

HIGH PLAINS SAGA

The Cities of Brownfield, Floydada, Lubbock, and Tulia created West Texas Municipal Power Authority (“WTMPA”) in 1986 for the provision of electric power to member cities. That obligation is met through a full requirements wholesale power agreement with Xcel Energy that does not expire until 2019.

In 2008, WTMPA entered a development agreement with Republic Power to jointly develop power plants to provide electricity to the West Texas area. WTMPA then created High Plains Diversified Energy Corporation (“High Plains”) as a local government corporation under Chapter 431 of the Texas Transportation Code and assigned the development agreement with Republic Power to High Plains. In January 2009, WTMPA and Republic Power obtained an uncontested summary judgment that declared broad authority for High Plains to function as a municipally-owned utility with power to issue debt. (See attached Order).

While the development agreement referred to development of generation resources in the Panhandle, the only resources pursued by High Plains were two gas fired plants located near Odessa. Acquisition of these existing electric generators threatened taxing authorities in Ector County, including the City of Odessa, with potential loss of over \$6 million annually because High Plains intended to claim tax exemption as a local government corporation.

The City of Odessa defeated High Plains’ effort to deprive the city of significant tax revenues by prevailing first, in the legislature and second, in district court in Lubbock. (See attached May 24, 2011 article by Sarah Mueller).

The legislature was appalled that the Transportation Code could become the authority for creation of a municipal corporation to own and operate electric generation stations and passed SB 1120. (See attached enrolled bill and briefing memo to Senator West). High Plains

attempted an end-run on legislative action before the Governor signed the bill by filing suit to compel the Attorney General to approve issuance of debt for the purchase of the two power plants. The City of Odessa intervened in that suit and prevailed in a plea to the jurisdiction (see attached brief) that persuaded the court that High Plains had not been lawfully created because WTMPA was not a municipality.

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

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ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On this day, came on to be heard the Motion for Summary Judgment (the "Motion") filed by Plaintiff, Republic Power Partners, LP ("Republic Power") on the declaratory judgment claims requested in Plaintiff's Original Petition. Defendants are West Texas Municipal Power Agency ("WTMPA") and High Plains Diversified Energy Corporation ("High Plains"). The facts in this proceeding are undisputed and have been stipulated to by the parties.

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")¹ between Plaintiff Republic Power and Defendant West Texas Municipal Power Agency ("WTMPA"). Previously, Defendant WTMPA was the subject of a similar declaratory judgment action filed in this county by which the 140th District Court declared Defendant 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 Development Agreement is attached to Plaintiff's Motion for Summary Judgment as "Exhibit A."

² 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).

Defendant 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, Defendant 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 Defendant WTMPA currently satisfies its obligations to supply electric energy to the Cities under a wholesale power sales contract with a third party, which contract will expire without the possibility of renewal in 2019.

Extensive renewable energy resources exist in the High Plains region of Texas that Defendant WTMPA serves, including wind, solar, and biomass energy sources. The development of these resources, along with the development of traditional electric generation fuels, including clean coal and natural gas, would provide balanced and reliable sources of electricity for Defendant WTMPA and its member Cities. However, the timeline for developing and constructing electric generation facilities and infrastructure could take many years. Because Defendant WTMPA's wholesale power sales contract will expire without the possibility of renewal in 2019, Defendant WTMPA must ensure that facilities capable of generating electricity to replace the electricity currently provided are built and online in advance of 2019.

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

³ See Amended Power Sales Contract between WTMPA and the Cities at 1 (Apr. 1, 1998), attached to Plaintiff's Motion for Summary Judgment as Exhibit C; see also TEX. UTIL. CODE § 163.012.

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

Plaintiff Republic Power and Defendant WTMPA have devoted substantial financial resources and efforts in connection with the Development Agreement. As a prerequisite to continued development of the additional energy sources contemplated in the Development Agreement, Defendant WTMPA has required that Plaintiff Republic Power obtain a declaratory judgment confirming Defendants WTMPA's and High Plains' legal authority to participate in the activities contemplated by the Development Agreement. 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.

