

ORIGINAL

Decision No. 79991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Lloyd W. and Roberta T. Olson,
Complainants,

vs.

San Jose Water Works, a corpora-
tion,

Defendant.

Case No. 9166
(Filed December 17, 1970)

A. George and Nadine Jackson
Stubbe,

Complainants,

vs.

San Jose Water Works, a corpora-
tion,

Defendant.

Case No. 9169
(Filed January 5, 1971)

Carl M. and Charlotte B. Stelling,
Complainants,

vs.

San Jose Water Works, a corpora-
tion,

Defendant.

Case No. 9170
(Filed January 5, 1971)

Harold N. and Patricia M. Lynge,
Complainants,

vs.

San Jose Water Works, a corpora-
tion,

Defendant.

Case No. 9172
(Filed January 11, 1971)

E. E. Dadmun,

Complainant.

vs.

San Jose Water Works, a corpora-
tion,

Defendant.

Case No. 9176
(Filed January 15, 1971)

L. A. Mayr, J. M. Eischens and
R. P. Criswell,

Complainants,

vs.

San Jose Water Works, a corpora-
tion,

Defendant.

Case No. 9178
(Filed January 18, 1971)

John J. Vlahos and David J. Miller, Attorneys
at law, for Lloyd W. Olson and Roberta T.
Olson, complainants in Case No. 9166; for
A. George and Nadine Jackson Stubbe, com-
plainants in Case No. 9169; for Harold N.
and Patricia M. Lynge, complainants in
Case No. 9172; for E. E. Dadmun, complainant
in Case No. 9176 and for R. P. Criswell,
complainant in Case No. 9178.
Robert Minge Brown, Attorney at law, for San
Jose Water Works, defendant.

O P I N I O N

Preliminary Matters

The record shows that subsequent to the filing of Case No. 9170 complainants Stelling sold their property to a party named Spurgeon.

The record shows that no appearance was entered during the course of the proceeding by anyone representing either the Stellings or the Spurgeons.

The record further reveals that of the complaints in Case No. 9178 an appearance was entered only on behalf of complainant Criswell.

Defendant's counsel requested that the complaints be dismissed as to the complainants who were not represented and who did not participate in the proceeding. The request was taken under submission by the Examiner. The request is granted and the order which follows will dismiss Case No. 9170 and sever complainants Mayr and Eischens from Case No. 9178.

The discussion which follows applies only to complainants Olson, Stubbe, Lynge, Dadmun and Criswell. The aforementioned parties originally initiated separate proceedings before this Commission. By direction of the Commission the separate matters were consolidated for hearing in San Francisco before Examiner Gillanders.

Hearings were held on March 22, May 3, 4, 5 and 13, 1971. The matter was submitted on October 22, 1971 upon receipt of complainants' reply brief.

Summary of the Complaints and Complainants' Contentions

Complainants are owners of five contiguous parcels of property composed of an aggregate total of approximately 65 acres, located off State Highway 17 between Santa Cruz and Los Gatos. All of the property owned by complainants either fronts upon or has a driveway right-of-way access to Bear Creek Road, a road immediately off of State Highway 17 and situated approximately three miles south of the Town of Los Gatos.

According to complainants, they uniformly suffer acutely from a severe shortage of water for domestic purposes. Although the particular facts and circumstances of this shortage differ in various respects from parcel to parcel, all of the complainants share the problem of a desperate need for water. This need for water service forms the basis of the complaints herein.

Complainants assert that defendant has dedicated water to public use in the area surrounding complainants' property and that defendant therefore is duty bound to supply them with water service.

In addition complainants Olson assert the defendant must assume the cost of an extension to their property to supply them with their minimal water needs.

Defendant's Position

Defendant claims that complainants are outside the boundaries of its filed service area; that Schedule II-2 relating to 'Metered Service to Customers on 6-inch Line Installed by Santa Clara Valley Water Conservation District is now in effect; that it is unwilling to impose undue burdens upon service from the 6-inch line and it is unwilling to undertake generally service to the property owned by complainants. Defendant does not believe it is in the public interest to remove the special conditions limiting service from said 6-inch line as heretofore approved by this Commission. Defendant has expressed a willingness to supply water at its regular metered rates at its Montevina Reservoir to a proposed water distribution system within Zone R-1 of the Santa Clara County Flood Control and Water District under terms and conditions described in the report of J. Robert Roll.

According to defendant, the problem of water service to complainants is essentially one involving service to a real estate development analogous to a tract or subdivision. Defendant believes this treatment is not only the one required by the facts, but also one which facilitates consideration of reasonable solutions to the problem.

Preliminary Discussion

Relying upon a letter sent by Mr. Olson to San Jose Water Works in 1967, together with an argument promulgated in complainants' Opening Brief, which argument was posed as an alternative contention, defendant has taken the position that complainants' application for water service should be characterized as one seeking service to a "real estate development analogous to a tract or subdivision". Complainants contest this characterization of their requests for water service.

The record is replete with testimony to the effect that complainants herein are seeking individual services. Insofar as the letter from Mr. Olson to defendant in 1967 is concerned, the record is clear that Mr. Olson had no plans for the development of his property at that time and at no time since has he conceived of such plans. Mr. Olson responded to questions posed by counsel for defendant on cross-examination as follows:

"Q. Exhibit 3 in this proceeding refers to the ownership of land suitable for potential subdivision. And I believe you indicated that you had plans for further development of the property in that letter. Could you tell me what those development plans are or were at that time?

"A. Yes, gladly. I happen to be eight years older than my wife. And we have a daughter that's an invalid. So I am making plans, of course, for her to benefit by making any improvements to the property I could make in the interim in the eventuality that something would happen. It's safe to assume that something might happen to me before the other members of my family.

"As to any immediate plans for development, I have none.

"Q. Well, in 1967 did you have any when you made this request of San Jose Water Works?

"A. No. But the situation remains the same. The potential, the property does have a good potential for development."

The testimony in this proceeding reveals that the area that is the subject of these proceedings merely possess the potential for development.

Defendant refers to the following sentence appearing on page 53 of complainants' Opening Brief for the proposition that complainants' applications for service should be construed as requests to supply a real estate development:

"... it is submitted that it would be reasonable to conclude that the application herein, encompassing contiguous territory of several land-owners and requiring approximately fourteen services would constitute an extension to a 'tract or subdivision.'"

According to complainants, the above-quoted provision was included in its brief merely to serve as an alternative response to the afterthought raised by defendant at the hearings that its statement of policy regarding extensions of service to areas outside its filed service area boundaries (Exhibit 16) is limited to extensions to tracts or subdivisions. Complainants submit that the intention of Exhibit 16 is not so limited, as such a qualification does not appear on the face of the document, nor in the written decision and order of the Public Utilities Commission in which the company's statement was introduced (Exhibit 17).

Due to this testimony appending unwritten limitations upon the scope of Exhibit 16, however, complainants found it appropriate to present the alternative argument that it is feasible to consider their applications for water service as applications to serve a tract or subdivision solely for the purpose of falling within the meaning of defendant's statement of position. Complainants' alternative argument was in no manner intended to convert their principal request for individual extensions into requests for extensions to a tract or subdivision.

Thus, complainants request the Commission to construe the proceedings as involving requests for individual extensions of water service.

Defendant has chosen to discuss the issues as though water service were to be served to a tract or subdivision. On page 3 of defendant's brief, it is written: ✓

"Accordingly, in the discussion of issues we shall treat the problem of water service as essentially one involving service to a real estate development analogous to a tract or subdivision."

We agree with complainants' contention that they are requesting public utility water service on an individual basis. Therefore, the issues, as we see them, are:

1. Has San Jose Water Works dedicated any of its facilities outside of its filed service area to public utility water service?
2. Has San Jose Water Works rendered public utility water service to Lloyd W. and Roberta T. Olson?

Case No. 9169, George and Nadine Jackson Stubbe

The Stubbes own a parcel of property containing approximately 7.27 acres, which fronts upon Bear Creek Road and is located immediately adjacent to the property owned by the Olsons. The Stubbes' driveway is located at a distance of approximately 4/10 mile from the intersection of Bear Creek Road and State Highway 17. Their property is lower in elevation than that of the Olsons.

The property was purchased in 1955 from the widow of Mr. Theobald (i.e. from Mrs. Olson's aunt), and at the present time is improved by a house in which the Stubbes and their son reside.

The Stubbes presently are supplied with water for domestic purposes by the Sacred Heart Novitiate, a Catholic order which owns property along Bear Creek Road across from the Stubbes' property. At the present time the Stubbes are receiving a supply of surplus water from the Novitiate, for which the Stubbes make an annual donation, pursuant to an agreement which is revocable at the option of the Novitiate at any time.

