

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF FRANKFORT)	
ELECTRIC & WATER PLANT BOARD OF AN)	CASE NO.
AMENDMENT TO WATER SUPPLY AGREEMENT)	2020-00269
WITH FARMDALE WATER DISTRICT)	

FPB'S RESPONSE TO DATA REQUEST OF SEPTEMBER 16, 2020

1. Provide a detailed explanation for the basis of the proposed contract amendment.

Witness(es): David Billings, P.E., Director of Water Operations;

Gary Zheng, P.E., Ph.D., General Manager

Response: Attached

2. Based on the Kentucky Supreme Court's recent ruling in *Ledbetter Water Dist. v. Crittenden-Livingston Water Dist.*, 2018-SC-000494-DG, 2020 WL 1303913, at *1 (Ky. Feb. 20, 2020), *reh'g denied* (July 9, 2020), explain why the proposed contract amendment, with a term exceeding 20 years, is not void due to violating Kentucky Constitution § 164. Further, provide a detailed explanation of the impact that ruling might have on the current contract between Frankfort Plant Board and Farmdale Water District.

Witness(es): David Billings, P.E.

Response: Attached

3. Provide copies of the minutes of any board meetings in which this contract at issue was discussed or voted upon.

Witness(es): David Billings, P.E.

Response: Attached

4. Provide a copy of the advertisement for bids for this contract.

Witness(es): David Billings, P.E.

Response: Attached

5. Provide a copy of the contract and amendments.

Witness(es): David Billings, P.E.

Response: Attached

CERTIFICATE OF SERVICE

I hereby certify that Frankfort Electric and Water Plant Board's October 2, 2020 electronic filing is a true and accurate copy of "FPB'S Response to Data Request of September 16, 2020"; and that on October 2, 2020, the electronic filing has been transmitted to the Commission.

Pursuant to the Commission's August 20, 2020 Order in this matter and its March 24, 2020 Order in Case No. 2020-00085 I certify that an electronic copy of the foregoing was served by email to the following. Frankfort Electric and Water Plant Board, by and through counsel, will serve a physical copy of this filing with the Commission and parties of record within 30 days of the ending of the current state of emergency caused by COVID-19.

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CERTIFICATION

I, Hance Price, certify that I am the attorney supervising the preparation of these Responses on behalf of the Frankfort Electric and Water Plant Board and that the Responses and attachments thereto are true and accurate to the best of my knowledge and belief formed after reasonable inquiry.

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This the 2nd day of October, 2020

RESPONSE TO PSC DATA REQUEST DATED SEPTEMBER 16, 2020

PSC CASE NO. 2020-00269

ITEM 1

Frankfort Electric and Water Plant Board
Response to PSC Data Request Dated 9-16-2020
Case No. 2020-00269

ITEM 1: Provide a detailed explanation for the basis of the proposed contract amendment.

Response:

As Farmdale explains in its Motion to Intervene filed in this matter on September 4, 2020, Farmdale is seeking a 40-year low interest loan from the United States Department of Agriculture, Rural Development in the amount of \$2,458,000. According to the terms of the loan established by USDA, the Water Supply Agreement between Farmdale and Frankfort Electric and Water Plant Board (“FPB”) must have 40 years left on its term. FPB’s understanding is that these funds will be used for system improvements.

RESPONSE TO PSC DATA REQUEST DATED SEPTEMBER 16, 2020

PSC CASE NO. 2020-00269

ITEM 2

Frankfort Electric and Water Plant Board
Response to PSC Data Request Dated 9-16-2020
Case No. 2020-00269

ITEM 2: Based on the Kentucky Supreme Court's recent ruling in *Ledbetter Water Dist. v. Crittenden-Livingston Water Dist.*, 2018-SC-000494-DG, 2020 WL 1303913, at *1 (Ky. Feb. 20, 2020), *reh'g denied* (July 9, 2020), ("*Ledbetter*") explain why the proposed contract amendment, with a term exceeding 20 years, is not void due to violating Kentucky Constitution § 164. Further, provide a detailed explanation of the impact that ruling might have on the current contract between Frankfort Plant Board and Farmdale Water District.

Response:

First, *Ledbetter* is an unpublished decision. As such, it does not require any new analysis with respect to wholesale water purchase agreements that are either already on file with the Commission or that may be executed in the future. Both the Kentucky Supreme Court and the Kentucky Rules of Civil Procedure make it clear that unpublished materials are not binding precedent.

In *Commonwealth v. Wright*, 415 S.W.3d 606, 613 (Ky. 2013), the Kentucky Supreme Court explained:

[W]e are not greatly influenced by unpublished opinions of this Court or the Court of Appeals, as may be inferred from the simple fact that such opinions were not selected for publication and from our adoption of CR 76.28(4)(c), which says "[o]pinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state."

The rule is clear. *Ledbetter* was not published. Consequently, it is not binding precedent in Kentucky.

Moreover, in *Baze v. Commonwealth*, 276 S.W.3d 761, 768 n.1 (Ky. 2008) the Court wrote that CR 76.28(4)(c) "prohibits citing unpublished cases as binding precedent where other published precedent exists." Here, there is other published precedent. In accordance with its own rulings and the Kentucky Rules of Civil Procedure, the Court must look to that authority and cannot consider *Ledbetter*.

Frankfort Electric and Water Plant Board
Response to PSC Data Request Dated 9-16-2020
Case No. 2020-00269

Second, as the Kentucky Rural Water Association explained in its brief filed in the *Ledbetter* case, the published cases contain no mandate to void the hundreds of water purchase agreements that are on file with the Commission. FPB hereby adopts the brief filed by the Kentucky Rural Water Association as its own and incorporates it by reference as if set forth fully herein. A copy of said brief is attached hereto. For the reasons set forth in the attached brief, FPB maintains that water purchase agreements are not franchises.

Third, *Ledbetter* does not consider Section 163 of the Kentucky Constitution. That section explains that it is the right to occupy public ways that creates a franchise. In a published decision, the Kentucky Supreme Court has held “Ky. Const. § 163 and § 164 ‘must be read together, as the right to occupy the streets and public ways conferred by section 163 can only be granted in the manner provided in section 164.’” *Southeast Bullitt Fire Prot. Dist. v. Southeast Bullitt Fire & Rescue Dep’t*, 537 S.W.3d 828, 832 (Ky. App. 2017) (quoting *Rural Home Tel. Co v. Kentucky & Indiana Tel. Co.*, 107 S.W. 787, 790 (Ky. 1908)). The Court explained “that the [framer’s main purpose for section 163 of the Kentucky Constitution] was to prevent the . . . indiscriminate use of [city streets] by public utilities without the city [controlling] the decision as to what streets and what public ways were to be occupied by such utilities.” *Southeast Bullitt Fire Prot. Dist. v. Southeast Bullitt Fire & Rescue Dep’t*, 537 S.W.3d 828, 833 (Ky. Ct. App. 2017) (quoting *Hatcher v. Kentucky & West Virginia Power Co.*, 133 S.W.2d 910, 915 (Ky. 1939)). Here, the FPB-Farmdale contract does not grant FPB any right to use any public way to install water lines or provide service to Farmdale customers. Hence, Section 164 is not applicable.

