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October 27, 2017

Todd A. Bianco
Coordinator
Rhode Island Energy Facility Siting Board
89 Jefferson Boulevard
Warwick, RI 02888

Re: Invenergy Thermal Development LLC – Clear River Energy Center
Docket No. SB-2015-06

Dear Dr. Bianco:

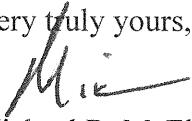
As you know, this office represents the Town of Burrillville in this docket.

Enclosed in both redacted and confidential unredacted form are an original and three (3) copies of a Motion of the Town of Burrillville for Dismissal or Denial of Invenergy's Application for Failure to Comply with an Order of the EFSB and EFSB Rules.

Electronic copies of the redacted motion have been sent to the service list.

If you need any further information, please do not hesitate to contact me.

Very truly yours,


Michael R. McElroy

cc: Service List

REDACTED VERSION

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD**

In Re: Invenergy Thermal Development LLC's :
Application to Construct the Clear River Energy : Docket No. SB-2015-06
Center in Burrillville, Rhode Island :

**MOTION FOR DISMISSAL OR DENIAL OF INVENERGY'S APPLICATION FOR
FAILURE TO COMPLY WITH AN ORDER OF THE EFSB AND EFSB RULES**

Now comes the Town of Burrillville ("Town") and hereby files this Motion for Dismissal or Denial of Invenergy Thermal Development LLC's ("Invenergy") Application for Failure to Comply with an Order of the EFSB and EFSB Rules.

I. FACTS

On August 9, 2017, Invenergy answered Town data request No. 32-9 ("DR 32-9") as follows:

Request 32-9 In light of the litigation concerning the proposed Johnston water supply arrangement, have any attempts been made to secure an alternate water supply? If so, please provide details.

Response 32-9 Invenergy has not made any attempts to secure alternative water sources as a result of the litigation. As indicated in our response to the Town's Data Request No. 22-57, Invenergy continues to engage in sound, responsible business practices through the exploration of additional contingent water sources to supplement the contingency contained in our previously filed water supply plan.¹

On August 11, 2017, the Town filed data request No. 33-1 ("DR 33-1") specifically asking Invenergy to "identify any and all additional possible sources of water that have been

¹ Invenergy refers to its response to the Town's Data Request No. 22-57, which states:

Request 22-57 Is Johnston your one exclusive primary water source or are you still considering any other water sources?

Response 22-57 Johnston is Invenergy's primary supplier. Invenergy has identified a contingent/redundant source, Benn Water & Heavy Transport Corp. Invenergy is still considering additional contingent/redundant sources.

REDACTED VERSION

considered or explored including, but not limited to, the location of the water supply.” See *Town’s 33rd Set of Data Requests to Invenergy*, at 1.

On August 15, 2017, Invenergy filed an objection to DR 33-1. The basis of Invenergy’s objection to DR 33-1 was that Invenergy should not be required to produce information related to potential “contingent/redundant [water] sources that have not resulted in any formal agreement.” *Objection of Invenergy to the Town’s DR 33-1*, at 1. In support of its objection, Invenergy twice committed to the EFSB that, while it opposed producing information about water sources for which there was no formal agreement, any agreement with an additional contingent/redundant water supplier would be provided to the EFSB and the parties to this docket.²

Two days later, on August 17, 2017, the three-member Water Board for the City of Fall River voted 2-to-1 to approve an agreement in which the Water Department of Fall River would provide water for the Clear River Energy Center (“CREC” or “Project”) as a designated alternate water supplier for CREC (“CREC-Fall River Water Agreement” or “Agreement”).³ Yet Invenergy did not produce the CREC-Fall River Water Agreement to the EFSB or the parties to this docket, despite its commitment and obligation to do so.⁴

On August 21, 2017, the Town filed a motion to strike Invenergy’s objection and to compel responses to DR 33-1 (“Town’s Motion to Strike and Compel”).

² “If Invenergy actually enters into an agreement with an additional contingent/redundant supplier, it will supplement its Water Supply Plan and its response to the Town’s Data Request No. 32-9 to disclose the existence of that agreement and supplier.” *Objection of Invenergy to the Town’s DR 33-1*, at 2. “If Invenergy reaches an agreement with an additional contingent/redundant supplier, Invenergy will provide that information to the Board (and the Town). *Id.*, at 5.

³ The CREC-Fall River Water Agreement is attached hereto as Exhibit A.

⁴ The Town was not aware of the secret CREC-Fall River Water Agreement until October 20, 2017, when the Agreement was provided to the Town by a Burrillville resident who made a public records request to Fall River.

REDACTED VERSION

On September 8, 2017, Invenergy filed an objection to the Town's Motion to Strike and Compel. The basis of Invenergy's objection to the Town's Motion was that Invenergy should not be required to disclose information "on what Invenergy might, or might not, be 'considering' or 'exploring' as an additional contingent process water source." *Objection of Invenergy to the Town's August 21, 2017 Motion*, at 10. Invenergy argued that the EFSB and the parties were only entitled to review agreements for CREC that had been "entered into" and the objection incorrectly asserted "the absence of an agreement with any other water supplier" at that time. *Id.* In furtherance of its point, Invenergy again pledged that if it entered into an agreement with an additional contingent/redundant supplier, it would supplement its water supply plan and disclose the contract and water supplier. *Id.* at 9-10. However, Invenergy again failed to disclose or produce the CREC-Fall River Water Agreement to the EFSB or the parties, despite its commitment and obligation to do so.

On September 15, 2017, the Board heard oral argument on the Town's Motion to Strike and Compel. During the hearing, Invenergy's counsel again incorrectly claimed that there was no agreement with any other additional/contingent water suppliers for CREC, pledging that: "If there is another alternative water supply arrangement that agrees to provide water, you will see that agreement. We will provide that to you." *See Hearing Transcript, September 15, 2017*, at 83, lines 9-13. Yet again, Invenergy failed to disclose the existence of or produce the CREC-Fall River Water Agreement, despite its commitment and obligation to do so. Instead, Invenergy continued its charade that no such agreement existed.