The Court, after considering the Motion, the response, the legal briefing, and the summary judgment evidentiary record, finds that Plaintiff Republic Power is entitled to summary judgment on all declaratory judgment claims set forth in Plaintiff's Original Petition. It is therefore:

ORDERED, ADJUDGED AND DECREED that Plaintiff Republic Power's Motion is GRANTED in all respects. Specifically, this Court finds:

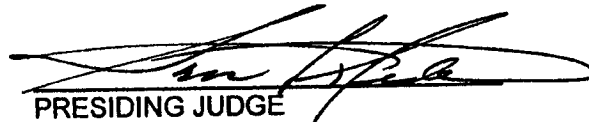
- a. The WTMPA is a municipal power agency, a municipal corporation, and a municipally owned utility.
- ✓ b. The WTMPA has the authority to execute the Development Agreement.
- ✓ c. The WTMPA has the authority to construct generation facilities in excess of its current system requirements.
- d. The WTMPA 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:
 - 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 Act⁴ ("PURA") 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 the Electric Reliability Council of Texas ("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.

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

- 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.

SIGNED this 21st day of January, 2009.


PRESIDING JUDGE

APPROVED AS TO FORM:

Craig T. Enoch
Attorney for Plaintiff Republic Power Partners, LP

John W. Davidson
R. Gaines Griffin
Attorneys for Defendants West Texas Municipal Power Agency
and High Plains Diversified Energy Corporation

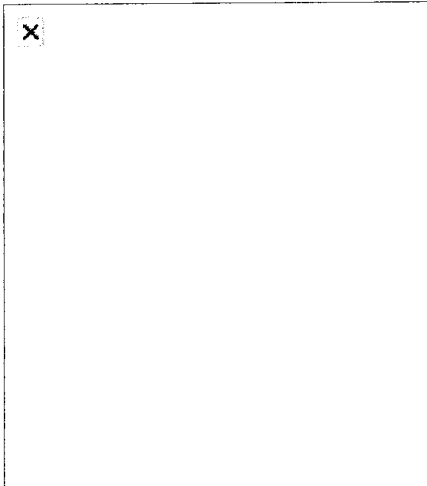
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Power plant sales on hold after judge's ruling

BY SARAH MUELLER

2011-05-24 20:36:36



High Plains Diversified Energy Corporation was dealt two blows Tuesday. First a judge ruled the group is not a municipal governmental corporation. Then a bill limiting tax exemptions for governmental corporations passed both chambers of the Texas Legislature and now heads to Gov. Perry's desk.

Tuesday's decisions could mean local tax entities will keep millions in property tax revenue expected to be lost in the sale of area power plants to High Plains. In a Lubbock court hearing, Judge John Board stopped plans for the governmental corporation to buy two Odessa power plants using \$1.5 billion in revenue bonds. **The judge ruled that High Plains is not a municipal governmental corporation and is not authorized to issue municipal revenue bonds.**

Scott Collier, High Plains board president, said the organization doesn't know where to go from here.

"Obviously it's unfortunate," Collier said. "It's not the ruling we wanted or expected," he said.

When asked if he still expects to purchase the Quail Run and Odessa Ector Generating Station power plants, he said giving up was not an option.

"We have no intentions of quitting," he said.

City of Odessa and Ector County leaders rejoiced at the outcome of Tuesday's hearing. If High Plains buys the Quail Run and the Odessa Ector Generating Station power plants as a municipal tax exempt corporation under current law, local taxing entities would lose millions in property tax revenue. Numbers from Odessa Development Corporation Board President Austin Keith show that the total negative impact to the area would total almost \$6.4 million annually.

"We're very excited the judge ruled in our favor," Mayor Larry Melton said.

High Plains was created under the Texas Transportation Act, Section 431. That means that the nonprofit, municipal utility has the same powers and rights as a government entity, High Plains General Counsel Brad Moore said in February. Former Lubbock judge and current Lubbock City Attorney Sam Medina blessed the creation when it was formed in 2008. The transportation act exempts a local governmental corporation from property taxes on land already owned and in purchasing land. Its member cities, Lubbock, Brownfield, Floydada and Tulia, will lose their current electricity providers in 2019.

High Plains had filed a petition to ask the Lubbock County District Court to authorize them to issue \$1.5 billion in mortgage-revenue bonds and \$75 million in subordinate bonds to be bought by investors. The hearing had been delayed twice as Lubbock District Judge Les Hatch and Medina recused themselves from the case.

State Rep. Tryon Lewis, R-Odessa, and Sen. Kel Seliger introduced bills in March to change the transportation code. **Seliger's bill 1120 passed the Senate on May 5 and passed the House on Tuesday**. Lewis's bill died in the Senate.

