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DISTRICT CLERK LUBBOCK CO.
DEPUTY
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2008 DEC - 1 AM 11:16

REPUBLIC POWER PARTNERS, LP,

Plaintiff,

v.

WEST TEXAS MUNICIPAL POWER
AGENCY, and HIGH PLAINS DIVERSIFIED
ENERGY CORPORATION,

Defendants.

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IN THE DISTRICT COURT OF
LUBBOCK COUNTY, TEXAS

237TH JUDICIAL DISTRICT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, Republic Power Partners, LP ("Republic Power"), asks this Court to grant summary judgment on the declaratory judgment claims requested in Plaintiff's Original Petition. The facts in this proceeding are undisputed and have been stipulated to by the parties. Thus, this Court may render judgment on the issues presented as a matter of law.

I. FACTUAL BACKGROUND

This case involves the interpretation and application of Chapter 163 of the Texas Utilities Code and Chapter 431 of the Texas Transportation Code with respect to a contract (*i.e.*, the "Development Agreement" or "Agreement")¹ between Plaintiff Republic Power and Defendant West Texas Municipal Power Agency ("WTMPA"). Previously, the WTMPA was the subject of a similar declaratory judgment action filed in Lubbock County by which the 140th District Court declared the WTMPA to be a validly created municipal power agency "authorized by law to borrow money and issue bonds, notes or other evidence of indebtedness."²

¹ A copy of the Agreement is attached hereto as Exhibit A.

² A copy of the Court's declaratory order holding same is attached as Exhibit B. *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 (140th District Court, Lubbock County, Tex., Aug. 28, 1987).

The WTMPA was created under the predecessor version of Chapter 163 of the Texas Utilities Code and is comprised of the cities of Brownfield, Floydada, Lubbock, and Tulia (the "Cities"). As a municipal power agency and municipally-owned utility under the Texas Utilities Code, the WTMPA is obligated to provide for the reliable and adequate supply of electric energy for the service, including the economic development, of the Cities.³ The WTMPA currently satisfies its obligations to supply electric energy to the Cities under a wholesale power sales contract with Xcel Energy ("Xcel"), which requires Xcel to supply the WTMPA's full requirement of electric energy until 2019. Xcel has advised the WTMPA that it will not be able to supply WTMPA's requirements for electric energy after 2019.

Extensive renewable energy resources exist in the High Plains region of Texas that the WTMPA serves, including wind, solar, and biomass energy sources. The development of renewable energy sources in the High Plains region, along with the development of traditional electric generation fuels, including clean coal and natural gas, will provide balanced and reliable sources of electricity; however, the development and construction of electric generation facilities and infrastructure is expected to take approximately five to six years. Facilities capable of generating electricity to replace the electricity currently provided by Xcel must be built and online in advance of 2019.

To fulfill its obligation to provide electricity to the Cities, the WTMPA has entered into an Agreement with Republic Power to develop, in the High Plains region served by the WTMPA, additional sources of renewable and traditional electric energy generation, together with the required transmission facilities (the "Project"). As permitted by law,⁴ excess electric energy not currently required by the WTMPA for its own needs will be sold through off-system sales to

³ See Amended Power Sales Contract between WTMPA and the Cities at 1 (Apr. 1, 1998), attached hereto as Exhibit C; see also TEX. UTIL. CODE § 163.012.

⁴ See TEX. UTIL. CODE § 163.060(b)(3).

others in the State of Texas.⁵ While the WTMPA will be the initial owner of the Project, the WTMPA has created a local government corporation, High Plains Diversified Energy Corporation ("High Plains"), to aid in the performance of the WTMPA's rights and responsibilities under the Development Agreement and will assign its powers and duties under the Agreement to High Plains.

Republic Power and the WTMPA have devoted substantial financial resources and efforts in connection with the Development Agreement. The WTMPA required — as a prerequisite to continued development of the additional energy sources contemplated in the Development Agreement — that Republic Power obtain a declaratory judgment confirming the WTMPA's and High Plains' legal authority to participate in the activities contemplated by the Development Agreement. Accordingly, Republic Power filed its Original Petition seeking a declaratory judgment on October 31, 2008. Defendants WTMPA and High Plains were properly served a copy of Plaintiff's Original Petition and Defendants have appeared in this action. This Court's entry of declaratory relief will resolve the live dispute between the parties and allow them to continue to proceed towards satisfaction of the objectives of and obligations under the Development Agreement.

Specifically, Republic Power asks 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.

⁵ Some sales may be made to purchasers located within ERCOT. The majority of the State of Texas is, for the most part, comprised of ERCOT's independent electrical grid, which is largely exempt from federal jurisdiction and regulation by the Federal Energy Regulatory Commission ("FERC"). WTMPA is located within the part of Texas electrically connected to the Southwest Power Pool ("SPP"), which is an interstate electrical grid subject to certain state and federal regulations. All sales made by WTMPA into ERCOT will be made under arrangements previously found to be adequate to safeguard ERCOT's current independence from federal jurisdiction.

- d. The WTMPA is a municipality for purposes of Chapter 431 of the Texas Transportation Code and has the authority to create High Plains, a local government corporation, to carry out the WTMPA's rights and responsibilities under the Development Agreement.
- e. The WTMPA has the authority to assign the Development Agreement to High Plains, and High Plains has the authority to accept the assignment, and to perform under, and be bound by, the terms of the Development Agreement.
- f. High Plains will have 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, 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 High Plains' election, distribute to the WTMPA a portion of High Plains' 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 rate for power and transmission.
- g. High Plains will be a municipally-owned utility as that term is defined by the Public Utility Regulatory Act ("PURA")⁶ and, consequently:
 - i. High Plains 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/High Plains are not subject to regulation under PURA.
 - iii. High Plains 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").

⁶ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001 – 66.017 (Vernon 2007) (PURA).

- h. High Plains 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 High Plains are not debts, obligations, contingent liabilities, or enterprise liabilities of the WTMPA or of the cities of Brownfield, Floydada, Lubbock and Tulia, Texas.

The legal basis for the Court to make such findings are discussed below.

II. ARGUMENT

A. Jurisdiction to Enter Declaratory Judgment

This Court has jurisdiction over this proceeding under Section 37.004(1) of the Texas Civil Practice and Remedies Code, 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.” Because the rights of the parties in connection with the 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.

