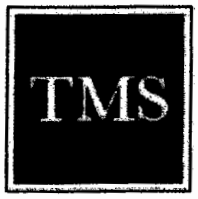

THOMPSON MILLER & SIMPSON PLC

Report to the Frankfort City Commission Regarding Potential Removal of Certain Members of the Electric and Water Plant Board of the City of Frankfort

March 2, 2018

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BACKGROUND

Scope and Conduct of Engagement

Thompson Miller & Simpson PLC ("TMS" or the "firm") was hired by the City Solicitor, as authorized by the Frankfort City Commission, to "conduct an investigation of Mr. Baldwin and Ms. Rosen and provide a report on whether they have acted in a manner that rises to the level of the removal reasons in the governing statute." Therefore, the scope of this engagement was limited to reviewing allegations related to Walt Baldwin ("Baldwin") and Anna Marie Pavlik Rosen ("Rosen") in their capacity as members of the Electric and Water Plant Board of the City of Frankfort, Kentucky ("FPB").

In conducting this investigation, we focused on specific allegations against Rosen and/or Baldwin. We have addressed each allegation. We received, reviewed, and analyzed thousands of pages of records from the City of Frankfort and the FPB. Certain witnesses also provided us with records. We interviewed current and former board members as well as current and former FPB employees. All interviews were conducted by two attorneys from the firm to ensure accuracy and integrity. All persons interviewed were informed that the interview was voluntary and that they had the right to counsel if they so desired. All FPB staff and former staff we requested to interview did so voluntarily and without an attorney. All FPB members and former board members, except Rosen and Baldwin, that we requested to interview did so voluntarily and without an attorney.

Rosen and Baldwin, through their attorney, presented us with a written argument. We requested interviews with both Rosen and Baldwin through their attorney. Their attorney responded questioning the City's authority to conduct an investigation into FPB members and declined the interview request until they were satisfied the City had authority. Therefore, we were unable to interview Rosen or Baldwin during the timeframe provided for completion. Their attorney offered to answer written questions, but we were unable to submit those for response in the timeframe allotted. Moreover, we felt that Rosen's and Baldwin's own statements, without being filtered through their attorney, would be more beneficial to the Commission. We also requested an interview with James Liebman, the board attorney. While he did respond to a records request, he did not respond to our interview request.

It is important to note that the scope of this engagement does not encompass any analysis of the Kentucky Municipal Energy Agency ("KyMEA") interlocal agreement or All Requirements contract. It also does not analyze or take any position on the viability of any potential causes of action by any FPB employee or member of the board. These issues are outside the scope of the engagement.

Electric and Water Plant Board of the City of Frankfort

The FPB was created in 1947 by ordinance of the City of Frankfort pursuant to KRS 96.171 *et seq*, which was enacted in 1946. The FPB is a municipal utility which provides the

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residents of Frankfort and surrounding areas with electric power, water, and telecommunication services. Its members are appointed by the Mayor of Frankfort and affirmed by a majority vote of the Frankfort Board of Commissioners. *See* KRS 96.172. The members of the board possess "[a]ll powers of the municipality to operate, maintain, improve and extend, and to furnish electric and water services ... of the municipality." KRS 96.176. Members of the FPB may be removed by a majority vote of the Frankfort Board of Commissioners, which serves as the FPB's governing body. KRS 96.172(9). The Kentucky Court of Appeals recognized the FPB's authority in *Settle v. Jones*, 206 S.W.2d 59, 61 (Ky. App. 1947). The Court held that the FPB functions as an administrative body to carry out the legislative intent, and is necessarily vested with some discretion. *Id.* The enabling statutes intend the FPB to operate "beyond the realm of political interference." *Id.* However, the City Commission still maintains supervision and control over the board. *Id.*

The current FPB members are Rosen (chairperson), Baldwin (vice-chair); Dawn Hale ("Hale") (secretary/treasurer), and Ralph Ludwig ("Ludwig"). Mr. Ludwig is the immediate past chairperson. The fifth board seat has been vacant since the resignation of John Cubine ("Cubine") in October 2017.

The FPB employs a staff of approximately 200 employees which perform the day-to-day operations of the FPB. The staff is headed by a General Manager ("GM"), who directly and indirectly supervises all FPB personnel. The GM serves as the superintendent under KRS 96.176(2). The GM is "[r]esponsible for the management and day to day operation of the utility. Responsible for planning, leading, controlling, and organizing all departments, functions, and activities to meet the organization's short term & long term objectives." (Frankfort Plant Board Class Specifications, General Manager). The GM position is currently vacant after the retirement of the former GM on November 1, 2017. The FPB's finance director is currently serving as interim General Manager.

Rosen's and Baldwin's Appointments to the FPB

The records show that Rosen was appointed to the FPB on September 28, 2015. Baldwin was appointed the same day. Both are in the midst of four-year terms. KRS 96.172(8). On October 17, 2017, Rosen was elected chairperson of the FPB. *See* FPB Meeting Minutes, October 17, 2017, at 13. Baldwin was elected a second time as vice-chair on that same day. *Id.* at 14.

Allegations Made Against Rosen and Baldwin

Several allegations have been lodged against Rosen and Baldwin, many of which were made in various public City Commission meetings. Others were made to us through the course of our investigation. We have generally categorized those allegations as follows:

1. Illegal appointment of Baldwin based on lack of qualifications;
2. Allegations related to hiring an independent consultant and law firm;

3. Allegations related to conducting board meetings, open meetings, and open records
4. Allegations related to mismanagement and interference with staff operations.

Our investigation attempted to address each of these allegations and provide you with a recommendation on whether the facts obtained through our investigation warrant cause for removal under KRS 96.712(9).

LEGAL STANDARD FOR REMOVAL UNDER KRS 96.172.

A. Due Process Requirements

A duly appointed and qualified member of the FPB pursuant to KRS 96.172(1) may be removed by the majority vote of the governing body for "inefficiency, neglect of duty, misfeasance, nonfeasance, or malfeasance in office." KRS 96.172(9). A duly appointed member of the board has a property right in the position and the City Commission cannot arbitrarily remove that person. *See* KY. CONST. § 2. The Commission must provide that person with adequate due process, which includes notice of the charges constituting removal, and an opportunity to heard. *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964). Generally, this is in the form of a public trial type hearing with the opportunity to cross-examine witnesses. *Kaelin v. City of Louisville*, 643 S.W.2d 590 (1982).

If, however, the appointment itself was invalid, the member has no property rights in the position and the appointment is void. The seat may be declared vacant and filled with another person without notice or a hearing. *See Henry v. Commonwealth*, 126 Ky 357, 360, 103 S.W. 371 (Ky. App. 1907); *Callis v. Brown*, 142 S.W.2d 675, 679 (1940) ("[T]he proper authorities may remove, without hearing, one who does not clearly bring himself within the immune class, and we think the lack of proper statutory qualifications would thus eliminate [the appointee] from the class.")

B. Inefficiency

"Inefficiency" is not defined in statute. Therefore, we must look to its common meaning to determine how it would be construed in this context. It is commonly defined as "not efficient; not producing the effect intended or desired; wasteful of time or energy. *Meriam-Webster Dictionary*, Inefficient. The D.C. Circuit recently upheld the President's ability to remove the Director of the Consumer Financial Protection Bureau for "inefficiency." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018). *PHH Corp.* contains an exhaustive discussion of the history of the term, and ultimately concludes that "an officer is inefficient when he fails to produce or accomplish the agency's ends … within the parameters set by Congress." *Id.* at 149. In reaching this conclusion, the court discussed the contemporary definition as synonymous with wasteful. *Id.* at 448. With these definitions in mind, we believe the courts would likely construe "inefficiency" along the lines of unreasonably wasting valuable resources. In an action for removal for inefficiency, proper notice of charges related to inefficiency must be

set forth clearly and distinctly. *See Bregel v. Newport*, 208 Ky. 581, 582, 271 S.W. 665 (Ky. App. 1925). However, it is not likely that mere policy disagreements could be grounds for inefficiency. *PHH Corp.*, 881 F.3d at 124. Those would likely be seen as violating the FPB's independence as set forth in KRS 96.176. *See Settle v. Jones*, 206 S.W.2d 59 (1947).

C. Neglect of Duty

"Neglect of Duty" is also not defined in statue. It generally refers to an "officer's neglect or failure to do and perform the duties of his or her office, or duties required of the office by law." 63C Am. Jur 2d., Public Officers and Employees, § 187. In Kentucky, neglect of duty has been defined as "a careless or intentional failure to exercise due diligence in the performing of official duty; the degree of care to be exercised depending upon the character of the duty performed." *Holliday v. Fields*, 210 Ky. 179, 191 275 S.W. 642 (Ky. App. 1925). Removal for neglect of duty must relate to neglect of performing official acts, and cannot relate to personal acts. *Id.* (habitual off-duty drunkenness is not ground to remove a sheriff for neglect of duty). Some isolated incidents are unlikely to qualify for cause to remove for neglect of duty. 63C Am. Jur., Public Officers and Employees, § 187.

The official duties of FPB members are outlined in statute. It is best summarized in KRS 96.176, which states that the "board shall have charge of the exclusive supervision, management and control of the operations, maintenance and extension of the electric water plant." In addition, the FPB has adopted a policy which outlines the common law fiduciary duties of board members including the duty of good faith, duty of care, duty of loyalty, duty to attend board meetings, duty to examine financial statements, and duty to inspect books and records. *See* Frankfort Plant Board Policy No. 10. A careless or intentional failure to exercise the statutory duties or the fiduciary duties related to the FPB could constitute removal for neglect of duty.

