CAUSE NO. CV06138

IN RE POWER TO TRANSFORM INC	§	**IN THE 42nd DISTRICT COURT**
	§	
V.	§	**OF**
	§	
CITY OF COLEMAN, TEXAS	§	**COLEMAN COUNTY, TEXAS**

DEFENDANT CITY OF COLEMAN'S ORIGINAL ANSWER AND REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES THE CITY OF COLEMAN, TEXAS ("Coleman" or "City"), Defendant in the instant cause, by and through the undersigned counsel, and presents this, Defendant City of Coleman's Original Answer and Request for Disclosure, and in support thereof, would show the Court as follows:

SPECIAL EXCEPTIONS

1. Coleman specially excepts to the allegation contained in Paragraph I., page 4, of the Petition for Writ of Mandamus filed by Power to Transform, Incorporated ("Plaintiff") that it has standing to bring this action. Plaintiff alleges that it is a Texas non-profit corporation whose members are citizens and/or business owners within the city limits of Coleman, Texas. An association has standing to sue on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requires the participation of individual members in the lawsuit. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). The test requires that the pleadings demonstrate that Plaintiff's members have standing to sue in their own behalf, the interests Plaintiff seeks to protect are germane to the organization's purpose, and that neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. *Id.* To have standing in a mandamus action

involving an initiative petition, a member must be a qualified voter who signed the initiative petition. *See Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999). Plaintiff has not pleaded the requisite facts. Coleman requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its Petition for Writ of Mandamus to plead sufficient facts to establish standing on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the Petition for Writ of Mandamus will be dismissed.

2. Coleman specially excepts to the Petition for Writ of Mandamus in that Plaintiff has failed to plead the county of its residence as required by Texas Rule of Civil Procedure 79. Coleman requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its Petition for Writ of Mandamus to plead the county of its residence on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the Petition for Writ of Mandamus will be dismissed.

3. Coleman specially excepts to the Petition for Writ of Mandamus in that Plaintiff has failed to plead a discovery level as required by Texas Rule of Civil Procedure 190.1. Coleman requests that the Court make an order sustaining this special exception, requiring that Plaintiff amend its Petition for Writ of Mandamus to plead a discovery level on or before a specific future date, and providing that if Plaintiff fails or refuses to amend, the Petition for Writ of Mandamus will be dismissed.

GENERAL DENIAL

4. Pursuant to the provisions of Rules 85 and 92, Texas Rules of Civil Procedure, Coleman denies generally each and every, all and singular, the allegations set forth in Plaintiff's Petition for Writ of Mandamus and demands strict proof of same in accordance with the laws of this State.

AFFIRMATIVE DEFENSES

5. For further answer, if any is necessary, the Coleman City Charter, Section 4.01, provides that the citizens' power of initiative shall not extend to ordinances in conflict with the City's Charter, the State Constitution and/or State laws or to an "ordinance appropriating money or authorizing the levy or taxes; or an ordinance repealing an ordinance appropriating money, levying taxes; or an ordinance involving zoning or annexation." As set forth above, in order for the citizens of Coleman to have the power to introduce legislation through the initiative process the ordinance must first be a proper subject for initiative. Coleman alleges that the two ordinances, the "Rate-Cap Ordinance" which is attached to Plaintiff's Petition for Writ of Mandamus as Exhibit "A" and the "Divestiture Ordinance" which is attached to Plaintiff's Petition for Writ of Mandamus as Exhibit "B," are not proper subjects for initiative because they are in conflict with the City Charter, the State Constitution and/or State Law and/or would have the effect of repealing an ordinance appropriating money.

6. For further answer, if any is necessary, the Rate-Cap Ordinance is withdrawn from the field of initiative because Section 4.01 of the City Charter provides that the initiative process may not be used to propose "an ordinance repealing an ordinance appropriating money." The City's ordinance establishing the electrical rates for the City's municipally owned electric utility appropriates money for the City's provision of electrical services and the operations of the City. The Rate-Cap Ordinance submitted by the Plaintiff effectively repeals the City's electrical rate ordinance by placing a maximum price or "cap" on the City's electrical rates. The City's Charter provides that the power to appropriate money lies within the sole discretion of the duly elected officials of the City, not the general public, and therefore, the Rate-Cap Ordinance is not a proper subject for initiative.

7. For further answer, if any is necessary, the Rate-Cap Ordinance is withdrawn from the field of initiative because State law has established that the Coleman City Council is vested with the exclusive jurisdiction to establish rates applicable to electric services provided by the City's municipally owned electric utility. *See McCutcheon v. Wozencraft*, 294 S.W.1105, 1106 (Tex. 1927)(city council had exclusive power to grant franchise agreements under charter and state law; therefore, franchise ordinances withdrawn from field of initiative process). Texas Utilities Code Section 40.055(a)(1) provides that "[t]he municipal governing body or a body vested with the power to manage and operate a municipally owned utility has exclusive jurisdiction to: ... set all terms of access, conditions, and rates applicable to services provided by the municipally owned utility." Indeed, under State law, ratepayers of a municipally owned utility who are inside the city limits of a municipality do not have the right to appeal the rates established by the governing body of the municipality. *See* Texas Utilities Code Section 33.101(a). To give the citizens of Coleman the power of initiative to set electrical rates and/or to set the maximum price to be charged for electrical rates, would, in violation of State law, give the citizens the right to appeal the electrical rates established by the Coleman City Council.

