

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN ELECTRONIC INVESTIGATION INTO CITY	)	
OF FALMOUTH'S THREAT OF INVESTIGATION	)	
OF WHOLESALE WATER SERVICE TO EAST	)	CASE NO.
PENDLETON WATER DISTRICT AND	)	2024-00403
PENDLETON COUNTY WATER DISTRICT	)	

NOTICE OF FILING

Comes now the City of Falmouth, by and through counsel, and hereby files a notice of filing of a Complaint for Declaratory Judgment and Injunctive and/or Other Applicable Relief in the Pendleton County Circuit Court, Case No. 24-CI-00222 a copy of which is attached hereto for reference.

Respectfully submitted,

/s/ Brandon N. Voelker

Brandon N. Voelker (KBA #88076)  
GATLIN VOELKER, PLLC  
50 E Rivercenter Blvd., Suite 1275  
Covington, KY 41011  
Ph: (859) 781-9100  
[bvoelker@gatlinvoelker.com](mailto:bvoelker@gatlinvoelker.com)  
*Counsel for City of Falmouth*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 30<sup>th</sup> day of December 2024, via electronic and/or regular US Mail, postage prepaid, upon the following:

Joseph P. Cottingham  
Daley, Cottingham, Brandt & Associates,  
PLLC  
4034 Alexandria Pike  
Cold Spring, KY 41076

David Fields  
Pendleton Judge Executive  
233 Main Street  
Falmouth, KY 41040  
[judgeexec@pendletoncountky.gov](mailto:judgeexec@pendletoncountky.gov)

[joecotlaw@fuse.net](mailto:joecotlaw@fuse.net)

Russell Coleman, Attorney General  
700 Capital Avenue, Suite 118  
Frankfort, KY 40601  
[ServetheCommonwealth@ky.gov](mailto:ServetheCommonwealth@ky.gov)

Kentucky Energy Environmental Cabinet  
Division of Water  
300 Sower Blvd, 3rd Flr  
Frankfort, KY 40601

*/s/ Brandon N. Voelker*

Brandon N. Voelker (KBA #88076)



**COMMONWEALTH OF KENTUCKY  
PENDLETON CIRCUIT COURT  
CASE NO. 24-CI-\_\_\_\_\_**

**CITY OF FALMOUTH, KENTUCKY**

**PLAINTIFF**

v.

**PENDLETON COUNTY WATER DISTRICT**

**DEFENDANTS**

**Serve: David Boden/Chair  
P.O. Box 232  
Falmouth, Kentucky 41040  
*Via Certified Mail***

**and**

**EAST PENDLETON WATER DISTRICT**

**Serve: Lisa Cobb/Chair  
P.O. Box 29  
601 Woodson Road  
Falmouth, Kentucky 41040  
*Via Certified Mail***

**and**

**THE KENTUCKY PUBLIC SERVICE COMMISSION**

**Serve: Linda Bridewell/Executive Director  
P.O. Box 615,  
211 Sower Boulevard,  
Frankfort, Kentucky 40602  
*Via Certified Mail***

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**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE AND/OR  
OTHER APPLICABLE RELIEF**

---

Plaintiff, the City of Falmouth, Kentucky (the “City” or “Falmouth”), by and through counsel, hereby files its Complaint for Declaratory Judgment, and in support thereof alleges as follows:

1. This is an action for declaratory judgment and other relief brought pursuant to Kentucky Revised Statute § 418.040, wherein Falmouth seeks a declaration of its rights,

Filed

24-CI-00222 12/27/2024

Michael D. Redden, Pendleton Circuit Clerk

Filed

24-CI-00222 12/27/2024

Michael D. Redden, Pendleton Circuit Clerk

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obligations and legal relations arising from two asserted contracts for wholesale water and the actions of the Kentucky Public Service Commission related thereto.

### **PARTIES**

2. Falmouth is a municipal corporation of the Home-Rule class located within the Commonwealth of Kentucky.

3. Pendleton County Water District and East Pendleton Water Districts (the “District or Districts”) are duly organized water districts under the laws of the Commonwealth of Kentucky, with a principal place of business in Pendleton County, Kentucky.

4. Defendant, the Kentucky Public Service Commission (“PSC”), is an administrative body with jurisdiction over utilities in the Commonwealth of Kentucky. The PSC is a party to this action based on its unlawful actions regarding the City of Falmouth. The PSC has taken action contrary to both the opinions of the Kentucky Attorney General and Kentucky Supreme Court.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this matter pursuant to KRS § 23A.

6. Venue is proper in that the Districts are both a special purpose governmental entity with a principal place of business in the County of Pendleton, furthermore, the actions giving rise to this action took place in the County of Pendleton.

7. The actions and/or inactions which gave rise to this Complaint all occurred in the Commonwealth of Kentucky.

### **FACTS UNDERLYING THE CONTROVERSY**

8. Falmouth incorporates by reference all previous allegations contained herein.

9. Falmouth entered into wholesale water sale agreements with the Districts, which have been subsequently modified, but each for a term in excess of 20 years.

10. Falmouth did not publicly bid for said contracts.

11. Section 162 of the Kentucky Constitution states in part, “No county, city, town or other municipality shall ever be authorized or permitted to pay any claim created against it, under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts shall be null and void.” Exhibit A herein is expressly prohibited by express authority of law.

12. Section 164 of the Kentucky Constitution states in part, “No county, city, town, taxing district or other municipality shall be authorized or permitted to grant ..., or make any contract in reference thereto, for a term exceeding twenty years.” It further provides that prior to even granting a twenty-year contract, proper advertisement and bids must be obtained. Exhibit A herein is for a term in excess of twenty years and was not advertised and bid.

13. Kentucky Attorney General Opinion 81-365, attached as Exhibit B, opined that KRS 96.120 allows for the sale of water in a manner in which one acquires a franchise pursuant to Section 164 of the Constitution. Exhibit A did not comply with the opinion of the Attorney General.

14. The Kentucky Supreme Court, in an unpublished case, *Ledbetter Water Dist. V Crittenden-Livingston Water Dist.* 2018-SC-000494 (Ky. 2000), copy attached as Exhibit C, addressing the identical issue presented herein regarding a wholesale water contract for a proposed term to exceed twenty years, held, “Since the contract entered into by Ledbetter and Crittenden-Livingston was both for a term of greater than twenty years and was not advertised for public bidding, it violates the Kentucky Constitution and applicable statutes and, thus is void.”

15. Exhibit A herein is void pursuant to said holdings and unenforceable. Furthermore, the Kentucky Attorney General in regards to its opinions states that, “public officials are

expected to follow them.”

[https://www.ag.ky.gov/Resources/Opinions/Pages/default.aspx#:~:text=Opinions%20of%20the%20Attorney%20General%20\(OAGs\)%20do%20not%20have%20the,cited%20in%20all%20Kentucky%20courts.](https://www.ag.ky.gov/Resources/Opinions/Pages/default.aspx#:~:text=Opinions%20of%20the%20Attorney%20General%20(OAGs)%20do%20not%20have%20the,cited%20in%20all%20Kentucky%20courts.)

16. The City of Falmouth brings this action as required by the directive of the Kentucky Attorney General.

17. While the directly applicable law establishes Exhibit A is void, the Districts and the PSC have sought to undermine applicable law.

18. Contrary to its own regulations, the PSC initiated a PSC Case, 2024-403, without a required Motion, hearing and/or other, and issued an Order to the City of Falmouth to continue to sell water to the Districts, in violation of the aforementioned holdings. Order attached hereto as Exhibit D.

19. The PSC failed to comply with its own laws/regulations, for which the City filed the attached Notice of Lack of Jurisdiction/Enforcement, with attachments and the applicable law. Attached as Exhibit E.

20. The City of Falmouth has no redress under the PSC since the PSC refuses to acknowledge applicable law/regulation.

21. This Declaratory Judgement is filed and sought, consistent with the actions in *Ledbetter*.

22. The PSC asserts that *Simpson County Water District v. City of Franklin*, 875 S.W.2d 460 (Ky. 1994), provides the authority for their actions, but the case involved legal contract, not one void as a matter of law.

23. If the PSC asserts it has the authority to determine legal questions such as presented herein, it must as a preliminary matter make such determination, prior to issuing the Order attached as Exhibit D.

24. The City of Falmouth did advise the PSC of the applicable law, which was not considered by the PSC. See attached Exhibit E.

**DECLARATION ONE**  
**THE WATER SALE CONTRACTS ARE VOID AS A MATTER OF LAW**

25. The City incorporates by reference all previous allegations contained herein.

26. As set forth above, the two water contracts, Exhibit A, are void as a matter of law, pursuant to Sections 162 and 164 of the Kentucky Constitution.

27. That the opinions of the Kentucky Attorney General and Kentucky Supreme Court also opine that said contracts are void.

28. That this Court should issue a Declaration of Law consistent herewith and hold that the contracts are void.

**DECLARATION TWO**  
**THE PSC LACKS JURISDICTION OVER THE CITY OF FALMOUTH**

29. The City incorporates by reference all previous allegations contained herein.

30. Falmouth does not dispute that should a valid contract exist water rate increases are subject to review and determination by the PSC.

31. The PSC only has jurisdiction if a valid contract exists, herein one does not.

32. Absent a valid contract the PSC lacks jurisdiction over the City of Falmouth.

33. Absent jurisdiction, PSC Case No. 2024-403, is not applicable and Falmouth is not subject to its Orders.

34. That this Court should make a Declaration of Law, that the PSC lacks jurisdiction over the City of Falmouth.

**DECLARATION THREE**  
**IN THE ALTERNATIVE THE PSC MUST MAKE AN INITIAL DETERMINATION**  
**REGARDING THE LAWFULNESS OF THE WATER CONTRACTS**

35. The City incorporates by reference all previous allegations contained herein.

36. As set forth above, and by the City of Falmouth in Exhibit E, the PSC issued the Order, Exhibit D, without making a required finding of jurisdiction through determining whether a lawful contract exists.

37. That should this Court determine that the PSC has the legal authority to determine the dispute between Falmouth and the Districts, the Court must direct that the PSC follow applicable law/regulations, including but not limited to, making a preliminary finding of jurisdiction pursuant to law.

38. Furthermore, that the PSC be directed to comply with its own laws/regulations regarding due process, notice and applicable hearings, prior to issuing Orders.

**EXISTENCE OF AN ACTUAL CONTROVERSY**

39. The City submits that an actual controversy exists for reasons set forth herein and requests that this Court issue Declaratory Orders consistent with applicable law.

**WHEREFORE**, the City of Falmouth, Kentucky respectfully seeks a declaration of its rights as follows:

- A. As to declaration one, Falmouth respectfully requests a declaration concerning the validity of the two water contracts applying the Kentucky Constitution, Attorney General Opinions and Kentucky Supreme Court guidance.

- B. As to declaration two, Falmouth respectfully requests a declaration that the PSC lacks jurisdiction over the City of Falmouth.
- C. As to declaration three, Falmouth respectfully requests a declaration setting forth that the PSC shall comply with applicable law/regulations regarding applications concerning the City of Falmouth.
- D. An award of attorney fees, costs, and expenses incurred by the City in this action; and
- E. Any other relief to which the City may be entitled.

Respectfully submitted,

/s/ Brandon N. Voelker

Brandon N. Voelker (KBA 88076)

GATLIN VOELKER, PLLC

50 E. Rivercenter Blvd., Ste 1275

Covington, Kentucky 41011

P: (859) 781-9100

bvoelker@gatlinvoelker.com

*Counsel for Plaintiff City of Falmouth,  
Kentucky*

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**EXHIBIT A**  
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MODIFICATION  
OF  
WATER PURCHASE CONTRACT

This modification of water purchase contract entered into this the 7<sup>th</sup> day of January, 2003, between, City of Falmouth hereinafter referred to as CITY and Pendleton County Water District, hereinafter referred to as PCWD,

WITNESSETH:

WHEREAS, on or about the 12<sup>th</sup> day of March, 1984, the CITY and PCWD entered into a contract by the terms of which PCWD was to purchase quantities of water from CITY under certain terms and conditions set forth in said contract, and

WHEREAS, PCWD is now desirous of extending the term of said contract, and

WHEREAS, PCWD has tendered to CITY the sum of Ten (\$10) Dollars in consideration of its agreement to extend the term as set forth hereinafter, and in consideration of the mutual promises and agreements of the parties hereto,

NOW THEREFORE, it is agreed that said contract shall be and hereby is modified as follows:

1. (Terms of Contract) That this contract shall extend for a term of forty-four (44) years from the date hereof, and thereafter may be renewed or extended for such terms as may be agreed upon by CITY and PCWD.

The intention and purpose of this modification of water purchase contract to extend the term of the original water purchase contract through this date in the year of 2047 so as to facilitate the financing of an extension by PCWD, and shall be interpreted, construed and applied so as to accomplish this purpose.



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IN WITNESS WHEREOF, the parties hereto, acting under authority of their respective governing bodies, have caused this contract to be duly executed in seven (7) counterparts, each of which shall constitute an original.

CITY OF FALMOUTH

By   
Mayor Gene Flaughter


ATTEST:

  
Terry England, City Clerk

PENDLETON COUNTY WATER DIST.

By   
J.C. Crowley, Chairman

ATTEST:

  
H.T. Ammerman, Secretary

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The City of Falmouth met on the 7<sup>th</sup> day of January, 2003 at the City Office in Falmouth, Kentucky with Council members Rick Mineer, Mark Hart, Kim Bastin, Mary Ann Pittman, and Shannon Weaver present.

Kim Bastin introduced the following Resolution and moved its adoption.

RESOLUTION

WHEREAS, on or about the 12<sup>th</sup> day of March, 1984, the City of Falmouth contracted with Pendleton County Water District for the furnishing of water to the latter District upon certain terms and conditions, and

WHEREAS, the Pendleton County Water District has asked that the term of said contract be amended by the extension of the term for said contract for an additional forty-four (44) years, to permit it to finance extension of certain lines.

WHEREAS, such an extension would appear to be in the best interest of the City of Falmouth, and

WHEREAS, the Pendleton County Water District has tendered the sum of Ten (\$10.00) Dollars in consideration for said modification.

NOW THEREFORE, Be it Resolved that the City of Falmouth, by and through its Mayor, enter into a modification contract with the Pendleton County Water District which shall accomplish as its purpose the extension of the contract of March 12, 1984 for an additional forty-four (44) year term. Be It Further Resolved that the said contract shall be ratified in all other respects as originally entered. A copy of said Modification of Contract is attached hereto and made a part thereof.

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Mary Ann Pittman seconded the motion and upon roll call being taken,

the following voted:

AYE Rick Mineer, Mark Hart, Kim Bastin,  
Mary Ann Pittman and Shannon Weaver.

NAY: None

Whereupon the foregoing Resolution was adopted.

A TRUE COPY ATTEST:

Terry England  
Terry England, City Clerk

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## WATER PURCHASE CONTRACT

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THIS CONTRACT, for the sale and purchase of water is entered into this 12th day of March, 1984, between the CITY OF FALMOUTH, PENDLETON COUNTY, KENTUCKY, Main Street, Falmouth, Kentucky, a Municipal Corporation, hereinafter referred to as the "SELLER" and the PENDLETON COUNTY WATER DISTRICT, 400 Main Street, Falmouth, Kentucky, hereinafter referred to as the "PURCHASER".

## WITNESSETH:

WHEREAS, the Purchaser is organized and established under the provisions of Chapter 74 of the Code of Kentucky Revised Statutes, for the purpose of constructing and operating a water supply distribution system serving water users within the area described in plans now on file in the office of the Purchaser and to accomplish this purpose, the Purchaser will require a supply of treated water, and.

WHEREAS, the Seller owns and operates a water supply distribution system with a capacity currently capable of serving the present customers of the Seller's system and the estimated number of water users to be served by the said Purchaser as shown in the plans of the system now on file in the office of the Purchaser, and

WHEREAS, by Resolution enacted on the 12th day of March, 1984, by the Seller, the sale of water to the Purchaser in accordance with the provisions of the said Resolution was approved, and the execution of this Contract carrying out the said Resolution by the Mayor and attested by the Secretary, was duly authorized, and

WHEREAS, by Resolution of the Commissioners of the Purchaser, enacted on the 11 day of JUNE, 1984, the purchase of water from the Seller in accordance with the terms set forth in said Resolution was approved, and the execution of this Contract by the Chairman and attested by the Secretary was duly authorized;

NOW, THEREFORE, in consideration of the foregoing and the mutual agreements hereinafter set forth,

## A. The Seller agrees:

1. (Quality and Quantity) To furnish the Purchaser at the point of delivery hereinafter specified, during the term of this contract or any renewal or extension thereof, potable treated water meeting applicable purity standards of the State of Kentucky in such quantity as may be required by the Purchaser not to exceed five million (5,000,000) gallons per month.

2. (Point of Delivery and Pressure) That water will be furnished at a reasonable constant pressure calculated at City Normal Pressure from an existing six (6) inch main supply at a point located as per the parties' agreement within the city or just outside the city. If a greater pressure than that normally available at the point of delivery is required by the Purchaser, the cost of providing such greater pressure shall be borne by the Purchaser. Emergency failures of pressure or supply due to main supply line breaks, power failure, flood, fire and use of water to fight fire, earthquake or other catastrophe shall excuse the Seller from this provision for such reasonable periods of time as may be necessary to restore service.

3. The metering equipment shall be read on or about the 14th day of each month. An appropriate official of the Purchaser at all reasonable times shall have access to the meter for

Presiding Judge: HON. JAY DELANEY (618318)

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the purpose of verifying its readings.

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4. (Billing Procedure) To furnish the Purchaser at the above address not later than the 30th day of each month, with an itemized statement of the amount of water furnished the Purchaser during the preceding month.

B. The Purchaser agrees:

1. (Metering Equipment) To furnish, install, operate and maintain at its own expense at point of delivery, the necessary metering equipment, including a meter house or pit, and required devices of standard type for properly measuring the quantity of water delivered to the Purchaser and to calibrate such metering equipment whenever requested by the Seller but not more frequently than once every twelve (12) months. A meter registering not more than two percent (2%) above or below the test result shall be deemed to be accurate. The previous readings of any meter disclosed by test to be inaccurate shall be corrected for the two (2) months previous to such test in accordance with the percentage of inaccuracy found by such tests. If any meter fails to register for any period, the amount of water furnished during such period shall be deemed to be the amount of water delivered in the corresponding period immediately prior to the failure, unless Seller and Purchaser shall agree upon a different amount.