Fourth, the *Ledbetter* Court refers to KRS 96.120(1) in support of its holding that a water purchase agreement is a franchise. *Ledbetter Water Dist. v. Crittenden-Livingston Water Dist.*, 2020 Ky. Unpub. LEXIS 10, *12 (Ky. 2020). However, in addition to a franchise, KRS 96.120(2) also says that the “furnishing of water” can be accomplished with a contract. Just like KRS 74.070(1) allows water districts to contract, KRS 96.120(2) says a city “may contract with any other city to furnish water and light to that other city” and that the “legislative bodies are given full power to so contract.” The contract can be for “a

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rental for water . . . from year to year, or for a term of years.” In OAG 79-54, the Kentucky Attorney General wrote that the “city of Paris can enter into an agreement with another city for the purchase of power [or water].” 1979 Ky. AG LEXIS 564 *2 (Ky. A.G.). Here, FPB and Farmdale have done just that and entered into an agreement to purchase water.

Based on the foregoing, a city (or water district) can purchase water by contract or grant a franchise. These are separate processes. It is only when the provider serves customers by directly operating the system and “occupying the public ways” that the requirements of Section 164 must be followed.

Even under the *Ledbetter* test, the FPB-Farmdale agreement is not a franchise and so no bidding is required under Section 164. The FPB-Farmdale water purchase agreement does not grant any right to FPB to serve Farmdale customers, to occupy any public way in Farmdale territory, or to use any land owned by Farmdale to construct any facilities. Unlike the water purchase agreement between Ledbetter and Crittenden-Livingston, FPB has no right “to install water line connections to the [Farmdale] system.” *Ledbetter*, 2020 Ky. Unpub. LEXIS 10, *3 (Ky. 2020). The FPB-Farmdale agreement provides for no connection to the Farmdale system aside from the delivery points. Consequently, as Justice VanMeter notes, the FPB-Farmdale agreement is just “a simple contract for the sale of water.” *Ledbetter*, 2020 Ky. Unpub. LEXIS 10, *17 (Ky. 2020).

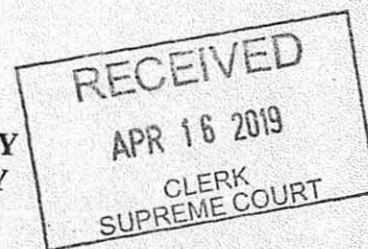
The *Ledbetter* ruling has absolutely no impact on the existing contract between FPB and Farmdale. As an unpublished opinion, it cannot overrule any existing authority. Not only are the facts in *Ledbetter* unique to the parties involved in that case, but they are also entirely different from the facts governing the relationship between FPB and Farmdale. Furthermore, by not “publishing” its opinion, the *Ledbetter* Court obviously intended to limit its ruling to the contract in question. Had it intended to void the hundreds of wholesale water purchase agreements which exist throughout the Commonwealth, the Supreme Court would have expressly done so and also “published” its opinion.

Frankfort Electric and Water Plant Board
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Finally, *Ledbetter* creates an unworkable test to define a franchise. *Ledbetter* says that a franchise was created because the rights conveyed to Crittenden-Livingston included the right to install and read a master meter as well as use the buyer's distribution system (*Ledbetter's*) to deliver the water. *Ledbetter*, 2020 Ky. Unpub. LEXIS 10, *10-11 (Ky. 2020). However, every water purchase agreement on file with the Commission today requires a master meter at the delivery point and contemplates that the buyer's distribution system will deliver the water to its customers beyond the master meter. These "rights" are insufficient to create a franchise. Instead, the plain language in Section 163 of the Kentucky Constitution makes clear that to constitute a utility franchise the rights conveyed must include the right to install "pipes or mains . . . along, over, under or across the streets, alleys or public grounds."

WHEREFORE, for the foregoing reasons, no franchise was created and FPB respectfully requests that the proposed contract amendment be filed in the Commission's records.

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2018-SC-000494-DG



LEDBETTER WATER DISTRICT

APPELLANT

vs

ON APPEAL FROM COURT OF APPEALS
2017-CA-000578
(Livingston Circuit Court No. 2015-CI-00079)

CRITTENDEN-LIVINGSTON WATER DISTRICT

APPELLEE

BRIEF OF AMICUS CURIAE
KENTUCKY RURAL WATER ASSOCIATION, INC.
IN SUPPORT OF APPELLEE CRITTENDEN-LIVINGSTON
WATER DISTRICT

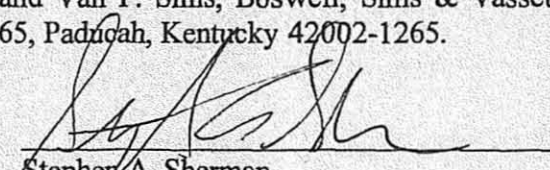
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CERTIFICATE REQUIRED BY CR 76.12(6)

It is hereby certified that a true and correct copy of the foregoing Brief of Amicus Curiae was served via first class US Mail, with postage prepaid, on this the 16th day of April, 2019 to the following: Robert B. Frazer, Frazer & Massey, 200 South Main Street, P.O. Box 361, Marion, Kentucky 42064 and Van F. Sims, Boswell, Sims & Vasseur, PLLC 425 South Sixth Street, P.O. Box 1265, Paducah, Kentucky 42002-1265.


Stephen A. Sherman

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2018-SC-000494-DG

LEDBETTER WATER DISTRICT

APPELLANT

vs

ON APPEAL FROM COURT OF APPEALS
2017-CA-000578
(Livingston Circuit Court No. 2015-CI-00079)

CRITTENDEN-LIVINGSTON WATER DISTRICT

APPELLEE

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IN SUPPORT OF APPELLEE CRITTENDEN-LIVINGSTON
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INTRODUCTION AND STATEMENT OF INTEREST

The Kentucky Rural Water Association, Inc. (“KRWA”) was established in 1979 as a private, non-profit organization to create a self-governed, member driven association of water utilities. KRWA operates to foster professionalism in the industry through non-regulatory training, technical assistance programs, and advocacy. KRWA has approximately 369 utility members throughout Kentucky, including water districts, municipally-owned water utilities, and non-profit water associations. KRWA represents the interests of its members in matters directly affecting their operations.

KRWA submits this brief as *amicus curiae* in support of Appellee Crittenden-Livingston County Water District (“Appellant”) seeking an affirmation of the Opinion of the Court of Appeals dated August 17, 2018 (the “Opinion” or “Op.”) reversing the Declaration of Rights and Order Granting Plaintiff’s Motion for Summary Judgment entered on January 25, 2017 by the Livingston Circuit Court.