Additionally, the requested relief will not constitute an impermissible advisory opinion or a ruling on a hypothetical fact situation because there exists “a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute.”⁷ Specifically, Republic Power and the WTMPA have spent substantial effort and financial resources pursuing the project under the Development Agreement. The WTMPA now requires – as a prerequisite to continued development of the additional energy sources contemplated in the Development Agreement – that Republic Power obtain a declaratory judgment about the

parties' statutory powers and authorities. The Court's entry of declaratory relief will resolve the parties' live dispute with regard to the parties' statutory authority to enter into the Agreement and allow the parties to continue to proceed toward the realization of their goals under the Development Agreement.

Moreover, the purpose of the Declaratory Judgments Act – “to settle and afford relief from uncertainty and insecurity about rights, status, and other legal relations”⁷ – will be accomplished by a declaration from this Court that the WTMPA and High Plains have the authority, under Chapter 163 of the Texas Utilities Code and Chapter 431 of the Texas Transportation Code, to enter into and perform the responsibilities and obligations in the Development Agreement. And the Court “has discretion to enter a declaratory judgment as long as it will serve a useful purpose or will terminate the controversy between the parties.”⁸ Indeed, “if a declaratory judgment will terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue.”¹⁰ Therefore, the Court has jurisdiction to grant the requested declaratory relief.

B. Authority in Support of Specific Findings Sought by Republic Power

1. *The WTMPA is a municipal power agency, a municipal corporation, and a municipally owned utility.*

The WTMPA is a Texas municipal power agency and municipal corporation comprised of the Cities of Brownfield, Floydada, Lubbock and Tulia (the “Cities”). The WTMPA was originally created in 1983 by the Cities of Brownfield, Crosbyton, Floydada, Lubbock, Plains,

⁷ See *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995); see also *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004); *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000).

⁸ *Bright v. Addison*, 171 S.W.3d 588, 606 (Tex. App.—Dallas 2005, pet. denied).

⁹ *Id.* (citing *Bonham State Bank*, 907 S.W.2d at 468).

and Tulia and was recreated in 1986 to include only the Cities. As previously noted, in 1987, the 140th District Court of Lubbock County entered a declaratory judgment confirming that the WTMPA was a valid municipal power agency and municipal corporation under the provisions of Section 4a, Article 1435a, Vernon's Annotated Civil Statutes. Article 1435a has since been re-codified as Chapter 163 of the Texas Utilities Code (collectively, the "Act").

Further, the Act allows public entities to jointly create a municipal corporation and municipal power agency for the generation, transmission, and sale of electrical energy to the public.¹¹ Specifically, section 163.054 permits public entities,¹² such as the Cities, to join in the creation of a municipal power agency and provides that the created agency is a "separate municipal corporation"¹³ with all powers "relating to municipally owned utilities and provided by law to a municipality that owns a public utility," except the power to tax.¹⁴ In addition, an agency created under the Act meets the definition of a municipally-owned utility, which is defined in PURA as a "utility owned, operated, and controlled by a municipality or by a nonprofit corporation the directors of which are appointed by one or more municipalities."¹⁵ A "utility" is generally defined as an entity that owns or operates equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity.¹⁶ Because the WTMPA was created to

¹⁰ *Pub. Util. Comm'n of Tex. v. City of Austin*, 728 S.W.2d 907, 910 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

¹¹ TEX. UTIL. CODE §§ 163.054, 163.060.

¹² See TEX. UTIL. CODE § 163.001(4) ("Public entity" means an entity that is an agency or political subdivision of this state.).

¹³ See TEX. UTIL. CODE § 163.054(c)(1).

¹⁴ See TEX. UTIL. CODE § 163.054(d).

¹⁵ See PURA § 11.003(11). The PUC further recognizes WTMPA's status as a municipally owned utility on its website. See Municipality Listing for WTMPA at http://www.puc.state.tx.us/electric/directories/muni/search_muni.cfm (last visited Sep. 3, 2008).

¹⁶ See PURA § 11.004(1)(defining "utility" as "an electric utility, as that term is defined by Section 31.002."); PURA § 31.002(6)(defining "electric utility" as an entity that owns that owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state). Municipally-owned utilities are excluded from the term "electric utility" except for certain statutorily specified circumstances not relevant here. This definition of electric utility is

provide electric service to its member cities, it meets the definition of a municipally-owned utility in PURA. Further, because the WTMPA was validly created under the Act, the WTMPA is a municipal power agency, municipal corporation, and municipally-owned utility.

2. *The WTMPA has the authority to execute the Development Agreement.*

The WTMPA has the authority to enter into the Development Agreement under Chapter 163 of the Texas Utilities Code. Specifically, under § 163.012, public entities (such as the WTMPA)¹⁷ may enter into agreements with private entities (such as Republic Power)¹⁸ to jointly plan, finance, acquire, construct, own, operate, and maintain electric facilities to: (1) achieve economies of scale in providing electric energy to the public; (2) promote the economic development of this state and its natural resources; and (3) meet the state's future power needs. Further, Subchapter C of Chapter 163 of the Texas Utilities Code permits a municipal power agency, such as the WTMPA, to "perform any act necessary to the full exercise of the agency's power"¹⁹ and to "enter into a contract, lease, or agreement with . . . a public or private person."²⁰

The Development Agreement is precisely the type of agreement that furthers the purposes of the statute, as outlined in § 163.012: the Development Agreement represents a public-private agreement to "jointly plan, finance, acquire, construct, own, operate, and maintain electric facilities"; allows the WTMPA to meet its member Cities' future power needs and the future power needs of the state; promotes economic development in the High Plains region; promotes effective use of underutilized wind, solar, agricultural, and natural resources; and achieves economies of scale in providing electric energy to the public. Thus, the express

provided to lend context to the use of the term "utility" in PURA § 11.003(11)'s definition of "municipally-owned utility."

¹⁷ See TEX. UTIL. CODE § 163.001(4) ("Public entity" means an entity that is an agency or political subdivision of this state."); *id.* § 163.054(c)(2) (providing that a municipal power agency is a "political subdivision of this state").

¹⁸ TEX. UTIL. CODE § 163.001(3) ("Private entity" means an entity that is not a public entity.').

¹⁹ TEX. UTIL. CODE § 163.060(b)(1).