2. (Rates and Payment Date) To pay the seller, not later than the 10th day of each month for water delivered in accordance with the schedule hereinbelow set out or prevailing at the time.

C. It is further mutually agreed between the Seller and Purchaser as follows:

1. (Term of Contract) That this Contract shall extend for a term of forty (40) years from this date, from the date water is delivered to the new line anticipated herein, or from the date of the issuance of the new bonds, and in no event for longer than forty-two (42) years from this date, and, thereafter may be renewed or extended for such term, or terms, as may be agreed upon by the Seller and Purchaser.

2. (Delivery of Water) That thirty (30) days prior to the estimated date of completion of construction of the addition of the Purchaser's water supply distribution system, the Purchaser will notify the Seller in writing of the date of the initial delivery of water.

3. (Failure to Deliver) That the Seller will, at all times, operate and maintain its system in an efficient manner and will take such action as may be necessary to furnish the Purchaser with quantities of water required by the Purchaser. Temporary or partial failures to deliver water shall be remedied with all possible dispatch. In the event of an extended shortage of water, or the supply of water available to the Seller is otherwise diminished over an extended period of time, the supply of water to Purchaser's consumers shall be reduced or diminished in the same ratio or proportion as the supply to seller's consumers is reduced or diminished.

4. (Modification of Contract) That the provisions of this Contract pertaining to the schedule of rates to be paid by the Purchaser for water delivered are subject to modification at any time the Seller adjusts rates to all its customers and by the same percent that it adjusts its rates to all its customers. Any increase or decrease in rates shall be based on a demonstrable increase or decrease in the costs of performance hereunder including, but not limited to, cost of labor, materials, necessary capital improvements, and reserve for

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depreciation. Other provisions of this Contract may be modified or altered by mutual agreement.

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a. However, by way of specifications, the rate schedule presently in effect is as follows:

0 - 2,000 gallons	- \$ 4.00 (minimum)
2,000 - 5,000 gallons	- 4.00 plus \$.84 per 1,000
5,000 - 10,000 gallons	- 6.52 plus \$.70 per 1,000
10,000 - 50,000 gallons	- 10.02 plus \$.58 per 1,000
all over 50,000 gallons	- 33.22 plus \$.75 per 1,000

b. At no time shall there be established, without the consent of second party, new classes of water usage. At anytime the City adjusts rates to any one or more class of water users, either by increasing or decreasing said rates, the same adjustment shall be made to the rates applicable to all classes of users for example, an increase of twenty-five (25%) percent would, based upon the schedule of rates set out herein, increase the minimum bill from \$4.00 to \$5.00 and would increase the rate to other classes to \$1.05 dollars per thousand, \$.875 dollars per thousand, \$.725 dollars per thousand, and \$.9375 dollars per thousand, respectively.

5. However, notwithstanding the above, it is agreed that the initial rate for the water purchased by purchaser in the range of 4,000,001 through 5,000,000 gallons shall be open to negotiation of the parties at the time same is delivered or anticipated as being delivered to purchaser by seller. However, once the initial rate is set, modifications of said rate will be in accordance with this contract.

6. (Regulatory Agencies) That this Contract is subject to such rules, regulations, or laws as may be applicable to similar agreements in this State and the Seller and Purchaser will collaborate in obtaining such permits, certificates, or the like, as may be required to comply therewith.

7. (Miscellaneous) That the construction of the water supply distribution system by the Purchaser is being financed by a loan made or insured by, and/or a grant from, the United States of America, acting through the Farmers Home Administration of the United States Department of Agriculture, and the provisions hereof pertaining to the undertakings of the Purchaser are conditioned upon the approval, in writing, of the State Director of the Farmers Home Administration, or some other state or Federal agency or agencies similarly administered and this contract is similarly conditioned if the same be another agency or agencies.

8. (Successor to the Purchaser) That in the event of any occurrence rendering the Purchaser incapable of performing under this Contract, any successor of the Purchaser, whether the result of legal process, assignment, or otherwise, shall succeed to the rights of the Purchaser hereunder.

9. This Contract is hereby pledged to the United States of America, acting through the Farmers Home Administration, as part of the security for a loan from the United States of America or such other state or Federal agency as may participate in or provide financing for the project.

10. This contract supersedes the contract and modification of 1976 and 1981, respectively.

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IN WITNESS WHEREOF, the parties hereto, acting under authority of their respective governing bodies, have caused this contract to be duly executed in two (2) counterparts, each of which shall constitute an original.

SELLER:

CITY OF FALMOUTH

BY *Mark Gaddy*

Title: MAYOR

ATTEST:

*H. L. Crummett*  
SECRETARY

PURCHASER:

PENDLETON COUNTY WATER DISTRICT

BY *Denise Hornbeck*

Title: CHAIRMAN

ATTEST:

*H. L. Crummett*  
SECRETARY

This Contract is approved on behalf of the Farmers Home Administration this  
11 day of December, 1985.

By *James H. Little*Title Community & Business Programs Specialist



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PENDLETON COUNTY WATER DISTRICT  
BOX 186  
BUTLER, KENTUCKY 41006

MINUTES OF  
COMMISSIONER'S MEETING  
JUNE 11, 1984

COMMISSIONER'S PRESENT: Denver Hornbeek, Chairman, Louis McClannahan,  
and Tommy Ammerman

COMMISSIONER'S ABSENT: Paul Wright and J. C. Crowley

ELECTION OF OFFICERS: Motion was made by Louis McClannahan to elect  
the following officers - Denver Hornbeek, Chair-  
man, Tommy Ammerman, Secretary - Louis McClanna-  
han, Treasurer - Second the motion by Tommy  
Ammerman - Motion carried.

FINANCIAL REPORTS: The following reports were presented to the board  
and discussed. (1) 1983 Public Service Commission  
Annual Report (2) 1983 Farmers Home Administration  
Budget and Annual Report.

LINE EXTENSION PROJECT: (1) The project engineering recommendations  
were presented to the Board and discussed. A motion to accept the  
project as recommended by the Engineers was made by Tommy Ammerman -  
Second by Louis McClannahan - Motion carried.

\* (2) The final revised Water Purchase Contract with the City of  
Falmouth raising monthly maximum volumes was reviewed by the board.  
Motion to approve the contract was made by Louis McClannahan - Second  
by Tommy Ammerman. Motion carried.

(3) Interim financing requirements for the line extension project  
were discussed. A motion was made by Tommy Ammerman to offer the  
\$1,000,000 interim financing if needed to all three banking institu-  
tions on an equal amount basis (\$333,333.00) to each bank. Motion  
seconded by Louis McClannahan - Motion carried.

KY. DEPT. OF HIGHWAYS RELOCATION OF LINES: The relocation of water  
and gas lines on US 27 to accommodate planned truck lane construction  
was reviewed and discussed by the board. A recent road slip in the  
area was also discussed and will be a part of the project.

The recent increase by the City of Falmouth in its water rates has  
necessitated a filing for a Purchase Water Adjustment by the District  
to pass on the increase in rates.

The Public Service Commission Water Inspection Report was reviewed  
and discussed with agreement to work toward correcting the various  
items in the report.

There being no further business, a motion to adjourn was made by  
Tommy Ammerman - Seconded by Louis McClannahan.



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March 12, 1984

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Falmouth City Council met in regular session with Mayor Max Goldberg presiding. Councilmembers present: Wes Simpson, Ernest G. Cummings, O. T. Gillespie, Ada Moore and Howard Showalter, Jr. Absent: Cliff Bonar.

Ralph Bonar appeared before Council concerning water taps at Bonar Village. Motion by O. T. Gillespie, seconded by Ernest Cummings, to approve these taps but we assume no responsibility for the water and sewer lines until such time as the area is annexed into the City. Motion carried.

Bob English and Ronnie English appeared before Council concerning a go-cart track on Weaver Drive.

Tommy and Michael Cummins appeared before Council concerning doing work on the curb and guttering.

Don Wells appeared before Council concerning water contracts with Pendleton County Water District. Motion by Howard Showalter, seconded by Ada Moore, to authorize Mayor Goldberg and H. L. Ammerman, Clerk to sign the contracts with the Water District. Motion Carried.

#### RESOLUTION

WHEREAS, the City of Falmouth and the Pendleton County Water District entered into a Contract dated August of 1976 whereby the City was to sell to the District water under certain terms in an amount not to exceed 4,000,000 gallons per month for a period of forty (40) years hence,

WHEREAS, said Contract was amended or modified by agreement of the parties in 1982, and

WHEREAS, Pendleton County Water District now seeks to extend its water service lines to areas outside the area served under the earlier Contract, and

WHEREAS, in order to do so engineers require that an additional capacity be entered into or engaged by the parties in an amount not to exceed 5,000,000 gallons per month and the agencies by virtue of which the financing will occur with respect to said additions required a forty (40) year contract to extend from the date of the first service of water or issuance of the new bonds, and

WHEREAS, the City of Falmouth desires to assist, encourage and enhance the development of the Community by virtue of adopting and approving the proposal which is set out and contained in the Water Purchase Contract, a copy of which is attached hereto, and

WHEREAS, the execution of said Contract should be deferred until such time as the extension is completed and service is needed,

HOW THEREFORE, be it resolved that the City of Falmouth shall enter into the Water Purchase Contract, a copy of which is attached, provided that the Water District's applications are approved and the anticipated line extensions are or are to be installed and that the Mayor of the City of Falmouth is authorized to execute said contract on behalf of the City of Falmouth in return for the District's like and simultaneous execution of the contract, but that said execution

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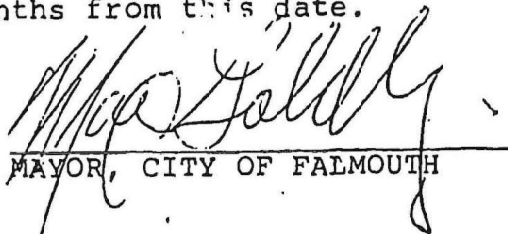
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the installation of the extension which contract shall be in force from that date or the date of the issuance of the new bonds until forty (40) years hence; in no event, shall said deferral for execution by longer than 24 months from this date.

  
MAYOR, CITY OF FALMOUTH

ATTEST

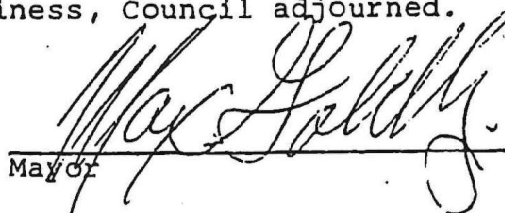
  
Clerk, City of Falmouth

Motion by Howard Showalter, seconded by Wes Simpson, to purchase the copy machine from Rawlings Business Machines for \$1,896.20. Motion carried.

Motion by Wes Simpson, seconded by Ada Moore, to advertise the trailers on the Donahue property for sale by sealed bids to be opened at the next Council meeting, April 9, 1984. Motion carried.

Mayor Max Goldberg appointed O. T. Gillespie, Jr., Wesley Simpson to review the water and sewer rates of the City of Falmouth and make recommendations to the Council.

City Clerk H. L. Ammerman reported cash in banks in the current operational funds of \$16,076.40 after paying. There being no further business, Council adjourned.

  
Mayor

  
Clerk

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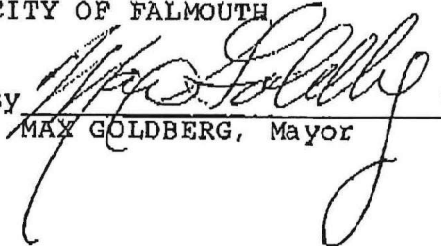
RESOLUTION

This matter having come to the attention of the City Council pursuant to a request by the East Pendleton Water District that the City and the Water District execute a new water purchase contract in order that the East Pendleton Water District might meet bonding requirements necessary to obtain a loan from the Farmers Home Administration to upgrade and repair the water system, and the City Council having considered the matter at its regular meeting on June 14, 1988, the following resolution was proposed by Virgiline Moore, seconded by Mike Whaley, and unanimously carried, to-wit:

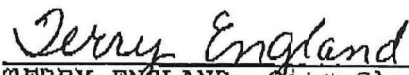
RESOLVED, that the Water Purchase Contract presented to the City Council this date by the East Pendleton Water District is hereby approved and the Mayor is hereby authorized to sign said contract on behalf of the City of Falmouth.

This 14 day of June, 1988.

CITY OF FALMOUTH

By   
MAX GOLDBERG, Mayor

ATTEST:

  
TERRY ENGLAND, City Clerk

Presiding Judge: HON. JAY DELANEY (618318)

EXH : 000012 of 000017

USDA--FHA  
Form FHA 442-30  
(Rev. 4-19-72)

Position 5

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## WATER PURCHASE CONTRACT

Divided  
12/30/2024

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This contract for the sale and purchase of water is entered into as of the 15th day of June, 19 88, between the City of Falmouth, Pendleton County, Kentucky a municipal corporation 88076

(Address)

hereinafter referred to as the "Seller" and the East Pendleton Water District, Route #1, Foster, Pendleton County, Kentucky 41043

(Address)

hereinafter referred to as the "Purchaser",

## WITNESSETH:

Whereas, the Purchaser is organized and established under the provisions of Chapter 74 of the Code of Kentucky Revised Statutes, for the purpose of constructing and operating a water supply distribution system serving water users within the area described in plans now on file in the office of the Purchaser and to accomplish this purpose, the Purchaser will require a supply of treated water, and

Whereas, the Seller owns and operates a water supply distribution system with a capacity currently capable of serving the present customers of the Seller's system and the estimated number of water users to be served by the said Purchaser as shown in the plans of the system now on file in the office of the Purchaser, and

Whereas, by Resolution No. -- enacted on the 14th day of June, 19 88, by the Seller, the sale of water to the Purchaser in accordance with the provisions of the said Resolution was approved, and the execution of this contract carrying out the said Resolution by the Mayor and attested by the Secretary, was duly authorized, and

Whereas, by Resolution of the Commissioners of the East Pendleton Water District of the Purchaser, enacted on the 15th day of June, 19 88, the purchase of water from the Seller in accordance with the terms set forth in the said Resolution was approved, and the execution of this contract by the Chairman and attested by the Secretary was duly authorized;

Now, therefore, in consideration of the foregoing and the mutual agreements hereinafter set forth,

## A. The Seller Agrees:

1. (Quality and Quantity) To furnish the Purchaser at the point of delivery hereinafter specified, during the term of this contract or any renewal or extension thereof, potable treated water meeting applicable purity standards of the State of Kentucky

in such quantity as may be required by the Purchaser ~~not to exceed XXXXX gallons per month~~

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(Point of Delivery and Pressure) That water will be furnished at a reasonably constant pressure calculated a minimum of 90 lbs. p. s. i. from an existing twelve inch main supply at a point located at the intersection of Shelby Street and Licking Street in the City of Falmouth, 90 lbs. p. s. i.

XXXXXX  
 If a greater pressure than that normally available at the point of delivery is required by the Purchaser, the cost of providing such greater pressure shall be borne by the Purchaser. Emergency failures of pressure or supply due to main supply line breaks, power failure, flood, fire and use of water to fight fire, earthquake or other catastrophe shall excuse the Seller from this provision for such reasonable period of time as may be necessary to restore service.

3. (Metering Equipment) To furnish, install, operate, and maintain at its own expense at point of delivery, the necessary metering equipment, including a meter house or pit, and required devices of standard type for properly measuring the quantity of water delivered to the Purchaser and to calibrate such metering equipment whenever requested by the Purchaser but not more frequently than once every twelve (12) months. A meter registering not more than two percent (2%) above or below the test result shall be deemed to be accurate. The previous readings of any meter disclosed by test to be inaccurate

shall be corrected for the two months previous to such test in accordance with the percentage of inaccuracy found by such tests. If any meter fails to register for any period, the amount of water furnished during such period shall be deemed to be the amount of water delivered in the corresponding period immediately prior to the failure, unless Seller

and Purchaser shall agree upon a different amount. The metering equipment shall be read on the 14th day of each month. An appropriate official of the Purchaser at all reasonable times shall have access to the meter for the purpose of verifying its readings.

4. (Billing Procedure) To furnish the Purchaser at the above address not later than the 30th day of each month, with an itemized statement of the amount of water furnished the Purchaser during the preceding month.

B. The Purchaser Agrees:

1. (Rates and Payment Date) To pay the Seller, not later than the 15th day of each month, for water delivered in accordance with the following schedule of rates:

- a. \$ \_\_\_\_\_ for the first \_\_\_\_\_ gallons, which amount shall also be the minimum rate per month.
- b. \$ \_\_\_\_\_ cents per 1000 gallons for water in excess of \_\_\_\_\_ gallons but less than \_\_\_\_\_ gallons.
- c. \$ \_\_\_\_\_ cents per 1000 gallons for water in excess of \_\_\_\_\_ gallons.

See attached rate schedule.

/Connection fee not applicable due to present connection.

2. (Connection Fee) To pay as an agreed cost, a connection fee to connect the Seller's system with the system of the Purchaser, the sum of \_\_\_\_\_ dollars which shall cover any and all costs of the Seller for installation of the metering equipment and \_\_\_\_\_

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It is further mutually agreed between the Seller and the Purchaser as follows:

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1. (Term of Contract) That this contract shall extend for a term of 42 years from the date of the initial delivery of the water as shown by the meter and monitored by the Seller to the Purchaser and may be renewed or extended for such term, or terms, as may be agreed upon by the Seller and Purchaser.

2. (Delivery of Water) That n/a days prior to the estimated date of completion of construction of the Purchaser's water supply distribution system, the Purchaser will notify the Seller in writing the date for the initial delivery of water.

3. (Water for Testing) When requested by the Purchaser the Seller will make available to the contractor at the point of delivery, or other point reasonably close thereto, water sufficient for testing, flushing, and trench filling the system of the Purchaser during construction, irrespective of whether the metering equipment has been installed at that time, at a

flat charge of \$ n/a which will be paid by the contractor or, on his failure to pay, by the Purchaser,

4. (Failure to Deliver) That the Seller will, at all times, operate and maintain its system in an efficient manner and will take such action as may be necessary to furnish the Purchaser with quantities of water required by the Purchaser. Temporary or partial failures to deliver water shall be remedied with all possible dispatch. In the event of an extended shortage of water, or the supply of water available to the Seller is otherwise diminished over an extended period of time, the supply of water to Purchaser's consumers shall be reduced or diminished in the same ratio or proportion as the supply to Seller's consumers is reduced or diminished.

