bay and northeastward to the Port Arthur-Beaumont area.” Ex. A-38 Platts Methodology and Specifics Guide, at 12. Thus, the Gas Daily index for HSC for flow date February 5, 2021, was the volume-weighted average of all fixed-

³ Platts also publishes indexes of monthly gas transactions, such as baseload transactions. Those indexes are commonly referred to as first-of-month or “Inside FERC” indexes. During the relevant time period, first-of-month indexes were calculated as the volume-weighted average of fixed-priced, monthly transactions consummated during the last five days immediately preceding the first of each month (otherwise known as “bid week”). *See* Ex. A-38 (CPSE-MDL_000035497 – Platts Methodology and Specifics Guide), at 5, 43.

price deals for gas to be delivered that day, as reported to Platts. *See id.*, Ex. A-39, *Gas Daily*, Feb. 5, 2021, at 2.

Platts obtains information on the fixed-price transactions that underlie its indexes from two sources. First, ICE reports all fixed-price deals done on the ICE platform to Platts in the early afternoon of every trading day, after next-day trading has largely concluded. Ex. A-38, Platts Methodology and Specifics Guide at 8. Second, many market participants, including Energy Transfer, also report their direct fixed-price deals to Platts in the afternoon of every trading day. *Id.*; [REDACTED] [REDACTED] Platts then publishes the Gas Daily index at the end of the trading day, generally between 4:30 PM and 5:00 PM. Ex. A-38, Platts Methodology and Specifics Guide at 8. So, returning to the example above, in the afternoon of February 4, 2021, after most next-day trading for February 5 gas was done, ICE and market participants reported all fixed-price trades to Platts. *See* [REDACTED] [REDACTED] Platts then identified the trades that fall into its definition of the HSC area (excluding trades between affiliated entities), calculated the volume-weighted average price of those trades, and then published that as the HSC Gas Daily index for February 5, 2021. *See* Ex. A-39, *Gas Daily*, Feb. 5, 2021.

Because Platts does not publish daily indexes until after most next-day trading has concluded, most trades with index-based prices are consummated before the parties definitively know what the published index will be. *See* [REDACTED] However, because a large portion of next-day fixed-price trading occurs over the ICE platform, gas traders can approximate where a particular index will be by reviewing the fixed-price trading in real-time on the ICE platform. [REDACTED] [REDACTED] Further, when entering into index-price transactions, natural gas suppliers also have the discretion to charge an “adder,” which is an additional per-MMBtu premium that is tacked onto the final invoiced price over and above the settled index price. [REDACTED] For example, a supplier might offer to sell gas at the HSC Gas Daily index plus five cents.

C. Energy Transfer's Outsized Role in the Texas Natural Gas Market

Energy Transfer plays an outsized role in the Texas natural gas market because of its dual role as transporters of natural gas for third parties and sellers of their own natural gas. According to Energy Transfer's website, approximately 30% of the nation's natural gas and crude oil are moved through its more than 125,000 miles of pipelines and other infrastructure nationwide. *See* Energy Transfer Aug. 2023 Investor Fact Sheet, available at <https://www.energytransfer.com/wp-content/uploads/2023/11/ET-IR-Fact-Sheet-8-23.pdf> (last visited Feb. 27, 2024). Among Energy Transfer's many business segments is its intrastate natural gas transportation and storage business in Texas, which in 2021 spanned more than 9,400 miles of natural gas pipelines across multiple interconnected pipeline systems, including but not limited to the ET Pipelines. Ex. A-41, Energy Transfer LP, Annual Report (Form 10-K) 3, 7–8 (Feb. 12, 2021); [REDACTED] The ET Pipelines and Energy Transfer's other intrastate gas pipelines in Texas—such as the ET Fuel System, the ETC Katy Pipeline, and the Old Ocean Pipeline, [REDACTED] are, by statute, “affected with the public interest,” Tex. Util. Code. § 121.051, and engaged in business that is “in its nature and according to the established method of conducting the business...a monopoly” *id.* 121.052(a).

Energy Transfer's intrastate gas pipeline business generates revenue in two primary ways. First, its intrastate pipelines enter into transportation and storage agreements under which third parties—such as other gas sellers as well as end users like CPS Energy—purchase capacity to ship and store their gas using Energy Transfer's intrastate pipelines and storage facilities. [REDACTED] Ex. A-41, Energy Transfer LP, Annual Report (Form 10-K) 3, 87 (Feb. 12, 2021). Historically, the transportation and storage fees from such contracts have made up the largest component of Energy Transfer's earnings in its intrastate segment. *Id.* at 3.

Second, Energy Transfer's intrastate pipelines generate revenues and margin by selling natural gas to third parties such as gas and electric utilities and other end users. *Id.* Energy Transfer's intrastate pipelines acquire the natural gas they sell by purchasing it from [REDACTED] [REDACTED] as well as

by [REDACTED]

[REDACTED]

[REDACTED] See [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For example, as of December 31, 2020, more than 60% of the 47.7 billion cubic feet of gas stored in HPL's Bammel storage facility was gas stored for HPL's own account. Ex. A-41, Energy Transfer LP, Annual Report (Form 10-K) 3 (Feb. 12, 2021).

Energy Transfer's vast interconnected network of intrastate pipelines in Texas, and its dual role as a seller of gas and a provider of transportation services to other market participants, gives it an outsized role in the Texas natural gas market. As transporters of natural gas, Energy Transfer's intrastate pipelines have access to information about the gas supplies and purchases made by other market participants, who are Energy Transfer's competitors and customers when it comes to gas sales. [REDACTED]

Further, as explained above, the intrastate pipelines have an advantage of being able to sell gas at delivery points that other sellers cannot. Ex. A-2, B. Bordovsky Dep. 367:23–368:12; Ex. B_, Bordovsky Aff. ¶ 7.

These advantages, combined with the massive reach of Energy Transfer's combined intrastate system, provide Energy Transfer with enormous influence over the natural gas market in Texas. And Energy Transfer has a history of exploiting that influence to its advantage. For example, at the conclusion of a market manipulation investigation, FERC and the CFTC found that in September 2005—when Hurricane Rita hit Houston—Energy Transfer's intrastate pipelines had a dominant position over the market for natural gas at HSC, such that their fixed-price transactions often comprised more than 80% of all reported trades in the HSC area. Ex. A-43, Order to Show Cause and Notice of Proposed Penalties, Docket. No. IN06-3-002, 120 FERC ¶ 61,086 (July 26, 2007). This allowed Energy Transfer to drive the HSC index in order to benefit sizable index-based positions. *Id.*

Winter Storm Uri would present another opportunity for Energy Transfer to leverage its outsized role in the Texas gas market for its own benefit and the expense of millions of Texans.

D. Winter Storm Uri

In the early part of 2021, CPS Energy went about its gas purchasing activities in the same manner it usually did during the winter months. At the end of January 2021, CPS Energy purchased baseload natural gas for the upcoming month based on the same thorough analysis of historical burn rates and projected weather forecasts. *See* Ex. A-6, K. Skaer Dep., at 259:13-261:17; *see also* Ex. A-2, B. Bordovsky Dep. 362:11–363:13. And in the first week or so of February, CPS Energy bought gas on the spot market as needed to fulfill its varying daily needs. Ex. A-44, CPSE-MDL_000009514.

However, in mid-February 2021, an “unprecedented and historical” winter storm barreled across the state of Texas. *See* February 2021 Historical Winter Storm Event South-Central Texas, Austin/San Antonio Weather Forecast Office, <https://www.weather.gov/media/ewx/wxevents/ewx-20210218.pdf>. What would ultimately become known as “Winter Storm Uri,” which left more than four million Texas households without power, materialized rapidly and quickly became dire. On February 12, 2021, Governor Greg Abbott issued a Declaration of Disaster covering all 254 counties in Texas due to the imminent prolonged freezing temperatures, heavy snow, and freezing rain statewide. Ex. A-45, Feb. 12, 2021 Gov. Abbott Decl., CPSE-MDL_000062050. The express stated purpose of the Governor’s declaration was to “reduce vulnerability of people and communities of this state to damage, injury, and loss of... property resulting from natural or man-made catastrophes[.]” TEX. GOV’T CODE § 418.002(1).

The same day, the Railroad Commission of Texas issued an Emergency Order that it deemed necessary “to protect human needs customers in the State of Texas because of current conditions which threaten [the] health, safety and welfare of those customers.” Ex. A-46, Feb. 12, 2021 RRC Order, ETP_00000162. The Railroad Commission ordered that “the transportation, delivery and/or sale of natural gas in the State of Texas for any other purpose than serving human

needs customers should be curtailed to the extent possible and necessary for the duration of this Emergency Order.” *Id.* As the weather deteriorated, CPS Energy needed to purchase natural gas for its plants to continue operating for its customers, but also to keep the ERCOT grid from collapsing. See https://www.ercot.com/files/docs/2021/03/03/EEA_Tools_One_Pager_Winter_2021_2-13-2021.pdf; Ex. A-47, Albers Dep. 43:17-44:20.

1. CPS Energy purchases gas for the long-weekend.

The first days of Winter Storm Uri fell over a long weekend culminating with President’s Day on Monday, February 16. This meant that spot-market purchases for gas during the long weekend would have to cover CPS Energy’s expected load for four days: Saturday through Tuesday. Ex. A-44, CPSE-MDL_000009514 at 9517. As weather forecasts began to solidify in the days leading up to February 12, CPS Energy began attempting to secure supply for the long weekend earlier than usual. On February 9, CPS Energy asked Energy Transfer and other suppliers about securing supply for the long weekend ahead, but it declined. *Id.* at 9514. On February 11, CPS Energy again asked Energy Transfer for gas for the long weekend, but it again declined. *Id.* at 9516.

When February 12 arrived, CPS Energy worked feverishly to secure the supply it needed for the bitter cold that was coming. When the dust settled on February 12, CPS Energy had contracted for 740,900 MMBtu of gas per day for the long weekend, amounting to a four-day total of more than 2.96 million MMBtu. 190,000 MMBtu per day (amounting to 25.6%) of the weekend gas CPS Energy secured was from the ET Pipelines because of their outsize role in the Texas gas market in general, and for CPS Energy in particular. Ex. A-44, CPSE-MDL_000009514 at 9517; Ex. A-48_, ETP_000000166; Ex. A-49, ETP_000000167; Ex. A-50, ETP_000000168; Ex. A-51, ETP_000000169; Ex. A-52, ETP_000000170; Ex. A-53, ETP_000000171; Ex. A-54, ETP_000000172. The vast majority of this was for delivered gas at North Gate, South Gate, and Rio Nogales. Ex. A-44, CPSE-MDL_000009514 at 9517. For the necessary natural gas that Energy Transfer sold to CPS Energy during a declared disaster, Energy Transfer demanded the highest prices CPS Energy had ever seen: \$225 per MMBtu for the delivered gas, and \$150–\$180 for gas pur-

chased from HPL at Katy and HSC-HPL Pool. *Id.*; Ex. A-48, ETP_000000166; Ex. A-49, ETP_000000167; Ex. A-50, ETP_000000168; Ex. A-51, ETP_000000169. But CPS Energy had no other options to secure the gas offered by Energy Transfer, and so it reluctantly agreed to the prices. *See infra* Part A.1.ii.

2. The situation worsens over and after the long weekend.

As the weekend progressed, the situation grew more dire. Late in the evening of February 14, CPS Energy lost two vital sources of supply that only strengthened Energy Transfer's hand. First, at around 11:00 PM, [REDACTED] 50,000 MMBtu per day sale of delivered gas at Rio Nogales stopped flowing. [REDACTED] This left Energy Transfer as the only source for delivered gas at Rio Nogales. Ex. B, Bordovsky Aff. ¶ 8. Second, late on February 14, suppliers who had sold CPS Energy gas at the tailgate to [REDACTED] [REDACTED] began notifying CPS Energy that their production was getting shut in. [REDACTED] [REDACTED]. Eventually, the [REDACTED] would go down altogether, leaving Energy Transfer as the only source of delivered gas at South Gate as well. [REDACTED].

As CPS Energy was losing critical gas supply, the ERCOT power grid was approaching disaster due to sky-high demand and loss of generation across the state. As a result, early in the morning on February 15, ERCOT ordered utilities across the state to begin “load shed” or blackouts for parts of their service areas. Ex. A-51, CPSE-MDL_000010339, at 10340-41. Later that day, well after CPS Energy had purchased its gas for the long weekend, the Texas Public Utility Commission (“PUCT”) administratively set the price of electricity at the system-wide offer cap of \$9,000 per MWh. Ex. A-58, Feb. 15, 2021 PUCT Order. The PUCT did not state how long electricity prices would remain at the system-wide offer cap. *Id.*

As temperatures remained below freezing, CPS Energy began experiencing even more significant cuts to the natural gas supply it had previously secured—including significant cuts from Enterprise. *See* [REDACTED]; Ex. C, Irving Aff. ¶ 3 & Ex. A. By the end of Monday,

February 15, CPS Energy received only 42% of the natural gas it contracted for from all suppliers. *Id.* The cuts continued on Tuesday, February 16. Of the 740,900 MMBtu that CPS Energy originally contracted for on that day, only 364,908 was delivered. *Id.*; Ex. C, Irving Aff. ¶ 3 & Ex. A.

When regular trading resumed on February 16, there was very little gas to be had in the next-day market. CPS Energy attempted to purchase natural gas from multiple suppliers, including [REDACTED] [REDACTED] but was repeatedly told that these suppliers had no gas to sell. [REDACTED]

[REDACTED] For the few suppliers other than Energy Transfer that had gas to sell on Tuesday, February 16, volumes were generally low. [REDACTED]

[REDACTED] Energy Transfer remained the only option for delivered gas at North Gate, South Gate, and Rio Nogales. Ultimately, of the 465,294 MMBtu of gas that CPS Energy contracted for delivery on February 17, 205,000 MMBtu (44%) came from Energy Transfer. Ex. C, Irving Aff. ¶ 3 & Ex. A. Once again, Energy Transfer demanded astronomical prices: between \$400 and \$500 per MMBtu, higher than any known price for natural gas in Texas. Ex. A-44, CPSE-MDL_000009514 at 9521-9523; Ex. A-68, ETP_000000196, Ex. A-69, ETP_000000197; Ex. A-70, ETP_000000229; Ex. A-71, ETP_000000230.

Energy Transfer's price gouging continued through February 18, 2021, when CPS Energy purchased gas for February 19. Ex. A-72, ETP_000000234; Ex. A-74, ETP_000000233. When temperatures finally began to fall and the snow began to melt, Energy Transfer's sales to CPS Energy over seven days totaled more than **\$317 million**. Ex. A-81, Oasis February 2021 Invoice, ETP_000025683-25684; Ex. A-177, HPL Feb. 2021 Invoice, ETP_0000629.

E. Energy Transfer's Profits

Energy Transfer began celebrating its expected windfall even before the storm ended. On February 17, 2024, during the heart of the storm, Energy Transfer's co-CEO bragged to investors on a conference call that Energy Transfer would "benefit" from what he described as the "strong commodity prices" Energy Transfer was demanding. Ex. A-74, *Fossil Fuel Executives Gloat About Profits*, PR From Winter Storm Crisis, THE INTERCEPT, Feb. 23, 2021. That was putting it mildly. When McCrea made that statement, Energy Transfer's intrastate team had already specifically informed him that Energy Transfer stood to make close to [REDACTED] in profit from gas sales during the long weekend alone. See [REDACTED]

When all was said and done, Energy Transfer announced that 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. Ex. A-76, Energy Transfer LP, Current Report (Form 8-K) Ex. 99.1, at 2 (May 6, 2021). In particular, for the first quarter of 2021, Energy Transfer's intrastate segment reported \$1.07 billion in margin from natural gas sales alone, as well as \$1.55 billion in realized storage margin. Ex. A-77, Energy Transfer LP, Quarterly Report (Form 10-Q) 40 (May 7, 2021). By comparison, Energy Transfer reported just \$88 million in such margin for the first quarter of 2020, Ex. A-78, Energy Transfer LP, Quarterly Report (Form 10-Q) 42 (May 11, 2020), and \$317 million for the entire year of 2020, Ex. A-41, Energy Transfer LP, Annual Report (Form 10-K) 87 (Feb. 12, 2021). In other words, Energy Transfer extracted more than three years' worth of intrastate gas-sales margin in just a matter of days.

F. Energy Transfer's Attempt to Preemptively Collect

Energy Transfer knew the prices it had charged CPS Energy during the storm were problematic. In an email to Energy Transfer's Vice President of U.S. Pipelines, Beth Hickey, Brian Riley

[REDACTED]

[REDACTED]

That is why just days after the snow finally melted, Energy Transfer sought to quickly collect on its enormous profits and demanded 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. Ex. A-80, ET Demand for Adequate Assurance, ETP_000000252. Neither HPL nor Oasis had submitted their invoices to CPS Energy for February 2021 gas deliveries and would not do so until mid-March. Ex. A-81, Oasis February 2021 Invoice, ETP_000025683-25684; Ex. A-177, HPL Feb. 2021 Invoice, ETP_0000629. Payment of the invoices was not due until March 26, more than a month later. But Energy Transfer was demanding early payment of the yet-to-be sent invoices, knowing full well how problematic those exorbitant prices were. Ex. A-82, J. Castrejana Email to O. Flores, ETP_000000579; [REDACTED]

Following receipt of Energy Transfer's February 23 demand for adequate assurance, CPS Energy responded with a request for justification. Ex. A--83, J. Kuo Email to J. Castrejana, ETP_000000280 at 280. Under the parties' NAESB agreement, a party may only demand adequate assurance if it has "reasonable grounds for insecurity." Ex. A-9, HPL-CPSE NAESB, ETP_000000689 at ETP_000000696. The only "grounds" Energy Transfer cited in its demand for adequate assurance to CPS Energy was the "unprecedented weather event" and "the price of natural gas." Ex. A-80, ET Demand for Adequate Assurance, ETP_000000252. In response to Energy Transfer's baseless demand, CPS Energy furnished Energy Transfer with financial information establishing CPS Energy's ability to meet all of its lawful obligations as they became due. Ex. A-83, J. Kuo Email to J. Castrejana, ETP_000000280 at 280. Six days later, without any additional conversation with CPS Energy, Energy Transfer instructed its natural gas traders to stop selling natural gas to CPS Energy. [REDACTED] When CPS Energy did not immediately accede to its baseless demand for early payment, Energy Transfer increased the frequency and urgency of its demands for adequate assurance, eager to accelerate collection of the outrageous prices it had charged CPS Energy.