The Court of Appeals properly relied upon *Southeast Bullitt Fire Prot. Dist. v. Southeast Bullitt Fire & Rescue Dep’t*, 537 S.W.3d 828 (Ky. App. 2017)(“*Southeast Bullitt*”) in upholding the contract between Appellant and Appellee in the instant case. The Court construed Ky. Const. § 164 to find that it does not apply to “non-profit entities statutorily created for the provision of government services.” Op. at 5. The Court correctly held that “public corporations [are] free to contract for the provision of water service without implicating the franchise prohibitions and requirements of Section 164.” *Id.* at 7. Where two governmental entities, especially those created by the same county, contract to fulfill their statutory obligations, no franchise is involved.

KRWA has an interest in this matter because its members seek to preserve the validity of their long-term water supply contracts and their ability to obtain financing for

water infrastructure projects. Reversing the Opinion would imperil those contracts and the ability to supply water throughout Kentucky. Most large projects are financed by the United States Department of Agriculture, Rural Development (“USDA-RD”) on a 40-year term. Consequently, it requires that all water supply contracts have a term of at least 40 years. Other lenders impose similar requirements, typically between 20 and 30 year terms. Imposing franchise requirements on these relationships, necessarily limited to a twenty year term, jeopardizes the ability of KRWA members to finance future water infrastructure projects in Kentucky and provide water to their customers. Accordingly, KRWA urges the Court to affirm the Opinion and preserve the validity of long-term contracts entered into between two non-profit, governmental entities.

STATEMENT OF THE CASE

Appellant and Appellee are non-profit water districts organized under KRS Chapter 74. Appellee was established by order of the Fiscal Courts of Crittenden and Livingston Counties. Appellant was established by order of the Fiscal Court of Livingston County. Neither Appellant nor Appellee is a city created pursuant to KRS Chapter 81. Circuit Court Record at 869 (cited hereafter as “R. at ___”).

Appellant and Appellee entered into the Water Purchase Contract (the “Contract”) on January 24, 2000. R. at 869-70. The Contract was not advertised or publicly bid. Under the terms of the Contract, Appellee agreed to sell and Appellant agreed to purchase a minimum amount of three (3) million gallons of water per month for forty (40) years. *Id.* at 870. To deliver the water to Appellant, Appellee agreed in the Contract to construct a water line to a specified connection point within Livingston County. *Id.* The water line crossed the rights-of-way in the unincorporated area of Livingston County to reach the connection point. *Id.* Appellee obtained from Livingston County all permits

necessary to construct the water line. At the connection point on Appellant's property, Appellee installed a master meter to measure the water sold to Appellant. *Id.* The master meter is located on land to which Appellant holds legal title not merely as public land, but in a proprietary capacity. R. at 45. No part of the supply system is within an incorporated area of the county. Appellee's employees enter Appellant's property to read the meter pursuant to the Contract. R. at 870.

On July 13, 2015, Appellant filed a complaint in the Livingston Circuit Court alleging the Contract is an unconstitutional franchise under Ky. Const. § 164. R. at 1-2. Appellee asserted that the Contract is not a franchise subject to Ky. Const. § 164 and that Appellee has no authority to require or grant a franchise for water. On January 25, 2017, the Circuit Court issued the Order finding Appellant has the authority to franchise for water and the Contract is an unconstitutional franchise. R. at 914-917. Appellee timely initiated an appeal to the Court of Appeals. On appeal, Appellee argued that the recent decision in *Southeast Bullitt* was determinative of the issues presented and that no franchise is required between two governmental entities fulfilling their statutory duties. On August 17, 2018, the Court of Appeals issued the Opinion following *Southeast Bullitt* and holding that the Contract is not subject to the requirements of Ky. Const. § 164. On September 12, 2018, Appellant filed a motion for discretionary review with this Court. This Court granted review by order dated February 7, 2019.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD A CONTRACT BETWEEN NON-PROFIT, GOVERNMENTAL ENTITIES IS NOT A FRANCHISE SUBJECT TO KY. CONST. §§ 163 AND 164

The Court of Appeals correctly reversed the Circuit Court and held that a contract between non-profit, governmental entities is not a franchise. Op. at 7. The Court of

Appeals correctly held that where a contract grants no “governmental rights or privileges,” the contract is not subject to Ky. Const. § 164. *Id.* Contracts between two governmental entities are not franchises when, as here, the services are for the public benefit to fulfill statutory obligations. *Louisville & Jefferson County Metropolitan Sewer Dist. v. Strathmoor Village*, 211 S.W.2d 127 (Ky. 1948); *Russell v. Flatwoods*, 394 S.W.2d 900 (Ky. 1965). There is ample precedent supporting the holding in the Opinion.

A. *Southeast Bullitt is Determinative of the Issue Presented*

The Court of Appeals properly relied upon the precedent established in *Southeast Bullitt*. *Southeast Bullitt* squarely addresses the instant issue and confirms that the Contract between Appellant and Appellee, two governmental entities, is not a franchise subject to the requirements of Section 164 of the Kentucky Constitution.

Southeast Bullitt involved a contract dispute between the Southeast Bullitt Fire Protection District (“District”), a fire protection district created pursuant to KRS Chapter 75, and Southeast Bullitt Fire and Rescue Department (“Department”), a fire department created pursuant to KRS Chapter 273. *Southeast Bullitt Fire Prot. Dist.*, 537 S.W.3d at 830. In 1979, the District and the Department entered into a long-term contract providing that the Department would furnish fire protection services to the District in exchange for payment from the District. *Id.* The Department proceeded to provide services to the District pursuant to the contract. *Id.* In 2015, the District claimed that the contract was void in violation of the law. *Id.* Like Appellee here, the District claimed the long-term contract was a franchise subject to Ky. Const. § 164. The Department filed suit seeking a declaratory judgment that the contract was valid and enforceable. *Id.* The trial court found the contract was valid and enforceable. On appeal, the Court of Appeals addressed the scope of Ky. Const. §§ 163 and 164. The Court found those Constitutional sections

“concern public utilities and a government body granting franchises to these utilities in order for them to provide their services to the citizenry.” *Id.* at 833. The Court held that the utilities subject to Ky. Const. §§ 163 and 164 are “for-profit organizations that the government allows to occupy some part of its public lands or roadways.” *Id.* The Court found that the Department is a “*non-profit organization and is considered by the laws of this state to be an agent of the Commonwealth of Kentucky*” under KRS 75.070. *Id.* (emphasis added). Because these provisions are limited to non-governmental, for-profit organizations, the Court concluded that the contract at issue, being between two non-profit governmental entities, was not a franchise under Ky. Const. § 164. *Id.* at 833-834.

Southeast Bullitt is on all fours with the instant case and supports the Opinion of the Court of Appeals. Just as in *Southeast Bullitt*, Appellant contracted for the provision of services and Appellee provided those services in compliance with the Contract. The parties here are water districts, which as in *Southeast Bullitt* “are nonprofit political subdivisions of county government.” *Public Service Com. v. Dewitt Water Dist.*, 720 S.W.2d 725, 727 (Ky. 1986); see also *Essex International, Inc. v. Public Service Com.*, 484 S.W.2d 837, 838 (Ky. 1972) (“The water district is, of course, a municipal, nonprofit corporation.”). As stated in *Southeast Bullitt*, “this distinction removes [them] from the utility category which would require a franchise and public bidding pursuant to Ky. Const. § 164.” *Southeast Bullitt*, 537 S.W.3d at 833.