5. (Modification of Contract) That the provisions of this contract pertaining to the schedule of rates to be paid by the Purchaser for water delivered are subject to modification, ~~and the said rates shall not be subject to any increase or decrease in rates shall be based on a demonstrable increase or decrease in the costs of performance hereunder, and such costs shall not include increased capitalization of the Seller's system.~~ Any increase or decrease in rates shall be based on a demonstrable increase or decrease in the costs of performance hereunder, and such costs shall not include increased capitalization of the Seller's system. Other provisions of this contract may be modified or altered by mutual agreement. If based on a demonstrable increase in the cost of performance, seller may increase the above-stated rates by the same percent that it increases the \*

6. (Regulatory Agencies) That this contract is subject to such rules, regulations, or laws as may be applicable to similar agreements in this State and the Seller and Purchaser will collaborate in obtaining such permits, certificates, or the like, as may be required to comply therewith.

7. (Miscellaneous) That the construction of the water supply distribution system by the Purchaser is being financed by a loan made or insured by, and/or a grant from, the United States of America, acting through the Farmers Home Administration of the United States Department of Agriculture, and the provisions hereof pertaining to the undertakings of the Purchaser are conditioned upon the approval, in writing, of the State Director of the Farmers Home Administration.

8. (Successor to the Purchaser) That in the event of any occurrence rendering the Purchaser incapable of performing under this contract, any successor of the Purchaser, whether the result of legal process, assignment, or otherwise, shall succeed to the rights of the Purchaser hereunder.

9. It is agreed that all of the Purchasers rights and equities under this contract may be and the same are hereby pledged to the USDA, FmHA, as security for a loan FmHA proposes to make the Purchaser to finance the construction or extensions of a water system.

10. It is further agreed by and between the parties hereto that the City reserves the right to purchase any and all facilities, including service connections, and the right to provide water service to any and all customers of the District, which facilities and customers are located within a radius of two miles measuring north-eastwardly generally along Highway 159 and five miles southward, measuring generally along Highway 27, all such measurements to be taken from the present limits of the City of Falmouth; provided however, such rights shall not be exercised until such time as the City has legally annexed the foregoing described area, or either of such two segments, into the city proper.

\* water rates applicable to users in the City of Falmouth.

**Presiding Judge: HON. JAY DELANEY (618318)**

EXH : 000015 of 000017



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In witness whereof, the parties hereto, acting under authority of their respective governing bodies, have caused this contract

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to be duly executed in four counterparts, each of which shall constitute an original.

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Seller:

CITY OF PALMOUTH

By

Title

Mayor

Attest:

Jerry England  
Secretary

Purchaser:

EAST PENDLETON WATER DISTRICT

By

Title

Chairman

Attest:

Leslie Herbst  
Secretary

28<sup>th</sup>

July

This contract is approved on behalf of the Farmers Home Administration this \_\_\_\_\_ day of \_\_\_\_\_,

19 88.

By

Title

James B. Little  
Community & Business Programs Specialist

Presiding Judge: HON. JAY DELANEY (618318)

EXH : 000016 of 000017

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RESOLUTION

This matter having come to the attention of the Commissioners of the East Pendleton Water District pursuant to a request by the Farmers Home Administration that the City and the Water District execute a new water purchase contract in order that the East Pendleton Water District might meet bonding requirements necessary to obtain a loan from the Farmers Home Administration to upgrade and repair the water system, and the Commissioners having considered the matter at a meeting on June 15, 1988, the following resolution was proposed by Leslie Herbst, seconded by Paul E. Hall, and unanimously carried, to-wit:

RESOLVED, that the Water Purchase Contract presented to the Commissioners this date is hereby approved and the Chairman is hereby authorized to sign said contract on behalf of the East Pendleton Water District.

This 15 day of June, 1988.

EAST PENDLETON WATER DISTRICT

By Paul E. Hall  
PAUL E. HALL, Chairman

ATTEST:

Leslie Herbst  
LESLIE HERBST, Secretary

Presiding Judge: HON. JAY DELANEY (618318)

EXH : 000017 of 000017





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**EXHIBIT B**  
12/30/2024

10:09:54 AM

**User Name:** Brandon Voelker**Date and Time:** Wednesday, December 18, 2024 1:49:00 PM EST

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**Job Number:** 241141698**Document (1)**

1. [Administrative Determination Document, 1981 Ky. AG LEXIS 73, OAG 81-365, OAG 81-365](#)

**Client/Matter:** -None-**Search Terms:** 81-365 kentucky attorney general**Search Type:** Natural Language**Narrowed by:****Content Type****Narrowed by**  
-None-

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1981 Ky. AG LEXIS 73

12/30/2024

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Office of the Attorney General of the State of Kentucky

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**KY Attorney General Opinions****Reporter**

1981 Ky. AG LEXIS 73 \*

**OAG 81-365**

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October 19, 1981

**Core Terms**

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franchise, furnish water

**Request By: [\*1]**

Honorable Martin W. Johnson

City Attorney

P.O. Box 165

Benton, Kentucky 42025

**Opinion By:** Steven L. Beshear, Attorney General; **By:** Walter C. Herdman, Assistant Deputy Attorney General**Opinion**

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This is in response to your letter of October 5, in which you state that the cities of Benton and Hardin are involved in negotiating a contract whereby the City of Benton will furnish water to the City of Hardin. The question is raised concerning the duration of the contract, that is, whether or not it could extend for forty years as proposed by the Farmers Home Administration which will loan money for the construction of the distribution system.

We initially refer you to [KRS 96.120](#), which reads as follows:

"Any city may acquire a franchise to furnish water and light to any other city, in the same manner that any private corporation or individual may acquire such a franchise."

The above statute authorizes the proposed sale of water between the cities of Benton and Hardin. However, such a contract would necessarily be in the nature of a franchise acquired in this instance by the City of Benton from the City of Hardin and would be governed, in our opinion, by Section 164 of the Constitution. As you know, [\*2] this section prohibits any franchise from exceeding twenty years and at the same time requires that it be let on a bid basis, though from a practical standpoint, in this instance, there would be only one bidder. Nevertheless, we believe that the terms of Section 164 must be complied with.

Prior to the expiration of the 20-year contract the franchise would have to be renegotiated as provided in [KRS 96.010](#), which should be no problem in this instance since there is apparently only one source of supply.

1981 Ky. AG LEXIS 73, \*2

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KY Attorney General Opinions

12/30/2024

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End of Document

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Presiding Judge: HON. JAY DELANEY (618318)

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**EXHIBIT C**

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12/30/2024

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**User Name:** Brandon Voelker**Date and Time:** Tuesday, December 17, 2024 3:38:00 PM EST**Job Number:** 241056917

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**Document (1)**

1. [Ledbetter Water Dist. v. Crittenden-Livingston Water Dist.](#)

**Client/Matter:** -None-**Search Terms:** city water district breach of contract**Search Type:** Natural Language**Narrowed by:****Content Type****Narrowed by**

-None-



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Neutral

As of: December 17, 2024 8:38 PM Z

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**Ledbetter Water Dist. v. Crittenden-Livingston Water Dist.**

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Supreme Court of Kentucky

February 20, 2020, Rendered

2018-SC-000494-DG

**Reporter**

2020 Ky. Unpub. LEXIS 10 \*; 2020 WL 1303913

LEDBETTER **WATER DISTRICT**, APPELLANT v. CRITTENDEN-LIVINGSTON **WATER DISTRICT**, APPELLEE

**Notice:** THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, [CR 76.28\(4\)\(C\)](#), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

**Subsequent History:** Rehearing denied by [Ledbetter Water Dist. v. Crittenden-Livingston Water Dist., 2020 Ky. LEXIS 237 \(Ky., July 9, 2020\)](#)

**Prior History:** [\*1] ON APPEAL FROM COURT OF APPEALS. CASE NO. 2017-CA-000578. LIVINGSTON CIRCUIT COURT NO. 15-CI-00079. HON. CLARENCE A. WOODALL, III.

[Crittenden-Livingston Water Dist. v. Ledbetter Water Dist., 2018 Ky. App. Unpub. LEXIS 571 \(Ky. Ct. App., Aug. 17, 2018\)](#)

## Core Terms

franchise, lease, **water district**, bidding, contracts, municipality, void, public entity, right to use, advertised, entity, meter, water supply, conferred, argues, wharf, acquire

**Counsel:** COUNSEL FOR APPELLANT: Van Franklin Sims, Paducah, Kentucky.

COUNSEL FOR CRITTENDEN-LIVINGSTON WATER: Robert Bartley Frazer, Marion, Kentucky.

COUNSEL FOR KENTUCKY RURAL WATER ASSOCIATION, INC, AMICUS CURIAE : Damon R. Tally, Hodgenville, Kentucky; Stephen A. Sherman, Louisville, Kentucky.

**Judges:** Minton, C.J.; Hughes, Keller, Lambert, VanMeter and Wright, J.J., sitting. Nickell, J., not sitting. Hughes, Keller, Lambert and Wright, J.J., concur. Minton, C.J. dissents with separate opinion in which VanMeter, J., joins. VanMeter, J. dissents with a separate opinion in which Minton, C.J., joins.

## Opinion

### MEMORANDUM OPINION OF THE COURT

### REVERSING



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The Kentucky Court of Appeals reversed a summary judgment entered by the Livingston Circuit Court which found that a contract entered into between Ledbetter Water District ("Ledbetter") and the Crittenden-Livingston Water District ("Crittenden-Livingston") was void because it violated Kentucky Constitution § 164. After review, we now reverse the Court of Appeals and reinstate the trial court judgment in favor of Ledbetter.

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## I. BACKGROUND

Ledbetter and Crittenden-Livingston [\*2] are both non-profit water districts organized under Kentucky Revised Statutes ("KRS") Chapter 74. Ledbetter is an unincorporated community located in Livingston County. Crittenden County and Livingston County formed a water company together. In 1988, Ledbetter entered into a four-year agreement with the city of Grand Rivers for Grand Rivers to become Ledbetter's new source of water supply. Ledbetter and Grand Rivers entered into multiple water purchase agreements between 1988 and 2000. Ledbetter learned that Grand Rivers planned to close their water plant and could no longer supply Ledbetter the amount of water they needed moving forward.

In 1996, the Crittenden-Livingston Board of Commissioners began drawing up plans to expand the Crittenden-Livingston water plant. Crittenden-Livingston marketed water to five local areas within Crittenden and Livingston counties to help fund the expansion. Ledbetter was one of the communities to which Crittenden-Livingston marketed a water supply contract.

In May 1996, the Crittenden-Livingston Superintendent attended a Ledbetter Water Board meeting to present the new plan. Ledbetter then sent a letter to Crittenden-Livingston stating that it wanted [\*3] to purchase 3,000,000 gallons of water per month from Crittenden-Livingston, at a price of \$1.68 per thousand gallons, for an unspecified length of time.

Experiencing delays in the project, it was not until January 17, 2000 that Crittenden-Livingston faxed a proposed contract to the Ledbetter Board for consideration. A week later, the Ledbetter Board approved the proposed contract. Relevant to our review, Ledbetter did not advertise, publicly or privately, for bids before voting to enter into this contract. Under this contract, Ledbetter and Crittenden-Livingston agreed for Crittenden-Livingston to provide and sell a minimum of three million gallons of water per month for a period of forty years. Crittenden-Livingston was also granted the right to install a master meter in a constructed meter housing building on Ledbetter property and to install water line connections to the Ledbetter water system. Crittenden-Livingston also reserved the right to enter Ledbetter property to read the meter and provide maintenance.

Over the course of the contract, Crittenden-Livingston tried to persuade Ledbetter to purchase more than the minimum 3,000,000 gallons. By 2010, Ledbetter was able to produce [\*4] some of their water supply at their own plant at a substantially lower cost than the contracted price.

In 2013, Ledbetter sought an opinion from the Kentucky Attorney General's office regarding the legality of the contract between the two entities. Assistant Attorney General Matt James rendered an advisory opinion that the contract was void because it violated Kentucky Constitution § 164. The letter addressed a savings clause within the contract, which would have shifted the term of years from forty to twenty; however, the contract was still deemed void as the contract was not put up for public bid. Ledbetter advised the Crittenden Board of Commissioners of this opinion, which Crittenden-Livingston rejected.

Ledbetter then filed a declaratory judgment action with the Livingston Circuit Court. The trial court determined that the contract was within Ledbetter's authority to make; however, because the contract granted a franchise and was in excess of twenty years, it was void under the Kentucky Constitution.

The Court of Appeals reversed the Livingston Circuit Court holding that because the contract involved two public entities, the franchise provision and the public bidding requirements of the Kentucky Constitution [\*5] did not apply. This appeal followed.

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**II. STANDARD OF REVIEW**

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Summary judgment is only proper "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant."<sup>1</sup> Because the grant of summary judgment does not involve fact-finding, our standard of review is *de novo*.<sup>2</sup>

**III. ANALYSIS**

First, we review how the Kentucky Constitution applies to the facts before us. [Ky. Const. § 162](#), states,

No county, **city**, town or other municipality shall ever be authorized or permitted to pay any claim created against it, under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts shall be null and void.

[Ky. Const. § 164](#), Term of Franchises, states:

No county, **city**, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, **such municipality shall first, after due advertisement, receive bids therefor publicly**, and award the same to the highest and best [\*6] bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

(emphasis added). Therefore, when examining the requirements set out in the Kentucky Constitution, we review both § 162 and § 164.

We must also determine the meaning of a "franchise." In *E.M. Bailey Distributing Co., Inc. v. Conagra, Inc.*,<sup>3</sup> the Lyon County Riverport Authority had granted Conagra, a private company, use of a grain loading facility on public property. E.M. Bailey, a competing private company, filed suit to challenge the legality of the agreement under § 164 because the riverport authority did not advertise for competitive bidding. Our Court defined a franchise as follows: "A franchise is generally defined as a right or privilege granted by a sovereign power, government or a governmental entity to a party to do some act which such party could not do without a grant from the government."<sup>4</sup> Furthermore, a franchise is a grant of a right to use public property or at least the property over which the granting authority has control.<sup>5</sup> The Court held that the "riverport authority holds title to the land and the improvements in an absolute trust for all the people of Lyon County. Such a [\*7] public asset cannot be disposed of without due advertising, competitive bidding and process mandated by the [Kentucky Constitution § 164](#)."<sup>6</sup>

Crittenden-Livingston argues that it is impossible that Ledbetter is empowered to grant a franchise because it is an extension of Livingston County, one of the two participating counties of Crittenden-Livingston. Additionally,

---

<sup>1</sup> *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985) (quoting *Roberson v. Lampton*, 516 S.W.2d 838, 840 (Ky. App. 1974)).

<sup>2</sup> *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006).

<sup>3</sup> 676 S.W.2d 770 (Ky. 1984).

<sup>4</sup> *Id.* at 771.

<sup>5</sup> *Young v. City of Morehead*, 314 Ky. 4, 233 S.W.2d 978 (Ky. 1950).

<sup>6</sup> *E.M. Bailey*, 676 S.W.2d at 773.



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Crittenden-Livingston argues that this claim involves one public entity acquiring the services of another public entity, and therefore does not require a franchise and public bidding.

In reviewing *Public Service Commission of Kentucky v. Dewitt Water District*, this Court provided insight to the issue of an unincorporated city water district.<sup>7</sup> Dewitt is an unincorporated city in Knox County, Kentucky. The *Dewitt* court held that an unincorporated city water district is a division of the county's government stating: "There are approximately 115 water districts in the Commonwealth of Kentucky which are nonprofit political subdivisions of county government."<sup>8</sup> This Court continued:

It is important to remember that **this case involves water districts which are nonprofit utilities** organized under Chapter 74 of the Kentucky Revised Statutes. The owners and consuming ratepayers are essentially the same individuals [\*8] because **the districts are political subdivisions of county government**.<sup>9</sup>

Crittenden-Livingston argues that Ledbetter has no authority to grant or deny it a franchise as it is not a county, city, town, taxing district, or other municipality under Ky. Const. § 164. However, water districts have long been held to be political subdivisions, and therefore observe the same formalities required of counties and municipalities to contract.<sup>10</sup>

Crittenden-Livingston argues that unlike *E.M. Bailey*, the claim here involves two public entities; not a public entity and private party. They argue that this distinction means that the contract cannot be a franchise. Crittenden-Livingston claims that this is not a franchise agreement, as it did not grant governmental rights or privileges that Crittenden-Livingston did not already possess.

By dissent, Chief Justice Minton cites *Inland Waterways Co. v. City of Louisville*, where a lease involving property held by the City of Louisville was given to a private corporation to be used for wharf purposes.<sup>11</sup> However, as pointed out specifically within *Inland Waterways* and by our court in *E.M. Bailey*, Inland Waterways is factually distinguishable because the lease granted Inland Waterways [\*9] Co. only temporary use of the property, and the City of Louisville retained a recapture provision allowing it to recover the wharf at any time.<sup>12</sup>

*Inland Waterways, supra*, cited in support of respondents' position, is distinguishable from the facts in this case because it involved a lease by the City of Louisville of property held by it, but not being used for, wharf purposes. The lease granted only a temporary use of the property and the City could recover it at any time it was needed for wharf purposes. This Court held that the lease was not a franchise, noting that the recapture provisions in the lease were wholly incompatible with the idea of a fixed right for a definite term.

Here Conagra is permitted a fixed right to use the grain facilities as needed by it for a definite term of five years. The authority cannot regain the grain facility once Conagra has given the required notice and cannot in any event ever recapture the operational area adjacent thereto over which Conagra has been granted absolute exclusive control.

In considering this matter, it is useful to distinguish a franchise from a license. A license in respect to real property can be defined as a personal privilege to do acts upon the land of [\*10] the licensor of a temporary nature which are revocable at the will of the licensor. A franchise is neither temporary or personal and it is not

<sup>7</sup> 720 S.W.2d 725 (Ky. 1986).

<sup>8</sup> Id. at 727.

<sup>9</sup> Id. at 731. (emphasis added).

<sup>10</sup> Louisville Extension Water Dist. v. Diehl Pump & Supply Co., 246 S.W.2d 585, 586 (Ky. 1952).

<sup>11</sup> 227 Ky. 376, 13 S.W.2d 283, 284-286 (Ky. 1929).