Following oral argument on September 15, 2017, the EFSB denied the Town's Motion to Strike and Compel based in part on Invenergy's incorrect assurances. As Chairperson Curran ordered: "If there were an additional agreement reached with any other entity for another water

REDACTED VERSION

supply plan, then that certainly would have to come before the Board.” *Id.* at 95, lines 5-9. Despite this order, Invenergy continued to hide the existence of the CREC-Fall River Water Agreement.

On September 28, 2017, Invenergy filed a supplement to its water supply plan (“September 28 Water Supply Plan Supplement” or “Supplement”). The majority of this Supplement was redacted and withheld from the public. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On October 19, 2017, the EFSB issued its written Decision and Order denying the Town’s Motion to Strike and Compel. The Order notes that “Invenergy represented it will supplement the information previously provided should it enter into any further agreements regarding alternative water supplies.” *Decision and Order No. 116*, at 2-3. The Decision further orders, in part, that “if Invenergy had entered into another water supply agreement, that agreement would have to be presented to the Board.” *Id.*, at 3.

On October 20, 2017, the Town received a copy of the CREC-Fall River Water Agreement.⁵ The Town was shocked and dismayed to learn for the first time that the CREC-Fall River Water Agreement had been in place **for over two months**, despite Invenergy’s repeated written and verbal claims to the EFSB and the parties that no such agreement existed.

⁵ The CREC-Fall River Water Agreement was procured by a Burrillville resident via an access to public records request to Fall River and provided to the Town.

REDACTED VERSION

To date, Invenenergy has still not filed the CREC-Fall River Water Agreement with the EFSB or the parties, nor has it supplemented its data responses, despite repeated promises that Invenenergy would provide contingent water agreements for the Project if and when they were entered into.

II. ARGUMENT

As set forth above, Invenenergy has repeatedly failed to disclose the CREC-Fall River Water Agreement to the EFSB and the parties for over two months, despite multiple opportunities to disclose it and a continuous obligation to do so. This conduct seriously undermines the public's faith in the siting process. The Town asks that the EFSB put a stop to Invenenergy's continued pattern of evasive behavior. Invenenergy must be held accountable in order to restore the public's faith in this Board's ability to treat the application process in an open, fair and transparent manner and make fully informed decisions that are in the best interest of the state and its residents.

A. Invenenergy and its proposed CREC energy facility are the intended beneficiaries of the Fall River Water Agreement.

An intended beneficiary is a third-party that, while not a named party to a contract, is intended to benefit from that contract. *Black's Law Dictionary*, 2nd Ed., at 64-65 (defining 'third-party beneficiary' and 'intended beneficiary'). "If the third party is an intended beneficiary, the law implies privity of contract." *Davis v. New England Pest Control Co.*, 576 A.2d 1240, 1242 (R.I. 1990). For this reason, an intended beneficiary "acquires rights under the contract as well as the ability to enforce the contract once those rights have vested." *Black's Law Dictionary*, at 64. Invenenergy and its proposed CREC energy facility are the intended beneficiaries of the CREC-Fall River Water Agreement.

REDACTED VERSION

As discussed above, the CREC-Fall River Water Agreement was entered into as of August 17, 2017. The Agreement was approved by the three-member Water Board by a vote of 2-to-1. Under the Agreement, Fall River acknowledged that it was an alternate/contingent water supplier for CREC.⁶

Invenergy's corporate parent and owner (Invenergy Thermal Global LLC) is also the corporate parent and owner to Clear River Energy LLC, which is a "special purpose project company" formed to "conduct development activities related to the Clear River Energy Center Project." *Invenergy Response to EFSB Data Request 2-1*. Invenergy is "affiliated and related to" Clear River Energy LLC. *Id.* The purpose of the CREC-Fall River Water Agreement was to procure an additional contingent water supply for Invenergy's proposed energy facility, CREC.⁷ Invenergy is the entity that is the applicant in this docket seeking approval of CREC by the EFSB. *Id.* Therefore, although Invenergy was not specifically named in the Agreement, Invenergy is the intended beneficiary of the CREC-Fall River Water Agreement.⁸

For example, under the CREC-Fall River Water Agreement, Fall River agreed to provide and sell water to Benn Water & Heavy Transport Corp. ("Benn") to be used in connection with CREC.⁹ The term of the CREC-Fall River Water Agreement is based on the commercial

⁶ "Notice of Alternate Supplier Status: The City acknowledges and agrees that as a contingent water supplier for the Project, Benn's daily water demand may be as low as 0 GPD. Notwithstanding, Benn shall remain obligated to pay the Capacity Reserve Payment." CREC-Fall River Water Agreement, at 3.

⁷ "WHEREAS, Benn requires a reliable water supply source to provide a contingent water supply up to an anticipated demand for a commercial project to which it has contracted to sell water (the "Project"); WHEREAS, the Project is a major energy facility and Benn has entered into a contract to provide water supply thereto known as the Clear River Energy Center located in Burrillville, Rhode Island;" CREC-Fall River Water Agreement, at 1.

⁸ [REDACTED]

⁹ "The daily water demand for the Project will be supplied by trucks that are filled at a location located within the City limits." CREC-Fall River Water Agreement, at 2.

REDACTED VERSION

operations date of CREC.¹⁰ The Agreement details specific requirements for water provided by Fall River for use by and in connection with CREC.¹¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²

[REDACTED]

[REDACTED] The CREC-Fall River Water Agreement permits Benn to resell the water provided by Fall River to Invenergy.¹³ In addition, the CREC-Fall River Water Agreement permits Benn to sell, convey,

¹⁰ “Term. This Agreement shall be for an initial term (“Initial Term”) commencing on the Effective Date and continuing until the third (3rd) anniversary of the commercial operations date of the Project (the “Term”).” CREC-Fall River Water Agreement, at 3. The Effective Date is defined elsewhere in the Agreement as August 17, 2017. CREC-Fall River Water Agreement, at 1.

¹¹ “City acknowledges it’s requirement to comply with all applicable state and federal drinking water standards (“Potable Water”) for use by and in connection with the Project.” CREC-Fall River Water Agreement, at 1-2.