B. Kentucky Precedent Supports the Recent Holdings in the Opinion and *Southeast Bullitt*

The Opinion and *Southeast Bullitt* are in conformity with long-standing Kentucky precedent examining contracts between governmental entities. In *Town of Jackson v. Breathitt County*, 105 S.W. 376 (1907), the town of Jackson contracted with Breathitt

County to build and operate a bridge within the town. *Id.* In so doing, the town passed an ordinance transferring “to Breathitt county fiscal court all its rights, titles and privileges in and to streets and alleys of the town... that may be necessary for the building and operation of the bridge...” *Id.* Thus, the county was granted special privileges over the rights-of-way of the town. After the construction of the bridge, the town filed suit claiming the contract violated Ky. Const. § 164 and sought monetary damages for the wrongful use of rights-of-way and renting the bridge. *Id.* at 376-377. The Court held that the contract between the town and the county was not in the nature of a franchise. Because the project was “for the use of the public generally, and for their benefit... [i]t has none of the elements of a franchise...” *Id.* at 377. Thus, although the county entered city land and exercised special privileges to construct and operate a bridge, the contract was not deemed a franchise because it was for the public benefit. Thus, as in the instant case, where a government constructs improvements and provides a service within the jurisdiction of another government for the benefit of the public, no franchise is required.

In *Strathmoor*, Kentucky highest court upheld the validity of a sewage disposal contract between Louisville and two municipalities. 211 S.W.2d at 129. Both municipalities entered into contracts with Louisville allowing them to connect their sewers to Louisville’s system and requiring them to pay annual fees. *Id.* at 128. Subsequently, the Louisville & Jefferson County Metropolitan Sewer District (“MSD”) notified the municipalities that all persons using city sewers would be required to pay additional charges notwithstanding the prior contracts. *Id.* at 128-29. The lower court upheld the validity of the prior contracts and determined MSD could not impose its rates

on the citizens of the municipalities. *Id.* at 129. On appeal, MSD asserted the contracts were invalid franchises in violation of Ky. Const. § 164. *Id.* The court found that although the contracts “have some of the attributes of a privilege, [they] do not have the character of a franchise.” *Id.* The court found that the services did not damage, interfere with or overtax the facilities. Also, the contracts were mutually advantageous and constituted a mere rental of a surplus facility. *Id.* The court stated that the contracts “are contracts such as individuals owning like facilities as private property might have made.” *Id.* Accordingly, the court upheld the contracts as not in violation of Ky. Const. § 164.

Similarly, in *Russell v. Flatwoods*, Kentucky’s highest court again examined a sewer use contract. In that case, the City of Flatwoods agreed to build the necessary facilities to provide sewage services for its citizens and the citizens of the City of Russell. 394 S.W.2d at 901. The parties agreed that Flatwoods would construct a trunk line to collect Russell’s sewage and Russell would pay Flatwoods a monthly sum based on the amount of sewage collected. *Id.* at 901-02. After Flatwoods had spent approximately \$190,000 constructing the sewage facilities, Russell refused to honor and perform the contract. *Id.* at 902. Russell argued the contract violated Ky. Const. § 164 and was an unconstitutional franchise. *Id.* Citing *Strathmoor*, the court found the contract conferred rights which did not have the character of a franchise and upheld the contract. *Id.*

Town of Jackson, Strathmoor and *Russell* reinforce the holding in the Opinion. As was approved in *Strathmoor* and *Russell*, Appellant sought to purchase excess capacity from Appellee to benefit the public by a connection of their systems. As was approved in *Russell*, the Contract required Appellee to construct improvements and have a continuous presence in Appellant’s jurisdiction. Accordingly, no part of the Contract

requires a franchise for operation and thus is not subject to Ky. Const. § 164. Therefore, this Court should affirm the Opinion of the Court of Appeals.

C. Appellant's Cited Cases are Inapplicable in the Instant Case

Appellant cites several cases which, although providing insight into franchise law, are irrelevant to the instant case. Each case cited by Appellant is distinguishable on its facts from the present case and therefore should be disregarded by the Court.

Appellant repeatedly and erroneously cites to *E.M. Bailey Distrib. Co. v. Conagra*, 676 S.W.2d 770 (Ky. 1984) as controlling. Appellant Brief at 9 and 12-16. *E.M. Bailey* is factually distinguishable on all points and is wholly inapplicable. In that case, the Lyon County Riverport Authority constructed grain loading facilities. The Authority then leased the facilities to Conagra to the exclusion of all others. The contract was challenged by Conagra's competitor on the basis that it was privately executed between a public body and a *private corporation* without complying with Ky. Const. § 164. *E.M. Bailey*, 676 S.W.2d at 771. The *E.M. Bailey* court made special note that franchising concerns only arise where a privilege is conferred upon a *private concern*. "In American law, a franchise is defined as a special privilege conferred by the government *on individuals or corporations* which does not belong to the citizens generally by a common right." *Id.* at 774 (emphasis added). Accordingly, *E.M. Bailey* is inapplicable here. Despite this, the Opinion is wholly consistent with *E.M. Bailey* by limiting franchise concerns to contracts between public agencies and private parties.

Appellant similarly cites to *Eastern Ky. Resources v. Arnett*, 934 S.W.2d 270 (Ky. 1996) as controlling. Appellant Brief at 9 and 12-14. Just as with *E.M. Bailey*, this claim is without merit. As in *E.M. Bailey*, the agreement at issue in *Eastern Ky. Resources* was between a governmental entity and a *private partnership*. In that case, Eastern Ky.

Resources contracted with the Magoffin Fiscal Court for the right to construct and operate a landfill on its private property in return for royalties. *Id.* at 272. Thus, unlike the instant case, *Eastern Ky. Resources* concerned not only a private entity but also private lands. Accordingly, *Eastern Ky. Resources* is inapplicable in the instant case.

Finally, Appellant's reliance upon Ky. Att'y Gen. Op. 81-365 is misplaced. The opinion addressed one *city* (City of Benton) contracting to furnish water to another *city* (City of Hardin). As the Attorney General noted, *by statutory mandate* such contracts *between cities* are required to be treated as franchises. KRS 96.120 requires that any *city* providing water to another *city* must procure a franchise. There is no similar statutory authority for such contracts between *water districts* within the same county. Therefore, Ky. Att'y Gen. Op. 81-365 is wholly inapplicable in this case.

The facts of the instant case are indistinguishable from those in *Southeast Bullitt*. The holdings in the Opinion and *Southeast Bullitt* are consistent with over one hundred years of Kentucky precedent. Accordingly, this Court should affirm the Opinion and find that the Contract is valid as between two non-profit, governmental entities fulfilling their statutory duties and is not a franchise subject to Ky. Const. § 164.