8. For further answer, if any is necessary, Texas case law has unanimously held that enacting and/or repealing utility rates are withdrawn from the field of initiative and referendum. Not one single case in Texas has upheld as valid a petition for initiative or referendum seeking to establish or repeal municipal utility rates or rates for public utilities in the municipality. *See Southwestern Telegraph & Telephone Co. v. City of Dallas*, 134 S.W. 321, 323 (Tex. 1911)(initiative petition ordinance telephone rates); *City of Dallas v. Dallas Consol. Electric St. Railway Co.*, 159 S.W.76, 78 (Tex. Civ. App.—Dallas 1913)(initiative petition street railway rates); *Dallas Railway Co. v. Geller*, 271 S.W. 1106, 1107 (Tex. 1925)(referendum petition street

railway rates); *Hatten v. City of Houston*, 373 S.W.2d 525, 541 (Tex. Civ. App.—Houston 1963)(City water rate ordinance not subject to referendum).

9. For further answer, if any is necessary, the Rate-Cap Ordinance is in violation of Texas Constitution art. XI, Section 16 and cannot be enacted because it would violate and/or impair various contracts and agreements Coleman has with its creditors and suppliers which require Coleman to stay financially solvent, which includes setting electrical rates high enough to not only pay Coleman's bills, but to adequately fund the City of Coleman (general fund, City services, etc.). See *City of Galveston v. Trimble, 241 S.W.2d 458* (Tex. Civ. App.-Galveston 1951, writ ref'd n.r.e.).

10. For further answer, if any is necessary, the initiative petition submitting the Rate-Cap Ordinance is in effect a referendum ordinance repealing the City's electrical rate ordinance which was enacted effective at the beginning of the City's Fiscal Year, October 1, 2014, and is therefore, untimely filed. Section 4.02 of the Coleman Charter requires that a referendum petition be filed with the City Secretary no later than the effective date of an ordinance. Because the initiative petition was not timely filed, the Coleman City Council is not required to enact the Rate-Cap Ordinance or to call an election for the Rate-Cap Ordinance.

11. For further answer, if any is necessary, the Divestiture Ordinance ordering Coleman to sell all of the assets of its municipally owned electric utility no later than December 31, 2019 has been withdrawn from the field of initiative because under Section 1.03(f) of the City's Charter and Section 1502.055 of the Texas Government Code, the Coleman City Council does not have the authority to enact the Divestiture Ordinance without seeking the prior approval of the voters. State law provides that there can be no right or power existing in the citizens of a home-rule city to adopt an ordinance through the initiative process if the power to adopt it is not lodged in the city

council in the first instance. *See Sale of City of Hitchcock v. Longmire,* 572 S.W.2d 122, 126-27 (Tex. Civ. App.-Houston [1st Dist.] 1979, writ ref'd n.r.e.).

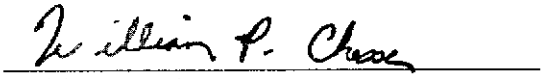
12. For further answer, if any is necessary, the Divestiture Ordinance has been withdrawn from the field of initiative because State law has established that the Coleman City Council is vested with the exclusive jurisdiction to manage and operate the City's municipally owned electric utility, which would include the decision to sell its assets. Texas Utilities Code Section 40.055(a)(6) provides that "[t]he municipal governing body or a body vested with the power to manage and operate a municipally owned utility 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." *See McCutcheon v. Wozencraft*, 294 S.W.1105, 1106 (Tex. 1927)(city council had exclusive power to grant franchise agreements under charter and state law; therefore, franchise ordinances withdrawn from field of initiative process).

REQUEST FOR DISCLOSURE

13. Under Texas Rule of Civil Procedure 194, Defendant requests that Plaintiff disclose, within 30 days of the service of this request, the information or material described in Rule 194.2.

WHEREFORE, PREMISES CONSIDERED, Coleman prays that this Court dismiss Plaintiff's Petition for Writ of Mandamus; that Coleman be awarded their costs, including any reasonable attorney's fees, as well as any and all other relief in law and equity to which they are justly entitled.

Respectfully Submitted,



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ATTORNEY FOR DEFENDANT, CITY OF COLEMAN

CERTIFICATE OF SERVICE

This hereby certifies that a true and correct copy of the foregoing document was sent by certified mail, return receipt requested, on this the 25th day of September, 2015, to:

Craig Allen **Certified Mail RRR#** 7011 3500 0002 0194 6832
P.O. Box 485
Coleman, TX 76834

WILLIAM P. CHESSER