²⁰ TEX. UTIL. CODE § 163.060(b)(2)(C).

language of Chapter 163 permits the WTMPA to enter into a Development Agreement with Republic Power to engage in the planning, financing, construction, ownership, operation, and maintenance of electric facilities.²¹

3. *The WTMPA has the authority to construct generation facilities in excess of its current system requirements.*

The Texas Utilities Code could be read to limit the entities to whom the WTMPA would be permitted to sell power to: (1) a participating public entity; or (2) a private entity that owns jointly with the agency an electric generating facility in the state.²² But a more complete reading shows that the Code expressly allows the WTMPA to "sell, lease, convey, or otherwise dispose of any right, interest, or property the agency considers to be unnecessary for the efficient maintenance or operation of its electric facilities."²³ Consequently, if generation capacity resulting from the planned generation projects under the Development Agreement exceed the current needs of the Cities, High Plains, on behalf of the WTMPA, would be permitted to enter into contracts for off-system sales of the excess generation as that generation would be "unnecessary for the efficient maintenance or operation of [the WTMPA's] electric facilities."²⁴

The WTMPA's construction of generation facilities with an eye towards satisfying future load growth in its service area is a prudent course of action. As the WTMPA's current needs would be more than satisfied through the additional generation facilities constructed under the Development Agreement, the WTMPA should be permitted to sell the excess generation, at wholesale, to areas outside its service territory.

4. *The WTMPA is a municipality for purposes of Chapter 431 of the Texas Transportation Code and has the authority to create, High Plains, a local*

²¹ Moreover, subchapter C of Chapter 163 of the Texas Utilities Code, which authorizes the creation of municipal power agencies such as WTMPA, is to be "liberally construed to carry out its purpose." TEX. UTIL. CODE § 163.052.

²² TEX. UTIL. CODE § 163.060(a).

²³ *Id.* at § 163.060(b)(3).

²⁴ See TEX. UTIL. CODE § 163.060(b)(3).

government corporation, to carry out the WTMPA's rights and responsibilities under the Development Agreement.

The WTMPA has the authority to create High Plains under Chapter 431 of the Texas Transportation Code, which provides that a local government corporation "may be created to aid and act on behalf of one or more local governments to accomplish any governmental purpose of those local governments."²⁵ Chapter 431 authorizes the following "local governments" to create local government corporations—a municipality, a county, a navigation district, a hospital district, and a hospital authority.²⁶ The WTMPA is properly considered a "local government" because it is, by statute, a "municipal corporation,"²⁷ and the term "municipal corporation" is generally synonymous with "municipality." In particular, "municipal corporation" is usually "understood to be 'an organized body, consisting of the inhabitants of a designated area-subdivision of the State, created by the Legislature, that is, a legal entity possessing certain delegated powers."²⁸ Similarly, "municipality" is commonly defined as "an organized body, consisting of inhabitants of a designated area, which is a legal entity constituting a subdivision of the State having delegated powers."²⁹ Thus, generally, the terms "municipal corporation" and "municipality" refer to the same entity.

Moreover, although "municipal corporation" can sometimes refer to political subdivisions other than municipalities,³⁰ the term primarily refers to municipalities and the plain language of Chapter 163 demonstrates the Legislature intended to use the term "municipal corporation" in its

²⁵ TEX. TRANSP. CODE § 431.101(a).

²⁶ TEX. TRANSP. CODE § 431.003(3).

²⁷ See TEX. UTIL. CODE § 163.054(c)(1).

²⁸ See Op. Tex. Att'y Gen. No. 95-003 (1995) (citing *Welch v. State*, 148 S.W.2d 876, 879 (Tex. Civ. App.—Dallas 1941, writ ref'd)).

²⁹ *Central Power & Light Co. v. City of San Juan*, 962 S.W.2d 602, 612 (Tex. App.—Corpus Christi 1998) (citing *City of Euless v. Dallas/Fort Worth Int'l Airport Bd.*, 936 S.W.2d 699, 704 (Tex. App.—Dallas 1996, no writ), *Welch v. State*, 148 S.W.2d 876, 879 (Tex. Civ. App.—Dallas 1941, writ ref'd), *Vela v. City of McAllen*, 894 S.W.2d 836 839 (Tex. App.—Corpus Christi 1995, no writ)).

³⁰ See, e.g., TEX. CONST. art. XI, § 3 ("[N]o county, city, or other municipal corporation ...").

primary sense.³¹ Specifically, under Chapter 163, municipal power agencies are comprised of municipalities and are given all the powers of a municipality that owns a public utility except the power to tax.³² Further, Chapter 163 provides for municipal power agencies to be created through the adoption of concurrent *ordinances* (i.e., a tool generally used by municipalities)³³ and further provides that it prevails in any conflict with a *home-rule charter* provision (i.e., the governing document of a municipality).³⁴ Thus, as used in Chapter 163, "municipal corporation" is reasonably construed to mean "municipality," and the WTMPA, as a municipal corporation under Chapter 163, is properly considered a "municipality," and thereby a "local government," for purposes of Chapter 431. As significant, under the relevant statute, there is no basis to conclude other than that a municipal corporation such as the WTMPA is a municipality.

Additionally, the WTMPA is authorized to create High Plains under Chapter 431 of the Texas Transportation Code because municipalities are expressly given that authority, and the WTMPA has all the powers "provided by law to a municipality that owns a public utility," except the power to tax.³⁵ While the WTMPA does not have all the powers of its member cities (e.g., the power to construct roads, establish zoning codes, maintain parks, etc.), the WTMPA does have all the powers that would be granted to its member cities in connection with their ownership and operation of an electric utility and that are reasonably necessary to accomplish any of the other purposes for which the WTMPA was created.³⁶ Therefore, the WTMPA

³¹ The Office of the Attorney General of Texas has recognized that the term municipal corporation can be used in a broad sense that "includes every corporation which pertains to the internal government of the State or Nation" (e.g., counties, school districts, etc.), but that the "primary sense of the term ... pertains only to incorporated cities, towns or villages." Op. Tex. Att'y Gen. No. 152 (1939). In determining whether the "broad" or "primary" definition of the term applies, the Office of the Attorney General has said that the intent of the Legislature in the particular context controls. See *id.*

³² See TEX. UTIL. CODE § 163.054(d).

³³ *Id.* § 163.054(a).

³⁴ *Id.* § 163.053(2).

³⁵ TEX. UTIL. CODE § 163.054(d).

³⁶ *Grimes County Taxpayers Assc. v. Tex. Municipal Power Agency*, 565 S.W.2d 258, 269 (Tex. Civ. App. — Houston [1st Dist.] 1978) (providing that Texas Municipal Power Agency ("TMPA"), a

possesses all the powers of its member cities with respect to the construction, maintenance, financing, operation, etc. of electric facilities. Consequently, because the WTMPA's member cities would have the power to form a local government corporation under § 431.101 of the Texas Transportation Code to effectuate their joint operation and ownership of electric facilities,³⁷ the WTMPA likewise has that power.

