

ORIGINAL

Decision No. 88472 FEB - 7, 1978

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application)

of WM. R. MIDDLETHON, JR. and

ROGER L. UFKES, for authority to

control the San Jose Highlands

Water Company.

Application No. 56316

(Filed March 8, 1976)

Wm. R. Middlethon, Jr., Attorney at Law,and Roger L. Ufkes, for themselves,

applicants.

Hartley R. Appleton, Attorney at Law,

San Jose Highlands Water Company, T. C.

Binkley Associates, and himself,

interested parties.

Antonino Cartelli, for San Jose HighlandsHome Owners Association; and Robert T.Sapp, Director - District III, andBruce Regandanz, David Gill, andWilliam Hoeft, staff for Santa ClaraValley Water District and homeowners,

protestants.

Cleo D. Allen, for the Commission staff.OPINIONStatement of Facts

San Jose Highlands is an 88-acre portion of a tract of approximately 500 acres located just north of Alum Rock Road off Penitencia Creek Road in the northeastern corner of the city of San Jose (see Appendix A map). It is in an area of expanding real estate development; in this instance an area where whoever controls the water controls the real estate. That fact is the salient feature of this application. The owner and subdivider was Priscilla, Inc. (Priscilla), a California corporation, in 1962 owned or controlled by one James D. Claitor (Claitor).<sup>1/</sup> (All footnotes are in Appendix B.)

Priscilla made application to San Jose Water Works for service to its subdivision. The subdivision being outside the utility's dedicated service area and because of its altitude presenting service problems which the utility did not wish to handle, San Jose Water Works was unwilling to extend service. However, San Jose Water Works was agreeable to wholesaling water from its nearby Dutard Reservoir by means of a backup facility pumping station, a 2-inch meter, and 2,600 feet of an 8-inch transmission pipeline to the facilities of a new water public utility which Priscilla would form to service its new subdivision. Accordingly on April 18, 1962, in association with Leopold Diel,<sup>2/</sup> a local attorney, Claflor caused the incorporation of San Jose Highlands Water Company (S.J.H.W. Co.) with Mr. Diel and two of his law firm partners, Sanford N. Diller and Paul M. Kouns, as the initial directors. A local registered civil engineer, Charles W. Davidson, prepared the engineering plans. By Application No. 44417 dated May 7, 1962 (amended August 6, 1962) the nascent corporation applied to this Commission for a certificate of public convenience and necessity to operate a water distribution system to service an initial 102 of a projected 150 lots in the San Jose Highlands subdivision,<sup>3/</sup> and for

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authority to issue preferred and common stock to finance the project. By Decision No. 64952 dated February 13, 1963, the application was approved and authority was granted to construct a public utility water system in a portion of the 500 acres and to issue and sell not more than 1,300 shares, with an aggregate par value of \$130,000 of the utility's nonvoting, noncumulative 5 percent preferred stock to Priscilla and not more than 40 shares, with an aggregate par value of \$20,000 of the utility's common stock to Priscilla, Charles Davidson, Leopold Diel, and Edward Teresi. The Commission order prohibited extensions into contiguous territory without further Commission approval.

By late 1963, 46 of the original 102 lots authorized service reportedly had been sold, and Priscilla desired to extend the subdivision and its water service facilities into additional tract areas. Accordingly on October 29, 1963 S.J.H.W. Co. filed Application No. 45913 (subsequently amended on January 3, 1964) for authority to extend service into these additional tracts<sup>4/</sup> comprising about 39 acres subdivided into 63 lots. San Jose Water Works agreed to furnish an additional 2-inch meter service to S.J.H.W. Co., and Priscilla proposed to finance the approximate \$21,000 cost of the additional facilities through advances it would make to S.J.H.W. Co. under the utility's main extension rules. After hearing on February 3, 1964, the Commission by Decision No. 66916 approved the extension. In February 1965 when the water utility was actually serving only 11 customers, although authorized to serve several hundred, and operating at a loss, Priscilla determined to subdivide two additional tracts<sup>2/</sup> containing about 47 lots. To meet this service request, S.J.H.W. Co. on February 24, 1965 filed Application No. 47357. Priscilla then decided to subdivide still another tract<sup>6/</sup> containing 16 lots,<sup>7/</sup> and S.J.H.W. Co. amended its application to conform. By its application S.J.H.W. Co. also proposed to convert existing main extension contracts incurred on tracts 3320, 3457, and 3561 into preferred stock on a dollar-for-dollar basis, and to

issue additional preferred stock in lieu of advance contracts for both in- and off-tract facilities in tracts 3807 and 3809. The Commission staff objected, pointing out that not only would the proposed deviation from the main extension rule result in an increased rate base, but would also substitute relatively high cost capital for interest-free money obtained from main extension agreements, resulting in dividend requirements and cash drain. The staff, however, did not object to issuance of common stock to finance off-tract facilities and pay refunds on advance contracts as they became due. Additionally, and of significance today, recognizing that in serving the Priscilla properties as developed, S.-J.-H.-W. Co. had been, was then, and probably would continue into the future for some time to incur operating losses, and to induce this Commission to grant the then pending and possible future applications for extensions of service, Priscilla and S.-J.-H.-W. Co. on April 28, 1965 signed an agreement which in part provided:

"...Developer agrees that so long as utility shall be operating at a loss, Developer will furnish from time to time and upon demand by Utility, such sums as may be necessary to defray the costs of all operating expenses of the Utility less any income received by Utility from its operations."