<sup>12</sup> *E.M. Bailey*, 676 S.W.2d at 772.



2020 Ky. Unpub. LEXIS 10, \*10

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revocable at the will of the grantor. See 36 Am.Jur.2d § 2, *Franchises*; cf. [Owensboro v. Cumberland Tel. & Tel. Co.](#), 230 U.S. 58, 33 S.Ct. 988, 57 L.Ed. 1389 (1913).<sup>13</sup>

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Analogous to our present case, in [E.M. Bailey](#), Conagra was permitted a fixed right to use the grain facilities for a definitive term, there was no recapture provision included and Conagra was granted exclusive control over the facilities.<sup>14</sup>

Here, the contract did in fact grant Crittenden-Livingston rights they would not have possessed without the contract with Ledbetter. The Crittenden-Livingston Water District encompassed areas within Crittenden and Livingston counties; however, it did not include the Ledbetter district. With the agreement, Crittenden-Livingston was permitted to install connecting water lines and a master meter with valves, to maintain a building on the Ledbetter water tower property so as to gain access to the Ledbetter master meter and was granted rights to enter the Ledbetter facility for readings and maintenance. The contract also granted Crittenden-Livingston the right to use Ledbetter's water system infrastructure to transport a minimum of 3,000,000 [\*11] gallons of water each month to fulfill the terms of the contract by selling water to Ledbetter.

Justice VanMeter's dissent notes that pursuant to [KRS 74.070\(1\)](#) a water district is authorized to "make contracts for the water district with municipalities and other persons." He concludes this is just a contract between the two public entities while a franchise is implemented where a water district contracts with a private entity to create infrastructure, deliver water to citizens and then direct bills those citizens. However, in [KRS 96.120\(1\)](#) the legislature refers to a contract such as the one before us as a franchise: "Any city that owns and operates its own water or light plant may acquire a franchise to furnish water and light to any other city, in the same manner that any private corporation or individual may acquire such a franchise." Although the statute refers to a water supply arrangement between two cities, there's no reason the rule would be different for two water districts, which as noted are political subdivisions of county government.

On October 5, 1981, Honorable Martin W. Johnson, City Attorney for Benton, Kentucky, requested an opinion from the Office of the Attorney General ("OAG") as to whether [\*12] two public entities could enter into a forty year contract as was required by the lender.<sup>15</sup> Under the contract the City of Benton planned to furnish water to the City of Hardin.<sup>16</sup> The contract in question included a proposed term of forty years. In response, the OAG made the following recommendation:

We initially refer you to [KRS 96.120](#), which reads as follows: "Any city may acquire a franchise to furnish water and light to any other city, in the same manner that any private corporation or individual may acquire such a franchise."

The above statute authorizes the proposed sale of water between the cities of Benton and Hardin. However, such a contract would necessarily be in the nature of a franchise acquired in this instance by the City of Benton from the City of Hardin and would be governed, in our opinion, by [Section 164 of the Constitution](#). As you know, this section prohibits any franchise from exceeding twenty years and at the same time requires that it be let on a bid basis, though from a practical standpoint, in this instance, there would only be one bidder. Nevertheless, we believe that the terms of Section 164 must be complied with.<sup>17</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 1980-1981 Ky. Op. Atty. Gen. 2-883 (Ky. A.G.), Ky. OAG 81-365, 1981 WL 142437.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*



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Much like the OAG opinion rendered regarding the contract between the cities of Benton and Hardin, [\*13] in the present case we have an analogous OAG advisory opinion stating that the contract between Ledbetter and Crittenden-Livingston was void because it violated Kentucky Constitution § 164.

Crittenden-Livingston relies on *Southeast Bullitt Fire Protection District v. Southeast Bullitt Fire and Rescue Department*, a dispute between public entities in Bullitt County.<sup>18</sup> That contract dispute involved a volunteer fire department that provided non-utility fire protection services in the district's area. The *Bullitt* court held, "The District is correct that the fire protection contract was not publicly advertised; however, the Fire Department argues that it provides a "professional service" and no public bidding was required. The trial court held that the Fire Department provided **professional services** and we agree with that conclusion."<sup>19</sup> This decision is factually distinguishable from the present case. Here we have a franchise granted for providing water utilities, rather than a contract for professional services. Since 1896 it has been held that a utility contract regarding water supply is a franchise, and pursuant to the Kentucky Constitution, a franchise or privilege that was not advertised and publicly bid is [\*14] void pursuant to § 164.<sup>20</sup>

Since the contract entered into by Ledbetter and Crittenden-Livingston was both for a term of greater than twenty years and was not advertised for public bidding, it violates the Kentucky Constitution and applicable statutes and, thus, is void. We reverse the Court of Appeals and reinstate the Livingston Circuit Court grant of summary judgment.

Minton, C.J.; Hughes, Keller, Lambert, VanMeter and Wright, J.J., sitting. Nickell, J., not sitting.

Hughes, Keller, Lambert and Wright, J.J., concur. Minton, C.J. dissents with separate opinion in which VanMeter, J., joins. VanMeter, J. dissents with a separate opinion in which Minton, C.J., joins.

**Dissent by:** MINTON; VanMeter

## Dissent

MINTON, C. J., DISSENTING: I agree with the result reached by Justice VanMeter's dissenting opinion<sup>21</sup> but write separately to express an additional point that, in my view, is a critical point under these facts. Ledbetter argues, in part, that the contract was a franchise because it granted to Crittenden-Livingston the right to use the real property of Ledbetter. Specifically, the contract gave Crittenden-Livingston the right to use Ledbetter property to install a water line and meter and to erect a building to house the [\*15] meter. But while the granting "of a right to use public property or at least the property over which the granting authority has control"<sup>22</sup> may be an attribute of a franchise,

<sup>18</sup> *Southeast Bullitt Fire Prot. Dist. v. Southeast Bullitt Fire and Rescue Dep't.*, 537 S.W.3d 828 (Ky. App. 2017).

<sup>19</sup> *Id. at 831* (emphasis added).

<sup>20</sup> *Nicholasville Water Co. v. Bd. of Councilmen of Town of Nicholasville*, 36 S.W. 549, 18 Ky. L. Rptr. 592 (Ky. 1896).

<sup>21</sup> The point in Justice VanMeter's dissent, that the right to produce and sell water to a water district is not the prerogative of the government, and a franchise is therefore not required to grant such a right, is supported by our case law. See *Young v. City of Morehead*, 314 Ky. 4, 233 S.W.2d 978, 980 (Ky. 1950) ("The right to produce and sell gas is not a prerogative of a government but is a business open to all, therefore, Young was not exercising a franchise when he contracted to sell and deliver his gas to the City at its corporate limits."); *City of Princeton v. Princeton Electric Light & Power Co.*, 166 Ky. 730, 179 S.W. 1074, 1077 (Ky. 1915) ("The right to produce and sell electricity as a commercial product is not a prerogative of a government, but is a business which is open to all, and for that reason is not a franchise.").

<sup>22</sup> *E.M. Bailey Distributing Co., Inc., v. Conagra, Inc.*, 676 S.W.2d 770, 771 (Ky. 1984) (citing *Young*, 314 Ky. 4, 233 S.W.2d 978).



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that fact alone does not render the granting of a lease a franchise. The nature of the public property and the activity being conducted on the property must be considered.

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For example, in *Inland Waterways Co. v. City of Louisville*, our predecessor court found that a lease given to a private corporation by the City of Louisville upon real property held by the City was not a franchise requiring advertisement and competitive bidding under Section 164.<sup>23</sup> More specifically, the contract in that case leased to the Inland Waterways Company, for a fixed term, two separate tracts of land abutting the Ohio River with the express purpose that the lessee develop the parcels to be used as a wharf.<sup>24</sup> The lease had been challenged as an invalid franchise under Section 164.<sup>25</sup>

The Court explained that a franchise of the type contemplated by Section 164 "is generally understood to designate and denote a right or preference conferred by law which may be granted only by the sovereign, and not by individuals generally."<sup>26</sup> The Court went on to explain that such a right [\*16] may not be conveyed by a lease even if the lease provides for the use of land held by the government.<sup>27</sup> It is instead the nature of the right being conveyed—whether it confers some special privilege not belonging to the public—that ultimately determines whether a franchise has been created.

The Court concluded that the lease at issue did not confer any special privilege exclusive to the City of Louisville but instead conferred only the right to operate a private wharf on the lessor's land—a right that could have been conveyed by any private entity.<sup>28</sup> The fact that the City of Louisville held title to the land did not change the nature of that right. The city was simply conveying the right to use land as other private individuals may do.<sup>29</sup>

Likewise, the Ledbetter lease at issue does not involve a right that may be granted only by the sovereign but instead involves a right that may be conferred by private individuals generally—the right to produce and sell water and construct water lines and meters on the lessor's property—as Justice VanMeter properly notes. The fact that Ledbetter holds title to the property does not change the nature of this right. Leases identical to this one [\*17] could be executed by any private entity.

As such, I would hold that the lease is not void for granting a franchise or privilege without allowing competitive bidding under Section 164. I would affirm the decision the Court of Appeals for the reasons I have stated. VanMeter, J., joins.

VanMeter, J., DISSENTING: Respectfully, I dissent. The majority's analysis of [Section 164 of the Kentucky Constitution](#) fails to recognize that the water districts in question entered into a simple contract for the sale of water from one district to the other, thus removing any contract for services between Ledbetter and Crittenden-Livingston from Section 164's provisions regarding franchises. "A franchise is generally defined as a right or privilege granted by a sovereign power, government or a governmental entity to a party to do some act which such

<sup>23</sup> [227 Ky. 376, 13 S.W.2d 283, 284-86 \(Ky. 1929\)](#).

<sup>24</sup> [Id. at 285](#).

<sup>25</sup> [Id.](#)

<sup>26</sup> [Id.](#)

<sup>27</sup> See [id. at 286](#).

<sup>28</sup> See [id. at 286-87](#).

<sup>29</sup> See [id. at 287](#) (citing Ky. Stats. § 2742; [Carrollton Furniture Mfg. Co. v. City of Carrollton](#), 104 Ky. 525, 47 S.W. 439, 20 Ky. L. Rptr. 818 (Ky. 1898)); [Board of Councilmen of the City of Frankfort v. Pattie](#), 227 Ky. 343, 12 S.W.2d 1108 (Ky. 1928)) ("A municipal corporation may be the owner of land and may control, use, lease, and dispose of it as other proprietors may do.")

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party could not do without a grant from the government." [E.M. Bailey Distrib. Co. v. Conagra, Inc., 676 S.W.2d 770, 771 \(Ky. 1984\).](#)

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In the context of public utilities, such as waterworks, a franchise is implemented if a water district contracted with a private entity to carry out the water district's duties in creating infrastructure, delivering water to the district's citizens, and billing them directly. However, under the present arrangement, Ledbetter is simply purchasing water from an adjacent [\*18] water district—not to franchise the supplying of water to Ledbetter citizens—but to add to Ledbetter's existing, limited supply held in its water tower. This Court has held, under similar factual circumstances related to two non-profit government entities contracting for services, "R]he contracts involved have some of the attributes of a privilege, but the rights conferred do not have the character of a franchise. \* \* \* The contracts are mutually advantageous to the three municipal corporations. They have added no appreciable burden. They constitute mere rental of a surplus facility." [City of Russell v. City of Flatwoods, 394 S.W.2d 900, 902 \(Ky. 1965\)](#) (quoting [Louisville & Jefferson Cnty. Metro Sewer Dist. v. Strathmoor Village, 307 Ky. 343, 345-46, 211 S.W.2d 127, 129 \(1948\)](#)).

Under [KRS 74.070\(1\)](#), Ledbetter's commission "may make contracts for the water district with municipalities and other persons." Ledbetter's contract with Crittenden-Livingston was simply fulfilling Ledbetter's statutory duty to provide water to its citizens, not through a franchise, but through a contract for an amount of water to be added to Ledbetter's own supply. Much like the sewer services contracts between the three municipal corporations in *Strathmoor Village*, "[t]hese are contracts such as individuals owning like facilities as private property might have made." [307 Ky. at 346, 211 S.W.2d at 129](#). Thus, Ledbetter should be free to [\*19] contract with Crittenden-Livingston for the provision of external water resources without implication of the franchise prohibition and requirements of Section 164.

Minton, C.J., joins.

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Presiding Judge: HON. JAY DELANEY (618318)

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**EXHIBIT D**

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

AN ELECTRONIC INVESTIGATION INTO CITY	)	
OF FALMOUTH'S THREAT OF TERMINATION	)	CASE NO.
OF WHOLESALE WATER SERVICE TO EAST	)	2024-00403
PENDLETON WATER DISTRICT AND	)	
PENDLETON COUNTY WATER DISTRICT	)	

ORDER

East Pendleton Water District (East Pendleton District) and Pendleton County Water District (Pendleton District) (collectively, the Districts) are water districts organized pursuant to KRS Chapter 74. The city of Falmouth's (Falmouth), located in Pendleton County, Kentucky, is a municipality that sells wholesale water to the Districts. The Commission, on its own motion, establishes this proceeding to investigate Falmouth's threat of termination of water service to East Pendleton District and Pendleton District in contrast to existing tariffs, and to investigate the adequacy and reliability of Falmouth's water service supplied to the Districts, pursuant to KRS 278.160, KRS 278.200, and KRS 278.260(1). The Commission became aware of this issue following communications with Commission staff from counsel for the Districts and counsel for Falmouth.

East Pendleton District owns and operates facilities that distribute and furnish water to approximately 2,414 customers in Pendleton County. East Pendleton purchases wholesale water from Falmouth and Bracken County Water District.<sup>1</sup>

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<sup>1</sup> Annual Report of East Pendleton Water District to the Public Service Commission for the Year Ending December 31, 2023, at 49 and 54.

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Pendleton District owns and operates facilities that distribute and furnish water to approximately 2,612 customers in Pendleton County, and sells wholesale water to the city of Butler, Kentucky.<sup>2</sup> Pendleton District purchases wholesale water from Falmouth and Northern Kentucky Water District.<sup>3</sup>

### BACKGROUND

Falmouth currently sells wholesale water to the Districts at a rate of \$1.98 per thousand gallons.<sup>4</sup> On July 17, 2024, Falmouth filed a tariff to increase its wholesale water rates to the Districts. Thereafter, on August 12, 2024, the Commission by Order<sup>5</sup> suspended Falmouth's proposed tariff for five months from August 16, 2024, up to and including January 15, 2025, and opened an investigation into the reasonableness of Falmouth's proposed tariff. As a result of Falmouth's lack of participation in its own tariff filing and its failure to provide sufficient evidence to support its proposed increase, the Commission denied and dismissed Falmouth's proposed tariff on November 15, 2024, but encouraged Falmouth and the Districts to attempt to resolve disagreements related to Falmouth's wholesale rate. The Commission further notified Falmouth it may re-file for a wholesale water rate increase with the Commission at any time.<sup>6</sup>

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<sup>2</sup> *Annual Report of Pendleton County Water District to the Public Service Commission for the Year Ending December 31, 2022*, at 51 and 57.

<sup>3</sup> *Annual Report of Pendleton County Water District to the Public Service Commission for the Year Ending December 31, 2022*, at 56.

<sup>4</sup> City of Falmouth Wholesale Water Tariff (effective June 27, 2007).

<sup>5</sup> Case No. 2024-00244, *Electronic Tariff Filing of the City of Falmouth to Increase the Wholesale Water Rates Charged to East Pendleton Water District and Pendleton County Water District* (Ky. PSC Aug. 12, 2024), Order.

<sup>6</sup> Case No. 2024-00244, *Electronic Tariff Filing of the City of Falmouth to Increase the Wholesale Water Rates Charged to East Pendleton Water District and Pendleton County Water District* (Ky. PSC Nov. 15, 2024), Order.

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On December 18, 2024, the Commission received an email notice from attorney Joseph P. Cottingham, counsel for the Districts, that during the past month, Falmouth and the Districts had discussed Falmouth's proposal to increase its wholesale water rates but the parties had been unable to reach an agreement. Moreover, attorney Cottingham was contacted by attorney Brandon Voelker, counsel for Falmouth, and notified that if the Districts did not agree to Falmouth's proposed rates, Falmouth would shut off its water supply to the Districts.<sup>7</sup>

LEGAL STANDARD

The Commission has jurisdiction over the Districts' rates and services pursuant to and KRS 278.015 and KRS 278.040(2). Pursuant to KRS 278.200, the Commission has jurisdiction over Falmouth's rates and services for wholesale water service to the Districts. The Supreme Court's decision in *Simpson County Water District* specifically stated that "where contracts have been executed between a utility and a city . . . KRS 278.200 is applicable and requires that by so contracting the City relinquishes the exemption and is rendered subject to the PSC rates and service Regulation."<sup>8</sup>

KRS 278.160(1) requires each utility to file with the Commission a schedule showing all rates and conditions for service established by it and collected or enforced.

DISCUSSION AND FINDINGS

Based upon the above, the Commission finds that an investigation should be initiated to consider the reasonableness of the potential termination of water service between Falmouth and the Districts.

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<sup>7</sup> See Appendix to this Order.

<sup>8</sup> *Simpson County Water District v. City of Franklin*, 875 S.W.2d 460,463 (Ky. 1994).



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The Commission further finds that, as Falmouth's potential termination of water service in contravention of its filed tariff raises serious questions about the adequacy and reliability of the Districts' ability to supply water to its customers, this proceeding should also investigate those subjects.

In order to provide notice of this investigation to additional interested parties, the Commission finds that the Executive Director should provide a copy of this Order to the Attorney General of the Commonwealth of Kentucky, by and through the Office of Rate Intervention (Attorney General), the Kentucky Energy and Environment Cabinet's Division of Water, and the Pendleton County Judge Executive.

The Commission directs all entities to the Commission's July 22, 2021, Order in Case No. 2020-00085<sup>9</sup> regarding filings with the Commission. All parties should be required to follow the procedures for filing outlined in this Order.

IT IS THEREFORE ORDERED that:

1. An investigation into the reasonableness of Falmouth's threat of termination of water service to the Districts is hereby established.
2. Falmouth and the Districts shall file a response to this Order and the allegations contained herein no less than 20 days after the date of service of this Order.
3. Falmouth shall continue selling wholesale water to the Districts at \$1.98 per thousand gallons throughout the pendency of this case unless otherwise ordered by the Commission.

