NO. 6138

In the 42nd Judicial District Court of Texas
at Coleman, Texas

IN RE POWER TO TRANSFORM INCORPORATED,

RELATOR

PETITION FOR WRIT OF MANDAMUS

PRO SE

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Relator: Power to Transform, Incorporated, Pro Se

Real Parties in Interest: Citizens and businesses of Coleman, Texas

Respondent: The city of Coleman Texas,
The city council of the City of Coleman, Texas

Counsel for Respondent: Pat Chesser, City Attorney
501 Center Avenue
Brownwood, Texas 76801
325-646-5775

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STATEMENT OF THE CASE

Nature of underlying proceedings: This is an original mandamus proceeding.

Respondent: The city of Coleman, Texas

Action from which Relator seeks relief: Respondent's failure to comply with Section 4.05 of the City Charter of the City of Coleman, Texas.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a writ of mandamus pursuant to Article 5, Section 8 of the Texas Constitution and section 273.061 of the Texas Government Code

TEX GV. CODE ANN. § 24.011: "A judge of a district court may, either in termtime or vacation, grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari, and supersedeas and all other writs necessary to the enforcement of the court's jurisdiction."

ISSUE PRESENTED

On May 7th, 2015, the Coleman City Secretary certified the two "Electrical" initiative petitions (ordinances amending ordinances) as being sufficient per section 4.04 of the City charter.

As provided for in section 4.05 of the City charter: "When the Council receives an authorized initiative petition certified by the City Secretary to be sufficient, the Council shall either:

(a) Pass the initiated ordinance, without amendment, within thirty (30) days after the date of the certification to the Council; or

(b) Submit said initiated ordinance, without amendment, to a vote of the registered voters of the City at a regular or special election to be held within ninety (90) days after the date of the certification to the Council; or

(c) At such election, submit to a vote of the registered voters of the City said initiated ordinance without amendment, and an alternative ordinance on the same subject proposed by the Council."

On May 21, 2105, during the next regular session of the Coleman City Council, the City Council of the City of Coleman, Texas, (respondent) voted unanimously, as advised by the city attorney (counsel for respondent) after meeting in executive session, to take no action and/or reject both ordinances presented to the Council by petition of the citizens because they are not legal topics for initiative or referendum.

Relator argues that the two ordinances are, in fact, appropriate for initiative; and, thus, the Council failed to follow the mandate of its own charter and has refused to perform ministerial duties.

STATEMENT OF FACTS

On, April 10th, 2015, at 4:30 pm, two initiative petitions containing two separate ordinances amending ordinances (exhibits "A" and "B") pertaining to the City of Coleman's municipally-owned utility (MOU) electrical system was duly submitted to Coleman's city secretary by representatives of the citizens of Coleman, Texas.

On May 7th, 2015, the Coleman city secretary certified the two petitions as being sufficient per section 4.04 of the City charter.

As provided for in section 4.05 of the City charter: When the Council receives an authorized initiative petition certified by the City Secretary to be sufficient, the Council shall either:

> (a) Pass the initiated ordinance, without amendment, within thirty (30) days after the date of the certification to the Council; or
>
> (b) Submit said initiated ordinance, without amendment, to a vote of the registered voters of the City at a regular or special election to be held within ninety (90) days after the date of the certification to the Council; or
>
> (c) At such election, submit to a vote of the registered voters of the City said initiated ordinance without amendment, and an alternative ordinance on the same subject proposed by the Council.

On May 21, 2105, during the next regular session of the Coleman city council, the City Council of the City of Coleman, Texas, (respondent) voted unanimously, as advised by the city attorney (counsel for respondent), to take no action and/or reject both ordinances presented to the City by petition of the citizens because they are not (in counsel's opinion) legal topics for initiative or referendum.

During the same meeting, counsel for respondent, during the regular session provided opinion based on generalities and vague associations of Texas law and the City charter, contending that both ordinances were non-legislative and the subject matter of both ordinances had been withdrawn from the field of initiative or referendum. The City attorney informed the public that a factor in his opinion was “Not a single case has ever upheld a petition that sets rates or repeals rates”.