Finally, San Jose Water Works advised that it wished to be relieved of the resale service as soon as S.-J.-H.-W. Co. could arrange to purchase water from the Penitencia Treatment Plant under construction for the Santa Clara Valley Flood Control and Water Conservation District.

By Decision No. 69268 dated June 22, 1965, the Commission authorized the requested expansions in the listed tracts, but limited further expansion without prior Commission approval; authorized issuance of common stock not to exceed an additional

aggregate par value of \$106,000, allotting up to \$40,500 to finance off-tract facilities and meters, and up to \$65,500 to refund advances on maturing main extension agreements; and W.A. 112 approved the loss reimbursement agreement between Priscilla and S.J.H.W. Co.

Thereafter, during the years 1965 and 1966, Priscilla paid certain of the operating expenses of S.J.H.W. Co., the subsidy amounting to an approximate \$10,000 a year.<sup>8/</sup> Meanwhile, the fortunes of Priscilla deteriorated. The tracts had been over-expanded, and the financial burden proved too great for Priscilla. The S.J.H.W. Co. stock held by Priscilla and Claitor, along with Priscilla subdivision lands, had been pledged to secure loans to Priscilla. Through intermediate mortgage companies, this security came to be held by Continental Mortgage Investors (CMI).<sup>9/</sup> After default on its loans by Priscilla, foreclosure was threatened by CMI. To avoid lawsuit and resolve matters, Claitor negotiated, resulting on October 27, 1966 in a signed agreement whereby CMI acquired the pledged subdivision lands as well as all the preferred stock issued and 55 percent of the common stock issued by S.J.H.W. Co. Inter alia, this Priscilla-CMI agreement provided that after October 27, 1966 "the expenses and operations of the water company shall be the sole responsibility of the Second Party" namely CMI. Thereafter, through January 1968 deficits in the S.J.H.W. Co. operating budget were met by funds advanced directly by CMI or through its affiliate, Delta Mortgage Advisors.<sup>10/</sup>

Late in 1966 one Walter P. Gribben (Gribben), a California attorney, assumed responsibilities as West Coast General Counsel for CMI. Gribben had performed certain services for CMI in connection with another real estate project built by a developer named Harbor Hall of Fame Homes, Inc., and apparently in return for these previously

rendered services, CMI late in 1966, after acquisition of control of S.J.H.W. Co., transferred equitable title to all the issued preferred stock and 55 percent of the issued common stock of S.J.H.W. Co. to Gribben. Because of certain legal technicalities, acquisition of legal ownership of the stock by Gribben was delayed until February 26, 1968, at which time Gribben also acquired the remaining common stock held by Leopold and Brubilda Diel,<sup>11/</sup> and became sole owner of S.J.H.W. Co. Thereafter, Gribben made certain advancements in funds toward the operating budget deficits. In December 1966, Gribben organized and incorporated Trans-Robles Corporation, of which he owned 10 percent,<sup>12/</sup> and the former Priscilla lands acquired by CMI were transferred to Trans-Robles. It then appears that all or part of this land was in turn transferred to San Jose Highlands Associates, a limited partnership in which Trans-Robles was a partner.

In 1968 S.J.H.W. Co. filed Application No. 50074 seeking a substantial rate increase. In the hearings under this application, the status of the loss reimbursement agreement or agreements was the subject of extensive but inconclusive testimony. The protestant homeowners' association contended that the funds provided S.J.H.W. Co. by CMI were actually loss reimbursements under the provisions of the October 27, 1966 agreement between Priscilla and CMI; whereas the utility through its president, Gribben, contended that the funds advanced by CMI were personal loans to Gribben from CMI, which personal loans must be repaid.<sup>13/</sup> In Decision No. 75238 issued January 21, 1969 in Application No. 50074, this Commission elected not to resolve the loss reimbursement agreements issues, noting that the question before it was only the determination of a reasonable level of water rates, and awarded a rate increase of substantial proportions. To this

day the loss reimbursement issues remain unresolved with Gribben, the sole owner of S.J.H.W. Co., in the past unwilling to test or pursue the remedies provided in those agreements. <sup>14</sup> These unresolved issues cast a pall over all proceedings which involve this utility.