Mrs. Stubbe testified that she has made several oral requests of San Jose Water Works for service.

Mrs. Stubbe visited the office of San Jose Water Works to request water service on several occasions from the time the property was purchased in 1955 until 1966. On those occasions she was never given an application form of any sort to complete, but was simply told that water service could not be made available to her on the grounds that the company did not have enough water and that only the company's customers who were served prior to the construction of Lexington Dam were entitled to service from the company's Highway 17 6-inch line. Following these repeated denials of her requests, Mrs. Stubbe, in 1966, simply gave up making further inquiries of the company for water service.

The Stubbes seek an order requiring San Jose Water Works to provide water service to their property, either by an extension up Bear Creek Road off the company's Highway 17 6-inch line, or by any other appropriate method. They are willing to share, on an equitable basis, in the cost of a main extension up Bear Creek Road, over and above the cost of the minimal system necessary to serve the Olsons. The Stubbes have calculated that three services constitute the minimum number of services that they will need.

Case No. 9172. Harold N. and Patricia M. Lynge

The Lynges own a parcel of property embracing approximately 8.5 acres, which fronts upon Bear Creek Road and is located immediately adjacent to the property owned by the Stubbes. There are two driveway entrances from Bear Creek Road. The driveway which leads to their house is located at a distance of approximately three tenths of a mile from the intersection of Bear Creek Road and State Highway 17. Their other driveway is located even closer to said intersection. The property is lower in elevation than that of the Olsons.

The Lynges purchased this property in 1964. At the present time it is improved by a house in which the Lynges and their two sons reside, and by a log cabin which they rent out. Both structures were located on the property when the Lynges purchased this parcel.

Like Stubbes, the Lynges presently are receiving surplus water from the Novitiate for which they make an annual charitable donation. The arrangement pursuant to which the Lynges presently are receiving water is detailed in letters from the Novitiate to Russell R. Samuels, prior owner of the Lyng parcel, and from the Novitiate to Kenneth Jackson, Mrs. Stubbe's former husband. These documents were introduced into evidence as Exhibit 7 during Mrs. Lyng's testimony. The letters reveal that it is "in the spirit of neighborliness" alone that the Novitiate is accommodating the Lynges and the Stubbes with water service. The letter from the Novitiate to Mr. Jackson expressly states that the arrangement is revocable at any time.

Moreover, there is no assurance that a purchaser of the Novitiate property will supply water to the Lynges or to the Stubbes. There recently has been discussion that the Novitiate is considering selling the property for development of a golf course, or some other facility.

The Lynges seek an order requiring San Jose Water Works to provide water service to their property, either by an extension up Bear Creek Road off the company's Highway 17 6-inch line, or by any other appropriate method. They are willing to share, on an equitable basis, in the cost of a main extension up Bear Creek Road, over and above the cost of the minimal system necessary to serve the Olsons. The Lynges have calculated that at least three, and possibly four, services represent the minimum number of services that they will need.

Case No. 9176, E. E. Dadmun

Mr. Dadmun is the owner of a parcel of property of approximately 1-1/4 acres which fronts on Bear Creek Road and is located immediately adjacent to the property owned by the Lynges. A temporary driveway exists on the property. The distance from the intersection of the temporary driveway with Bear Creek Road to the intersection of Bear Creek Road with State Highway 17 is approximately 200 yards.

Mr. Dadmun has owned this parcel since 1948. He does not reside there at the present time. There are no improvements at this time on this property, nor is there water service to the property in any form.

At one time the 1-1/4-acre parcel involved in this proceeding was part of a larger parcel, comprising approximately 7 acres, owned by Mr. Dadmun. The additional approximately 5-3/4-acre parcel formerly owned by Mr. Dadmun is situated along Bear Creek Road between his present 1-1/4-acre parcel and State Highway 17.

During the time that Mr. Dadmun was the owner of the 7-acre parcel, he was a water customer of San Jose Water Works. At first, he was connected to the company's old Alma line and was supplied therefrom. Following the construction of Lexington Dam, however, around 1951 or 1952, the Alma line was inundated. The Santa Clara Valley Water Conservation District, pursuant to a contract with San Jose Water Works, then constructed the presently existing Highway 17 6-inch line for the purpose of relocating the services served by San Jose Water Works in that area prior to the construction of the lake. For a short period of time after the construction of this line, Mr. Dadmun received water service from the district.

Thereafter, on September 29, 1953, San Jose Water Works was ordered by the Public Utilities Commission to take over the 6-inch line from the district (Application No. 34143, Decision No. 48847. As a result, Mr. Dadmun again became a customer of the San Jose Water Works this time off the presently existing Highway 17 6-inch line. His service connection was located in the vicinity of the 3/4-inch service connection to W. Farfaw depicted on Exhibit 1 herein.

Mr. Dadmun then sold a 4-acre parcel in the center of his property, containing his house, to an individual named Rollo. Mr. Dadmun's rights to service from the 6-inch line pursuant to the

Public Utilities Commission's order were transferred with the property. Subsequently, Dadmun sold the parcel of property adjacent to the freeway.

The parcel that was sold to Mr. Rollo continued to be supplied with water by San Jose Water Works through its Highway 17 6-inch line, and is supplied with water in this manner at the present time. The parcel of property retained by Mr. Dadmun, which is immediately contiguous to, and perhaps 25 or 30 feet higher in elevation than the property now being served by the company, has never been supplied with water by San Jose Water Works. Applications for service to this property have been made to the company directly and to the company through the Public Utilities Commission, but have been denied.

In this proceeding, Mr. Dadmun seeks an order requiring San Jose Water Works to provide water service to his property, either by an extension up Bear Creek Road off the company's Highway 17 6-inch line, or by any other appropriate method. He is willing to share, on an equitable basis, in the cost of an extension up Bear Creek Road over and above the cost of the minimal system necessary to serve the Olsons. He has calculated the minimum number of necessary services to be one.

Case No. 9178, Robert P. Criswell

Robert P. Criswell is the owner of a parcel of property containing approximately 15.48 acres located off Bear Creek Road. Although the property does not front upon Bear Creek Road, it is accessible to and from Bear Creek Road by a driveway right-of-way owned by Mr. Criswell over the property owned by the Lynges. In addition, the property is accessible to and from Black Road (see Exhibit 1) by a driveway that Mr. Criswell owns.

The distance from the point where Mr. Criswell's right-of-way intersects Bear Creek road to the point where Bear Creek Road intersects with Highway 17 is approximately 1500 feet. The distance from the intersection of his right-of-way and Bear Creek Road to

his property line is approximately 500 feet. The far eastern edge of the Criswell property, as depicted on Exhibit 1, virtually abuts on State Highway 17. Conceivably he could attach to defendant's Highway 17 6-inch line at that point. The elevation of this property is approximately 200 feet below that of the Olsons.

At the present time there are no improvements on the Criswell property. It is not being used in any way; however, it contains at least two building sites, were there a water supply. In addition, there is presently no source of water for domestic purposes to the property.

Prior to the institution of this proceeding, Mr. Criswell made no inquiries of Mr. Andrews as to when San Jose Water Works would extend a line up Bear Creek Road. In this proceeding Mr. Criswell seeks an order from the Public Utilities Commission requiring San Jose Water Works to provide water service to his property, either by an extension up Bear Creek Road off the company's Highway 17 6-inch line, by an attachment to said 6-inch line from the easternmost corner of his property to the line, or by any other appropriate method. In this regard, Mr. Criswell has calculated that two services represent the minimum number of services necessary for the use of his property. He is willing to participate on an equitable basis in the cost of a main extension up Bear Creek Road, over and above the cost of the minimal system necessary to serve the Olsons.

ISSUE 1. Has San Jose Water Works Dedicated Any Of Its Facilities Outside Of Its Filed Service Area To Public Utility Water Service?
Yes.

The service area map that San Jose Water Works has filed with this Commission shows its nearest service area boundary to the complainants' properties to be immediately above the Lexington Dam. Exhibit 6 in this proceeding indicates an elevation of 660 feet at that point. Mr. J. Robert Roll testified, however, that the elevation at the top of Lexington Dam actually is 665 feet.

The record reveals that defendant has been and is presently rendering a number of public utility water services outside the area of its claimed service boundary as designated on Exhibit 6, and in the immediate vicinity of complainants' property.

