

CAUSE NO. 2021CI04574

CPS ENERGY,	§	IN THE DISTRICT COURT OF
	§	
PLAINTIFF,	§	
	§	
V.	§	BEXAR COUNTY, TEXAS
	§	
ELECTRIC RELIABILITY COUNCIL	§	
OF TEXAS, et al.,	§	
	§	
DEFENDANTS	§	285th JUDICIAL DISTRICT

**TEMPORARY RESTRAINING ORDER**

On this day came for consideration Plaintiff's First Amended Petition and Application for Emergency Temporary Restraining Order (the "Petition"), filed by CPS Energy ("CPS Energy") against the **Electric Reliability Council of Texas** ("ERCOT") and its officers, directors and board members named herein in their official capacities (the "Individual Defendants") and, pursuant to Rule 680 of the Texas Rules of Civil Procedure, the Court finds from specific facts shown by the verified Petition that immediate and irreparable injury, loss, or damage will result to CPS Energy before notice can be secured and a hearing had thereon.

ERCOT seeks to charge as much as \$47 billion for 5 days from February 15-19, 2021 during a winter storm (the "Winter Storm Event"), of which more than \$16 billion is an acknowledged error caused by ERCOT's own mistake in not coming down from the System Wide Offer Cap of \$9,000 per MWh when the scarcity conditions that prompted this charge no longer existed on February 18 and 19, 2021, as determined by the Independent Monitor for the Public Utility Commission of Texas (the "Overcharge"). Both the Public Utility Commission of Texas (the "PUCT") and ERCOT have refused to correct this blatant Overcharge even though the Attorney General of the State of Texas has opined that they could have done so and ERCOT

has admitted as much (the total amount of \$47 billion including the \$16 billion Overcharge is referred to as “Excessive Prices” by the PUC’s Independent Market Monitor).

CPS Energy needs to protect its customers from the massive errors in ERCOT’s Excessive Prices during the Winter Storm Event that would cause price spikes in monthly bills and a blatantly unlawful result.

ERCOT should not be allowed to charge any Short-Pays or Default Uplift Invoices (together the “Default Uplift Invoices”) resulting from these Excessive Prices, including the Overcharge, until the Overcharge error is resolved.

The Governor of the State of Texas issued a Declaration of a State of Disaster for all counties in the State on February 12, 2021, with respect to the Winter Storm Event, and CPS Energy declared a Force Majeure Event as a result of the Winter Storm Event on March 1, 2021. ERCOT is precluded by Sec. 8.A(5) of its Market Agreement with CPS Energy dated June 9, 2011 (the “Market Agreement”), from declaring a default based on a Force Majeure Event like the Winter Storm.

ERCOT has reportedly short-paid the market almost \$2.5 billion, and has short-paid CPS Energy at least \$18 million for the two weeks following the Winter Storm which is a prior material breach under general contract principles excusing the performance of CPS Energy. Nevertheless, CPS Energy has met all of its payment obligations to ERCOT for electricity. ERCOT should not be able to declare a default by CPS Energy when ERCOT itself is in default.

ERCOT is also trying to make CPS Energy pay the debts of the failed market participants caused by ERCOT’s Excessive Prices, which violates the Texas Constitution as it is an unlawful extension of CPS Energy’s credit and constitutes a taking. *See, inter alia*, Article I, section 17, Article III, Section 52(a), and Article XI, Section 3 of the Texas Constitution. Beginning on

April 29, 2021, ERCOT is starting the process to make CPS Energy pay the debts of others through the charge of Default Uplift Invoices, and without any prospect for CPS Energy to be paid back by these failed market participants. The credit of CPS Energy will also be extended on April 29, 2021, to ERCOT to allow for the payment of these unlawful Default Uplift Invoices. CPS Energy could have its credit extended by as much as \$2.4 million after tomorrow without the consent of CPS Energy to pay for these unlawful charges, and CPS Energy does not know when the extension of its credit will end, how much it will ultimately be, or how fast and far it will be extended. Several market participants have already failed, and many more are projected to fail. CPS Energy should not have to pay for the insolvency of other market participants caused by ERCOT's erroneous Overcharge. If CPS Energy's credit is extended due to these wrongful charges it will have an incalculable effect on CPS Energy's credit, and it will start the process for CPS Energy and its customers to pay for these Excess Charges with an acknowledged \$16 billion error.