High Plains may consider appealing the judge's decision, Collier said. If the case was appealed, it would go to the Seventh Appellate Court in Amarillo.

[@OAgovernment](#)

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To: Senator Seliger
From: Geoffrey Gay

Re: Discussion of Local Government Corporations and Ad Valorem Tax Exemption Under Transportation Code § 431.102(b) as Requested by Senator West in Consideration of SB 1120

Purposes of Local Government Corporations

Municipalities and counties throughout the state have formed local government corporations (“LGC”) to facilitate government and private cooperation for local objectives. Examples include Collin County’s LGC where the cities of Allen, Frisco and Plano cooperate to encourage cultural arts and economic development. The City of Houston has created separate LGCs for redevelopment in the Fourth Ward and Midtown. In November of 2010, the City of Houston formed a LGC to oversee development of a sports arena in south Houston. The City of Dallas formed a LGC entitled “Dallas Convention Center Hotel Development Corporation.” Brazoria County has a LGC to obtain grants and donations for studies that will lead to mitigation of flood and wind and storm surge disasters. The City of Mineral Wells uses a LGC to negotiate with Emerald Correctional Management which builds and manages prisons. The City of Missouri City created a recreation and leisure LGC. As the name “local government corporation” implies, the purposes and objectives of all these examples are “local” in nature.

Attached is the Bill Analysis and Committee Report for SB 888. Its “Background and Purpose” provides useful information regarding the purpose and benefits of forming LGCs. Also, attached is a Subregional Planning document for the Dallas area. It addresses the usefulness of LGCs as a local area planning tool for the cities of Lewisville and Dallas. SB 1120 would do nothing to undermine the purposes, objectives or benefits of the LGC’s referenced above or in the attachments. No LGC herein identified attaches a purpose, objective or benefit to

acquisition of property outside the boundaries of the political subdivisions that created the LGC that can be removed from tax rolls where the property is located.

High Plains Purpose for an LGC is Unique

The Transportation Code is a strange place to turn to for creation of an electric generation company. The City of Odessa is unaware of any similar use of a LGC. The one existing model of municipally-owned utilities joining together to create generation assets is the Texas Municipal Power Authority (“TMPA”) which was created under Chapter 163 (Joint Powers Agencies) of the *Utilities Code* for the benefit of the cities of Garland, Bryan, College Station and Greenville. No entity like High Plains currently exists in Texas. Interestingly, West Texas Municipal Power Authority, WTMPA, creator of High Plains LGC, was organized under Chapter 163 of the *Utilities Code* and should be able to function just as TMPA does. High Plains was apparently formed so that electricity could be sold to entities other than the municipally-owned utilities that formed WTMPA, and so that profits could be shared with a private partner to WTMPA. Electricity capable of being generated by the two Ector County plants significantly exceeds what would be needed by WTMPA. Additionally, the Panhandle where the WTMPA load is located is not connected to the ERCOT grid and for the foreseeable future all generation from these plants would have to be sold within ERCOT. It is arguable that creation of High Plains has a profit making purpose greater than its public purpose.

Legal History

Cities are entitled to a tax exemption pursuant to Article XI, Section 9 of the Texas Constitution. If the City of Lubbock were to purchase the facilities in Ector County, the City could achieve the tax exemption it desires. Instead of directly purchasing the generation plants itself, the City of Lubbock with the co-participants of WTMPA chose to create a political

subdivision corporation. A LGC has no constitutional entitlement to a tax exemption. Such exemption can only be achieved through a legislative grant, without taxing authorities risking significant loss of revenue.

If a city or county were to grant property owned by its LGC a tax exemption without legislative authorization, the requirement in Article VIII, Section 1 of the Texas Constitution that taxation be equal and uniform would entitle similarly situated properties to claim exemptions.

In 1987, the Legislature enacted Local Government Code § 394.905 to exempt from taxation property owned by LGCs created for public housing—a very limited purpose. Presumably, the thought was that if a city wanted to provide discounted housing to elderly and impoverished individuals it should be able to do so without taxing the property owned by the corporation it established for that purpose.