The Howell Reservoirs System

San Jose Water Works is the owner of a house located at the Howell Reservoirs in which Norman Andrews, vice-president of the company presently resides. He pays the company \$75 each month as rental therefor and is provided, at the company's expense, with water through a water system that the company operates at the Howell Reservoirs. This system is partially depicted on Exhibit 21.

In addition to the service to the company's house, San Jose Water Works also renders potable water service through its Howell Reservoirs System to other metered customers in an area commonly referred to as Sunrise Hill. This service emanates from an application (Exhibit 27) that was submitted by the former owners of Sunrise Hill to the company in 1915.

Exhibit 27 states:

"It is further agreed by applicants that they are to pay the Company for water at the rate of one dollar (\$1.00) per month and that in case of failure to pay same in the next calendar month after same becomes due, the Company may shut off the supply and keep the same shut off until all amounts in arrears are fully paid.

"It is further agreed that the supply of water to be taken through the proposed pipe is for the use of two houses, two gardens and necessary out-buildings, and that in case of subdivision of the property of the applicants, or the building of other and additional houses for human habitation, the Company may charge for the water taken as hereinafter specified. It is understood and agreed to by the applicants that this payment of one dollar per month does not contemplate irrigation other than lawns and flowers, or waste - and that in case the Company believes the conditions justify, it may install a meter on the pipeline and charge the applicants at the then existing meter rates.

"It is further agreed by the applicants that no water shall be allowed to be taken to any other property without the permission of the Company having first been obtained."

Two customers were to be supplied with water pursuant to the 1915 application. Since that time, however, the Howell Reservoirs System has been expanded so that at the present time four metered customers are supplied, with potable water. The four metered customers, as depicted on Exhibit 21, are named Fishbach, Schwinn, Forbes and Tabacco. The elevation of the meters is approximately 1,300 feet. The property served by the four meters is somewhere between five to seven acres in area and is approximately 1-1/2 airline miles from the nearest edge of the filed tariff service area map.

An individual named Fruhling also receives water through this system, the company having granted Fruhling a free water right in exchange for a right-of-way that Fruhling had conveyed to the company. Defendant calculates a public utility metered revenue for this service when determining its operating revenue for rate-making purposes.

Johnson, Lynn, Porter Service

Exhibit 28 is a copy of an indenture entered into on November 16, 1959 between Walter J. Johnson, Mary F. Johnson, Stanley Lynn, Rosamond G. Lynn, J. W. Porter and Edith M. Porter, First Parties, and San Jose Water Works, Second Party.

Exhibit 28 shows that First Parties granted to Second Party the right and privilege of excavating for and laying pipelines in a strip of land 10 feet wide running from Black Road to Beardsley Road over the lands owned by First Parties.

The indenture states:

"This right is being granted to Second Party with the express understanding that water will be made available to First Parties from the pipeline that will be installed at regular metered rates if water is available in the line when needed by

First Parties. It is to be expressly understood and agreed to by both parties that Second Party will not be required to treat or purify the water in the line for First Parties nor does Second Party assume any responsibility should there be no water available in this line when it is required by First Parties."

Exhibit 29 shows that the construction of a 6-5/8-inch pipeline running between the Howell Reservoirs to the Beardsley pipeline was commenced in 1963. Approximately 3,000 feet of the pipeline traverses the properties of the Johnsons', Lynns' and Porters'. This exhibit shows that there exists a 2-inch service connection to supply the Lynns at elevation 1,260 feet \pm . This connection has not as yet been used to supply water service.

The highest elevation of the line is 1,380 feet on the Porter property and the closest piece of property is approximately 1 mile from the nearest edge of defendant's filed tariff service area map.

United States of America Service

Exhibit 26 is a copy of an "Agreement For Purchase Of Water Between The United States of America And San Jose Water Works". On December 15, 1959 it was mutually agreed as follows:

"Article 1. The Government shall be allowed to divert a maximum of 60 gallons of water per minute on the Company's property as shown on map as Tract A-107E-5, spring area, approximately 0.344 plus or minus acres, which is part of Lot 9, District File No. 45-1-260 Sheet 1 of 1, attached hereto and made a part hereof.

"Article 2. The Government shall pay the Company \$150.00 monthly for the diversion of a maximum of 60 gallons of water per minute."

* * *

"Article 8. It is the understanding of the Government that the Company is a public utility corporation operating under the laws of the State of California affecting such a corporation, and that a copy of this agreement will be filed with the Public Utilities Commission of the State of California.

"Article 9. This agreement shall continue in effect until cancelled by the Government upon 30 days' written notice to the Company."

Exhibit 19 shows that the spring area is at an elevation of approximately 1,300 feet and is located approximately 6 airline miles from the nearest portion of defendant's filed tariff service area map.

The State Highway 17 Six-Inch Line

San Jose Water Works owns, operates and maintains a 6-inch water line which commences at its Montevina Reservoir and runs for a distance of approximately one mile, past Bear Creek Road, along the easterly side of State Highway 17. Seven customers, including the owner of the property immediately adjacent to complainant Dadmun's property, are presently connected to this line. Customers from this line pay metered rates pursuant to San Jose Water Works' Tariff Schedule No. IL-2 on file with this Commission. A special condition attached to this schedule provides as follows:

"Service shall be limited to the lands of the nine (9) customers described in C.P.U.C. Decision No. 45159, Case No. 5490, or their successors in occupancy, with only one service connection to each property."

The complainants herein, as one alternative of relief, seek to have the aforementioned special condition set aside by order of this Commission. It should be noted that since only seven customers presently are being served from this line, at least two more may be connected pursuant to Schedule IL-2 as it presently exists.

The line was constructed in 1953 by the Santa Clara Valley Water Conservation District. The earlier construction of Lexington Lake by the District having caused San Jose Water Works' Alma distribution system to become inundated, the District, pursuant to contract with San Jose Water Works, constructed the 6-inch line in order to relocate the services formerly supplied by the company. In addition, lands owned by an individual, by a relocated school and by a relocated fire station, not formerly served by the company through its Alma distribution system, were connected to this line.

Although the 6-inch line was not constructed by San Jose Water Works, shortly after construction of the line by the District, the company assumed the operation of the line. During a proceeding before this Commission commenced by San Jose Water Works, the purpose of which was to procure an order approving the contractual arrangements the company had made with Santa Clara Valley Water Conservation District arising out of the construction of Lexington Lake, the question was raised regarding who was responsible to serve the customers attached to the newly constructed 6-inch line.

San Jose Water Works took the position that it was not obligated to serve these consumers on the ground that the lands were located at a distance from the company's inundated Alma distribution line and were in fact outside the company's service area. In rejecting this argument, the Commission opined as follows:

"We cannot accept this view. The Company served these users through meters located close to the inundated six-inch Alma pipeline and charged its established meter rates for such service. Moreover, there is nothing in the record to indicate that the Company has ever secured authority from this Commission to circumscribe its service area in the vicinity in question so as to warrant it in denying service to these consumers or to anyone else who might apply for service under like conditions."

The Commission ordered the company, as a condition precedent to approval of the contract entered into with Santa Clara Valley Water Conservation District, to file with and to obtain authorization from the Commission for tariffs regarding service to those consumers attached to the 6-inch line. The company complied with this order and since that time has been rendering service through this line.

Complainants herein, as one alternative of relief, seek an order that will set aside the restrictions presently in effect which limit the number of services that may be supplied with water from the 6-inch line. In this regard, testimony was adduced at the hearing regarding the capacity of this line to serve additional consumers.

Mr. J. Robert Roll, who was the Resident Engineer for Santa Clara Valley Water Conservation District in charge of the installation of the 6-inch line in question, testified that the line is, with some added pumping, capable of accommodating a 6-inch main extension up Bear Creek Road to the Olsons' property. According to Mr. Roll, such an extension would not impair the service to existing consumers from the 6-inch line, nor would it place any undue physical strain on the line. In this regard, Mr. Roll testified that during a recent telephone conversation with Mr. Dunton of San Jose Water Works, Mr. Dunton stated that, with pumping, a 6-inch main extension could be attached to the existing 6-inch line.

Mr. Dunton, on cross-examination, confirmed having spoken with Mr. Roll and having told him that there were "no practical or physical problems" to an extension up Bear Creek Road as far as the Olsons' property off the company's 6-inch line. Mr. Dunton testified on direct examination that, with certain changes, an additional twenty customers could be served from the 6-inch line.

"Q. Now, are there changes in facilities that could be made which would enable you to serve more customers from that Highway 17 six-inch line and, if you conclude that there are, would you tell us what changes would have to be made and how many customers that would enable you to serve from that line?