G. The Disputed Amounts and this Lawsuit

CPS Energy invoked Section 7.4 of the parties' NAESB agreement, which gave CPS Energy the right to dispute the amount of an invoice "or any part thereof":

If 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. In the event the parties are unable to resolve such dispute, either party may pursue any remedy available at law or in equity to enforce its rights pursuant to this Section.

Ex. A-9, HPL-CPSE NAESB, ETP_000000689 at ETP_000000696.

To dispute a portion of an invoice, CPS Energy had to first determine what amount it “concede[d] to be correct.” *Id.* To make that determination, CPS Energy hired an econometrician, Dr. Ray Perryman, who performed an economic analysis showing the upper bound of an appropriate price had the natural gas markets been functioning appropriately, which he determined to be \$38.83/MMBtu. That amount ultimately became the conceded price under Section 7.4 of the NAESB. CPS Energy provided “supporting documentation” in the form of a spreadsheet showing the excessive amounts charged by Energy Transfer along with the conceded amount paid by CPS Energy. *See* CPS Energy’s 1st Am. Pet., Ex. F. Pursuant to that calculation, CPS Energy then paid Energy Transfer more than \$46 million for the gas the ET Pipelines delivered during the disaster, which reflects a 1,000% increase from the prices prevailing just days earlier.

Energy Transfer’s baseless demand for adequate assurance made it clear that it had no intention of abiding by the dispute resolution procedures in the parties’ NAESB agreement. Concerned that Energy Transfer would use CPS Energy’s refusal to cede to its baseless demands for adequate assurance as an attempt to manufacture grounds to declare an Event of Default under the NAESB Contracts to use as further leverage against CPS Energy, CPS Energy sought judicial intervention, by invoking its rights under Section 7.4 of the NAESB and filing suit.

After three years of litigation and more than 35 depositions, Energy Transfer now seeks to evade a trial and obtain summary judgment based on invented bright-line rules at odds with the fact-intensive inquiry the unconscionability doctrine requires. Myriad fact disputes pervade that fact-intensive inquiry and make resolution of this case on summary judgment improper.

LEGAL STANDARD

Pursuant to Rule 166a of the Texas Rules of Civil Procedure, traditional summary judgment is proper when the movant demonstrates that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). In deciding whether there is a disputed material fact precluding summary judgment, courts will take evidence favorable to the non-movant as true. *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and all doubts must be resolved in the non-movant’s favor. *Id.*

ARGUMENT & AUTHORITIES

Freedom of contract is a bedrock principle of Texas contract law, but it is not and has never been a limitless or singular principle in the law. To the contrary, the law of contracts—in Texas and elsewhere—has always recognized countervailing principles that demand exceptions to the general enforceability of agreements. Two of those exceptions apply here and render unenforceable the prices Energy Transfer demanded for critical natural gas during Winter Storm Uri. First, under the long-standing doctrine of unconscionability, grossly unfair bargains will not be enforced. Unconscionability requires a deeply fact-intensive analysis of the circumstances surrounding the agreement in question, in light of several factors. Energy Transfer asks the Court to chisel a CPS Energy shaped hole into unconscionability by adopting multiple limitations to the doctrine, but none of those supposed limitations find any basis in the law. Under the correct analysis, the evidence here shows, at the very least, that genuine issues of material fact exist as to whether the prices Energy Transfer demanded during Winter Storm Uri are unconscionable. And it is therefore up to the factfinder to weigh that evidence and resolve those disputed issues.

Second, independent of the unconscionability doctrine, Texas law has long refused to enforce contracts that violate Texas public policy. And Texas has for decades had a public policy against taking advantage of a declared disaster by demanding excessive or exorbitant prices for necessities. Unable to contest the evidence showing that it did exactly that during Winter Storm Uri, Energy Transfer focuses its efforts on arguing that there is no such public policy in Texas, or that it

is limited to a single cause of action under the DTPA. As with its attempt to erode the unconscionability doctrine, Energy Transfer’s attempt to limit that public policy to a single cause of action under the DTPA misunderstands the law.

A. Energy Transfer’s prices are unconscionable and, thus, unenforceable.

“Contracts offending the conscience are ‘an exception to the freedom that generally pervades contract law.’” *Muzquiz v. Para Todos, Inc.*, 624 S.W.3d 263, 275 (Tex. App.—El Paso 2021, pet. denied) (quoting *Venture Cotton Co-op. v. Freeman*, 435 S.W.3d 222, 228 (Tex. 2014)). The “notion that parties are free to negotiate their own bargains conflicts with the equally compelling notion that grossly unfair bargains should not be enforced.” *Venture Cotton Co-op.*, 435 S.W.3d at 228. “Unconscionable bargains are therefore an exception to the freedom that generally pervades contract law” and have long been unenforceable in Texas. *Id.* (“[T]he [unconscionability] defense has a long history.”); see also *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.”). Despite its long history, unconscionability is “not easily defined.” *Venture Cotton Co-op.*, 435 S.W.3d at 228. “The term defies a precise legal definition because “it is not a concept, but a determination to be made in light of a variety of factors not unifiable into a formula.” *Id.*

Article 2 of the Uniform Commercial Code (“UCC”)—which governs certain sales of goods in most states, including Texas—incorporates the doctrine of unconscionability and is “intended to allow the court to pass directly on the unconscionability of the contract or a particular clause therein and to make a conclusion of law as to its unconscionability.” TEX. BUS. & COM. CODE § 2.302 cmt 1. “A contract for the sale of oil or natural gas is a contract for the sale of goods under the UCC” and thus applies to this case. *Aquila Sw. Pipeline, Inc. v. Harmony Expl., Inc.*, 48 S.W.3d 225, 234 (Tex. App.—San Antonio, 2001, pet. denied). “[S]ection 2.302 of the Business and Commerce Code does not limit its protections to only those involved in personal, as opposed to commercial, transactions.” *El Paso Nat. Gas Co. v. Minco Oil & Gas Co.*, 964 S.W.2d 54, 62 (Tex. App.—Amarillo 1997), *opinion modified on reh’g* (Apr. 8, 1998), *rev’d sub nom. El Paso Nat. Gas Co. v. Minco Oil & Gas, Inc.*,

8 S.W.3d 309 (Tex. 1999). The unconscionability analysis under the UCC is substantively the same as under the common law. Indeed, because unconscionability is not easily defined, Texas courts often turn to the doctrine's common law roots for context. *See, e.g., Venture Cotton Co-Op*, 435 S.W.3d at 228 (“One of the earliest decisions to apply the defense described an unconscionable contract as one that ‘no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.’”) (quoting *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100, 2 Ves. Sr. 125, 155 (1751)).

“Under the UCC, an unconscionability defense is a question of law that involves a highly fact-specific inquiry into the circumstances of the bargain, such as the commercial atmosphere in which the agreement was made, the alternatives available to the parties at the time and their ability to bargain, any illegality or public-policy concerns, and the agreement's oppressive or shocking nature.” *Id.* As part of its fact-intensive analysis, courts also consider whether the party seeking to enforce the contract employed “sharp business practices.” *El Paso Natural Gas Co.*, 964 S.W.2d at 61; *LDF Constr., Inc. v. Texas Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 731 (Tex. App.—Houston [14th] 2015, no pet.). The UCC “provides that a court should afford the parties a reasonable opportunity to present evidence as to a contract's commercial setting, purpose and effect to aid the court in evaluating the defense.” *Venture Cotton Co-op.*, 435 S.W.3d at 228 (citing TEX. BUS. & COM. CODE § 2.302(b).)

“Texas recognizes both procedural and substantive unconscionability as a defense against contract enforcement.” *Budget Rent a Car Sys., LLC v. Oꝓumba*, No. 01-20-00408-CV, 2022 WL 2347742, at *12 (Tex. App.—Houston [1st Dist.] June 30, 2022, no pet.); *Muꝓquiz*, 624 S.W.3d at 275 (“A contract or contract provision can be found unenforceable based on egregious facts supporting either procedural or substantive unconscionability.”). “[S]ubstantive unconscionability refers to the inherent unfairness of a particular contract or provision; procedural unconscionability deals with the circumstances surrounding a contract's adoption.” *Muꝓquiz*, 624 S.W.3d at 275. Contrary to Energy Transfer's MSJ, a contract can be unenforceable “if it is procedurally unconscionable, substantively unconscionable, or both.” *Roꝓston, Rayꝓor, Vickery, & Williams, LLP v. Lopeꝓ*, 467 S.W.3d 494, 499

(Tex. 2015); *ReadyOne Indus., Inc. v. Flores*, 460 S.W.3d 656, 666–67 (Tex. App.—El Paso 2014) (“Unconscionability . . . may exist in one or both of two forms: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself.”).⁴

Price unconscionability cases constitute a special subclass of the unconscionability doctrine. *See generally* Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1820 (1994). Typically, in a price unconscionability case, “one party asserts that the price to be paid is grossly disproportionate to the cost or value of the good or service received in exchange.” *Id.* at 1820. Although no Texas court has directly addressed the issue, courts in other jurisdictions have concluded that “[t]here is no reason to doubt [that Section 2-302 of the Uniform Commercial Code] is intended to encompass the price term of an agreement.” *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 191 (Sup. Ct. Nassau Cty. 1969); *see also Cent. Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 621 (Civ. Ct. 1967) (“Excessively high prices may constitute unconscionable contractual provisions within the meaning of Sec. 2—302 UCC”); *Perdue v. Crocker Nat’l Bank*, 38 Cal. 3d 913, 916 (1985) (“[T]he price term, like any other term in a contract, may be unconscionable.”). “Indeed no other provision of an agreement more intimately touches upon the question of unconscionability than does the term regarding price.” *Jones*, 59 Misc. 2d at 191.

Moreover, courts in other jurisdictions applying the UCC have consistently held in price unconscionability cases that the degree to which a seller profits from a given price is relevant to wheth-

⁴ Energy Transfer cites *In re Green Tree Servicing LLC*, 275 S.W.3d 592, 603 (Tex. App.—Texarkana 2008, orig. proceeding) for the proposition that a party asserting unconscionability bears the burden of proving both procedural and substantive unconscionability. ET Mot. Summ. J. at 20. The Texas Supreme Court, and later cases, say otherwise. *See Royston, Rayzor, Vickery, & Williams, LLP*, 467 S.W.3d at 499 (stating a contract can be unenforceable “if it is procedurally unconscionable, substantively unconscionable, or both.”); *see also Muzyquiz*, 624 S.W.3d at 275. The unconscionability analysis rarely proceeds in discrete “procedural” and “substantive” buckets because the unconscionability factors are interrelated and the unconscionability inquiry requires an assessment based on the totality of the circumstances as they existed at the time of contracting. *El Paso Nat. Gas Co.*, 964 S.W.2d at 61 (“We admit that there is an interrelationship between the indicia used under both prongs and agree that the assessment should be made based upon the totality of the circumstances. Yet, the two-pronged analysis is a way of categorizing the pertinent factors and, to that extent, it is useful.”).

er that price is unconscionable or excessive. See *California Grocers Assn. v. Bank of Am.*, 27 Cal. Rptr. 2d 396, 403 (1994) (concluding that a bank’s fee was not unconscionable only after comparing the fee to the bank’s costs and examining the bank’s profit margin); *Frostifresh Corp. v. Reynoso*, 281 N.Y.S.2d 964, 965 (App. Term 1967) (taking the seller’s net costs and profit margin into account in evaluating unconscionability under the UCC); *Moran v. Prime Healthcare Mgmt., Inc.*, 208 Cal. Rptr. 3d 303, 316 (Cal. Ct. App. 2016) (explaining that in evaluating an unconscionable price term, “courts consider not only the market price, but also the cost of the goods or services to the seller”); *Jones*, 59 Misc. 2d at 191-192 (finding \$900 price charged was unconscionable under the UCC by examining “the mathematical disparity” between the cost of the good and its retail value and concluding that “the value disparity itself leads inevitably to the felt conclusion that knowing advantage was taken of the plaintiffs.”).

In assessing unconscionability, the court may not consider any one factor in a vacuum “because [the court] must determine whether the [a]greement is unconscionable based on the totality of the circumstances” as they existed at the time of contracting. *Delfingen US-Texas, L.P. v. Valenzuela*, 407 S.W.3d 791, 801 (Tex. App.—El Paso 2013, no pet.); *El Paso Nat. Gas Co.*, 964 S.W.2d at 61 (“[T]he situation must be assessed as of the time it occurred, not via hindsight . . . What may be fair in one scenario may not be in another. Thus, the totality of the situation (as of the time the situation unfolded) must again be measured.”). Because unconscionability requires an individualized, fact-specific inquiry into the circumstances surrounding each bargain, “unconscionability must be determined on a case-by-case basis.” *Pony Exp. Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex. App.—San Antonio 1996, no writ); see also *Besteman v. Pitcock*, 272 S.W.3d 777, 787–88 (Tex. App.—Texarkana 2008, no pet.). In determining whether a contract provision is unconscionable, Texas courts examine “the **entire atmosphere** in which the agreement was made.” *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex. App.—Waco 2005, pet denied) (emphasis added).

Eager to circumvent the fact-intensive inquiry unconscionability requires, Energy Transfer oversimplifies the standard of review, asserting that the unconscionability defense “present[s] questions of law and can be disposed of on summary judgment.” ET Mot. Summ. J. at 20. That is mis-

leading. While “[t]he ultimate question of unconscionability of a contract is one of law, to be decided by the court[,] . . . it cannot be forgotten that the decision of whether some agreement is or is not unconscionable is dependent upon the existence of facts which allegedly illustrate unconscionability.” *Ski River Den.*, 167 S.W.3d at 126 (cleaned up). “The determination of the facts relevant to the question of unconscionability . . . presents a question of fact for the factfinder.” *Budget Rent a Car Sys.*, 2022 WL 2347742 at *12. That is, “[u]nconscionability involves both questions of law *and fact* and is committed to the trial court by statute.” *Pony Exp. Courier Corp.*, 921 S.W.2d at 820 (emphasis added). Similarly, the UCC expressly addresses the factfinding inherent to the unconscionability inquiry. TEX. BUS. & COM. CODE § 2.302 (recognizing that a party “shall be afforded a reasonable opportunity to present evidence as to [the contract’s] commercial setting, purpose and effect to aid the court in making the determination.”); *see also Venture Cotton Co-op.*, 435 S.W.3d at 228 (noting that the unconscionability defense involves a “highly fact-specific inquiry into the circumstances of the bargain”).

In a further effort to avoid an analysis of the facts, Energy Transfer cites a federal bankruptcy decision, *Brazos v. 507 Capital LLC, et al.*, from the Southern District of Texas for the proposition that a federal court has “rejected as a matter of law identical arguments from another Texas utility challenging natural gas prices during Winter Storm Uri” on unconscionability and public policy grounds. ET Mot. Summ. J. at 1, 21. Even if the *Brazos* pleadings and transcripts were proper summary judgment evidence,⁵ that case is easily distinguishable. *Brazos* is a Rule 12(b)(6) decision. The bankruptcy judge merely determined that Brazos failed to plead sufficient facts to show that each of the challenged transactions were unconscionable or void as to public policy. The bankruptcy judge did not decide in *Brazos*, as Energy Transfer represents, that a utility like CPS Energy “has no legal

⁵ Rather than cite a particular court opinion, Energy Transfer attaches several pleadings and transcripts from the *Brazos* case as evidence to support its MSJ. As will be detailed in CPS Energy’s Objections to Energy Transfer’s MSJ Evidence, to be filed before the hearing, those pleadings and transcripts are not proper summary judgment evidence and the Court should strike them from the summary judgment record.

claim under Texas law that the contracts were either unconscionable or against public policy.”⁶ ET Mot. Summ. J. at 21. The issue before the court in *Brazos* was about garden-variety, Rule 12(b)(6) pleading sufficiency.⁷ The federal bankruptcy court, sitting in diversity, did not—and could not—rewrite state unconscionability law to eliminate the totality of the circumstances analysis when sophisticated parties are involved. Indeed, during a hearing in the *Brazos* case, the judge noted that if *Brazos had* pleaded sufficient facts, in his mind, they would have a “pretty good claim.” ET Summ. J., Ex. 1 at Ex. F., at 50.

Of course, we are well past the pleadings stage in this case. And, unlike in the *Brazos* case, CPS Energy has produced evidence demonstrating that specific contracts are unconscionable. The evidence obtained in discovery has now confirmed everything CPS Energy alleged and more: that CPS Energy had no choice but to buy natural gas at the excessive prices Energy Transfer demanded and Energy Transfer chose to exploit that desperation, during a state-declared disaster, for profit. At the very least, the evidence creates a material fact issue on CPS Energy’s unconscionability and public policy defenses and therefore precludes resolution of Energy Transfer’s breach of contract claim on summary judgment.

1. The evidence shows that the prices Energy Transfer charged CPS Energy during Winter Storm Uri were unconscionable.

CPS Energy challenges 16 transactions as unconscionable. The factual circumstances surrounding each challenged transaction are, at a minimum, sufficient to raise a material fact issue with respect to CPS Energy’s unconscionability defense.

⁶ Indeed, the court issued a two-page summary order in the *Brazos* case that provides no reasoning or basis for its decision. So while Energy Transfer attaches a copy of ETC Marketing’s brief, there is no indication that the *Brazos* court adopted those arguments.