D. Misfeasance in Office.

Misfeasance in office is "the improper doing of an official act." *Commonwealth v. Williams*, 79 Ky. 42, 47 (1880). In other words, it is the wrongful doing of an official act, which the person has the authority to do. *Holliday v. Fields*, 245 S.W. 642 (1922). The misconduct must relate to an official action, while a personal act, not related to the office, does not constitute grounds for removal. *Id.* Kentucky law no longer requires evil intent for a finding of misfeasance. *See Woodward v. Commonwealth*, 984 S.W.2d 477, 480 (Ky. 1998). There is little recent Kentucky case law providing examples of misfeasance. The acceptance of increased compensation during an officer's term has been held to justify removal for misfeasance. 63C Am. Jur. 2d Public Officers and Employees § 185, citing *Bruno v. Civil Service Commission of City of Chicago*, 38 Ill.App.2d 100, 186 N.E.2d 108 (1st Dist. 1962).

E. Nonfeasance in Office.

Nonfeasance in office is "the omission of an [official] act which a person ought to do." *Cottingim v. Steward*, 142 S.W.2d 171, 177 (Ky. App. 1940). Essentially, to commit

nonfeasance in office, one must have a duty to perform an official act and fail to perform that act. As stated previously, the duties of the plant board are outlined in KRS 96.176 and in the fiduciary duties policy.

F. Malfeasance in Office.

To be removed for malfeasance in office, the person must be performing an official act, and the act must be wrongful, unjust or constitute gross negligence. *Woodward v. Commonwealth*, 984 S.W.2d 477, 479 (Ky. 1998). In other words, the officer must be performing an act he or she has no right to perform and doing so with gross negligence. *See also Cottongim*, 142 S.W.2d at 177. Kentucky law does not require the showing of an evil intent for a finding of malfeasance. *Woodward, supra.* Therefore, to remove a FPB member for malfeasance in office, the evidence must support a finding that the member performed an official act they had no authority to perform, and they did so with gross negligence.

To constitute an official act, the act must relate to the business of the FPB. *See Bailey v. Commonwealth*, 790 S.W.2d 233 (Ky. 1990) (false statements made by a county judge about the county attorney at a fiscal court meeting did not constitute malfeasance, as they were personal in nature and not related to the business of the fiscal court). A good example of malfeasance in office is found in *Woodward, supra.* In *Woodward*, a county judge executive's conviction for malfeasance was upheld for ordering the paving of a road he knew was not in the county road system. 984 S.W.2d at 478.

FINDINGS AND RECOMMENDATIONS

I. Illegal Appointment of Baldwin Based on Lack of Qualifications.

A. Baldwin's appointment and confirmation to the FPB on September 28, 2015 is void because he was not qualified under KRS 96.172(1) as he was not a "voter." He is currently acting as a de facto officer.

It is alleged that Baldwin was not registered to vote in Frankfort, Franklin County, or in the Commonwealth of Kentucky at the time of his appointment and approval. Baldwin, through his attorneys, does not dispute this. *See Barkley ltr. to Mayor May*, Nov. 10, 2017. Instead, he argues that the term "voter" as used in the KRS 96.172 means merely that he met the criteria to be eligible to vote, and need not actually be registered to vote. Baldwin's attorney states he meets the eligibility criteria. Records obtained from the City of Frankfort show Baldwin was appointed and approved by the City Commission on September 28, 2015. Records obtained through an open records request to the Kentucky State Board of Elections confirm that Baldwin was not registered to vote when he was appointed in September 2015. That record shows Baldwin first registered to vote in the Commonwealth of Kentucky on November 2, 2017.

KY. CONST. § 160 permits the legislature to prescribe the manner in which inferior city officers are appointed. KRS 96.172 states that the mayor appoints and the city commission, by majority vote, approves the five persons appointed to the FPB. The requirements to serve on the FPB are clearly outlined in the statutes. The appointees must be citizens, taxpayers, voters, and users of electric or water. KRS 96.172. At issue here is the term "voter."

In *Coffey v. Anderson*, the Kentucky Court of Appeals, then the Commonwealth's highest court, addressed the definition of the term voter. 371 S.W.2d 624 (Ky. App. 1963). *Coffey* involved the term "voter" found in KRS 67.030 as it relates to the qualifications for persons signing petitions for local option elections. *Id.* The court held that one must be a registered to be a voter. *Id.* Baldwin's counsel argues that this opinion is limited to instances related to local option elections. However, it is clear from *Coffey* that the court intended this definition of "voter" in a broader context. In defining the term "voter" as one who must be registered to perform the act, the court discussed the interplay between Ky. Const. 145 and Ky. Const. 147, stating,

> We recognize that Const. § 145 says that a person possessing certain qualifications "shall be a voter." This provision must, however, be read *in pari materia* with Const. § 147, which provides, "Where registration is required, only persons registered shall have the right to vote." If a person does not have the "right to vote," he is not a "voter." By force of Const. § 147 registration is a qualification or condition precedent of equal dignity with the age, residence, and other qualifications prescribed in Const. § 145.

Id. at 626. Clearly *Coffey* applies more broadly than in just election cases.

Moreover, *Coffey* overruled several cases which held that a person meeting the qualifications to vote was nonetheless a voter, whether registered or not. *Id.* Three of these cases relate to gathering signatures for petitions to various types of local elections. *City of Covington v. Miller*, 266 Ky. 198, 98 S.W.2d 293 (1936); *Branstetter v. Heater*, 269 Ky. 844, 108 S.W.2d 1040 (1937); *Stieritz v. Kaufman*, 314 Ky. 10, 234 S.W.2d 145 (1950). In essence, those overruled cases held that a "voter" met the criteria to sign the petition to hold an election even though he was not registered.

However, the fourth case overruled by *Coffey* related to the qualifications of a person to hold public office. In *Meffort v. Brown*, the Court of Appeals determined whether a member of the Louisville board of commissioner of the sinking fund was qualified to hold the position. 132 Ky. 201, 203, 116 S.W. 779, 780 (Ky. App. 1909). The plaintiffs, in *Meffort*, believing they were soon to be removed from their employment as clerks and license inspectors challenged the qualifications of one of the sinking fund board members. *Id.* In addition to a residency question, which was decided in favor of the commissioner, the court decided whether the lack of registration disqualified him from holding the office. *Id.* The Court, citing to Ky. Const. 145, reasoned that the commissioner need not be registered to be a "qualified voter" eligible to hold the office. *Id.* at 781. This reasoning, however, was **expressly overruled** by *Coffey*. "[W]e have reconsidered the question of proper definition and have concluded that registration is one of the essential qualifications of a 'voter.'" 371 S.W.2d at 626. To the extent that *Meffert, City of Covington, Branstetter and Stieritz* opinions hold otherwise they are overruled." 371 S.W.2d at 626. Therefore, since the court's ruling in *Coffey*, to be a "voter" as it relates to qualifications to hold a public office, one must be registered.

Shortly after *Coffey* was decided, the Court of Appeal reiterated that "registration is one of the essential elements of a voter, legal voter, qualified voter, or the like." *Howell v. Wilson,* 371 S.W.2d 624, 629 (Ky. App. 1963). It's reasoning was again confirmed in *Commonwealth v. Kash*, a criminal case where the defendant was alleged to have wrongfully registered a convicted felon to vote. 967 S.W.2d 37 (Ky. App. 1997). Therefore, *Coffey* remains good law and there is little doubt that the term "voter" in KRS 96.172 would be construed as one who must be registered to vote in the Commonwealth of Kentucky.[1]

Thus, we do not believe Mr. Baldwin met the qualifications to be appointed to the FPB on September 28, 2015, the date he was appointed.

Since his appointment, Mr. Baldwin registered to vote in Frankfort, Franklin County, Kentucky on November 2, 2017. The question now becomes whether this subsequent registration cures his prior ineligibility and qualifies him to serve of the FPB. In other words, can Baldwin fix an illegal appointment by registering to vote subsequent to the appointment?

To answer this question, we return to KY. CONST. 160. That section permits only the legislature to prescribe the manner in which inferior municipal officers are appointed to office.

[1] Because Baldwin was not registered anywhere in the Commonwealth, it is not necessary to analyze whether a FPB member must be registered to vote in the City of Frankfort.

FINDINGS AND RECOMMENDATIONS

The legislature has clearly set the qualifications of plant board members in KRS 96.172. A city ordinance or other action in violation of this scheme set forth by the legislature would violate both KRS 96.172 and KY. CONST. § 160. *See Hargadon v. Silk*, 279 Ky. 69, 129 S.W.2d 1039 (Ky. App. 1939) (ordinance in violation of statute and KY. CONST. § 160 to appoint a police judge invalid); *See also Watkins v. Pinkston*, 190 Ky. 455, 457-458, 227 S.W. 583 (Ky. App. 1921) (statute which changes term of years outlined in and KY. CONST. § 160 unconstitutional). Thus, the City was without authority to appoint Baldwin to the FPB, as he did not meet the qualification prerequisite of being a voter.