¹² “Average Operating Conditions: Benn estimates water usage rates during the summer season of approximately 18,720 gallons per day (“GPD”) In turn, Benn estimates that up to three (3) truck deliveries per day will be required to satisfy expected water use needs of the Project. In order to approximately respond to certain operational occurrences and weather related impacts, however, Benn may require up to 40,000 GPD which may necessitate up to five (5) truck deliveries per day (the “Average Demand Flow Rate”).” CREC-Fall River Water Agreement, at 2. “Maximum Demand Flow Rate: Upon the occurrence of certain events at the Project, Benn may require up to 88,000 GPD, which in turn may necessitate up to eleven (11) truck deliveries per day (the “Maximum Demand Flow Rate”).” CREC-Fall River Water Agreement, at 2.

¹³ “The City has the unrestricted right and authority to supply Potable Water up to the Maximum Daily Flow Rate to Benn for any use (including, without limitation, for Benn’s use or for resale by Benn to a third party).” CREC-Fall River Water Agreement, at 4.

REDACTED VERSION

assign or transfer its rights under the Agreement to Invenergy without obtaining any approval or consent.¹⁴

Under the CREC-Fall River Water Agreement, Fall River would receive a capacity reserve payment of \$25,000 annually from Benn.¹⁵ In exchange, Fall River agreed to reserve water capacity of up to sixteen trucks per day for CREC.¹⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The purpose of the CREC-Fall River Water Agreement is to provide water for Invenergy's proposed energy facility, CREC. Thus, Invenergy and its proposed CREC energy facility are the intended beneficiaries of the CREC-Fall River Water Agreement.

B. Invenergy concealed the CREC-Fall River Water Agreement from the EFSB and the parties.

Invenergy had multiple opportunities to provide the CREC-Fall River Water Agreement to the EFSB, but it did not do so. The CREC-Fall River Water Agreement is dated August 17, 2017. Since that time, Invenergy has filed an objection to the Town's Motion to Strike and Compel on September 8, 2017, and presented oral argument to the EFSB on September 15, 2017. Invenergy has also been subject to orders by the EFSB since September 15, 2017 requiring

¹⁴ "Non-Collateral Assignments. Benn shall have the right, without the prior consent of the City, to sell, convey, assign or transfer any or all of its rights hereunder provided such transfer is related to the Project. Benn shall be relieved of all of its obligations arising under this Agreement from and after the effective date of such transfer, provided such rights and obligations have been assumed by such transferee." CREC-Fall River Water Agreement, at 5.

¹⁵ "Capacity Reserve Payment. Commencing on March 1, 2018 and continuing until the expiration or termination of this Agreement, Benn shall pay to the City twenty-five thousand and 00/100 dollars (\$25,000.00) per year (the "Capacity Reserve Payment") for the City to reserve (for Benn's potential use in accordance with this Agreement) water capacity up to the Maximum Demand Flow Rate and otherwise act as a contingent supplier of Water for the Project." CREC-Fall River Water Agreement, at 3.

¹⁶ Fall River receives this payment even if CREC never utilizes water from Fall River.

REDACTED VERSION

disclosure of any and all contingent water supply agreements in connection with CREC. Yet, despite its obligations and opportunities, Invenergy kept the CREC-Fall River Water Agreement a secret from the EFSB and the parties for over two months.

It is unclear why Invenergy withheld the CREC-Fall River Water Agreement from the EFSB for so long. Perhaps Invenergy has faced significant challenges in its search for reliable water sources for the Project. Invenergy may be concerned that revealing Fall River as CREC's contingent water source could invite public pressure on Fall River to reject the CREC-Fall River Water Agreement. CREC cannot operate without a reliable water source. Invenergy could be justifiably concerned about the success of its application if it does not secure firm water sources for the Project. This could explain why Invenergy has apparently attempted to conceal its Fall River water source via a straw man (Benn).

A second possible reason Invenergy withheld the CREC-Fall River Water Agreement could be related to the timeline described above. The CREC-Fall River Water Agreement was in place when Invenergy filed its objection to the Town's motion on September 8, 2017, and when Invenergy presented oral argument to the EFSB on September 15, 2017. In denying the Town's motion, the EFSB relied on Invenergy's assurances that no agreements with other water suppliers existed in its written objection and at oral argument. Rather than admit that it misled the EFSB at that time, perhaps Invenergy hid the CREC-Fall River Water Agreement, hoping that the Agreement's August 17, 2017 execution date would not be discovered.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REDACTED VERSION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Why would Invenenergy risk getting caught making false and misleading statements about essential information to the EFSB and the parties at this stage in the proceedings? Sadly, the reason may be that Invenenergy has concealed and withheld essential information time and again in this docket, and thus far Invenenergy has not been held responsible. Therefore, it appears that Invenenergy no longer deems it necessary to be fully transparent with the EFSB, the parties, and the public. This is unacceptable. Invenenergy should now be held fully accountable for its actions.

C. Invenenergy had an obligation to produce the CREC-Fall River Water Agreement to the EFSB and the parties.

Invenenergy had an obligation to produce the CREC-Fall River Water Agreement to the EFSB and the parties. The purpose of discovery is to “make trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *U.S. v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958). “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

REDACTED VERSION

The EFSB Rules provides that the “relevancy of [data] request[s] shall be determined under the standards established for such determinations under Rule 26 of the Superior Court Rules of Civil Procedure.” EFSB Rule 1.27(b)(3). Rhode Island Superior Court Rule of Civil Procedure 26(e) requires a party to supplement or amend a prior discovery response when “the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true or complete and the circumstances are such that a failure to amend the response is in substance a knowing concealment.” R.I. Sup. Ct. R. of Civ. Pro. 26(e)(2).