5. ***The WTMPA has the authority to assign the Development Agreement to High Plains, and High Plains has the authority to accept the assignment, and to perform under, and be bound by, the terms of the Development Agreement.***

Under Texas Transportation Code § 431.101(a), a local government corporation can be created to aid and act on behalf of a local government, like the WTMPA, "to accomplish any governmental purpose of the local government." The Development Agreement represents a proper "governmental purpose" of the WTMPA, as it will further WTMPA's obligation to provide for the reliable and adequate supply of electric energy to its member cities. Therefore, the WTMPA may assign the Development Agreement to High Plains, and High Plains may accept that assignment to aid and act on behalf of the WTMPA in the performance of the terms of the Development Agreement.

6. ***High Plains will have all the authority of a non-profit corporation and will be empowered to aid and act on the WTMPA's behalf to carry out the objectives of the Development Agreement.***

As noted above, High Plains has the authority to aid and act on behalf of the WTMPA to accomplish any governmental purpose, including the purposes embodied in the Development Agreement. Moreover, a local government corporation has all the powers and privileges of a

municipal power agency, does not possess all powers that the city could exercise but that TMPA has those powers granted to cities which are reasonably necessary to enable TMPA to accomplish the purpose for which it was created).

³⁷ See TEX. TRANSP. CODE § 431.101(a) (providing that a Local Government Corporation "may be created to aid and act on behalf of one or more local governments to accomplish any governmental purpose of the local governments).

non-profit corporation incorporated under the Texas Non-Profit Corporation Act.³⁸ Consequently, High Plains will be empowered to do all of the following activities:

- i. *Plan, finance, construct, purchase, own, manage, operate, sell or lease electric generation, including capacity and energy, and transmission.*

As discussed above, High Plains will have the power to aid and act on behalf of the WTMPA in carrying out its governmental purposes under Chapter 163 of the Texas Utilities Code.³⁹ Thus, High Plains will have all the powers that the WTMPA is granted under Chapter 163 to carry out the WTMPA's governmental purposes. These powers include jointly planning, financing, acquiring, constructing, owning, operating, and maintaining electric facilities with a private entity to fulfill certain purposes (e.g., meeting the state's future power needs).⁴⁰ They further include the power to "sell, lease, convey or otherwise dispose" of any excess energy resulting from the generation facilities constructed under the Development Agreement.⁴¹

- ii. *Contract without competitive bidding.*

Although the WTMPA is required to award certain construction contracts on the basis of competitive bids,⁴² a local government corporation is statutorily exempted from any competitive

³⁸ TEX. TRANSP. CODE § 431.101(b) (giving local government corporations the powers of corporations created under Subchapter B of Chapter 431 of the Texas Transportation Code); *Id.* § 431.062(a) (giving corporations created under Subchapter B of Chapter 431 the powers and privileges of a non-profit corporation); *see also* Office of the Attorney General, State of Texas, Op. JC-0206, at 3 (Apr. 12, 2000). These powers include the power to purchase, receive, lease, or otherwise acquire, own, hold, improve, use, or otherwise deal in and with, real or personal property, or any interest therein, wherever situated, as the purposes of the corporation shall require; to sell, convey, mortgage, pledge, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets; to make contracts and incur liabilities; and to conduct its affairs, carry on its operations, and have officers and exercise the powers granted by this Act in any state, territory, district or possession of the United States, or any foreign country. *See* VERNON'S TEX. CIV. STATS. Art. 1396-2.02.

³⁹ *See* TEX. TRANSP. CODE § 431.101(a).

⁴⁰ TEX. UTIL. CODE § 163.012.

⁴¹ TEX. UTIL. CODE § 163.060(b)(3).

⁴² TEX. UTIL. CODE § 163.061(a) ("Except as provided by Subsection (c), an agency may award a contract for construction of an improvement that involves the expenditure of more than \$20,000 only on the basis of competitive bids."); *Id.* § 163.061(c) ("An entity that has joint ownership of the improvement to be constructed or that is an agent of a joint owner shall award a contract using the entity's contracting procedures.").

bidding requirements that would apply to the contracts of the WTMPA.⁴³ Section 431.101(e) of the Texas Transportation Code creates this exemption by adopting for local government corporations a provision in the Local Government Code otherwise applicable to housing finance corporations. Specifically, the statutory provisions provide:

TEX. TRANSP. CODE § 431.101:

- (e) ... Section 394.904(b) of [the Local Government Code] *applies to each contract awarded by a local government corporation.*⁴⁴

TEX. LOC. GOV'T CODE § 394.904:

- (b) *Any competitive bidding requirement or restriction imposed on the procedure regarding the award of contracts for [the] acquisition, construction, or rehabilitation [of a private residential development or a home] or regarding the lease, sale, or other disposition of property of the local government is not applicable to any action taken under this chapter.*⁴⁵

The Legislature has thus made the competitive bidding exemption found in § 394.904(b) of the Local Government Code applicable to *each* contract of a local government corporation – not just to those contracts specifically mentioned in § 394.904(b) (e.g., the acquisition, construction, or rehabilitation of a private residential development). The Office of the Attorney General has confirmed this interpretation, opining that:

[A]lthough it might have been preferable for the legislature to have provided this competitive bidding exemption in a straightforward fashion, we have no choice but to conclude that the purpose of section 431.101(e) is to exempt all contracts of a local government corporation from competitive bidding requirements applicable to the contracts of the local government that created it.⁴⁶

⁴³ See TEX. TRANSP. CODE § 431.101(e); see also Op. Tex. Att'y Gen. Op. JC-0206 (Apr. 12, 2000).

⁴⁴ Emphasis added. This subsection also makes § 394.904(a) of the Local Government Code applicable to the property and improvements of a Local Government Corporation.

⁴⁵ Emphasis added. The text added in brackets is taken from subsection (a) of § 394.904, which states that "The acquisition, construction, or rehabilitation of a private residential development or a home is not subject to requirements relating to public buildings, structures, grounds, works, or improvements imposed by the laws of this state, or to any other similar requirements."

⁴⁶ Op. Tex. Att'y Gen. Op. JC-0206 at 4 (Apr. 12, 2000).

Thus, High Plains is exempted from the competitive bidding requirements that might otherwise apply to the construction contracts of the WTMPA.