In 1995, the Legislature specifically extended (presumably to facilitate transportation projects) Local Government Code § 394's authorization for LGCs, including tax exemptions, by enacting § 431 of the Transportation Code. The purposes listed in § 431.002 are all transportation related. However, the language used in § 431.101 is broad, rather than limited as in Local Government Code § 394.905. While the vast majority of LGCs created under Transportation Code § 431.101 have been local in focus, the High Plains situation identifies how the breadth of § 431.101's language can lead to unintended consequences and enable one political subdivision can deprive another political subdivision, hundreds of miles away from the point of the LGC's origin, of substantial tax revenue.

SB 1120 will not limit the usefulness or benefits of LGC's by cities and counties throughout the state that are pursuing local projects. It will however, preclude a horrible public policy of allowing one taxing jurisdiction to deprive another of tax revenue.

Conclusion

1. All the LGC's that Odessa could locate are predominantly local in nature.
2. Other than High Plains, there are no LGC's functioning as electric generators.
3. Other than High Plains, Odessa is unable to find any LGC that has purchased property in another area of the State and removed that property from local tax rolls without consent of taxing authorities where the property is located.
4. If High Plains effort to deprive Ector County taxing authorities of tax revenue from property in Ector County, every city and county in the State could be vulnerable to loss of revenue through creative use of LGCs.

AN ACT

relating to the exemption from taxation of property of a local government corporation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (b), Section 431.102, Transportation Code, is amended to read as follows:

(b) The property of a local government corporation and a transaction to acquire the property is exempt from taxation in the same manner as a corporation created under Chapter 394, Local Government Code, except that property of a local government corporation created by a municipal power agency that was created under Subchapter C, Chapter 163, Utilities Code, is not exempt from ad valorem taxation if the property is located outside of the boundaries of each of the municipalities that created the municipal power agency.

SECTION 2. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 1120 passed the Senate on May 5, 2011, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 1120 passed the House on May 25, 2011, by the following vote: Yeas 140, Nays 6, three present not voting.

Chief Clerk of the House

Approved:

Date

Governor

CAUSE NO. 2011 556897

HIGH PLAINS DIVERSIFIED ENERGY CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
GREG ABBOTT, ATTORNEY	§	
GENERAL OF THE STATE OF TEXAS	§	
AND ALL PERSONS HAVING OR	§	LUBBOCK COUNTY, TEXAS
CLAIMING A RIGHT, TITLE, OR	§	
INTEREST IN ANY PROPERTY OR	§	
MONEY TO BE AFFECTED BY THE	§	
PUBLIC SECURITY AUTHORIZATION	§	
OR THE ISSUANCE OF THE PUBLIC	§	
SECURITIES AT ISSUE IN THIS	§	
PROCEEDING,	§	
	§	
Defendants.	§	237 TH JUDICIAL DISTRICT

CITY OF ODESSA’S BRIEF IN SUPPORT OF ITS PLEA TO THE JURISDICTION

To assist the Court and provide a convenient reference on the matter that Odessa believes should be addressed promptly, the City of Odessa (“Odessa”) provides this bench brief in support of its Plea to the Jurisdiction on the basis that High Plains Diversified Energy Corporation (“High Plains”) is not an “issuer” that has standing to bring an action under Chapter 1205 of the Texas Government Code.

SUMMARY OF ARGUMENT

If there is no jurisdiction, there is no case. No matter how detailed a pleading High Plains may file, and no matter how much money it may be trying to gain access to, it still must pass through the doorway of jurisdiction before it can proceed. And, because High Plains *is not an issuer that may bring a Chapter 1205 action*, it may not pass through that doorway.

- High Plains can only bring a Chapter 1205 action if it is an “issuer” as defined therein.

- To be an “issuer,” High Plains must be a valid local government corporation.
- To be a valid local government corporation, High Plains must have been created by a county, municipality, navigation district, hospital district, or hospital authority, per Chapter 431 of the Transportation Code.
- **High Plains’ Problem:** *High Plains was not created by any of those entities. It was created by WTMPA, a limited purpose municipal corporation. Therefore, High Plains is not a legally existing local government corporation. And THEREFORE, High Plains is not an “issuer” that can bring a Chapter 1205 action.*

1. Only an “issuer” can bring a Chapter 1205 Bond Validation Lawsuit, and High Plains is not an issuer because it was not a legally formed.