⁷ Energy Transfer insists that the only reason this case proceeded to discovery is because “Texas state law does not have an analogue to a Fed. R. Civ. P. 12(b)(6) motion.” ET. Mot. Summ. J. at 21. If Energy Transfer really thought CPS Energy’s claims had no basis in law or fact, it could have filed a Rule 91(a) motion. It did not do so because it knew then and it knows now that CPS Energy has sufficient facts to substantiate its unconscionability and public policy defenses.

a. The prices Energy Transfer charged CPS Energy on February 12, 2021 for gas over the long weekend (February 13–16) are unconscionable.

February 12, 2021 was a Friday. 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 President's Day, meaning that CPS Energy needed to also secure gas for the following four days: Saturday, February 13 through Tuesday, February 16. Accordingly, CPS Energy set out on February 12 to buy the significant volumes of natural gas necessary to serve its customers' critical human needs over the long weekend, including from Energy Transfer.

Recognizing that CPS Energy needed large volumes of gas, Energy Transfer leveraged the disaster and CPS Energy's lack of options to extract unprecedented prices and reap unparalleled profits. Energy Transfer was able to do so because it knew, by virtue of its unique status as a pipeline operator and as a trading desk, [REDACTED] that CPS Energy had no other alternatives—no other gas supplier could sell CPS Energy the volumes of gas it needed for the long weekend at the locations where it needed it.

i. Energy Transfer deploys oppressive and sharp practices to exploit the disaster by demanding unprecedented prices for desperately needed gas.

Even before the storm began, Energy Transfer discussed [REDACTED] [REDACTED] Energy Transfer understood before the storm that utilities like CPS Energy were going to need large volumes of natural gas to run their gas-fired power plants and distribute directly to their customers. Ex. A-87, ETP_000008924. And Energy Transfer understood demand for natural gas would only climb further as the temperatures continued to drop and the weather situation became increasingly dire. *Id.*; [REDACTED] So, on February 9, when CPS Energy first reached out to Energy Transfer about obtaining gas for the long weekend, Energy Transfer refused to sell CPS Energy weekend gas, holding out for higher same-day prices as the weather grew steadily worse. Ex. A-44,

CPSE-MDL_000009514; [REDACTED]. Specifically, Bruce Bordovsky, one of CPS Energy’s traders, messaged Energy Transfer’s trader Jennifer Merritt, to purchase delivered volumes at three different points on CPS Energy’s facilities: HPL’s interconnect with CPS Energy’s Southgate Pipeline in Karnes County; CPS Energy’s North Gate interconnect with Oasis; and CPS Energy’s Rio Nogales power plant. Ex. A-44_, CPSE-MDL_000009514. But Merritt refused to transact for the weekend at that point, saying that “it will be a day to day look for us.” *Id.*

On Thursday, February 11, CPS Energy again tried to secure supply for the long weekend. *Id.* at 9515. While negotiating a purchase of 100,000 MMBtu of gas for delivery on Friday, February 12 for \$15—already more than three times prevailing prices for the previous day—CPS Energy asked if Energy Transfer would agree to extend the deal through February 16. *Id.* at 9516. But Merritt declined, stating “I won’t be able to price the weekend until tomorrow.” *Id.* The next day, CPS Energy’s traders continued to secure gas, including the large delivered volumes that CPS Energy needed from Energy Transfer. At 7:30 AM,⁸ Bordovsky contacted Merritt and asked for a price quote for 150,000 MMBtu of delivered gas per day for February 13–16, across three different points on CPS Energy’s facilities: 50,000 for delivery at HPL’s interconnect with CPS Energy’s Southgate Pipeline in Karnes County; 50,000 for delivery at CPS Energy’s North Gate interconnect with Oasis; and 50,000 for delivery at the Rio Nogales power plant. *Id.* at 9517. Merritt did not respond with an offer for an hour and a half. *Id.* While CPS Energy waited for an offer from Merritt, Energy Transfer’s commercial development team confirmed the [REDACTED] weekend gas purchase they had negotiated with [REDACTED] the prior evening, [REDACTED].

When Merritt finally responded to CPS Energy, the first thing she said was: “ok, are you sitting down?” Ex. A-44, CPSE-MDL_000009514 at 9517. Merritt then quoted CPS Energy a price of \$150/MMBtu—ten times the price charged the previous morning for next-day gas. *Id.* Neither Merritt nor any member of Energy Transfer’s intrastate optimization team—the team that sold CPS En-

⁸ All time stamps in the ICE Chat between Jennifer Merritt and Bruce Bordovsky during the storm are in Eastern Standard Time.

ergy natural gas during Winter Storm Uri—had ever seen prices that high. [REDACTED]
[REDACTED]

Bordovsky responded, understandably, “Wow,” and then asked for “one sec” to discuss the price with his superiors. Ex. A-44, CPSE-MDL_000009514 at 9517. But just nine minutes later—before CPS Energy could even respond to the \$150 offer—Merritt messaged “out,” withdrew the offer, and raised the asking price even higher to \$225/MMBtu. *Id.* Bordovsky attempted to clarify whether Energy Transfer was “out” of gas or merely out of gas at the \$150 price. *Id.* Merritt ignored him and repeated “\$225.00 offer.” *Id.* Unable to risk losing the much-needed gas, CPS Energy had no choice but to accept. *Id.*

During her deposition, Merritt admitted that [REDACTED]
[REDACTED]
[REDACTED] When asked [REDACTED] Merritt merely stated [REDACTED] But [REDACTED]
[REDACTED] At 9:20 AM, when Merritt demanded \$225 from CPS Energy, [REDACTED]
[REDACTED] Rather, it was Merritt herself who, just one minute before demanding \$225 from CPS Energy, posted an offer on ICE to sell gas at HSC for \$225. Ex. A-91A, ICE-Energy_Transfer000011. [REDACTED]
[REDACTED] Indeed, consistent with Energy Transfer’s historical control over the HSC market,⁹ Energy Transfer’s sales would make up [REDACTED]
[REDACTED]

⁹ *See, e.g.*, FERC Order to Show Cause and Notice of Proposed Penalties, July 26, 2007 (noting FERC investigation concluded that Energy Transfer manipulated wholesale natural gas prices at HSC).

ii. CPS Energy had no choice but to purchase gas for the long weekend from Energy Transfer.

CPS Energy had no choice but to accede to Energy Transfer's exorbitant prices both to provide gas to its customers and to generate electricity to protect the grid, as ERCOT demanded. Ex. A-47, Albers Dep. 43:10-44:20. CPS Energy's lack of choice has two aspects: volume and delivery point. First, CPS Energy could not obtain the volume of gas it needed for the long weekend from any other supplier. On February 11 and 12, CPS Energy purchased a total of 740,990 MMBtu per day for the long weekend from 22 different suppliers. More than [REDACTED] of those volumes [REDACTED] [REDACTED]—were purchases from Energy Transfer. [REDACTED] Other than Enterprise Products—which sold CPS Energy 90,000 MMBtu per day during the long weekend—no other supplier could sell CPS Energy even close to the volumes of gas that Energy Transfer did.

Second, in February 2021, Energy Transfer was one of only two suppliers that could sell CPS Energy delivered gas at CPS Energy's Southgate in Karnes County and at its Rio Nogales power plant, and it was the only supplier that could sell CPS Energy delivered gas at Oasis Northgate. Ex. A-6, Skaer Dep. at 253:7-20; Ex. B, Bordovsky Aff. ¶¶ 8–11. Specifically, in February 2021, only [REDACTED] and Energy Transfer could sell CPS Energy delivered gas at Rio Nogales and only [REDACTED] and Energy Transfer could sell CPS Energy delivered gas at Karnes. Ex. B, Bordovsky Aff. ¶¶ 8–10. Moreover, CPS Energy's transportation contract with Oasis Pipeline limited the amount of gas it could transport from gas hubs like Katy and HSC to the Oasis North Gate point to [REDACTED] per day. [REDACTED]

[REDACTED] Once CPS Energy maxed out that 50,000 MMBtu limit—as it did for the long weekend—the only other option for getting gas to Oasis North Gate was the purchase of delivered gas from Energy Transfer. Energy Transfer, as a party to that transportation contract, understood those limitations and CPS Energy's corresponding reliance on delivered gas.

On February 12, CPS Energy purchased 50,000 MMBtu of delivered gas per day for the long weekend from Energy Transfer at Karnes, Rio Nogales and Oasis Northgate because no other supplier could sell them that gas. Ex. B, Bordovsky Aff. ¶¶ 8–10. When Energy Transfer raised its prices from \$150 to \$225 in a period of nine minutes, CPS Energy had no ability to bargain. Ex. A-44, CPSE-MDL_00009514 at 9517. Energy Transfer knew CPS Energy’s options were limited—it “had no meaningful choice, no real alternative” but to agree to that exorbitant price. *Ski River Dev.*, 167 S.W.3d at 136 (“Gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.”).

Energy Transfer nevertheless argues that CPS Energy “had numerous alternatives to purchasing gas from Energy Transfer.” ET Mot. Summ. J. at 25. According to Energy Transfer, the fact that CPS Energy purchased natural gas from other counterparties during Winter Storm Uri “by itself, defeats any argument that CPS had no alternative but to buy from Energy Transfer.” ET Mot. Summ J. at 25. That CPS Energy purchased gas from other counterparties does not mean that CPS Energy could have purchased the *volumes* it purchased from Energy Transfer from another counterparty. Energy Transfer points to no evidence suggesting—much less conclusively demonstrating—that CPS Energy could have purchased the 190,000 MMBtu it purchased from Energy Transfer for the long weekend from another counterparty.

Energy Transfer’s argument also ignores CPS Energy’s lack of alternatives for delivered gas at the Karnes, Rio Nogales, and Oasis Northgate delivery points. Energy Transfer points to no evidence suggesting that CPS Energy could have purchased the 50,000 MMBtu/day of delivered gas at Rio Nogales it purchased from Energy Transfer for the long weekend from DCP instead. It likewise points to no evidence suggesting that CPS Energy could have purchased the 50,000 MMBtu/day of delivered gas at Karnes for the long weekend from Targa. To the contrary, when CPS Energy reached out to Targa to secure supply for the long weekend, Targa’s trader responded that he had no gas to sell and predicted that Targa would actually be reducing its gas supply over the weekend by 40%. Ex. A-92, CPSE-MDL_000009416, at 9418 (Ken Skaer: “I would absolutely love to be your

market for any gas you might sell tomorrow [Feb. 12].” Joe Brice: “man i wish,” “im sure we’ll be reducing like 40% of our gas.”). And because Energy Transfer is the only party that could sell CPS Energy delivered gas at Oasis Northgate, it was simply not possible to obtain that delivered gas from another counterparty. Ex. B. Bordovsky Aff. ¶ 11. Any suggestion from Energy Transfer to the contrary is false.

Disinterested in grappling with specifics, Energy Transfer simply asks the Court to “See generally” a list of suppliers CPS Energy purchased gas from during Winter Storm Uri and asserts CPS Energy could have purchased gas from one of those counterparties instead. ET Mot. Summ. J. at 25. But Energy Transfer does not bother to identify a specific counterparty from that list who (1) had the available volumes and (2) had the ability to get that gas to the necessary delivery points on CPS Energy’s system. Moreover, every CPS Energy witness testified that CPS Energy had no choice but to buy the gas it did from Energy Transfer. Ex. A-93, Pollo Dep at 229:19-230:5; Ex. A-6, Skaer Dep. 235:7-20; *see also Ski River Den.*, 167 S.W.3d at 137 (citing testimony that party felt he had no choice and could not change anything about the lease before signing it as evidence supporting unconscionability). Indeed, CPS Energy typically didn’t do “that much business with Energy Transfer when there was an option,” but when CPS Energy needed significant volumes of natural gas at Karnes, Rio Nogales, and Oasis Northgate—as it did during Winter Storm Uri—CPS Energy was “at [Energy Transfer’s] mercy,” “because they were the only ones that could deliver into [the CPS Energy] system at the places [CPS Energy] needed it.” Ex. A-6, Skaer Dep. 253:7-20. This reality is, at a minimum, sufficient to demonstrate a material fact issue with respect to the alternatives available to CPS Energy on February 12.

iii. Energy Transfer’s unique access to low-cost supply allows it to profit enormously from the disaster.

Energy Transfer had planned for days before the storm to reap a profit from high-volume natural gas users like CPS Energy. To execute its plan, Energy Transfer [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] —all for the purpose of obtaining gas for the intrastate optimization team to flip for exorbitant prices.¹⁰ [REDACTED]

[REDACTED]

While Energy Transfer demanded unprecedented prices from CPS Energy, its intrastate optimization team withdrew large volumes of low-cost gas from its Bammel, Bethel, and Bryson storage facilities to sell during the long weekend. From February 13 through February 16, Energy Transfer withdrew over [REDACTED] of gas from Bammel, Bryson, and Bethel. [REDACTED]

[REDACTED] The intrastate optimization team then [REDACTED]

[REDACTED] During the storm, the intrastate optimization team assigned the gas it withdrew from storage an estimated cost basis of [REDACTED]. But Energy Transfer's internal accounting records attributed an even lower cost to that gas: [REDACTED] *See* [REDACTED], at RFP 9 & 10 & 11. So, while the intrastate optimization team was pulling gas out of storage for [REDACTED] or less, it demanded \$225 per MMBtu from CPS Energy.

Energy Transfer supplemented this low-cost storage gas with relatively low-cost supply secured by its intrastate commercial development team. The commercial development team typically did not engage in [REDACTED]

[REDACTED] That changed during the storm.

The commercial development team, headed by Brian Riley, had preexisting relationships with

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ [REDACTED]

[REDACTED]¹¹ Energy Transfer also [REDACTED]

[REDACTED] Prior to Winter Storm Uri, the intrastate optimization and commercial development teams [REDACTED]

[REDACTED]

[REDACTED] But during Winter Storm Uri, [REDACTED]

[REDACTED]

[REDACTED]. Energy Transfer understood [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

But [REDACTED]

[REDACTED]

[REDACTED] As a result, Energy Transfer's intrastate optimization team [REDACTED]

[REDACTED]

[REDACTED]

This required extensive coordination. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹ "Buy Mortimer Buy" is a reference to the film *Trading Places*. [REDACTED]

[REDACTED]

While the commercial development team acquired low-cost supply through [REDACTED] [REDACTED] the intrastate optimization team demanded unprecedented prices from CPS Energy. Less than 10 minutes before Merritt demanded \$225 from CPS Energy for weekend gas, Energy Transfer's commercial development team directed [REDACTED] [REDACTED] [REDACTED]

Approximately 13 minutes after Merritt demanded \$225 from CPS Energy, Energy Transfer's commercial development team purchased even more weekend gas for its own supply through [REDACTED] [REDACTED] [REDACTED] [REDACTED]. Throughout the day, Energy Transfer continued to [REDACTED] [REDACTED] [REDACTED] [REDACTED]

By late evening on February 12, Energy Transfer was [REDACTED] [REDACTED]

By the evening of February 12, Energy Transfer had successfully executed on its plan to turn the impending storm disaster into a sales opportunity. [REDACTED]. Riegler poured

¹² [REDACTED]

¹³ Energy Transfer also [REDACTED]

himself a rum. Ex. A1-108, ETP_000039814. Ryan Lee poured himself a scotch. *Id.* They joked about buying [REDACTED] “a drink when we visit them next” for all his help. *Id.* Later that evening, Energy Transfer purchased [REDACTED] [REDACTED] [REDACTED]. When Riegler closed that final deal of the day, he texted the group thread [REDACTED]. Riegler then texted Ochoa: [REDACTED].

iv. Energy Transfer understood and celebrated their exorbitant profits on February 12.

Energy Transfer knew that [REDACTED] meant an exorbitant profit at the expense of utilities like CPS Energy. [REDACTED]. As Brian Riley testified, he understood that [REDACTED] [REDACTED] [REDACTED]; *see also* [REDACTED]. As just one example, when Energy Transfer was offered a package of gas for \$60 on February 12, Riegler [REDACTED] [REDACTED]. But Riley reminded him that Energy Transfer could flip that gas for an enormous profit, texting back [REDACTED] [REDACTED].

Energy Transfer reveled in the exorbitant profit it was making off the intrastate optimization team’s gas sales. When Ochoa texted that he was [REDACTED] to utilities that were just trying to keep the lights on, the commercial development team [REDACTED] [REDACTED]. When the commercial development team secured low-cost supply for the intrastate optimization team to sell, they [REDACTED] [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED] For Energy Transfer, other market participants' desperation for gas was one big fist bump. In reporting on the status of the day to another Energy Transfer colleague, Riley said [REDACTED]

[REDACTED] That colleague texted back [REDACTED]

[REDACTED] Late that evening, another Energy Transfer employee, Ryan Lee, began to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Eager to assess the extent of the profits Energy Transfer had made, [REDACTED]

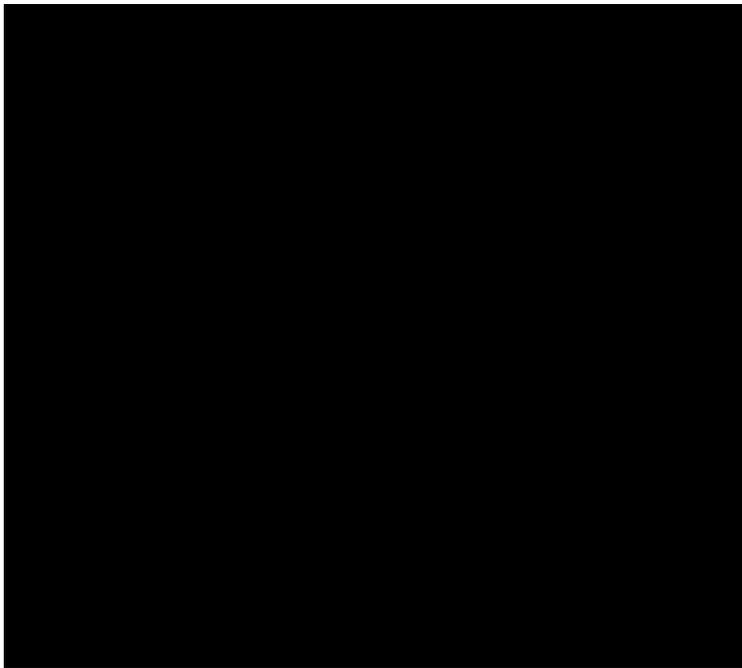
[REDACTED]

[REDACTED] From Energy Transfer's perspective, it

was, [REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

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. Exploiting CPS Energy and other utilities’ desperation for natural gas at the onset of an unprecedented winter storm to “flip gas” at an exorbitant profit—and reveling in it—are exactly the kind of “sharp business practices” courts consider as evidence of unconscionability. *El Paso Nat. Gas Co.*, 964 S.W.2d at 61.

v. Energy Transfer’s “different market” argument is unavailing.