The effect is that Baldwin's appointment was, and is, illegal. Just like an illegal act is void *ab initio, see* S.J.L.S. v. T.L.S., 265 S.W.3d 804 (Ky. App. 2008), an illegal appointment of an inferior public officer is void. *See Henry v. Commonwealth*, 126 Ky 357, 360, 103 S.W. 371 (Ky. App. 1907). The Kentucky Office of the Attorney General has recently opined that the appointment of an unqualified person to the Kentucky Retirement Systems is void *ab initio*. In OAG 16-004, the Attorney General reviewed the qualification of an individual appointed as someone with "investment experience" as outlined in KRS 61.545(1)(e)(5). The Attorney General, after reviewing the record, found that the appointed person did not meet the qualifications outlined in the statute. *Id.* at 7-8. He stated "[a]s he was not qualified to hold the position when he was appointed, his appointment is void *ab initio*. *Id.* at 8. *See also Martin v. Pugh*, 175 W.Va. 495 (W.Va. App. 1985) (illegal appointment of a police officer void *ab inito*).

This rule also applies to the illegal hiring of a public employee. In *Bowling v. Natural Resources & Envt'l. Protection Cabinet*, the Court of Appeals held the Energy and Environmental Cabinet failed to comply with state regulation when it promoted an employee to the rank of administrative secretary. 891 S.W.2d 406, 411 (Ky. App. 1994). The Cabinet's failure the rendered promotion void *ab inito*, or null and void. *Id.*

An act that is void, or void *ab initio*, is a nullity and has no legal effect. *See S.J.L.S., supra.* In *Meglemery v. Weissinger*, the Court of Appeals held the appointment by a fiscal court of one of its members to the position of bridge commissioner was void. 140 Ky. 353, 131 S.W. 40, 41 (1910). Moreover, it could not be validated by a subsequent legal ratification of the fiscal court. *Id. Meglemery* makes clear that the only way to cure the illegal appointment is for a new, legal, appointment to occur. *Id.* Applied to this case, Baldwin's later attempt to come into compliance with KRS 96.172 by registering to vote was not sufficient. The appointment itself was illegal and cannot be cured by a subsequent ratification or other act to attempt to come into compliance.

Baldwin is currently, however, acting as a *de facto* member of the FPB. A *de facto* officer is one who is in possession of an office and exercising its functions under color of title, or the apparent right to the office. *Coquillard Wagon Works v. Melton*, 137 Ky. 189, 125 S.W. 291 (Ky. App. 1910). A defective appointment constitutes color of title. OAG 80-546, citing 63 Am.Jur.2d Public Officers and Employees, § 504. The exercise of authority of a *de facto* officer which lawfully pertains to the office is as valid and binding as if exercised by an officer *de jure*.

Schaffield v. Hebel, 192 S.W.2d 84, 87 (Ky. App. 1946). Therefore, Baldwin's legal official acts as a *de facto* officer of the FPB are valid and binding.

In such an instance, where an officer is acting under an illegal appointment, he does not possess any property right to the office. *Bowling*, 891 S.W.2d at 411. ("[T]he Due Process Clause of the Fourteenth Amendment is not a guaranteed against incorrect or ill-advised personnel decisions"). Thus, the governing body "may remove, without hearing" one who "lack[s] of proper statutory qualifications." *Callis v. Brown*, 142 S.W.2d 675, 679 (Ky. App. 1940). This means the City Commission may remove Baldwin as a member of the FPB and declare the seat vacant without notice or a hearing. Removing Baldwin from this *de facto* position does not require a finding of any cause listed in KRS 96.172(9).

However, a new officer cannot be appointed to that office until the office has been declared vacant. *See Henry v. Commonwealth*, 126 Ky 357, 360, 103 S.W. 371 (Ky. App. 1907).[2] Therefore, the City must wait to fill the seat with another qualified person until the office has been declared vacant. At that time, the City could fill the seat with another qualified person, or Baldwin could be appointed, as he now meets the qualifications. An appointment of a qualified person, including Baldwin, would require a majority vote of the commission pursuant to KRS 96.172.

In summary, Baldwin did not meet the qualifications to serve as a member for the FPB at the time of his appointment and approval because he was not a registered voter. The appointment is, therefore, void and it cannot be cured by his subsequent registration. The City Commission may remove Baldwin and declare the seat vacant without notice or a hearing because Baldwin possesses no property rights as a FPB member. Thereafter, the Mayor may appoint, and the Commission approve, a qualified person to serve as a member on the FPB. Unless and until the City removes Baldwin, he may continue to serve as a *de facto* officer. *See* OAG 80-546, at 7.

II. Allegations Related to Hiring an Independent Consultant and Law Firm.

A. Rosen's and Baldwin's support for hiring an independent consultant and law firm to review the KyMEA contracts is not grounds for removal.

Several allegations against both Rosen and Baldwin relate to their support of hiring an independent contractor and law firm to review the Kentucky Municipal Energy Agency ("KyMEA") interlocal agreement and the "All Requirements" agreement. We address those here.

For context, a brief history of how the FPB's agreements with the KyMEA came about is warranted. In 2013 and 2014, after a back and forth with Kentucky Utilities ("KU") over various

[2] It is important to note that the Mayor and the Commissioners who appointed and approved Baldwin for the seat on the FPB acted in good faith. This is also evidenced by the subsequent actions of the City to attempt to clarify the appointment and approval process by requiring would-be appointees to submit affidavits. *See Henry*, 126 Ky. at 366.

rate matters, including a new 10-year termination notice provision, the FPB decided to explore the possibility of purchasing electricity from an alternative source. Several sister cities (collectively referred to as the "municipalities") joined in this effort. The municipalities jointly hired various consultants and legal counsel to determine the viability of leaving KU and purchasing power from an alternative source. The legal counsel hired was Tom Trauger of Spiegel & McDiarmid LLP, based in Washington D.C., who had served the FPB and other municipalities in various roles for decades. A witness provided us with a news article and court records showing that Spiegel & McDiarmid had represented the FPB as early as 1974. The consultants were Brown Thornton of NewGen Strategies and Solutions and John Painter of nFront. Numerous current and former staff and board members stated that these consultants or the companies for which they were associated had served as consultants for the FPB on many occasions. These witnesses, including Ludwig, Scott Green ("Green"), and Rick Progrotsky, who were board members throughout and up to the entry into the interlocal agreement, stated they were familiar with and trusted the law firm's and consultant's work and valued their opinions from prior experience.

After consideration of the various options,[3] the municipalities decided to opt out of the KU contract in 2014 and ultimately form KyMEA. KyMEA is a joint action agency consisting of ten municipal members. The central purpose of KyMEA is to allow the member municipal systems to benefit from economies of scale in planning for and obtaining power supply resources. Each municipality has is a voting "director" on KyMEA, which can be a senior staff member or a board member. *See* KyMEA Interlocal Agreement, Article III, Section 1. Members generally have equal voting rights, with weighted votes in certain circumstances based on the municipalities' respective power usage. *See* KyMEA Interlocal Agreement, Article III, Section 3. In 2015, the FPB unanimously voted to enter into the interlocal agreement along with ten other municipalities, and the KyMEA was created. In 2016, the FPB voted 3-2 (Baldwin and Rosen opposing) to enter into the "All Requirements" agreement to purchase power from KyMEA. The FPB is currently a member of KyMEA. However, there is currently no official representative on the KyMEA board. The interim GM and the Staff Attorney resigned their seats of "director" and "alternative director" after the FBP's January 16, 2018 board meeting.

Many of the allegations center around Rosen's and Baldwin's alleged actions to undermine the KyMEA contract based on the alleged belief that they wish to exit KyMEA. Rosen and Baldwin, through their attorney, dispute this claim. They state they do not wish to exit the KyMEA, but merely seek to review the contracts to provide for the best possible deal for the FPB. *See Barkley Ltr. to Denham*, February 16, 2018, p. 13.

Regardless of their motivations, we do not believe this allegation to be grounds for removal of either Rosen or Baldwin. Even if they desire to exit the KyMEA contract, that is a

[3] Witnesses describe a thorough process to decide whether to stay with KU, form KyMEA, or purchase power from another supplier.

policy disagreement between them and other members of the board.[4] As previously stated, the FBP is insulated from political interference and its board members cannot be removed based on legitimate policy differences. *See Settle v. Jones*, 206 S.W.2d 59, 61 (Ky. App. 1947). *See also PHH Corp.*, 881 F.3d at 124 ("[I]nefficiency is not properly construed to allow removal for mere policy disagreements") (applying federal law).

In addition, we do not believe the support for hiring the independent consultant or law firm to be grounds for removal. Cubine informed us that he was present in a meeting with an Assistant Attorney General ("AAG") whom the board asked to review the interlocal agreement. According to Cubine, that AAG stated that there may be a conflict of interest with the law firm that advised both the FPB, other municipalities, and KyMEA related to the KyMEA agreements. Cubine states that the AAG advised that a written waiver should be executed, but none was done. In addition, at the November 15, 2016 board meeting, Baldwin specifically asked the staff attorney and Liebman if they had expertise in interpreting these types of contract—and both responded in the negative. *See FPB Meeting Video*, November 15, 2016, at 1:34:45. Therefore, there was a legitimate question raised as to whether another consultant and law firm should review the contracts.

Various staff and board members (both current and former) stated that they were not concerned with any potential conflict because of the FPB's extensive pre-existing relationship with the firm. Moreover, at the time the KyMEA was being created, at least three of the board members appear to have been fully aware of the alleged dual roles, and did not object. However, whether there was a conflict and whether it was waived is a question that is beyond the scope of this report. Instead, given the information presented to the FPB, particularly the statements from an AAG, it is reasonable that the board would seek independent counsel to review these agreements. Therefore, the support for hiring these independent consultants was not unreasonable and does not rise to the level of malfeasance or misfeasance.

