No. 2007-70853

CENTERPOINT ENERGY SERVICES, INC., Plaintiff,	§	IN THE DISTRICT COURT
v.	§	HARRIS COUNTY, TEXAS
AIR PRODUCTS, L.L.C. and THE PREMCOR REFINING GROUP, INC., Defendants.	§	295TH JUDICIAL DISTRICT

AIR PRODUCT'S AND PREMCOR'S MOTION FOR A RULING ON THE LEGAL QUESTION OF CONTRACT INTERPRETATION

The defendants, Premcor and Air Products, file this motion seeking a ruling on the legal question of whether the parties' contracts, and specifically sections 3.9, are unambiguous.

I. Ambiguity Should Be Determined Prior to Trial.

"If the trial court has not made a determination on the question of whether a contract is ambiguous before a jury trial commences, it is incumbent on the judge when it first becomes apparent during trial that at least one of the parties is claiming ambiguity, supported by adequate pleadings, to examine the provisions in question and determine at that time whether or not the contract is or is not ambiguous." *Pitman v. Lightfoot*, 937 S.W.2d 496, 516 (Tex. App.—San Antonio 1996, writ denied); *West Texas Gathering Co. v. Exxon Corp.*, 837 S.W.2d 764, 778 (Tex. App.—El Paso 1992), *rev'd on other grounds* 868 S.W.2d 299 (Tex. 1993). The court must rule on ambiguity so that the parties and the court will know what issues are relevant and what evidence is admissible during trial. *Id.*

"Whether a contract is ambiguous is a question of law for the court to decide." *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996). Only after a contract is first determined to be ambiguous by the court is there any fact question for a jury to resolve. Moreover, only after a contract is determined to be ambiguous may a court admit parol evidence of the parties' intent. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450-51 (Tex. 2008). For these reasons, the defendants ask the Court to address the threshold legal question of contract ambiguity "so that the court can properly rule on evidentiary objections and submit a substantially correct charge." *Pitman v. Lightfoot*, 937 S.W.2d at 516; *West Texas Gathering v. Exxon*, 837 S.W.2d at 770.

II. The Court Should Decide Whether the Contract Has More than One Reasonable Meaning, Giving Effect to the Intent Expressed in the Contract Language.

"The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument." *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); *accord Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006); *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000). "Contract terms are given their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

A contract is ambiguous only if it is susceptible to more than one reasonable interpretation. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.* 940 S.W.2d 587, 598 (Tex. 1996); *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157

(Tex. 1951). A contract provision that has only one reasonable interpretation is unambiguous and must be construed as a matter of law. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006).

A contract is not ambiguous merely because the parties advance conflicting interpretations of the agreement. *Columbia Gas v. New Ulm*, 940 S.W.2d at 589. Likewise a contract is not ambiguous because one party believes the contract does not mean what it actually says. *Standard Constr., Inc. v. Chevron Chem. Co.*, 101 S.W.3d 619, 625 [Tex. App.—Houston. [1st Dist.] 2003, pet. denied). Furthermore, lack of clarity does not create an ambiguity nor does it negate the court's responsibility to interpret the parties' agreement. *Universal Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003). Even if the meaning of a key phrase is not clear, a contract is not ambiguous when only one reasonable interpretation exists. *Columbia Gas v. New Ulm*, 940 S.W.2d at 591-92; *Universal C.I.T. v. Daniel*, 243 S.W.2d at 158-59.

Moreover, parol evidence of intent cannot be used to create an ambiguity. *Friendswood Dev. v. McDade*, 926 S.W.2d at 283. "[P]arol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *David J. Sacks, P.C. v. Hayden*, 266 S.W.3d at 450.

III. There Is Only One Reasonable Interpretation of the Phrase "Applicable Geographic Area."

CenterPoint contends that the phrase "applicable geographic area," as used in section 3.5 of the parties' contracts, is ambiguous; and CenterPoint seeks to offer parol evidence of the parties' alleged intent during trial. The defendants dispute CenterPoint's evidence, and the defendants will controvert CenterPoint's evidence should it ever be admitted. But CenterPoint's evidence is irrelevant, immaterial, and inadmissible unless and until this Court rules that the contract is ambiguous. And the contract is not ambiguous.