II. APPELLANT ACTS IN A PROPRIETARY CAPACITY NOT SUBJECT TO KY. CONST. § 164

Appellant repeatedly claims that it provides water services as a governmental function. Appellant Brief at 1, 17, 18 and 29. Appellant asserts that it holds its property as public property in trust and not in a proprietary capacity. *Id.* at 11 and 30. However, Kentucky case law undermines such claims.

While the instant case was pending on the motion for discretionary review, the Court of Appeals rendered its decision *Carucci v. N. Ky. Water Dist.*, __ S.W.3d __, 2019

Ky. App. LEXIS 3 (Ky. App. 2019), *mot. for disc. rev. pending* 2019-SC-105. In *Carucci*, an individual was injured after tripping over an unsecured water meter cover owned by a water district. The individual sued and the water district claimed sovereign immunity as a political subdivision of the county acting in a governmental capacity. *Id.* at *2-3. The Court of Appeals found that past case law providing water districts with sovereign immunity had been overturned. Relying on *Coppage Construction Company, Inc. v. Sanitation District No. 1*, 459 S.W.3d 855 (Ky. 2015), the Court found that a water district does not “perform[] a function integral to state government.” *Id.* at *8. Furthermore, the functions provided by a water district can be, and are, provided by the private sector. *Id.* Finally, the Court found that the services of a water district all involve the private consumption and use of water. *Id.* at *9. Accordingly, the Court held that a water district operates in a non-governmental, proprietary capacity. *Id.* at *9-10.

Prior case law further supports the fact that land held by Appellant is private property not subject to franchise law. A governmental entity may own real estate “and may control, use, lease, and dispose of it as other proprietors may do.” *Inland Waterways Co. v. Louisville*, 13 S.W.2d 283, 287 (Ky. 1929). A governmental instrumentality “has the same rights in and control over [property] owned by it that any individual would have... It may sell or lease property owned by it in its [private] proprietary capacity... section 164 of the Constitution has no application...” *Board of Councilmen v. Pattie*, 12 S.W.2d 1108, 1109 (Ky. 1928). *See also, Miller v. City Of Owensboro*, 343 S.W.2d 398 (Ky. 1961); *Baird v. Adairville*, 426 S.W.2d 124 (Ky. 1968).

Kentucky courts have consistently held that Ky. Const. § 164 does not apply to proprietary functions of government. *Faulconer v. Danville*, 232 S.W.2d 80 (Ky. 1950).

Franchise requirements do not apply to the sale or leasing by a government of its private property held in its proprietary capacity. *Pattie*, 12 S.W.2d 1108; *Inland Waterways Co.*, 13 S.W.2d 283; *Southeastern Greyhound Lines v. City of Lexington*, 186 S.W.2d 201 (Ky. 1945). Concerning the authority of a municipality to dispose of its property,

there is a clear distinction between disposing of property purchased and held for public use and the benefit of the citizens and disposing of property acquired and used for strictly corporate or proprietary purposes. As to the latter class of property, the *power of a municipality to sell is unquestionable* unless restrained by charter or statute. That is the law in general.

Bennett v. Mayfield, 323 S.W.2d 573, 576 (Ky. 1959)(emphasis added). This has held true even where a municipality owns a utility system. *See, i.e., Baird v. Adairville*, 426 S.W.2d 124 (Ky. 1968) (the lease of a natural gas distribution and transmission system); *Young v. Morehead*, 233 S.W.2d 978 (Ky. 1950) (purchase by a city of natural gas from a third party for use in its gas distribution and transmission). Where the activity at issue “is not a prerogative of a government but is a business open to all,” a contract with a third party is not the grant of a franchise by the municipality. *Id.* at 980.

Kentucky case law provides that Appellant holds its property and operates in a proprietary capacity, not in a governmental capacity. Accordingly, Appellant is free to contract for the sale, lease or use of its property without the application of Ky. Const. § 164. Therefore, the Contract is not a franchise subject to Ky. Const. § 164. As such, the Court should affirm the holding of the Court of Appeals and find the Contract valid.

III. APPELLANT HAS NO FRANCHISING AUTHORITY

Finally, the Contract is not subject to Ky. Const. § 164 because Appellant has no authority to grant franchises. Appellant erroneously claims that a water district is a “sovereign power for the distribution of water with the authority to grant franchises...”

and that “all government entities are ‘sovereign powers’...” Appellant Brief at 30. Kentucky law refutes these claims and demonstrates that neither a county nor its subdivisions is a sovereign and accordingly neither has authority to franchise for water.

A. Counties Have Been Withheld the Power to Franchise for Water

“[N]o one inherently possesses the right to grant a franchise, except the sovereignty within which it is proposed to be exercised.” *Irvine Toll Bridge Co. v. Estill County*, 275 S.W. 634, 636 (Ky. 1925). Counties are not such sovereignties. In fact, Kentucky case law holds the opposite, that “[c]ounties are at most but local organizations... invested with a few functions characteristic of a corporate existence... created by the sovereign power of the State...” *Marion County v. Rives & McChord*, 118 S.W. 309, 311 (Ky. 1909) (internal quotations omitted). Counties have only such authority and power as is *expressly* delegated by statute. *Fiscal Court of Jefferson County v. Louisville*, 559 S.W.2d 478, 482 (Ky. 1977). Furthermore, the counties of this state are created and may be abolished by the General Assembly. Ky. Const. § 63. The counties themselves are not sovereign powers because their existence and scope of power is at the whim of the true sovereign power, the Commonwealth.

Lacking an inherent sovereign power to franchise, counties and their subdivisions must be delegated such authority from the Commonwealth. Ky. Const. § 164 and its limitations are “applicable only to action by municipalities or other local subdivisions *as to matters under their control... [not] to matters which the Legislature may withhold from municipal or local control.*” *Tri-State Ferry Co. v. Birney*, 31 S.W.2d 932, 933 (Ky. 1930) (emphasis added). Counties and their subdivisions have not been granted, and in fact have been *statutorily denied* franchising authority over water. The General Assembly in KRS 416.140(1) expressly reserved to itself the power to grant franchises to

certain utilities, *including water utilities*, outside the boundaries of cities. Pursuant to KRS 416.140, the Kentucky legislature has granted all water utilities the right to use public ways in unincorporated areas. A fiscal court can require no franchise for water utilities which have their lines and equipment on the public land since the state has granted them permission. See OAG 79-346; OAG 71-538; and *Warfield Natural Gas Co. v. Lawrence County*, 189 S.W.2d 357, 359 (Ky. 1945) (“[u]nder KRS 416.140 the State has reserved to itself the right to grant the named utilities permission to use public roads, and has not delegated that right to any of its political subdivisions.”).