Since 1968 S.J.H.W. Co. has continued to provide service to its customers, charging rates which average \$1 per 100 cubic feet. The utility has never earned its way and has accumulated over \$100,000 in operating deficits. Unstable land conditions in that area continue to plague the utility, causing frequent service interruptions and necessitating placing replacement water mains on the surface of the ground and the use of rubber hose as flexible connections. The city of San Jose at one point imposed a moratorium on building permits as a result of past ground movements; a moratorium since lifted. However, the city now requires geological and civil engineering reports on each individual building site before a permit will be granted. Since October 1974 the Binkley engineering firm (which has managed the day-to-day operations of the utility since approximately 1966) has had difficulty in communicating with the legal owner, Gribben, a situation creating managerial problems. <sup>15</sup>

Early in 1976 the utility applied to the Hydraulic Branch of the Commission's Utility Division for an ex parte 20 percent rate increase under advice letter proceedings. At that point in time, the utility served approximately 135 customers. These were notified by mail of the proposed increase and a number responded, protesting and requesting a hearing. On June 23, 1976, Messrs. Ernst Knolle and R. H. Bennett of the Hydraulic Branch conducted a "public meeting" at the Piedmont Middle School in San Jose to attempt to explain the factors responsible for the decline in earnings of the water company to its customers. In addition to the approximately 75 customers in attendance were Sal Bianco (aid to

Assemblyman Alister McAlister - 25th District), Dan McCorquodale (Santa Clara County Supervisor), Bob Sapp (Chairman, Santa Clara Valley Water District), and members of the press. The meeting concluded in a certain disarray.<sup>16/</sup> Thereafter, the Hydraulic Branch advised the utility that an advice letter increase would not be processed and that it would be necessary to file a formal application to obtain any increase in rates. To this date the utility has not filed a formal application for a rate increase.

Meanwhile, on March 8, 1976 William R. Middelthon, Jr. (Middelthon), a Florida attorney, and Roger L. Ufkes (Ufkes), a State of Washington real estate broker, filed this application seeking authority under the provisions of Section 854 of the California Public Utilities Code<sup>17/</sup> to purchase and control S.J.H.W. Co., stating therein that the present owner, Gribben, being otherwise occupied with business affairs and unable to devote time and attention to the affairs of the utility, desires to dispose of the utility. The sale price was stated to be \$100 in cash. The application was signed and verified by Middelthon and Ufkes, but not by Gribben.

A duly noticed public hearing was held on November 8, 1976 in Santa Clara before Administrative Law Judge John B. Weiss. The hearing was attended by approximately 60 people, mostly homeowner-consumers. Middelthon and Ufkes presented their reasons for desiring to acquire and control the utility. Opposition to the application was led by one of the homeowners who introduced a petition opposing the transfer signed by 114 persons,<sup>18/</sup> and six homeowners testified in opposition. Councilman Al Garza, speaking for the San Jose City Council, objected to ownership being transferred to absentee owners. Robert T. Sapp, a director of the Santa Clara Valley Water District, testified of his district's interest and technical assistance to this utility<sup>19/</sup> and of the potential availability of wholesale priced water from the district's Penitencia



Treatment Plant, introduced evidence, including a copy of a report prepared following a district-called meeting July 22, 1976, of local authorities following the June 23, 1976 PUC-Hydraulic Branch "public meeting", and urged that determination be made as to (1) the ownership of the utility, (2) the status of its outstanding liabilities, and (3) the status of the loss reimbursement agreements before authorization of any change in ownership. Sal Bianco, administrative assistant to Assemblyman Alister McAlister, spoke of the utility's preliminary application for a \$40,000 loan under the California Safe Drinking Water Bond Law of 1976 to make the connection to the Santa Clara Valley Water District facility at Penitencia and other improvements. Thad C. Binkley testified of his firm's association with and work for the utility, of his possible interest in acquiring the water company were the approximate \$36,000 CMI liability not a collectible item, and answered questions about monies owed by the utility to his firm. Cleo D. Allen, PUC staff representative, introduced the staff's report into evidence, which report concluded that it had not been shown to be in the public interest to authorize the transfer. At conclusion of the hearing, the matter was submitted.

#### Discussion

Ownership or control of any public utility organized and doing business within this state, generally speaking, may be transferred to any person or corporation, subject to the requirement since 1971 that approval of this Commission be first obtained (see Section 854 of the California Public Utilities Code). In any consequent transfer proceedings before this Commission, its function and its primary interest is to protect and safeguard the rights and interests of the public. Such is our interest in this proceeding.

While on its face the instant application purports to request authority from the Commission under Section 854 of the Public Utilities Code for the owner of record Gribben "to sell" the utility,

and for applicants Middelthon and Ufkes "to assume control" of the utility, the evidence adduced at the hearing makes it clear that at an undetermined date within the two-year period immediately preceding the hearing, applicants Middelthon and Ufkes in fact purchased all of the issued common stock of S.J.H.W. Co. from Gribben; were issued new stock certificates to reflect that acquisition; and have been controlling the utility since; Middelthon as chairman of the board and Ufkes as a board member with Middelthon on the three-person board of directors.<sup>20/</sup> Furthermore, in contravention to the unawareness professed on the record by Thad Binkley, general manager of record of the utility, and head of the engineering firm which has operated the utility since the mid-1960s, to the fact of Middelthon-Ufkes control, Middelthon testified that "...in terms of making operating decisions that were presented to us by Messrs. Binkley, Ufkes, and I have made those decisions in, I believe, the last year and a half, two years." Lastly in this regard, Middelthon, on the record, assertedly as chairman of the board of the utility, relieved attorney Hartley R. Appleton of authority to represent the interests of S.J.H.W. Co. in this proceeding.<sup>21/</sup> From the foregoing it is obvious that there has been a de facto acquisition and assumption of control by the applicants. However, it is also a fact that this acquisition is null and void, as the penultimate sentence of Section 854 provides that any acquisition or control obtained absent prior Commission authorization "shall be void and of no effect." The

statute means what it plainly states; any such acquisition or transfer of control is void. Therefore, the stock herein has not been legally sold to Middelthon and Ufkes and control remains with Gribben.<sup>22/</sup> Accordingly, we will look to the instant application as a present request to transfer ownership and control from Gribben to Middelthon and Ufkes.