"A. Yes, a change could be made, an enlargement of the existing pump, in effect doubling its capacity to 200 gallons a minute, and assuming that all the new customers that could be added under that condition were normal household size, 3/4-inch meters only, we could, under that condition, then add approximately 20 new customers."

Mr. James M. Barnes, a staff engineer of the Public Utilities Commission, testified as to the capacity of the 6-inch line. With certain qualifications, Mr. Barnes concluded that the existing 6-inch line would safely accommodate 20 additional customers, including the Olsons.

Thus, the testimony in this proceeding produced uniform agreement that the 6-inch line is capable of serving at least 20 additional customers.

Montevina Road

Water service is rendered by San Jose Water Works to six customers through a line running from the Montevina Reservoir under State Highway 17 to Montevina Road.

Four of these customers were served by the company prior to the construction of Lexington Dam through a different line. Following construction of the dam, the services were relocated to the present situs, and the number of customers served by the company in this location was increased from 4 to 6.

The elevation of the service is approximately 800 feet and the service area is approximately 1/3 mile from the nearest edge of defendant's filed tariff area service boundary.

Fire Hydrants

Two fire hydrants outside of defendant's filed tariff area service map were installed at the request of the Alma Fire District. The district is charged at the regular filed rates for such service. One fire hydrant is at approximately 1,000 feet elevation and about 1-1/4 miles from the nearest edge of defendant's filed tariff area service boundary. The other hydrant is located at about 900 feet elevation and is about 2-1/4 miles from the nearest edge of the filed tariff area service boundary.

Aldercroft Heights

Exhibit 23 is a document dated April 14, 1966 concerning the purchase of water from San Jose Water Works by the Aldercroft Heights County Water District. The district commenced operating its water system on April 1, 1966.

The agreement to purchase water contemplates the district obtaining water either from a sump on Los Gatos Creek or from a sump serviced by the parallel pipeline located on lot 63. The district would pay for the water it pumped at San Jose's standard quantity rates.

The location of the service area is at approximately 1,000 feet elevation and approximately 3 miles from the nearest edge of defendant's filed tariff service area map. As of 1969, 315 customers were served.

Exhibit 23 is a continuance of an agreement made between San Jose Water Works and Aldercroft Heights Water Company - a public utility water company - dated August 25, 1961. (Exhibit 22.)

Exhibit 22 states:

"It is hereby expressly understood and agreed that this agreement is executed by First Party only as a matter of neighborly accommodation to Second Party and for a temporary emergency period which shall in no event extend beyond December 31, 1961, at which date this agreement and all obligations of First Party hereunder shall terminate."

Chemeketa Park Mutual Water Company

Exhibit 24 is a document dated July 11, 1966 concerning the arrangement between San Jose Water Works and Chemeketa Park by which Chemeketa Park will obtain surplus water from San Jose on an emergency accommodation temporary basis only from Los Gatos Creek or from the parallel pipeline owned by San Jose.

The agreement states as follows:

"It is hereby expressly understood and agreed that this agreement is executed by First Party only as a matter of neighborly accommodation to Second Party and for a temporary emergency period which shall in no event extend beyond December 31, 1966, at which date this agreement and all obligations of First Party hereunder shall terminate."

* * *

"Nothing herein contained shall be construed as constituting a covenant running with the land of the parties hereto, nor as a dedication by First Party of water for public use."

The elevation of the service area is approximately 1,000 feet and the area is about 3 miles from the nearest edge of defendant's filed tariff service area map. As of 1969, service was supplied to 140 customers.

Redwood Mutual Water Company

Exhibit 25 is a document dated January 21, 1970 between San Jose Water Works and Redwood Mutual Water Company.

Exhibit 25 states as follows:

"It is hereby expressly understood and agreed that this agreement is executed by First Party only as a matter of neighborly accommodation to Second Party and for a temporary emergency period which shall in no event extend beyond December 31, 1970, at which date this agreement and all obligations of First Party hereunder shall terminate."

* * *

"Nothing herein contained shall be construed as constituting a covenant running with the land of the parties hereto, nor as a dedication by First Party of water for public use."

The elevation of the service area lies between 1,400-3,000 feet. The area is approximately three miles from the nearest edge of defendant's filed tariff service area map. As of 1969, service was supplied to 110 customers.

Vista Grande Water Users

Exhibit 19 and its accompanying testimony shows that San Jose Water Works supplies potable water to Vista Grande Water users (25 customers) at regular metered rates. The elevation is approximately 800 feet and the area served is about 1/3 of a mile from the nearest edge of defendant's filed tariff service area map.

Lake Canyon Mutual Water Company

Exhibit 19 and its accompanying testimony show that San Jose Water Works supplies raw water to Lake Canyon Mutual Water Company (54 customers) at regular metered rates. The elevation is approximately 1,000 feet and the area served is about 1-1/3 miles from the nearest edge of defendant's filed tariff area service map.

Ronald V. Harder

Exhibit 29-C is a copy of an agreement dated March 12, 1970 between San Jose Water Works and Ronald V. Harder.

Exhibit 29-C states as follows:

"It is hereby expressly understood and agreed that this agreement is executed by First Party only as a matter of neighborly accommodation to Second Party and for a temporary emergency period which shall in no event extend beyond December 31, 1970, at which date this agreement and all obligations of First Party hereunder shall terminate. Nothing herein contained shall be construed as constituting a covenant running with the land of the parties hereto, nor as a dedication by First Party of water for public use."

Robert A. Vasconcellos

Exhibit 29-D is a copy of an agreement dated January 14, 1971 between San Jose Water Works and Robert A. Vasconcellos.

Exhibit 29-D states as follows:

"It is hereby expressly understood and agreed that this agreement is executed by First Party only as a matter of neighborly accommodation to Second Party and for a temporary emergency period which shall in no way extend beyond December 31, 1971, at which date this agreement and all obligations of First Party hereunder shall terminate.

"Nothing herein contained shall be construed as constituting a covenant running with the land of the parties hereto, nor as a dedication by First Party of water for public use."

Exhibit 29 shows that the two services (supra) are above and to the west of the Howell Reservoirs.

The record also shows that defendant allows the Loma Prieta School free use of a spring located outside of its filed tariff area service map.

Discussion

It appears from the record that defendant contends that it is not rendering public utility water service to the public as a public utility water company outside of its filed tariff area service map.

The Commission is not unmindful that parties, without meaning to do so, may become subject to regulation because of the acts which they commit. It may well be that defendant is of the opinion that it is avoiding regulated status, but such would not be a defense against regulation if the acts actually committed have brought them within the ambit of the regulatory statute. The Commission must proceed upon the law and the facts, whatever may be the specific intent of defendant.

The Public Utilities Code in discussing water companies states as follows:

"2701. Any person, firm, or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system within this State, who sells, leases, rents, or delivers water to any person, firm, corporation, municipality, or any other political subdivision of the State, whether under contract or otherwise, is a public utility, and is subject to the provisions of Part 1 of Division 1 and to the jurisdiction, control, and regulation of the commission, except as otherwise provided in this chapter."

Clearly, there can be no doubt that defendant, for over 56 years has been rendering public utility water service to customers supplied from the Howell Reservoirs system which is at an elevation of 1300 feet and 1-1/2 miles approximately from the nearest edge of defendant's filed tariff service area map boundary. Likewise it is apparent that defendant for over 12 years has been obligated to supply public utility service to three separate properties which are at least one mile from defendant's filed tariff service area map boundary and whose highest elevation is 1380 feet. The area concerned consists of more than 25 acres.

It is crystal clear that for over 12 years defendant has been supplying public utility water service to the United States Government at a location approximately 6 airline miles from the nearest edge of its filed tariff area service map boundary at an elevation of approximately 1300 feet.

The three instances cited above fall squarely within the ambit of Public Utilities Code Section 2701.

Likewise, service to fire hydrants falls squarely within the ambit of Code Section 2701.

There can be no question that service from the Highway 17 line and from the Montevina Road line is a public utility service.

Likewise, there can be no doubt that service to the Vista Grande water users and Lake Canyon Mutual Water Company are public utility services.

It further appears from the record that defendant believes that by its actions in other instances it is shielded from regulation by the provisions of Section 2704 of the Public Utilities Code which states:

"Any owner of a water supply not otherwise dedicated to public use and primarily used for domestic or industrial purposes by him or for the irrigation of his lands, who (a) sells or delivers the surplus of such water for domestic or school district purposes or for the irrigation of adjoining lands, or (b) in an emergency water shortage sells or delivers water from such supply to others for a limited period not to exceed one irrigation season, or (c) sells or delivers a portion of such water supply as a matter of accommodation to neighbors to whom no other supply of water for domestic or irrigation purposes is equally available, is not subject to the jurisdiction, control, and regulation of the commission."