CPS Energy will be immediately and irreparably harmed as it will never be able to recover from other market participants who have failed, nor can it calculate the harm caused to its credit rating. CPS Energy will also be immediately and irreparably harmed if CPS Energy's credit is extended to ERCOT to pay for the defaults of others caused by ERCOT's Excessive Prices, including the acknowledged erroneous Overcharge, in violation of the Texas Constitution. CPS Energy has a probable right to recover at trial. CPS Energy has no adequate remedy at law.

The threat to CPS Energy and to its customers of paying for the insolvency of other market participants is imminent. ERCOT is starting this process tomorrow, April 29, 2021, of taking CPS Energy's credit to pay for the unlawful Default Uplift Invoices. The ultimate

extension of credit for Default Uplift Invoices for other failed market participants that could fall on CPS Energy and its customers is incalculable. CPS Energy is prepared to post a bond in support of its application for injunctive relief, and believes a nominal amount would be adequate security for purposes of this application for injunctive relief as CPS Energy will pay all legitimate charges for electricity as they come due.

Accordingly, the Court **ORDERS** that **ERCOT and THE INDIVIDUAL DEFENDANTS** and the agents, servants, employees, independent contractors, attorneys, representatives, and those persons or entities in active concert or participation with **ERCOT AND THE INDIVIDUAL DEFENDANTS**, are **ENJOINED** from:

- a) Declaring CPS Energy in default in violation of the Market Agreement for a Force Majeure Event like the Winter Storm Event and because of ERCOT's prior material default;
- b) Requiring CPS Energy to pay any Default Uplift Invoices resulting from the Overcharge and the Excessive Prices during the Winter Storm Event, which inequitably burdens CPS Energy in violation of the Texas Constitution;
- c) Accepting payment from CPS Energy as payment for any Default Uplift Invoices resulting from the Overcharge and Excessive Prices during the Winter Storm Event;
- d) Applying any funds otherwise due and owing to CPS Energy for the payment of any Default Uplift Invoices resulting from the Overcharge and Excessive Prices during Winter Storm Event;
- e) Requiring the collateralization of CPS Energy's alleged obligation for any Default Uplift Invoices resulting from the Overcharge and the Excessive Prices during the Winter Storm Event;
- f) Restricting CPS Energy's access to the wholesale electric market, including the day-ahead or real-time markets for any reason connected with the Winter Storm Event;
- g) Declaring CPS Energy in default under its Market Agreement for non-payment of any Default Uplift Invoices resulting from the Overcharge, or an accelerated charge in violation of its own rules, or any other charge associated with Excessive Prices during the Winter Storm Event; or

- h) Taking any action against CPS Energy to adjust, extend or otherwise affect its credit to pay for payment of any Default Uplift Invoices including the Overcharge, or any other charges associated with the Excessive Prices during the Winter Storm Event, including without limitation the threatened action affecting the credit of CPS Energy on April 29, 2021, to allow for the payment of Default Uplift Invoices.

CPS Energy has requested the aforementioned relief *ex parte* because immediate harm or injury will result before notice can be served and a hearing held on this matter, specifically including the declaration of default and the termination of CPS Energy's right of access to the electric grid. This would further harm CPS Energy's customers.

The Court finds that CPS Energy will suffer immediate and irreparable harm if a Temporary Restraining Order is not issued because the conduct of ERCOT and the Individual Defendants is wrongful and if allowed to continue will injure CPS Energy and its customers, and leave CPS Energy without an adequate remedy at law.

The Court finds that CPS Energy has a probable right to relief on this cause of action.

A temporary injunction hearing shall be heard on May 12, 2021 at 9:00 a.m.


A bond in the amount of \$5000 is fixed for this matter.

The Clerk of the Court is instructed to prepare a writ of injunction for issuance complying with the requirements of Texas Rule of Civil Procedure 687.

This Temporary Restraining Order is entered on ~~March~~ <sup>April 28</sup> \_\_\_, 2021 at 4:33 p.m. It expires at the time of the Temporary Injunction Hearing set above unless otherwise extended.

Signed on this 28 day of April, 2021.

APR 28 2021

  
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Judge Presiding

**Aaron S. Haas**  
**Presiding Judge**  
**285th District Court**  
**Bexar County, Texas**

Dated: April 28, 2021.

Respectfully submitted,

**DENTONS US LLP**

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