Moreover, a motion to hire both the independent counsel and an independent consultant were submitted to the board in November 15, 2016. The board, at that time, unanimously voted to hire both. Rosen and Baldwin, therefore, cannot be singled out for this unanimous board action. *See FPB Meeting Minutes*, November 15, 2016, p. 10.

B. The FPB failed to follow its procurement policy in hiring E3 and Reed Smith, but the full board was aware and consented to the process, which included the board's attorney.

It is alleged that Baldwin did not follow the correct procurement process when Energy+Environmental Economics ("E3") and Reed Smith, LLP ("Reed Smith") were hired. The evidence shows that the FPB did not follow its procurement policy when hiring these outside firms. However, all members of the board were fully aware that Liebman was in charge of

[4] Of course, they, and all board members, must exercise their due diligence in coming to these decisions to comply with the duty of care.

handling the procurement process for these contracts outside of the regular policy. Therefore, this, in and of itself, is not grounds for removal.

The FPB has implemented a procurement policy. *See* Policy No. 16, Frankfort Plant Board Procurement Policy. This policy details the procedure and responsibilities of various FPB personnel when entering into contracts. The objective of the policy is to "maintain the confidence and integrity of our purchasing and to uphold the professionalism of our Staff." *Id.* at 3. The policy details the FPB's small purchase authority, sole source exemptions, and emergency procedures. *Id.* at 4. It also describes the competitive sealed bidding process for purchases that exceed $20,000.00. *Id.* at 5-7. This includes advertisement in the local newspaper, review of the bids by the Department Head, and a recommendation to the General Manager. *Id.* The policy states that "[a]ll departments requiring ... services shall place with the Purchasing Agent a written purchase request." *Id.* It permits the GM to make a written determination that competitive bidding is not feasible for certain purchases, including "services of a licensed professional, such as attorney ... or engineering services." *Id.* at 9.

Each staff member interviewed stated that they were not involved in the hiring of either E3 or Reed Smith. Instead, the records show that Liebman was ultimately tasked with overseeing the procurement process of both E3 and Reed Smith. Therefore, the board did not follow its own procurement procedures when hiring E3 and Reed Smith.

However, going outside the process appears to have been sanctioned by the entire FPB board—not just Rosen and Baldwin. The minutes and the video recording of the November 15, 2016 board meeting shows that Baldwin made the motion to hire the independent consultant and law firm. The official meeting minutes recorded the motion as follows: "Mr. Baldwin moved to direct the General Manager to acquire counsel and consulting services as quickly as possible to give independent analysis from a legal perspective and a business perspective of the contract." *FBP Meeting Minutes*, Nov. 15, 2016, p. 9; *Meeting Video*, at 1:34:45. At the meeting, Cubine suggested, and it appears to have been generally understood among the board members, that Liebman would handle hiring the outside law firm. *Id.*

Therefore, at least initially, the GM was tasked with identifying the independent consultant and Mr. Liebman was tasked with finding independent legal counsel.

C. *The procurement process used by FPB to hire the independent consultant contributed to a records management issue.*

As it relates to the independent consultant, who ultimately became E3, the former GM states that after the November 2016 board meeting, he identified what he believed to be a qualified independent consultant. When he presented his findings to Liebman, Liebman told him that Baldwin wanted a request for proposal ("RFP") sent to numerous qualified consulting firms instead of picking a firm whom the FPB had previously done business. After this conversation, the former GM states that he had no further involvement in the process.

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The records show that Liebman sent a request for proposal to what appear to be multiple qualified firms. In all, the RFP was sent to seven (7) firms and four (4) responses were received. After receiving responses, Liebman sent them to Cubine and Baldwin. Cubine and Baldwin scored the responses based on a scoring matrix sent by Liebman. Cubine states that he and Baldwin independently scored the various proposals and both chose E3 as the winning bidder. On March 27, 2017, Liebman informed the full board of this procedure. *FPB Meeting Minutes*, March 27, 2017, p. 2.

Therefore, the full board, on March 27, 2017, was made fully aware of the process used to select E3 as the winning bidder. Rosen stated that she had read the proposal and agreed that E3 was her recommendation. *Id.* Ludwig, who was not involved in the scoring, also stated that he had reviewed the responses and noted that they were highly technical. *Id.* Therefore, the evidence indicates that the while Cubine and Baldwin scored the proposals, Rosen and Ludwig were also aware of the process implemented by Liebman. The board voted unanimously to hire E3. *Id.*

We have found no evidence to show that the process used to hire E3 is grounds for removal of any board member. While it was outside of the FPB's normal procurement policy, the full board was aware of the deviation in the procedure, and after being informed of the process, voted unanimously to hire E3. They did this even though the original motion directed the GM "to acquire" the consulting firm. In addition, the records show that Liebman sought qualified firms to bid on the project. We have been presented with no evidence that indicates that Baldwin inappropriately steered the contract to E3. Cubine states that he independently scored the proposals.

There does, however, appear to be a records management issue related to the E3 procurement process. We requested several records related to this process from the FPB custodian of records. He, acknowledging the City's authority to conduct this investigation, was cooperative, providing us with thousands of pages of records. But in response to various requests related to the E3 contract, included the procurement materials, he stated that they were still in the possession of Liebman, who was also cooperative with this request. We, therefore, requested the same from Liebman. Liebman was also cooperative, providing us with numerous records. Missing from these records, however, were the scoresheets used to judge the contracts. We asked for both the custodian and Liebman to search again, and both responded that they did not possess the score sheets.

This raises record management issues. It is the responsibility of the official custodian of records to maintain agency records. *See* KRS 61.870(5). However, the FPB custodian cannot be faulted in this circumstance. It was the board's decision to go outside the normal procurement process and to keep the records with Liebman, a private attorney, instead of with the official custodian. Maintaining records outside of the control or access of the official custodian violates both the letter and spirit of the open records act. *See* KRS 61.870(5). Furthermore, it has caused confusion and extra work on staff who have been tasked with responding to public records

requests for years. Many staff members stated that this was the first time they were aware the normal procurement policy was not followed. This certainly led or contributed to the destruction or misplacement of these public records.

In addition, this process led to a failure of the FPB to enter into a contract with E3 prior to E3 performing the work on the project. Statements and records show that the Interim GM/Finance Director discovered this failure when he received an invoice from E3. The evidence clearly points to the initial lack of a contract as inadvertent and this situation was quickly remedied when the Interim GM discovered the issue. However, had the board followed the long-standing procurement procedure detailed in policy, this issue would likely have been avoided.

Based on the evidence presented to us, we do not believe that this violation of the open records act or the inadvertent failure to enter into the contract with E3 before the work began are sufficient grounds for removal under KRS 96.172.

D. Because we could not interview Rosen, Baldwin, or Liebman, we cannot determine if the procurement process used by FPB to hire the independent law firm constitutes malfeasance.

After the November 15, 2016 meeting, Liebman was tasked with finding an independent law firm. This, however, was apparently held until after E3 submitted its analysis in June 2017. After that analysis, Liebman started the process to hire the law firm. Much like the consultant, Liebman formulated an RFP and sent it to numerous qualified law firms. In all, he sent the RPF to thirteen (13) firms—both regional firms and national firms. He received seven (7) responses. After receipt of the various responses, he forwarded them to Cubine and Baldwin. Cubine acknowledged receipt of these proposals. However, he states that he did not score these. He stated that he declined to be involved in this process because he did not believe hiring an outside law firm was necessary or required. Both Ludwig and Green state that they did not participate in the scoring of the proposals.

An email sent by Cubine to Ludwig and staff members on August 1, 2017 supports his statements that he did not score these proposals. In the email, Cubine states,

> my personal feeling is all future Board procurement be handled by Regular internal process. The contract with E3 and independent KYMEA counsel came about due to some concerns where FPB staff felt a possible conflict with board action to select a consultant to review KYMEA. I think operating outside the normal process puts everyone in an awkward administrative position.

This email was sent before the proposals were received from the law firms, before Baldwin sent the scoring matrices to Liebman, and before the board entered into the contract with Reed Smith.

Hale, however, states that Liebman told her that it was Baldwin and Cubine who scored the outside counsel proposals. The records show that on September 17, 2017 at 11:32 p.m. Baldwin sent Liebman an email informing him that "[w]e selected Reed Smith…." On

September 18, 2017 at 6:35 p.m. Baldwin sent Liebman an email with two scoring matrices. The two persons scoring the proposals are identified as "Reviewer #1" and "Reviewer #2." No names are mentioned. It appears obvious that Baldwin is one of the reviewers, but the identity of the second reviewer remains unknown.[5]

Neither Baldwin, Liebman, or Rosen submitted to our interview requests so we were unable to ask them their knowledge of the scoring process. We do not have subpoena powers to compel their cooperation or to discover records in their possession, so we are unable to conclusively state who, in addition to Baldwin, scored the proposals.