There is only one reasonable interpretation of the phrase "applicable geographic area." The "applicable geographic area" is the geographic area associated with and applicable to the East Texas Houston Ship Channel Index that the parties chose to use in pricing their natural gas transactions. Thus, the "applicable geographic area" is defined by Platts—the publisher of the East Texas Houston Ship Channel Index—as the "industrial area extending from the east side of Houston to Galveston Bay and northeastward to the Port Arthur/Beaumont area." CenterPoint's assertion that "applicable geographic area" means "the Delivery Point(s)" is unreasonable.

A. CenterPoint's ever-changing definition of "applicable geographic area" demonstrates the unreasonableness of its position

Through the course of the litigation, CenterPoint has offered up several inconsistent definitions for the phrase "applicable geographic area." At the hearing on CenterPoint's motion for summary judgment the Court asked CenterPoint, "What are you arguing is the applicable geographic area?" *See* Summary Judgment Hearing Transcript

at 58, attached as Ex. A. CenterPoint responded that the applicable geographic area was the entire East Texas Houston Ship Channel area as represented by the large oval on Mr. Lerman's figure 3. *Id.* CenterPoint conceded that "when we entered into the contract, it was the entire oval." *Id.*

Of course, the meaning of "applicable geographic area" could not and did not change after the parties entered into the contract. But when the Court questioned CenterPoint's ability to prove any inaccuracy in the HSC Index in the entire HSC area, CenterPoint changed its mind about the definition of "the applicable geographic area." CenterPoint then disavowed its admission that the applicable geographic area was the entirety of the East Texas Houston Ship Channel region. *Id.* at 72-74; 83. CenterPoint instead insisted that the applicable geographic area excluded that portion of the HSC region that was also included within the ICE trading platform: "[T]he geographical area for us under the contract is outside of ICE." *Id.* at 72. The Court labeled this area within the East Texas Houston Ship Channel region, but outside of ICE, as "B." *Id.* Accepting the Court's shorthand description, CenterPoint's counsel said, "I put my name on it, the applicable geographical area is B, all that area outside of A, the ICE." *Id.* at 74. Expressing its desire "to be very clear," CenterPoint's closing statement was "[o]ur applicable geographic area is B, Your Honor." *Id.* at 83.

Despite CenterPoint's adamant insistence that the applicable geographic area was "B," CenterPoint has since adopted yet another position regarding the meaning of "applicable geographic area." CenterPoint now contends that "applicable geographic area" means "delivery point." CenterPoint's witnesses, Geoff Carroll and Ben Reece,

have both testified that the meaning of "applicable geographic area" is "the delivery point." *See* Depo. of Geoff Carroll at 179, 182, 193, attached as Ex B; Depo. of Ben Reece at 88, attached as Ex. C. According to Mr. Carroll, the contract language of section 3.5 could be rewritten accurately to substitute the contractually defined term "Delivery Point(s)" for the phrase "applicable geographic area." Carroll Depo. at 193.

CenterPoint's inability to settle on the definition of the applicable geographic area demonstrates the unreasonableness of its ambiguity argument. There is but one reasonable interpretation of the phrase "applicable geographic area." The applicable geographic area is the defined area associated with the East Texas Houston Ship Channel Index the parties agreed to use. Any other definition of applicable geographic area is purely arbitrary and ripe for manipulation—as CenterPoint's ever changing positions prove.

B. The phrase "applicable geographic area" cannot reasonably be defined as the "delivery point."

In its entirety, the first sentence of section 3.5 provides: "If a price index used in a transaction ceases to be available or no longer accurately reflects the prevailing market price in the applicable geographic area the parties shall promptly and in good faith negotiate an alternative index or methodology for pricing which most closely approximates the prevailing market price in the applicable geographic area." CenterPoint now asserts that the words "applicable geographic area" mean "delivery point," but CenterPoint's definition is unreasonable.