Further, although the Legislature recently amended Chapter 431 to include a new section relating to the "procurement of design and construction services" as well as an additional competitive bidding exemption,⁴⁷ the Legislature left the broad competitive bidding exemption in § 431.101(e) intact. Moreover, the Legislature rejected an earlier version of the bill that would have stricken § 431.101(e) in its entirety.⁴⁸ Thus, the Legislature has demonstrated an intent that the competitive bidding exemption set forth in § 431.101(e) should continue to apply to each contract of a local government corporation.⁴⁹ Moreover, the new sections must be

⁴⁷ The first, subsection (g) of § 431.101, states that a Local Government Corporation "must comply with all state law related to the *design and construction* of projects, including the procurement of design and construction services, that applies to the local government that created the corporation," and the second, § 431.110, sets forth a competitive bidding exception for "(1) an improvement: (A) that is constructed in a reinvestment zone; and (B) the construction of which is managed by a private venture participant; or (2) an improvement constructed by the corporation for which more than 50 percent of the construction is funded by a private entity." (emphasis added). The use of the phrase "design and construction" in new subsection (g) indicates that this section, as well as the companion exemption in § 431.110, was intended to refer to the "design-build" process set forth in the Local Government Code, which was the primary focus of the bill that added these amendments to Chapter 431. See TEX. LOC. GOV'T CODE § 271.111(3) (defining "design-build contract" as "a single contract with a design-build firm for the *design and construction* of a facility") (emphasis added). See also *infra* note 49.

⁴⁸ Compare HB 1886, Introduced and Enrolled Versions, 80th Leg., R.S., ch. 1213.

⁴⁹ HB 1886, which added §§ 431.101(g) and 431.110 to the Texas Transportation Code, was primarily focused on the design-build process set forth in the Texas Local Government Code and not on the modification of the general powers and privileges of a Local Government Corporation. See Senate Committee Report, Bill Analysis, HB 1886, 80th Leg. R.S., ch. 1213 ("This bill creates a design-build process for civil works projects and allows certain local governmental entities to use this process on a phased basis. This bill expands the use of competitive sealed proposals and construction manager-at-risk civil works projects."). Specifically, section 431.101(g) enables local government corporations to take advantage of the design-build process that would be available to the local government that created High Plains. Design-build projects group both the "design and construction" of a project into one contract, and the governmental entity awards the contract based on a set of published criteria, which may include factors other than cost. See TEX. LOC. GOV'T CODE § 271.111(3) (defining design-build contracts); *id.* § 271.119(d)(2) (stating that the governmental entity will select the proposal offering the "best value" based on "published selection criteria"). The other new section added to Chapter 431, § 431.110, would exempt certain improvements from any competitive bidding requirements. Given that this section was added along with the design-build amendments, it is reasonable to conclude that this section was intended to create a specific exemption from bidding processes applicable to certain design-build projects undertaken by High Plains (not to override or erode the broad competitive bidding exemption in § 431.101(e)).

read in harmony with the statute as a whole⁵⁰ and cannot be read to effectively eliminate the competitive bidding exemption provided by § 431.101(e).⁵¹ Given that these new sections were added to address "design-build" contracts, it is reasonable to conclude that these sections underscore a specific exemption from bidding processes applicable to certain design-build projects undertaken by High Plains. Thus, if these new competitive bidding sections apply to High Plains at all, they would only apply if High Plains were to use a single contract for design-build purposes under which it would hire a single entity to perform both functions. Otherwise, High Plains would remain generally exempt from the competitive bidding requirements applicable to the WTMPA.

iii. Exercise the power of eminent domain in connection with its construction of generation and transmission facilities.

As a participating entity to the Development Agreement, High Plains will have the authority to exercise the power of eminent domain in connection with the construction of generation and transmission facilities developed under the Development Agreement. The Development Agreement was entered into under section 163.012 of the Texas Utilities Code, which allows "public entities" (such as the WTMPA) to enter into agreements with "private entities" (such as Republic Power) to jointly plan, finance, acquire, construct, own, operate, and maintain certain electric facilities. Additionally, the WTMPA can create High Plains and assign the rights and obligations under the Development Agreement to High Plains,⁵² such that High Plains will be made a participating entity to the Agreement.

Section 163.014(a) of the Texas Utilities Code expressly provides that a "participating entity" has the "power of eminent domain to be exercised as provided by [§ 163.014]." While "participating entity" is not defined by the statute, this term most reasonably refers to the "public" and "private entities" that can enter into an agreement under this chapter. "Public entity" is

⁵⁰ See *Continental Cas. Co. v. Downs*, 81 S.W.3d 803, 806 (Tex. 2002).

⁵¹ See TEX. GOV'T CODE § 311.021(2).

defined as "an entity that is an agency or political subdivision of the state," and "private entity" is defined as "an entity that is not a public entity."⁵³ Under these definitions, clearly the WTMPA and Plaintiff Republic Power are "participating entities" to the Development Agreement. High Plains would also fit the definition of a public or private entity⁵⁴ and could properly be considered a "participating entity" to the Development Agreement, as High Plains would be effectuating the WTMPA's duties under the Development Agreement. As such, Chapter 163 of the Texas Utilities Code expressly grants the power of eminent domain to High Plains.

Moreover, even if High Plains were not a "participating entity" to the Development Agreement, High Plains would still have the power of eminent domain as an "arm" of the WTMPA created to carry out the purposes of the Development Agreement. As previously discussed, High Plains has the power to aid and act on behalf of the WTMPA to accomplish any governmental purpose, such as those embodied in the Development Agreement.⁵⁵ The power of eminent domain is critical to the ability to carry out the purposes of the Development Agreement, specifically, the construction, maintenance, and enlargement of generation and transmission facilities. While the Texas Supreme Court has limited a municipal corporation's ability to delegate the power of eminent domain, such limitations would not apply to High Plains' exercise of eminent domain.⁵⁶ Consequently, the WTMPA would not be prohibited from

⁵² See TEX. TRANSP. CODE § 431.101(a).

⁵³ TEX. UTIL. CODE § 163.001(4) and (3).

⁵⁴ It is not entirely clear whether High Plains would be a public entity (*i.e.* an "agency" of the state) or a private entity. However, classification of High Plains as either public or private would not affect High Plains' status as a "participating entity" and thus as an entity with the power of eminent domain.

⁵⁵ TEX. TRANSP. CODE § 431.101(a).

