

CASE NO. 2008-545, 207 ⁺

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BY [signature]

REPUBLIC POWER PARTNERS, LP,

Plaintiff,

v.

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

Defendants.

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IN THE 237 DISTRICT COURT OF

LUBBOCK COUNTY, TEXAS

_____ JUDICIAL DISTRICT

ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Republic Power Partners, LP ("Republic Power") files this Original Petition seeking a declaratory judgment under Chapter 37 of the Texas Civil Practice & Remedies Code.

DISCOVERY LEVEL

1. This case will be conducted under a Level 2 Discovery Control Plan. See TEX. R. Civ. P. 190.3.

PARTIES

- 2. Plaintiff Republic Power Partners, LP is a Texas Limited Partnership.
- 3. Defendant West Texas Municipal Power Agency is a Texas municipal power agency and municipal corporation comprised of the cities of Brownfield, Floydada, Lubbock and Tulia, Texas.
- 4. Defendant High Plains Diversified Energy Corporation is a domestic local government corporation. See Chapter 431, TEX. TRANS. CODE.



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ORIGINAL

JURISDICTION AND VENUE

5. 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

6. 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"). 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.¹ ~~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 served by the WTMPA. See Exhibit A.~~ Republic Power and the WTMPA have devoted substantial financial resources and efforts in connection with the Development Agreement.

7. 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.

8. As a prerequisite to continued development of the additional energy sources contemplated in the Development Agreement, and to ensure adequate protection of the Cities' interests, the WTMPA has deemed it necessary for Republic Power 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

I. Creation of the WTMPA

9. Chapter 163 of the Texas Utilities Code allows public entities to jointly create a municipal corporation for the generation, transmission, and sale of electrical energy to the public. TEX. UTIL. CODE §§163.054, 163.060. The cities of Brownfield, Crosbyton, Floydada, Lubbock, Plains, and Tulia originally created the WTMPA under the predecessor version of Chapter 163 of the Texas Utilities Code.² The WTMPA was recreated in 1986 by the cities of Brownfield, Floydada, Lubbock and Tulia. The WTMPA currently operates as a municipal power agency under Chapter 163 of the Texas Utilities Code³ and as a municipally-owned utility under section 11.003(11) of the Public Utility Regulatory Act.⁴ As such, it discharges its

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

² See TEX. REV. CIV. STATS. ANN. art. 1435a, § 4a.

³ 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 (140th Dist. Ct., Lubbock County, Tex., Aug. 28, 1987).

⁴ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001 - 66.017 (Vernon 2007)(PURA).

obligation to provide electrical energy to residential, commercial and industrial consumers within the service areas of the WTMPA.

II. *Alternative sources of electricity generation*

10. Extensive renewable energy resources exist in the High Plains region of Texas that the WTMPA serves. These include wind and biofuel energy sources. The WTMPA desires to augment its development of renewable energy sources with more traditional electric generation fuels, including clean coal and natural gas, as a means of providing a balanced, and reliable source of electricity. The WTMPA has determined that it is in the best interest of the Cities to develop additional renewable and traditional sources of electricity, as well as transmission facilities to provide for electricity to be available to the Cities. As permitted by law,⁵ excess electric energy not currently required by the WTMPA for its own needs will be sold through off-system sales to others in the State of Texas. Some sales may be made to purchasers located within the Electric Reliability Council of Texas (ERCOT).⁶

11. The WTMPA currently satisfies its obligation to supply electric energy to the Cities under a wholesale power sales contract with Xcel Energy which requires Xcel to supply the WTMPA's full requirements 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. Well before the contract with Xcel Energy expires, the WTMPA must have developed the resources to continue the adequate and reliable supply of electricity to support the current and potential future requirements of its service area.~~

⁵ See TEX. UTIL. CODE § 163.060(b)(3).

⁶ The majority of the State of Texas is, for the most part, comprised of its own independent electrical grid known as ERCOT, 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 pursuant to arrangements previously found to be adequate to safeguard ERCOT's current independence from federal jurisdiction.

12. The WTMPA has determined that the development of the additional alternative and traditional sources of energy in the High Plains region would provide a number of significant public purpose benefits:

- a reliable source of electrical energy to assure the future needs of the WTMPA and the Cities;
- local control over the supply of electrical energy;
- a competitively priced source of electrical energy;
- the opportunity to generate revenues from the sale of excess electrical energy;
- a needed processing service for under-utilized local wind and agricultural resources;
- an increase in the generation and consumption of clean, renewable energy; and
- creation of a significant number of new jobs within the High Plains region, additional tax revenues, and overall economic development.