1. When the parties intended to say the "Delivery Point(s)," they did so.

First, when the parties wanted to use the phrase "delivery point," they did so. "Delivery Point" is a defined term in the parties' contracts, and the parties used that defined term when they intended and meant the "Delivery Point." For example, in section 10.3.1 "Early Termination Damages Apply," the parties distinguish between "Contract Value" and "Market Value" and provide definitions of the two terms. Contract Value is defined as "the amount of Gas remaining to be delivered or purchased under a transaction multiplied by the Contract Price." By contrast, Market Value is defined as "the amount of Gas remaining to be delivered or purchased under a transaction multiplied by *the market price for a similar transaction at the Delivery Point*" (emphasis added).

As section 10.3.1 reflects, when the parties meant to reference "market price . . . at the Delivery Point," the parties used those very words. But the parties used very different words in section 3.5. The parties did not condition section 3.5 on whether the index accurately reflects prevailing "market price at the Delivery Point." The parties instead conditioned section 3.5 on whether the index accurately reflects prevailing "market price in the applicable geographic area."

CenterPoint asks this Court to ignore the different language the parties used in sections 3.5 and 10.3.1 and pretend that the parties used the same words in section 3.5 as they did in section 10.3.1. That interpretation is unreasonable. There is no rule of contract construction that supports CenterPoint's interpretation of section 3.5. No rule of

contract construction supports giving different words in a contract the identical meaning. To the contrary, the rules of contract construction require that the parties' use of differing words be respected and the differing words be given different meanings. *See Rowan Cos., Inc. v. Wilmington Trust Co.*, __ S.W.3d __, 2009 WL 3210936, * 7-8 (Tex. App.—Houston [14th Dist.] October 8, 2009, no pet. hist.) (recognizing that different contract phrases should not be given the same meaning); *see also Valence Operating Co. v. Dorsett*, 164 S.W.3d at 662 (Tex. 2005) ("[C]ourts should examine and consider the entire writing in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless."); *Great Am. Ins. Co. v. Norwin School Dist.*, 544 F.3d 229, 246 (3rd Cir. 2008) ("The use of different language to address the same or similar issue . . . strongly implies that a different meaning was intended."); *Penncro Assocs., Inc. v. Sprint Spectrum, L.P.*, 499 F.3d 1151, 1156-57 (10th Cir. 2007) ("When a contract uses different language in proximate and similar provisions, we commonly understand the provisions to illuminate one another and assume that the parties' use of different language was intended to convey different meanings."); *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996) ("[W]hen parties to the same contract use such different language to address parallel issues . . . it is reasonable to infer that they intend this language to mean different things.").

Here, the parties chose to use different words in section 3.5 and section 10.3.1 because they intended different meanings. *Id.* Had they intended section 3.5 to focus on prevailing market price at the Delivery Point(s), the parties knew how to say that; and they would have used those very words, as they did in section 10.3.1. They did not use

those words, and it is unreasonable to ignore the very different words the parties actually used and interpret them to have the same meaning.[1]

2. The "delivery point" is not a "geographic area."

Additionally, CenterPoint's interpretation is unreasonable because the words "Delivery Point(s)" do not mean the same thing as "applicable geographic area." The contracts define Delivery Point(s) as specific meter locations on certain pipelines: "Delivery Point(s) shall mean Kinder Morgan Texas SLN #36126 and #35031, Centana Intrastate Pipeline Company SLN #77382-01 and #77382-02, and Houston Pipeline Co. SLN #981511-15" (in the Premcor contract) and "Delivery Point(s) shall mean Kinder Morgan Texas SLN #36956 and CenterPoint Energy Intrastate Pipeline, Inc.; Air Products H2 Facility meter and the CenterPoint Intrastate Pipeline, Inc., bi-directional meter described in the Attachment 1 of the Facilities Agreement referenced in Section A.4. above" (in the Air Products contract).