Relator respectfully disagrees and believes that the two ordinances are appropriate for initiative and that both ordinances are legislative in character and are not administrative. Further, the proposed ordinances have not been withdrawn or excluded by general law or the charter, either expressly or by necessary implication, from the operative field of initiative therefore, Respondent failed to follow the mandate of its own charter and has refused to perform ministerial duties.

Relevant here, is that counsel for respondent has failed to show any specific statues or cases supporting the opinion that such ordinances are not appropriate for initiative; moreover, such discretion is not afforded the City. The resultant failure of the City Council to perform its ministerial duties as mandated by its own charter has unlawfully circumvented the due process granted the citizens of Coleman, who seek relief from the current electrical rates being charged by the City of Coleman.

The MOU, owned and operated by the City of Coleman, charges its citizens an electrical rate that is currently higher than any other MOU in the state of Texas. Many believe these rates are both usurious and burdensome to both residents and businesses alike.

The petitions, having been signed by a significant number of citizens, clearly demonstrate the democratic request by the citizens of Coleman for relief from such burdensome rates. The citizens have invoked their right to act legislatively and expect the City to act in a lawful manner and follow the mandate of the city charter.

Relator, acting on behalf of itself and the petitioning citizens of Coleman, therefore petitions the Court to issue a writ of mandamus compelling the City to perform its ministerial duties as mandated by the City charter to prevent further harm to the citizens and businesses of Coleman.

ARGUMENT

Respondents have blatantly refused to comply with a mandatory, non-discretionary provision of their own city charter.

Power to Transform, Incorporated, (PTT) and the citizens of Coleman have no adequate remedy by appeal and thus respectfully request that this Court grant our petition and direct Respondent to follow section 4.05 of the charter.

I. PTT has standing to bring this action.

PTT is a Texas non-profit corporation, whose members are citizens and/or business owners within the city limits of Coleman, Texas. Because the City failed to properly follow section 4.05 of its home rule charter, PTT members as well as the general citizenship of Coleman have been and continue to be harmed by this unlawful action.

II. Mandamus is proper because Respondents have refused to perform ministerial duties.

A writ of mandamus will issue to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate remedy by appeal. E.g.,

> Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992). "There are two requirements to a mandamus. The relator must show, first, a clear abuse of discretion and, second, that he has no adequate remedy by appeal. In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex. 2004). The "[t]raditional[]" way in which to establish a clear abuse of discretion is by showing that an entity failed to perform a ministerial law or duty. See Walker, 827 S.W.2d at 839; Wortham v. Walker, 128 S.W.2d 1138, 1150 (1939). A duty or law is ministerial if it "is mandatory and allows for no discretion." Duffy v. Branch, 828 S.W.2d 211, 213 (Tex. App.—Dallas 1992, orig. proceeding).

A. Respondents had a non-discretionary duty to either approve the ordinances without amendment or submit the issue (with or without their own version) to a vote under the City's charter mandate.

Here, the citizen petitions filed with the city on April 10th, 2015 demanded that the city council consider the two Electrical Ordinances and, if the council did not pass the ordinances, submit the two Electrical Ordinances to a popular vote. When presented with the valid petitions, the City Council had the choice of only three lawful actions; however, Respondent decided to ignore them. By refusing to follow the only options it had, per section 4.05 of the City charter, Respondent refused to perform its non-discriminatory or ministerial duties.

> See Anderson v. City of Seven Points, 806 S.W.2d 791, 793 (Tex. 1991) (mandamus relief appropriate because mayor's refusal to order an election when presented with a complying petition amounted to a failure to perform a ministerial act); Duffy, 828 S.W.2d at 212–14 (mandamus relief appropriate to compel city council member to hold recall election when all necessary requirements for holding such an election were met); Burns v. Kelly, 658 S.W.2d 731, 732 (Tex. App.— Fort Worth 1983, orig. proceeding) (mandamus relief appropriate to compel city council to hold election to recall member of city council when required under the law).

B. Respondent was misguided by the city attorney's reliance on bad law.

Respondent did not discuss the petitions or consider the matter during the regular session of the city council because the unelected city attorney advised them that the two citizen initiative petitions were, in his opinion "not appropriate". In addition, the city attorney contends that both ordinances are administrative in character and the subject matter of both has been withdrawn from the field of initiative or referendum.