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<sup>9</sup> Case No. 2020-00085, *Electronic Emergency Docket Related to the Novel Coronavirus COVID-19* (Ky. PSC July 22, 2021), Order (in which the Commission ordered that for case filings made on and after March 16, 2020, filers are NOT required to file the original physical copies of the filings required by 807 KAR 5:001, Section 8).



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4. A formal conference in this matter shall be held at the offices of the Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky, at a date and time to be set by a future order and served upon all parties.

5. Any interested party may, by counsel, file a motion to intervene within 14 days of the date of service of this Order or, if not served the Order, within 30 days of the issuance date of the Order.

6. As set forth in 807 KAR 5:001, Section 4(11)(a), a person requesting permissive intervention in a Commission proceeding is required to demonstrate either (1) a special interest in the proceeding that is not adequately represented in the case, or (2) that the person requesting permissive intervention is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Therefore, any person requesting to intervene in a Commission proceeding must state with specificity the person's special interest that is not otherwise adequately represented, or the issues and facts that the person will present that will assist the Commission in fully considering the matter. A mere recitation of the quantity of utility service consumed by the movant or a general statement regarding a potential impact of possible modification of rates will not be deemed sufficient to establish a special interest.

7. Falmouth and the Districts are made parties to this proceeding.

8. The parties shall, by counsel, enter an appearance in this proceeding within seven days of the date of service of this Order. The entry of appearance shall include the name, address, telephone number, fax number, and electronic mail address of counsel.

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9. Unless otherwise ordered by the Commission, the procedures set forth in 807 KAR 5:001, Section 8, related to service and electronic filing of papers shall be following in this proceeding.

10. Pursuant to 807 KAR 5:001, Section 8(9), within seven days of services of this Order, all named parties shall file a written statement with the Commission that:

a. Certifies that it, or its agent, possess the facilities to receive electronic transmissions; and

b. Sets forth the electronic mail address to which all electronic notices and messages related to this proceeding shall be served.

11. Unless a party granted leave to intervene states its objection to the use of electronic filing procedures in a motion for intervention, the party shall:

a. Be deemed to have consented to the use of electronic filing procedures and the service of all papers, including Orders of the Commission, by electronic means; and

b. Within seven days of the date of service of an order of the Commission granting intervention, file with the Commission a written statement that:

(1) It or its authorized agent possesses the facilities to receive electronic transmissions; and

(2) Sets forth the electronic mail address to which all electronic notices and messages related to this proceeding shall be served.

12. If a party objects to the use of electronic filing procedures and the Commission determines that good cause exists to excuse that party from the use of

Presiding Judge: HON. JAY DELANEY (618318)

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13. All parties shall follow the procedures for filing outlined in the Commission's July 22, 2021, Order in Case No. 2020-00085.

14. All named parties shall respond to any request for information propounded by Commission Staff, as provided in those requests, whether listed on a procedural schedule or not.

15. The Attorney General, the Kentucky Energy and Environment Cabinet's Division of Water, and Pendleton County Judge Executive, David Fields, shall each be served with a copy of this Order.

16. Nothing contained herein shall prevent the Commission from entering further Orders in this matter.

Presiding Judge: HON. JAY DELANEY (618318)

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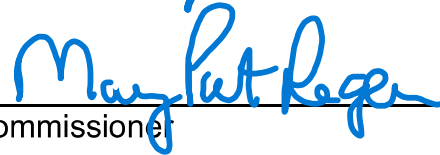
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PUBLIC SERVICE COMMISSION 12/30/2024

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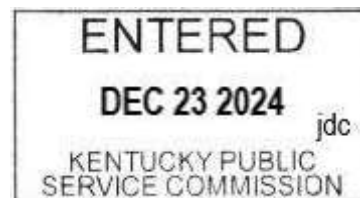
  
Chairman

  
Commissioner

  
Commissioner

ATTEST:

  
Executive Director



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APPENDIX

12/30/2024

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APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2024-00403 DATED DEC 23 2024

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TWO PAGES TO FOLLOW

Presiding Judge: HON. JAY DELANEY (618318)

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12/30/2024

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**From:** [joecotlaw@fuse.net](mailto:joecotlaw@fuse.net) <[joecotlaw@fuse.net](mailto:joecotlaw@fuse.net)>**Sent:** Wednesday, December 18, 2024 9:17 AM**To:** Wallingford, Angie G (PSC) <[angie.wallingford@ky.gov](mailto:angie.wallingford@ky.gov)>**Cc:** Jack Lawless <[jslawlessconsulting@gmail.com](mailto:jslawlessconsulting@gmail.com)>; Austin Monroe <[amonroe@pcwater.org](mailto:amonroe@pcwater.org)>**Subject:** Follow Up to Case 2024-00244

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Report Suspicious

Ms. Wallingford,

Thank you for taking my call this morning. This email contains the requested information. I have attached the original water supply contract and the extension. I represent East Pendleton Water District (EPWD) and Pendleton County Water District (PCWD), collectively the "Districts". On July 25, 2024, the City of Falmouth (Falmouth) filed a tariff filing. The PSC requested multiple filings from Falmouth that were not supplied to the PSC. The Districts filed to intervene August 20, 2024. The Districts requested additional documentation and tried to expand the discovery. After multiple requests and filings, Falmouth's tariff increase was denied, the case dismissed, and the PSC issued an order encouraging the parties to resolve the wholesale rate dispute. In the past month, the parties have discussed the wholesale rate but have been unable to reach an agreement. Falmouth cannot or chooses to not supply any pertinent information on which to base any negotiations. Finally, last night at approximately 6:30 PM, Falmouth's attorney contacted me and stated that if my clients do not agree to the stated rates for each District, Falmouth will shut off the water supply to my clients. Falmouth's attorney bases his threat on the case of Ledbetter Water District v. Crittenden-Livingston Water District, 2020 WL 1303913. Simply, the contract violates the Kentucky Constitution because it is beyond a 20-year agreement.

I am reaching out to the PSC in an attempt to resolve this without additional protracted litigation. Has the PSC been involved in any disputes such as this? Do you have any guidance on proceeding?

Thank you,

Joe Cottingham

Daley, Cottingham, Brandt & Associates, PLLC  
Joseph P. Cottingham  
[joecotlaw@fuse.net](mailto:joecotlaw@fuse.net)  
4034 Alexandria Pike  
Cold Spring KY 41076

Presiding Judge: HON. JAY DELANEY (618318)

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Mob: (859)750-3728

12/30/2024

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Tax advice disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the internal revenue code, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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Presiding Judge: HON. JAY DELANEY (618318)

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Filed  
\*City of Falmouth  
City of Falmouth  
230 Main Street  
Falmouth, KY 41040

24-CI-00222 12/27/2024  
\*East Pendleton Water District  
East Pendleton Water District  
601 Woodson Road  
Falmouth, KY 41040

Michael D. Redden, Pendleton Circuit Clerk

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12/30/2024  
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\*Pendleton County Water District  
331 Highway 330 W  
P. O. Box 232  
Falmouth, KY 41040

\*Pendleton County Water District  
Pendleton County Water District  
331 Highway 330 W  
P. O. Box 232  
Falmouth, KY 41040

\*John Horne  
Office of the Attorney General Office of Rate  
700 Capitol Avenue  
Suite 20  
Frankfort, KENTUCKY 40601-8204

\*David Fields  
Pendleton County Judge Executive  
Pendleton County Fiscal Court  
233 Main Street  
Falmouth, KENTUCKY 41040

\*Sarah Gaddis  
Director  
Kentucky Division of Water  
300 Sower Boulevard, 3rd Floor  
Frankfort, KENTUCKY 40601

\*East Pendleton Water District  
601 Woodson Road  
Falmouth, KY 41040

Presiding Judge: HON. JAY DELANEY (618318)  
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**EXHIBIT E**NOT  
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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

88076

In the Matter of:

AN ELECTRONIC INVESTIGATION INTO CITY	)	
OF FALMOUTH'S THREAT OF INVESTIGATION	)	
OF WHOLESALE WATER SERVICE TO EAST	)	CASE NO.
PENDLETON WATER DISTRICT AND	)	2024-00403
PENDLETON COUNTY WATER DISTRICT	)	

NOTICE OF LACK OF JURISDICTION/ENFORCEMENT

Comes now the City of Falmouth and tenders Notice of inapplicability of the Order entered herein. The PSC's order in Case No. 2024-00403, is inapplicable to the City of Falmouth. Furthermore, the Order entered is contrary to the laws/regulations governing the PSC. Specifically, 807 KAR 5:001 sets for the rules of procedure before the PSC. Section 5(1), specifically states, "All requests for relief that are not required to be made in an application, petition, or written request shall be by motion. A motion shall state precisely the relief requested." Herein, there is no Motion. Attached to the Order is what appears to be an inappropriate ex-parte communication by Counsel for East and Pendleton Water District to the PSC chair, specifically asking, "Do you have any guidance on proceeding." Statute and Regulation do not provide for "advisory type opinions." The Order indicates the PSC took action on it's own "Motion," which is more troubling and indicative of the denial of due process, without required filings of a Motion and Notice at a minimum.

The City of Falmouth was not served notice of this proceeding, but for the PSC Chair advising Representative Mark Hart of the two District's ex-parte attempts, Falmouth would not have even known of the email. Furthermore, Section 9 requires a hearing, which did not occur. Section 22 does provide for deviations from rules, "for good cause shown," none of which was

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requested by the Districts, since a proper Motion was not filed, nor did the PSC Board make such a finding. 12/30/2024 10:10:10 AM 88076

The PSC's order indicates it is taking actions based on KRS 278.160, KRS 278.200 and KRS 278.260(1). KRS 278.160 is a requirement for utilities, which the City of Falmouth is not. The PSC asserts KRS 278.200 is applicable, but fails to find that applicable contract, franchise or agreement exists as a matter of law. Lastly, KRS 278.260, governs "complaints as to rates or service, investigations-hearing," which appears to be the applicable statute since the Order directs an investigation. Most importantly, KRS 278.260 requires a hearing, which again did not occur herein, like the failure to comply with the aforementioned KAR regarding Motion practice.

While the City of Falmouth did not receive Notice, the courtesy of the PSC to contact Falmouth's state representative at least allowed Falmouth to provide the applicable law, which based on the record was not submitted to the PSC for consideration. Attached as Exhibit A is the email and attachments, including the applicable Attorney General Opinion and Kentucky Supreme Court case, that while unpublished, is directly on point and consistent with the Attorney General Opinion. The Supreme Court opinion, coupled with the applicable Kentucky Attorney general opinion, establish as a matter of law, the contract(s) giving rise to the Order are unlawful pursuant to Section 164 of the Kentucky Constitution. The Kentucky Attorney General's office, specifically states, "public officials are expected to follow them."

[https://www.ag.ky.gov/Resources/Opinions/Pages/default.aspx#:~:text=Opinions%20of%20the%20Attorney%20General%20\(OAGs\)%20do%20not%20have%20the,cited%20in%20all%20Kentucky%20courts.](https://www.ag.ky.gov/Resources/Opinions/Pages/default.aspx#:~:text=Opinions%20of%20the%20Attorney%20General%20(OAGs)%20do%20not%20have%20the,cited%20in%20all%20Kentucky%20courts.)

Presiding Judge: HON. JAY DELANEY (618318)

EXH : 000002 of 000036

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Most importantly, while the District's email is part of the Order, Exhibit A, is not referenced, not part of this case documents on file with 2024-403, further illustrating the lack of due process and compliance with applicable law/regulation. 12/30/2024 8:0676

This Notice is filed to provide Notice to the PSC, that the City of Falmouth, through its executive authority/mayor, will be following the applicable Opinions of the Kentucky Supreme Court and the Attorney General, both of which establish that the asserted contracts, giving rise to jurisdiction under KRS 278, are void. The PSC lacks jurisdiction herein and has failed to follow its own applicable regulations. The PSC's order asserts that *Simpson County Water Dist. V City of Franklin*, 872 S.W.2d 460 (Ky. 1994) supports the Order, but the case involves a valid contract. Herein, the PSC has not made a finding of a contract, because to do so would go against applicable Attorney General and/or Supreme Court guidance. The same "public official," admonition applies to the PSC members herein, who upon information and belief were not advised of Exhibit A and the applicable law.

Based on the applicable Kentucky law, and the void contracts, the City of Falmouth will continue its conduct consistent with law and tenders this Notice if the PSC believes it must seek injunctive or other relief under is misunderstanding of applicable law. The *Simpson County* case clearly requires a contract for applicability by the PSC, herein the PSC does not set forth in its Order a finding of a required "contract, franchise, or agreement." The PSC's failure to establish a "contract, franchise, or agreement," between the parties, establishes that the PSC lacks jurisdiction over the City of Falmouth and should it believe the City of Falmouth is erroneous in its assertions, KRS 278.390 provides that the PSC may "compel obedience," in a court of competent jurisdiction. A review of the Kentucky Supreme Court case further establishes that lack of jurisdiction by the PSC. Attached in Exhibit A is *Ledbetter Water District v. Crittenden-*

Presiding Judge: HON. JAY DELANEY (618318)

EXH : 000003 of 000036

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## ORIGINAL DOCUMENT

10:10:10 AM *Livingston Water District*, which was filed in the Livingston Circuit Court, not the PSC. Further establishing the inapplicability and lack of jurisdiction herein. 12/30/2024 88076

Respectfully submitted,

/s/ Brandon N. Voelker

Brandon N. Voelker (KBA #88076)

GATLIN VOELKER, PLLC

50 E Rivercenter Blvd., Suite 1275

Covington, KY 41011

Ph: (859) 781-9100

[bvoelker@gatlinvoelker.com](mailto:bvoelker@gatlinvoelker.com)

*Counsel for City of Falmouth*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 27<sup>th</sup> day of December 2024, via electronic and/or regular US Mail, postage prepaid, upon the following:

Joseph P. Cottingham  
Daley, Cottingham, Brandt & Associates,  
PLLC  
4034 Alexandria Pike  
Cold Spring, KY 41076  
[joecotlaw@fuse.net](mailto:joecotlaw@fuse.net)

Russell Coleman, Attorney General  
700 Capital Avenue, Suite 118  
Frankfort, KY 40601  
[ServetheCommonwealth@ky.gov](mailto:ServetheCommonwealth@ky.gov)

David Fields  
Pendleton Judge Executive  
233 Main Street  
Falmouth, KY 41040  
[judgeexec@pendletoncountky.gov](mailto:judgeexec@pendletoncountky.gov)

Kentucky Energy Environmental Cabinet  
Division of Water  
300 Sower Blvd, 3rd Flr  
Frankfort, KY 40601

/s/ Brandon N. Voelker

Brandon N. Voelker (KBA #88076)





## ORIGINAL DOCUMENT

**From:** Brandon Voelker  
**10:10:10 AM Sent:** Wednesday, December 18, 2024 5:04 PM  
**To:** [Linda.Bridewell@ky.gov](mailto:Linda.Bridewell@ky.gov)  
**Cc:** Luke Price <[LPrice@CityofFalmouth.com](mailto:LPrice@CityofFalmouth.com)>  
**Subject:** City of Falmouth/East Pendleton and Pendleton Water Districts

88076

Dear Ms. Bridewell:

I was advised that the two water districts have filed a complaint regarding Falmouth and that the City is not "contractually" required to provide water to the two districts. I provide to you both "contracts," but most importantly, Kentucky Supreme Court law and/or Attorney General Opinion regarding the requirement to comply with Section 164 of the Kentucky Constitution and the failure to do so rendering the contracts void. In as much, there is no contract between the parties. We have shared this information with the two water district boards, so I am unsure of why they felt compelled to file a complaint. KRS 96.120 also specifically requires a franchise to sell water, which is the basis of the AG opinion. These opinions, coupled with the Supreme Court's holding, establish that there is not a contract.

Falmouth has offered to enter a proper contract for the sale of water, but the Districts mistakenly believe that they are governed by the contracts. While the PSC does not govern Falmouth, I wanted to provide this information, Falmouth certainly understands that if we had a valid contract with the Districts, the PSC would be involved in a rate increase, but presently Falmouth does not. Falmouth has been subsidizing the District's for many years and the Districts purchase water from two other entities at the rate of \$4.45 and \$3.61 per 1000 gallons, and presently Falmouth \$1.98. Falmouth at a minimum must charge \$2.96 to at least seek to break even.

If you have a chance and would like to discuss further, please do not hesitate to call, email or text. My cell number is 859.802.8690.

Thanks, Brandon

**Brandon N. Voelker**

Attorney at Law

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[Gatlin Voelker PLLC](#)

12/30/2024

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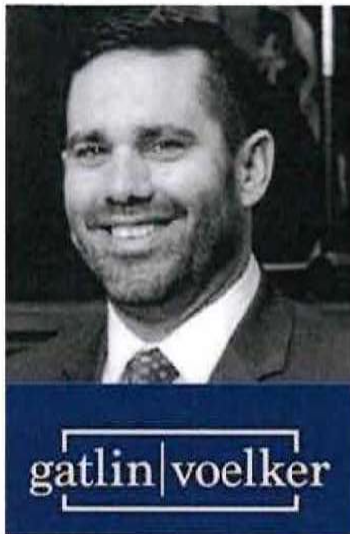
50 East Rivercenter Blvd., Suite 1275

88076

Covington, Kentucky 41011

Office: (859) 781-9100

cell: (859) 802-8690

[Read Brandon's Bio](#)[Leave us a review on Google](#)**--- CONFIDENTIALITY STATEMENT ---**

This e-mail transmission contains information that is intended to be privileged and confidential. It is intended only for the addressee named above. If you receive this e-mail in error, please do not read, copy or disseminate it in any manner. If you are not the intended recipient, any disclosure, copying, distribution or use of the contents of this information is prohibited. Please reply to the message immediately by informing the sender that the message was misdirected. After replying, please erase it from your computer system. Your assistance is appreciated.

This E-mail has been scanned for viruses

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MODIFICATION  
OF  
WATER PURCHASE CONTRACT

This modification of water purchase contract entered into this the 7<sup>th</sup> day of January, 2003, between, City of Falmouth hereinafter referred to as CITY and Pendleton County Water District, hereinafter referred to as PCWD,

WITNESSETH:

WHEREAS, on or about the 12<sup>th</sup> day of March, 1984, the CITY and PCWD entered into a contract by the terms of which PCWD was to purchase quantities of water from CITY under certain terms and conditions set forth in said contract, and

WHEREAS, PCWD is now desirous of extending the term of said contract, and

WHEREAS, PCWD has tendered to CITY the sum of Ten (\$10) Dollars in consideration of its agreement to extend the term as set forth hereinafter, and in consideration of the mutual promises and agreements of the parties hereto,

NOW THEREFORE, it is agreed that said contract shall be and hereby is modified as follows:

1. (Terms of Contract) That this contract shall extend for a term of forty-four (44) years from the date hereof, and thereafter may be renewed or extended for such terms as may be agreed upon by CITY and PCWD.