The first issue for consideration anent this application is the failure of Gribben to have joined in it. (Commission Rule 35.) Although the language used in the application recites that "WALTER P. GRIBBEN, referred to herein as 'Seller', proposes to sell..." and thereafter purports to state why Gribben desires to sell all the outstanding stock, Gribben did not sign or verify the application. Neither did Gribben make an appearance at the hearing, nor request a continuance of the hearing, although he was given notice with adequate time to have acted had he desired to do so. In this regard the following colloquy issued at the hearing:

"Examiner Weiss: Let's get one thing straight: can Mr. Middelthon -- can you speak for Mr. Gribben?"

"Mr. Middelthon: I represent Mr. Gribben in another area which Roger and I wish to get into to establish California contacts which, I believe, was of some concern to the Commission staff. But I don't think I have got the authority to represent Mr. Gribben today. I would be happy, from my own standpoint, to respond to the questions you may wish to ask Mr. Gribben, but I think Mr. Gribben would be best left with the last word.

"Examiner Weiss: Mr. Gribben, I take it, was given notice of this hearing?"

"Mr. Middelthon: Yes, sir. Mr. Gribben is part of what he is involved in is some litigation. He was under subpoena today for a deposition, and was unable to be here. He had a conflict, and the court order required him to be in another location in California.

"Examiner Weiss: He didn't request a continuance, however. I'm sure he knew of this hearing.

"Mr. Middelthon: Oh, yes, sir. I think Mr. Gribben's position is that it is Mr. Ufkes' - the responsibility of Mr. Ufkes and myself to persuade the PUC to grant this change of ownership."

The problem is that there must be an owner ready to sell before the Commission can act, and this Commission has no jurisdiction to authorize an acquisition or transfer of control where the owner does not join in the application to transfer (for an analogous situation involving the sale of public utility property under the predecessor section to Section 851 of the Public Utilities Code, Section 51(a), see Hanlon v Eshleman (1915) 169 C 200, 202-3). The obvious answer here would have been for Gribben to have joined in the application, and to have attended the hearing. The duty of this Commission is to protect the patrons of this public utility and to insure continuance of adequate service at reasonable rates regardless of ownership. To this end it is necessary that both parties to the sale of a public utility submit their affairs to the scrutiny of the Commission. (Southern Cal. Mountain Water Co. (1912) 1 CRC 520). In this instance it is absolutely essential that Gribben appear, for in the affairs of this utility there are many matters raising questions and with the passage of time these matters more and more slip into shadowy depths which obscure understanding and build up future problems for the utility.

The status of certain of the liabilities contained in the balance sheet of the utility has never been clarified, always in the past yielding to the expediency of the moment. Today these uncertainties impede resolution of any durable solution to the problems of the utility, and place roadblocks in the path of possible rehabilitation. To insiders with some present or past association with CMI and its behind-the-scenes methods of conducting business, these liabilities are some form of debt which is merely considered as "a contingent liability that has a remote possibility

of creating a problem for the company and the consumers", and they do not fear these obligations in the least sense because if CMI should attempt to collect on them, they assertedly have an offset against them.<sup>23/</sup> But to outsiders who might be potential purchasers, such as the Binkleys, San Jose Water Works, or others, the liability, because of its uncertainty, presents unsurmountable barriers to any acquisition or merger.

For example, what is the validity and status of the \$35,786 debt carried among the account 230 "Current Liabilities" on the balance sheet, and listed as being owed to Gribben? In the 1966-67 period when CMI was the owner of record of this utility, CMI either directly or through its affiliate, Delta Mortgage Advisors, Inc., advanced \$32,536 to the utility to meet operating expenses. In early 1968 CMI similarly advanced another \$1,200. Thereafter in 1968, after he became the legal owner, Gribben assertedly advanced another \$2,050 to the utility to meet operating expenses. Whether these funds are advances under the Priscilla-CMI agreement of October 27, 1966, or personal loans to the utility by Gribben is open to serious question. It is a fact that on March 6, 1968 Gribben for the utility executed a demand promissory note in the amount of \$32,536 payable to himself, and immediately assigned the note to CMI, and on May 2, 1968 similarly executed a \$3,250 note and assigned it to CMI. In the 1968 hearing for a rate increase, Application No. 50074, where these matters were also aired, Gribben testified that CMI had loaned the utility \$50,000 on the security of a note which he, Gribben, had signed and that between \$30,000 and \$40,000 had been advanced to the utility against that note. But although offered an opportunity to obtain and submit a copy of that note (to be Exhibit 6 in Application No. 50074), an offer accepted on the record, Gribben never did submit any copy of such a note. Furthermore,

the two notes of March 6, 1968 and May 2, 1968 do not appear in the schedules of assets submitted by CMI in a bankruptcy action it filed March 8, 1976 in the U.S. District Court in Boston, Massachusetts.<sup>24/</sup> Therefore, it appears inferable that these advances in 1966-1967-1968 were made by CMI to the utility under the terms of the Priscilla-CMI agreement of October 27, 1966 whereby CMI assumed all responsibility for the expenses and operations of the water company, and that the Gribben notes are a sham.