Relator respectfully disagrees, and contends both ordinances are clearly legislative and neither has been withdrawn.

1. The two Electrical Ordinances are legislative in character, and not administrative:

   Denman v. Quin, 116 S.W.2d 783, 786 (Tex. Civ. App. San Antonio 1938, writ ref'd): "It is obvious that ordinances intended by the electorate to be subject to referendum are those which are legislative in character, as distinguished from those of an administrative or executive nature"

   Humphrey v. Balli 61 S.W.3d 519 (Tex.App.-San Antonio 2001), (which further cites Denman): Legislative matters are those "of a general, or permanent, character"; and a legislative ordinance is one "originating or enacting a permanent law or laying down a rule of conduct or course of policy for the guidance of the citizens or their officers and agents." Denman v. Quin, 116 S.W.2d 783, 786 (Tex. Civ. App. San Antonio 1938, writ ref'd). Administrative or executive ordinances, on the other hand, "are only transitory, or temporary, or routine ... in their purpose and effect," and "an ordinance which simply puts into execution previously-declared policies, or previously-enacted laws, is administrative or executive in character." Id. The sale of city-owned property is a legislative act. See Brooks v. Watchtower Bible & Tract Soc'y of Florida, Inc., 706 So.2d 85, 89 (Fla. Ct. App. 1998).2. The ordinance at issue in this case authorizes a permanent, uniquely policy-oriented act.

   Also: Glass v. Smith, 150 Tex. 632, 244 S.W. 2d 645 (Tex., 1951) "We agree with the conclusion of the Court of Civil Appeals that the subject matter of the proposed ordinance is legislative in character. This seems to us to be settled by the opinion of this Court in the case of Taxpayers' Ass'n of Harris County v. City of Houston, 129 Tex. 627, 105 S.W.2d 655. The fact that the proposed ordinance involved in that case fixed only minimum salaries whereas the proposed ordinance here sets up a fixed scale of salaries renders the proposal here nonetheless legislative in character. See McQuillen on Municipal Corporations, 3rd Edition, Vol. 5, § 16.57, pp. 262 and 263, and the cases there cited."

   a. Ordinance A (Exhibit A):

      i. is legislative in character, as it enacts a permanent law, laying down a rule of

conduct or course of policy for the guidance of the citizens or their officers and agents;

ii. does not administer the periodic (monthly or annual) electrical rate charged by the city. Instead, Ordinance A sets a maximum ceiling on the electrical rate the city may charge. Again, in Denman v. Quin, "Pursuing the question further, an ordinance fixing salaries to be paid city officials is a practical example of those which are referable, it being a permanent general law empowering the Board of Commissioners to levy taxes and appropriate the public funds to put that law into execution."

iii. fixes a maximum ceiling on the electrical rate not to exceed the greater of (a) 12 cents per kilowatt hour or (b) 3 cents per kilowatt hour above the combined rate paid to purchase wholesale electricity (inclusive of all direct charges). As affirmed in Glass v. Smith, fixing maximum operative parameters is found to be legislative: as such, the administrative, minstrel duties of setting the appropriate electrical rate within the legislative boundaries still remains within the city;

iv. is acknowledged by the city attorney, by implication, that it is fixing a maximum rate: he made reference to Exhibit A as "the Rate Cap Ordinance". During the public session of the city council on May 21, 2015, the city attorney, after reading Ordinance A aloud and in its entirety, said: "I will refer to this ordinance as "the Rate Cap Ordinance", in essence agreeing that Ordinance A does not set (administer) an electrical rate; but, instead, caps the

rate the city may charge while leaving it to the city to administer the electrical rates it finds prudent, providing it does not exceed the maximum rate set forth through this legislative action. In furtherance, we offer rebuttal to the argument by the city attorney, who states: "Not a single Texas case has ever upheld a petition that sets rates or repeals rates." We clearly disagree and find this statement to be misguided. This is not in question, since neither ordinance sets or repeals a rate

b. Ordinance B (Exhibit B):

i. demands that the municipally-owned utility be divested within a designated time. It is, therefore, legislative in character, as it enacts a permanent law, laying down a rule of conduct or course of policy for the guidance of the citizens or their officers and agents.

ii. is affirmed by multiple precedents, where the sale of city owned property has been repeatedly opined to be a legislative act. Again, in HUMPHREY v. BALLI

> "The ordinance at issue in this case authorizes a permanent, uniquely policy-oriented act:"

The sale of the city's municipally-owned utility is not routine, nor is it the implementation of a previously-enacted law.