The intention and purpose of this modification of water purchase contract to extend the term of the original water purchase contract through this date in the year of 2047 so as to facilitate the financing of an extension by PCWD, and shall be interpreted, construed and applied so as to accomplish this purpose.

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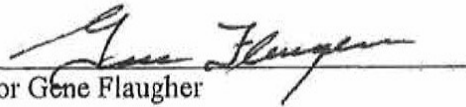
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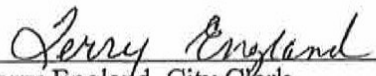
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IN WITNESS WHEREOF, the parties hereto, acting under authority of their respective governing bodies, have caused this contract to be duly executed in seven (7) counterparts, each of which shall constitute an original.

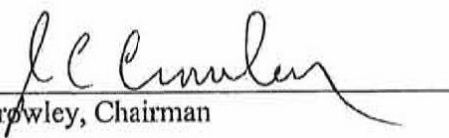
CITY OF FALMOUTH

By   
Mayor Gene Flaughter


ATTEST:

  
Terry England, City Clerk

PENDLETON COUNTY WATER DIST.

By   
J.C. Crowley, Chairman

ATTEST:

  
H.T. Ammerman, Secretary

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The City of Falmouth met on the 7<sup>th</sup> day of January, 2003 at the City Office in Falmouth, Kentucky with Council members Rick Mineer, Mark Hart, Kim Bastin, Mary Ann Pittman, and Shannon Weaver present.

Kim Bastin introduced the following Resolution and moved its adoption.

#### RESOLUTION

WHEREAS, on or about the 12<sup>th</sup> day of March, 1984, the City of Falmouth contracted with Pendleton County Water District for the furnishing of water to the latter District upon certain terms and conditions, and

WHEREAS, the Pendleton County Water District has asked that the term of said contract be amended by the extension of the term for said contract for an additional forty-four (44) years, to permit it to finance extension of certain lines.

WHEREAS, such an extension would appear to be in the best interest of the City of Falmouth, and

WHEREAS, the Pendleton County Water District has tendered the sum of Ten (\$10.00) Dollars in consideration for said modification.

NOW THEREFORE, Be it Resolved that the City of Falmouth, by and through its Mayor, enter into a modification contract with the Pendleton County Water District which shall accomplish as its purpose the extension of the contract of March 12, 1984 for an additional forty-four (44) year term. Be It Further Resolved that the said contract shall be ratified in all other respects as originally entered. A copy of said Modification of Contract is attached hereto and made a part thereof.

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Mary Ann Pittman seconded the motion and upon roll call being taken,  
the following voted:

AYE Rick Mineer, Mark Hart, Kim Bastin,  
Mary Ann Pittman and Shannon Weaver.

NAY: None

Whereupon the foregoing Resolution was adopted.

A TRUE COPY ATTEST:

Terry England  
Terry England, City Clerk



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## WATER PURCHASE CONTRACT

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THIS CONTRACT for the sale and purchase of water is entered into this 12th day of March, 1984, between the CITY OF FALMOUTH, PENDLETON COUNTY, KENTUCKY, Main Street, Falmouth, Kentucky, a Municipal Corporation, hereinafter referred to as the "SELLER" and the PENDLETON COUNTY WATER DISTRICT, 400 Main Street, Falmouth, Kentucky, hereinafter referred to as the "PURCHASER".

## WITNESSETH:

WHEREAS, the Purchaser is organized and established under the provisions of Chapter 74 of the Code of Kentucky Revised Statutes, for the purpose of constructing and operating a water supply distribution system serving water users within the area described in plans now on file in the office of the Purchaser and to accomplish this purpose, the Purchaser will require a supply of treated water, and.

WHEREAS, the Seller owns and operates a water supply distribution system with a capacity currently capable of serving the present customers of the Seller's system and the estimated number of water users to be served by the said Purchaser as shown in the plans of the system now on file in the office of the Purchaser, and

WHEREAS, by Resolution enacted on the 12th day of March, 1984, by the Seller, the sale of water to the Purchaser in accordance with the provisions of the said Resolution was approved, and the execution of this Contract carrying out the said Resolution by the Mayor and attested by the Secretary, was duly authorized, and

WHEREAS, by Resolution of the Commissioners of the Purchaser, enacted on the 11 day of JUNE, 1984, the purchase of water from the Seller in accordance with the terms set forth in said Resolution was approved, and the execution of this Contract by the Chairman and attested by the Secretary was duly authorized;

NOW, THEREFORE, in consideration of the foregoing and the mutual agreements hereinafter set forth,

## A. The Seller agrees:

1. (Quality and Quantity) To furnish the Purchaser at the point of delivery hereinafter specified, during the term of this contract or any renewal or extension thereof, potable treated water meeting applicable purity standards of the State of Kentucky in such quantity as may be required by the Purchaser not to exceed five million (5,000,000) gallons per month.

2. (Point of Delivery and Pressure) That water will be furnished at a reasonable constant pressure calculated at City Normal Pressure from an existing six (6) inch main supply at a point located as per the parties' agreement within the city or just outside the city. If a greater pressure than that normally available at the point of delivery is required by the Purchaser, the cost of providing such greater pressure shall be borne by the Purchaser. Emergency failures of pressure or supply due to main supply line breaks, power failure, flood, fire and use of water to fight fire, earthquake or other catastrophe shall excuse the Seller from this provision for such reasonable periods of time as may be necessary to restore service.

3. The metering equipment shall be read on or about the 14th day of each month. An appropriate official of the Purchaser at all reasonable times shall have access to the meter for

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the purpose of verifying its readings.

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4. (Billing Procedure) To furnish the Purchaser at the above address not later than the 30th day of each month, with an itemized statement of the amount of water furnished the Purchaser during the preceding month.

B. The Purchaser agrees:

1. (Metering Equipment) To furnish, install, operate and maintain at its own expense at point of delivery, the necessary metering equipment, including a meter house or pit, and required devices of standard type for properly measuring the quantity of water delivered to the Purchaser and to calibrate such metering equipment whenever requested by the Seller but not more frequently than once every twelve (12) months. A meter registering not more than two percent (2%) above or below the test result shall be deemed to be accurate. The previous readings of any meter disclosed by test to be inaccurate shall be corrected for the two (2) months previous to such test in accordance with the percentage of inaccuracy found by such tests. If any meter fails to register for any period, the amount of water furnished during such period shall be deemed to be the amount of water delivered in the corresponding period immediately prior to the failure, unless Seller and Purchaser shall agree upon a different amount.

2. (Rates and Payment Date) To pay the seller, not later than the 10th day of each month for water delivered in accordance with the schedule hereinbelow set out or prevailing at the time.

C. It is further mutually agreed between the Seller and Purchaser as follows:

1. (Term of Contract) That this Contract shall extend for a term of forty (40) years from this date, from the date water is delivered to the new line anticipated herein, or from the date of the issuance of the new bonds, and in no event for longer than forty-two (42) years from this date, and, thereafter may be renewed or extended for such term, or terms, as may be agreed upon by the Seller and Purchaser.

2. (Delivery of Water) That thirty (30) days prior to the estimated date of completion of construction of the addition of the Purchaser's water supply distribution system, the Purchaser will notify the Seller in writing of the date of the initial delivery of water.

3. (Failure to Deliver) That the Seller will, at all times, operate and maintain its system in an efficient manner and will take such action as may be necessary to furnish the Purchaser with quantities of water required by the Purchaser. Temporary or partial failures to deliver water shall be remedied with all possible dispatch. In the event of an extended shortage of water, or the supply of water available to the Seller is otherwise diminished over an extended period of time, the supply of water to Purchaser's consumers shall be reduced or diminished in the same ratio or proportion as the supply to seller's consumers is reduced or diminished.

4. (Modification of Contract) That the provisions of this Contract pertaining to the schedule of rates to be paid by the Purchaser for water delivered are subject to modification at any time the Seller adjusts rates to all its customers and by the same percent that it adjusts its rates to all its customers. Any increase or decrease in rates shall be based on a demonstrable increase or decrease in the costs of performance hereunder including, but not limited to, cost of labor, materials, necessary capital improvements, and reserve for

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depreciation. Other provisions of this Contract may be modified or altered by mutual agreement.

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a. However, by way of specifications, the rate schedule presently in effect is as follows:

0 - 2,000 gallons	-	\$ 4.00 (minimum)
2,000 - 5,000 gallons	-	4.00 plus \$.84 per 1,000
5,000 - 10,000 gallons	-	6.52 plus \$.70 per 1,000
10,000 - 50,000 gallons	-	10.02 plus \$.58 per 1,000
all over 50,000 gallons	-	33.22 plus \$.75 per 1,000

b. At no time shall there be established, without the consent of second party, new classes of water usage. At anytime the City adjusts rates to any one or more class of water users, either by increasing or decreasing said rates, the same adjustment shall be made to the rates applicable to all classes of users for example, an increase of twenty-five (25%) percent would, based upon the schedule of rates set out herein, increase the minimum bill from \$4.00 to \$5.00 and would increase the rate to other classes to \$1.05 dollars per thousand, \$.875 dollars per thousand, \$.725 dollars per thousand, and \$.9375 dollars per thousand, respectively.

5. However, notwithstanding the above, it is agreed that the initial rate for the water purchased by purchaser in the range of 4,000,001 through 5,000,000 gallons shall be open to negotiation of the parties at the time same is delivered or anticipated as being delivered to purchaser by seller. However, once the initial rate is set, modifications of said rate will be in accordance with this contract.

6. (Regulatory Agencies) That this Contract is subject to such rules, regulations, or laws as may be applicable to similar agreements in this State and the Seller and Purchaser will collaborate in obtaining such permits, certificates, or the like, as may be required to comply therewith.

7. (Miscellaneous) That the construction of the water supply distribution system by the Purchaser is being financed by a loan made or insured by, and/or a grant from, the United States of America, acting through the Farmers Home Administration of the United States Department of Agriculture, and the provisions hereof pertaining to the undertakings of the Purchaser are conditioned upon the approval, in writing, of the State Director of the Farmers Home Administration, or some other state or Federal agency or agencies similarly administered and this contract is similarly conditioned if the same be another agency or agencies.

8. (Successor to the Purchaser) That in the event of any occurrence rendering the Purchaser incapable of performing under this Contract, any successor of the Purchaser, whether the result of legal process, assignment, or otherwise, shall succeed to the rights of the Purchaser hereunder.

9. This Contract is hereby pledged to the United States of America, acting through the Farmers Home Administration, as part of the security for a loan from the United States of America or such other state or Federal agency as may participate in or provide financing for the project.

10. This contract supersedes the contract and modification of 1976 and 1981, respectively.

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IN WITNESS WHEREOF, the parties hereto, acting under authority of their respective governing bodies, have caused this contract to be duly executed in two (2) counterparts, each of which shall constitute an original.

SELLER:

CITY OF FALMOUTH

BY

Title: MAYOR

ATTEST:

SECRETARY

PURCHASER:

PENDLETON COUNTY WATER DISTRICT

BY

Title: CHAIRMAN

ATTEST:

SECRETARY

This Contract is approved on behalf of the Farmers Home Administration this 11 day of December, 1985.

By

Title Community & Business Programs Specialist



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PENDLETON COUNTY WATER DISTRICT  
BOX 186  
BUTLER, KENTUCKY 41006

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MINUTES OF  
COMMISSIONER'S MEETING  
JUNE 11, 1984

COMMISSIONER'S PRESENT: Denver Hornbeek, Chairman, Louis McClannahan,  
and Tommy Ammerman

COMMISSIONER'S ABSENT: Paul Wright and J. C. Crowley

ELECTION OF OFFICERS: Motion was made by Louis McClannahan to elect  
the following officers - Denver Hornbeek, Chair-  
man, Tommy Ammerman, Secretary - Louis McClanna-  
han, Treasurer - Second the motion by Tommy  
Ammerman - Motion carried.

FINANCIAL REPORTS: The following reports were presented to the board  
and discussed. (1) 1983 Public Service Commission  
Annual Report (2) 1983 Farmers Home Administration  
Budget and Annual Report.

LINE EXTENSION PROJECT: (1) The project engineering recommendations  
were presented to the Board and discussed. A motion to accept the  
project as recommended by the Engineers was made by Tommy Ammerman -  
Second by Louis McClannahan - Motion carried.

\* (2) The final revised Water Purchase Contract with the City of  
Falmouth raising monthly maximum volumes was reviewed by the board.  
Motion to approve the contract was made by Louis McClannahan - Second  
by Tommy Ammerman. Motion carried.

(3) Interim financing requirements for the line extension project  
were discussed. A motion was made by Tommy Ammerman to offer the  
\$1,000,000 interim financing if needed to all three banking institu-  
tions on an equal amount basis (\$333,333.00) to each bank. Motion  
seconded by Louis McClannahan - Motion carried.

KY. DEPT. OF HIGHWAYS RELOCATION OF LINES: The relocation of water  
and gas lines on US 27 to accommodate planned truck lane construction  
was reviewed and discussed by the board. A recent road slip in the  
area was also discussed and will be a part of the project.

The recent increase by the City of Falmouth in its water rates has  
necessitated a filing for a Purchase Water Adjustment by the District  
to pass on the increase in rates.

The Public Service Commission Water Inspection Report was reviewed  
and discussed with agreement to work toward correcting the various  
items in the report.

There being no further business, a motion to adjourn was made by  
Tommy Ammerman - Seconded by Louis McClannahan.

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March 12, 1984

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Falmouth City Council met in regular session with Mayor Max Goldberg presiding. Councilmembers present: Wes Simpson, Ernest G. Cummings, O. T. Gillespie, Ada Moore and Howard Showalter, Jr. Absent: Cliff Bonar.

Ralph Bonar appeared before Council concerning water taps at Bonar Village. Motion by O. T. Gillespie, seconded by Ernest Cummings, to approve these taps but we assume no responsibility for the water and sewer lines until such time as the area is annexed into the City. Motion carried.

Bob English and Ronnie English appeared before Council concerning a go-cart track on Weaver Drive.

Tommy and Michael Cummins appeared before Council concerning doing work on the curb and guttering.

Don Wells appeared before Council concerning water contracts with Pendleton County Water District. Motion by Howard Showalter, seconded by Ada Moore, to authorize Mayor Goldberg and H. L. Ammerman, Clerk to sign the contracts with the Water District. Motion Carried.

#### RESOLUTION

WHEREAS, the City of Falmouth and the Pendleton County Water District entered into a Contract dated August of 1976 whereby the City was to sell to the District water under certain terms in an amount not to exceed 4,000,000 gallons per month for a period of forty (40) years hence,

WHEREAS, said Contract was amended or modified by agreement of the parties in 1982, and

WHEREAS, Pendleton County Water District now seeks to extend its water service lines to areas outside the area served under the earlier Contract, and

WHEREAS, in order to do so engineers require that an additional capacity be entered into or engaged by the parties in an amount not to exceed 5,000,000 gallons per month and the agencies by virtue of which the financing will occur with respect to said additions required a forty (40) year contract to extend from the date of the first service of water or issuance of the new bonds, and

WHEREAS, the City of Falmouth desires to assist, encourage and enhance the development of the Community by virtue of adopting and approving the proposal which is set out and contained in the Water Purchase Contract, a copy of which is attached hereto, and

WHEREAS, the execution of said Contract should be deferred until such time as the extension is completed and service is needed,

HOW THEREFORE, be it resolved that the City of Falmouth shall enter into the Water Purchase Contract, a copy of which is attached, provided that the Water District's applications are approved and the anticipated line extensions are or are to be installed and that the Mayor of the City of Falmouth is authorized to execute said contract on behalf of the City of Falmouth in return for the District's like and simultaneous execution of the contract, but that said execution



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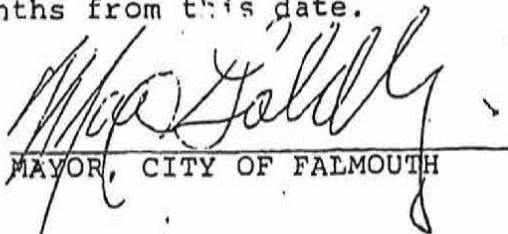
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the installation of the extension which contract shall be in force from that date or the date of the issuance of the new bonds until forty (40) years hence; in no event, shall said deferral for execution by longer than 24 months from this date.

  
MAYOR, CITY OF FALMOUTH

ATTEST

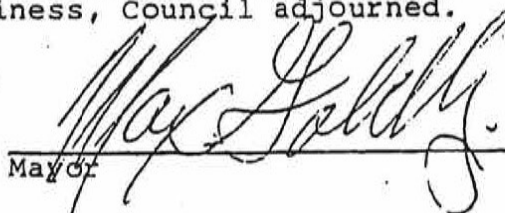
  
Clerk, City of Falmouth


Motion by Howard Showalter, seconded by Wes Simpson, to purchase the copy machine from Rawlings Business Machines for \$1,896.20. Motion carried.

Motion by Wes Simpson, seconded by Ada Moore, to advertise the trailers on the Donahue property for sale by sealed bids to be opened at the next Council meeting, April 9, 1984. Motion carried.

Mayor Max Goldberg appointed O. T. Gillespie, Jr., Wesley Simpson to review the water and sewer rates of the City of Falmouth and make recommendations to the Council.

City Clerk H. L. Ammerman reported cash in banks in the current operational funds of \$16,076.40 after paying. There being no further business, Council adjourned.

  
Mayor

  
Clerk

JUL 13 1988

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RESOLUTION

This matter having come to the attention of the City Council pursuant to a request by the East Pendleton Water District that the City and the Water District execute a new water purchase contract in order that the East Pendleton Water District might meet bonding requirements necessary to obtain a loan from the Farmers Home Administration to upgrade and repair the water system, and the City Council having considered the matter at its regular meeting on June 14, 1988, the following resolution was proposed by Virgiline Moore, seconded by Mike Whaley, and unanimously carried, to-wit:

RESOLVED, that the Water Purchase Contract presented to the City Council this date by the East Pendleton Water District is hereby approved and the Mayor is hereby authorized to sign said contract on behalf of the City of Falmouth.