On September 19, 2017, Liebman explained the process to the full board. *See FPB Meeting Minutes*, September 19, 2017, p. 11. He did not state the identities of the two reviewers. At that meeting, the Baldwin's motion to hire Reed Smith failed 3-2. *Id.* at 12

On October 17, 2017, Baldwin once again brought the motion before the board. *See FPB Meeting Minutes*, October 17, 2017, p.12. This meeting was Hale's first as a board member, replacing Green. This time, the board voted 3-2 to hire Reed Smith. *Id.* The minutes show this motion included seeking "exit paths" to the contract, and while there was discussion whether this should be included in the scope of work, it was ultimately included. Moreover, it is reasonable to include this in the scope of work for the same reasons outlined above. *Id.*

Therefore, the actual hiring of the independent law firm does not constitute malfeasance or misfeasance. Because we cannot compel testimony or records, we cannot conclusively state whether an act of malfeasance was committed during the scoring process. Based on the facts listed above, it may merit consideration by the Commission to send written questions to Baldwin or Rosen, or to refer this matter to the appropriate investigative agency.

E. Placing an item on the agenda for an RFI to seek rate prices from MISO is not grounds for removal.

Also, on October 17, 2017, Baldwin asked for an agenda item to be brought for a vote. The motion was to issue a Request for Information ("RFI") to the Midcontinent Independent System Operator ("MISO") market participants for cost data and timing of supplying power to the FPB. *Id.* It is alleged that Baldwin did not discuss this proposed RFI with staff. Had he, witnesses state, he would have known that KyMEA was currently negotiating prices with MISO, which included supplying power to the FPB under the All Requirements contract.

The records show prior to the meeting, the KyMEA sent a memorandum to the staff attorney and to Liebman describing its concerns related to the RFI and the potential implications

[5] Invoices show Reed Smith was one of the highest hourly rates at up to $710 per hour, while local firms that bid on the project ranged from $225 per hour to up to $520 per hour. The email correspondence shows that Baldwin asked for hourly rate information from Liebman for all of the bidders, but the scoring matrices do not show that the hourly rates were considered in the selection process. The scoring matrices have criteria for "Corporate Experience and Qualifications (30 Points); Staff Experience and Qualifications (40 Points); and Firm Understanding of Project Scope (30 Points)."

to the All Requirements contract. While KyMEA raised concerns about this RFI, the memorandum states that the issuance of the RFI is not itself a violation of the contract. Baldwin's attorneys state that this request was merely for information and was not an attempt to circumvent the KyMEA contract. *Barkley ltr.*, Feb. 16, 2017, p. 13.

As addressed later in this report, the FPB bylaws do not outline the procedure for placing items on the agenda. Moreover, while the staff states it was not consulted regarding the RFI, they clearly had time to prepare for the meeting, as staff members advised against the RFI. In addition, there was enough time for the KyMEA to issue its memorandum. Ultimately, the board voted down the motion 3-2. We have been presented with no evidence that Baldwin, or anyone else, unilaterally sought this information from MISO contrary to the board vote.

Staff witnesses state, and it appears obvious, that rate analysis and negations involve complex analysis in need of professional judgement. Discussing these matters with staff ahead of board meetings certainly would assist the board to make complex policy decisions. However, based on the facts above, we do not believe there is sufficient evidence in this particular instance to support a charge of misfeasance under KRS 96.172, primarily because the staff was able to present its analysis of the motion to the board in an open meeting.

III. Allegations Related to Conducting Board Meetings, Open Meetings, and Open Records.

A. Rosen drafting her own version of board minutes to compete with the staff generated minutes is not grounds for removal under these facts.

The records show that Rosen drafted a version of the meeting minutes for the November 21, 2017 meeting. She presented these minutes for consideration at the December 19, 2017 meeting. The plant board staff also transcribed minutes and those were also considered. One issue related to whether the full resolution read by Hale regarding KyMEA was included in the minutes. After much discussion, the board voted to accept Rosen's version of the minutes. The vote was 2-1, with Rosen and Baldwin in favor and Hale opposed (Ludwig was not present at the meeting).

The FPB bylaws state that the "[m]inutes of each board of directors meeting will be kept and transcribed by a designated officer of the Frankfort Plant Board." *Bylaws*, Article 11. That appears to have been done and the staff presented the minutes to the board for consideration. *See FPB Meeting Minutes*, December 19, 2017, at 3. While Rosen's version were not drafted by the designated officer, she, and any other board member, has the right to ask for changes to the minutes at the board meeting. While procedurally, this is not what occurred, her changes could have been achieved this way. A majority of a quorum of the board approved these minutes.

Regarding Hale's resolution, she states that she was under the impression that her entire resolution would be included in the minutes. Baldwin and Rosen stated that because the "whereas" provisions were not read into the record, it should not be included. Hale states that the

absence of the "whereas" provisions changes the context of her resolution. While this may be the case, a majority of the quorum of the board voted not to include the "whereas" provisions in the minutes. Thus, we have not been presented with evidence of any malfeasance related to this controversy.

Also, at the most recent board meeting, the board voted to form a committee to discuss the content of board minutes, focusing on the length and detail which should go into the minutes. *See FPB Meeting Video*, February 22, 2018, at 5:45.

We have been presented with no evidence that these actions are cause for removal under KRS 96.172(9).

B. Evidence is not sufficient to remove Baldwin or Rosen for directing staff regarding the FPB's position on the KyMEA CEO's compensation.

The next allegation focuses on whether Rosen and Baldwin committed malfeasance in office by directing the interim GM and the staff attorney, who were also at the time FPB's KyMEA delegate director and alternative director respectively, on the parameters of negotiating the KyMEA CEO's salary.

Witnesses state that in October and November 2017, the KyMEA had identified a candidate it desired to become its first CEO. The various members of KyMEA were set to discuss this candidate, his proposed salary, and other benefits at a KyMEA meeting on November 15, 2017. At a special meeting of the FPB, on November 14, 2017, witnesses state that the board went into closed session and discussed the CEO's salary parameters. All witnesses present, who submitted to an interview, state that there was clear direction given to the interim GM and the staff attorney, who were the FPB's KyMEA director and alternative director respectively. These witnesses include Ludwig and Hale. Rosen and Baldwin, through their attorney, do not dispute this occurred. *See Barkley ltr.*, Feb. 16, 2018, p. 6.

However, there was no action taken by the board at that meeting, meaning there was no board vote to direct the staff on the parameters of the negotiation. The next morning, both Rosen and Baldwin contacted the board staff, who were on their way to the KyMEA meeting in Owensboro. The records show that Rosen sent an email directing staff to vote at the KyMEA meeting "in a way that supports the previously voted Board motion, regardless of the discussion we had." Witnesses also state that Baldwin corresponded with staff expressing his belief that they must act in accordance with a prior board vote. Hale, who was also on the email chain objected, stating that she "stood by what was decided yesterday."

Witnesses state the prior board vote referenced by Baldwin and Rosen was taken on June 20, 2017. That vote was to formally submit "eleven items" to the KyMEA for response. *See FPB Meeting Minutes*, June 20, 2017, at 5-6. The eleven items, however, do not state the parameters of the CEO salary, or direct staff on how to negotiate this salary. Instead, as it relates to the CEO compensation, the items state, "Request KYMEA provide the job description for the CEO and

CFO positions and salary to members prior to hiring." *See Response of KyMEA to E-3 Report and FPB Requests Adopted on June 20, 2017*, August 1, 2018, p. 38. Witnesses have stated that there was some informal discussion about the KyMEA salary range parameters, but we have not been shown any evidence of an official board action and have found none.

Thus, it is unclear what vote Rosen is referencing in her email. We were unable to ask her to clarify because she did not submit to an interview. However, the email shows that she is under the impression that there was some board action directing staff on the FPB's position of a salary range for the KyMEA CEO. At the KyMEA meeting on November 15, 2018, the FPB representatives presented FPB's parameters as discussed with the full board in closed session the night before.

There is a question of whether any official board action was necessary to begin with on this matter. Staff witnesses state that the FPB appointed KyMEA representatives (director and alternative director) previously acted with some discretion on KyMEA matters. This, the witnesses state, would be an issue that they would normally undertake using their best judgment, with the understanding that they had a fiduciary duty to the FPB. These matters would be discussed at the FPB's regular monthly meetings and would rarely require board action. Still, some matters, such as the "eleven items" presented to KyMEA were adopted by formal board action. Thus, there does not appear to be a clear policy which delegates authority to the FPB appointed director and alternative director.

The witnesses state, and the records confirm, the former GM, in his capacity of the KyMEA director, brought many matters before KyMEA and they were voted on by the KyMEA board, who provided a response to the FPB. Thus, for these reasons, it appears staff, in good faith, believed they had the discretion to participate in the KyMEA's CEO salary without a formal vote from the FPB board.

While there is some evidence that Baldwin and Rosen did not have the authority to change the parameters discussed the night before, it is also unclear whether an official board vote was necessary to give staff the authority to negotiate the parameters of the new CEO's salary. Because of this uncertainty, we do not believe the evidence would support a charge of malfeasance.

However, following better practices related to open meetings and agenda items could avoid issues like this in the future. Also, creating clear guidelines for the appointed director and alternative director which delineate their discretion and authority is recommended.

C. The procedure to place items on the agenda should be clarified in policy. Evidence related to placing items on the agenda does not support removal.

Various witnesses stated that Baldwin waits to bring important matters before the board under the "new business" agenda item of regularly scheduled meetings. They state that many of

these items are not discussed with pertinent staff ahead of time. The RFI for rate quotes from MISO is an example that was given. [6]

Some staff witnesses state that under prior practice, a meeting was held the week before the board meeting with the board chairperson, the GM, and other senior staff. Sometimes a second board member would join the meeting. At that meeting, the agenda items would be determined. This was done so that staff would have adequate time to prepare for presentations and the board members would have adequate time to prepare for the meeting. Witnesses state that these last-minute agenda items leave staff scrambling and the board uninformed.