HUMPHREY v. BALLI "Therefore, guided by Glass and Denman and in keeping with the decision in Brooks, we hold the ordinance at issue in this case legislative in nature as a matter of law. "

The sale of city-owned property is clearly a legislative act.

2. The two Electrical Ordinances have not been withdrawn or excluded by general law or the charter, either expressly or by necessary implication, from the operative field of initiative.

Respondent, by opinion of counsel, states that general law and the city charter confer on the city council exclusively the authority to pass ordinances dealing with the matters of these two Electrical Ordinances; yet, nowhere in the city charter, or in general law, is this exclusive authority granted. (See Section 13.04.001 (of the Coleman City Charter): Rates, deposits, penalties and service charges.)

> "The utility billing office is hereby authorized to charge and collect monthly service charges for water, sewer, garbage and electricity services, security deposits, penalties, fees and other charges established by ordinance or resolution. The amounts to be charged shall be established by ordinance or resolution of the city council and adjusted from time to time as necessary to sustain efficient utility services and comply with laws and regulations."

As opined in Glass, The terms "shall" or "authorized" do not imply or confer exclusive authority.

> Glass v. Smith, 150 Tex. 632, 244 S.W. 2d 645 (Tex., 1951) "The legislative direction that classification 'shall be provided by ordinance of the City Council', does not negate the right and power of the people to pass the classification ordinance. The legislature's use of the words 'City Council, or legislative body' is simple of explanation. All legislative powers conferred by statute on municipalities in this state are conferred on the 'City Council' or 'City Commission'. It is to be doubted that there exists anywhere in our

statutes a provision that a given legislative power of a municipality may be exercised 'by the people' or 'through the initiative'."

And later continued: "If it were held that legislative powers could not be exercised by the people through the initiative in all cases in which the statutes provide that they shall be exercised by the 'City Council', the people would be shorn of all right to exercise any of the statutory powers conferred on municipal governments and the initiative would become an empty symbol. "

a. Ordinance A (Exhibit A):

   i. has not been withdrawn or excluded by general law or the charter, either expressly or by necessary implication, from the operative field of initiative.

   ii. has not been withdrawn explicitly, as there is no language that setting a fixed electrical rate or maximum rate can 'only' or 'exclusively' be enacted by the City Council is significant and therefore such power remains within the legislative process of referendum and/or initiative, barring any other explicit or implied impediments.

> "If the mere fact that a particular provision directs that the City Council exercise a particular legislative power were held to exclude the right of the people to exercise the same power, it might well be argued that Section 1 of Article XI of the [Austin] Charter completely nullifies the initiative provision of the Charter. Of course it does not." (Glass v. Smith)

b. Ordinance A (Exhibit A):

Has not been withdrawn or excluded by general law or the charter, either expressly or by necessary implication, from the operative field of initiative.

There is no language in general law or the city charter removing this matter (the sale of city-owned property) from referendum or initiative. Further, by implication, Glass v. Smith and Humphrey v. Balli both concur that the sale of property remains within the legislative authority of the people.

3. Non-interference.

The court, by law, must defend the right of the people to act in a legislative manner.