⁵⁶ See *Burch v. City of San Antonio*, 518 S.W.2d 540, 544-545 (Tex. 1975) (explaining that "[i]n construing statutes that delegate the power of eminent domain, the language used by the legislature may be accorded a full meaning so as to carry out the manifest purpose and intention of the statute, however, the application of the law will be restricted to only those cases clearly falling within its terms") (finding that a home rule city was not authorized to delegate the power of eminent domain to a subordinate agency because no express or implied grant of such authority could be supported by statute). Here, either Chapter 163 of the Texas Utilities Code would expressly provide the power of eminent domain to High Plains or Chapter 431 of the Texas Transportation Code could support an implied grant of

delegating its power of eminent domain to High Plains to carry out the purposes of the Development Agreement.

iv. Hire employees.

A local government corporation has all the powers and privileges of a non-profit corporation incorporated under the Texas Non-Profit Corporation Act.⁵⁷ Those powers include a broad grant to "conduct its affairs [and] carry on its operations,"⁵⁸ which would necessarily include hiring employees.⁵⁹ Consequently, High Plains as a non-profit corporation would have the power to hire employees to effectuate the purpose of the Development Agreement.

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.

Section 163.064(a) of the Texas Utilities Code expressly permits the WTMPA to "issue revenue bonds to accomplish the purposes of the agency." Consequently, because Section 431.101(a) of the Texas Transportation Code provides that a local government corporation may be created to accomplish any governmental purpose of the WTMPA, High Plains would be permitted to issue taxable revenue bonds to finance the construction and development of the generation and transmission facilities required by the Development Agreement.

vi. Agree to compensate a private developer by means of a percentage share of the net revenues from project in lieu of a fixed fee.

Section 431.107(b) of the Texas Transportation Code provides that the "earnings of a local government corporation may not benefit a private interest." But this section must be read

eminent domain to a Local Government Corporation to accomplish the governmental purposes for which it was created.

⁵⁷ TEX. TRANSP. CODE § 431.101(b) (giving local government corporations the powers of corporations created under Subchapter B of Chapter 431 of the Texas Transportation Code); *id.* § 431.062(a) (giving corporations created under Subchapter B of Chapter 431 the powers and privileges of a non-profit corporation); *see also* Office of the Attorney General, State of Texas, Op. JC-0206, at 3 (Apr. 12, 2000).

⁵⁸ *See* VERNON'S TEX. CIV. STATS. art. 1396, § 2.02(10).

in harmony with those sections of the Texas Utilities and Transportation Codes⁶⁰ that permit the WTMPA to jointly develop electric facilities with a private entity⁶¹ and to create a local government corporation to aid and act on its behalf in carrying out that development.⁶² These joint public/private development projects would necessarily include agreements to financially compensate the private developer-participant. That compensation could include a fixed fee or any other method of compensation appropriate for the particular project, e.g., a percentage share of net revenues. Thus, section 431.107(b) prohibits the earnings of a local government corporation from benefiting a private interest,⁶³ but it does not prohibit High Plains from aiding and acting on behalf of the WTMPA with respect to the joint public/private undertaking or from compensating the private entity in connection with its risks undertaken or services rendered.⁶⁴ Therefore, High Plains, acting on behalf of the WTMPA, can agree to compensate Republic Power by means of a percentage share of the net revenues of the Project in lieu of a fixed fee.

⁵⁹ See also VERNON'S TEX. CIV. STATS. art. 1396, § 2.02(6), (17) (referencing various powers related to a non-profit corporation's employees, i.e. the power to lend money to employees and pay pensions, thereby necessarily implying the power to hire employees in the first instance).

⁶⁰ See TEX. GOV'T CODE § 311.021(12) ("In enacting a statute, it is presumed that: ... (2) the entire statute is intended to be effective."); *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002) (stating that every provision of a statute should be construed with every other portion to produce a harmonious whole, and thus, one provision should not be given a meaning inconsistent with the other provisions).

⁶¹ TEX. UTIL. CODE § 163.012 (permitting public entities, such as WTMPA, to enter into agreements with private entities to jointly plan, finance, acquire, construct, own, operate, and maintain certain electric facilities).

⁶² TEX. TRANSP. CODE § 431.101(a) (authorizing a local government, like WTMPA, to create a Local Government Corporation to aid and act on its behalf to carry out any of its governmental purposes).

⁶³ TEX. TRANSP. CODE § 431.107(b).

⁶⁴ Not only is High Plains authorized to enter into a public-private venture acting on behalf of WTMPA, but the Transportation Code also contemplates that High Plains could itself enter into a public-private venture, which venture would necessarily include compensation to the private entity. See TEX. TRANSP. CODE § 431.110(1)(B) (exempting from any applicable competitive bidding requirements an expenditure by the local government for an improvement the construction of which is managed by a "private venture participant").

- vii. *From time to time, at High Plains' election, distribute to the WTMPA a part of High Plains' share of net revenues.*

Section 431.107(a) of the Texas Transportation Code expressly provides that a local government (e.g., the WTMPA) creating a local government corporation "is entitled at any time to receive any income earned by the local government corporation that is not needed to pay the local government corporation's expenses or obligations." Although the statute empowers the local government to receive the income of High Plains at the local government's election, the statute does not prohibit the local government from allowing High Plains to determine when or if these distributions should be made. High Plains may, at any time and at its election, distribute to the WTMPA a portion of its 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.*

Section 163.060(b)(3) of the Texas Utilities Code permits the WTMPA, and therefore High Plains acting on its behalf in furtherance of a governmental purpose, to "sell, lease, convey, or otherwise dispose of any right, interest, or property the agency considers to be unnecessary for the efficient maintenance or operation of its electric facilities." Further, PURA § 40.052(b) permits a municipally-owned utility to purchase and sell electric energy at wholesale without geographic restriction. Accordingly, High Plains, as a local government corporation created to accomplish certain of the WTMPA's electric facility purposes and as a municipally-owned utility, may make off-system sales into the wholesale power market or through bilateral contracts of any electric energy not required by the WTMPA.