Chapter 1205 of the Texas Government Code only allows an “issuer” to bring a bond validation lawsuit. Tex. Gov’t Code Ann. § 1205.021 (Vernon 2000). “Issuer” is defined by that chapter as “an agency, authority, board, body politic, commission, department, district, instrumentality, municipality or other political subdivision, or public corporation of this state,” including “a state-supported institution of higher education and any other type of political or governmental entity of this state.” Tex. Gov’t Code § 1205.001. High Plains is not a public or governmental entity, or any other type of legally recognized entity, because it was not lawfully formed under Subchapter D of Chapter 431 of the Texas Transportation Code, for the reasons explained below. Consequently, High Plains is not an “issuer” under Chapter 1205, and thus, does not have standing to bring this suit.

2. WTMPA is not a “local government” and therefore does not have authority to create High Plains.

Subchapter D of Chapter 431 of the Texas Transportation Code allows only a “local government” to create a local government corporation (“LGC”). WTMPA is not a “local government” as that term is defined in the statute, and as such, does not have the authority to create High Plains, a LGC. Thus, the creation of High Plains was invalid, and as such, so is its existence.

Subchapter D provides:

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*. To be effective, the articles of incorporation and the bylaws of a local government corporation must be approved by ordinance, resolution, or order adopted by the governing body of each *local government* that the corporation is created to aid and act on behalf of.

Tex. Transp. Code Ann. § 431.101(a) (Vernon 2007) (emphasis added). A “local government” is defined in the statute as a county, municipality, a navigation district, hospital district, or hospital authority. Tex. Transp. Code § 431.003(3).

WTMPA is—as a clear matter of law—a joint municipal power agency created under Chapter 163 of the Texas Utilities Code, and as such, is a municipal corporation. *See* Tex. Util. Code Ann. § 163.054(c) (Vernon 2007) (A joint municipal power agency is a: “(1) separate municipal corporation; (2) political subdivision of this state; and (3) political entity and corporate body”). Importantly, WTMPA is *not* a municipality, contrary to what it and High Plains may argue.

Being a municipal corporation does not automatically make WTMPA a “municipality” and thus, a “local government” as defined in Chapter 431. In fact, the term “municipality” is used only one other time in the Transportation Code, which is in a list that *separately* uses the terms “municipality” and “municipal corporation.” *See* Tex. Transp. Code Ann. § 458.010(b) (Vernon 2007).¹ Further, “municipality” is defined by the Local Government Code as “a general-law municipality, home-rule municipality, or special-law municipality.” Tex. Loc.

¹ This provision states:

A rural transit district may contract with the United States, a state or state agency, another rural transit district, an urban transit district, a metropolitan or regional transit authority, a county, *a municipality, a metropolitan municipal corporation*, a special district, a governmental agency in or outside this state, or any private person, firm, or corporation: (1) to receive a gift or grant or secure a loan or advance for a preliminary planning and feasibility study; or (2) for the design, construction, or operation of a transportation facility, including an intermodal transportation facility.

Gov't Code Ann. § 1.005(3) (Vernon 2008). That definition does not include a municipal corporation, such as WTMPA. *Id.*

“Municipalities” are “established by law partly as an agency of the state to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.” *Welch v. State*, 148 S.W.2d 876, 879 (Tex. App.—Dallas 1941, writ ref'd). The term “municipality,” thus refers to cities, towns, and districts that are municipal corporations of a general character. *Id.*; see also *Grimes County Taxpayers Ass'n v. Tex. Mun. Power Agency*, 565 S.W.2d 258, 270 (Tex. App.—Houston 1978, writ dism'd).

Although municipalities, like power agencies, are also “municipal corporations,” not all municipal corporations are municipalities, as the Texas Constitution “contemplates the formation of municipal corporations other than cities and towns [municipalities].” *Grimes County*, 565 S.W.2d at 270. Accordingly, while municipalities are municipal corporations with general governmental authority, joint power agencies are limited purpose municipal corporations. See *id.* Indeed, if all “municipal corporations,” including joint municipal power agencies, were “municipalities” (that is, general purpose municipal corporations), then Chapter 163 of the Utilities Code would be unconstitutional as “[t]wo municipal corporations ‘cannot exercise the same general governmental authority over the same area.’” *Grimes County*, 565 S.W.2d at 268.