Water districts are nothing more than a political subdivision of the county government. *Pub. Serv. Comm’n v. Dewitt Water Dist.*, 720 S.W.2d 725, 727 (Ky. 1986). If the county has no authority to grant a franchise for water and invoke Ky. Const. § 164, then it may not create or delegate such authority. *Transit Authority of Lexington-Fayette Urban Cnty. Gov’t v. Amalgamated Transit Union, Local 639*, 698 S.W.2d 520, 526 (Ky. 1985); *Nance v. Ky. Admin. Office of the Courts*, 336 S.W.3d 70, 77 (Ky. 2011); *Bruner v. Danville*, 394 S.W.2d 939, 942 (Ky. 1965). Therefore, Appellant has no authority to grant a franchise and may not invoke the terms of Ky. Const. § 164. Therefore, the Opinion of the Court of Appeals must be affirmed.

B. Appellant has not been Delegated Franchising Authority

Assuming arguendo that the county has franchising authority over water utilities, the county has not delegated such authority to Appellant. KRS Chapter 74 grants a water district the power to enter contracts but does not grant the power to grant a franchise. This power may not be delegated by implication. Local governments possess only those powers *expressly* delegated by the Kentucky Constitution and the Kentucky Revised Statutes. “It is a fundamental and elemental law that... municipal executive or

administrative bodies have only such powers as are expressly granted by law.” *Bell Cnty. Bd. of Educ. v. Lee*, 39 S.W.2d 492, 493-494 (Ky. 1931); *see also Fiscal Court of Jefferson Cnty. v. City of Louisville*, 559 S.W.2d 478, 481 (Ky. 1977). Any doubt as to the existence of a particular power is resolved against the existence of the power. *City of Horse Cave v. Pierce*, 437 S.W.2d 185, 186 (Ky. 1969); *see also 729, Inc. v. Kenton Cnty. Fiscal Court*, 515 F.3d 485, 494 (6th Cir. 2008)(“[O]nly when a power is expressly granted... may it exercise that power...”)(emphasis in original).

Appellant has only the limited authority granted to it by statute and there is no evidence of greater authority having been delegated outside the statutes. The duties and powers of the governing body of a water district, such as Appellant, are outlined in KRS 74.070. Although Appellant has the authority to “make contracts for the water district with municipalities and other persons,” as is the case in the instant action, it has *no authority to grant franchises*. Accordingly, the Contract is not a franchise subject to Ky. Const. § 164. Therefore, the Opinion of the Court of Appeals must be affirmed.

C. Any Delegation of Franchising Authority is Unconstitutional

Furthermore, if Appellant was impliedly delegated such power, such delegation is unconstitutional and void. “It is basic constitutional law that the legislative functions of a municipal corporation rest in the discretion and judgment of the municipal body intrusted with them, and that body may not refer the exercise of those powers to the discretion and judgment of its subordinate.” *Covington v. Covington Lodge No. 1*, 622 S.W.2d 221, 222 (Ky. 1981). “Public powers conferred upon a municipality, to be exercised by its council when and in such manner as it shall judge best, *are incapable of delegation*.” *Lowery v. Lexington*, 75 S.W. 202, 203 (Ky. 1903)(emphasis added); *Louisville v. Parsons*, 150 S.W. 498 (Ky. 1912); *Calvert v. Allen County Fiscal Court*, 67 S.W.2d 701 (Ky. 1934).

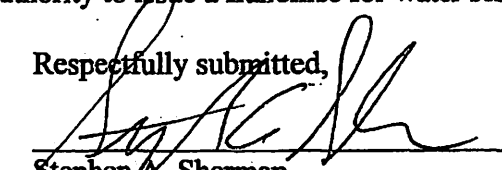
It is well established that granting franchises is a legislative function. *Groover v. City of Irvine*, 300 S.W. 904, 905 (Ky. 1927); *Kentucky Utilities Co. v. Board of Comm'rs*, 71 S.W.2d 1024, 1026 (Ky. 1933). If the county has delegated the power to grant a water franchise to Appellant, a discretionary power has been invalidly delegated. “[T]he grant [of the franchise] must be made by the council... the rights of the purchaser will depend upon the acceptance of his bid by the council.” *Kentucky Electric Co. v. Barrett*, 116 S.W. 1186, 1187 (Ky. 1909). The county must “remain supreme in the matter of... the acceptance or rejection of bids...” *Lowery*, 75 S.W. at 203. Therefore, if such a power exists, it resides with and must remain with the county.

If the county has the power to grant a franchise for the provision of water, such a power is legislative in nature. Such a legislative power may not be delegated to another, including a water district. Accordingly, Appellee has no authority to grant or deny a franchise and the Contract is a valid water supply contract and not a franchise. Therefore, the Opinion should be affirmed.

IV. CONCLUSION

For the reasons stated above, *amicus curiae* KRWA respectfully requests that this Court uphold the decision of the Court of Appeals and hold (a) Appellee and Appellant, as non-profit governmental entities, are not subject to Ky. Const. § 164 in contracting with each other, and (b) Appellant has no authority to issue a franchise for water services.

Respectfully submitted,


Stephen A. Sherman
Damon R. Talley

*Counsel for Amicus Curiae Kentucky Rural
Water Association, Inc.*

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RESPONSE TO PSC DATA REQUEST DATED SEPTEMBER 16, 2020

PSC CASE NO. 2020-00269

ITEM 3

Frankfort Electric and Water Plant Board
Response to PSC Data Request Dated 9-16-2020
Case No. 2020-00269

ITEM 3. Provide copies of the minutes of any board meetings in which this contract at issue was discussed or voted upon.

Response: Minutes are attached hereto.



MINUTES

FPB Board Meeting

5:00 PM - Tuesday, June 16, 2020
Community Room & Audio

The Frankfort Plant Board met in a Special FPB Board Meeting on Tuesday, June 16, 2020 at 5:00 PM.

ATTENDANCE:

Dawn Hale, Board Secretary/Treasurer
Stephen Mason, Board Vice Chair
John Cubine, Board Chair
John Snyder, Board Member
James Liebman, Board Attorney
Gary Zheng, General Manager
David Billings, Chief Water Engineer
David Denton, Chief Financial Officer
Vent Foster, Chief Operations Officer
Adam Hellard, Cable Superintendent
Ryan Henry, Assistant IT Director
Scott Hudson, Electric Superintendent
Casey Jones, IT Director
Cathy Lindsey, Communications & Marketing Director
Kathy Poe, Executive Assistant to GM
Hance Price, Assistant GM Administration/Staff Attorney
Kim Phillips, Safety Director
Leigh Ann Phillips, Support Services Director
Julle Roney, Water Treatment Superintendent
Dianne Schneider, HR Director
Alan Smith, Water Distribution Superintendent
Jennifer Hellard, Purchasing Agent
State Journal

1 NOTICE OF SPECIAL MEETING

- 1.1 Notice of Special Meeting held In Person and Via Audio Conference.

In person attendance limited to 10 people pursuant to Executive Order of the Governor.

2 ACTION ITEM: APPROVAL OF MINUTES

- 2.1 Consider approval of the Minutes of the June 5, 2020 Special Board Meeting.

Dawn Hale moved to approve minutes for the June 5, 2020 board meeting. John Snyder seconded the motion. CARRIED. 4 to 0.