- ix. *To recover cost of transmission either through a separate charge or through bundled rate for power and transmission.*

Unlike investor owned utilities, municipally-owned utilities like the WTMPA and High Plains are not required to "unbundle" service, meaning they are not required to (but may) separate the electric generation, transmission, and retail sales functions and price those

functions separately.⁶⁵ PURA § 40.055(a)(2) explains that the municipal governing body or a body vested with the power to manage and operate a municipally-owned utility has exclusive jurisdiction to determine whether to unbundle any energy-related activities and, if the municipally-owned utility chooses to unbundle, whether to do so structurally or functionally.⁶⁶ As the WTMPA has not chosen to unbundle its services, it provides service through the use of a bundled rate. Consequently, High Plains, acting on behalf of the WTMPA, would be permitted to recover the cost of transmission associated with the Development Agreement either through a separate charge or bundled rate for power and transportation (*i.e.*, transmission) of that power.

g. High Plains is a municipally-owned utility as that term is defined by PURA:

As a non-profit corporation whose board members will be appointed by the WTMPA, which is itself a municipal corporation whose members are appointed by Cities, High Plains will be a municipally-owned utility, as defined by PURA. PURA §11.003(11), defines a municipally owned utility as a "utility owned, operated, and controlled by a municipality or *by a nonprofit corporation the directors of which are appointed by one or more municipalities.*" On its face, this statute would classify High Plains as a municipally-owned utility because High Plains is a non-profit corporation whose board members have been appointed by one or more municipalities (*i.e.*, the WTMPA and the four individual WTMPA member cities) and will own or operate electric facilities to produce, generate, transmit, distribute, sell or furnish electricity – which activities are the hallmark of a utility.⁶⁷ Consequently, High Plains will be a "municipally-

⁶⁵ *Texas Municipal Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184 at 197 (Tex. 2007).

⁶⁶ *See supra* note 17.

⁶⁷ *See supra* note 15.

owned utility" as that term is defined by PURA and will possess all the powers granted to municipally-owned utilities.⁶⁸

- i. *No statute or regulation requires High Plains to obtain a CCN for construction of power plants or transmission lines;*

There is no requirement that High Plains seek or obtain any certification for construction from the Federal Energy Regulatory Commission ("FERC"), as States generally have exclusive, plenary jurisdiction over transmission siting.⁶⁹ With respect to state certification, Chapter 37 of PURA requires only "electric utilities" to obtain a certificate of convenience and necessity ("CCN") before constructing a transmission line,⁷⁰ and the term "electric utility" does not include a municipally-owned utility.⁷¹ Consequently, under PURA, High Plains, as a municipally-owned utility, is not required to seek approval for certification of transmission or generation facilities developed under the Development Agreement.

- ii. *High Plains' rates for bundled wholesale power sales and transmission services are not regulated under PURA*

PURA § 32.002(1) provides that the Public Utility Commission ("PUC") generally does not "regulate or supervise a rate or service of a municipally-owned utility." Though the PUC may review whether a municipally-owned utility provides wholesale transmission service on

⁶⁸ It is also true that since High Plains is an "arm" of the WTMPA created to effectuate the WTMPA's powers with respect to certain generation projects, High Plains would properly be considered a municipal governing body for purposes PURA § 40.055. See PURA § 40.055(a) (providing that the municipal governing body or a body vested with the power to manage and operate an MOU has exclusive jurisdiction to manage and operate the municipality's electric utility systems, including exercise of control over resource acquisition and any related expansion programs) (setting forth a list of items that remain in the exclusive jurisdiction of the "municipal governing body or a body vested with the power to manage and operate a municipally owned utility."); see also PURA § 32.002 (explaining that, as a general matter, the PUC does not have the authority to regulate or supervise the service of a municipally-owned utility or to affect the jurisdiction of a municipality exercising exclusive original jurisdiction in that municipality's regulation and supervision of an electric utility in the municipality).

⁶⁹ See *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Docket No. RM06-12-001, Order Denying Rehearing at ¶ 23 (May 17, 2007); see also *id.*, Order at 2 (Nov. 16, 2006) (Commissioner Kelly dissenting in part) ("FPA section 201(a) confers to the Commission jurisdiction over the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce, and notes that such regulation extends 'only to those matters which are not subject to regulation by the States.'").

⁷⁰ See PURA § 37.051.

terms and at rates comparable to the terms and rates applicable to the municipally-owned utility's own use of the transmission facilities,⁷² that authority does not extend to regulating bundled sales contracts of municipally-owned utilities to require that the wholesale rates contained within those contracts are in accord with the wholesale rates set by the PUC.⁷³ Accordingly, rates for bundled wholesale power sales and transmission services by either the WTMPA, or High Plains acting on behalf of the WTMPA, are not subject to regulation under PURA.

- iii. *High Plains has not elected to enter competition under PURA by virtue of making off-system sales of wholesale power into ERCOT.*

The Texas Legislature left to the discretion of municipally-owned utilities the decision whether to participate in the competitive retail energy market in Texas.⁷⁴ A municipally-owned utility that opts to not participate in customer choice remains generally exempt from regulation by the PUC.⁷⁵ Moreover, the municipally-owned utility is permitted to make off-system sales of wholesale power into ERCOT. Specifically, a municipally-owned utility that opts not to participate in customer choice "retains the right to offer and provide a full range of customer service and pricing programs to the customers within its certificated area and to purchase and

⁷¹ PURA § 31.002(6) (defining "electric utility" so as to exclude a municipal corporation).

⁷² PURA § 35.004(a).

⁷³ *Texas Municipal Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184 at 187, 194-195 (Tex. 2007) (explaining that, while the Legislature has authorized the PUC to regulate wholesale transmission service by MOUs, the PUC could not effectively "unbundle" a power sales contract between MOUs to include the transmission service cost determined by the PUC for the MOU).

⁷⁴ PURA § 40.051(b) provides that municipally-owned utilities "may choose to participate in customer choice at any time on or after January 1, 2002, by adoption of an appropriate resolution of the municipal governing body or a body vested with power to manage and operate the municipally owned utility. The decision to participate in customer choice by the adoption of a resolution is irrevocable."

⁷⁵ See, e.g., P.U.C. SUBST. R. 25.191(c) (providing that an MOU that has not opted for customer choice is not required to provide transmission service to a retail electric provider or retail customer in connection with the retail sale of electricity in its exclusive service area); see also PURA § 32.002 (setting forth limitations upon the PUC's jurisdiction and providing "Except as otherwise provided...[PURA] does not authorize the commission to: (1) regulate or supervise a rate or service of a municipally owned utility; or (2) affect the jurisdiction, power, or duty of a municipality exercising exclusive original jurisdiction in that municipality's regulation and supervision of an electric utility in the municipality.")

sell electric energy at wholesale without geographic restriction."⁷⁶ Thus, the plain language of PURA permits a municipally-owned utility, like the WTMPA or High Plains, to sell electric energy at wholesale, outside of its certificated area, and still maintain its exemption from regulation by not opting into competition.

