



## JURISDICTION AND VENUE

4. Venue is proper in Lubbock County as the City of Lubbock is a participant in the West Texas Municipal Power Agency, a Texas municipal power agency and municipal corporation. This Court has jurisdiction over this proceeding under Texas Civil Practice and Remedies Code, Section 37.004(1), which provides that “[a] person interested under a ... written contract ... or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.” The amount in controversy in this case exceeds the minimum jurisdictional limits of the Court.

## BACKGROUND

5. The West Texas Municipal Power Agency (the “WTMPA”) is a municipal power agency created under Chapter 163 of the Texas Utilities Code and is comprised of the cities of Brownfield, Floydada, Lubbock, and Tulia (the “Cities”).<sup>1</sup> The WTMPA is obligated to provide for the reliable and adequate supply of electric energy for the service, including the economic development, of its member cities. The WTMPA has entered into a Development Agreement with Republic Power under this obligation for the development of additional sources of renewable and traditional electric energy generation, together with the required transmission facilities, in the High Plains region

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<sup>1</sup> The District Court of Lubbock County, Texas has held that the WTMPA was validly created as a municipal corporation pursuant to the provisions of Vernon's Ann. Civ. St. art. 1435a, as amended, §§ 4a and 4b (now codified in Chapter 163 of the Texas Utilities Code). See *Ex Parte: West Texas Municipal Power Agency; the City of Brownfield, Texas; the City of Floydada, Texas; the City of Lubbock, Texas; and the City of Tulia, Texas*, No. 87-517, 876 (140<sup>th</sup> Dist. Ct., Lubbock County, Tex., Aug. 28, 1987).

served by the WTMPA. Republic Power and the WTMPA have devoted substantial financial resources and efforts in connection with the Development Agreement.

6. The WTMPA has formed High Plains Diversified Energy Corporation, a domestic local government corporation (the "LGC"), see Chapter 431, Tex. Trans. Code, for the purpose of owning and operating the development project. In that connection, the WTMPA has announced that all of its rights and obligations under the Development Agreement will be assigned to and assumed by the LGC.

7. As a prerequisite to continued development of the additional energy sources contemplated in the Development Agreement, to ensure adequate protection of the Cities' interests, and because the project is a significant and expensive undertaking which is critical to meeting the area's future power needs, the WTMPA has deemed it necessary to obtain a declaratory judgment confirming the WTMPA's authority to participate in the activities set forth in the Development Agreement, to create the LGC, and to make the assignments to the LGC to assist WTMPA to carry out its rights and responsibilities under the Development Agreement.

#### **STATEMENT OF FACTS**

8. The WTMPA and the LGC agree with the Statement of Facts contained in the Original Petition filed by Republic Power Partners, LP and incorporate these facts by reference in this Answer and Counterclaim.

#### **COUNTERCLAIM FOR DECLARATORY RELIEF**

9. The WTMPA and the LGC seek a declaratory judgment under Texas Civil Practice and Remedies Code, Section 37.004(a). The rights, status, and other legal relations of the WTMPA, and the LGC and Republic Power are affected by the statutory

provisions contained in Chapter 163 of the Texas Utilities Code and Chapter 431 of the Texas Transportation Code, and WTMPA and the LGC therefore seek a declaration of rights, status and legal relations under those statutes.

10. The WTMPA and the LGC seek a declaration that the WTMPA has the authority, under Chapter 163 of the Texas Utilities Code and Chapter 431 of the Texas Transportation Code, to enter into and perform its responsibilities and obligations under the Development Agreement. Specifically, the WTMPA and the LGC respectfully request this Court to find:

- a. The WTMPA is a municipal power agency, a municipal corporation, and a municipally owned utility.
- b. The WTMPA has the authority to execute the Development Agreement.
- c. The WTMPA has the authority to construct generation facilities in excess of its current system requirements.
- d. The WTMPA is a municipality for purposes of Chapter 431 of the Texas Transportation Code and has the authority to create a Local Government Corporation to carry out its rights and responsibilities under the Development Agreement.
- e. The WTMPA has the authority to assign the Development Agreement to the LGC, and the LGC has the authority to accept the assignment, and to perform under, and be bound by, the terms of the Development Agreement.
- f. The LGC has all the authority of a non-profit corporation and is empowered to do the following:
  - i. Plan, finance, construct, purchase, own, manage, operate, sell or lease electric generation, including capacity and energy, and transmission.
  - ii. Contract without competitive bidding.
  - iii. Exercise the power of eminent domain in connection with its construction of generation and transmission facilities.

- iv. Hire employees.
  - v. Finance the construction and development of generation and transmission facilities through issuance of taxable revenue bonds repayable only through the revenues received from the project and secured solely by the project assets.
  - vi. Agree to compensate a private developer by means of a percentage share of the net revenues from the project in lieu of a fixed fee.
  - vii. From time to time, at the LGC's election, distribute to the WTMPA a portion of the LGC's share of net revenues.
  - viii. Make off-system sales into the wholesale power market or through bilateral contracts of any electric energy not required by the WTMPA.
  - ix. Recover cost of transmission either through a separate charge or through a bundled charge for power and transmission.
- g. The LGC is a municipally owned utility as that term is defined by the Public Utility Regulatory Act ("PURA").
- i. The LGC is not required to obtain a certificate of convenience and necessity ("CCN") for construction of power plants or transmission lines.
  - ii. Rates for bundled wholesale power sales and transmission services by the WTMPA/LGC are not subject to regulation under PURA.
  - iii. The LGC will not be deemed to have elected to enter competition under PURA by virtue of making off-system sales of wholesale power into the Electric Reliability Council of Texas ("ERCOT").
- h. The LGC was properly formed and has authority to issue bonds without seeking a declaratory judgment under Chapter 1205 of the Texas Government Code.
- i. All indebtedness and other obligations incurred by the LGC are not debts, obligations, contingent liabilities, or enterprise liabilities of the WTMPA or of the cities of Brownfield, Floydada, Lubbock and Tulia, Texas.

**CONCLUSION AND PRAYER**

Section 37.004 of the Texas Civil Practice & Remedies Code provides that "a person ... whose rights, status, or other legal relations are affected by a statute... may have determined any question of construction or validity arising under the ...statute ...and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code § 37.004(a). Because the rights of the WTMPA, the LGC and Republic Power Development Agreement are affected by the statutory provisions contained in Chapter 163 of the Texas Utilities Code and Chapter 431 of the Texas Transportation Code, declaratory relief is appropriate under Section 37.004.

WHEREFORE, the WTMPA and the LGC pray that this Court grant WTMPA and the LGC the requested declaratory judgment and for any such other and further relief to which they may show themselves to be justly entitled to receive.

Respectfully submitted,  
Davidson & Troilo  
A Professional Corporation  
7550 IH-10 West, Suite 800  
San Antonio, Texas 78229  
Telephone: (210) 349-6484  
Telecopier: (210) 349-0041

By:



John W. Davidson  
SBN 05436000  
R. Gaines Griffin  
SBN 08464500

**ATTORNEYS FOR DEFENDANTS AND  
COUNTERCLAIMANTS, WEST TEXAS  
MUNICIPAL POWER AGENCY AND  
HIGH PLAINS DIVERSIFIED ENERGY  
CORPORATION**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Original Answer and Counterclaim for Declaratory Judgment has been forwarded to the following by Certified Mail Return Receipt Requested and facsimile on this 25<sup>th</sup> day of November 2008.

Craig T. Enoch  
Winstead, P.C.  
401 Congress Avenue, Suite 2100  
Austin, Texas 78701

  
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R. Gaines Griffin