> Convention, Etc. v. Dc Bd. of Elec., Etc. 441 A.2d 871 (1980)
> " [i]t is a general rule that grants of power to municipal corporations to adopt municipal legislation by exercise of initiative or referendum are to be liberally construed, to the ends of permitting rather than restricting the power and to attaining rather than preventing its object. [5 E. McQuillin, Municipal Corporations § 16.51, at 203-04 (3d rev.ed.1969) (citation omitted) (emphasis added).]
>
> Thus, the law requires a mind set to favor the right to vote unless there are compelling reasons to do otherwise."
>
> In Glass v. Smith "A like holding was made by the Commission of Appeals in the case of Winder v. King, Tex.Com.App.,[150 Tex. 636] 1 S.W.2d 587. The basis of the decisions in the City of Austin and the Winder cases was that the courts will not interfere with the exercise by the people of their political right to hold elections. …"
>
> "After referring to the City of Austin and the City of Dallas cases, the Court of Civil Appeals in the instant case said that 'as a corollary to the rule of nonjudicial interference with elections the courts are duty bound to prevent all interference with the political power of the people.' (238 S.W.2d 249) It was in keeping with this pronouncement that the Court of Civil Appeals held that the writ of mandamus would issue irrespective of the possible invalidity of the proposed ordinance."
>
> Also in Glass v. Smith "Since the subject matter of the proposed ordinance is legislative in character and neither the general law nor the City Charter of the City of Austin has withdrawn from the people the right to deal with the

subject matter thereof under the initiative provisions of the Charter, it follows that the [Relator is] undertaking to exercise only such rights as are legally theirs."

Also in Glass: "When the people exercise their rights and powers under the initiative provisions of a city charter and thereby become the legislative branch of the city government, the members of the City Council, like other city officials and employees, become ministerial officers in the legislative process, burdened with the mandatory obligation of performing the duties imposed upon them incidental to carrying out the initiative procedure. There is nothing in the charter that qualifies the mandatory duty of petitioners in the calling and holding of initiative elections so that they may decline to hold those which in their opinion might result in the adoption of void ordinances. Furthermore, the duty to call and hold the election is one imposed by the charter in order that the legislative machinery of the city may function to the full extent of its intendment."

4. Complexity.

CITY OF AUSTIN v. QUICK 930 S.W.2d 678 (1996)
"These cases notwithstanding, there is no common law rule that certain issues are too complex and technical to be adopted pursuant to the initiative and referendum process. In each of the cases the landowners cite, the legislative function was either expressly conferred on a governmental body exclusively or a prerequisite action required by law (such as a public hearing) had not taken place. The Supreme Court of Texas has noted this key distinction in *Glass v. Smith,* 150 Tex. 632, 244 S.W.2d 645 (1951):"

"In all Texas cases called to our attention in which it has been held that the people of a municipality could not validly exercise a delegated legislative power through initiative proceedings, it will be found that authority to act was expressly conferred upon the municipal governing body exclusively, or there was some preliminary duty such as the holding of hearings, etc., impossible of performance by the people in an initiative proceeding, by statute or charter made a prerequisite to the exercise of the legislative power."

Glass v. Smith "There may be those whose political philosophy cannot accept the initiative and referendum as a sound investment of political power. But the wisdom of the initiative and referendum is not the question here; the question of their

> wisdom was foreclosed when they became a part of the []Charter. They are as much a part of the Charter as is the provision for a City Council. Once the people have properly invoked their right to act legislatively under valid initiative provisions of a city charter and the subject matter of the proposed ordinance is legislative in character and has not been withdrawn or excluded by general law or the charter, either expressly or by necessary implication, from the operative field of initiative, members of the City Council and other municipal officers should be compelled by the courts to perform their ministerial duties so as to permit the legislative branch of the municipal government to function to the full fruition of its product, though that product may later prove to be unwise or even invalid. The Charter of the City of Austin requires the publication of penal ordinances by the City Clerk before they may become effective"

III. **Mandamus is proper because PTT does not have an adequate remedy by appeal**.

An original mandamus proceeding is the only remedy that can force respondents to follow Section 4.05 of the city charter and ensure the two certified citizen-initiated ordinances to be allowed to come to a popular vote.

The city is taking actions to proceed with multiple other electrical studies, consultations and planning using taxpayers' money that will not be appropriate if either of the two citizen initiatives is passed either by council or via popular vote.

The Texas Constitution (article 5, § 8) confers upon this Court "the jurisdiction District Court judges shall have the power to issue writs necessary to enforce their jurisdiction." Respondents have simply refused to follow the law; only mandamus by this Court can remedy that failure and avoid further harm to the citizens of Coleman.