3 ACTION ITEM: ACCEPT FINANCIALS

- 3.1 Consider Accepting Financials for month ending May 31, 2020.

Stephen Mason moved to accept the financials for month ending May 31, 2020 John Snyder seconded the motion. CARRIED. 4 to 0.

A copy of the proposed plan amendment and the extension timeframe summary page is included in the detail pages for this Board item.

Stephen Mason moved to approve Coronavirus Deadline Extension Amendment Dawn Hale seconded the motion.

CARRIED. 4 to 0.

- 5.8 Consider Accepting the Minutes for the January 8, 2020 Cable Advisory Committee meeting.

John Snyder moved to accept the Minutes for the January 8, 2020 Cable Advisory Committee meeting. Dawn Hale seconded the motion.

CARRIED. 4 to 0.

- 5.9 Consider Approval of 42 Year Contract Extension with Farmdale Water District.

Recently, Farmdale Water District contacted FPB and noted they are seeking financing for system improvements. In order to obtain their financing, Farmdale is required to extend their water purchase agreement with FPB for a 42 year term. The existing contract was executed in 2011 and the amendment extends its term 42 years from the date of the amendment. All other terms of the agreement remain the same. Staff recommends execution of the amendment.

Stephen Mason moved to approve 42 year Contract Extension with Farmdale Water District. John Snyder seconded the motion.

CARRIED. 4 to 0.

- 5.10 Review and Approve Fiscal Year 2020-2021 Budget and accept 5 year plan.

John Snyder moved to approve the FY 2020-2021 Budget with changes regarding pay structure to eliminate all pay increases at July 1, 2020 and establish a 2% pay increase to employees below the midpoint of their salary grade effective January 1, 2021, and a pay increase to all employees equal to the increase approved for City employees but not to exceed 1.5% effective January 1, 2021. Stephen Mason seconded the motion.

CARRIED. 4 to 0.

6 INFORMATIONAL ITEM: GENERAL MANAGERS COMMENTS

NONE

7 INFORMATION ITEM: DISCUSS BOARD GOVERNANCE POLICY

- 7.1 Ms. Hale will meet with Mr. Price prior to the July meeting and a draft will be sent to all board members to review.

8 REQUEST PERMISSION TO HAVE CHAIR CALL FOR A CLOSED SESSION

- 8.1 Chair calls for a motion to conduct a closed session pursuant to KRS 61.810(1)(b) for deliberations regarding the sale of real property. The reason for privacy is because publicity at the deliberation stage might be likely to affect the value of the property.

John Snyder moved to call closed session pursuant to KRS 61/810(1)(b) for deliberations regarding the sale of real property. The reason for privacy is because publicity at the deliberation stage might be likely to affect the value of the property. Stephen Mason seconded the motion.

CARRIED. 4 to 0.

9 CLOSED DOOR SESSION


- 9.1 Potential action from closed session regarding the sale of real estate.
No Action was Taken.

10 ACTION ITEM: ADJOURNMENT

- 10.1 Adjourn Meeting

John Snyder moved to adjourn meeting. Dawn Hale seconded the motion.

CARRIED.


Board Chair


Board Secretary/Treasurer

RESPONSE TO PSC DATA REQUEST DATED SEPTEMBER 16, 2020

PSC CASE NO. 2020-00269

ITEM 4

Frankfort Electric and Water Plant Board
Response to PSC Data Request Dated 9-16-2020
Case No. 2020-00269

ITEM 4. Provide a copy of the advertisement for bids for this contract.

Response: FPB has no copies of advertisements because no advertisement for bids was made by Faramdale.

RESPONSE TO PSC DATA REQUEST DATED SEPTEMBER 16, 2020

PSC CASE NO. 2020-00269

ITEM 5

Frankfort Electric and Water Plant Board
Response to PSC Data Request Dated 9-16-2020
Case No. 2020-00269

ITEM 5. Provide a copy of the contract and amendments.

Response: A copy of the contract and amendments are attached hereto.

Water Supply Agreement

Professional
Engineers, Inc. CAS
DEC 27 2010 JG

THIS AGREEMENT made and entered into on this 18th day of January, ~~2010~~ ²⁰¹¹, by and between the Electric and Water Plant Board of the City of Frankfort, Kentucky, whose address is 317 West Second Street, P.O. Box 308, Frankfort, Kentucky 40602, having the powers granted by KRS 96.171 *et seq.*, ("Board"), and the Farmdale Water District, whose address is 100 Highwood Drive, Frankfort, Kentucky 40601, a water district created and existing under the laws of the state of Kentucky ("District");

WHEREAS: The District currently purchases water on a wholesale basis from the Board and has four existing points of delivery located at Tamworth Lane, Moss Lane, Twilight Trail #1, and Twilight Trail #2.

WHEREAS, The District desires to abandon the two existing points of delivery on Twilight Trail and obtain a new point of delivery on Evergreen Road (SR 1665) at Interstate 64;

WHEREAS, The District desires to maintain the two existing points of delivery located on Tamworth Lane and Moss Lane;

WHEREAS, the Board desires to continue to be the District's sole and exclusive supplier of water for an additional forty-two (42) years;

WHEREAS, this Water Supply Agreement supersedes and replaces any other agreements for the purchase of water between the parties;

WITNESSETH: That the parties hereto in consideration of the mutual duties and obligations herein created, have, and do agree as follows:

KENTUCKY PUBLIC SERVICE COMMISSION
JEFF R. DEROUEN TARIFF BRANCH
<i>Brent Kirtley</i>
EFFECTIVE 2/23/2011 PURSUANT TO 807 KAR 5:011 SECTION 9 (1)

1. **Quality:** During the term of this agreement and any renewal or extension thereof, the Board will furnish to the District at the points of delivery hereinafter specified, treated, potable water that complies with all applicable Kentucky Division of Water and U.S. Environmental Protection Agency standards for water quality.

2. **Points of Delivery, Flow Rates, Minimum Quantities, and Pressure:** The Board will provide water to the District at the following points of delivery:
 - A. New metering point at Evergreen Road and I-64. The Board will install, at the District's expense, metering equipment inside the District's pump station; the Board shall have access to the pump station for proper maintenance or testing of the metering equipment; the maximum flow rate shall be 1,200 gallons per minute; the minimum consumption shall be 14,600,000 gallons per month computed on an annual basis.

 - B. Existing metering point at Tamworth Lane; the maximum flow rate shall be 400 gallons per minute; the minimum consumption shall be 3,700,000 gallons per month computed on an annual basis.

 - C. Existing metering point at Moss Lane; the maximum flow rate shall be 400 gallons per minute; the minimum consumption shall be 70,000 gallons per month computed on an annual basis.