In addition, since 1967 the utility has carried a \$61,504 liability on its balance sheet under Account 246, "Other Credits". This liability purportedly is owed Priscilla for advances allegedly made to the utility for construction and operation purposes. But in April 1965, Priscilla signed a loss reimbursement agreement with the water company whereby Priscilla agreed to pay operating losses until in essence the utility operates in the black - something it has never done. While Claitor, through Priscilla, did provide some operational assistance to the utility in 1965 and 1966 in the form of paying the salary of one Frank Fregosa and expenses for his truck used by the utility, there appears to have been no other attempt to offset any of these advances claimed by any assertion of the provisions of the operating loss agreement.

The continued presence on the utility's balance sheet of these long quiescent liabilities - if indeed they are valid liabilities in view of the offset questions posed by the loss reimbursement agreements - serves to seriously inhibit or prevent local factions, such as the Binkleys or San Jose Water Works, from seriously entertaining any consideration of acquiring the utility.

Why would Middelthon and Ufkes desire to acquire such an unprofitable and debt-saddled utility? It was stated by Middelthon that Gribben agreed to take ownership and operate the water company only to facilitate the administrative burden of CMI in owning the

utility. Certainly Gribben has made no money out of ownership, nor under present or immediately foreseeable circumstances is he likely to. It was alleged that Gribben desires to get out, and it appears that since October 1974 he frequently is unavailable to general manager Binkley when management problems arise, and Binkley must fend for himself. Middelthon testified that he was investor or asset oriented, and that for him the utility offers a substantial increase for his asset base, as well as federal income tax aspects; for example, a possible phase through of the operating losses to his individual income tax obligation through utilization of a Subchapter S status election. Ufkes testified that he was interested in the acquisition for tax advantages, and also hopefully to offset some monies that CMI owes him personally by "an asset swap of some nature", so that he can recover his position. Ufkes further stated that both looked at the acquisition in terms of a potential merger, acquisition, or sale although these prospects were for the future. Neither has any utility operational experience. Middelthon stated they could buy that. They planned to retain Binkley as general manager to operate the utility for them - although Binkley testified that while he would continue under Gribben, he would not be interested in continuing under Middelthon and Ufkes for any period of time.

There was general agreement at the hearing that the utility must somehow raise the financing<sup>25/</sup> to take advantage of an opportunity to acquire less expensive water on a wholesale basis direct from the Santa Clara Valley Water District's Penitencia Water Treatment Plant, rather than continue purchasing water from the San Jose Water Works. These funds would be required to construct a pipeline alignment to deliver treated water directly to the utility at approximately one-quarter less cost, and to provide the pumping and hookup adjustments needed.

When questioned as to how the financing would be accomplished were they authorized to acquire the utility, Middelthon testified that while he and Ufkes were prepared to make a capital infusion, subject to being given "the rate base which would amortize the indebtedness involved over a commercially reasonable time at a commercially reasonable rate", they would also seek a State of California Safe Drinking Water Bond Act loan. When Ufkes on cross-examination was asked how the cash would be raised if a cash infusion were necessary, he replied that they had the cash at their disposal and "How we obtain that cash is no business of yours." Hartley R. Appleton, ousted erstwhile attorney for S.J.H.W. Co., appearing for himself as a creditor (for unpaid services rendered the utility in other matters) and for the Binkley interest, made what we believe to be a cogent observation as to possible motives when he stated, referring to the two S.J.H.W. Co. notes to Gribben which were assigned to CMI:

"Now, I think they are important, because I feel that these notes are probably the only reason that this company appears to be of any importance to anyone, outside of the people in the immediate area who are operating it... If these notes are the important thing, if you are buying a company for \$100 and you are going to collect \$36,000 on those notes, then it is a very good business venture for you, if they are collectible."

On balance, aside from the initially noted technical obstacles to our approval of the proposed acquisition or control of this utility by the applicants, we cannot find that such acquisition or control would be in the best interests of the public and the ratepayers. The expressed reasons for the acquisition and control carry no assurance that after the transfer the utility would be in any better posture to carry out its responsibilities than under the present ownership. The would-be out-of-state purchasers are not qualified operators, nor do they have any public utility experience, and absentee ownership of small water utilities such as the one at bar is not favored by this



Commission. Apart from an expressed intention to retain the Binkley organization as managers, which organization's president stated on the record that it would not be interested in continuing on as operating managers under the proposed new ownership, no other operational plans have been set forth. The still unanswered questions relating to the status of the substantial, but possibly flawed, liabilities carried on the balance sheet of the utility do not create support for another transfer of ownership which could tend to further complicate any resolution of their present status. Accordingly, we will deny the application.