PRAYER

The Citizens have properly invoked their right to act legislatively under valid initiative provisions of the city charter, the subject matter of the two proposed ordinances are legislative in character, and the proposed ordinances have not been withdrawn or excluded by general law or the charter either expressly or by necessary implication from the operative field of initiative. Thus, Power to Transform, Incorporated, respectfully requests this Court grant this petition and require Respondent to follow the provisions contained in section 4.05 of the city's charter.

Respectfully submitted,

Craig Allen

By: _____

Craig Allen
For Power to Transform, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this, the 31st day of August, 2015, a true and correct copy of the foregoing Petition for Writ of Mandamus and Record in Support of Petition for Writ of Mandamus was sent by the means noted to the following counsel of record:

Counsel for Respondent:

Pat Chesser - City Attorney
501 Center Ave
Brownwood, Texas 76801
325-646-5775

via PatChesserlaw@yahoo.com & certified mail of the U.S. Post office.

_____

Craig Allen

AFFIDAVIT AND VERIFICATION

STATE OF TEXAS §

COUNTY OF COLEMAN §

BEFORE ME, the undersigned authority, on this day personally appeared

Craig All who, being duly sworn, deposed and said the following:

1. My name Craig Allen. I am over the age of eighteen (18), have never been convicted of a crime, and am fully competent and able to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am an executive member of Relator, Power to Transform, Inc.

3. The factual statements in Power to Transform, Inc's petition for writ of mandamus are true and correct, based on my personal knowledge.

_____

Craig Allen

SUBSCRIBED AND SWORN TO BEFORE ME on this 31st day of August 2015 to certify which witness my hand and official seal.

Notary Public in and for the State of Texas _____

My Commission Expires: _____

EXHIBIT "A"

Ordinance Number: _____

AN ORDINANCE AMENDING ORDINANCE, ARTICLE 13.04.101 DIVISION 3, MAXIMUM ALLOWED PRICE DIFFERENTIAL BETWEEN THE TOTAL COST OF ELECTRICITY PAID FROM ITS WHOLESALE ELECTRICAL PROVIDER AND THE TOTAL PRICE CHARGED BY AND THROUGH CITY OF COLEMAN WHILE OPERATING AS A MUNICIPALLY OWNED UTILITY.

Be it ordained by the City Council of the City of Coleman, Texas that:

The City of Coleman, while operating as a Municipally Owned Utility (MOU), shall charge its residential, commercial and nonresidential customers an electrical rate (the Combined Rate) inclusive of all power cost adjustments, congestion fees, ancillary charges and other associated charges not to exceed the greater of:

a) .12/kWh, or
b) .03/kWh above the Combined Rate paid to purchase wholesale electricity (inclusive of all direct charges).

The City shall continue to charge a meter fee in addition to the Combined Rate as documented in the 2014-15 published electrical rate schedule. The City may increase such meter fees at a rate not to exceed 3% per annum.

This section does not impede the right of the city to negotiate electrical rates as currently provided for in §13.04.104, Schedule I, §13.04.105, Schedule ED, §13.04.106, Schedule SC and §13.04.107, Schedule 148, but pertains specifically to residential and commercial customers as currently provided for in §13.04.103, Schedule R and §13.04.104, Schedule C.

EXHIBIT "B"

Ordinance Number: _____

AN ORDINANCE AMENDING ORDINANCE, ARTICLE 13.04.101 DIVISION 3, ELECTRICAL, REQUIRING THAT THE MUNCIPALLY OWNED UTILITY BE DIVESTED, WITHIN A DESIGNATED TIME.

Be it ordained by the City Council of the City of Coleman, Texas that:

The City of Coleman shall, at its earliest convenience, sell, trade or otherwise transfer all of the assets, or substantially all of the assets comprising its electrical transmission and distribution system (T&D system), to an entity licensed to operate in the state of Texas that is duly certified by ERCOT and PUCT for the transmission of electricity. The transfer may not be made to any entity within the operational control of the City, nor incorporated by or on behalf of the City. The transfer shall occur within the timeframe and financial parameters the City deems most beneficial; however, such transfer shall occur no later than December 31st 2019. The City shall not extend the termination date of the existing electrical contract between the City and AEPEP, nor enter into any other contract with any other entity, which could cause the City to operate as a MOU beyond the date of December 31st 2019.