When confronted with the gross disparity between the prices Energy Transfer was paying for its own supply and the prices it demanded from CPS Energy, some Energy Transfer witnesses have insisted that any such comparison is improper because Carthage is a “different market.” But during Winter Storm Uri, Energy Transfer’s traders routinely acknowledged the relevance of Carthage supply to sales all over the state, including in CPS Energy’s area. For example, [REDACTED]

[REDACTED]

[REDACTED]. Other parties likewise acknowledged the connection between [REDACTED].

In negotiating with Riegler over price, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Energy Transfer has also at times insisted that it cannot move gas from the Tiger-Carthage interconnect to Central Texas on the HPL system, so it could not possibly flip the gas it was buying in Carthage to customers like CPS Energy in Central Texas. Ex. A133, Chambers Dep. at 36:8-38:23. But this litigation-driven argument runs headlong into Energy Transfer's own business practices. During Winter Storm Uri, Energy Transfer [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It is perhaps for this reason that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. More fundamentally, as Alex Thom at ETC Marketing explained, when selling gas,

the focus is on balancing receipts and deliveries, not on tracking particular molecules—“[R]egardless of where [the gas] sits geographically on the pipe, if we can achieve that delivery, it does not matter to me if it’s north, south, east, west, back haul, forward haul.” Ex. A-135, Thom Dep. 166:9-14. And ultimately, all of the trades the business development team did at Carthage through ETC Marketing were moved over to the commercial optimization team’s book. Ex. A-14, Small Dep. 217:7-218:3; Ex. A-136, ETP_000039587 at 39588. There is, at a minimum, a fact dispute on this issue.

Energy Transfer has similarly contended that the natural gas it purchased for its own supply at single-digit prices off the interstate Trunkline Pipeline at Trunk Katy (again through ETC Marketing) has no relevance to CPS Energy. Ex. A-133, Chambers Dep. at 130: 1-5. But, once again, Energy Transfer’s contemporaneous conduct contradicts its after-the-fact litigation position. Internal communications show that Energy Transfer used natural gas purchased from ETC Marketing at Trunk Katy to displace third-party storage withdrawals from Energy Transfer’s Bammel storage facility—the very same HPL storage facility where CPS Energy stored gas and from which it withdrew gas during February 2021. Ex. A-137, ETP_000040606; Ex. A-138, ETP_000040417¹⁴; Ex. A-101, ETP_000040423; Ex. A-34, CPSE-MDL_000028821 (Master Storage Agreement); Ex. A-139, CPSE-MDL_000004510 (Storage Agreement Confirmation). To say the low-cost supply Energy Transfer acquired from ETC Marketing at Trunk Katy had no relevance to gas available to CPS Energy during Winter Storm Uri is plain false.

The totality of the circumstances surrounding the prices Energy Transfer charged CPS Energy on February 12 demonstrate that they were unconscionable and/or void as to public policy. Accordingly, the Court should deny Energy Transfer’s motion for summary judgment with respect to the following February 12 transactions:

Transaction No.	Seller	Trade Date & Time	Sale Point	Price (All fixed price deals)	Quantity + Flow Date(s)
CPSE # 62083	HPL	Feb. 12 9:24 AM	987357 HPL CPS Karnes Delivered Gas	\$225	50,000/day (Feb. 13-16)

¹⁴ Panhandle Energy is a third party storage customer at Bammel.

CPSE #62089	Oasis	Feb. 12 9:24 AM	1702 Oasis Rio Nogales Delivered Gas	\$225	50,000/day (Feb. 13-16)
CPSE #62090	Oasis	Feb. 12 9:24 AM	1483 Oasis North Gate Delivered Gas	\$225	50,000/day (Feb. 13-16)
CPSE # 62086	HPL	Feb. 12 9:51 AM	986780 Oasis Katy	\$180	10,000/day (Feb. 13-16)
CPSE # 62087	HPL	Feb. 12 9:52 AM	986780 Oasis Katy	\$180	10,000/day (Feb. 13-16)
CPSE# 62084	HPL	Feb. 12 10:02 AM	987342 HSC Pool	\$150	10,000/day (Feb. 13-16)
CPSE# 62085	HPL	Feb. 12 10:05 AM	987342 HSC Pool	\$150	10,000/day (Feb. 13-16)

b. The Long Weekend: February 13-16, 2021

Throughout the long weekend, temperatures plummeted and freezing precipitation bore down on Texas. Energy Transfer remained focused on exploiting the winter storm for profit. While weather reports warned of an impending human needs crisis, Energy Transfer remained laser-focused on profit and continued to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

i. Saturday, February 13

Throughout the weekend, Energy Transfer continued to insist on exorbitant fixed price deals, prompting one counterparty to [REDACTED]

[REDACTED] Meanwhile, ETC Marketing continued to [REDACTED]

[REDACTED] Riegler confirmed that

[REDACTED]

[REDACTED]

[REDACTED]. That day, Beth Hickey
texted the accounting department [REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]

ii. Sunday, February 14

On February 14, CPS Energy experienced the first of many weather-related cuts to its supply [REDACTED] Ex. A-144, CPSE-MDL_000010372 (A. Irving et al. Text Thread). That morning, [REDACTED])—the only other supplier besides Energy Transfer able to deliver gas to Rio Nogales—notified CPS Energy’s Bordovsky that [REDACTED] was “seeing some significant freezeoffs behind [its] plants and watching production disappear by the moment.” [REDACTED] Ex. A-144, CPSE-MDL_000010372 (A. Irving et al. Text Thread). As Bordovsky explained, CPS Energy really needed

that gas from [REDACTED] Without [REDACTED] Energy Transfer was CPS Energy's only option for delivered gas at Rio Nogales. Ex. B, Bordovsky Aff. ¶ 8. If [REDACTED] volumes failed to show up, CPS Energy's only option would be to purchase those replacement volumes at exorbitant prices from Energy Transfer or derate its Rio Nogales power plant as customer generation demand only continued to climb. *Id.*, [REDACTED]; Ex. A-145, CPSE-MDL_000010809. Understanding that bind, [REDACTED] trader messaged [REDACTED]. But by 11:00pm that evening, [REDACTED] and gas stopped showing up to Rio Nogales. [REDACTED].

Meanwhile, Energy Transfer continued to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] By late afternoon, [REDACTED]
[REDACTED]
[REDACTED] At this point, Energy Transfer was purchasing so much low-cost supply from [REDACTED] that it prompted Ochoa to text "How much gas does [REDACTED] have[?]" "Unlimited?" Ex. A-158, ETP_000040658 at 40661. Later that afternoon, Riegler texted [REDACTED]. Small replied "Yeah. ... We will take it all." [REDACTED].

By early evening, Energy Transfer was still [REDACTED]
[REDACTED] Just before 5:00 pm on February 14, [REDACTED]
[REDACTED] Ex. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]. As processing plants in West Texas went down, Small instructed the commercial development team to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].
That afternoon, Energy Transfer's Co-CEO Mackie McCrea asked Small's intrastate optimization team to [REDACTED]

[REDACTED]. As Small put it, [REDACTED]
[REDACTED] Indeed, in a single weekend, Energy Transfer had just made almost triple what it typically makes from intrastate gas sales in an entire year. [REDACTED]; Ex. A-41, Energy Transfer LP, Annual Report (Form 10-K) 87 (Feb. 12, 2021); *see also Frostifresh*, 281 N.Y.S.2d at 965 (taking the seller's net costs and profit margin into account in evaluating unconscionability under the UCC).

iii. Monday, February 15

On February 15, temperatures plunged to 9 degrees. That morning, one-third of the state's power-generation capacity was down. To prevent a total collapse of Texas' power grid, ERCOT first ordered retail electric providers like CPS Energy to ensure all generators were working, and then eventually issued load-shedding directives to drastically reduce electricity distribution to CPS Energy's customers. The result was widespread blackouts across Texas.

The gas supply situation continued to deteriorate. [REDACTED]'s gas supply remained down, eliminating the only source of gas for CPS Energy's Rio Nogales power plant other than Energy Transfer. [REDACTED]; Bordovsky Aff. ¶ 9. And things were only getting worse. Later that day, CPS Energy's supply from other gas suppliers, [REDACTED], coming in on HPL had been cut. Ex. A-158, CPSE-MDL_000010380, at 10381. Indeed, [REDACTED] reported to

CPS Energy that it was “losing gas all over the place.” [REDACTED]

[REDACTED] Of the 354,500 MMBtu CPS Energy had counted on coming in off the Enterprise pipeline, 252,833 MMBtu had been cut. Ex. A-158, CPSE-MDL_000010380 at 10382. All natural gas scheduled to flow on the Permian Highway Pipeline had been cut to zero. *Id.* An HPL cut notification email arrived at around 11:30 AM, indicating approximately [REDACTED] of cuts at Katy Oasis and Houston Ship Channel. [REDACTED]

[REDACTED] As the day continued, cuts at the hubs climbed to 65,150 MMBtu. Ex. A-158, CPSE-MDL_000010380 at 10382. 41,692 MMBtu were cut at West Texas Map. *Id.* Of the 740,900 MMBtu CPS Energy had purchased for the long weekend, only 319,532 MMBtu were even flowing. *Id.* at 10383.

Critically, earlier that morning, CPS Energy learned that the Teak processing plant had shut down entirely, making it impossible for CPS Energy to receive any gas at Karnes from the Targa Pipeline. [REDACTED]; Ex. A-158, CPSE-MDL_000010380 at 10383. Once the Teak plant went down, CPS Energy’s only option for delivered gas at Karnes was Energy Transfer. Ex. B, Bordovsky Aff. ¶¶ 4, 9–10. And because [REDACTED] had already cut CPS Energy’s deliveries to zero, Energy Transfer was CPS Energy’s only option at Rio Nogales as well. *Id.* at ¶8; [REDACTED] With no other gas showing up at Rio Nogales from [REDACTED] CPS Energy had to turn to Energy Transfer to meet the increasing demand of its customers. *Id.*; Ex. A-145 CPSE-MDL_000010809.

Around 3:30 PM—hours after ERCOT’s load shedding left millions of Texans in the dark—Merritt demanded that CPS Energy put a deal in place “in the event” CPS Energy pulled more gas off the pipeline at Rio Nogales than it had nominated to the pipeline. Ex. A-44, CPSE-MDL_000009514 at 9519. Less than 10 minutes later, she messaged Bordovsky: “Right now, we do not have the gas. [W]e cannot support the overpull.” *Id.* But she quickly clarified that the only overpull Energy Transfer could not support was one “outside of contractual rights.” *Id.* That is, it wasn’t that Energy Transfer lacked the gas that CPS Energy needed. It was instead that Energy Transfer wanted to extract as much money as possible for that gas. Accordingly, Merritt demanded \$300 per

MMBtu for any overpulled volumes at Rio Nogales. *Id.* Bordovsky told Merritt CPS Energy was looking into whether Rio Nogales was overpulling. *Id.* “300.00/mmbtu,” Merritt repeated. *Id.* One minute later, Merritt again demanded that CPS Energy confirm it would pay the \$300.00/MMBtu price. *Id.* CPS Energy’s transportation contract with HPL allowed for them to withdraw gas from their storage account with HPL at Bammel to automatically balance any overpulled volumes, up to their maximum daily withdrawal rate. Ex. A-17, CPSE-MDL_000026189 at 26195-26196; [REDACTED]

[REDACTED] It also allowed CPS Energy to cash out any overpulled volumes at an index price at the end of the month. Ex. A-17, CPSE-MDL_000026189 at 26195-26196. Confused about Merritt’s demand, Bordovsky attempted to clarify whether Energy Transfer just wanted to put a sale in place or whether Energy Transfer truly did not have the volumes. Ex. A-44, CPSE-MDL_000009514 at 9520. Merritt did not answer. *Id.* She simply kept demanding CPS Energy agree to her \$300 price. *Id.*

CPS Energy was in a bind—it had yet to pull more gas off the system than it had nominated and despite CPS Energy’s contractual right to automatic balancing from its storage account for any overpulled volumes, Energy Transfer was still preemptively attempting to extract \$300 for any excess gas CPS Energy *might* pull off the system. *Id.* Rio Nogales was pulling hard, and CPS Energy did not know if it could decrease its volumes to avoid the overpull without losing the unit. [REDACTED]

[REDACTED] Despite the fact that Energy Transfer had already made over [REDACTED] on intrastate gas sales over the weekend, Energy Transfer seized on another opportunity to exploit the human needs crisis: [REDACTED] Merritt insisted. Ex. A-44, CPSE-MDL_000009514 at 9519; [REDACTED]

[REDACTED] That day, the highest price HPL had paid to buy sameday gas for its own supply was [REDACTED]

When CPS Energy did not immediately agree to her \$300 price, Merritt demanded that CPS Energy get on the phone with her and Small. Ex. A-44, CPSE-MDL_000009514 at 9520. CPS Energy and the rest of the state were “extremely concerned about the health of the grid,” but Energy Transfer would not budge. *Id.*; Ex. A-145, CPSE-MDL_000010809 at 10824. Ultimately, as a result of Energy Transfer’s sharp business practices, CPS Energy was forced to de-rate its Rio Nogales

plant, cutting its hourly power output by more than 35%. Ex. A-161, CPSE-MDL_000008776, at 8784.

c. The next-day prices Energy Transfer charged CPS Energy on February 16, 2021 are unconscionable.

When normal day-ahead gas trading resumed on Tuesday, February 16, temperatures had reached record low temperatures for two consecutive days. Temperatures in San Antonio would dip to another record-low 12 degrees. Millions of Texans remained without power. And the gas-supply situation was worse than ever. As CPS Energy's access to available supply became increasingly limited, CPS Energy was again left with no choice but to purchase gas from Energy Transfer. Knowing that CPS Energy had no available alternatives, Energy Transfer took advantage of that lack of bargaining power to extract exorbitant prices, deploying oppressive and sharp business practices to do so.

i. As gas supply grew even worse, CPS Energy was left with no available alternatives besides Enterprise and Energy Transfer.

CPS Energy's traders began contacting suppliers at 6:17 AM, asking anyone and everyone for any gas they could supply at a variety of sale points. But supplier after supplier responded the same way: they had no gas available to sell.

OXY - Ryan Hinze	CPS - Ken Skaer	02/16/2021 08:11:58	hey, gm...we have nothing here
------------------	-----------------	---------------------	--------------------------------

Ex. A-162, CPSE-MDL_000009053.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

To make matters worse, [REDACTED] remained unable to sell any delivered gas Rio Nogales, [REDACTED]

[REDACTED] and [REDACTED]

[REDACTED]

[REDACTED] So Energy Transfer remained the only option for delivered gas three critical CPS Energy delivery points.

ii. Energy Transfer took advantage of CPS Energy’s lack of bargaining power to extract exorbitant prices.

Amidst these conditions, Energy Transfer surged their prices to truly unimaginable levels. Early that morning, Bordovsky reached out to Merritt for an offer on delivered gas. Ex. A-44, CPSE-MDL_000009514 at 9520. Four days earlier, the Railroad Commission had ordered gas suppliers like Energy Transfer to prioritize gas for local distribution companies serving human needs like CPS Energy. Ex. A-46, ETP_000000162 But that morning, Merritt stalled, telling Bordovsky that she would need to see how they were “shaping up for the new day.” Ex. A-44, CPSE-MDL_000009514 at 9520. Meanwhile, Small set out to bid up prices on ICE. At 9:44 AM, Small posted offers on ICE for [REDACTED]. Over the next 45 minutes, he [REDACTED]

[REDACTED] At 10:23 AM, Small posted an offer [REDACTED]. The counterparty that lifted a small volume at that \$400 price was Energy Transfer affiliate, ETC Marketing. Ex. A-91B, ICE-ET-EP000001.

[REDACTED] then instructed Merritt to offer CPS Energy \$400 for next day (i.e., February 17) delivered gas at Rio, Karnes, and Oasis North Gate. Ex. A-44, CPSE-MDL_000009514 at 9521; [REDACTED]

[REDACTED] As [REDACTED] conceded, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵ CPS Energy implored Energy Transfer to lower the price. Bordovsky asked Merritt if she would consider selling CPS Energy gas on an index basis as opposed to demanding a \$400 fixed price. Ex. A-44, ETP_000009514 at 9521. Merritt responded “No” without any further explanation, as directed by [REDACTED] *Id.*; [REDACTED] A few minutes later, Bordovsky again attempted to negotiate: “Katy price has been coming off a bit. Can we wiggle on your \$400 price offer?” Ex. A-44, ETP_000009514 at 9521. Merritt refused to negotiate, responding “No wiggle room.” *Id.* Again, that directive came directly from [REDACTED] Bordovsky tried one final time, reminding Energy Transfer that the gas was for human needs. Ex. A-44, ETP_000009514 at 9521. Merritt refused to budge: “We have to hold at \$400.” *Id.* CPS Energy had no choice but to accede to the \$400 price. *Id.*

CPS Energy could not obtain the supply it needed at Oasis North Gate or Rio Nogales from any other supplier. *Freeman*, 435 S.W.3d at 228 (in assessing unconscionability, courts consider “the alternatives available to the parties at the time and their ability to bargain”); *El Paso Nat. Gas Co.*, 964 S.W.2d at 61 (listing “the absence of a viable alternative,” as a factor to consider in the unconscionability analysis). Energy Transfer knew CPS Energy had no other options and no ability to bargain, so Energy Transfer refused to negotiate. Ex. A-44, CPSE-MDL_000009514 at 9521. CPS Energy needed the gas for human needs; it could not walk away. *Id.* So Energy Transfer, holding all the cards, doggedly insisted on their concocted price of \$400. *Id.* Lacking any other option, CPS Energy purchased 25,000 MMBtu for delivery at Oasis North Gate and 50,000 MMBtu for delivery at Rio Nogales for \$400. *Id.*

15 [REDACTED]

Notwithstanding these facts, Energy Transfer insists that the bargaining process was “standard and fair” and—more remarkably—that “[t]here was nothing unusual about the bargaining process during Winter Storm Uri.” ET Mot. Summ. J. at 24. The evidence demonstrates that there was nothing standard and fair about Winter Storm Uri or Energy Transfer’s conduct. Instead, Energy Transfer planned in advance of the storm to leverage its unique position in the natural gas market to take advantage of the sales opportunity that CPS Energy’s human needs obligation would present.