“A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.” R.I. Sup. Ct. R. of Civ. Pro. 26(e)(3). Here, Invenergy had an obligation to supplement its prior data response related to water sources for CREC. The EFSB ordered on September 15, 2017 that “If there were an additional agreement reached with any other entity for another water supply plan, then that certainly would have to come before the Board.” Hearing Transcript, September 15, 2017, at 95, lines 5-9. Invenergy also promised on multiple occasions to provide contingent water agreements to the Board if and when they were entered into. The Town (and the EFSB) mistakenly believed that Invenergy would follow through on its commitment to produce contingent water agreements when they were entered into. Invenergy has not provided an amended response disclosing the CREC-Fall River Water Agreement as a supplement to DR 22-57, 32-9, or 33-1 or to any other data request related to water sources for the Project. Invenergy therefore has failed to meet its obligation to disclose the existence of and produce a copy of the CREC-Fall River Water Agreement.

REDACTED VERSION

D. Invenergy had an obligation to ensure its filings and arguments to the Board were grounded in fact.

Under R.I.G.L. § 9-29-21, Invenergy has a legal obligation to ensure that all of its filings and arguments to the EFSB are grounded in fact. Invenergy has not done so. Instead, Invenergy concealed the existence of the CREC-Fall River Water Agreement from the EFSB. Invenergy has repeatedly made misleading statements affirmatively denying the existence of the CREC-Fall River Water Agreement to the EFSB and the parties on multiple occasions over the past two months. Further, Invenergy has still to this day never corrected its misrepresentations, nor provided the EFSB or the parties with a copy of the CREC-Fall River Water Agreement.

Invenergy has taken a consistent course of action at every stage in this docket. Invenergy has withheld and/or refused to provide information with the apparent intent of getting CREC licensed by the EFSB at all costs. This behavior is troubling. To allow such conduct to go unchecked will undercut the public's trust in the entire facility siting process.

E. Dismissal or denial of Invenergy's Application is appropriate because Invenergy failed to comply with an Order of the EFSB and its Rules.

The pattern of conduct outlined above demonstrates Invenergy's disdain for the EFSB, its Rules, its Orders, the parties, the public, and the entire facility siting process. Under R.I.G.L. § 42-98-16, lack of compliance by an applicant constitutes grounds for dismissal of licensing proceedings.¹⁷ Further, the EFSB Rules of Procedure make it clear that the EFSB is authorized to "issue orders to remedy noncompliance with [the EFSB] rules, [...], the [Energy Facility Siting] Act or orders of the Board." EFSB Rule 1.15(a)(8).

¹⁷ "Failure to comply with any promulgated board rule, regulation, requirement or procedure for the licensing of energy facilities shall constitute grounds for suspension or dismissal, with or without prejudice in [the EFSB's] discretion, of licensing proceedings, provided that the applicant shall have a reasonable opportunity to show cause for and remedy the lack of compliance." R.I.G.L. § 42-98-16

REDACTED VERSION

Moreover, R.I.G.L. § 42-98-10(d) provides that “failure or refusal of the applicant to provide requested information may be considered as grounds for recommending denial.” Despite multiple opportunities to do so, Invenergy failed to properly respond to and supplement the Town’s data requests and failed to comply with the EFSB’s orders related to alternative water sources for CREC. Such failures are grounds to deny an application.

III. CONCLUSION

For the reasons set forth herein, the Town respectfully requests that Invenergy’s application be dismissed or denied with prejudice and this docket closed.

The Town requests oral argument on this Motion.

Respectfully submitted,
Town of Burrillville
By its attorneys



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Date: October 27, 2017

CERTIFICATE OF SERVICE

I certify that the original and ten photocopies of this Motion were filed by U.S. Mail, postage prepared, with the Coordinator of the EFSB, 89 Jefferson Boulevard, Warwick, RI 02888. In addition, electronic copies of this Motion were served via email on the service list for this docket. I certify that all of the foregoing was done on October 27, 2017.

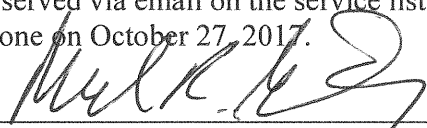

Michael R. McElroy, Esq.

Exhibit A

CREC-Fall River Water Agreement

WATER SUPPLY AGREEMENT

THIS WATER SUPPLY AGREEMENT (the "Agreement") is entered into as of August 17, 2017 (the "Effective Date") by and between the City of Fall River, a municipal corporation organized under the laws of the Commonwealth of Massachusetts, County of Bristol, acting through its Watuppa Water Board (hereinafter the "City") and Benn Water & Heavy Transport Corp., a corporation organized under the laws of the State of Rhode Island ("Benn"). The City and Benn may each be referred to herein individually as a "Party", and collectively as "Parties".

RECITALS

WHEREAS, the City owns and operates a treatment works in order to treat and supply, potable water to out-of-City customers pursuant to Chapter 74 of the Revised Ordinance of the City of Fall River, Massachusetts, 1999, as amended (the "Water System");

WHEREAS, Benn is in the business of water re-sale for residential, commercial and industrial processes, including but not limited to supplementing supply of water for residences, providing water for construction sites, supplementing process water from manufacturing customers, providing water to commercial ice skating rinks, and providing water for commercial irrigation purposes;

WHEREAS, Benn supplies water to such processes in an amount between 5-8 million gallons annually;

WHEREAS, Benn requires a reliable water supply source to provide a contingent water supply up to an anticipated demand for a commercial project to which it has contracted to sell water (the "Project");

WHEREAS, the Project is a major energy facility and Benn has entered into a contract to provide water supply thereto known as the Clear River Energy Center located in Burrillville, Rhode Island;

WHEREAS, based on Benn's historical volume of water sales, plus the demand represented by the Project, Benn requires a contingent water supply for the Project, as well as its existing business;

WHEREAS, the protocols adopted pursuant to Section 3(a)(ii) of this Agreement, Benn shall submit the list of facilities to which the water supplied by the City was delivered to by Benn with the payment of said invoice; and

WHEREAS, the City has the available water supply capacity and has agreed to supply Benn with potable water on the terms and conditions set forth herein.