This 14 day of June, 1988.

CITY OF FALMOUTH

By

Max Goldberg  
MAX GOLDBERG, Mayor

ATTEST:

Terry England  
TERRY ENGLAND, City Clerk

May. 22. 2015 11:34AM

No. 1458 P. 1

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EAST PENDLETON CO. WATER DISTRICT

12/30/2024

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601 Woodson Road

P. O. Box 29

88076

Falmouth, KY 41040

(859) 654-2100

(859) 654-3144 Fax

## FACSIMILE TRANSMITTAL

TO: Ramona FAX#: 654-3603COMPANY: City of Falmouth

FROM: \_\_\_\_\_

DATE: 5-22-15 TIME: 11:45 AMRE: ContractTOTAL NUMBER OF PAGES SENT: 7

REMARKS:

If you do not receive all of the pages, please contact us  
as soon as possible at 859-654-2100

USDA-FHA  
Form FHA 442-30  
(Rev. 4-19-72)

Position 5

JUL 13 1988

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## WATER PURCHASE CONTRACT

Divided  
12/30/2024

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This contract for the sale and purchase of water is entered into as of the 15th day of June, 19 88, between the City of Falmouth, Pendleton County, Kentucky a municipal corporation

88076

(Address)

hereinafter referred to as the "Seller" and the East Pendleton Water District, Route #1, Foster, Pendleton County, Kentucky 41043

(Address)

hereinafter referred to as the "Purchaser",

## WITNESSETH:

Whereas, the Purchaser is organized and established under the provisions of Chapter 74 of the Code of Kentucky Revised Statutes, for the purpose of constructing and operating a water supply distribution system serving water users within the area described in plans now on file in the office of the Purchaser and to accomplish this purpose, the Purchaser will require a supply of treated water, and

Whereas, the Seller owns and operates a water supply distribution system with a capacity currently capable of serving the present customers of the Seller's system and the estimated number of water users to be served by the said Purchaser as shown in the plans of the system now on file in the office of the Purchaser, and

Whereas, by Resolution No. -- enacted on the 14th day of June, 19 88, by the Seller, the sale of water to the Purchaser in accordance with the provisions of the said Resolution was approved, and the execution of this contract carrying out the said Resolution by the Mayor and attested by the Secretary, was duly authorized, and

Whereas, by Resolution of the Commissioners of the East Pendleton Water District of the Purchaser, enacted on the 15th day of June, 19 88, the purchase of water from the Seller in accordance with the terms set forth in the said Resolution was approved, and the execution of this contract by the Chairman and attested by the Secretary was duly authorized;

Now, therefore, in consideration of the foregoing and the mutual agreements hereinafter set forth,

## A. The Seller Agrees:

1. (Quality and Quantity) To furnish the Purchaser at the point of delivery hereinafter specified, during the term of this contract or any renewal or extension thereof, potable treated water meeting applicable purity standards of the State of Kentucky

in such quantity as may be required by the Purchaser ~~not to exceed XXXXXX gallons per month~~

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2. (Point of Delivery and Pressure) That water will be furnished at a reasonably constant pressure calculated at a minimum of 90 lbs. p. s. i. from an existing twelve inch main supply at a point located at the intersection of Shelby Street and Licking Street in the City of Falmouth.

90 lbs. p. s. i. If a greater pressure than that normally available at the point of delivery is required by the Purchaser, the cost of providing such greater pressure shall be borne by the Purchaser. Emergency failures of pressure or supply due to main supply line breaks, power failure, flood, fire and use of water to fight fire, earthquake or other catastrophe shall excuse the Seller from this provision for such reasonable period of time as may be necessary to restore service.

3. (Metering Equipment) To furnish, install, operate, and maintain at its own expense at point of delivery, the necessary metering equipment, including a meter house or pit, and required devices of standard type for properly measuring the quantity of water delivered to the Purchaser and to calibrate such metering equipment whenever requested by the Purchaser but not more frequently than once every twelve (12) months. A meter registering not more than two percent (2%) above or below the test result shall be deemed to be accurate. The previous readings of any meter disclosed by test to be inaccurate

shall be corrected for the two months previous to such test in accordance with the percentage of inaccuracy found by such tests. If any meter fails to register for any period, the amount of water furnished during such period shall be deemed to be the amount of water delivered in the corresponding period immediately prior to the failure, unless Seller

and Purchaser shall agree upon a different amount. The metering equipment shall be read on the 14th day of each month. An appropriate official of the Purchaser at all reasonable times shall have access to the meter for the purpose of verifying its readings.

4. (Billing Procedure) To furnish the Purchaser at the above address not later than the 30th day of each month, with an itemized statement of the amount of water furnished the Purchaser during the preceding month.

B. The Purchaser Agrees:

1. (Rates and Payment Date) To pay the Seller, not later than the 15th day of each month, for water delivered in accordance with the following schedule of rates:

- a. \$ \_\_\_\_\_ for the first \_\_\_\_\_ gallons, which amount shall also be the minimum rate per month.
- b. \$ \_\_\_\_\_ cents per 1000 gallons for water in excess of \_\_\_\_\_ gallons but less than \_\_\_\_\_ gallons.
- c. \$ \_\_\_\_\_ cents per 1000 gallons for water in excess of \_\_\_\_\_ gallons.

See attached rate schedule.

/Connection fee not applicable due to present connection.

2. (Connection Fee) To pay as an agreed cost, a connection fee to connect the Seller's system with the system of the Purchaser, the sum of \_\_\_\_\_ dollars which shall cover any and all costs of the Seller for installation of the metering equipment and \_\_\_\_\_



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It is further mutually agreed between the Seller and the Purchaser as follows:

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1. (Term of Contract) That this contract shall extend for a term of 42 years from the date of the making hereof, or any part as may be agreed upon by the Seller and Purchaser; and this contract may be renewed or extended for such term, or terms, as may be agreed upon by the Seller and Purchaser.

2. (Delivery of Water) That n/a days prior to the estimated date of completion of construction of the Purchaser's water supply distribution system, the Purchaser will notify the Seller in writing the date for the initial delivery of water.

3. (Water for Testing) When requested by the Purchaser the Seller will make available to the contractor at the point of delivery, or other point reasonably close thereto, water sufficient for testing, flushing, and trench filling the system of the Purchaser during construction, irrespective of whether the metering equipment has been installed at that time, at a

flat charge of \$ n/a which will be paid by the contractor or, on his failure to pay, by the Purchaser.

4. (Failure to Deliver) That the Seller will, at all times, operate and maintain its system in an efficient manner and will take such action as may be necessary to furnish the Purchaser with quantities of water required by the Purchaser. Temporary or partial failures to deliver water shall be remedied with all possible dispatch. In the event of an extended shortage of water, or the supply of water available to the Seller is otherwise diminished over an extended period of time, the supply of water to Purchaser's consumers shall be reduced or diminished in the same ratio or proportion as the supply to Seller's consumers is reduced or diminished.

5. (Modification of Contract) That the provisions of this contract pertaining to the schedule of rates to be paid by the Purchaser for water delivered are subject to modification, ~~and the said rates xxxxxx xxxxxxxx~~ Any increase or decrease in rates shall be based on a demonstrable increase or decrease in the costs of performance hereunder, and such costs shall not include increased capitalization of the Seller's system. Other provisions of this contract may be modified or altered by mutual agreement. If based on a demonstrable increase in the cost of performance, seller may increase the above-stated rates by the same percent that it increases the \*

6. (Regulatory Agencies) That this contract is subject to such rules, regulations, or laws as may be applicable to similar agreements in this State and the Seller and Purchaser will collaborate in obtaining such permits, certificates, or the like, as may be required to comply therewith.

7. (Miscellaneous) That the construction of the water supply distribution system by the Purchaser is being financed by a loan made or insured by, and/or a grant from, the United States of America, acting through the Farmers Home Administration of the United States Department of Agriculture, and the provisions hereof pertaining to the undertakings of the Purchaser are conditioned upon the approval, in writing, of the State Director of the Farmers Home Administration.

8. (Successor to the Purchaser) That in the event of any occurrence rendering the Purchaser incapable of performing under this contract, any successor of the Purchaser, whether the result of legal process, assignment, or otherwise, shall succeed to the rights of the Purchaser hereunder.

9. It is agreed that all of the Purchasers rights and equities under this contract may be and the same are hereby pledged to the USDA, FmHA, as security for a loan FmHA proposes to make the Purchaser to finance the construction or extensions of a water system.

10. It is further agreed by and between the parties hereto that the City reserves the right to purchase any and all facilities, including service connections, and the right to provide water service to any and all customers of the District, which facilities and customers are located within a radius of two miles measuring north-eastwardly generally along Highway 159 and five miles southward, measuring generally along Highway 27, all such measurements to be taken from the present limits of the City of Falmouth; provided however, such rights shall not be exercised until such time as the City has legally annexed the foregoing described area, or either of such two segments, into the city proper.

\* water rates applicable to users in the City of Falmouth.

**Presiding Judge: HON. JAY DELANEY (618318)**

**EXH: 000022 of 000036**



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In witness whereof, the parties hereto, acting under authority of their respective governing bodies, have caused this contract

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to be duly executed in four counterparts, each of which shall constitute an original.

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Seller:

CITY OF FALMOUTH

By

Title

Mayor

Attest:

Jerry England  
Secretary

Purchaser:

EAST PENDLETON WATER DISTRICT

By

Title

Chairman

Attest:

Leslie Herbst  
Secretary

28<sup>th</sup>

July

This contract is approved on behalf of the Farmers Home Administration this \_\_\_\_\_ day of \_\_\_\_\_,

19 88.

By

Title

James B. Letcher  
Community & Business Programs Specialist

Presiding Judge: HON. JAY DELANEY (618318)

EXH : 000023 of 000036

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12/30/2024

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RESOLUTION

This matter having come to the attention of the Commissioners of the East Pendleton Water District pursuant to a request by the Farmers Home Administration that the City and the Water District execute a new water purchase contract in order that the East Pendleton Water District might meet bonding requirements necessary to obtain a loan from the Farmers Home Administration to upgrade and repair the water system, and the Commissioners having considered the matter at a meeting on June 15, 1988, the following resolution was proposed by Leslie Herbst, seconded by Paul E. Hall, and unanimously carried, to-wit:

RESOLVED, that the Water Purchase Contract presented to the Commissioners this date is hereby approved and the Chairman is hereby authorized to sign said contract on behalf of the East Pendleton Water District.

This 15 day of June, 1988.

EAST PENDLETON WATER DISTRICT

By Paul E. Hall  
PAUL E. HALL, Chairman

ATTEST:

Leslie Herbst  
LESLIE HERBST, Secretary

Presiding Judge: HON. JAY DELANEY (618318)

EXH : 000024 of 000036



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12/30/2024

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User Name: Brandon Voelker

Date and Time: Tuesday, December 17, 2024 3:38:00 PM EST

Job Number: 241056917

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**Document (1)**

1. [Ledbetter Water Dist. v. Crittenden-Livingston Water Dist.](#)

**Client/Matter:** -None-**Search Terms:** city water district breach of contract**Search Type:** Natural Language**Narrowed by:**

Content Type

Narrowed by

-None-



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Neutral

As of: December 17, 2024 8:38 PM Z

12/30/2024

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**Ledbetter Water Dist. v. Crittenden-Livingston Water Dist.**

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Supreme Court of Kentucky

February 20, 2020, Rendered

2018-SC-000494-DG

**Reporter**

2020 Ky. Unpub. LEXIS 10 \*; 2020 WL 1303913

LEDBETTER **WATER DISTRICT**, APPELLANT v. CRITTENDEN-LIVINGSTON **WATER DISTRICT**, APPELLEE

**Notice:** THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, [CR 76.28\(4\)\(C\)](#), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

**Subsequent History:** Rehearing denied by [Ledbetter Water Dist. v. Crittenden-Livingston Water Dist., 2020 Ky. LEXIS 237 \(Ky., July 9, 2020\)](#)

**Prior History:** [\*1] ON APPEAL FROM COURT OF APPEALS. CASE NO. 2017-CA-000578. LIVINGSTON CIRCUIT COURT NO. 15-CI-00079. HON. CLARENCE A. WOODALL, III.

[Crittenden-Livingston Water Dist. v. Ledbetter Water Dist., 2018 Ky. App. Unpub. LEXIS 571 \(Ky. Ct. App., Aug. 17, 2018\)](#)

## Core Terms

franchise, lease, **water district**, bidding, contracts, municipality, void, public entity, right to use, advertised, entity, meter, water supply, conferred, argues, wharf, acquire

**Counsel:** COUNSEL FOR APPELLANT: Van Franklin Sims, Paducah, Kentucky.

COUNSEL FOR CRITTENDEN-LIVINGSTON WATER: Robert Bartley Frazer, Marion, Kentucky.

COUNSEL FOR KENTUCKY RURAL WATER ASSOCIATION, INC, AMICUS CURIAE : Damon R. Tally, Hodgenville, Kentucky; Stephen A. Sherman, Louisville, Kentucky.

**Judges:** Minton, C.J.; Hughes, Keller, Lambert, VanMeter and Wright, J.J., sitting. Nickell, J., not sitting. Hughes, Keller, Lambert and Wright, J.J., concur. Minton, C.J. dissents with separate opinion in which VanMeter, J., joins. VanMeter, J. dissents with a separate opinion in which Minton, C.J., joins.

## Opinion

### MEMORANDUM OPINION OF THE COURT

### REVERSING



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The Kentucky Court of Appeals reversed a summary judgment entered by the Livingston Circuit Court which found that a contract entered into between Ledbetter Water District ("Ledbetter") and the Crittenden-Livingston Water District ("Crittenden-Livingston") was void because it violated Kentucky Constitution § 164. After review, we now reverse the Court of Appeals and reinstate the trial court judgment in favor of Ledbetter.

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## I. BACKGROUND

Ledbetter and Crittenden-Livingston [\*2] are both non-profit water districts organized under Kentucky Revised Statutes ("KRS") Chapter 74. Ledbetter is an unincorporated community located in Livingston County. Crittenden County and Livingston County formed a water company together. In 1988, Ledbetter entered into a four-year agreement with the city of Grand Rivers for Grand Rivers to become Ledbetter's new source of water supply. Ledbetter and Grand Rivers entered into multiple water purchase agreements between 1988 and 2000. Ledbetter learned that Grand Rivers planned to close their water plant and could no longer supply Ledbetter the amount of water they needed moving forward.

In 1996, the Crittenden-Livingston Board of Commissioners began drawing up plans to expand the Crittenden-Livingston water plant. Crittenden-Livingston marketed water to five local areas within Crittenden and Livingston counties to help fund the expansion. Ledbetter was one of the communities to which Crittenden-Livingston marketed a water supply contract.

In May 1996, the Crittenden-Livingston Superintendent attended a Ledbetter Water Board meeting to present the new plan. Ledbetter then sent a letter to Crittenden-Livingston stating that it wanted [\*3] to purchase 3,000,000 gallons of water per month from Crittenden-Livingston, at a price of \$1.68 per thousand gallons, for an unspecified length of time.

Experiencing delays in the project, it was not until January 17, 2000 that Crittenden-Livingston faxed a proposed contract to the Ledbetter Board for consideration. A week later, the Ledbetter Board approved the proposed contract. Relevant to our review, Ledbetter did not advertise, publicly or privately, for bids before voting to enter into this contract. Under this contract, Ledbetter and Crittenden-Livingston agreed for Crittenden-Livingston to provide and sell a minimum of three million gallons of water per month for a period of forty years. Crittenden-Livingston was also granted the right to install a master meter in a constructed meter housing building on Ledbetter property and to install water line connections to the Ledbetter water system. Crittenden-Livingston also reserved the right to enter Ledbetter property to read the meter and provide maintenance.

Over the course of the contract, Crittenden-Livingston tried to persuade Ledbetter to purchase more than the minimum 3,000,000 gallons. By 2010, Ledbetter was able to produce [\*4] some of their water supply at their own plant at a substantially lower cost than the contracted price.

In 2013, Ledbetter sought an opinion from the Kentucky Attorney General's office regarding the legality of the contract between the two entities. Assistant Attorney General Matt James rendered an advisory opinion that the contract was void because it violated Kentucky Constitution § 164. The letter addressed a savings clause within the contract, which would have shifted the term of years from forty to twenty; however, the contract was still deemed void as the contract was not put up for public bid. Ledbetter advised the Crittenden Board of Commissioners of this opinion, which Crittenden-Livingston rejected.

Ledbetter then filed a declaratory judgment action with the Livingston Circuit Court. The trial court determined that the contract was within Ledbetter's authority to make; however, because the contract granted a franchise and was in excess of twenty years, it was void under the Kentucky Constitution.

The Court of Appeals reversed the Livingston Circuit Court holding that because the contract involved two public entities, the franchise provision and the public bidding requirements of the Kentucky Constitution [\*5] did not apply. This appeal followed.



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**II. STANDARD OF REVIEW**

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Summary judgment is only proper "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant."<sup>1</sup> Because the grant of summary judgment does not involve fact-finding, our standard of review is *de novo*.<sup>2</sup>

**III. ANALYSIS**

First, we review how the Kentucky Constitution applies to the facts before us. [Ky. Const. § 162](#), states,

No county, **city**, town or other municipality shall ever be authorized or permitted to pay any claim created against it, under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts shall be null and void.

[Ky. Const. § 164](#), Term of Franchises, states:

No county, **city**, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, **such municipality shall first, after due advertisement, receive bids therefor publicly**, and award the same to the highest and best [\*6] bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

(emphasis added). Therefore, when examining the requirements set out in the Kentucky Constitution, we review both § 162 and § 164.