██████████ As temperatures plummeted and snowfall pummeled San Antonio, Energy Transfer capitalized on CPS Energy’s lack of alternatives and demanded \$400 for natural gas. Ex. A-44, CPSE-MDL_00009514 at 9521. It then refused to “wobble” on price, understanding full well that CPS Energy had no ability to bargain and nowhere else to turn. *Id.* It did not matter that the gas was for human needs. *Id.* (“[W]e can definitely attest that this would be for human needs.”) It did not matter that the Governor had declared a statewide disaster. It did not matter that CPS Energy had no other options—indeed, that was the point. Because Energy Transfer knew that on February 16, CPS could not buy the gas it needed from any other counterparty, Energy Transfer could demand whatever price it wanted and CPS Energy had no choice but to accede.

Energy Transfer also insists that CPS Energy was “free” to reject offers from Energy Transfer during the storm and simply purchase gas from some other, unidentified counterparty. ET Mot. Summ. J. at 25-26. Again, that argument ignores the realities of Winter Storm Uri, the massive cuts to supply CPS Energy had already received, and the limited number of options that CPS Energy had, even outside of the storm, to acquire delivered gas at Rio Nogales, Karnes, and Oasis North Gate. Ex. B, Bordovsky Aff. ¶¶ 7–11. As CPS Energy’s attempts to buy gas from other suppliers demonstrate, CPS Energy’s options to purchase gas at the hubs were also limited. Although a typical trading day would see upwards of 50 deals totaling millions of MMBtu of gas traded at Katy, on February 16, only nine fixed-price next-day deals for gas at Katy Oasis, totaling only 78,400 MMBtu, closed on the ICE platform. Ex. A-91B, ICE-ET-EP0000001. Similarly, only two transactions for gas at HSC pool, totaling less than 10,000 MMBtu, closed on the ICE platform. *Id.* Both were sales

by HPL. *Id.* Indeed, 100% of all transactions at HSC reported to Platts for flow day February 17 were sales by Energy Transfer. Ex. D, P. Bergin Decl. at ¶ 5(g).

With gas continuing to be cut at the hubs, CPS Energy had to purchase delivered gas, leaving them at Energy Transfer's mercy. Ex. A-6, Skaer Dep. at 253:7-20. Delivered gas that CPS Energy normally could count on receiving at Karnes off the [REDACTED]; *see also* Ex. B, Bordovsky Aff. ¶ 9. Again, because [REDACTED] had cut CPS Energy to zero, Energy Transfer was CPS Energy's only option for delivered gas at Rio Nogales as well. [REDACTED]; *see also* Ex. B, Bordovsky Aff. ¶ 8. And even outside of Winter Storm Uri, Energy Transfer was CPS Energy's only option for delivered gas at Oasis North Gate. Ex. B, Bordovsky Aff. ¶ 11. As Skaer explained "[T]here are only limited companies that can sell gas directly to CPS Energy...CPS Energy was at the mercy of those companies and we, essentially, had to buy the gas at whatever price they dictated, unless our executive team was willing to not buy the gas and have people freeze." Ex. A-6, Skaer Dep. at 69:11-17. Another CPS Energy executive explained: "[T]here were people dying, and we had no choice." Ex. A-168, Almaraz Dep. at 219:10-17. CPS Energy was "at the mercy of anyone that could supply to us at that time." *Id.*

iii. Energy Transfer deploys sharp business practices to extract the highest prices it could from CPS Energy.

Energy Transfer deployed sharp business practices to exploit CPS Energy's desperation in two ways. First, before offering gas to CPS Energy on February 16, Small posted offers on ICE to drive up prices. Ex. A-91B, ICE-ET-EP0000001. The Railroad Commission's order required suppliers like Energy Transfer to prioritize natural gas sales to local distribution companies serving human needs. Ex. A-46, ETP_000000162. In defiance of that order, Energy Transfer was not first communicating with utilities like CPS Energy—it was posting offers on ICE to the open market to drive up prices so that it could extract the highest price it could from CPS Energy. *Id.*

In addition to bidding up prices on ICE to extract the highest price it could from CPS Energy for next-day gas, Energy Transfer also deployed sharp business practices to capitalize on sameday pricing, as they had planned to do before the storm even started. Ex. A-85, CPSE-MDL_00009014. Later on February 16, when CPS Energy asked Merritt for an offer for additional next day delivered gas at Oasis North Gate and Karnes, she refused to make an offer. Ex. A-44, CPSE-MDL_000009514 at 9521-9522 (“We’ll have to wait and look at it tomorrow. [S]ame day[.]”)

Energy Transfer’s decision to wait to price gas for February 17 until the following day had nothing to do with available supply and everything to do with holding out for higher prices as the winter storm disaster grew steadily worse. Indeed, Merritt could not identify a single instance during Winter Storm Uri when Energy Transfer turned down a deal because of a lack of available volumes to sell. Ex. A-36, Merritt Dep. 174:3-14.

So on February 16, Energy Transfer had CPS Energy exactly where it wanted them—desperate for gas and with no other supplier to turn to. CPS Energy had no choice but wait until the following day to see what exorbitant price Energy Transfer would demand for same day gas. Ex. A-85, ETP_000009014. Because the totality of the circumstances surrounding the prices Energy Transfer charged CPS Energy for next-day gas on February 16 demonstrate that they were unconscionable, the Court should deny Energy Transfer’s motion for summary judgment with respect to the following February 16 transactions:

Transaction No.	Seller	Trade Date & Time	Sale Point	Price (Note: All fixed price deals)	Quantity + Flow Date(s)
CPSE #62325	Oasis	Feb. 16 12:38 PM	1702 Oasis Rio Nogales Delivered	\$400	50,000 (Feb. 17)
CPSE# 62326	Oasis	Feb. 16 12:38 PM	1483 Oasis North Gate Delivered	\$400	25,000 (Feb. 17)

d. The prices Energy Transfer charged CPS Energy on February 17, 2021 are unconscionable.

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, Energy Transfer's prices went even higher. That day, Energy Transfer charged their highest price for natural gas of the entire disaster period: \$500/MMBtu for same-day gas for delivery at Karnes and Oasis North Gate, representing an increase of more than 15,000% over pre-event prices. Ex. A-70, ETP_000000229; Ex. A-71, ETP_000000230. Energy Transfer also charged CPS Energy outrageous prices for next-day gas to be delivered on February 18: \$300 for gas delivered to Rio Nogales, Oasis North Gate, and Karnes. Ex. A-169, ETP_000000226; Ex. A-170, ETP_000000227; Ex. A-171, ETP_000000228.

i. The prices Energy Transfer charged “shock the conscience” and compel the court to intercede.

The prices Energy Transfer charged CPS Energy are “sufficiently shocking or gross to compel the court to intercede.” *Ski River Dev.*, 167 S.W.3d at 136; *Venture Cotton Co-op.*, 435 S.W.3d at 228 (“Under the UCC,” the unconscionability analysis considers “the agreement’s oppressive or shocking nature”). Every Energy Transfer witness conceded that they had never seen prices that high. Energy Transfer’s own traders referred to the very prices they were charging as [REDACTED] Ex. A-178, ETP_000039658 at 39660; [REDACTED] But because those [REDACTED] prices were [REDACTED] they didn’t think twice about charging them. [REDACTED]. The prices alone are sufficiently shocking and oppressive as to warrant court intervention. *Jones*, 59 Misc. 2d at 192 (finding the price charged was unconscionable because it was “exorbitant on its face,” and so outrageous that it warranted a finding of unconscionability irrespective of the presence of any unfairness in the contract formation process); TEX. BUS. & COM. CODE § 2.302, cmt. 1.

The oppressive and shocking nature of Energy Transfer’s prices is only heightened by the fact that Energy Transfer never considered whether it should charge any price other than the highest

price it could charge, even during the height of the storm on February 17. [REDACTED]

[REDACTED]; *see also* [REDACTED] When asked whether Energy Transfer could have charged less for natural gas during the storm and still made a significant profit, Small testified [REDACTED]

[REDACTED] Indeed, Energy Transfer—to this day—has no second thoughts about price gouging during a declared disaster and is [REDACTED] of its conduct during the storm. [REDACTED]

There is no reason Energy Transfer could not have chosen a different path and charged lower prices during the state-declared disaster. *See Jones*, 59 Misc. 2d at 191 (“Section 2-302 of the Uniform Commercial Code enacts the moral sense of the community into the law of commercial transactions.”). Recognizing the severity of Winter Storm Uri, other natural gas suppliers made the decision after the long weekend not to extract whatever price they could get from CPS Energy. For instance, [REDACTED] decided starting on February 16 to charge CPS Energy first of month prices: “[M]aking sure people get gas,” [REDACTED] trader said “[N]ot price gouging in these times if its for human needs”:

[REDACTED]

[REDACTED].

Energy Transfer, too, could have made different choices. By the end of the long weekend, Energy Transfer had already made record profits. [REDACTED] If Energy Transfer had charged first of month prices like [REDACTED], Energy Transfer still would have made [REDACTED] Indeed, Energy Transfer’s profit margin coming out of the long weekend was already triple what it typically was for an entire year. Ex. A-78, Energy Transfer LP, Quarterly Report (Form 10-Q) 42 (May 11, 2020); Ex. A-41,

Energy Transfer LP, Annual Report (Form 10-K) 87 (Feb. 12, 2021). But Energy Transfer wanted more and it deployed oppressive and shocking business practices—during a declared disaster—to get it.

ii. Energy Transfer’s attempts to normalize the shocking prices they charged are unavailing.

Unable to escape the fact that the prices it charged CPS Energy are exorbitant and shocking on their face, Energy Transfer makes several unpersuasive attempts to normalize them. First, Energy Transfer insists that the prices it charged CPS Energy were “not market outliers,” but were in fact “consistent” with prices charged by other suppliers. ET Mot. Summ J. at 28-31. That is misleading for several reasons. First, Energy Transfer ignores the fact that by February 16, only the pipeline companies had any gas. *See supra*. Second, it ignores that a number of the comparator sales plotted on pg. 32 of Energy Transfer’s motion were done on an index basis. The *Gas Daily* index is a volume-weighted average of all reported fixed-price transactions for a given hub. [REDACTED]

[REDACTED] Energy Transfer’s vast intrastate natural gas transportation and storage assets, including HPL and Oasis, give it a dominant role as a seller of natural gas in many Texas market areas, especially at Houston Ship Channel and Katy. For instance, on February 13-16, Energy Transfer’s transactions made up **93%** of the reported fixed-price transactions at Houston Ship Channel. Ex. D, P. Bergin Aff. ¶ 5(g). On February 17, Energy Transfer’s transactions made up **100%** of the reported fixed-price transactions at Houston Ship Channel.

Flow Date(s)	HSC	Katy	Waha
Feb. 6–8	100%	54%	58%
Feb. 9	91%	51%	60%
Feb. 10	0%	2%	48%
Feb. 11	100%	34%	42%
Feb. 12	32%	0%	13%
Feb. 13–16	93%	36%	34%
Feb. 17	100%	6%	0%
Feb. 18	64%	56%	15%
Feb. 19	64%	77%	2%

Id. Thus, any argument about the reasonableness of the prices Energy Transfer charged that relies on a comparison to an index price or a price charged by another supplier based on an index price must be assessed with an understanding of Energy Transfer’s outsize influence on the daily indices reported for various hubs. Because of Energy Transfer’s dominant influence—and on February 17—complete influence over the index price at Houston Ship Channel, any comparison to that index price is essentially a comparison with itself.

Energy Transfer next asserts that there is “abundant, undisputed evidence that CPS did not think the prices were unfair at the time.” ET Mot. Summ. J. at 35. There could not be a more hotly disputed issue in this case. Every CPS Energy witness has testified that they thought the prices Energy Transfer was demanding were excessive and exorbitant. *See, e.g.*, Ex. A-168, Almaraz Dep at 97:6-12 (“**Q.** Did - - at this time, February 15th 2021 . . . did you believe these prices were excessive or exorbitant? **A.** Me, Frank, personally, absolutely. **Q.** At this time, February 15th, 2021? **A.** I was operating against a frame of reference of \$2.50, \$3. These numbers were stunning.”); Ex. A-6, Skaer Dep. at 25:9-13 (“As the gas prices began to elevate, we were very concerned about the prices and wanted to ensure that - - that we had full support before buying any gas deals that were, what we considered, to be excessively priced.”) Contemporaneous documents corroborate that testimony. Ex. A-44, CPSE-MDL_00009514 at 9521 (“[T]he numbers are so large . . . it’s got everyone pretty freaked out”). And even Energy Transfer understood the prices at the time were “crazy”. *See* Ex. A-172, ETP_000039658 at ETP_000039660.

Grasping at straws, Energy Transfer argues that because CPS Energy “was aware of market conditions and gas prices when it made its gas purchases during the storm,” the prices Energy Transfer charged were somehow not unconscionable. ET Mot. Summ. J. at 34. CPS Energy knew that Energy Transfer was demanding outrageous prices during the storm. It also knew that because of Energy Transfer’s outsize influence over the daily indexes at Houston Ship Channel and Katy, Energy Transfer was influencing—if not wholly driving—the index prices at various hubs. Ex. A-6, Skaer Dep. at 160:12-20; Ex. D, Bergin Aff. ¶ 5(g). CPS Energy’s *awareness* of Energy Transfer’s outrageous prices—and Energy Transfer’s influence over the daily index prices at various hubs—does

not make those prices any less shocking. Indeed, because CPS Energy was constantly monitoring price and available supply, it made every effort to avoid buying gas from Energy Transfer when it had any other option, given Energy Transfer’s reputation for charging the highest prices that it could. Ex. A-6, Skaer Dep. 252:11-15 (“I would say that oftentimes when we asked them for a price, Bruce, for instance, was afraid to hang up the phone because he said if he called them back in one minute they would raise the price.”). CPS Energy only turned to Energy Transfer when it had no other option, and Energy Transfer used CPS Energy’s lack of choice and ability to bargain to demand oppressive and shocking prices. Ex. B, Bordovsky Aff. ¶¶ 7–11.

Because the totality of the circumstances surrounding the prices Energy Transfer charged CPS Energy for next-day and same-day gas on February 17 demonstrate that they were unconscionable, the Court should deny Energy Transfer’s motion for summary judgment with respect to the following February 17 transactions:

Transaction No.	Seller	Trade Date & Time	Sale Point	Price (Note: All fixed price deals)	Quantity + Flow Date(s)
CPSE# 62419	Oasis	Feb. 17 11:17 AM	Oasis Rio Nogales Delivered	\$300	50,000 (Feb. 18)
CPSE# 62420	Oasis	Feb. 17 11:17 AM	Oasis North Gate Delivered	\$300	75,000 (Feb. 18)
CPSE# 62417	HPL	Feb. 17 11:26 AM	987357 HPL CPS Karnes Delivered	\$300	35,000 (Feb. 18)
CPSE #62323	HPL	Feb. 17 11:58 AM (intraday)	987357 HPL CPS Karnes Delivered	\$500	80,000 (Feb. 17)

CPSE #62327	Oasis	Feb. 17 3:25 PM (intraday)	1483 Oasis North Gate Delivered	\$500	50,000 (Feb. 17)
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e. The prices Energy Transfer charged CPS Energy on February 18, 2021 are unconscionable.

At 8:00 AM on February 18, Bordovsky messaged Jennifer Merritt asking for 75,000 MMBtu of next-day delivered gas at Oasis North Gate. Ex. A-44, CPS-MDL_00009514 at 9524. She did not give him a price for an hour and a half. *Id.* At 9:30 AM, Merritt messaged “\$50.00 offer.” *Id.* Bordovsky asked Merritt to please “give [him] a sec, please” to get approval to buy the gas. *Id.* Small then started posting offers [REDACTED], offering gas to the entire market in violation of the Railroad Commission’s prioritization order. [REDACTED]; Ex. A-46, ETP_000000162 (Railroad Commission Order). As Small was posting offers to sell gas at [REDACTED] he was posting a bid to buy gas for [REDACTED] [REDACTED]. At 9:41 AM, a counterparty lifted Small’s \$75 offer. Ex. A-91C, ICE-ET-EP000001. One minute later, Merritt messaged CPS Energy that she was “out” of her original \$50 offer and increased her price to \$75. Ex. A-44, CPS-MDL_00009514 at 9524. CPS Energy needed gas at North Gate and Energy Transfer remained CPS Energy’s only option for delivered gas at that delivery point. CPS Energy had no choice but to assent to the \$75. *Id.*; Ex. B, Bordovsky Aff. ¶ 11.

At this time, Energy Transfer’s deals constituted 77% of all reported transactions at Katy as well as 80.6% of the volume traded at Katy on ICE. Ex. D, Bergin Aff. ¶5(g). Energy Transfer’s outsize influence at Katy gave it the ability to influence, if not outright control, the price at Katy. *Id.*

As prices fell toward the end of the trading day, Energy Transfer seized its final opportunity of the storm to demand exorbitant prices: Small sold gas to CPS Energy over ICE for \$50, the original price Merritt had quoted CPS Energy and then withdrawn earlier that morning. Ex. A-91C, ICE-ET-EP000001; Ex. A-44, CPS-MDL_00009514 at 9524. The next day, gas prices would return to pre-event levels of \$2–\$3 dollars. Reflecting on the exorbitant profit they had helped make possi-

ble, the commercial development joked about getting paid that month based on a percentage of Energy Transfer’s profit. Ex. A-173, ETP_000039858 at 39859 (Ryan Lee asked Riley “How about .5% of book?” and Riegler texted back “BOOM!”).

