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 PENDLETON WATER DISTRICT AND PENDLETON COUNTY WATER DISTRICT	)))))	CASE NO. 2024-00403

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

requested by the Districts, since a proper Motion was not filed, nor did the PSC Board make such a finding.

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.

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.

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-*

Livingston Water District, which was filed in the Livingston Circuit Court, not the PSC. Further establishing the inapplicability and lack of jurisdiction herein.

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
Counsel for City of Falmouth

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 27th 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

Russell Coleman, Attorney General
700 Capital Avenue, Suite 118
Frankfort, KY 40601
ServetheCommonwealth@ky.gov

David Fields
Pendleton Judge Executive
233 Main Street
Falmouth, KY 41040
judgeexec@pendletoncountyky.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)

Filed 24-CI-00222 12/27/2024 Michael D. Redden, Pendleton Circuit Clerk

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

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

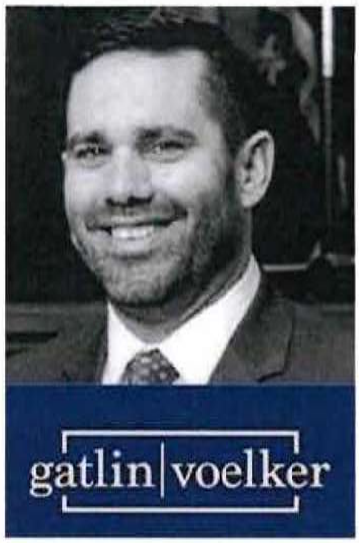
Gatlin Voelker PLLC

50 East Rivercenter Blvd., Suite 1275

Covington, Kentucky 41011

Office: (859) 781-9100

cell: (859) 802-8690



Read Brandon's Bio

Leave us a review on Google

--- CONFIDENTIALITY STATEMENT ---

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This E-mail has been scanned for viruses

MODIFICATION
OF
WATER PURCHASE CONTRACT

This modification of water purchase contract entered into this the 7th 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 12th 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.

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 Flaugher

ATTEST:

_____
Terry England, City Clerk

PENDLETON COUNTY WATER DIST.

By _____
J.C. Crowley, Chairman

ATTEST:

_____
H.T. Ammerman, Secretary

The City of Falmouth met on the 14 day of January, 2003 at the City Office in Falmouth, Kentucky with Council members Rick Mineer, Mark Hart, Kim Bustin, Mary Ann Pittman, and Shannon Weaver present.

Kim Bustin introduced the following Resolution and moved its adoption.

RESOLUTION

WHEREAS, on or about the 12th 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.

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

WATER PURCHASE CONTRACT

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 castastrophe 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

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. (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

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

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 simularly 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.

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 Goldberg

Title: MAYOR

ATTEST:

H. L. Crumbaugh

SECRETARY

PURCHASER:

PENDLETON COUNTY WATER DISTRICT

BY Dewey Hornbeck

Title: CHAIRMAN

ATTEST:

H. L. Crumbaugh

SECRETARY

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

By James D. Fetter

Title Community & Business Programs Specialist

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, Chairman, Tommy Ammerman, Secretary - Louis McClannahan, 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 institutions 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.

Secretary

March 12, 1984

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 m[illegible]h for a period of forty (40) years hence,

WHEREAS, said Contract was amended of 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 whith 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 [illegible]

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

May. 22. 2015 11:35AM No. 1458 P. 7

JUL 1 8 1988

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 Mooree, 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
TERRY ENGLAND, City Clerk

EAST PENDLETON CO. WATER DISTRICT

601 Woodson Road
P. O. Box 29
Falmouth, KY 41040
(859) 654-2100
(859) 654-3144 Fax

FACSIMILE TRANSMITTAL

TO: Ramona FAX#: 654-3603

COMPANY: City of Falmouth

FROM:

DATE: 5-22-15 TIME: 11:45 AM

RE: Contract

TOTAL 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

WATER PURCHASE CONTRACT

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, (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 [illegible]

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 _____

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

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

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. 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 occurence 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.

In witness whereof, the parties hereto, acting under authority of their respective governing bodies, have caused this contract to be duly executed in four counterparts, each of which shall constitute an original.

Seller:

CITY OF FALMOUTH

By Wm E Fatherree

Title Mayor

Attest:

Terry England

Secretary

Purchaser:

EAST PENDLETON WATER DISTRICT

By Paul E. Hall

Title Chairman

Attest

Leslie Hubst

Secretary

This contract is approved on behalf of the Farmers Home Administration this 28th day of July, 19 88.

By James A. Letton

Title Community & Business Programs Specialist

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

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

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-

Neutral

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

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

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 ASSOCATION, 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

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.

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.

II. STANDARD OF REVIEW

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."[1] Because the grant of summary judgment does not involve fact-finding, our standard of review is *de novo*.[2]

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.*,[3] 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."[4] 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.[5] 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."[6]

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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[1] *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)).

[2] Pinkston v. Audubon Area Community Services, Inc., 210 S.W.3d 188, 189 (Ky. App. 2006).

[3] 676 S.W.2d 770 (Ky. 1984).

[4] Id. at 771.

[5] Young v. **City** of Morehead, 314 Ky. 4, 233 S.W.2d 978 (Ky. 1950).

[6] *E.M. Bailey*, 676 S.W.2d at 773.

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***.[7] 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."[8] 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**.[9]

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.[10]

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.[11] 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.[12]

> *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

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[7] 720 S.W.2d 725 (Ky. 1986).

[8] Id. at 727.

[9] Id. at 731. (emphasis added).

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

[11] 227 Ky. 376, 13 S.W.2d 283, 284-286 (Ky. 1929).

[12] *E.M. Bailey*, 676 S.W.2d at 772.

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).[13]

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.[14]

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.[15] Under the contract the ***City*** of Benton planned to furnish water to the ***City*** of Hardin.[16] 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.[17]

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[13] *Id.*

[14] *Id.*

[15] 1980-1981 Ky. Op. Atty. Gen. 2-883 (Ky. A.G.), Ky. OAG 81-365, 1981 WL 142437.

[16] *Id.*

[17] *Id.*

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.[18] 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."[19] 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.[20]

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[21] 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"[22] may be an attribute of a franchise,

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

[19] *Id. at 831* (emphasis added).

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

[21] 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.").

[22] *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*).

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.[23] 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.[24] The lease had been challenged as an invalid franchise under Section 164.[25]

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."[26] 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.[27] 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.[28] 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.[29]

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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[23] 227 Ky. 376, 13 S.W.2d 283, 284-86 (Ky. 1929).

[24] Id. at 285.

[25] Id.

[26] Id.

[27] See id. at 286.

[28] See id. at 286-87.

[29] 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.").

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).

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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Date and Time: Wednesday, December 18, 2024 1:49:00□PM EST
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Document (1)

1. *Administrative Determination Document, 1981 Ky. AG LEXIS 73, OAG 81-365, OAG 81-365*

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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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