III. *The proposed development project*

13. Based on these benefits, the WTMPA entered into the Development Agreement to develop the additional energy sources. The project involves the development and operation of a system to do one or more of the following:

- capture local wind energy resources to generate electricity;
- process and utilize local biomass (e.g., manure and agricultural waste) to generate electricity;
- construct thermal energy facilities, including clean coal facilities, to generate electricity; and
- construct transmission facilities.

See Appendix A to Ex. A. Based on the results of feasibility studies and other factors, however, the project could go forward without one or more of these generation technologies.

IV. *Republic Power's responsibilities under the Development Agreement*

14. Republic Power has the responsibility to conduct feasibility studies at its own cost and expense. To fund the studies and pay substantially all of the related costs, Republic Power

has committed to raise equity capital of up to \$40 million. If additional equity capital is required to complete the initial phase of the project development, Republic Power will also raise those additional funds, which would be repaid (plus interest) after longer-term bond financing is accomplished. If bond financing is not obtained, neither the WTMPA nor the Cities would have any obligation to repay Republic Power for the development costs.

15. Republic Power also has the responsibility, subject to the WTMPA's reasonable consent, to oversee initial development of the project. This includes, for example, supervising the design of the project; developing a financing plan and preparing related documents; identifying, studying, and negotiating to acquire potential sites for power generation facilities and related infrastructure; acquiring technology, equipment, and services needed for the project; and negotiating contracts for the sale or other disposition of excess generated energy.

V. *The WTMPA's responsibilities under the Development Agreement*

16. While retaining final authority to approve various development contracts, the LGC is required to cooperate with Republic Power as it prosecutes development. This includes, for example, approving or rejecting contracts that Republic Power recommends as necessary for the project development phase, assisting Republic Power in identifying and acquiring potential sites for power generation facilities and related infrastructure, and assisting Republic Power in obtaining all required governmental approvals.

17. At the conclusion of the initial development phase and in the event the Project proceeds, the LGC also has the responsibility to issue taxable revenue bonds to fund the project costs, including the costs to acquire sites for power generation facilities and off-site easements and to design, construct, start up, test, and operate the utilities. The LGC's responsibility to issue the bonds is contingent on Republic Power meeting several requirements, including delivering a Feasibility Report that confirms that the base revenue projections for the project are sufficient to cover projected operating expenses and debt service requirements. The bonds will

requesting that the bonds be payable solely from the revenue and assets of the development project such that repayment of the bonds shall be without recourse to any other assets of the LGC, the WTMPA or the Cities.

18. After all outstanding bonds have been repaid, the LGC will have the right to transfer ownership of the development project to the WTMPA.

VI. Compensation to the LGC and Republic Power

19. In recognition of their respective undertakings, the LGC and Republic Power will each be entitled to the recovery of approved expenses and 50 percent of the surplus revenues from the project. The parties also plan to seek a development fee to be included in the bond financing, which development fee will also be paid 50 percent each to the LGC and Republic Power. The parties have also agreed to contract with Texas Tech University for research services related to the project and agree to pay the University at least five percent of the surplus revenues annually (with half paid by each of the LGC and Republic Power).

REQUEST FOR DECLARATORY RELIEF

20. Republic Power seeks a declaratory judgment under Texas Civil Practice and Remedies Code, Section 37.004(a). The rights, status, and other legal relations of Republic Power, the WTMPA, and the LGC are affected by the statutory provisions contained in Chapter 163 of the Texas Utilities Code and Chapter 431 of the Texas Transportation Code, and Republic Power therefore seeks a declaration of rights, status and legal relations under the statutes.

21. Specifically, Republic Power seeks 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 (Ex. A). Specifically, Republic Power respectfully requests 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")⁷ and, consequently:
- i. The LGC is not required to obtain a CCN for construction of power plants or transmission lines.
 - ii. The Public Utility Commission of Texas ("PUCT") may not regulate rates for bundled wholesale power sales and transmission services by the WTMPA/LGC.
 - 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 Republic Power, the WTMPA, and the LGC 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.

WHEREFORE, Republic Power Partners, LP. prays that this Court grant Republic Power the requested declaratory judgment and for any such other and further relief to which it may show itself to be justly entitled.

⁷ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001 – 66.017 (Vernon 2007)(PURA).

Respectfully submitted,

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