By no stretch of the imagination can it be found that San Jose Water Works is "...owner of a water supply not otherwise dedicated to public use and primarily used for domestic or industrial purposes by him or for the irrigation of his lands..."

On the contrary, this record reveals that San Jose Water Works or its predecessor has been a public utility subject to the jurisdiction of this Commission since the Commission's inception.^{1/}

The Public Utilities Code defines a public utility in Section 216(a) as follows:

"216(a) 'public utility' includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof."

There is not a scintilla of evidence in this record that San Jose Water Works is in any business other than a public utility water corporation.

^{1/} We take official notice of the fact that San Jose Water Works and its predecessor, The San Jose Water Company (Incorporated 1886), has been supplying water service to the Central Santa Clara Valley for over 105 years. In the early 1880's the company purchased 5,000 acres in the Santa Cruz mountains as watershed land and by 1951 had constructed five impounding lakes with a capacity of 2,300,000 gallons for conservation of the water crop.

Prior to March 23, 1912, the rental and distribution of water outside of municipalities was subject to regulation by county boards of supervisors under provisions of an act of the Legislature passed in 1885 pursuant to Article XIV of the State Constitution, as adopted in 1879, and also pursuant to an amendment to said act passed in 1897. The powers of the boards of supervisors were conferred upon the Railroad Commission and enlarged by amendments to the Constitution adopted in 1911, and the provisions of the Public Utilities Act, effective March 23, 1912.

The fixed capital recorded on the books of San Jose Water Works in its opening entry of March 15, 1932, in the amount of \$5,447,773, was based on Decision No. 24228, dated November 16, 1931, in the matter of the sale of properties of the predecessor company. Among the assets included in the opening entry were:

1. Values of water rights as established in Decision No. 1534, dated December 31, 1913, in Case No. 476, plus additions at cost to March 15, 1932 totaling \$113,653.
2. Minimum current values of land and rights-of-way of 1932 amounting to \$687,017.

Decision No. 1534 shows that the company owned 4,045 acres of land in the Los Gatos Creek watershed and the water rights associated with such land. The lands were purchased to protect the watershed of Los Gatos Creek in order to safeguard the purity of water used for domestic purposes (sale to customers in the Santa Clara Valley).

The decision clearly shows that the company made no claim that its surface water supply was not dedicated to public use. On the contrary, it urged the Commission to value its water rights in Los Gatos Creek at some \$213,000. Likewise, the company, as shown by Decision No. 24228, made no claim that any of its water rights were not for domestic use. Again a perusal of applicant's various rate proceedings reveals that at no time did the company suggest to the Commission that any of its land or water rights be excluded from the rate base for rate-making purposes on the basis that such land and/or water rights were surplus to its needs.

It is clear that, at least since 1913, San Jose Water Works customers have been paying for all operating expenses including a return on the company's Los Gatos Creek land and water rights on the basis that such land and water rights are dedicated to public use and are used and useful in its public utility service.

According to defendant's vice-president, service to Aldercroft Heights, Chemeketa Park Mutual and Redwood Mutual Water Company use surplus water although he did not explain why such water was surplus other than that the various pumps in the creek are below its (San Jose Water Works) intake.

According to the vice-president's testimony, the first time San Jose made an agreement with Aldercroft Heights prior to 1953 was "that we were having a lot of trouble with the residents of Aldercroft Heights polluting the creek and throwing garbage on our property, so we felt by entering into a contract with them to sell them water out of the creek we could have some control over their throwing garbage on our property, and it is recited in the agreement".

This vice-president would also have us believe that the water is surplus even though Aldercroft Heights Water District takes water from the creek "every month".

Defendant's witness also testified that the agreement between Chemeketa Park and San Jose is renewable each year but in the absence of a renewal the agreement is "effective". The record shows the agreement was first signed in 1966 and San Jose has no record of its renewal.

The agreement with Redwood Mutual is renewable each year. Nothing changes except the date.

It appears from the evidence that San Jose Water Works believes that by entering into an agreement to sell water from a public utility water supply in order to prevent pollution of such supply and agreements that expire on a yearly basis bring its operations under the shield of Section 2704. Such beliefs are patently erroneous.

Issue 2. Has San Jose Water Works Rendered Public Utility Water Service To Lloyd W. And Roberta T. Olson? No.

Complainant's analysis of the record is as follows:

The property owned by the Olsons is comprised of approximately 32-1/2 acres. The property commences at a distance of approximately four-tenths of a mile from the intersection of Bear Creek Road and State Highway 17, and the driveway which leads to the Olsons' house is located at a distance of about 1/2 mile from said intersection. The elevation of the Olsons' house is approximately 950 feet above sea level.

The primary improvement on the Olsons' property is their house, in which the Olsons and their invalid daughter reside. In addition to the house, a barn and a Christmas tree farm are situated on the property. The Christmas tree farm comprises approximately 15 acres of the Olsons' land. It was installed in 1964 and is a dry farming operation.

The Olsons purchased their parcel in 1945 from Mrs. Olson's uncle, Mr. Theobald, and have resided there continuously since that time. At one time, the Olsons' property was part of a much larger parcel owned by Mr. Theobald. Prior to the time when the Olsons purchased their property, all of the property presently owned by the Lyages, the Stubbes, the Olsons, and the Stelling^{2/}, as well as the blank parcel that appears on Exhibit 1 between the Stelling and Olson properties, was owned by Mr. Theobald.

Since the date of purchase of their property, the Olsons have been supplied with water through a well located on the property owned by the Stelling. The Olsons were originally authorized to drill a well in Briggs Creek itself, which runs through the Stelling's (Spurgeon) property. The cost of installing the well was shared equally between Mr. Olson and Mr. Theobald.

The well was constructed by Mr. Olson in 1946 and since that time it has provided the Olsons with their only domestic supply of water. At the time of installation, the well derived water from Briggs Creek, which, in turn, was fed by the Howell Reservoirs owned by San Jose Water Works and located approximately three-fourths of a mile to the west and above the Olsons' property. In 1946, Briggs Creek was an integral part of San Jose Water Works' water distribution system which flowed from Howell Reservoirs into Briggs

^{2/} The property depicted on Exhibit 1 as belonging to Carl and Charlotte Stelling recently has been sold to individuals by the name of Spurgeon.

Creek, down Briggs Creek and into a flume in the Town of Alma and thence into the Santa Clara Valley. From the time the well was installed, until 1964, water in the Alma distribution system flowed continuously down Briggs Creek providing the Olsons with a constant and adequate supply of water.

San Jose Water Works has known of the existence of the Olsons' well and that the Olsons have been supplied with water from Briggs Creek for a considerable period of time. Norman Andrews, currently Vice President of San Jose Water Works, who resides in a house owned by the company located at the Howell Reservoirs, testified that he has been aware of the existence of the Olsons' well for the past 15 or 16 years. He knew of the precise location of the Olsons' well as early as 1961, at which time he visited the Olsons' property and saw the well.

It appears that from the time they installed their well in 1946 until water was diverted from Briggs Creek by San Jose Water Works in 1964, the Olsons, with the knowledge, acquiescence and implied consent of San Jose Water Works, enjoyed a continuously available supply of water for domestic purposes through the Alma distribution system.

In 1964, the water shortage, about which the Olsons presently are complaining, commenced. At that time, San Jose Water Works constructed a pipeline running from the Howell Reservoirs to its water treatment plant at Montevina Reservoir. This line completely bypassed the Olson property and diverted much of the water that formerly flowed out of the Howell Reservoirs into Briggs Creek.

The net effect of this diversion has been to diminish the flow of water running in Briggs Creek so that it dries up each summer, thereby severely impairing the Olsons' water supply. Moreover, due to the restricted flow in Briggs Creek since 1964, the quality of the water therein has been affected. Tests made by the Santa Clara Health Department on August 10, 1970, reveal that the water is now contaminated.

The Olsons would have been entirely devoid of water during the summers of 1964-1970 but for the fact that San Jose Water

Works has each year allowed some water to flow out of the Howell Reservoirs into Briggs Creek. In some instances, this action was taken by the company voluntarily, while in others, the company honored requests for water service by Mr. Olson. On at least four occasions, telephone conversations transpired between the Olsons and Norman Andrews, Vice President of San Jose Water Works. During the summer of 1967 or 1968, and again during the summer of 1969, Mr. Olson telephoned Norman Andrews requesting that the valve at the reservoirs be cracked so as to permit water to flow into the creek. The gist of the telephone conversations when Mr. Olson contacted Norman Andrews was testified to by Mr. Olson, on cross-examination, to be as follows:

"A. Norm, we are out of water. How about letting a little down our way. Okay, when I go home I will crack the valve.