However, there appears to be no written policy on how items are placed on the agenda. This topic is not covered by the bylaws. Moreover, the open meetings act permits broad discussion of business in a regularly scheduled meeting. While some may characterize this practice as inefficient, we do not believe the evidence presented to us supports removal based on this allegation under KRS 96.172. It is recommended that the FPB adopt a policy to clarify how items are placed on the agenda to avoid issues like this in the future.[7]

D. Rosen asking that all open records requests related to Reed Smith go through Liebman is not grounds for removal.

After the December 29, 2017 special meeting (discussed in more detail below), Rosen sent an email on January 11, 2018 to the records custodian stating,

> Decisions concerning Open Records is a matter for the Board's attorney, James Liebman. The detail included in the invoice effects attorney client privilege and is confidential. It is not to be given out in an open records request by FPB. The status must be determined by James. Please refer to James.

That email was in response to the records custodian sending board members an email stating that a reporter from the *Frankfort State Journal* had sent an open records request for a Reed Smith invoice.

The interim GM responded to Rosen's email addressing this issue and other issues he saw concerning board overreach into FPB operations. Regarding the open records dispute, the interim GM stated states that the records custodian/staff attorney "has done an excellent job handing this [open records] process for over 12 years." He further states that the FPB tariff specifically states the name of the records custodian/staff attorney. He also attaches an opinion from the Office of the Attorney General related to the application of the attorney client privilege to public records provided by the official custodian/staff attorney. He states that until the full board directs him

[6] This agenda item actually was not brought up in new business, but was specifically listed on the meeting agenda.
[7] There is also an allegation that Rosen exceeded her authority by removing an agenda item related to Reed Smith. The bylaws do not give the board chair this authority. However, since there is no clear policy related to placing or removing items from the agenda, we do not believe the evidence would constitute grounds for removal.

otherwise, the FPB will continue to route open records requests through the official records custodian. We have no records showing Rosen responded to this email.

As previously discussed, the official custodian is responsible for the maintenance of public records. KRS 61.870(5). The official custodian is responsible for responding to open records requests in a timely manner. KRS 61.872(4). Neither the bylaws or the enabling statute gives the chairperson the right to unilaterally change the records custodian or to require someone other than the records custodian to respond to open records requests. It is within the board's authority to name the official records custodian, and absent their direction, the GM.

While the Commission could conclude that Rosen acted outside her authority, it is unlikely that this act would constitute gross negligence as required by the malfeasance jurisprudence. Her actions are further mitigated because she did not act on her request after the interim GM informed her of the correct process. Also, no actual violation of the act appears to have occurred. It is an unfortunate truth that violations of the open records act are all too common among public agencies. Without evidence showing some bad faith or gross negligence, we do not believe removal for a violation of the open records act would be upheld by the courts.

IV. Allegations Related to Mismanagement and Interference with Staff Operations.

A. Rosen asking staff to sign a joint letter to the City Commission is not itself grounds for removal.

The next allegation concerns Rosen presenting both the former GM and the current interim GM with what has been referred to as a "unity letter" to the Mayor and the Kentucky Capital Development Corporation ("KCDC"). Witnesses state, and the records reviewed corroborate, that on or about October 23, 2017, Rosen, the then-newly elected board chair, asked the former GM to sign a draft letter addressed to Mayor May and Terry Bradshaw of the Kentucky Capital Development Corporation. This letter essentially stated that the FPB members and staff were united in the "importance of [the] critical assessment" done by E3 and Reed Smith. The former GM refused to sign and responded to Rosen in writing, copying all the board members and several staff members. In his response, he states that "the statement 'FPB Staff and Board are united ..." is blatantly misrepresentative of the facts and is 180 degrees from reality." *Bannister ltr. to Rosen*, October 30, 2017, p. 1.

On November 1, 2018, Rosen approached the new interim GM with the same request and presented the same draft letter (with a new date). The interim GM refused to sign for similar reasons. Rosen then sent a revised version of the letter, in her capacity as board chair, purportedly on behalf of the board, to the Commissioners, Franklin County Judge/Executive, and the Franklin County Magistrates. This letter did not include any mention of the staff's position on the KyMEA matter.

Various staff members interviewed believe this was an attempt to further undermine the KyMEA contract and to force staff to agree with board actions to which they do not agree. Ms. Rosen states that this was merely an attempt to quell public fear that the FPB was attempting to

terminate its agreement with KyMEA. Regardless of her intentions, the act itself is not grounds for removal.

While there does not appear to be any specific board vote to permit or authorize this letter, there is nothing that prohibits a board chair, or another member of the board, from sending a letter to members of the public or to elected officials. Nor is there any law or policy which prohibits a board chair from requesting the GM to jointly sign a letter. Given that the board had previously voted unanimously to hire the outside consultant and the outside law firm, it was not unreasonable for her to send the letter from the board's perspective. Moreover, she did not need the permission of the staff to send this letter under her own signature. *See* KRS 96.176.

However, it was within the rights of the GM and the interim GM to not sign a letter with which they disagreed, and that was not official board policy. This letter is revisited in the next section.

B. Refusal to provide pertinent information to staff could constitute grounds for removal for neglect of duty or nonfeasance.

Various senior staff personnel stated that information related to E3 and Reed Smith was not shared with them. They state this makes it difficult to perform their job duties, communicate with rate payers, and communicate with KyMEA. The records support that the Reed Smith draft report was not given to the staff and the recent E3 report related to the proposed KyMEA Southeastern Power Administration ("SEPA") contract was not initially shared with staff. Current and past staff members and current and past board members interviewed state that they are not aware of the staff not receiving consultant or attorneys reports prior to the E3 and Reed Smith matters. Ludwig, the immediate past chair, also stated he was not aware of a prior instance where staff was prohibited from reviewing reports.

At the January 16, 2018 board meeting, Baldwin provided some insight into his rational for not providing staff with a copy of the report. Towards the end of a long statement preceding his motion to approve a Reed Smith invoice (this statement is discussed further later in this report), Baldwin states, "[i]t is also a breach of our fiduciary duties as board members to release documents to staff that have not been approved for their consideration." He later states, "[i]t's my hope that board members will not compromise their fiduciary duties by improperly disclosing the confidential board materials to staff and the general public." *See FPB Meeting Video*, January 16, 2018, 1:19:15. Thus, Baldwin bases his position to refuse disclosure of the report on his "fiduciary duty."

At the board meeting on February 22, 2018, sharing the Reed Smith report with staff was discussed extensively. *See FPB Meeting Video*, February 22, 2018, 2:07:30. Hale argued that the FPB is one organization and neither the board nor the staff cannot perform its duties if important information is not shared. *Id.* Liebman ultimately advised that the staff could receive the report without waiving the attorney/client privilege. *Id.* at 2:13:15. The board voted 3-1 to share the report with senior staff, but for them not to share with anyone outside the FPB. (Ludwig opposed

because he stated he wanted to waive the privilege and make the report public.). *Id.* at 2:29:00. At that same meeting the board voted to share E3's SEPA report with staff.

When Hale asked "since when has reports that the board has voted on not automatically gone to senior management." *Id.* at 2:40:30. Rosen responded that when she first became board chair, she worked on a letter to state that the board and staff were working toward the same goal and because that was rejected, "that puts the board in a different category." *Id.* at 2:40:39.

The letter Rosen is referencing is the "unity letter" discussed above. Again, this letter was not voted on as an official board action, but was a letter drafted by Rosen, presumably as the new chairperson. Rosen's statements at the February 22, 2018 board meeting indicate that senior staff, including the GM, whose responsibilities are defined by statute, have not received consultant's reports because staff disagreed with the statements in her proposed letter.

Thus, the available evidence shows that senior staff refused to sign their names to a letter because they disagreed with the content. As a result, Rosen, as chairperson, states that the board is in a different category than the staff. Baldwin states it would violated the board's fiduciary duty to send staff these reports. Thus, for the first time, final reports from consultants containing information related to the energy future of Frankfort are not shared with the GM and other senior staff unless placed to a board vote.

We intended to ask Rosen and Baldwin about their statements and to further explain the circumstances related to withholding these reports. As stated previously, they declined our interview request. We can find no support that sharing these reports with the professional staff violates a fiduciary duty. We also can find no support that reports cannot be shared because of a disagreement over the content of a letter. Nor is there any support that sharing information with staff, who is responsible for operating the plant, violates any fiduciary duty. Based on the information presented to us, the City Commission could conclude that Rosen and Baldwin are using a pretextual reason to withhold this information.

Without additional information, the existing evidence shows that there may be cause to remove Rosen and Baldwin on this ground for neglect of duty or nonfeasance.

As previously stated, neglect of duty is defined as "officer's neglect or failure to do and perform the duties of his or her office, or duties required of the office by law." 63C Am. Jur 2d., Public Officers and Employees, § 187. Nonfeasance is "the omission of an [official] act which a person ought to do." *Cottingim*, 142 S.W.2d at 177. KRS 96.176 imposes a duty on the board to manage and control the operation of the plant. As a board member, they are required to comply with certain fiduciary duties include the duty of good faith and the duty of care. *See* Frankfort Plant Board Policy No. 10.

Withholding important board records from these professional staff members, particularly regarding a matter which affects where the FPB will purchase its power of the next decade, could violate the duty of good faith and the duty of care.