A delivery point—a specified meter—is not a "geographic area." A specified meter certainly lies within a geographic area, but no one would describe a specified delivery point meter as a geographic area. The plain, ordinary, and generally accepted meaning of a "point" differs from the plain, ordinary, and generally accepted meaning of an "area." *See Valence Operating Co.*, 164 S.W.3d at 662 ("Contract terms are given

---

[1] The parties identified and measured other obligations at the Delivery Point. For example in section 6, relating to the payment of taxes, the parties agreed that "Seller shall pay or cause to be paid all taxes . . . prior to the Delivery Point(s). Buyer shall pay or cause to be paid all taxes on or with respect to the Gas at the Delivery Point(s) and all Taxes after the Delivery Point(s). As discussed above, when the parties wanted to talk about "the Delivery Point(s)," they used those words. They did not, however, use those words in section 3.5.

their plain, ordinary, and generally accepted meanings . . . ."). As we learn in elementary school math, a point has no area. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (defining point as "a geometric element that has zero dimensions and a location determinable by an ordered set of coordinates"); THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE (1999) (defining point as "that which in geometry has position but not magnitude"). Similarly, a point is defined as "a narrowly localized place having a precisely indicated position" and "a particular place or position." *Id.* By contrast, an area is defined as "the surface included within a set of lines, . . . a particular extent of space, . . . a geographic region" and "the extent or measure of a surface, . . . a region or tract." MERRIAM WEBSTER'S DICTIONARY at 65; OXFORD AMERICAN DICTIONARY at 46.

Giving the words their plain, ordinary, and accepted meaning, a geographic area is not a delivery point. A geographic area denotes something far larger than a delivery point, or a specified meter. A point is a narrowly localized position, such as a specified meter on a pipeline. An area refers to an entire region. It is unreasonable to interpret "applicable geographic area" to mean "Delivery Point(s)."

C. The applicable geographic area is the East Texas Houston Ship Channel area as defined by Platts.

The phrase "applicable geographic area" occurs in the first sentence of section 3.5. That sentence reads: "If a price index used in a transaction ceases to be available or no longer accurately reflects the prevailing market price in the applicable geographic area the parties shall promptly and in good faith negotiate an alternative index or methodology for pricing which most closely approximates the prevailing market price in the applicable geographic area."

1. The parties left "the applicable geographic area" undefined, understanding that it would change with the "price index used in a transaction."

Section 3.5 is deliberately expansive, specifying neither a particular "price index" nor a particular "geographic area." Section 3.5 is intended to apply to any "price index used in a transaction," not merely one specified price index. In this case, the "price index used in a transaction" is Platts' East Texas Houston Ship Channel Monthly Index. Nonetheless, the parties understood that some other price index might be used to price a transaction during the course of the contract, and they intended section 3.5 to apply regardless of the "price index" involved.

Just as the parties did not specify a single price index in section 3.5, they also did not specify or identify "the applicable geographic area." The only reasonable explanation for the parties' choice of these words is that the parties understood that the price index used in a transaction might change, and therefore, that the associated "applicable geographic area" might change too. Certainly the parties could have identified "the

applicable geographic area," had the parties intended for "the applicable geographic area" to be a constant unchanging area or point. Yet they did not. CenterPoint's explanation for the parties' decision to leave "the applicable geographic area" undefined is that the parties made a mistake. According to CenterPoint, the parties actually had an identified "applicable geographic area" in mind, but they forgot to put it in the contract.

CenterPoint's interpretation of the contract language is unreasonable. The parties did not make a mistake. These sophisticated parties intentionally used the words "applicable geographic area"—and did not identify some specific point or area—because these parties understand natural gas indices. The sole purpose of a price index is to provide price information about, and from within, a specified area. As these parties well-knew, "a price index" is always associated with and tied to a particular defined "applicable geographic area." The reason that CenterPoint can draw a circle on a map and label it the "HSC area" is because Platts publicly provides the definition of the geographic area that is applicable to its East Texas Houston Ship Channel Index. Platts publishes many other natural gas indices as well, and each of those indices likewise covers a defined applicable geographic area.