"Q. That's the substance of the conversation as you recall it?

"A. Approximately, yes."

In each instance, Andrews granted the Olsons' request.

Defendant characterizes Mr. Andrews' acquiescence to the Olsons' requests for water as merely an accommodation. It appears that the Olsons issued their requests to Andrews not merely because of the fact that they were neighbors and social friends but rather because they felt that positive results could be achieved by directing their applications to him. The record so indicates:

"Mr. Olson, in connection with your requests for service that were made to Mr. Andrews, was it your impression that you were asking Mr. Andrews on behalf of the water company to let some water down that stream to serve you?

"THE WITNESS: Yes.

"Q. It wasn't just a friend as Mr. Andrews representing the San Jose Water Company, is that correct?

"A. I felt that I could probably ask most anybody else in the San Jose Water Works and get nowhere, but asking Norm Andrews I felt sure I would get results."

In 1970, two other telephone conversations took place between Andrews and the Olsons. Notes of these conversations were taken by the Olsons during these conversations, which transpired on September 25, 1970 and on October 7, 1970.

At least one of the 1970 telephone conversations was initiated by Norman Andrews. On September 25, 1970, Andrews called the Olsons. He spoke with Mrs. Olson who made the following notes, as read by Mr. Olson at the hearing of this matter:

"A.

"I have a note here on September the 25th, Norm Andrews phoned us. At that time he heard we were out of water. Told him our pipeline broke and lost 5,000 gallons storage. He wanted to know if Briggs Creek had any water in it. We said just a trickle.

"He said when he got home he would let a little down to us, but not to let anyone know."

Each time water was permitted to flow down the creek following these conversations, the Olsons' water shortage problem was temporarily solved.

Even on those occasions during the summers between 1964 and 1970 when water was not released from the reservoirs into Briggs Creek as a result of telephone conversations between the Olsons and Norm Andrews, Mr. Olson still noticed that water commenced to run down the creek during the dry season, thereby obviating the need for the Olsons to formally request water from Mr. Andrews. These unsolicited releases of water from the reservoirs were explained by N. J. Kendall, President of San Jose Water Works as follows:

"Q. There has been testimony in this proceeding regarding unsolicited releases of water from the Howell Reservoir in the Fall of some years.

"Would you explain the circumstances under which some releases are made?

"A. Well, towards the end of the summer the water in the smaller lakes that we have becomes quite turbid and high color and is not fit to use

under our standards and the lakes have weed growth, tules grow in them and in order to clean these out it is necessary then to drain the lakes. Therefore, the water is discharged so that this operation may take place prior to the winter rains."

On these occasions water not otherwise usable by San Jose Water Works was permitted to be drained from the reservoirs into Briggs Creek. Subsequently, San Jose Water Works installed a filter plant which solved the turbidity problem referred to by Mr. Kendall, as a result of which water will no longer have to be dumped out of the reservoirs into Briggs Creek. Instead, virtually all of the water from the reservoirs will be capable of being used by San Jose Water Works and will be transported from the reservoirs to the company's treatment plant at its Montevina Reservoir. ✓

The net effect of the company's new filter plant, insofar as the Olsons are concerned, will be to further reduce the availability of a water supply from Briggs Creek. The water for many years supplied to the Olsons by San Jose Water Works, so greatly impeded by the 1964 diversion line constructed by the company, will now for all intents and purposes be eliminated. ✓

The requests made by the Olsons between 1964 and 1970 for water to be released from the Howell Reservoir into Briggs Creek do not constitute the only applications that the Olsons have made to San Jose Water Works for water service. On September 18, 1967, Mr. Olson wrote to the company requesting water service from the company's 6-inch line which runs from the Montevina Reservoir along State Highway 17 past the intersection of the Highway with Bear Creek Road. This line was initially constructed by the Santa Clara Valley Water Conservation District but was taken over by San Jose Water Works pursuant to a decision of this Commission which ordered the company to provide water to consumers in the area of this line based upon the company's prior rendition of water service in that vicinity. San Jose Water Works owned and operated the Highway 17 line at the time Mr. Olson made written application for service in

September 1967, and was supplying water from that line to several customers pursuant to a tariff schedule on file with this Commission.

Mr. Olson did not receive a written reply to his written application for service. Instead, he received a telephone call from Norm Andrews on September 18, 1967, notes of which conversation were taken by Mr. Olson on the back of a copy of his letter of application. During this conversation Andrews informed Mr. Olson that the company was unable to supply any additional services from the Highway 17 line by virtue of restrictions imposed on this line pursuant to the company's tariff on file with the Public Utilities Commission. Andrews recommended that a district in the Lexington Hills area would have to be formed to finance a water and sewer system.

Having been denied water service from San Jose Water Works, and having unsuccessfully punched test holes into his property in search of subterranean water, Mr. Olson ultimately did initiate action to create a zone within the Santa Clara County Flood Control and Water District and to procure an authorization of funds for the purpose of financing an engineering study to determine the feasibility of a water distribution system within said zone. A petition was submitted to the Board of Directors of the Santa Clara County Flood Control and Water District, signed by several residents of the Lexington Hills area (including all of the complainants represented herein), requesting that a zone be created within the district and that an engineering feasibility report be authorized to determine that portion of the zone that could be served by a water distribution system which would obtain water from defendant San Jose Water Works at its Montevina Reservoir. The requests made in the petition subsequently were granted. By Resolution No. 69-77, dated July 8, 1969, the Board of Directors of the Santa Clara County Flood Control and Water District created Zone No. R-1 within said district and by Resolution No. 69-94, dated August 26, 1969, the Board authorized an engineering study to be made to evaluate the feasibility of implementing a water supply system within the district.

A feasibility report was thereafter prepared by Mr. J. Robert Roll, a registered civil engineer, who from 1954 until 1967 was the Chief Engineer of the Santa Clara Valley Water Conservation District, the predecessor District to the Santa Clara Valley Flood Control and Water District. This report was submitted to the District on June 9, 1970.

The report embraced a proposed service area of some 650 acres of property "along Bear Creek Road, Black Road and included the Lake Canyon area and the property up along Montevina Road." The scope of Mr. Roll's feasibility report thus encompassed a substantially broader territory than that involved in this proceeding, which, the testimony reveals, includes between 70 and 80 acres.

Roll's plan called for a system to be supplied with water by defendant San Jose Water Works. Prior to preparing his report, Roll met with officials of the company, who assured him that water was available and would be made available to supply the system. The contemplated source of this water was the company's Montevina Reservoir.

During the hearing of this matter, Mr. Roll testified regarding assurances given by San Jose Water Works as to the availability of water to supply the system he designed as follows:

"Q. Did you have any discussion with the San Jose Water Company in which the matter of the adequacy of the source of supply to such a system was discussed?

"A. Well, before we even started to design a system we had to determine if we could get water.

"I met with officials of the San Jose Water Works and they assured me that the water supply would be available at Montevina Reservoir.

"Q. Do you recall with whom you met?

"A. I believe it was Mr. Andrews. And I don't remember whether Mr. Kendall was present at the meeting or not.

"Q. Was Mr. ----- the name escapes me for a moment --- the engineer ---

"A. Mr. Dunton. I don't know. He may have been present. I don't remember right now.

"Q. And you were told at that time there would be no problems with respect to supply of water for the area you were proposing to be served?

"A. No. We were assured there would be sufficient water to serve the area.

"Q. In your opinion, if there was an adequate supply of water to serve the 654 acres contemplated in your feasibility report, would there be an adequate supply of water to serve the seventy some odd acres involved in this proceeding?

"A. Well, obviously yes."

That the company in fact gave these assurances to Mr. Roll was verified by Mr. Andrews, Vice President of the company, during his testimony:

"Q. Have you had discussions with Mr. Roll regarding the possibility of providing water service to this zone that he was studying on behalf of the Santa Clara Valley Water Conservation District?

"A. Yes. I did.

"In 1968, Mr. Roll came in to talk about this project. And he wanted to know before he got started whether the company would agree to sell this zone water at our Montevina Reservoir.

"I took this matter up with the officers of the company. And after much discussion we decided that we would sell them water at Montevina Reservoir and agreed to maintain and operate the system after the District installed it."

These assurances given by San Jose Water Works concerning their ability to adequately serve the area contemplated in the Zone R-1 study, make inescapable the conclusion that insofar as service to the complainants herein is concerned, defendant is not confronted with the problem of an adequate water supply.