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Senior staff is responsible for the day-to-day operations of the FPB. They must have pertinent information to perform their duties and responsibilities. For example, the GM's duties and responsibilities are outlined in statute and in FPB personnel policy. KRS 96.176(2) states in pertinent part:

> The board in the operation of such system may, in its discretion, engage the services of a professional engineer, qualified by education, training and experience in the operation, maintenance, improvement and extension of electric and water systems, as supervising engineer, upon terms and conditions of service such as may be satisfactory to the board.

The General Manager Class Specifications state he is:

> Responsible for the management and day to day operation of the utility. Responsible for planning, leading, controlling, and organizing all departments, functions, and activities to meet the organization's short term & long term objectives.

FPB Class Specification, General Manager. The General Duties and Responsibilities list numerous "Essential" duties, including the following:

- Develops in consultation with staff and Board of Directors, short and long-term strategic planning for the utility.
- Ensures efficient and effective operation of the Plant Board.
- Responsible for overall direction and management of the Frankfort Plant Board.

Id. In addition, the interim GM and the staff attorney were charged with representing the FPB before KyMEA. Yet, they were not provided this report regarding KyMEA's contracts.

Witnesses state that the Interim GM is a certified public accountant. The Assistant General Manager for Operations holds an electrical engineering degree. The former GM holds a master's degree in engineering. The staff attorney holds a master's in business administration and a law degree. Former and current board members compliment the professionalism and the ability of the FPB staff. However, staff claims it cannot adequately perform these job duties if the board withholds consultant reports.

The FPB's board fiduciary duties policy defines the duty of care as:

> A Board Member is legally bound to use that degree of care in governing the Organization which an ordinarily prudent and diligent person would exercise under similar circumstances.

The reports are obviously important to the energy future of Frankfort. The analysis in these reports affect whether the FPB continues with KyMEA, negotiates a new contract with

KyMEA, or leaves KyMEA altogether. Staff witnesses state they could not perform their responsibilities because information was withheld. The interim GM and the staff attorney resigned as the KyMEA director and alternative director because they state they could not adequately fulfill their duties without access to this information. Previously, the Assistant GM of Operations resigned his appointment as director to KyMEA, stating "in my professional and technical opinions the FPB Board has not chosen a path that in some areas is no longer in the best interest of KyMEA and thus its members." *Foster ltr. to Banister*, June 26, 2017.[8]

The Commission could conclude that a reasonable prudent board member would share these reports with senior staff who have extensive experience dealing in these matters and by not doing so, they have breached the duty of care.

The policy further defines the duty of good faith as:

> A decision by a Board Member may be actionable ... if the decision is motivated by "bad faith." "Bad faith" encompasses fraud, deception gross neglect, or acting from sinister motives.

In addition, without further explanation from Rosen and Baldwin, the Commission could conclude that excluding senior staff from review of these reports because there was a disagreement over the content of a letter is done in bad faith. Likewise, the Commission could conclude that citing "fiduciary duty" as a reason to withhold these reports is pretextual and done in bad faith. The statutes, the fiduciary duties, the GM's duties and responsibilities, and the history of the operation of the plant board all show that these reports "ought to" be shared with staff and failing to do so is the "omission of an official act." *See Cottingim*, 142 S.W.2d at 177.

Finally, the Commission should consider whether the recent agreement to disseminate these reports has mitigated or cured any failure to comply with these duties.

C. Baldwin's failure to share the Reed Smith draft report with other board members could constitute grounds for removal for neglect of duty or nonfeasance.

It is alleged that Baldwin withheld materials from fellow board member Hale regarding the Reed Smith engagement. Specifically, Hale states, and the records support, that she asked for material regarding the engagement numerous times. The records show she began asking for this information in November 2017. Baldwin sent Hale an email on December 8, 2017 listing various documents which were provided to Reed Smith for their review. Hale continued to ask for the emails between Baldwin and Reed Smith. On January 12, 2018, she sent an email once again asking for information. In the email, she stated that she would file an open records request if she did not receive them. A few days later, Liebman sent her email correspondence between Baldwin and Reed Smith.

[8] Baldwin's failure to discuss the RFI for MISO rates could also be considered in conjunction with the failure to share the reports.

One issue that arose related to a draft report Reed Smith sent to Baldwin on November 28, 2017. The Reed Smith invoice presented to the board on December 29, 2017 showed that Baldwin received this draft report, and then had a conversation with Reed Smith the next day. However, Hale states she was never told about this report. This was even though she was asking for information from Baldwin.

Baldwin, at the regularly scheduled meeting on January 16, 2018 states:

> When an unexpected draft letter was provided by Reed Smith, it was recalled as it was important to discuss the matter in closed session so that the entire board could be present and provide input. This would allow for the board to ask questions of Reed Smith, streamline any communications and would allow for transparency.
>
> For the last several weeks, the chair and I have been working with the board attorney and citizen expert on open meetings seeking advice on how best to present this information to the entire board without violating the open meetings laws and without waiving our attorney client privilege with Reed Smith.

See FPB Meeting Video, January 16, 2018, at 1:19:15.

Hale states that she ultimately did receive a copy of this draft report directly from Reed Smith. She also states that an attorney at Reed Smith stated that he had advised Baldwin not to share the report to other members of the board for fear that it would be leaked. We intended to seek clarification on this issue from Baldwin, but our interview request was denied.

With the information presented, the Commission could conclude that the failure to notify other board members of this draft report could constitute neglect of duty or nonfeasance. The same analysis as the previous section applies. The Commission could find his rationale that there may be a violation of the open meetings act as pretextual. There does not appear to be any basis for this statement. In fact, numerous emails reviewed as part of this engagement show that the board regularly shares information prior to board meetings for preparation purposes. In addition, Hale states that Baldwin had a long meeting with him in December 2017, but never mentioned the draft report. Finally, Baldwin's public statements outlining the rationale to withhold the report differ from the statements Reed Smith gave Hale.

However, the fact that he was advised not to disclose the report by Liebman, Reed Smith, and others may be a mitigating factor. Furthermore, while the Reed Smith invoice states that Baldwin did have a teleconference with the attorneys the day after receiving the report, we cannot ascertain the substance of that conversation without interviewing Baldwin. We have not been presented with any evidence that would show that Baldwin inappropriately affected the content of this report without board action. In addition, we have been presented with no evidence that the substance of the Reed Smith draft report changed from November 29, 2017 to when it was disseminated to the full board. Therefore, we have been presented with no evidence that there are grounds for removal for malfeasance.

Again, however, had the board followed its normal procurement process and staff been involved in this process, it is unlikely this issue would have occurred.

D. Evidence is not sufficient to remove Baldwin based on him asking the Assistant General Manager for Operations to withhold support for the KyMEA All Requirements Contract.

It is alleged that Baldwin called the Assistant General Manager for Operations a few days before the FPB was set to vote on the KyMEA All Requirements contract. Essentially, witnesses state that Baldwin wished for the assistant GM to agree to pull the contract from the agenda so a vote could not take place. They state he called the Assistant GM and persistently requested the agenda item be removed. The Assistant GM refused. We were unable to ask Baldwin about this incident because he refused our interview request. However, no witness stated that Baldwin threatened the Assistant GM with some type of adverse employment action. Nor has anyone pointed us to any specific adverse action that has taken place as a direct result of the Assistant GM's refusal. We have not been provided with any evidence that this action supports removal under KRS 96.172.

E. Rosen asking staff not to speak at public events is not grounds for removal.

The next allegation concerns Rosen contacting the former assistant general manager for telecom and asking him not to speak at a public event. In an interview, the former assistant general manager stated that on October 23, 2017, Rosen left a message for him to call her. When he returned her call, she initially thought he was going to speak to the Frankfort Chamber of Commerce regarding the KyMEA issue. He informed her that he was not speaking about KyMEA, but about the fiberoptics project. She still asked him not to speak.

He informed her that he had worked on the project a couple of years and had the most experience on his staff. He also stated his boss had approved the presentation earlier that day. She also asked him not to speak at the KCDC. Ultimately, while he did not agree with her decision, he felt it was her prerogative, as board chair, to tell him not to speak at these public events. He informed Rosen that he did not know why he was being silenced in his last week, that he was retiring in a few days, and he would speak his mind freely at that time.

The former assistant GM recorded the conversation and provided us with a copy of that recording. In the recording, Rosen states she is "concerned with all the turbulence that is happening over at the Frankfort Plant Board." *Rosen call with Higgenbotham*, October 23, 2017, at 0:56. She further states, she was "real concerned about anything that he might present would rile up people about the board versus the staff and KyMEA." *Id.* at 1:07. She was concerned that there are "bad feelings about the plant board currently" and about bringing up anything "controversial." *Id.* at 1:50. She says she doesn't think it is good to make a presentation concerning anything about Frankfort Plant Board to the Chamber at this time. *Id.* at 2:07.

The Assistant GM told Rosen that everything he was going to discuss was on the FPB's website. Rosen stated "she was hoping it has a calming effect on all of the publicity that the FPB

and the board itself is getting currently and to limit or reduce that discussion level." *Id.* at 5:36. The Assistant GM told her he still did not understand why he couldn't give these presentations, but in his opinion they needed to work as a board to regain credibility with the staff and it does not help "by shutting him down." *Id.* 6:17.