NOW THEREFORE, in consideration of these promises and mutual benefits to be derived by the parties hereto an Agreement is prepared in the following form:

1. Recitals. The foregoing recitals are hereby incorporated herein by this reference.
2. Water Supply.
 - (a) Agreement to Provide, Sell and Supply. The City agrees to provide and sell to Benn, water sufficient to satisfy the demand set forth herein.
 - (b) Flow Rate. During the Term (defined below), Benn will purchase from the City and the City shall supply to Benn potable, treated water. City acknowledges its requirement to comply with all applicable state and federal drinking water standards ("Potable Water") for use by and in connection with the

Project. The City shall supply Potable Water to Benn upon request up to the Average Demand Flow Rate at all times, and up to the Maximum Demand Flow Rate. The daily water demand for the Project will be supplied by trucks that are filled at a location located within the City limits. The approximate number of trucks required to satisfy the water usage rates (as set forth herein) are based upon the assumption that the trucks have a maximum capacity of 8,000 gallons. Benn shall provide the City with notice forty-eight (48) hours in advance of delivery when reasonably allowed. In those situations where forty-eight (48) hour notice is not reasonably allowed, Benn shall provide as much advance notice to the City as practical and then, from the first day of such delivery, provide the City with a two (2) week schedule projected demand going forward.

(i) Average Operating Conditions. Benn estimates water usage rates during the summer season of approximately 18,720 gallons per day ("GPD"). In turn, Benn estimates that up to three (3) truck deliveries per day will be required to satisfy expected water use needs of the Project. In order to appropriately respond to certain operational occurrences and weather related impacts, however, Benn may require up to 40,000 GPD which may necessitate up to five (5) truck deliveries per day (the "Average Demand Flow Rate").

(ii) Maximum Demand Flow Rate. Upon the occurrence of certain events at the Project, Benn may require up to 88,000 GPD, which in turn may necessitate up to eleven (11) truck deliveries per day (the "Maximum Demand Flow Rate").

(c) Point of Delivery. The City shall deliver all Potable Water pursuant to this Agreement through a mutually designated point of delivery ("Point of Delivery") at the Water Department Facility at 1620 Bedford Street, Fall River, MA, or a designated hydrant of point of delivery, which shall be equipped with a backflow preventer. The City shall ensure that the Point of Delivery is capable of docking the trucks required for the Average and Maximum Demand Flow Rates. Benn shall cooperate with the City to assure that trucks comply with the City's delivery procedures (the "Delivery Procedures") set forth on **Exhibit A** attached hereto. Benn shall take title to and be solely responsible for the Potable Water at the Point of Delivery.

(d) Quantity/Quality. the City shall immediately notify Benn of any material condition in the Water System of which it learns may materially affect the quality or quantity of water supplied to Benn by the City.

3. Water Supply Terms.

(a) Water Supply Rates.

(i) Rate. As full consideration for the City's supply of Potable Water to the Project up to the Maximum Demand Flow Rate, Benn shall pay to the City the tariff rate otherwise charged by the City to bulk water customers. The City and Benn agree to the rate schedule as delineated below.

- A. First 500,000 gallons per calendar year: \$0.012 per gallon.
- B. 501,000 to 1,000,000 gallons: \$0.010 per gallon.
- C. Over 1,000,000 gallons: \$0.008 per gallon.
- D. All trucks to be billed at full capacity.

(ii) *Invoices.* The City shall send monthly invoices to Benn detailing Benn's usage per the receiving log during the month proceeding the date of the invoice and the amount due from Benn for its usage pursuant to this Agreement (an "Invoice"). Benn shall submit the list of facilities that the water was delivered to with payment of said invoice.

(iii) *Audit.* The City shall maintain records documenting all relevant charges and usage by Benn, and the City shall make the same available to Benn for viewing and copying upon reasonable notice. The Benn driver shall sign and acknowledge the receiving log of each delivery of water. Benn shall have the right, within thirty (30) days following receipt of any Invoice, to dispute any item shown on such Invoice (including, without limitation, the payment due and usage) by giving written notice to the City of such dispute. Following Benn's delivery of any such dispute notice, the Parties shall work in good faith to determine whether the relevant Invoice contains incorrect information. However, Benn shall remain required to pay all undisputed amounts of any Invoice.

(b) Capacity Reserve Payment to The City.

(i) *Capacity Reserve Payment.* Commencing on March 1, 2018 and continuing until the expiration or termination of this Agreement, Benn shall pay to the City Twenty-five Thousand and 00/100 Dollars (\$25,000.00) per year (the "Capacity Reserve Payment") for the City to reserve (for Benn's potential use in accordance with this Agreement) water capacity up to the Maximum Demand Flow Rate and otherwise act as a contingent supplier of Water for the Project. Notwithstanding, anything to the contrary herein, the Capacity Reserve Payment shall be deemed full and final compensation to the City in the event that Water consumption by Benn in any calendar year is eight (8) million gallons or less notwithstanding the rates paid for the water actually taken. If Benn exceeds the breakpoint of eight (8) million gallons in any one calendar year, Benn shall pay a Retroactive Capacity Reserve Payment for that year equal to an additional Twenty Thousand and 00/100 (\$20,000.00) Dollars. The Capacity Reserve Payment up to the breakpoint of eight (8) million gallons shall be paid in a lump sum on January 1 of each year. However, the Retroactive Capacity Reserve Payment shall be paid in a lump sum as soon as the breakpoint eight of (8) million gallons has been exceeded.

4. Notice of Alternate Supplier Status. The City acknowledges and agrees that as a contingent water supplier for the Project, Benn's daily water demand may be as low as 0 GPD. Notwithstanding, Benn shall remain obligated to pay the Capacity Reserve Payment.

5. Term. This Agreement shall be for an initial term ("Initial Term") commencing on the Effective Date and continuing until the third (3rd) anniversary of the commercial operations date of the Project (the "Term"). Benn has an option of extending the Agreement for two (2) successive, three (3) year periods subject to the consent of the City, such consent shall not being unreasonably withheld. Rates are subject to review and renegotiation at the end of the second third year extension, should the City choose to review or renegotiate.