Following the filing of the Zone R-1 Feasibility Report, the Board of Directors of the Santa Clara Valley Flood Control and Water District passed Resolution No. 70-48 in which it voiced its general approval of Roll's plan, but set a hearing date of September 8, 1970 for the purpose of considering written and oral objections to the proposed project. At the hearing, appearances were made by numerous residents in the area and by representatives of various public agencies and public entities within the district. The minutes of the hearing reveal that the general consensus of those participating in the meeting was that the board should not adopt the Feasibility Report. This recommendation ultimately prevailed.

There is testimony in the record that the Board of Directors of the District decided merely to table the Report pending the outcome of a Mountain Study Report which was being prepared by a Committee composed of representatives of various constituencies within Santa Clara County for the purpose of considering overall developments in the mountain areas of Santa Clara County. At the time of the hearing before the District, it was contemplated that the Mountain Study Report would be completed within six months. At the date of the hearing in the instant proceeding, however, which was more than six months after the public hearing held before the Santa Clara Valley Flood Control and Water District, the Mountain Study Committee had not, as yet, completed its report. Lucien Dunton, Director of Planning for San Jose Water Works, who also is a member of the Mountain Study Committee, testified that it was hoped that the Mountain Study Report will be completed by the early part of the summer of 1971. Even if it were to be assumed the Report was, in fact, be completed by that time, the overall study process will be further prolonged because the Mountain Study Report thereafter will have to be reviewed by the Planning Policy Committee of Santa Clara County. Then the various cities and counties within the jurisdiction of this Committee will have to enact the recommended policies. In short, if the Board of Directors of the Santa Clara Valley Flood Control and Water District merely tabled the Zone R-1 Feasibility Report at the conclusion of the September 8, 1970, public hearing, it reasonably can be anticipated that the Board will not be in a position to reconsider the Zone R-1 Report in the foreseeable future.

There is also testimony contained in this record to the effect that the Santa Clara Valley Flood Control and Water District did not merely table the Zone R-1 Report. Instead, according to both Mr. Roll and Mr. Andrews, the project was abandoned. Andrews testified as to this subject as follows:

"Mr. Vlahos: There has been some talk in this proceeding that the project which all these exhibits were introduced concerning was delayed.

In Fact, what happened at the September 8, 1970 meeting, Mr. Andrews, was that the project was abandoned, was it not?

"The Witness: That is right.

"Q. It was not delayed, it was abandoned?

"A. It was going to be delayed, but I think it finally, and I wasn't there at the very last, I left after they went on to some other matters, as I understood, it was hard to hear the vote, and Mrs. Olson got a copy of the vote to try to verify just exactly what happened, but for all and intents and purposes it was abandoned, according to the newspaper."

Moreover, it is submitted that the best evidence of the action the Board ultimately took is contained in the Minutes of the September 8, 1970, hearing, which were introduced into evidence during the instant proceeding as Exhibit 14. On page 9 thereof, it is written:

"Motion was made and seconded to continue the hearing to November 1, 1970, to allow Mr. Roll, Consulting Engineer, to determine alternatives and to prepare an amended plan; however, following discussion, the mover and seconder withdrew their motion. It was then moved by Director Sapp, seconded by Chairman Lenihan (Chairman Lenihan relinquished the chair to second the motion) that the project as presented be abandoned. During discussion on the motion Director Dullea suggested that the motion be amended to direct the staff to continue to cooperate in an attempt to work out a solution for these people who have a real water problem. Director Sapp accepted Director Dullea's amendment that the staff be directed to keep exploring the problem of getting water in that area adding to it his motion that the project as presented be abandoned. Director Lenihan seconded the motion as amended and the motion was carried."

Following the abandonment of the Zone R-1 project at the September 8, 1970, hearing, Mr. Olson, on October 27, 1970, made a second appearance before the Santa Clara Valley Flood Control and Water District, at which time he requested the Board to make funds available for their staff engineer to revise Mr. Roll's Feasibility Report. The revision proposed by Mr. Olson contemplated a condensing of the area covered by the original report so as to "fit the requirements of the people that really needed water." The Board rejected Mr. Olson's request, informing him that any revision in the Report initially filed with the Board would entail commencing anew the entire process by a petition akin to the one which requested the formation of Zone R-1 and the undertaking of an engineering study.

Having exhausted all available methods to procure water service, Mr. Olson, upon the recommendation of several public officials, filed his complaint in the instant proceeding. Mr. Olson seeks an order from the Public Utilities Commission requiring San Jose Water Works to provide water service to his property, preferably by an extension up Bear Creek Road off the company's Highway 17 six-inch line or by any other appropriate method. In addition, he asserts that the cost of installing a minimally adequate system that will provide water to his property must be borne by the company predicated upon an argument of wrongful interference with, and potential cessation of, water service by the company to his property.

Mr. Olson has calculated the minimum number of services necessary to serve his property for present and prospective uses to be four: one for his existing house, one for an existing trailer on his property housing farm help, and one for each of his two daughters who have been promised land on the Olson property for future house locations.

Since the filing of the instant complaint on December 17, 1970, San Jose Water Works has indicated a willingness to serve Mr. Olson with water. Norm Andrews visited the Olsons just before the company's deadline to file its answer to the complaint and told them that the company was willing to provide them with service for his household from the Highway 17 six-inch line. This offer contemplated the installation of a meter alongside the line at the highway, but would require that the Olsons install the requisite service line (over one-half mile in length), pumping and storage facilities necessary to serve their property from that point.

Defendant argues as follows:

"In the period prior to 1964, no water was intentionally delivered to the Olsons by San Jose Water Works. The Olsons simply took advantage of water seepage from a stream. Seepage is inevitable where a stream bed is used as a conduit and San Jose Water Works had no way of stopping the Olsons from utilizing this seepage. The stream bed at this location was not owned by San Jose Water Works. The well was located off the stream on property of Mrs. Olson's uncle with his permission. No permission was sought from San Jose Water Works by the Olsons and if the company chose to use Briggs Creek as a conduit it had to accept the inevitable loss of water by seepage to land adjacent to the stream. The recognition of this fact of life does not create a foundation for any utility obligation in favor of persons who use this seepage. As to them, there has been no intentional delivery of water which could constitute a water service. Indeed, such beneficiaries do not ordinarily even acquire any rights to the seepage. ✓

"The so-called 'water service' to the Olsons possesses none of the necessary characteristics of utility service. No water was intentionally supplied through company facilities. At no time did Mr. Olson pay any compensation at all."

San Jose Water Works has promulgated a "Statement of Position Regarding Service Area", which pronounces the company's policy as to extensions of service outside its service area boundaries. The policy was formulated as a result of criticism leveled at the company by the Public Utilities Commission, which was predicated upon the company's practice of furnishing water to small utilities for resale rather than extending its mains to higher elevations outside of its filed service area.^{3/} The document has been introduced into evidence in this proceeding as Exhibit 16.^{4/} Of particular relevance to the instant matter is Paragraph 2 of the company's statement, which provides that service will be extended outside the company's service area boundaries pursuant to the following conditions:

"2. The present water system is physically capable of expansion without major changes to accommodate one additional water lift of approximately 300 feet in elevation along the foothill boundaries of the service area. Accordingly, the Company will consider applications for extension of its present service area to territory contiguous to its existing boundaries which can be directly served by a

^{3/} Defendant has, for a number of years, permitted other purveyors of water to commence operation in areas logically within applicant's ultimate service area, by selling water to those other purveyors for resale to their customers or members. In Decision No. 67296, dated June 3, 1964, in Application No. 45787, the Commission expressed concern over this practice:

"The record is quite clear that applicant's quality of service and its ability to fulfill its public obligations are unusually good. An exception is its somewhat shortsighted policy of refusing to extend its mains to serve areas located at higher elevations outside its present service area and, instead, furnishing water for resale by newly formed small utilities in those areas."

^{4/} Of course, the term "service area boundaries" is not limited to the service performed in the area covered by the filed map, if in fact, as here, public utility service is being performed in areas outside of the map's boundaries.

distribution system installed within this additional lift elevation limit. Applications must include evidence of adequate street locations approved by the appropriate governmental agencies."

The word "contiguous" as used in Paragraph 2 has been deemed to mean "touching" according to N. J. Kendall, President of San Jose Water Works. In this respect, it should be noted that the company concedes that all of the parcels involved in this proceeding are contiguous to each other and to customer Rollo who is receiving public utility water service from the Highway 17 line. In addition, there are several customers being served through company meters on the opposite side of Highway 17. The intervention of a public highway or street does not interrupt the contiguity of the area for purposes of extensions.