#### Findings

1. S.J.H.W. Co. is a California public utility water corporation subject to the jurisdiction of this Commission.

2. The majority stock interest and control of S.J.H.W. Co. has devolved over approximately 15 years from Priscilla, a California real estate development corporation, whose successor corporation is now suspended, to CMI, a Massachusetts Business Trust, now in bankruptcy proceedings in the U.S. District Court in Boston, Massachusetts, to Walter P. Gribben, a California attorney associated with affiliates of CMI Investors, and one-time West Coast General Counsel for CMI.

3. Since acquiring the utility, Gribben has largely left its operation and maintenance to the engineering consulting firm of Thad C. Binkley Associates who since October 1974 have had difficulty in communicating with Gribben.

4. S.J.H.W. Co. has never operated profitably, and has been plagued with operational and maintenance problems, operating as it does in a highly unstable area of the Santa Clara Valley eastern foothills.

5. To induce this Commission to approve certain service extensions, Priscilla on April 28, 1965 entered into a loss reimbursement agreement with S.J.H.W. Co. On October 27, 1966, as

part of a settlement of differences and rights between themselves, Priscilla and CMI entered into an agreement wherein, among other things, CMI from and after that date assumed sole responsibility for the expenses and operation of the water company.

6. The past and present applications and status of the April 28, 1965 and the October 27, 1966 agreements have never been resolved.

7. In view of the unresolved applications and status of the April 28, 1965 and October 27, 1966 agreements, the status of certain liabilities on the S.J.H.W. Co. balance sheet, principally the amount of \$32,536 assertedly owed Walter P. Gribben for cash advanced the utility from funds borrowed by Gribben from CMI, and an obligation in the amount of \$61,504 assertedly owed Priscilla for cash advanced to and obligations paid for the utility, is open to question and has never been definitively resolved.

8. The unresolved nature of its balance sheet liabilities has effectively precluded local interests from acquiring the utility.

9. Since its inception S.J.H.W. Co. has purchased its water at retail rates from San Jose Water Works for resale to its approximately 134 customers who currently pay among the highest rates in the State, averaging \$1 per 100 cu. ft.

10. The utility has filed for a \$40,000 loan from the State under the California Safe Drinking Water Bond Law of 1976 to pay for a hookup to the Santa Clara Valley Water District facilities, which connection would enable it to obtain water at wholesale rates. The anticipated cost savings have the potential of placing this utility in at least a break even posture.

11. At an undetermined time within the two-year period prior to November 1976, Middelthon, a Florida attorney, with past CMI associations, and an associate of Gribben, together with Ufkes, a State of Washington real estate broker, acquired all the outstanding

stock of S.J.H.W. Co. and assumed control of the utility, albeit without the requisite prior authorization under Section 854 of the Public Utilities Code, from Gribben.

12. The instant application, signed by Middelthon and Ufkes, is now being processed to meet the Section 854 requirement of Commission approval for acquisition and control of a California public utility.

13. Gribben, the owner of record with this Commission of the issued stock of the utility, did not sign the instant application.

14. Neither Middelthon or Ufkes have any public utility water corporation experience. Their intent would be to operate the utility as an investment through a hired local manager. Their interest is tax advantage oriented with potential merger, acquisition, or sale intentions, and Ufkes in addition seeks recovery of monies CMI allegedly owes him by "an asset swap of some nature".

15. The majority of the homeowner customers of the utility oppose any transfer to absentee ownership.

#### Conclusions

1. The previous attempted acquisition and control of S.J.H.W. Co. by Middelthon and Ufkes from Gribben, without prior authorization by this Commission is void and of no effect.

2. The instant application should and must be denied for these reasons:

- (a) Approval of acquisition and control of S.J.H.W. Co. by Middelthon and Ufkes has not been shown to be in the best interests of the public and the ratepayers, and
- (b) The owner of record before this Commission, Gribben, has not joined in the application to transfer ownership and control.

O R D E R

IT IS ORDERED that:

1. The previous inchoate acquisition and control of San Jose Highlands Water Company by Wm. R. Middelthon and Roger L. Ufkes from Walter P. Gribben is void and of no effect.