The Assistant GM for telecom states that in his 23 years of service to the FPB this is the first time he had ever been asked not to speak. His resume shows that he holds a masters in communication from Morehead State University. In addition to his work at the plant board, he was the Telecom Committee Chairman of the Kentucky Municipal Utility Association. He has given numerous presentations throughout Kentucky and across the nation related to telecom services. In addition, he stated to us that he regularly spoke to the Frankfort/Franklin County Chamber of Commerce and the KCDC.

There was no official board action on this matter. The FPB bylaws do not discuss the authority of the board chairperson to dictate staff presentations to the public. The staff attorney states there is no formal communications policy which has been adopted by the board. However, the General Manager's duties state that he is responsible for "maintain[ing] an effective relationship with customers and the public." This is in addition to his duties listed above. Thus, it appears that the GM has the authority to approve public speaking engagements of the staff. It does not appear the chairperson has the authority to unilaterally, without an action of the full board, override this decision. The evidence does not show that Rosen threatened any type of adverse employment action against the Assistant GM.[9]

Based on the foregoing, the Commission could conclude that Rosen was acting outside of her authority in directing the Assistant GM not to speak to the Chamber of Commerce. However, based on our review of the malfeasance jurisprudence, we do not believe this action rises to the level of gross negligence as required to prove malfeasance. The lack of policy describing the chairperson's authority to speak on behalf of the FPB makes the success of this claim difficult.

Many agencies have written policies in place related to speaking to the public and the media. These generally allow the subject matter experts to present on issues with the approval of the department head or the communications director. Many of these policies are similar to the informal procedure followed by the Assistant GM and the GM prior to Rosen's involvement. The FPB may wish to consider enacting such a policy.

F. Baldwin's statements about certain staff members and another board member at the January 16, 2018 FPB meeting could constitute grounds for removal for malfeasance.

At the January 16, 2018 FPB meeting, Baldwin read from prepared remarks before moving that the board pay an invoice submitted by Reed Smith. *See FBP Meeting Video*, January 16, 2018, at 1:19:15. The remarks proceeded his motion that FPB pay the invoice. Included in

[9] The Assistant GM had already announced his retirement effective a few days later.

the remarks, which were later transcribed by FPB staff, were various allegations against two FPB staff members and fellow board member Hale. Baldwin alleged that staff members improperly called and noticed a special meeting on December 29, 2017, which violated the open meetings act. *Id.* He also stated "the staff attorney and interim GM fabricated the law in an effort to modify the agenda to support their effort to undermine board policy" at a November 20, 2017 planning meeting. *Id.*

Finally, he stated "a board member has acted unilaterally and without the support of the board and furthered a personal project with Reed Smith which may result in unauthorized expenditure of ratepayer resources to fund this fishing expedition." *Id.* Based on the statements of witnesses and the records reviewed, we believe this statement directed at Hale. Hale emphatically disputed these statements. *Id.* Baldwin statement continues with a defense of his actions related to the Reed Smith engagement. *Id.*

Several witnesses allege that Baldwin's statements are false, amount to slander, and violate basic employment law.

Regarding whether staff "improperly" called a special meeting, we have been presented with no evidence to support this statement. Witnesses interviewed assume Baldwin is referencing the December 29, 2017 special meeting. However, email records show that the full board was notified of the request for a special meeting on Friday, December 22, 2017. Rosen, by email, agreed to the special meeting, which was held December 29, 2017. The bylaws state that a special meeting may be called by the board chairperson or two board members. *Bylaws*, Article 7. Thus, the evidence with which we have been presented shows that the board chairperson agreed to call the special meeting on December 29, 2017, which was compliant with the bylaws.

Regarding staff "fabricating the law" to modify the agenda, we also find no evidence to support Baldwin's statement. Witnesses believe Baldwin is referencing the inclusion of the Reed Smith invoice on the December 29, 2017 special meeting. Baldwin's complete statement indicates this is what he is referencing. *See FPB Meeting Video* at 1:19:15. A staff witnesses explains that the FPB first received this invoice on December 27, 2017 and made the decision to place it on the December 29, 2017 special meeting agenda for several reasons. First, the FPB staff could not approve the invoice per the procurement policy because staff was not involved in Reed Smith's work. Second, staff were concerned that they would owe interest if the Reed Smith invoice was not approved. Finally, staff believed the full board needed to be aware of the matter related to Reed Smith, as the invoice showed that Baldwin had received a draft report.

The bylaws do not discuss how items get placed on the agenda. They only state that the chairperson has the right to add agenda items if he believes that any particular matter constitutes an emergency situation which requires immediate attention by the Board. *Bylaws*, Article 13. The GM's duties include that he:

1. Maintains communication with Board of Directors, to keep the Board informed of the operation of the Plant Board.

2. Secures Board approval, for matters regarding company insurance, employee benefits, budget, rates, legal issues, contracts, Plant Board policy, and other issues as necessary.
3. Supervises content, development, and presentation of Board package at monthly meeting.

FPB Class Specification, General Manager, p. 1. Under any of these duties and responsibilities, the interim GM would have the ability to add an item to the agenda for Board approval. If he had to go to the board chair every time he felt an agenda item needed to be discussed, the chair would effectively control the agenda items placed to a vote by the full board, and therefore, control the board. Neither the bylaws or KRS 96.171 *et seq.* provide the board chair this power.

While we were not afforded the opportunity to ask Baldwin what he meant by "fabricating the law," the evidence we have been presented does not support this statement.

We also have not been presented with any evidence to support the statements that Hale furthered a personal project with Reed Smith which may result in an unauthorized expenditure. The only records with which we have been presented relate to Hale asking for records of communications with Reed Smith and her desire to talk to the attorneys at Reed Smith regarding their engagement. These communications clearly relate to Reed Smith's contract with the FPB to issue a report regarding the KyMEA contracts. Therefore, the evidence shows it is not a "personal project."

In addition, it was discussed at the same board meeting that Reed Smith agreed to cap its fees at $50,000, which it had already exceeded. Baldwin and the other board members were fully aware of this. Thus, there could not have been an "unauthorized expenditure."

We were unable to ask Baldwin to clarify these comments because he denied our interview request. With the evidence available, the Commission could conclude that these statements were false.

False statements made about board business can constitute malfeasance in office. *See Bailey v. Commonwealth*, 790 S.W.2d 233 (Ky. 1990). In *Bailey*, the county judge executive made defamatory and false statements about the county attorney. *Id.* The opinion does not list the content of these statements were, but it is clear that they were personal in nature and the court does state that they were repugnant. *Id.*[10] Moreover, the county judge admitted these statements were false. *Id.* The Court held that the county judge executive could not be convicted of malfeasance in office because the statements did not relate to official business, and were therefore, not official acts. *Id.*

[10] The overruled Court of Appeals opinion in the *Bailey* case states that the county judge accused the county attorney of being a homosexual and having extramarital affairs. *See Bailey v. Commonwealth*, 1988 Ky.App. LEXIS 198 (Ky. App., December 22, 1988), *overruled by Bailey v. Commonwealth*, 790 S.W.2d 233 (Ky. 1990) (cited only to provide context to the statements referenced in the Supreme Court case).

The statements made here are different from the statements made in *Bailey.* The statements here are not necessarily personally repugnant statements. They do, however, relate to board business. Therefore, we believe they constitute official acts as described in *Bailey.* In addition, the Commission could conclude that the other elements of malfeasance are met. The statements accuse staff of "fabricating the law" and another board member of an "unauthorized expenditure." These are serious allegations. Thus, the Commission could conclude that these are unjust and made with gross negligence.

In addition, these public statements may open the FPB up to potential legal action by employees. One staff member stated to us that Baldwin was creating a "hostile work environment" and that these statements were slanderous. It is, however, outside the scope of this report to analyze any potential employment action.

G. *Rosen's alleged conversations with General Managers from other municipal utilities are not grounds for removal.*

Some witnesses state that Rosen contacted General Managers at other municipal utilities to discuss their views on KyMEA and the KyMEA contracts. As should be expected, these conversations made their way back to FPB staff. A witness states that at least one of these general managers informed him that Rosen made her concern regarding the KyMEA contract known. However, we have been presented with no evidence that any of these conversations were inappropriate. Some may claim this is unorthodox. However, the only evidence we have been presented with related to this allegation indicates that Rosen was doing her due diligence and seeking opinions on an important matter for rate payers. There is nothing that prohibits her, or other board members, from seeking opinions on these matters from other municipalities. In addition, there is nothing inappropriate about Rosen expressing her personal views on board matters such as the KyMEA contract.

H. *Allegations related to manufacturers leaving Frankfort based on Rosen's and Baldwin's actions are too speculative to support removal.*

There is an allegation that Rosen's and Baldwin's actions surrounding the KyMEA contracts create uncertainty and could cause manufacturers to look elsewhere. It is alleged this causes serious economic development issues for the City. We have been presented with evidence that some concerns have been raised by manufacturers regarding the stability of the FPB. However, we have been presented with no evidence that Baldwin and Rosen's actions have actually caused any loss of jobs for Frankfort residents or any loss of revenue for the City. Thus, while this may be a legitimate concern, we do not believe the evidence related to this allegation supports removal under KRS 96.172.

I. *Additional Allegations are not cause for removal.*

There are additional allegations, which on their face, even if true, are not cause for removal under KRS 96.172(9). We have, therefore, not analyzed these allegations.

FINDINGS AND RECOMMENDATIONS

Conclusion

Thank you for the opportunity to submit this report. We hope you find it useful in your consideration of these issues.