The parties, in writing, may agree to one or more additional points of delivery, subject to the force majeure events described herein. Adequate pressure normally provided from the Board's existing facilities will be supplied to the

KENTUCKY PUBLIC SERVICE COMMISSION
JEFF B. DEROUEN EXECUTIVE DIRECTOR
TARIFF BRANCH 
EFFECTIVE 2/23/2011 PURSUANT TO 807 KAR 5:011 SECTION 9 (1)

points of delivery. If a greater pressure than is normally available at the points of delivery is required by the District, the cost of providing such greater pressure shall be the responsibility of the District. Notwithstanding the foregoing, the Board under this Agreement assumes no obligation whatsoever to furnish satisfactory quantity or pressure for any particular service such as irrigation, fire protection, industrial, or commercial use.

3. **Term of Agreement and Effective Date:** This Agreement will take effect on the Effective Date and will continue for a term of forty-two (42) years thereafter. The Parties acknowledge that this Agreement will require submission to the Kentucky Public Service Commission ("PSC") for approval. The Board shall file an executed copy of this Agreement with the PSC. The District pledges its assistance to help expedite the PSC review process. The Effective Date of this Agreement shall be the date the Agreement is deemed to be "filed" by the PSC. The Board shall give written notice of the Effective Date to the District.

4. **Metering Equipment and Flow Measurement:** The Board will own, operate and maintain the metering equipment located at all points of delivery. The Board shall make annual tests and inspections of the master meters; and additional testing may be performed by the Board at its sole discretion at any time. The Board will provide a twenty-four (24) hour notice to the District prior to conducting any meter test, allow District personnel to witness the test, and submit test results to the appropriate official or agent designated by the District upon request. A meter registering within the acceptable limits as

KENTUCKY PUBLIC SERVICE COMMISSION
JEFF R. DEBOUEN EXECUTIVE DIRECTOR
TARIFF BRANCH <i>Brent Kirtley</i>
EFFECTIVE 2/23/2011 PURSUANT TO 807 KAR 5:011 SECTION 9 (1)

defined by American Water Works Association (AWWA) standards shall be deemed to be accurate. A reading of the meter determined by the test results to be inaccurate (registering outside of acceptable limits of AWWA standards based upon type of meter) shall cause billings for at least one (1) month, and up to three (3) months, previous to such test to be adjusted by the percentage of inaccuracy found by such test. If any meter should fail to register usage for any regular billing period, the amount of water furnished during such billing period shall be determined based on historical consumption.

5. **Billing and Payment:** The District shall at all times pay the rates and charges for water that exist at the time of delivery under the existing published rates, rules and regulations of the Board.

The District and the Board acknowledge the Board's wholesale water rate is determined by the Board's rate-making methodology, and agree that the Board's rate making methodology is a reasonable basis for the rate adjustments under the Water Supply Agreement. That methodology requires that the wholesale rate be determined by considering the following components including but not limited to:

- A. Operation and maintenance expenses
- B. Depreciation expenses
- C. Debt service and coverage on debt service

6. **Force Majeure:** Emergency failures due to main supply line breaks, power failure, flood, fire, act of God, war, riot, earthquake, explosion, or other catastrophic events shall excuse the Board from its performance under this

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Agreement for such reasonable period of time as may be necessary to restore service.

7. **Future Growth:** The District agrees to utilize water purchased from the Board as the sole source of supply for any future growth or increase in water sales by the District, which shall include both new customers and increased sales to existing customers.
8. **Proportionate Reduction:** In the event any occurrence, condition, or circumstance leads the Board to request voluntary curtailment of water consumption or to impose mandatory curtailment of water consumption with respect to the Board's own water users, the District will make the same request for voluntary curtailment of consumption or will impose the same mandatory curtailment of water consumption, upon its water users, to the end that District water users will be treated alike with respect to curtailment of water consumption, and the District will cooperate fully in taking the same character of enforcement action as the Board takes with respect to any such request or mandate.
9. **Assignment:** This Agreement shall be binding on all successors and assigns of the Parties but shall not be assigned by either Party without the written consent of the other.
10. **Waivers:** The failure of any Party at any time to enforce any provision of this

Agreement, to exercise its rights under any provision, or to require a certain performance of any provision shall in no way be construed a waiver of such

require a certain PUBLIC SERVICE COMMISSION
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provision nor in any way affect the validity of this Agreement or the right of the Party thereafter to enforce each and every provision.

11. Authority to Execute Agreement: The Board possesses full authority to enter into this Agreement as indicated by the Board's minutes attached hereto as Exhibit A. The District possesses full authority to enter into this Agreement as indicated by the District's minutes attached hereto as Exhibit B.

12. Entire Agreement: This Agreement constitutes the entire understanding and agreement between the Parties and supersedes all other understandings and agreements between the Parties with respect to the subject matter of this Agreement. There are no understandings, representations or warranties of any kind, expressed or implied, not expressly set forth in this Agreement. No modifications or amendment of this Agreement shall be effective unless in writing and executed on behalf of both Parties.

13. Termination of Prior Agreements: Any and all prior Agreements between the Board and the District relating to the supply of water and all other matters relating thereto will automatically be terminated on the effective date of this Agreement; provided, however, that such prior Agreements will immediately and automatically be revived and considered to be in full force and effect if the PSC does not approve this Agreement.

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IN TESTIMONY WHEREOF, the parties hereto have caused this Agreement to be executed by its duly authorized officers, on this date and year first above written.

Electric and Water Plant Board
of the City of Frankfort,
Kentucky

By: 
Board Chair

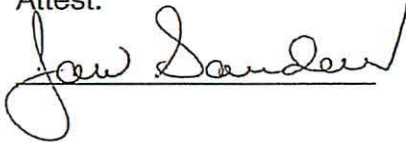
Attest:



Farmdale Water District

By: 
Board Chair

Attest:



KENTUCKY PUBLIC SERVICE COMMISSION
JEFF R. DEROUEN EXECUTIVE DIRECTOR
TARIFF BRANCH 
EFFECTIVE 2/23/2011 PURSUANT TO 807 KAR 5:011 SECTION 9 (1)

AMENDMENT TO WATER SUPPLY AGREEMENT

This Amendment made and entered into this the 6th day of July, 2020, by and between the Parties hereto, the Electric and Water Plant Board of the City of Frankfort, KY, a municipal utility organized and existing pursuant to KRS 96.171 et seq., hereinafter referred to as "Board" and the Farmdale Water District, a water district organized and existing under the laws of the State of Kentucky, hereinafter referred to as "District".

The Parties hereto, in consideration of the mutual duties and obligations herein created, have and do hereby agree that Paragraph three (3) of the Water Supply Agreement dated January 18, 2011, previously entered into between these same Parties is hereby amended to read as follows:

The Water Supply Agreement entered into January 18, 2011 shall be extended for a term of forty-two (42) years from the date of execution of this Amendment shown above.

The Parties agree that all other terms of the January 18, 2011 Water Supply Agreement shall remain in full force and effect throughout the term of the Water Supply Agreement.

**ELECTRIC AND WATER PLANT BOARD
OF THE CITY OF FRANKFORT, KY**

ATTEST:

BY: 
Board Chair


Secretary

FARMDALE WATER DISTRICT

ATTEST:

BY: 
Board Chair


Secretary