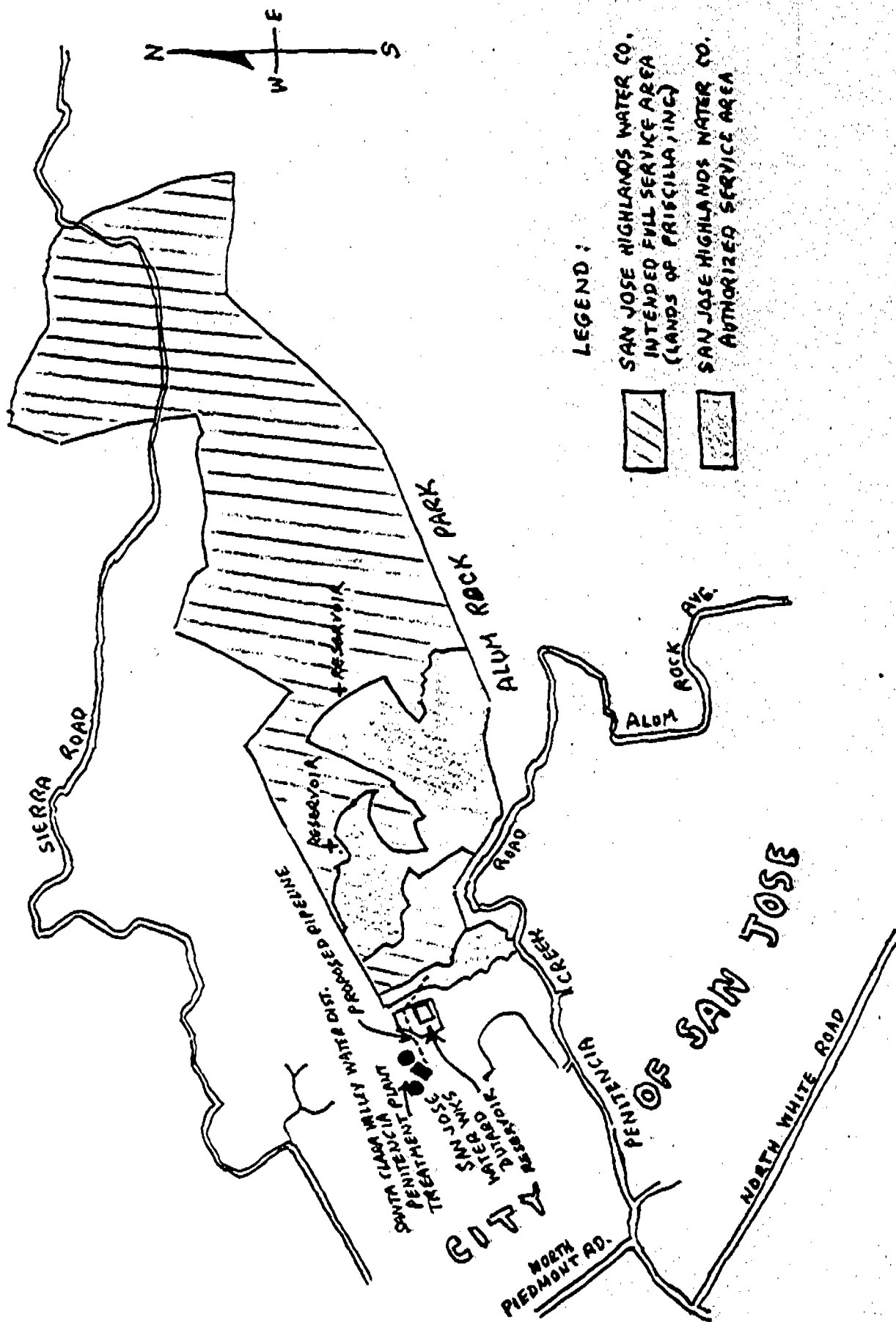
2. The instant application is denied.

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

Dated at San Francisco, California, this 7th day of FEBRUARY, 1978.

Robert Bateman  
President  
William J. Grooms  
Vernon L. Springer  
Charles D. Harrell  
Clair L. Smith  
Commissioners

A. 56316  
APPENDIX A - MAP



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- 1/ James D. Claitor, apart from being the common director of Priscilla and San Jose Highlands Water Co., and vice president of the utility at the time in 1962 when Application No. 44417 was filed, played a prominent role in three affiliated corporations involved in the saga of San Jose Highlands Water Company. According to records on file with the office of California Secretary of State, records which we officially notice, Priscilla was incorporated on April 17, 1958; Nordale, Inc. was incorporated on June 4, 1959 (and on June 14, 1965 changed its name to Claitor Development Corporation); and Claitor, Inc. was incorporated on May 15, 1968. At one time or another Mr. Claitor was president of each. Priscilla and Nordale, Inc. (predecessor in name to Claitor Development Corporation) had several common directors. On May 15, 1968 Priscilla, Claitor Development Corporation, and Claitor, Inc. were all inter-merged as Claitor, Inc. On June 1, 1976 Claitor, Inc. was suspended by the Secretary of State for nonfiling of tax returns for the year ending April 30, 1975.
- 2/ At the time of its incorporation in 1958, Mr. Diel was one of the initial directors of Priscilla.
- 3/ These lots were in tracts Nos. 3279 and 3319. Tract No. 3808 was also included in the authority sought and granted.
- 4/ These lots were in tracts Nos. 3451 and 3561, as well as tract No. 3320 (the lots in this latter tract subsequently appear on maps as included in tract No. 3561).
- 5/ Tracts Nos. 3807 and 3809; allegedly 130 lots had been sold.
- 6/ S.J.H.W. Co. at this point in time was owned 55 percent by Mr. Claitor and 45 percent by Mr. Diel. Mr. Claitor also either directly owned or held a controlling interest in Priscilla. The Charles W. Davidson Company was no longer associated with the utility; the consulting engineering firm of Thad C. Binkley Associates having been engaged to handle engineering work. This latter association ripened into full managerial operation of the utility so that today Thad C. Binkley Associates manages and operates S.J.H.W. Co.
- 7/ These lots were in tract No. 3922.
- 8/ Largely reflecting the salary of Frank A. Fregoso and the expenses attendant upon use of his truck, both used in the S.J.H.W. Co. operations.

