

# **Bond Case Briefs**

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## **PUBLIC UTILITIES - TEXAS**

### **West Texas Mun. Power Agency v. Republic Power Partners, L.P.**

**Court of Appeals of Texas, Amarillo - February 5, 2014 - S.W.3d - 2014 WL 486287**

In 1983 the cities of Brownfield, Floydada, Lubbock and Tulia formed West Texas Municipal Power Agency (WTMPA) for the purpose of obtaining a reliable and adequate source of electric energy for its citizens. WTMPA is a municipal power agency created pursuant to subchapter C of chapter 163 of the Texas Utilities Code.

WTMPA negotiated and executed a Development Agreement with Republic Power, a private business entity, for the purpose of forming a partnership to develop, finance and operate future electric energy generation and transmission facilities.

The Development Agreement required WTMPA to form a local government corporation to own and operate any electric energy generation or transmission facility to be built and to issue bonds to finance their construction. WTMPA formed High Plains Diversified Energy Corporation for this purpose.

Over the next three years, Republic Power raised millions in capital and expended considerable sums completing feasibility studies and arranging for financing of the project. The Development Agreement provided for issuance of first mortgage revenue bonds by the local government corporation, ultimately High Plains, for the purpose of obtaining the balance of the funds necessary to complete the project. In furtherance of that financing obligation, a bond validation hearing was ultimately scheduled in a Lubbock County district court to approve issuance of the revenue bonds.

Prior to that hearing, at a regularly scheduled meeting of the board of High Plains, a dispute arose as to the allocation of any surplus revenue generated by the project. Due to its greater usage of the electric energy to be generated, the City of Lubbock believed it should receive a greater percentage of any surplus revenue. The Board of Directors disagreed and ultimately, at the bond validation hearing, the City of Lubbock objected to issuance of the revenue bonds by arguing High Plains was not a valid local government corporation and WTMPA did not have the authority to create it. The district court agreed with the City of Lubbock and dismissed the bond validation proceeding with prejudice. As a result, no revenue bonds were ever issued.

Republic Power sued WTMPA and Lubbock - under a joint enterprise theory - for breach of contract and breach of warranties. The District Court granted Lubbock's plea to the jurisdiction but denied WTMPA's plea. WTMPA appealed. WTMPA argued that the trial court erred in denying its plea to the jurisdiction because it is an entity entitled to governmental immunity under the facts of the case.

The Amarillo Court of Appeals held that:

- The proprietary/governmental distinction employed in the Texas Tort Claims Act does not apply to contract disputes, and
- WTMPA's contract with Republic Power was within statutory waiver of governmental immunity.

WTMPA's contract with Republic Power to develop new sources of electricity for the agency was a contract for "goods or services" to a "local governmental entity," and thus was within the coverage of the statute providing for a waiver of governmental immunity from suit in the context of a breach of contract claim, even if the agency assigned its rights and duties under the contract to a local government corporation - High Plains - where the contract required the power company to perform services such as obtaining necessary feasibility studies and securing private investment capital.