We must also determine the meaning of a "franchise." In *E.M. Bailey Distributing Co., Inc. v. Conagra, Inc.*,<sup>3</sup> the Lyon County Riverport Authority had granted Conagra, a private company, use of a grain loading facility on public property. E.M. Bailey, a competing private company, filed suit to challenge the legality of the agreement under § 164 because the riverport authority did not advertise for competitive bidding. Our Court defined a franchise as follows: "A franchise is generally defined as a right or privilege granted by a sovereign power, government or a governmental entity to a party to do some act which such party could not do without a grant from the government."<sup>4</sup> Furthermore, a franchise is a grant of a right to use public property or at least the property over which the granting authority has control.<sup>5</sup> The Court held that the "riverport authority holds title to the land and the improvements in an absolute trust for all the people of Lyon County. Such a [\*7] public asset cannot be disposed of without due advertising, competitive bidding and process mandated by the [Kentucky Constitution § 164](#)."<sup>6</sup>

Crittenden-Livingston argues that it is impossible that Ledbetter is empowered to grant a franchise because it is an extension of Livingston County, one of the two participating counties of Crittenden-Livingston. Additionally,

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<sup>1</sup> *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985) (quoting *Roberson v. Lampton*, 516 S.W.2d 838, 840 (Ky. App. 1974)).

<sup>2</sup> *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006).

<sup>3</sup> 676 S.W.2d 770 (Ky. 1984).

<sup>4</sup> *Id.* at 771.

<sup>5</sup> *Young v. City of Morehead*, 314 Ky. 4, 233 S.W.2d 978 (Ky. 1950).

<sup>6</sup> *E.M. Bailey*, 676 S.W.2d at 773.



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Crittenden-Livingston argues that this claim involves one public entity acquiring the services of another public entity, and therefore does not require a franchise and public bidding.

In reviewing *Public Service Commission of Kentucky v. Dewitt Water District*, this Court provided insight to the issue of an unincorporated city water district.<sup>7</sup> Dewitt is an unincorporated city in Knox County, Kentucky. The *Dewitt* court held that an unincorporated city water district is a division of the county's government stating: "There are approximately 115 water districts in the Commonwealth of Kentucky which are nonprofit political subdivisions of county government."<sup>8</sup> This Court continued:

It is important to remember that **this case involves water districts which are nonprofit utilities** organized under Chapter 74 of the Kentucky Revised Statutes. The owners and consuming ratepayers are essentially the same individuals [\*8] because **the districts are political subdivisions of county government**.<sup>9</sup>

Crittenden-Livingston argues that Ledbetter has no authority to grant or deny it a franchise as it is not a county, city, town, taxing district, or other municipality under Ky. Const. § 164. However, water districts have long been held to be political subdivisions, and therefore observe the same formalities required of counties and municipalities to contract.<sup>10</sup>

Crittenden-Livingston argues that unlike *E.M. Bailey*, the claim here involves two public entities; not a public entity and private party. They argue that this distinction means that the contract cannot be a franchise. Crittenden-Livingston claims that this is not a franchise agreement, as it did not grant governmental rights or privileges that Crittenden-Livingston did not already possess.

By dissent, Chief Justice Minton cites *Inland Waterways Co. v. City of Louisville*, where a lease involving property held by the City of Louisville was given to a private corporation to be used for wharf purposes.<sup>11</sup> However, as pointed out specifically within *Inland Waterways* and by our court in *E.M. Bailey*, Inland Waterways is factually distinguishable because the lease granted Inland Waterways [\*9] Co. only temporary use of the property, and the City of Louisville retained a recapture provision allowing it to recover the wharf at any time.<sup>12</sup>

*Inland Waterways, supra*, cited in support of respondents' position, is distinguishable from the facts in this case because it involved a lease by the City of Louisville of property held by it, but not being used for, wharf purposes. The lease granted only a temporary use of the property and the City could recover it at any time it was needed for wharf purposes. This Court held that the lease was not a franchise, noting that the recapture provisions in the lease were wholly incompatible with the idea of a fixed right for a definite term.

Here Conagra is permitted a fixed right to use the grain facilities as needed by it for a definite term of five years. The authority cannot regain the grain facility once Conagra has given the required notice and cannot in any event ever recapture the operational area adjacent thereto over which Conagra has been granted absolute exclusive control.

In considering this matter, it is useful to distinguish a franchise from a license. A license in respect to real property can be defined as a personal privilege to do acts upon the land of [\*10] the licensor of a temporary nature which are revocable at the will of the licensor. A franchise is neither temporary or personal and it is not

<sup>7</sup> 720 S.W.2d 725 (Ky. 1986).

<sup>8</sup> Id. at 727.

<sup>9</sup> Id. at 731. (emphasis added).

<sup>10</sup> Louisville Extension Water Dist. v. Diehl Pump & Supply Co., 246 S.W.2d 585, 586 (Ky. 1952).

<sup>11</sup> 227 Ky. 376, 13 S.W.2d 283, 284-286 (Ky. 1929).

<sup>12</sup> *E.M. Bailey*, 676 S.W.2d at 772.



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revocable at the will of the grantor. See 36 Am.Jur.2d § 2, *Franchises*; cf. *Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 33 S.Ct. 988, 57 L.Ed. 1389 (1913).<sup>13</sup>

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Analogous to our present case, in *E.M. Bailey*, Conagra was permitted a fixed right to use the grain facilities for a definitive term, there was no recapture provision included and Conagra was granted exclusive control over the facilities.<sup>14</sup>

Here, the contract did in fact grant Crittenden-Livingston rights they would not have possessed without the contract with Ledbetter. The Crittenden-Livingston *Water District* encompassed areas within Crittenden and Livingston counties; however, it did not include the Ledbetter district. With the agreement, Crittenden-Livingston was permitted to install connecting water lines and a master meter with valves, to maintain a building on the Ledbetter water tower property so as to gain access to the Ledbetter master meter and was granted rights to enter the Ledbetter facility for readings and maintenance. The contract also granted Crittenden-Livingston the right to use Ledbetter's water system infrastructure to transport a minimum of 3,000,000 [\*11] gallons of water each month to fulfill the terms of the contract by selling water to Ledbetter.

Justice VanMeter's dissent notes that pursuant to *KRS 74.070(1)* a *water district* is authorized to "make contracts for the *water district* with municipalities and other persons." He concludes this is just a contract between the two public entities while a franchise is implemented where a *water district* contracts with a private entity to create infrastructure, deliver water to citizens and then direct bills those citizens. However, in *KRS 96.120(1)* the legislature refers to a contract such as the one before us as a franchise: "Any *city* that owns and operates its own water or light plant may acquire a franchise to furnish water and light to any other *city*, in the same manner that any private corporation or individual may acquire such a franchise." Although the statute refers to a water supply arrangement between two *cities*, there's no reason the rule would be different for two *water districts*, which as noted are political subdivisions of county government.

On October 5, 1981, Honorable Martin W. Johnson, *City* Attorney for Benton, Kentucky, requested an opinion from the Office of the Attorney General ("OAG") as to whether [\*12] two public entities could enter into a forty year contract as was required by the lender.<sup>15</sup> Under the contract the *City* of Benton planned to furnish water to the *City* of Hardin.<sup>16</sup> The contract in question included a proposed term of forty years. In response, the OAG made the following recommendation:

We initially refer you to *KRS 96.120*, which reads as follows: "Any *city* may acquire a franchise to furnish water and light to any other *city*, in the same manner that any private corporation or individual may acquire such a franchise."

The above statute authorizes the proposed sale of water between the *cities* of Benton and Hardin. However, such a contract would necessarily be in the nature of a franchise acquired in this instance by the *City* of Benton from the *City* of Hardin and would be governed, in our opinion, by *Section 164 of the Constitution*. As you know, this section prohibits any franchise from exceeding twenty years and at the same time requires that it be let on a bid basis, though from a practical standpoint, in this instance, there would only be one bidder. Nevertheless, we believe that the terms of Section 164 must be complied vvith.<sup>17</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 1980-1981 Ky. Op. Atty. Gen. 2-883 (Ky. A.G.), Ky. OAG 81-365, 1981 WL 142437.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*



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Much like the OAG opinion rendered regarding the contract between the cities of Benton and Hardin, [\*13] in the present case we have an analogous OAG advisory opinion stating that the contract between Ledbetter and Crittenden-Livingston was void because it violated Kentucky Constitution § 164.

Crittenden-Livingston relies on *Southeast Bullitt Fire Protection District v. Southeast Bullitt Fire and Rescue Department*, a dispute between public entities in Bullitt County.<sup>18</sup> That contract dispute involved a volunteer fire department that provided non-utility fire protection services in the district's area. The *Bullitt* court held, "The District is correct that the fire protection contract was not publicly advertised; however, the Fire Department argues that it provides a "professional service" and no public bidding was required. The trial court held that the Fire Department provided **professional services** and we agree with that conclusion."<sup>19</sup> This decision is factually distinguishable from the present case. Here we have a franchise granted for providing water utilities, rather than a contract for professional services. Since 1896 it has been held that a utility contract regarding water supply is a franchise, and pursuant to the Kentucky Constitution, a franchise or privilege that was not advertised and publicly bid is [\*14] void pursuant to § 164.<sup>20</sup>

Since the contract entered into by Ledbetter and Crittenden-Livingston was both for a term of greater than twenty years and was not advertised for public bidding, it violates the Kentucky Constitution and applicable statutes and, thus, is void. We reverse the Court of Appeals and reinstate the Livingston Circuit Court grant of summary judgment.

Minton, C.J.; Hughes, Keller, Lambert, VanMeter and Wright, J.J., sitting. Nickell, J., not sitting.

Hughes, Keller, Lambert and Wright, J.J., concur. Minton, C.J. dissents with separate opinion in which VanMeter, J., joins. VanMeter, J. dissents with a separate opinion in which Minton, C.J., joins.

**Dissent by:** MINTON; VanMeter

## Dissent

MINTON, C. J., DISSENTING: I agree with the result reached by Justice VanMeter's dissenting opinion<sup>21</sup> but write separately to express an additional point that, in my view, is a critical point under these facts. Ledbetter argues, in part, that the contract was a franchise because it granted to Crittenden-Livingston the right to use the real property of Ledbetter. Specifically, the contract gave Crittenden-Livingston the right to use Ledbetter property to install a water line and meter and to erect a building to house the [\*15] meter. But while the granting "of a right to use public property or at least the property over which the granting authority has control"<sup>22</sup> may be an attribute of a franchise,

<sup>18</sup> *Southeast Bullitt Fire Prot. Dist. v. Southeast Bullitt Fire and Rescue Dep't.*, 537 S.W.3d 828 (Ky. App. 2017).

<sup>19</sup> *Id.* at 831 (emphasis added).

<sup>20</sup> *Nicholasville Water Co. v. Bd. of Councilmen of Town of Nicholasville*, 36 S.W. 549, 18 Ky. L. Rptr. 592 (Ky. 1896).

<sup>21</sup> The point in Justice VanMeter's dissent, that the right to produce and sell water to a water district is not the prerogative of the government, and a franchise is therefore not required to grant such a right, is supported by our case law. See *Young v. City of Morehead*, 314 Ky. 4, 233 S.W.2d 978, 980 (Ky. 1950) ("The right to produce and sell gas is not a prerogative of a government but is a business open to all, therefore, Young was not exercising a franchise when he contracted to sell and deliver his gas to the City at its corporate limits."); *City of Princeton v. Princeton Electric Light & Power Co.*, 166 Ky. 730, 179 S.W. 1074, 1077 (Ky. 1915) ("The right to produce and sell electricity as a commercial product is not a prerogative of a government, but is a business which is open to all, and for that reason is not a franchise.").

<sup>22</sup> *E.M. Bailey Distributing Co., Inc. v. Conagra, Inc.*, 676 S.W.2d 770, 771 (Ky. 1984) (citing *Young*, 314 Ky. 4, 233 S.W.2d 978).



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that fact alone does not render the granting of a lease a franchise. The nature of the public property and the activity being conducted on the property must be considered.

For example, in *Inland Waterways Co. v. City of Louisville*, our predecessor court found that a lease given to a private corporation by the City of Louisville upon real property held by the City was not a franchise requiring advertisement and competitive bidding under Section 164.<sup>23</sup> More specifically, the contract in that case leased to the Inland Waterways Company, for a fixed term, two separate tracts of land abutting the Ohio River with the express purpose that the lessee develop the parcels to be used as a wharf.<sup>24</sup> The lease had been challenged as an invalid franchise under Section 164.<sup>25</sup>

The Court explained that a franchise of the type contemplated by Section 164 "is generally understood to designate and denote a right or preference conferred by law which may be granted only by the sovereign, and not by individuals generally."<sup>26</sup> The Court went on to explain that such a right [\*16] may not be conveyed by a lease even if the lease provides for the use of land held by the government.<sup>27</sup> It is instead the nature of the right being conveyed—whether it confers some special privilege not belonging to the public—that ultimately determines whether a franchise has been created.

The Court concluded that the lease at issue did not confer any special privilege exclusive to the City of Louisville but instead conferred only the right to operate a private wharf on the lessor's land—a right that could have been conveyed by any private entity.<sup>28</sup> The fact that the City of Louisville held title to the land did not change the nature of that right. The city was simply conveying the right to use land as other private individuals may do.<sup>29</sup>

Likewise, the Ledbetter lease at issue does not involve a right that may be granted only by the sovereign but instead involves a right that may be conferred by private individuals generally—the right to produce and sell water and construct water lines and meters on the lessor's property—as Justice VanMeter properly notes. The fact that Ledbetter holds title to the property does not change the nature of this right. Leases identical to this one [\*17] could be executed by any private entity.

As such, I would hold that the lease is not void for granting a franchise or privilege without allowing competitive bidding under Section 164. I would affirm the decision the Court of Appeals for the reasons I have stated. VanMeter, J., joins.

VanMeter, J., DISSENTING: Respectfully, I dissent. The majority's analysis of Section 164 of the Kentucky Constitution fails to recognize that the water districts in question entered into a simple contract for the sale of water from one district to the other, thus removing any contract for services between Ledbetter and Crittenden-Livingston from Section 164's provisions regarding franchises. "A franchise is generally defined as a right or privilege granted by a sovereign power, government or a governmental entity to a party to do some act which such

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<sup>23</sup> 227 Ky. 376, 13 S.W.2d 283, 284-86 (Ky. 1929).

<sup>24</sup> Id. at 285.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> See id. at 286.

<sup>28</sup> See id. at 286-87.

<sup>29</sup> See id. at 287 (citing Ky. Stats. § 2742; Carrollton Furniture Mfg. Co. v. City of Carrollton, 104 Ky. 525, 47 S.W. 439, 20 Ky. L. Rptr. 818 (Ky. 1898)); Board of Councilmen of the City of Frankfort v. Pattie, 227 Ky. 343, 12 S.W.2d 1108 (Ky. 1928)) ("A municipal corporation may be the owner of land and may control, use, lease, and dispose of it as other proprietors may do.").

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party could not do without a grant from the government." E.M. Bailey Distrib. Co. v. Conagra, Inc., 676 S.W.2d 770, 771 (Ky. 1984).

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In the context of public utilities, such as waterworks, a franchise is implemented if a water district contracted with a private entity to carry out the water district's duties in creating infrastructure, delivering water to the district's citizens, and billing them directly. However, under the present arrangement, Ledbetter is simply purchasing water from an adjacent [\*18] water district—not to franchise the supplying of water to Ledbetter citizens—but to add to Ledbetter's existing, limited supply held in its water tower. This Court has held, under similar factual circumstances related to two non-profit government entities contracting for services, "[t]he contracts involved have some of the attributes of a privilege, but the rights conferred do not have the character of a franchise. \* \* \* The contracts are mutually advantageous to the three municipal corporations. They have added no appreciable burden. They constitute mere rental of a surplus facility." City of Russell v. City of Flatwoods, 394 S.W.2d 900, 902 (Ky. 1965) (quoting Louisville & Jefferson Cnty. Metro Sewer Dist. v. Strathmoor Village, 307 Ky. 343, 345-46, 211 S.W.2d 127, 129 (1948)).

Under KRS 74.070(1), Ledbetter's commission "may make contracts for the water district with municipalities and other persons." Ledbetter's contract with Crittenden-Livingston was simply fulfilling Ledbetter's statutory duty to provide water to its citizens, not through a franchise, but through a contract for an amount of water to be added to Ledbetter's own supply. Much like the sewer services contracts between the three municipal corporations in Strathmoor Village, "[t]hese are contracts such as individuals owning like facilities as private property might have made." 307 Ky. at 346, 211 S.W.2d at 129. Thus, Ledbetter should be free to [\*19] contract with Crittenden-Livingston for the provision of external water resources without implication of the franchise prohibition and requirements of Section 164.

Minton, C.J., joins.

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**User Name:** Brandon Voelker**Date and Time:** Wednesday, December 18, 2024 1:49:00 PM EST**Job Number:** 241141698

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**Document (1)**

1. [Administrative Determination Document, 1981 Ky. AG LEXIS 73, OAG 81-365, OAG 81-365](#)

**Client/Matter:** -None-**Search Terms:** 81-365 kentucky attorney general**Search Type:** Natural Language**Narrowed by:****Content Type****Narrowed by**

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Office of the Attorney General of the State of Kentucky

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**KY Attorney General Opinions****Reporter**

1981 Ky. AG LEXIS 73 \*

**OAG 81-365**

October 19, 1981

**Core Terms**

franchise, furnish water

**Request By: [\*1]**

Honorable Martin W. Johnson

City Attorney

P.O. Box 165

Benton, Kentucky 42025

**Opinion By:** Steven L. Beshear, Attorney General; **By:** Walter C. Herdman, Assistant Deputy Attorney General**Opinion**

This is in response to your letter of October 5, in which you state that the cities of Benton and Hardin are involved in negotiating a contract whereby the City of Benton will furnish water to the City of Hardin. The question is raised concerning the duration of the contract, that is, whether or not it could extend for forty years as proposed by the Farmers Home Administration which will loan money for the construction of the distribution system.

We initially refer you to [KRS 96.120](#), which reads as follows:

"Any city may acquire a franchise to furnish water and light to any other city, in the same manner that any private corporation or individual may acquire such a franchise."

The above statute authorizes the proposed sale of water between the cities of Benton and Hardin. However, such a contract would necessarily be in the nature of a franchise acquired in this instance by the City of Benton from the City of Hardin and would be governed, in our opinion, by Section 164 of the Constitution. As you know, [\*2] this section prohibits any franchise from exceeding twenty years and at the same time requires that it be let on a bid basis, though from a practical standpoint, in this instance, there would be only one bidder. Nevertheless, we believe that the terms of Section 164 must be complied with.

Prior to the expiration of the 20-year contract the franchise would have to be renegotiated as provided in [KRS 96.010](#), which should be no problem in this instance since there is apparently only one source of supply.

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KY Attorney General Opinions

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Presiding Judge: HON. JAY DELANEY (618318)

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