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- 9/ Gribben testified during the hearing held on Application No. 50074 in 1968 (the Commission in this proceeding has taken official notice of the record and exhibits in that proceeding) that CMI was a publicly held Massachusetts business trust with assets of approximately 37½ million dollars, and that it was operated by seven trustees who delegated day-to-day business functions of the trust to various mortgage consultant firms, some of whose officers in turn were investors in CMI. Among these mortgage consultant firms were Mortgage Consultants and Delta Mortgage Advisors. Gribben has been an employee of Mortgage Consultants.
- 10/ In the 1968 hearing on Application No. 50074, Gribben testified that these advances made by CMI to S.J.H.W. Co. were really loans made on the basis of a \$50,000 note which Gribben had signed in advance. An exhibit number was reserved for documentary proof of the loan arrangement with CMI, but Gribben never presented such proof.
- 11/ Gribben allegedly paid the Diels \$3750 for their minority interest.
- 12/ It also appears that CMI was a major stockholder in Trans Robles Corporation.
- 13/ See Footnote 10.
- 14/ The possible efficacy of these agreements today is even more obscure since CMI reportedly is presently in bankruptcy proceedings in federal district court in Boston.
- 15/ For example, the annual reports required by the Commission require listing of the names, titles, and addresses of the corporation's principal officers, and a signed declaration by an officer, partner, or owner. For years 1975 and 1976 the annual report filed by S.J.H.W. Co. has noted "Information Not Available At Present" for the names, titles, etc., of officers, and has been signed by G. R. Binkley, General Manager.
- 16/ As a consequence of this "meeting", Assemblyman McAlister wrote at length to the Commission president, commenting adversely on the procedure followed and asking for an investigation of S.J.H.W. Co. to determine its present and proposed owners, as well as the status of its assets and liabilities. The Assemblyman also asked that the Commission staff attempt to resolve the water purchase problem, and that any rate increase be deferred until after formal proceedings.

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16/ (Continued)

In addition, the Santa Clara Valley Water District, by a six to nothing vote (one absent) passed Resolution No. 76-77 which, inter alia, requested this Commission:

"To take no action on a rate increase for or any change of ownership of the water company until there has been a thorough inquiry by the Commission of its ownership, present, and prospective as well as of its assets and liabilities."

17/ Section 854, California Public Utilities Code: No person or corporation, whether or not organized under the laws of this State, shall, after the effective date of this section, acquire or control either directly or indirectly any public utility organized and doing business in this State without first securing authorization to do so from the commission. Any such acquisition or control without such prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this State shall aid or abet any violation of this section. (Added Stats. 1971, Ch. 1373.)

18/ Exhibit 4.

19/ At Sapp's direction, the district had briefly investigated the financial condition of the utility, and had obtained a letter from San Jose Water Works purportedly offering an easement over their Dutard Reservoir site for a pipeline connecting S.J.H.W. Co. to the district's Penitencia plant. The utility's water loss is estimated to be as high as 25 percent because of leaks, thefts, etc. The district lent technical assistance to locate a number of the leaks for the utility.

20/ The third director elected by Middelthon and Ufkes is A. J. Barranco of Miami, Florida.

21/ Appleton also appeared at the hearing on his own behalf as a creditor of the utility and on behalf of the Binkley interests. Appleton represents the utility in other ongoing litigation.

22/ Although any acquisition or transfer of control is void until approved by the Commission, Section 854 would not serve to prevent parties from contracting; their contract being considered an unexecuted contract for the sale. In such instance the transferee would merely be acting as the agent of the transferor who would remain responsible for operation of the utility (Dillingham v Schipp, (1957) 154 CA 2d 553, 559).



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- 23/ At one point in the hearing on cross-examination, Middelthon stated flatly "there is no debt to CMI", and went on subsequently to repeat "There is no enforceable indebtedness owing Continental Mortgage Investors. Let's put that issue to rest." (Page 54 of transcript.)
- 24/ We take notice that on March 8, 1976 CMI filed a petition in the U.S. District Court at Boston, Massachusetts, seeking relief under Chapter XII of the Bankruptcy Act. A decision in that matter, Proceeding No. 76-593, by Judge John Glennon, is currently under appeal. On October 21, 1976, a second filing, No. 76-2710 under Chapter X was filed.
- 25/ Under date of October 1, 1976, S.J.H.W. Co. filed an application for a \$40,000 loan under the California Safe Drinking Water Bond Law of 1976. The application was signed by G. Robert Binkley for the utility and estimated that improvements which would be made were the loan granted would serve to reduce operating costs at least \$5,000 a year.