PUC Substantive Rule 25.275 provides further support for the proposition that a municipally-owned utility can sell generation at wholesale without that act triggering the municipally-owned utility being brought into competition. A municipally-owned utility that is engaged in competitive activities must comply with the code of conduct rules in P.U.C. SUBST. R. 25.275. Section (b)(1) of that Rule provides that the code of conduct rules apply to a municipally-owned utility that is conducting the activities of a transmission and distribution business unit provided that each of the following conditions is met: (A) the municipally-owned utility has chosen to participate in customer choice under PURA § 40.051(b) or § 41.051(b); and (B) the competitive affiliate of the municipally-owned utility or a bundled municipally-owned utility is providing electric energy *at retail* to consumers in Texas outside its certificated retail service area. Accordingly, if a municipally-owned utility provided electric energy *at wholesale* outside its certificated retail service area, the municipally-owned utility has not, by its actions, opted into competition, as the PUC's code of conduct rules for municipally-owned utilities engaged in competition do not apply.⁷⁷ Therefore, High Plains, as a municipally-owned utility acting on behalf of the WTMPA, is authorized under PURA to sell electric energy at wholesale into ERCOT without triggering WTMPA's or High Plains' entrance into the Texas competitive electric market.

⁷⁶ PURA § 40.052(b).

⁷⁷ Moreover, the PUC's Substantive Rules contemplate that municipally-owned utilities ("MOU") play a role in the wholesale energy market. See P.U.C. SUBST. R. 25.93 (defining a "wholesale seller of electricity" to include an MOU that sells power at wholesale and requiring such seller to make quarterly wholesale electricity transaction reports with the PUC); P.U.C. SUBST. R. 25.503 (defining a "market entity" to include any person or entity participating in ERCOT-administered wholesale market, including an MOU, and requiring such entities to comply with certain ERCOT procedures and PURA).

h. High Plains was properly formed and has authority to issue bonds without seeking a declaratory judgment under Chapter 1205 of the Texas Government Code.

High Plains has authority to issue bonds without seeking a declaratory judgment under Chapter 1205 of the Texas Government Code. Chapter 1205 of the Texas Government Code provides a mechanism by which a municipality may obtain an expedited declaratory judgment authorizing the municipality's issuance of public securities.⁷⁸ This mechanism is not mandatory. Specifically, section 1205.021(1) provides that certain entities, including a municipality, "may bring an action under [Chapter 1205] to obtain a declaratory judgment" as to their authority to issue public securities.⁷⁹ The Code Construction Act provides that the term "may" "creates discretionary authority or grants permission or a power," whereas the term "shall" "imposes a duty."⁸⁰ Because Chapter 1205 uses the term "may" rather than "shall" with respect to a municipality's ability to bring an action under the statute, Chapter 1205 does not impose an obligation to bring that action.

i. All indebtedness and other obligations incurred by High Plains are not debts, obligations, contingent liabilities, or enterprise liabilities of the WTMPA or of the cities of Brownfield, Floydada, Lubbock and Tulla, Texas.

Under Chapter 431 of the Texas Transportation Code, a local government does not assume the indebtedness and other obligations incurred by a local government corporation unless the local government has also assumed the corporation's powers and duties. Specifically, section 431.104(a) provides that a local government may assume the powers and duties of a local government corporation that the local government created. Section 431.104(b)

⁷⁸ See TEX. GOV'T CODE § 1205.021(1) (providing that an "issuer" may bring an action under Chapter 1205 to obtain a declaratory judgment as to the authority of the issuer to issue the public securities); *id.* § 1205.001(1) (defining "issuer," in relevant part, as an agency, authority, board, body politic, commission, department, district, instrumentality, municipality or other political subdivision, or public corporation of this state).

⁷⁹ Emphasis added.

⁸⁰ See TEX. GOV'T CODE § 311.016(1), (2).

states that "[a] local government that assumes the powers and duties of a local government corporation assumes the assets and liabilities of the corporation." Hence, the assets and liabilities of the local government corporation are not those of the local government *unless* the local government assumes the powers and duties of the local government corporation. Accordingly, unless the WTMPA assumes the powers and duties of High Plains (which it has not), High Plains' debts and obligations are separate from the WTMPA and its member cities. Because the WTMPA has not assumed the powers and duties of High Plains, the debts and obligations of High Plains are separate from the WTMPA and its member cities.

III. CONCLUSION AND PRAYER

For the reasons cited herein, Plaintiff Republic Power respectfully requests this Court to enter summary judgment affirming the WTMPA's and High Plains' legal authority to perform their respective duties under the Development Agreement. Each of these authorities is granted in Chapter 163 of the Texas Utilities Code and Chapter 431 of the Texas Transportation Code either expressly or by necessary implication as intended by the Texas Legislature.⁸¹ Specifically, Plaintiff Republic Power asks 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 the WTMPA's rights and responsibilities under the Development Agreement.
- e. The WTMPA has the authority to assign the Development Agreement to High Plains, and High Plains has the authority to accept the assignment, and to perform under, and be bound by, the terms of the Development Agreement.
- f. High Plains will have all the authority of a non-profit corporation and is empowered to do the following:

⁸¹ TEX. UTIL. CODE §163.052.

- i. Plan, finance, construct, purchase, own, manage, operate, sell or lease electric generation, including capacity, 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 High Plains' election, distribute to the WTMPA a portion of High Plains' 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 rate for power and transmission.
- g. High Plains is a municipally-owned utility as that term is defined by the Public Utility Regulatory Act⁸² and, consequently:
- i. High Plains is not required to obtain a certificate of convenience and necessity for construction of power plants or transmission lines.
 - ii. Rates for bundled wholesale power sales and transmission services by the WTMPA/High Plains are not subject to regulation under PURA.
 - iii. High Plains has not elected to enter competition under PURA by virtue of making off-system sales of wholesale power into ERCOT.
- h. High Plains 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 High Plains are not debts, obligations, contingent liabilities, or enterprise liabilities of the WTMPA or of the cities of Brownfield, Floydada, Lubbock and Tulia, Texas.

WHEREFORE, Plaintiff Republic Power Partners, LP. prays that this Court grant Plaintiff's Motion for Summary Judgment as to the requested declaratory relief and for such other relief to which it may show itself to be entitled.

⁸² Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001 – 66.017 (Vernon 2007) (PURA).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded by certified mail in accordance with Texas Rule of Civil Procedure 21(a), to counsel indicated below on this 26th day of November, 2008.

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