6. Termination.

(a) Benn's Right to Terminate. Benn has the right to terminate this Agreement for any reason within Benn's sole discretion upon written notice to the City by and through the Watuppa Water Board, sixty (60) days before the date on which an annual Capacity Reserve Payment is due to the City. Thereafter, Benn still reserves the right to terminate the Agreement for any reason upon sixty (60) day written notice to the City by and through the Watuppa Water Board; however, a Capacity Reserve Payment due for that calendar year must be paid in full despite the date of termination.

(b) The City's Right to Terminate the Agreement. The City shall have the right to terminate this Agreement for cause upon sixty (60) days written notice from the City to Benn. As used herein, "Cause" means Benn's failure to make the payments under Section 2 hereof for a period of thirty (30) days after receipt of any invoice from the City, or for Benn's failure to abide by the Delivery Procedures attached hereto as Exhibit A, after Benn has received a thirty (30) day notice to cure which specifies the procedures being violated and allows Benn a thirty (30) day period to correct said violation.

7. Emergency Conditions. Benn agrees that, in the event of an emergency which causes the City to impose limitations or conditions upon the use of water by its customers, that the City will impose and enforce the same limitations and conditions upon Benn. The City, however, acknowledges during such emergency it will treat Benn no less favorably than it will treat its industrial and residential customers within the geographic limits of the City.

8. Revised Ordinances of the City of Fall River. Benn agrees to be subject to and bound by the provisions of the revised Ordinances of the City of Fall River as applicable to rates to be paid by bulk water customers, as set forth in Paragraph 3 (a)(i).

9. Representations and Warranties.

(a) Benn's Representations and Warranties. Benn hereby represents, warrants and covenants to the City that Benn has the unrestricted right and authority to execute this Agreement. Each person signing this Agreement on behalf of Benn is authorized to do so. Upon execution by all Parties hereto, this Agreement shall constitute a valid and binding agreement enforceable against Benn in accordance with its terms. Benn shall provide a corporate resolution of authorization acknowledging authority to enter into this contract and accept the terms thereof. This Agreement shall constitute a valid and binding agreement enforceable against the City in accordance with its terms.

(b) The City's Representations and Warranties. The City hereby represents, warrants and covenants to Benn that:

(i) The City is the sole owner of the Water System and has been explicitly authorized to enter into this Agreement pursuant to a vote of the Watuppa Water Board attached hereto as Exhibit B (the "WSA Approval").

(ii) The City has the unrestricted right and authority to supply Potable Water up to the Maximum Daily Flow Rate to Benn for any use (including, without limitation, for Benn's use or for resale by Benn to a third party).

(iii) The City has the unrestricted right and authority to execute this Agreement. Each person signing this Agreement on behalf of the City is authorized to do so. Upon execution by all Parties hereto, and upon approvals as may be required by the City as a regulated water supplier, this Agreement shall constitute a valid and binding agreement enforceable against the City in accordance with its terms.

(iv) No litigation is pending, and, to the best of the City's knowledge, no actions, claims or other legal or administrative proceedings are pending, threatened or anticipated with respect to, or which could affect, the Water System or the ability to deliver the Water Demand. If the City learns that any such litigation, action, claim or proceeding is threatened or has been instituted, the City shall promptly deliver notice thereof to Benn and provide Benn with periodic updates of the status of said litigation, action, claim or proceeding that is ongoing.

10. Assignment.

(a) Collateral Assignments. Benn shall have the absolute right in its sole and exclusive discretion, without obtaining the consent of the City, to finance, mortgage, encumber, hypothecate, pledge or transfer to one or more Mortgagees (defined below) any and all of the rights granted hereunder, and/or any or all rights and interests of Benn in and to the Project.

(b) Non-Collateral Assignments. Benn shall have the right, without the prior consent of the City, to sell, convey, assign or transfer any or all of its rights hereunder provided such transfer is related to the Project. Benn shall be relieved of all of its obligations arising under this Agreement from and after the effective date of such transfer, provided such rights and obligations have been assumed by such transferee.

(c) Acquisition of Interest. The acquisition of all interests, or any portion of interest, in Benn by another person shall not require the consent of the City or constitute a breach of any provision of this Agreement and the City shall recognize the person as Benn's proper successor; however said successor agrees to be bound by the terms and conditions of this agreement and City is to be notified of any successor, ten (10) business days prior to any successor taking delivery of any water from the City. Furthermore, any successor or assignee shall execute this document acknowledging its terms and conditions and also become a party thereto.

11. Mortgagee Protection. In the event that any document memorializing a security interest in this Agreement or in any part of the Project (a "Mortgage"), is entered into by Benn, then any person who is the mortgagee, grantee or beneficiary of a Mortgage (a "Mortgagee") shall, for so long as its Mortgage is in existence and until the lien thereof has been extinguished, be entitled to the protections set forth in this Section 10. Benn shall send written notice to the City of the name and address of any such Mortgagee; provided that failure of Benn to give notice of any such Mortgagee shall not constitute a default under this Agreement and shall not invalidate such Mortgage.

(a) Notice of Default; Opportunity to Cure. As a precondition to exercising any rights or remedies as a result of any default of Benn, the City shall give a Notice of Default (defined below) to Benn. In the event the City gives a Notice of Default, the following provisions shall apply:

(i) The Mortgagee shall have the same period after receipt of the Notice of Default to remedy the default, or cause the same to be remedied, as is given to Benn, plus, in each instance, the following additional time periods: (i) thirty (30) days in the event of any monetary default; and (ii) sixty (60) days in the event of any non-monetary default. The Mortgagee shall have the absolute right to substitute itself for Benn and perform the duties of Benn hereunder for purposes of curing such default. the City expressly consents to such substitution, agrees to accept such performance. the City shall not take any action to terminate this Agreement in law or equity prior to the expiration of the cure periods available to a Mortgagee as set forth above.

(ii) Neither the bankruptcy nor the insolvency of Benn shall be grounds for terminating this Agreement as long as all material obligations of Benn under the terms of this Agreement are performed by the Mortgagee in accordance with the terms hereunder.