Given this fact, the parties' choice of words in section 3.5 is understandable and entirely reasonable. The parties understood that once you had identified "a price index used in a transaction," you had also identified "the applicable geographic area," because every price index is tied to a defined and specified applicable geographic area. Had the parties believed and agreed that "the applicable geographic area" is some identified, specified, unchanging area that was unrelated to "a price index used in a transaction," the

parties easily could have, and would have, said so. In other words, had the parties intended and agreed that no matter what index might be used in a transaction, that index was to accurately reflect prevailing market price "at the Delivery Point(s)"—or at some other identified, unchanging point or area—the parties easily could have, and would have, said so. But they did not.

The reason the phrase "applicable geographic area" is not further defined is because it is tied to "a price index used in a transaction." The parties intended for section 3.5 to apply no matter what "price index" might be used in a transaction. They also intended for that price index to be measured against "the applicable geographic area," rather than against some predetermined, unchanging, specified point or geographic area. The Court should give effect to the words the parties intentionally used in their contracts. It should not ignore them or deem them a mistake.

2. Platts defines "the applicable geographic area" for its East Texas Houston Ship Channel Index.

The "price index used in a transaction" that is at issue in this case is Platts' East Texas Houston Ship Channel Index. The Platts East Texas Houston Ship Channel Index is associated with and tied to a defined, applicable geographic area. That defined, applicable geographic area is the "industrial area extending from the east side of Houston to Galveston Bay and northeastward to the Port Arthur/Beaumont area." Platts Methodology and Specification Guide: North American Natural Gas, available at www.platts.com/MethodologyAndSpecificationDetails. The only reasonable interpretation of "the applicable geographic area" is the area that applies to the East

Texas Houston Ship Channel Index. Both CenterPoint and the defendants know exactly what that area is. CenterPoint has circled it on a map. There can be no confusion, no doubt, no misunderstanding. The Platts defined area for the East Texas Houston Ship Channel Index is the only reasonable interpretation of "the applicable geographic area" when the "price index used in a transaction" is Platts' East Texas Houston Ship Channel Index. Section 3.5 is not ambiguous.

PRAYER

The defendants ask the court to rule that the parties' contracts are unambiguous. Defendants Air Products and Premcor further pray for any relief to which they are justly entitled.

Respectfully submitted,

By: _____

William E. Junell, Jr.
State Bar No. 11053000
Steven R. Rech
State Bar No. 16649200
Dianne M. Friedl
State Bar No. 24051317
SCHWARTZ, JUNELL, GREENBERG,
& OATHOUT L.L.P.
2 Houston Center
909 Fannin, Suite 2700
Houston, Texas 77010
Telephone: (713) 752-0017
Telecopier: (713) 755-0327

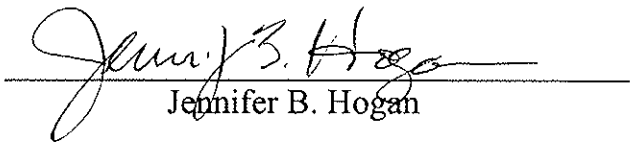
By: _____

Jennifer Bruch Hogan
State Bar No. 03239100
Richard P. Hogan, Jr.
State Bar No. 09802010
Matthew E. Coveler
State Bar No. 24012462
HOGAN & HOGAN
2 Houston Center
909 Fannin, Suite 2700
Houston, Texas 77010
Telephone: (713) 222-8800
Telecopier: (713) 222-8810

Attorneys for The Premcor Refining Group, Inc. and Air Products, LLC

CERTIFICATE OF SERVICE

This instrument was served in compliance with Rules 21 and 21a of the Texas Rules of Civil Procedure, on November 12, 2009, upon all counsel of record.



Jennifer B. Hogan

Counsel for Plaintiff:

Charles R. Parker
Erin Kolondy
LOCKE LORD BISSELL & LIDDELL, LLP
3400 Chase Tower
600 Travis, Suite 3400
Houston, Texas 77002
Via Certified Mail, Return Receipt Requested

Patti Prewitt
LAW OFFICE OF
PATRICIA WILLIAMS PREWITT
412 E. Washington Ave.
Navasota, Texas 77868
Via Certified Mail, Return Receipt Requested