In addition, no property in this proceeding is more than 300 feet higher in elevation than the claimed boundary area of San Jose Water Works at the Lexington Dam.

Defendant takes the position that Exhibit 16 has no application to individual requests for extensions of service. Rather it was suggested that Exhibit 16 is applicable only to extensions to tracts and subdivisions. No such limitation appears, however, on the face of Exhibit 16, nor in the written decision and order of this Commission pertaining to the rate proceeding in which the company's statement was introduced (Application No. 51283, Decision No. 77766.)

The record discloses that the company's policy regarding extensions to individuals whose property is without the filed tariff area service map is to permit such individuals to take service from within the company's service area. This position was revealed during the testimony of Mr. Kendall, in the following manner.

"Examiner Gillanders: Does the Company have a policy regarding extensions to individuals outside its filed service area map and above a 300 -- well, first of all, within the 300-foot level and then above the 300-foot level.

"The Witness: Our policy in the past has been to accommodate these people who were outside our service area by allowing them to come down and take service within our service area."

The record in this proceeding indicates that it is indeed well within this defendant's capability to install and operate a system to supply complainants. The record clearly demonstrates that it is in the public's interest for San Jose Water Works to do so.

The potability and level of purity of defendant's water supply is, in the first instance, within the jurisdiction of the appropriate health authorities. Public utility status of a water supply is not determined on the basis of potability.

We will not order defendant to build a particular system to supply complainants as defendant in following the orders in these matters has many options it may use.

Findings of Fact

Based upon a consideration of the record herein, the Commission finds as follows:

1. Complainants' property is not located within the boundaries of any service area map of San Jose Water Works as filed with this Commission.
2. Complainants' property is not within the boundaries of a municipality which San Jose Water Works is obligated to service under the terms of an existing franchise.
3. Complainants individually are requesting defendant to supply their own property with water service.
4. The Highway 17 line of San Jose Water Works is located on the southeasterly side of the highway and parallels it for a considerable distance.

5. A portion of this line is separated from the property of complainants only by the highway itself.

6. Water service from this highway line is supplied under the conditions of Schedule IL-2.^{5/}

7. San Jose Water Works has at all times prior to the filing of these complaints restricted service from the Highway 17 line to the consumers specifically named in Schedule IL-2 and has consistently rejected all applications for additional service from that line.

8. The conditions contained in Schedule IL-2 were originally established in the course of the proceedings by which San Jose Water Works acquired the Highway 17 line. The line can now serve 20 additional customers.

9. Only the Dadmums, among the five complainants, have at any time received any water service from the Highway 17 line and they were expressly limited to one service connection which was transferred with the sale of the residence to which it was appurtenant.

10. There are eight raw water services of various kinds all located outside of defendant's filed tariff area service map. The first is the contract with the Air Force to take water from Austrian Gulch at a point 9.5^{6/} miles from complainants' property for use in a military installation on Mt. Umunhum, three services are to water districts or mutual water companies which take water from the Los Gatos Creek at locations over 3 miles from complainants' property,

5/ Schedule IL-2 contains the following limiting special conditions:

"1. Service shall be limited to the lands of the nine (9) customers described in C.P.U.C. Decision No. 45159, Case No. 5490, or their successors in occupancy, with only one service connection to each property.

"2. Service under this schedule shall be rendered to, and meters installed at, the point of connection of the service lines of such customers to said 6-inch pipeline."

6/ This mileage figure and those following are in road miles - not airline miles.

one service is to a mutual water company at a point on Beardsley Creek approximately 2 miles from complainants' property, one connection is a raw water service on the Beardsley-Montevina line about 1.8 miles from complainants' property to a customer who has his own domestic water supply and the remaining two are fire hydrant connections on raw water lines, the closest of which is over 6,000 feet from complainants' property.

11. In addition to the above instances of raw water supply, there are other points of potable water service and one additional connection on the Howell-Montevina line.

12. San Jose Water Works has an adequate supply of water at its Montevina Reservoir. An 8-inch pipeline was run under Highway 17 at that point and service is presently rendered at the west side of the highway to six customers, including a water company with at least 25 users.

13. This point of service is more than a half mile from the Olsons' driveway and more than a half mile from the nearest boundary of the property of any of the complainants.

14. This service is outside the company's filed service area boundaries.

15. Complainants Olsons request four domestic service connections.

16. At the time of original purchase of their property, Mr. Olson made an agreement with Mr. Theobald (the seller and also Mrs. Olson's uncle) that they would have to have a satisfactory source of water before they would buy the property.

17. This condition was met by Mr. Theobald giving permission to the Olsons to drill a well on Theobald's property.

18. The well was dug in 1946 at a location about 30 feet from Briggs Creek.

19. During the period from 1946 to 1964, San Jose Water Works used the bed in Briggs Creek as a conduit for water transported from the company's Howell Reservoirs to its pipeline at Alma.

20. Water from Briggs Creek filled the Olsons' well and provided sufficient water for the Olsons' needs.

21. In 1964, San Jose Water Works completed a pipeline from the Howell Reservoirs to the company's system and discontinued the use of Briggs Creek as a conduit.

22. Thereafter, Briggs Creek, and the Olsons' well along with it, has dried up each summer.

23. From 1964 to 1970, San Jose Water Works has released water from the Howell Reservoirs toward the end of the summer in order to drain and clear the reservoirs prior to the winter rains.

24. This is water which San Jose Water Works did not wish to use.

25. These releases recharge the Olson well but there are quality problems relating to this water.

26. In addition to these releases, there have been four occasions (two in September and October 1970) in which Mr. Andrews, a vice-president of San Jose Water Works, and a friend and neighbor of the Olsons, himself cracked a valve in the reservoir and let some water down Briggs Creek to replenish the Olson well.

27. On one occasion this was done at Mr. Andrews' initiative and on the other three occasions Mr. Andrews acted after receipt of a request from the Olsons.

28. At the time of purchasing the property and of constructing his well, Mr. Olson had no discussions with San Jose Water Works and made no inquiry of that company regarding the water supply.

29. The Olsons never received any bills from San Jose Water Works nor did they ever pay monies to San Jose Water Works for water service.

30. No appearance was entered on behalf of the complainants in Case No. 9170.

31. No appearance was entered on behalf of complainants Mayr and Eischens in Case No. 9178.

Conclusions of Law

Based on the foregoing findings, the Commission concludes that:

1. Case No. 9170 should be dismissed.
2. Complainants Mayr and Eischens should be severed from Case No. 9178.
3. Defendant has not supplied public utility water to the property of Lloyd W. and Roberta T. Olson.
4. Defendant's actions bring it squarely within the ambit of Section 2701 of the Public Utilities Code.
5. Defendant's actions do not fall under the provisions of Section 2704 of the Public Utilities Code.
6. Defendant has been and now is supplying public utility water service outside of its filed service area and has dedicated its facilities to serve such outside areas.
7. Public Utility status is not determined by the potability and level of purity of the water system.
8. The areas outside of its filed service area map to which defendant is presently supplying public utility water service are contiguous to complainants' property.
9. Defendant's facilities are capable of supplying the domestic water needs of complainants herein.
10. Defendant should be ordered to supply public utility water service to complainants upon individual application of each complainant herein in accordance with its filed tariff.

O R D E R


IT IS ORDERED that:

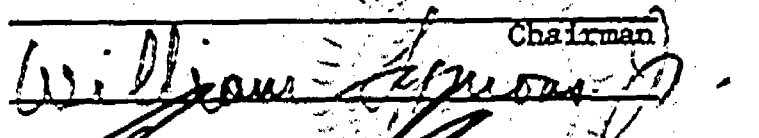
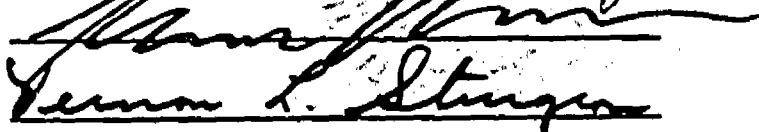
1. The complaint in Case No. 9170 is dismissed.
2. Complainants Mayr and Eischens are severed from Case No. 9178.
3. San Jose Water Works shall, upon individual application of each complainant in Cases Nos. 9166, 9169, 9172, 9176 and 9178, supply domestic water to such applicants in accordance with its filed tariff.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 25th day of APRIL, 1972.

I dissent


Commissioner


Chairman

Commissioner

Commissioners

Commissioner J. P. Tobasco, Jr., being necessarily absent, did not participate in the disposition of this proceeding.