(b) New Agreement to Mortgagee. If this Agreement terminates because of Benn's default or if this Agreement is rejected or disaffirmed pursuant to bankruptcy law or other law affecting creditors' rights, the City shall, upon written request from any Mortgagee within ninety (90) days after such event, consider a new water supply agreement on the following terms and conditions:

(i) The terms of the new agreement shall commence on the date of termination, rejection or disaffirmance and shall continue for the remainder of the Term and subject to the same terms and conditions set forth in this Agreement.

(ii) The new agreement may be executed within thirty (30) days after receipt by the City of written notice of the Mortgagee's election to enter a new agreement, provided said Mortgagee: (i) pays to the City all monetary charges payable by Benn under the terms of this Agreement up to the date of execution of the new agreement, as if this Agreement had not been terminated, rejected or disaffirmed; (ii) performs all other obligations of Benn under the terms of this Agreement, to the extent performance is then due and susceptible of being cured and performed by the Mortgagee; and (iii) agrees in writing to perform, or cause to be performed, all non-monetary obligations which have not been performed by Benn and would have accrued under this Agreement up to the date of commencement of the new agreement, except those obligations which constitute non-curable defaults.

(iii) The provisions of this Section 10 shall survive the termination, rejection or disaffirmance of this Agreement and shall continue in full force and effect thereafter to the same extent as if this Section 10 were a separate and independent contract made by the City, Benn and such Mortgagee, and, from the effective date of such termination, rejection or disaffirmance of this Agreement to the date of execution and delivery of such new agreement, such Mortgagee may use and enjoy the Potable Water, provided that all of the conditions for a new agreement as set forth herein are complied with.

(c) Mortgagee's Consent to Amendment, Termination or Surrender. Notwithstanding any provision of this Agreement to the contrary, the Parties agree that so long as there exists an unpaid Mortgage, this Agreement shall remain in effect. This provision is for the express benefit of and shall be enforceable by such Mortgagee.

(d) Benn's Reimbursement to the City for Professional Fees and/or Expenses. In the event that the City incurs any professional fees and/or expenses in undertaking the steps required in Sections 10 or 11 of this Agreement, Benn shall reimburse the City for those professional fees and/or expenses within ten (10) day's notice from the City. Benn's obligation to reimburse the City is an express condition to any steps required by the City under Section 10 and 11.

12. Default/Remedies.

(a) Default. If a Party defaults in or otherwise fails to perform an obligation under this Agreement, the non-defaulting Party shall not have the right to exercise any remedies hereunder if the default is cured by the defaulting Party within thirty (30) days of receiving written notice of such default specifying in detail the default and the requested remedy (a "Notice of Default"); provided, that if the nature of the default requires, in the exercise of reasonable diligence, more than thirty (30) days to cure, the non-defaulting Party shall not have the right to exercise any remedies hereunder as long as the defaulting Party commences performance of the cure within thirty (30) days of receipt of Notice of Default and thereafter completes such cure with reasonable diligence.

(b) Remedies. Should a default remain uncured beyond the applicable cure periods, the non-defaulting Party shall have the right to exercise any and all remedies available to it at law or in equity, all of which remedies shall be cumulative, including the right to enforce this Agreement by injunction, specific performance or other equitable relief and the right to terminate this agreement.

13. **Indemnities.** Each Party (the "Indemnifying Party") shall defend, indemnify, and hold harmless the other Party (the "Indemnified Party"), including its agents, servants, employees, affiliates, contractors, licensees, invitees, and/or elected officials, from and against all liability, damage, loss, costs, (including reasonable attorneys' fees) claim, demands, and actions of any nature whatsoever for any personal injury, death, physical damage or fines which arise out of or are connected with, or claimed to arise out of or be connected with, the Indemnifying Party's violation of any applicable water use regulations, hazardous materials regulations, or regulations promulgated by the Massachusetts Department of Environmental Protection and/or the Massachusetts Department of Public Health.

14. **Safety.** Benn warrants that all drivers and operators of its equipment are licensed to operate the trucks utilized to take water delivery within the Commonwealth of Massachusetts. Moreover, Benn will have its drivers and employees meet with the City's Water Department to make sure that Benn's employees are trained in the use of the City apparatus and equipment to be utilized by Benn at the Point of Delivery.

15. **Insurance.** Benn shall provide the City with proof of insurance on its commercial general liability policy in the amount of \$1,000,000. Such policy shall include the City as an additional insured for bodily injury and/or property damage claims brought against the City resulting from the actions of Benn or its employees take in furtherance of this agreement.

16. **Notice.** All notices or other communications required or permitted by this Agreement, including payments to the City, shall be in writing and shall be deemed given when personally delivered to the City or Benn, the same day if sent via facsimile or email, with confirmation, or the next business day if sent via overnight delivery or five (5) days after deposit in the United States mail, first class, postage prepaid, certified, addressed as follows:

If to the City:

Terrance J. Sullivan
Dept. Community Utilities
1 Government Ctr.
Fax: 508-324-2103
Attn: Terry Sullivan
Email: Water@fallriverma.org

If to Benn:

Benn Water & Heavy Transport Corp.
29 Moonlight Drive
Westerly, RI 02891
Fax: _____
Attn: Jeffrey R. Benn
Email: benwater@icloud.com

Either Party may change its address for purposes of this paragraph by giving written notice of such change to the other Parties in the manner provided in this paragraph.

Notwithstanding, forty-eight (48) hours' notice under Section 2(b) shall be provided by Benn to the City by electronic mail to the following:

Water@fallriverma.org
tsullivan@fallriverma.org
jlittle@fallriverma.org

17. **Miscellaneous.**

(a) **Emergency.** Either party may terminate or suspend its obligations under this Agreement by reasonable advance written notice to the other in order to protect the public health and safety of its

agents, servants, employees, affiliates, contractors, licensees, invitees and inhabitants pursuant to a written declaration of a health or safety emergency by either Party. Both Parties shall forthwith thereafter jointly address any such issues so as to promptly remedy the same and effectuate the intention and purposes of this Agreement. Any purported emergency termination by Benn does not alleviate the obligation to pay the outstanding amount of a Capacity Reserve Payment for the year in which the Agreement is terminated as pursuant to Section 6(a). Notwithstanding anything to the contrary herein, however, Benn shall not be responsible to pay any outstanding Capacity Reserve Payment for that year, if the emergency termination is undertaken as a result of the City's actions or omissions in causing the emergency situation on which the termination is based.