This issue was addressed in *Grimes County*, where the plaintiffs tried to argue that a “municipal corporation” is also a “municipality,” and thus the statute (which was Section 4a of Article 1435a of the Texas Revised Civil Statutes, but is now Chapter 163 of the Texas Utilities Code) providing for the creation of the Texas Municipal Power Agency (“TMPA”), a joint municipal power agency, is unconstitutional, as “it permits TMPA to exercise any power that the

city could exercise.” *Id.* at 269. The court there disagreed, stating that “[t]he Act clearly does not grant such broad powers to TMPA.” *Id.* It noted that courts must “give [a] statute a construction or interpretation that would render it valid, if it is reasonably possible to do so.” *Id.* at 270. Finding the statute constitutional, the court held that joint municipal power agencies created under the Act (such as WTMPA) are “limited purpose municipal corporations” created to “perform limited rather than general functions when compared to the older types of municipal organizations, such as cities.” *Id.* at 269-270.

Therefore, “municipal corporation,” as that term is used in Chapter 163 of the Utilities Code, does not mean the same thing as “municipality,” and must be read to mean a *limited purpose* municipal corporation.

Additionally, if the Legislature wanted to allow LGCs to be formed by *any* municipal corporation, and particularly joint municipal power agencies, it would have expressly stated that in the definition of “local governments” in Chapter 431 of the Transportation Code. Instead, the Legislature specifically limited the authority to create such corporations to counties, municipalities (cities and towns), navigation districts, hospital districts, and hospital authorities. Tex. Transp. Code § 431.003(3). The fact that the Legislature expressly expanded the definition of “local government” for purposes of Subchapter D to only three other specific types of entities (navigation districts, hospital districts, and hospital authorities) and did not use the term ‘municipal corporation,’ further shows the specific intent to limit the authority granted in the statute. *See* Tex. Transp. Code § 431.003(3)(c) (definition expanded by amendment in 2001). If LGCs (which are limited purpose municipal corporations) could be created by other limited purpose municipal corporations, then cities and other governmental entities could follow such a winding path to take any sort of action with public funds and under color of State authority,

while at the same time avoiding public accountability (which is exactly what WTMPA and High Plains are attempting to do here).

Further, in order to be a validly formed LGC under Subchapter D of Chapter 431 of the Transportation Code, High Plains' articles of incorporation must be approved by the "local government" for which High Plains' is created to act on behalf of. Tex. Transp. Code § 431.101(a). The resolution issued by the Board of Directors of WTMPA—and *only* WTMPA—is insufficient for this purpose, as WTMPA is not a "local government," and thus, has no such authority.

Consequently, because High Plains was not lawfully formed, it is not a legal entity; at the very least, it is not a valid local government corporation or any other type of public entity. It, therefore, is not an issuer under Chapter 1205 of the Government Code and does not have standing to bring this suit.

3. When a plaintiff does not have standing, dismissal for want of jurisdiction is the proper remedy.

A plea to the jurisdiction is proper to challenge a party's lack of standing, and "if the named plaintiff lacks individual standing, the court should dismiss the entire suit for want of jurisdiction." *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 711 (Tex. 2001). The Court can do so on a party's motion or *sua sponte*. See *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex.2000); see also *In re G.S.G.*, 145 S.W.3d 351, 353 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Nutraceutical Dev. Corp. v. Summers*, 2010 WL 4913949, at *2 (Tex. App.—Beaumont Dec. 2, 2010). Odessa suggests that in the interest of judicial economy, now is

the time to do so, and not later, after the parties have expended many unnecessary hours and public dollars litigating a matter that is not even properly before this Court.²

CONCLUSION


The question presented by Odessa's Plea to the Jurisdiction is direct and is a matter of law. Either High Plains is a valid local government corporation that can be an issuer and thus may bring a Chapter 1205 action, or it is not. The authority provided to the Court herein reveals the same answer as a quick reading of the operative statutes: High Plains is not a valid local government corporation, thus it is not an issuer, and cannot bring the Chapter 1205 claim asserted herein. High Plains' Chapter 1205 case should be dismissed.

² Contrary to what High Plains may argue, the 2008 Declaratory Judgment among High Plains and its affiliates is not dispositive of this issue. The City of Lubbock has addressed the relationship between this suit and the 2008 Declaratory Judgment in its trial brief, and in the interest of brevity, Odessa will not repeat them in full herein. In short, that "Declaratory Judgment" (1) is not binding because there was no true controversy between the parties, and (2) it certainly is not binding on Odessa because Odessa was not a party to that action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the above and foregoing has been served in accordance with the Texas Rules of Civil Procedure on this the 19th day of May, 2011, to the following:

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