The prices Energy Transfer extracted from CPS Energy on February 18 culminated the weeks-long effort to deploy sharp and oppressive business practices to profit off a statewide emergency and CPS Energy’s attendant desperation for gas. Indeed, by February 18, Energy Transfer had perfected its price gouging technique. When CPS Energy reached out in the morning for an offer, Energy Transfer again stalled, giving Small time to bid up prices on ICE. Ex. A-44, CPS-MDL_00009514, at 9524. It leveraged its outside influence over the Katy index to essentially set that price. Ex. D, Bergin Aff. ¶5(g). Then, it withdrew its original \$50 offer and demanded \$75 from CPS Energy. Ex. A-44, CPS-MDL_00009514 at 952. Meanwhile, it was unwilling to purchase gas for its own supply for any more than \$8. Ex. A-90C, ICE-Energy_Transfer000011. And the cost basis Energy Transfer assigned to the gas it withdrew from storage to sell remained \$3. Ex. A-96, ETP_000012086.

Because the totality of the circumstances demonstrate that the prices Energy Transfer charged CPS Energy on February 18, like the prices Energy Transfer charged throughout the storm, were unconscionable, the Court should deny Energy Transfer’s motion for summary judgment with respect to the following February 18 transactions:

Transaction No.	Seller	Trade Date & Time	Sale Point	Price (Note: All fixed price deals)	Quantity + Flow Date(s)
CPSE# 62454	Oasis	Feb. 18 9:50 AM Oasis North Gate	1483 Oasis North Gate Delivered	\$75	75,000 (Feb. 19)
CPSE #62453	HPL	Feb. 18 11:05 AM	986780 Oasis Katy	\$50	10,000 (Feb. 19)

2. The prices Energy Transfer charged CPS Energy during the storm bore no reasonable relationship to their supply costs.

The prices Energy Transfer charged CPS Energy are all the more outrageous given the enormous profit it knew it was making throughout the disaster. In price unconscionability cases, courts across the country have consistently held that the degree to which a seller profits from a given price is relevant to whether that price is unconscionable or excessive. *See California Grocers Assn.*, 27 Cal. Rptr. 2d at 403; *Frostifresh*, 281 N.Y.S.2d at 965; *Moran*, 208 Cal. Rptr. at 316; *Jones*, 59 Misc.2d at 191-192. To that end, courts look to the relationship between the prices a party charged and its supply costs. *See id.* Here, the prices Energy Transfer charged during Winter Storm Uri bore no reasonable relationship to its supply costs. For example, as previously discussed, Energy Transfer's commercial development team sourced low-cost gas—in the single digits— from Louisiana producers for Energy Transfer's own weekend supply. Energy Transfer also [REDACTED]

[REDACTED] Yet, it demanded prices as high as \$500 from CPS Energy. Ex. A-70, CPSE-MDL_00009514 at 9523-9524; Ex. A-71, ETP_000000229; ETP_000000230.

Moreover, Energy Transfer knew—and celebrated—these outrageous profits throughout the disaster. *See supra* at Part A.1.iv. Energy Transfer's exorbitant profits combine with several other factors militating in favor of unconscionability, including CPS Energy's inability to bargain; its lack of alternatives; the context of a once in a generation storm; Energy Transfer's dominant role as a seller of natural gas in many Texas market areas, especially the Houston Ship Channel and Katy, and its corresponding ability to influence if not outright control the index price; Energy Transfer's sharp business practices—including its refusal to wiggle on price, its practice of bidding up prices on ICE before offering gas to CPS Energy, and the many actions it took to capitalize on CPS Energy's desperation to extract excessively high prices. At a minimum, the commercial circumstances that existed during Winter Storm Uri are sufficient to raise a fact issue on CPS Energy's unconscionability defense and summary judgment is therefore improper.

3. Sophisticated entities are not precluded from asserting the affirmative defense of unconscionability.

Unable to contest these facts, Energy Transfer baldly asserts, with no citation, that the Court can ignore them because “[i]n Texas, the affirmative defense of unconscionability is not available to large sophisticated entities in commercial transactions.” ET Mot. Summ. J. at 23. Energy Transfer urges that because CPS Energy is “a sophisticated business entity,” that “sophistication rules out procedural unconscionability,” the Court should “end its inquiry here.” *Id.* at 23-24. There is no such rule.

Unconscionability requires a fact-intensive inquiry into the circumstances at the time of contracting. A party’s level of sophistication, while potentially probative of various factors, is not dispositive—indeed, no single factor is dispositive because under Texas law, the unconscionability analysis considers “the totality of the circumstances.” *Delfingen US-Texas*, 407 S.W.3d at 801; *Besteman*, 272 S.W.3d at 787–88 (“Unconscionability must be determined on a case-by-case basis in light of a variety of factors.”). There are no Texas cases indicating that a party’s sophistication renders all other considerations immaterial, including the entire commercial atmosphere surrounding the challenged transactions.¹⁶ Likewise, testimony that a party is unsophisticated does not, in the absence of other factors, establish unconscionability. *See, e.g., Brackenridge Healthcare, Inc. v. Camero*, No. 04-22-00271-CV, 2023 WL 3107064, at *5 (Tex. App.—San Antonio Apr. 27, 2023, no pet.). A party’s level of sophistication is not dispositive either way.

¹⁶ Indeed, even when courts in Texas have concluded that a contract between two sophisticated entities is not unconscionable, the court’s analysis did not begin and end with a party’s level of sophistication. Courts in Texas, like those across the country, assess unconscionability in light of all the commercial circumstances existing at the time of contracting. *See, e.g., Transamerican Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472, 478 (Tex. 1979) (expressly considering factors such as whether the terms of the contract were “harsh” or “oppressive” and whether the party challenging the contract was in an unfair bargaining position in case involving two corporations); *Franz Chem. Corp. v. Philadelphia Quartz Co.*, 594 F.2d 146, 149–50 (5th Cir. 1979) (explaining that although the corporation was sophisticated, the corporation had the right under the UCC “to present evidence regarding the totality of circumstances surrounding the negotiation and execution [of the agreement] in order to assist the court in making its [unconscionability] determination”).

Energy Transfer’s proposed rule also altogether ignores that unconscionability is a defense *in the UCC*, which undoubtedly applies to sophisticated commercial entities. TEX. BUS. & COM. CODE § 2.302. “[S]ection 2.302 of the Business and Commerce Code does not limit its protections to only those involved in personal, as opposed to commercial, transactions.” *El Paso Nat. Gas Co.*, 964 S.W.2d at 62. Indeed, the UCC also requires that parties be afforded “a reasonable opportunity to present evidence as to [a contract’s] commercial setting, purpose and effect” to aid the court in evaluating the defense. TEX. BUS. & COMM. CODE § 2.302(b). “[T]he legislature did not intend to *ipso facto* exclude commercial transactions from the realm of unconscionability.” *El Paso Nat. Gas Co.*, 964 S.W.2d at 62. And neither Energy Transfer nor this Court is “in a position to do that which the legislature has not done.” *Id.*

Energy Transfer’s cases do nothing more than demonstrate that the parties’ relative sophistication is one among many factors in the totality of the circumstances analysis. ET Mot. Summ. J. at 23-24 (citing *Lost Maples Gen. Store, LLC v. Ascentium Cap., LLC*, No. 14-18-00215-CV, 2019 WL 1966671 (Tex. App.—May 2, 2019, no pet.) For instance, in *Lost Maples*, the court’s unconscionability analysis did not stop because the challenging party was sophisticated. The court considered whether the challenging party “was afforded ample time to review [the contract’s terms] and seek legal counsel before signing them,” whether the party had “negotiated [the contract’s] terms” and evidence indicating that the challenging party had “considered the option of paying cash for the ice machine and walking away from the financing offer altogether.” 2019 WL 1966671 at *6. As required by both case law and statute, the court considered the totality of the commercial circumstances surrounding the challenged transaction and all of plaintiff’s evidence before rendering its decision about whether the agreement was unconscionable. *Venture Cotton Co-op.*, 435 S.W.3d at 228; TEX. BUS. & COMM. CODE § 2.302(b).

As for Energy Transfer’s assertion that courts across the country have held it a “foundational principle” that sophisticated entities cannot assert an unconscionability defense, that is plainly untrue. Many courts, including in Texas, have applied the UCC’s unconscionability framework to sophisticated commercial entities. *See, e.g., Industralease Automated & Sci. Equip. Corp. v. R.M.E. Enterpris-*

es, Inc., 58 A.D.2d 482, 490, 396 N.Y.S.2d 427, 432 (1977) (applying the UCC and concluding that a disclaimer of warranties provision in a contract between two corporations involving industrial equipment was unconscionable because the industrial equipment never operated); *Transamerican Leasing Co. v. Three Bears, Inc.*, 586 S.W.2d 472, 478 (Tex. 1979) (analyzing unconscionability under the UCC in case involving two corporations with no mention of the challenging party's sophistication in its analysis).

In each of these cases cited by Energy Transfer, *see* ET Mot. Summ. J. at 23, the court does not dispense with its unconscionability analysis upon a determination that the challenging party is sophisticated but rather considered the party's sophistication as one of many factors in unconscionability's totality of the circumstances analysis. Indeed, in *Morrison v. Amway*, the court makes that requirement explicit, explaining that unconscionability "has no precise legal definition because it is not a concept but a determination to be made *in light of a variety of factors*?" and "no single test exists to determine if a contract is unconscionable." 49 F. Supp. 2d 529, 533-544 (S.D. Tex. 1998) (emphasis added). In *United Teacher's Assocs. Ins. Co. v. MacKeen & Bailey, Inc.*, the court concluded the agreement was not unconscionable because the evidence demonstrated, among other things that the agreement was drafted by counsel, that the agreement provided consideration, and the parties were aware of the risk of conflicting interests. 847 F. Supp. 521, 540 n. 28 (W.D. Tex. 1994), *aff'd in part, rev'd in part sub nom United Tchrs. Assocs. Ins. Co. v. MacKeen & Bailey*, 99 F.3d 645 (5th Cir. 1996). In *NML Cap. v. Republic of Argentina*, 621 F.3d 230 (2d Cir. 2010) and *BBVA Compass Inv. Sols, Inc. v. Brooks*, 456 S.W.3d 711, 715 (Tex. App.—Fort Worth 2015, no pet.), the party's unconscionability claim failed because it rested in part on the occurrence of unfavorable *subsequent events* and a lack of evidence of oppressive conduct *at the time* the agreement was signed. *NML Cap.*, 621 F.3d 230, 237 (Argentina's later financial crisis caused the interest rate at issue in the contract to spike and there was no indication of a lack of meaningful choice or alternatives at the time of drafting; indeed Argentina drafted the very interest rate provision it was challenging); *BBVA Compass Inv. Sols*, 456 S.W.3d at 715 (BBVA Compass's transfer of all of plaintiffs' money into somebody else's account occurred long after plaintiffs signed a brokerage agreement containing the challenged arbitration agreement). And in

SOL Grp. Mktg. Co. v. Lines, No. 14-CV-9929 (SHS), 2016 WL 205444 (S.D.N.Y. Jan. 15, 2016), the court examined evidence demonstrating that the challenging party was “able to negotiate both a VIP rate and an amendment to the contract” and noted the lack of evidence that APL was Sol’s only option, *id.* at *7. None of these cases hinged on a party’s sophistication alone.

Moreover, in each of these cases, the party challenging the agreement simply failed to provide the kind of evidence CPS Energy has provided here. For instance, in *Morrison*, the court did not throw out the party’s unconscionability defense because it was relatively sophisticated; rather, the court concluded the contract at issue was not unconscionable because the party challenging the agreement presented “no evidence” of “overreaching or sharp practices” and no evidence the agreement was “unfair or oppressive.” 49 F. Supp. 2d at 534. Likewise, in *BBVA Compass Inv. Sols*, the record contained “no specific evidence” that the plaintiffs would “actually be charged excessive arbitration fees” and there was “no legally sufficient evidence that such fees prevent the [plaintiffs] from effectively pursuing their claim in the arbitral forum.” 456 S.W.3d at 724. CPS Energy, by contrast, has presented substantial evidence that it lacked alternatives, had no bargaining ability, and it has demonstrated that Energy Transfer deployed sharp business practices to profit off a declared disaster to.¹⁷ *See supra* at Part III.

Energy Transfer asks the Court to invent a rule without basis in case law or statute. The Court should decline the invitation and see the request for what it is: another attempt by Energy Transfer to avoid the fact-intensive inquiry the unconscionability doctrine requires.

4. Energy Transfer’s sideshow arguments are unavailing.

At various points in its motion, Energy Transfer insists that CPS Energy had alternatives to purchasing gas from Energy Transfer at exorbitant prices. Energy Transfer, however, fails to identify a single supplier besides Energy Transfer that was able to sell CPS Energy the volumes it needed at

¹⁷ Importantly, none of the cases Energy Transfer cites involved exorbitant price terms demanded during a declared disaster and the attendant public policy concerns associated with price gouging in times of an emergency. *Venture Cotton Co-op.*, 435 S.W.3d at 228 (explaining that unconscionability considers “public-policy concerns, and the agreement’s oppressive or shocking nature”).

the locations where it needed it during Winter Storm Uri. CPS Energy has explained why, for each day of the storm, Energy Transfer was CPS Energy's only option. Against that backdrop, Energy Transfer cannot establish as a matter of law that CPS Energy had other alternatives *at the time of contracting*. See TEX. BUS. & COM. CODE § 2.302 (limiting the lens of analysis to the commercial circumstances existing "at the time [the contract] was made").

Unable to identify the existence of actual available alternatives *during the storm*, Energy Transfer next points to supposed options CPS Energy should have pursued *before the storm even started*.

These include:

- Purchasing baseload gas;
- Making additional financial hedges;
- Maintaining additional gas in storage which could have been used during Winter Storm Uri; and
- Relying on or storing additional natural gas alternatives, like fuel oil.

See ET Mot. Summ. J. at 2, 4, 25-27. Even if Energy Transfer's proposed "alternatives" were relevant, CPS Energy has adduced sufficient evidence to raise a genuine issue of material fact that these options were not available to CPS Energy or were not feasible in light of Winter Storm Uri. Energy Transfer's related arguments that CPS Energy deliberately chose a "risk profile" that exposed it to spot prices and somehow excuses Energy Transfer's unconscionable prices and that CPS Energy had a so-called "plan" to profit off high gas prices are also red herrings.

a. Energy Transfer's so-called alternatives are not relevant.

As noted above, because the unconscionability defense requires a court to assess the totality of the circumstances as they existed at the time of contracting, Energy Transfer's purported alternatives are not relevant. See TEX. BUS. & COM. CODE § 2.302(a); *Delfingen US-Texas*, 407 S.W.3d at 798; *Venture Cotton Co-op.*, 435 S.W.3d at 228. Here, because of the nature of the NAESB, the trial court must look at the particular circumstances when the natural gas transactions at issue were executed

between CPS Energy and Energy Transfer – that is, during Winter Storm Uri. That timing is important. Energy Transfer seems to concede as much at one point in its motion.¹⁸

Elsewhere, however, Energy Transfer wants this Court to examine hypothetical actions that CPS Energy could have taken in the months before Winter Storm Uri to allegedly better prepare for Winter Storm Uri. Those actions are simply not relevant to the unconscionability determination because none of them were alternatives available to CPS Energy *at the time* the disputed gas transactions occurred.

As Energy Transfer’s own expert concedes, none of these so-called “alternatives” are relevant to the Court’s unconscionability determination. Energy Transfer’s expert, Michael De Laval, admits that CPS Energy’s pre-Winter Storm Uri gas purchasing and hedging strategies were a “separate issue” from the question of whether the prices Energy Transfer ultimately charged were excessive. When asked how his review of CPS Energy’s gas purchasing strategies for baseload versus swing gas would help the fact-finder determine whether Energy Transfer’s prices were excessive, De Laval explained that “[r]egarding the individual prices, I think that’s a separate issue.” (Ex. A-174, De Laval Dep. 140:3–14.) De Laval then conceded on follow-up questioning that CPS Energy’s gas purchasing strategy does not “go toward” the determination of whether a price is excessive because that is a separate issue:

Q. But these specific opinions about their risk strategy don’t go toward the determination of whether a price is excessive or not. Right? That’s separate?

A. That’s separate. Correct.

(*Id.* at 140:15–19.)

¹⁸ See ET Mot Summ. J. at 27 (quoting *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 678 (Tex. 2006) (“The test for substantive unconscionability is whether, “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.*”).

De Laval also admitted that his opinions concerning CPS Energy’s hedging strategies would not help the fact-finder determine whether the prices charged by Energy Transfer were excessive, which is the exact question the fact-finder will be asked to resolve:

Q. So I have the same question about what we were discussing with hedging. So how would your opinion with respect to CPS Energy’s inter-month hedging strategy help the fact-finder to determine whether the prices Energy Transfer charged were excessive? . . .

A. The absolute price, if they were just looking at the price of the transaction to the fact-finder to say if it’s excessive or not, it wouldn’t.

Ex. A-174, De Laval Dep. 214:5–14.

Even if the Court ventured beyond the permissible, contemporaneous lens of the unconscionability analysis to examine Energy Transfer’s proposed alternatives, those proposed alternatives assume the benefit of hindsight. While Energy Transfer concedes that Winter Storm Uri had “no recent precedent,” CPS Energy’s weather expert, Jeffrey Basara—whom Energy Transfer has not challenged in this case—has testified that Winter Storm Uri was “unprecedented in the climatological record when you consider the combined attributes of its intensity, duration, and precipitation accumulation” and the likelihood of an event like Winter Storm Uri occurring was 1 in over 300,000 years. Ex. A-175, Basara Dep. 24:13-24. CPS Energy could not have taken steps to prepare for what would be an unprecedented event, and this Court should reject Energy Transfer’s blame-game. Because all of Energy Transfer’s proposed alternatives assume CPS Energy could have predicted Winter Storm Uri and its impact, the Court should reject all of them. Further, as detailed below, there are genuine issues of material fact as to whether these alternatives were available to CPS Energy or feasible.