(b) Force Majeure. If performance of this Agreement or of any obligation hereunder is prevented or substantially restricted or interfered with by reason of an event of Force Majeure (defined below), the affected Party, upon giving notice to the other Party, shall be excused from such performance to the extent of and for the duration of such prevention, restriction or interference, and the time to so perform herein shall be extended for such period of time. The affected Party shall use its reasonable efforts to avoid or remove such causes of nonperformance and shall continue performance hereunder whenever such causes are removed. As used herein, "Force Majeure" means fire, earthquake, flood, or other casualty, condemnation or accident; strikes or labor disputes; war, civil strife or other violence; any law, order, proclamation, regulation, ordinance, action, demand or requirement of any government agency or utility; or any other act or condition beyond the reasonable control of a Party hereto.

(c) Successors/Assigns. This Agreement shall inure to the benefit of and be binding upon Benn, its successors and assigns and the City and, to the extent provided in any assignment or other transfer permitted hereunder, any transferee, and their respective heirs, transferees, successors and assigns, and all persons claiming under them.

(d) Entire Agreement/Amendments. This Agreement, together with all exhibits attached hereto, constitutes the entire agreement between the City and Benn respecting its subject matter, and supersedes any and all oral or written agreements. All of the provisions of any exhibit hereto shall be treated as if such provisions were set forth in the body of this Agreement and shall represent binding obligations of each of the Parties as part of this Agreement. Any agreement, understanding or representation respecting the Property, or any other matter referenced herein not expressly set forth in this Agreement or a previous writing signed by both Parties is null and void. No purported modifications or amendments, including without limitation any oral agreement (even if supported by new consideration), course of conduct or absence of a response to a unilateral communication, shall be binding on either Party unless in a writing signed by both Parties. Provided that no material default in the performance of Benn's obligations under this Agreement shall have occurred and remain uncured, the City shall cooperate with Benn in amending this Agreement from time to time to include any provision that may be reasonably requested by Benn for the purpose of implementing the provisions contained in this Agreement or for the purpose of preserving the security interest of any transferee of Benn or Mortgagee.

[signatures on following page]

IN WITNESS WHEREOF, Benn and the City, acting through their duly authorized representatives, have executed this Agreement with the intent that it be effective as of the Effective Date, and certify that they have read, understand and agree to the terms and conditions of this Agreement.

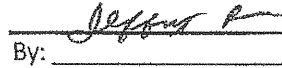
THE CITY OF FALL RIVER

By its Mayor, duly authorized,



Jasiel F. Correia, II

BENN WATER & HEAVY TRANSPORT
CORP., a Rhode Island Corporation

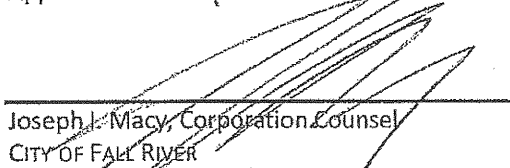


By:

Name: JEFFREY BENN

Title: PRESIDENT

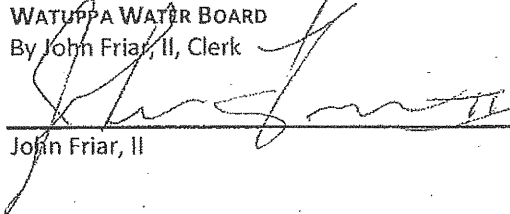
Approved as to Form & Manner:



Joseph J. Macy, Corporation Counsel
CITY OF FALL RIVER

WATUPPA WATER BOARD

By John Friar, II, Clerk



John Friar, II

FIRST ASSIGNEE

By: _____

Name: _____

Title: _____



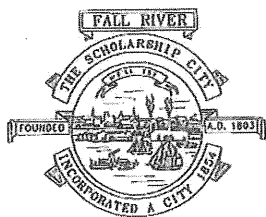
EXHIBIT A

Delivery Procedures

Benn and the City agree that the following procedures shall be utilized at the Point of Delivery:

1. Benn shall not have trucks line up or idle outside of the gates that separate the Water Department Facility from Bedford Street.
2. Benn shall take delivery during daylight hours. The exception to the daylight hour requirement shall be those instances in which Benn has to arrange for delivery of Maximum Demand Flow Rate during the months of November through March. During that time period, the evening hours for delivery may be extended to 7:00 p.m. upon twenty-four (24) hour notice to the City.
3. Notwithstanding the procedures set forth herein, in the event that the parties find issues in complying with the procedures, the parties shall work in good faith to identify a hydrant location elsewhere in the City that is mutually acceptable to Benn and the City and not located within a residential area.

EXHIBIT B



City of Fall River
The Watuppa Water Board
One Government Center
Fall River, MA 02722

JAZIEL F. CORREIA II
Mayor

JOHN FRIAR
Clerk

TO: T. J. Sullivan

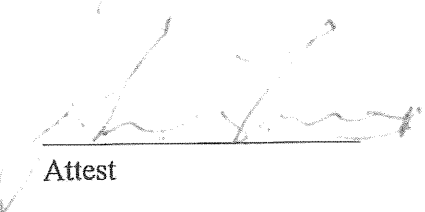
FROM: John Friar, Clerk

DATE: September 13, 2017

RE: Contract between the Watuppa Water Board / City of Fall River and Benn Water & Heavy Transport, Inc., a Rhode Island corporation.

Be advised that at a meeting held on August 17, 2017, the Watuppa Water Board approved a contract for the "Contingent Supply of Water" by the Water Department of the City to Benn Water & Heavy Transport, Inc., a Rhode Island Corporation.

The contract was approved on a roll-call vote, with President Normand Valiquette and Member Christopher Ferreira voting in the affirmative and Member Robert Pearson voting in the negative.


Attest