Baseload gas. In its motion, Energy Transfer asserts that CPS Energy could have “[p]urchased additional baseload gas each month, making it less reliant on spot market prices.” ET Mot. Summ. J. at 26. There is no dispute between the parties that CPS Energy could only buy baseload gas for February 2021 during “bid week” in January, long before forecasts ever predicted a storm of Winter Storm Uri’s magnitude. Ex. A-37, CPS Corp Rep. Dep. 287:21-288:6. Weather

forecasts during bid week predicted a mild February. Ex. A-175, Basara Dep 42:21-25. Baseload gas is “the minimum amount of usage you can expect in a month.” Ex. A-8, Bayazitoglu Dep. 86:20-22. Historically, CPS Energy has its lowest average daily gas consumption in February. So, based on its assessment of historical weather forecasts and its historical demand in a typical February, as even Energy Transfer’s expert concedes is the correct approach, CPS Energy purchased a similar amount of baseload gas for February 2021 that it had purchased for the previous five Februaries. Ex. A-8, Bayazitoglu Dep. 78:10-12; Ex. A-174, De Laval Dep. 80:25-81:3. CPS Energy could “not know the kind of consumption month the coming February would be, and the market consensus did not suggest that February was going to be a cold or an above-average month.” Ex. A-8, Bayazitoglu Dep. 86:13-17. Energy Transfer can point to no information available to CPS Energy during bidweek in January 2021 that should have signaled to CPS Energy that it needed to depart from what it had done for the past five Februaries.

Because the evidence shows that no one had any indication how bad the storm was going to be during bid week in January, buying additional baseload gas was not a reasonable alternative. *See* Ex. A-175, Basara Dep. 25:22-26:13 (explaining that the Winter Storm Uri forecast was not actionable until February 11, 2021, just days before the storm). And, as De Laval states, even if CPS Energy had additional baseload agreements in place, there is no guarantee that CPS Energy would have received that gas during the storm. Ex. A-174, De Laval Dep. 154:21-155:8 (**Q.** “So setting aside Energy Transfer specific, if CPS Energy had purchased more baseload gas in January 2021, would it have been guaranteed to flow during Winter Storm Uri? **A.** Of course not. But neither would daily gas.”).¹⁹

Moreover, as it does throughout its motion, Energy Transfer refuses to engage with specifics. It asserts that CPS Energy could have “[p]urchased additional baseload gas,” but it does not bother to explain how much more or whether a counterparty was interested in selling CPS Energy

¹⁹ CPS Energy has moved to exclude De Laval’s opinions and uses his statements here only to demonstrate that no competent evidence exists to support Energy Transfer’s argument that reasonable alternatives exist.

that unspecified volume. Energy Transfer concedes that it would be unreasonable for a municipal utility like CPS Energy to meet its full demand requirements through baseload gas. Ex. A-174, De Laval Dep. at 80: 20-22 (Q. “So is it your opinion that CPS Energy should meet its full demand requirements through baseload gas?” A. Absolutely not.”) And, as previously discussed, CPS Energy had to buy delivered gas from Energy Transfer at Karnes, Rio Nogales, and Oasis Northgate because no other counterparty could sell them delivered gas at those points on CPS Energy’s system. Ex. B, Bordovsky Aff. ¶¶ 8–11. There is therefore simply no evidence to suggest that had CPS Energy purchased some unspecified increased volume of gas through baseload contracts that it could have avoided Energy Transfer’s predatory spot market pricing.

Hedging. As for hedging, Energy Transfer contends that CPS Energy should have “[p]urchased additional financial hedges to protect itself from daily price risk.” ET Mot. Summ. J. 26. Setting aside the absurdity of Energy Transfer’s insistence that it was somehow CPS Energy’s responsibility to protect itself from Energy Transfer’s predatory conduct, the only competent evidence that Energy Transfer relies on for this point are two deposition excerpts referencing a BALMO – “balance of the month trade” – at \$9 per MMBtu. But as CPS Energy has argued elsewhere, there is no indication that this hypothetical trade was even available to CPS Energy. *See* CPS Energy Mot. to Exclude De Laval at 9; *see also* Ex. A-8, Bayazitoglu Dep. 100:24-101:102:3 (identifying several factors why CPS Energy could not transact this “hypothetical BALMO trade”). Even if Energy Transfer had evidence that such a trade was available, CPS Energy could not have executed that trade under its policies for a host of reasons, including that CPS Energy’s risk management policies—vetted by third-party consultant, Siemens—did not contemplate that type of trade, the trade would have exceeded set maximum volume limits, and CPS Energy’s risk management policy, by design, does not allow for knee-jerk changes to its hedging strategy to prevent rogue decision making and to protect the public. Ex. A-8, Bayazitoglu Dep. 100:2-14; 101:6-102:3. Moreover, the historical data available to CPS Energy at the time would have indicated that entering into that hypothetical trade would have been foolish because historically, when there has been a price spike in the Houston Ship Channel market, prices have fallen within a day or two. *Id.* at 102:1-3. Nobody knew on Febru-

ary 11 how long Winter Storm Uri would last. Locking in a \$9 BALMO price only to have prices subsequently return to \$2 would have carried enormous hedging losses for CPS Energy, and its hedging policies are designed to prevent just that kind of risk taking. *Id.* Ultimately, Energy Transfer contends CPS Energy should have purchased a financial product to protect itself from Energy Transfer's price gouging that it has no evidence to suggest was even available, much less allowed under CPS Energy's risk management program. The Court should reject this argument.

Storage Gas. Next, Energy Transfer claims that CPS Energy could have purchased "additional storage contracts to both store additional gas at a lower cost and the ability to withdraw higher volumes each day." ET Mot. Summ. J. at 26. Energy Transfer points to no evidence outlining the terms of these hypothetical contracts or identifies with whom CPS Energy could have contracted to obtain additional storage. Energy Transfer also ignores the risks associated with CPS Energy purchasing natural gas and storing it for later use, the costs associated with obtaining and storing that gas, or the injection and withdrawal limits in these hypothetical storage contracts. The storage contract CPS Energy had with HPL, for instance, limited CPS Energy's daily storage withdrawals to 40,000 MMBTu—and CPS Energy maxed out its storage withdrawals for every day of the storm.

[REDACTED]. Accordingly, there is no evidence to suggest that a hypothetical storage contract, for an unspecified storage volume, with an unidentified counterparty would have ensured that CPS Energy could have withdrawn sufficient gas from storage to avoid Energy Transfer's predatory pricing—much less that the gas would have shown up to the points on CPS Energy's system where it needed it.

Reliance on Additional National Gas Alternatives. Finally, Energy claims that CPS Energy should have used different alternatives to natural gas to avoid the excessive prices charged by Energy Transfer. This is equivalent to a gas station that is accused of price-gouging customers during a disaster arguing that customers should be driving Teslas instead of gas-powered vehicles. The Court should reject this argument.

Thus, even if these pre-storm alternatives were relevant—and they are not—CPS has certainly produced sufficient evidence to raise a genuine issue of material fact as to whether these alternatives were available to CPS Energy or were even feasible.

Energy Transfer is also wrong on the law. Energy Transfer claims that CPS Energy, as the party challenging the contract “must produce evidence that it unsuccessfully attempted to make use of alternatives” and cites a federal case, *Am. Stone Diamond, Inc. v. Lloyd’s of London*, 934 F. Supp. 839, 845 (S.D. Tex. 1996), in support of that proposition. But *American Stone Diamond* says nothing of the sort. Instead, the availability of reasonable alternatives is simply one factor—among many—that is part of the highly-specific factual inquiry that the court must undertake to determine whether a contract is unconscionable or not. *Venture Cotton Co-op.*, 435 S.W.3d at 228. And *American Stone Diamond* is distinguishable on its facts. In that case, an insurance coverage dispute, the Houston federal court determined that the plaintiff, the insured, had failed to produce any evidence of any “lack of choice” because the only evidence it submitted was a single affidavit that did not explain whether the insured’s agent could have used self-insurance, negotiated with the insurance carrier differently, or negotiated with other insurers. *Am. Stone Diamond*, 934 F. Supp. at 845. Here, by contrast, CPS Energy has produced evidence that it had no choice but to purchase natural gas from Energy Transfer and Energy Transfer has pointed to no evidence suggesting that CPS Energy could have purchased the volumes it purchased from Energy Transfer from another counterparty, or that another counterparty had the ability to get the gas to various delivery points on CPS Energy’s system.

Energy Transfer also claims that courts broadly construe a “reasonable alternative” and that parties can arrange “viable alternatives” months beforehand. ET Mot. Summ. J. at 25. But the case it cites for the proposition, *Am. Emps. Ins.’ Co. v. Aiken*, 942 S.W.2d 156, 161-162 (Tex. App.—Fort Worth 1997), is distinguishable. In that case, which involved an agent suing an insurer for termination of an agency agreement, the insurer filed a motion to compel arbitration, and the agent claimed that the arbitration provision was unconscionable. The court determined that there were reasonable alternatives in terms of different insurance companies that the agent could have signed with; there was no discussion that those reasonable alternatives included other actions that the agent could take

internally – like hedging differently, adding storage capacity, or purchasing baseload gas. In short, the reasonable alternatives must be tied to the specific unconscionable act.

b. Energy Transfer’s risk-allocation argument is a red herring.

At various points in its motion, Energy Transfer claims that CPS Energy adopted a “risk profile” that exposed it to higher prices in the spot market. *See, e.g.*, ET Mot. Summ. J. at 27. Energy Transfer further contends that because CPS Energy allocated risk to the spot market, that somehow excuses the excessive prices charged by Energy Transfer during the storm because the “freedom to contract includes the freedom to allocate risk.” ET Mot. Summ. J. at 15. Energy Transfer seeks to craft another exception to the unconscionability doctrine in Texas that does not exist.

First, because the unconscionability defense requires a court to assess the totality of the circumstances as they existed at the time of contracting, TEX. BUS. & COM. CODE § 2.302(a); *Delfingen US-Texas, L.P.*, 407 S.W.3d at 798, CPS Energy’s actions before Winter Storm Uri have no bearing on whether the prices charged by Energy Transfer during the storm were excessive.

Second, and more fundamentally, there is no indication that CPS Energy allocated risk as part of its contract with Energy Transfer. Each of the cases Energy Transfer cites involves the allocation of risk between bilateral parties within the four corners of a contract. In *Lost Maples General Store*, for example, a general store purchased an ice machine, and to finance that purchase, entered into a separate agreement with the financier that explicitly “allocated to [the general store] the risk that [the ice machine seller] would fail to perform” by requiring the general store to “begin making immediate payments” to the financier even before the ice machine was delivered. 2019 WL 1966671 at *1. When the ice machine was never delivered, the general store sued the financier. The court ruled against the general store, finding that *the contract itself* contained an allocation of risk provision and “there is nothing unconscionable or against public policy by allowing sophisticated parties to allocate risks as they see fit.” *Id.* at *7. Similarly, in *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, the construction contract had explicit “risk-allocation provisions” that related to due diligence and that “constitute[d] the allocation by market participants of risks and benefits regarding the pipeline’s

construction.” 389 S.W.3d 802, 803 (Tex. 2012) (cleaned up). And in *Gym-N-I Playgrounds, Inc. v. Snider*, the commercial lease agreement at issue contained a risk allocation provision by which the commercial tenant leased the property “as is,” and assumed the risk of a fire that eventually destroyed the property. 220 S.W.3d 905, 912-913 (Tex. 2007).

Here, by contrast, there is no such risk allocation provision in the NAESB contract between Energy Transfer and CPS Energy. Energy Transfer does not point to any such provision. Instead, the facts show that CPS Energy was compelled to purchase gas from Energy Transfer at the prices Energy Transfer charged. Unlike the contracts at issue in *Lost Maples*, *El Paso Field Services*, and *Gym-N-I Playgrounds*, the NAESB agreement at issue between Energy Transfer and CPS Energy is a form contract; the terms of individual transactions, including the price, quantity, delivery term and delivery point, are memorialized in separate Transaction Confirmations. As a result, CPS Energy could not negotiate or allocate a way to offload the risk of high spot market prices charged by Energy Transfer. Regardless, that CPS Energy could have hedged more, bought more storage capacity, or used fuel oil is simply irrelevant to the risk allocation as *between* CPS Energy and Energy Transfer. The Court should reject Energy Transfer’s misguided attempt to craft an exception to the unconscionability doctrine based on risk allocation.

c. CPS Energy did not purchase gas during Winter Storm Uri “with a clear plan to profit.”

Energy Transfer next contends that the predatory prices it charged CPS Energy were not unconscionable because CPS Energy bought gas from Energy Transfer “with a clear plan to profit from the subsequent sale of expensive electricity.” ET Mot. Summ. J. at 35. According to Energy Transfer, CPS Energy benefited from the exorbitant prices it charged because CPS Energy could burn that “expensive gas” and generate electricity that it could then sell on the wholesale power market for \$9,000/MWh. ET Mot. Summ J. at 37. This is nonsensical for several reasons.

First, as Energy Transfer well knows, CPS Energy is neither a for-profit power generator nor a “power generation compan[y],” much as Energy Transfer would have it otherwise. ET Mot.

Summ. J. at 35. CPS Energy is a municipal utility. Municipally-owned utilities are public, government-owned utilities that are owned not by shareholders but by the communities that they serve. CPS Energy does not strive to make a profit, but strives only to serve its customers through the efficient delivery of critical services, including electricity and natural gas on demand. Therefore, CPS Energy buys gas for two purposes, neither of which is profit: (1) for direct distribution to homes and business and (2) for fuel to generate electricity, which is in turn provided to homes and businesses. Any argument about profiting off electricity generation ignores that CPS Energy purchases gas to generate electricity *and for direct distribution to homes and businesses*.

Nevertheless, Energy Transfer, in an effort to distract from its own shocking business practices, declares that CPS Energy bought gas during Winter Storm Uri as part of some “clear plan to profit from the subsequent sale of expensive electricity.” ET Mot. Summ. J. at 35. But, the only party that had a grand plan to profit off the statewide disaster was Energy Transfer. [REDACTED]

[REDACTED] *see also* [REDACTED].
[REDACTED].

Energy Transfer also argues that CPS Energy should be grateful for the predatory prices Energy Transfer charged because that gas “allowed CPS [Energy] to keep its power plants . . . up and running.” ET. Mot. Summ. J. at 36. As a preliminary matter, keeping its power plants “up and running” during the storm was not a “benefit” Energy Transfer bestowed on CPS Energy. During Winter Storm Uri, the electrical grid came within 4 minutes and 37 seconds of total collapse; it was not an option for CPS Energy to not run its power plants—it had to provide electricity to its customers and play its part in maintaining the integrity of the electrical grid. Moreover, Energy Transfer’s own actions severely limited CPS Energy’s ability to run its power plants at full capacity. On February 15, Energy Transfer demanded \$300 for any overpulled volumes at Rio Nogales, causing CPS Energy to derate the plant. Ex. A-44, CPSE-MDL_000009514 at 9519. Later, Energy Transfer states that “had [CPS Energy’s] powerplants been able to run at capacity throughout the storm,” it could have generated and sold more power to the ERCOT grid and made out like Austin Energy. ET Mot. Summ. J. at 37. Again, Energy Transfer ignores that CPS Energy, unlike Austin Energy,

buys gas for direct distribution. Ex. A-178, Gold-Williams Dep. 83:16-19. None of that distribution gas is used to generate power, much less to generate power to then sell to the ERCOT market.

Energy Transfer insists that because ERCOT raised the price of electricity to the regulatory cap to avoid a statewide blackout, the prices Energy Transfer extracted from CPS Energy's desperation for gas were excusable. ET Mot. Summ. J. at 37. But as Merritt explained, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Moreover, ERCOT did not raise the price of electricity to \$9,000 until Monday, February 15. At a bare minimum, none of the exorbitant prices Energy Transfer charged during Winter Storm Uri on February 12 for weekend gas have any relevance to the \$9,000 cap imposed on February 15.²⁰

B. The prices Energy Transfer charged during Winter Storm Uri are unenforceable because they violate Texas public policy.

Independent of unconscionability, the prices Energy Transfer charged CPS Energy are unenforceable for a separate reason: they violate Texas public policy against taking advantage of a declared disaster by charging exorbitant or excessive prices for necessities. The freedom to contract is “not limitless.” *Progressive Cnty. Mut. Ins. Co. v. Caltzonsing*, 658 S.W.3d 384, 397 (Tex. App.—Corpus Christi-Edinburg 2022, no pet.); *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711, 726 (Tex. App.—Dallas 2004, no pet.) (“Contracts are subject to the public policy of the State.”). Instead, it is “well established that courts may refuse to enforce contracts that are either expressly or impliedly prohibited by statute or by public policy.” *In re Lee*, 411 S.W.3d 445, 464 n. 9 (Tex. 2013). In examining an agreement to determine if it is contrary to public policy, courts “look to whether the agreement has a tendency to injure the public good. A state’s public policy is embodied in its constitution, statutes, and the decisions of its courts.” *Johnson*, 148 S.W.3d at 726–27 (cleaned up).

²⁰ Furthermore, at least one Court of Appeal has determined that the PUCT overstepped its authority when it enacted the \$9,000 cap. *Luminant Energy Co. LLC v. Pub. Util. Comm’n of Texas*, 665 S.W.3d 166, 192 (Tex. App.—Austin, 2023), *review granted* (Sept. 29, 2023), *review dismissed* (Dec. 1, 2023).

For decades, Texas has statutorily declared that price gouging during a declared disaster is unlawful in the DTPA. TEX. BUS. & COM. CODE § 17.46(a), (b)(27). Energy Transfer asks this Court to ignore that declaration of illegality because the excessive prices Energy Transfer charged CPS Energy total more than \$500,000 and, thus, cannot form the basis of a private cause of action under the DTPA. *See id.* § 17.49(g).²¹ But CPS Energy is not asserting a private cause of action under the DTPA and there is no authority for the proposition that Texas’s public policy against price gouging is limited to such a private right of action.

1. Exemptions to a DTPA private cause of action do not alter Texas’s public policy against price gouging.

Energy Transfer appears to concede that the Texas Legislature has declared price gouging during a declared disaster unlawful. Under Section 17.46(b)(27) of the DTPA, it is unlawful to take advantage of a declared disaster by selling fuel (i.e., natural gas) at an exorbitant or excessive price. And as explained above, Energy Transfer charged CPS Energy a more than 15,000% increase for natural gas during a state declared disaster. This amount significantly passes the threshold that has prompted the Attorney General to pursue price gouging claims under the DTPA before.²² What En-

²¹ Energy Transfer also contends that CPS Energy is not a “consumer” under the DTPA because CPS Energy has assets of \$25 million or more and, thus, is a “business consumer.” *See ET Mot. Summ. J.* at 40 (citing TEX. BUS. & COM. CODE § 17.45(4)). This is wrong. The DTPA defines *consumer* to include “an individual, partnership, corporation, this state, or a subdivision or agency of this state,” but the definition excludes “a business consumer that has assets of \$25 million or more.” TEX. BUS. & COM. CODE § 17.45(4). Importantly, however, the DTPA makes clear that *business consumer* “does not include...a subdivision or agency of this state.” *Id.* 17.45(10). Municipalities are subdivisions of the state, *Ass’n of Sch. Boards Risk Mgmt. Fund v. Benavides Indep. Sch. Dist.*, 221 S.W.3d 732, 734 (Tex. App.—San Antonio 2007, no pet.), and “CPS Energy is treated as a municipality,” *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 450 n.1 (Tex. 2016). As such, CPS Energy cannot be a “business consumer” and is therefore a consumer under the DTPA.

²² *See, e.g.*, Ex. A-179, *In the Matter of State of Texas and Thaman Enterprise, LLC d/b/a Caddo Stop*, No. D-1-GN-18-002665, Travis County (2018) (prosecuting 125% increase in the price of gas during Hurricane Harvey as excessive and exorbitant); *State of Texas and CMDM, LLC d/b/a Hans Chevron*, No. D-1-GN-19001827, Travis County (2019) (same); *State of Texas and Lovely Products, LLC*, No. D-1-GN-20-006547, Travis County (2020) (prosecuting 1,000% increase in face masks during Covid-19); *State of Texas v. Gregory Markwardt d/b/a Hotel Corpus Christi Bayfront*, Cause No. 2020DCV-0829-A, Nueces County (2021) (fining hotel for increasing price of hotel rooms by 67% during the Harvey State of Disaster); *State of Texas v. Starlight International, Inc. D/B/A/ Roadway Inn; Hsiang-Ting Huang and Wei-Cheng Kao*, No. 2009-V-0017 Austin County (2009) (following price gouging claims

ergy Transfer instead argues is that CPS Energy’s public policy defense does not apply as a matter of law because, according to Energy Transfer, CPS Energy cannot bring a private cause of action under the DTPA.

Energy Transfer’s argument is a red herring. CPS Energy is not asserting a cause of action under the DTPA, and Energy Transfer knows it. Rather, CPS Energy asserts as an affirmative defense that the exorbitant prices Energy Transfer charged during Winter Storm Uri violate Texas’s public policy against price gouging during a declared disaster. Texas’s public policy against price gouging is reflected in the declaration of unlawful conduct in § 17.46 of the DTPA, TEX. BUS. & COM. CODE § 17.46(a), (b). The fact that the Texas legislature subsequently enacted limitations on private rights of action under § 17.50 of the DTPA does not erase or limit the public policy underlying the declaration that price gouging during declared disasters is unlawful.

Indeed, the interests underlying that public policy—protecting Texans from companies and individuals who would use the peril caused by natural disasters as an opportunity to profit—are directly implicated in this case. If the exorbitant and unlawful prices charged by Energy Transfer are allowed to stand, those excessive charges won’t be borne by CPS Energy, but by CPS Energy’s customers, the very class of Texas consumers the DTPA was intended to protect. Ex. A-7, Kuchinsky Dep. 44:16–45:18. CPS Energy has no shareholders and it pays no dividends. Instead, CPS exists and operates solely for the benefit of its customers. Ex. A-178, Gold-Williams Dep. 26-2-14; *id.* 80:14-24; *id.* 96:8-12. As a result, whenever CPS Energy purchases gas from a gas supplier, it is acting for its customers since the costs of purchasing such gas will be passed through to, and paid for by, those customers. Ex. A-35, Guinn Dep. 12:4-8; Ex. A-178, Gold-Williams Dep. 119:16-20.

2. Price gouging is anathema to Texas public policy.

Texas’s public policy against price gouging during natural disasters is also reflected in communications from the Texas Attorney General’s Office. The Attorney General’s website, for exam-

during Hurricane Ike, the Court permanently restrained respondent from “taking advantage of any declared disaster by demanding or charging a price for lodging or other necessities that exceeds the normal price by more than ten percent (10%).”

ple, 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 (“CIDs”) 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, including issuing CIDs to Energy Transfer and its affiliates. Ex. A-180 (CID to Energy Transfer); Ex. A-181 (CID to Energy Transfer Fuel); Ex. A-182 (CID to Oasis). And Governor Abbott’s disaster declaration itself embodied that same policy by suspending “any state statute or administrative rule regarding contracting or procurement [that] would impede any state agency’s emergency response that is necessary to protect life or property threatened by this declared disaster.” Ex. A-45, Feb. 12, 2021 Gov. Abbott Decl., CPSE-MDL_000062050.

Contracts can also be void as against public policy in the absence of express statutory declaration. “In the absence of expressed direction from the Legislature, whether a promise or agreement will be unenforceable on public policy grounds will be determined by weighing the interest in enforcing agreements versus the public policy interest against such enforcement.” *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 663 (Tex. 2008). To do so, courts consider four factors: “(a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.” RESTATEMENT (SECOND) OF CONTRACTS § 178(3). In weighing the factors set out in the Restatement, it is clear that Energy Transfer’s price gouging during the declared disaster does violate public policy. The strength of the public policy of prohibiting price gouging during a declared disaster is manifested by the unambiguous provisions of Section 17.46(b)(27) of the DTPA. Next, this Court’s refusal to enforce Energy Transfer’s invoices for exorbitant prices during a declared disaster will further the policy of preventing price gouging during a declared disaster. Third, the magnitude of Energy Transfer’s price gouging in relation to pre-storm and post-storm

pricing demonstrates the seriousness of Energy Transfer's deliberate price gouging during the declared disaster.

There is also no dispute that the price gouging during the declared disaster had other serious consequences including multiple bankruptcies of power companies, as well as legislative and regulatory actions to allow utilities to securitize to recoup costs and expenses from high natural gas prices. *See, e.g.*, Ex. A-5, Perryman Dep. 114:2-115:3; Railroad Commission of Texas, Notice to Gas Utilities, Procedure for Gas Utilities to File an Application for Regulatory Asset Determination Pursuant to H.B. 1520, Texas Utilities Code, chapter 104, subchapter I, and Participate in Securitization of Extraordinary Costs Incurred as a Result of the February 2021 Winter Weather Event, June 2021, available at <https://www.rrc.texas.gov/media/ntrb1r1k/nto-re-securitization-061721.pdf>. And finally, finding Energy Transfer's price gouging to be unlawful will disincentivize price gouging during future declared disasters. If the Court were to determine that charging 15,000% more for natural gas during a state declared disaster is permissible, then Energy Transfer – or other gas suppliers – will continue to take advantage of consumers—and municipal utilities like CPS Energy—during the next disaster.

Finally, and alternatively, material issues of fact exist with respect to whether Energy Transfer's price gouging is inconsistent with or contrary to the best interests of the public and, therefore, unenforceable as a matter of public policy. If this Court were to find that there is no “express[] direction” from the Texas Legislature, *Fairfield Ins. Co., LP*, 246 S.W.3d at 663, then the trial court must make further factual inquiries, including weighing evidence relating to the effect the enforcement of the transactions at issue will have upon the public good, to determine whether those transactions were “inconsistent with or contrary to the best interest of the public.” *Johnson*, 148 S.W.3d at 727. Based upon the summary judgment evidence submitted by CPS Energy, there are clearly material fact issues relating to CPS Energy's affirmative public policy defense that preclude summary judgment in favor of Energy Transfer.

C. Energy Transfer’s arguments regarding \$38.83 and “short pay” are more misdirection.

As it has done throughout this case, Energy Transfer repeatedly harps on the fact that, once CPS Energy determined that some of the prices it had been charged during Winter Storm Uri were unconscionable or violated public policy (a determination made well after the storm ended), CPS Energy retained an expert to help it determine what to pay in place of those prices. Energy Transfer misrepresents this banal process as evidence of a premeditated scheme to short-pay Energy Transfer and other gas suppliers during Winter Storm Uri and impose a lasting, market-wide “price cap” on natural gas. ET Mot. Summ. J. at 11-14. As an initial matter, Energy Transfer fails to explain why this conspiracy theory is relevant to determining whether the prices Energy Transfer charged CPS Energy during the seven days of Winter Storm Uri are unconscionable or contrary to public policy. And even if it was somehow relevant, Energy Transfer is wrong on the underlying facts, wrong about CPS Energy’s legal position, and wrong about the consequences of CPS Energy’s payment of a conceded amount.

The NAESB contract that governs the natural gas transactions between CPS Energy and Energy Transfer in this case contains a dispute resolution procedure at Section 7.4 that provides:

7.4. If 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 without undue delay. In the event the parties are unable to resolve such dispute, either party may pursue any remedy available at law or in equity to enforce its rights pursuant to this Section.

When Energy Transfer and some other suppliers began seeking to collect on the excessive prices for natural gas sold to CPS Energy during the storm, CPS Energy challenged those excessive prices in good faith and used this dispute resolution provision of the NAESB to pay Energy Transfer “such amount as it concedes to be correct.” To calculate the conceded amount, CPS Energy did not pull a number out of hat. Nor did it simply pay the prevailing prices before the storm, which were in the range of \$3–\$4. Instead, it hired Dr. Perryman, an outside economic expert, who performed an economic analysis showing the upper bound of an appropriate price had the natural gas markets been functionally appropriately, which he determined to be \$38.83/MMBtu. That amount ultimately became the conceded price under Section 7.4 of the NAESB. CPS Energy provided

“supporting documentation” in the form of a spreadsheet showing the excessive amounts charged by Energy Transfer along with the conceded amount paid by CPS Energy. *See* CPS Energy’s 1st Am. Pet., Ex. F. The conceded amount is a “placeholder” until the ultimate factfinder determines the appropriate price for the transactions. Ex. A-37, CPS Energy Corp. Rep. Dep. 61:2-10.

Contrary to Energy Transfer’s argument, Dr. Perryman’s calculation is not some overarching price cap on the market for natural gas. Dr. Perryman testified that he did not calculate a price cap. Ex. A-5, Perryman Dep. 153:4-12. Instead, his analysis indicates the “outer range of the price of natural gas should have been if the market had functioned properly during the storm” if “people had not opted to take advantage of the situation of a market failure and . . . charged excessive prices[.]” Ex. A-5, Perryman Dep. 165:19-24. Dr. Perryman also made clear that his analysis was limited to “very specific transactions involving CPS [Energy].” *Id.* at 255:8-18.

Energy Transfer also takes issue with the process, arguing that CPS Energy improperly used Section 7.4 of the NAESB, the dispute resolution procedure. To support this argument, Energy Transfer relies on the testimony of Josefa Castrejana, an Energy Transfer employee, for the proposition that Section 7.4 is only used to “resolve disputes about commercial terms that the parties agreed to at the time the transaction was negotiated,” that “[t]here is no basis or precedent for using Section 7.4 to dispute a price after it was agreed,” and that Dr. Perryman’s report cannot qualify as “supporting documentation acceptable in industry practice” sufficient to challenge Energy Transfer’s excessive prices under Section 7.4. ET Mot. Summ. J. at 18-19 (citing ET Mot. Summ. J. at Ex. 40). Of course, as revealed by Exhibit 40 itself, Castrejana’s testimony was limited to “her experience” and Castrejana admitted that she did not work “usually” with Section 7.4. ET Mot. Summ. J. at Ex. 40, Castrejana Dep. 199:7-20. In any event, as will be set forth in CPS Energy’s objections to Energy Transfer’s summary judgment evidence, Castrejana’s testimony is improper lay opinion testimony that the Court should not consider. But even if it were proper summary judgment evidence, CPS Energy has raised a genuine issue of fact on this issue because there is ample testimony that CPS Energy properly used Section 7.4 to challenge the invoices at issue in this lawsuit. *See, e.g.*, Ex. A. 37,

CPS Energy Corp. Rep. Dep. 60:18-61:10, 65:5-12; Ex. A-168, Almaraz Dep. 101:5-18, 209:24-210:11; Ex. A-5, Perryman Dep. 146:11-23.

Energy Transfer has also attempted to craft a narrative that CPS Energy concocted a plan to short-pay Energy Transfer and other gas suppliers during Winter Storm Uri. Again, this has nothing to do with determining whether Energy Transfer charged CPS Energy prices that are unconscionable or violate public policy. Further, as already explained in CPS Energy's motion for summary judgment on Energy Transfer's fraudulent inducement claim, there is no competent evidence to support Energy Transfer's theory. Two of the documents that Energy Transfer cites to support their theory are "action items" prepared by members of CPS Energy's financial team that list "partial pay all gas suppliers" as potential "options" to retain cash. ET Mot. Summ. J. at Exs. 25-26. And the third document Energy Transfer cites makes clear that "short pay" refers to one of several options in a "draft Financial Action Plan." ET Mot. Summ. J. at Ex. 27 at CPSE-MDL-000053702. Energy Transfer thus relies on speculation and innuendo to support its argument that CPS Energy concocted a plan to buy gas from Energy Transfer without any intent to pay the prices charged. *See Hurlston v. City of Princeton*, 672 Fed. App'x. 335, 341 (5th Cir. 2016) (speculation and innuendo are not competent summary judgment evidence).

Finally, this Court should reject Energy Transfer's argument that any result other than ordering CPS Energy to pay Energy Transfer an additional \$250-plus million would "trigger a public policy crisis." Again, CPS Energy is not asking this Court or any other to make any rulings about any gas transactions at any time in any place other than the transactions during Winter Storm Uri in which Energy Transfer and Enterprise took advantage of a natural disaster to extract previously unthinkable prices from CPS Energy. That being the case, there is no likelihood that CPS Energy's payment of a Conceded Amount would "sow chaos in the Texas gas and power markets." ET Mot. Summ. J. at 41. There is certainly no undisputed evidence to support that contention.

D. CPS Energy’s declaratory judgment claims survive.

Finally, the Court should reject Energy Transfer’s motion for summary judgment on CPS Energy’s declaratory judgment claim for three independent reasons.

First, Energy Transfer argues that CPS Energy’s declaratory judgment claims fail because its affirmative defense fail. ET Mot. Summ. J. at 42. As described in extensive detail above, just as the evidence demonstrates that CPS Energy’s affirmative defenses of unconscionability and public policy survive summary judgment, so should its declaratory judgment claim.

Second, Energy Transfer forgets that CPS Energy is the plaintiff in this matter. Energy Transfer quotes *Headington Royalty, Inc. v. Finley Res., Inc.*, 623 S.W.3d 480, 499 (Tex. App.—Dallas, 2021), *aff’d*, 672 S.W.3d 332 (Tex. 2023), for the proposition that a party may not have identical affirmative defenses and a declaratory judgment counterclaim, but here, CPS Energy, as the plaintiff, has an affirmative declaratory judgment claim that it filed before Energy Transfer filed its counterclaim. Energy Transfer’s case law is inapposite.

Third, CPS Energy’s declaratory judgment is substantially different than its affirmative defenses. CPS Energy’s declaratory judgment has three parts: (1) that the amounts Energy Transfer charged in excess of the “Unlawful Price Threshold” (\$38.83/MMbtu) are “unconscionable and/or violate Texas policy,” (2) that it has no liability to Energy Transfer under the NAESB contracts when it paid amounts up to that “Unlawful Price Threshold”; and (3) that CPS Energy complied with the contracts by withholding payment of the “Unlawful Price Amounts” “as permitted by, and in accordance with, the NAESB Dispute Resolution Procedures[.]” CPS Energy’s Am. Pet. ¶ 58. This relief is, on its face and in its entirety, substantially different than the affirmative defenses CPS Energy affirmatively pled in response to Energy Transfer’s breach of contract counterclaim. For example and as described above, Energy Transfer has failed to present competent evidence that CPS Energy did not comply with the NAESB Dispute Resolution procedures. Accordingly, Energy Transfer’s motion for summary judgment on CPS Energy’s declaratory judgment claim should be denied.²³

²³ In a footnote, Energy Transfer asserts that CPS Energy’s affirmative defense of unclean hands is “unavailable” because Energy Transfer is seeking only “legal” relief in its breach of contract counterclaim. ET Mot. for Summ. J. at 19 n. 11. While it is not clear that Energy Transfer is expressly mov-

CONCLUSION

For the foregoing reasons, CPS Energy respectfully requests that the Court deny Energy Transfer's Motion for Summary Judgment on its breach of contract claim and award all other relief to which CPS Energy is entitled.

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ing for summary judgment on CPS Energy's unclean hands defense, CPS Energy concedes that the unclean hands defense is available only as a defense to requests for equitable relief. Insofar as Energy Transfer represents that it is not seeking equitable relief as part of its counterclaim for *either* breach of contract or fraudulent inducement, CPS Energy will agree to withdraw its affirmative defense of unclean hands.

CERTIFICATE OF SERVICE

I certify that on March 1, 2024, I served a copy of the foregoing on the parties and through email.

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