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ORIGINAL

Decision 93419 AUG 18 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Frank Perrotta and Virginia Perrotta et al., Complainants, vs William E. Jones and Edna M. Jones et al., Defendants.	Case 10849 (Filed April 15, 1980)

Charles Perrotta, Attorney at Law, for Frank and Virginia Perrotta, complainants.
William E. Jones, for himself and Edna M. Jones, defendants.

O P I N I O N

Statement of Facts

After thrusting straight as an arrow three miles eastward from San Jose's Capitol Expressway over the flat Santa Clara Valley floor, Aborn Road reaches the base of the billowing foothills of the Mount Hamilton range, and after an abrupt 90-degree turn, steeply ascends another half-mile into the foothills before terminating at an elevation of about 1,000 feet over the valley. The vistas at that elevation are magnificent.

Straddling much of the last half mile of Aborn Road, and bisected by Lazy Lane, are the beautiful hillside orchards, pastures, and homesites of the 15 or so customers served by the Jones Water Company (Company). Begun in 1950 when a Dutch rancher-farmer named Humfeld had a well dug on his ranch, the water system grew slowly.

Originally it consisted of the 81-foot well, a five-hp automatic pump capable of delivering 55 gpm, and a 15,000-gallon capacity three-inch white-oak-roofed water tank. Although there are other wells on adjacent properties, this well appears to be the only really reliable well in the vicinity. (Even during the 1977 drought period the water level dropped only 10 feet.) (See Appendix A.)

Shortly after its installation, Humfeld began to provide water to neighbors, initially as an accommodation to augment their own supplies during the long arid summer, and later as an inducement and part of the consideration for the sale of land.[1/] To effect delivery, Humfeld built what the present owner describes as a "Mickey Mouse" gravity flow system, using second-hand pipe and valves, and adding sections as new customers were allowed to connect. Originally all services were metered and the charges and rates were allegedly those the city of San Jose applied in its Evergreen District. In 1977 the rates were changed, and these changed rates prevail today (see Appendix B).

Among the first neighbors to be allowed to connect were Stafford, Provedello, Wolf, Reider, Sunseri, and Frank and Virginia Perrotta (complainants). Some of these used the water both for domestic and agricultural use. In 1953 Humfeld contracted with the Perrottas' to run a pipeline across the latter's property. The consideration was to be an annual payment and delivery of a limited amount of free water for irrigation purposes. But the agreement also provided that "If First Parties [Perrottas] desire more water they must pay at the going rate." That pipeline has since been removed, but the Perrottas continue through today to purchase water year around for both domestic and agricultural purposes, augmenting their own inadequate well supplies.

1/ It would appear that, at least initially, Humfeld's intentions were only to be neighborly, helping those people with marginal wells, or no wells, as an accommodation. Allegedly, he said that he did not want to be a public utility, that the water was merely an accommodation for agricultural purposes.

In 1961 Humfeld sold four acres to William and Edna Jones (defendants). The contract included a written agreement (duly recorded), that Humfeld would provide metered domestic water sufficient for two single-family dwellings.[2/] In 1963 Humfeld sold another multi-acre parcel to Faltersack, again agreeing to furnish domestic water for two single-family dwellings.[3/] In 1964 Humfeld sold still another parcel to Weeks, agreeing as part of the inducement and consideration to furnish domestic water. At one point during this period Humfeld also ran a pipeline down Aborn Road onto the valley floor, a distance of about a mile to the Mirassou Winery property, and sold the winery water as part of a bulk-type agricultural accommodation to help the winery out during a very dry period. At another time during this period Humfeld began furnishing water for both domestic and irrigation purposes to Station KSJO (a local FM radio station) which has a transmitter and building on the hillside.

In 1968 Humfeld decided he wanted to retire from ranching and farming. Fearing that outsiders might come into the scene and purchase the Humfeld property, raising water rates and changing things, and desiring to ensure his own water supply, Jones purchased the Humfeld ranch and with it inherited the water system. Humfeld has since left the area and today resides in San Luis Obispo.

2/ The agreement stated that providing the water did not make Humfeld a public utility; that it was a neighborly convenience, and made to facilitate the sale of the property. Jones built his own home on part of this land, later subdividing the balance into two new parcels which he sold to Rupert and Rumph, each with a right to purchase water as part of the inducement to buy.

3/ Faltersack later subdivided his multi-acre parcel into three new parcels, building a home for himself on one parcel and selling the remaining two to Fraser and Adcock along with rights to purchase water. The Fraser parcel was later purchased by Jones and then resold to Edens. All three parcels today receive domestic water at the going rate from the Jones Water Company.

Growth continued, and Jones, after acquiring the company in 1968, added additional customers, in part because of the legacy left by Humfeld commitments, and in part in his own interest. For example, the Bell property was subdivided and today the resulting parcels are owned by Weeks and Cornelius, both of whom obtain domestic service from the Company. The extra parcel which resulted from Jones' 3-way split of his original Humfeld purchase (see footnote 2), was accommodated even though the Humfeld agreement called for only two services. Similarly, the extra parcel resulting out of Faltersack's 3-way split (see footnote 3) of his property was also accommodated with domestic service, this despite the fact that the original Humfeld-Faltersack agreement was for only two services.

But at some point, allegedly deciding that he did not want the 24-hour-a-day maintenance and supply problems involved with domestic service, and concerned that an earthquake might shift the strata of the underground aquifer supplying his system,[4/] Jones determined that he did not want to take on additional domestic service. The Sunseri property has a 4-inch pipeline belonging to the company crossing over part of it, and Sunseri and Humfeld had an agreement whereby Sunseri was entitled to a maximum of 60,000 gallons of water for agricultural uses each year. Sunseri had no home on the six acres, and merely used it for horses and farming. In 1971 Sunseri sold one acre to Cecconi, telling Cecconi that he was entitled to water. For a while Cecconi obtained water from the company for a horse and plants. But then Cecconi decided to build a home and asked for domestic water. At first Jones declined, stating that he did not want to provide additional domestic service, but then to avoid a lawsuit Jones was persuaded by his attorney to provide domestic service, and Cecconi joined the list of customers.

4/ The Mount Hamilton range features numerous fault lines in the surrounding terrain.

Several years later Sunseri determined to further divide his remaining five acres and asked for two domestic services. Jones refused and in the ensuing lawsuit in 1975, the Superior Court of Santa Clara County, basing its decision on contractual grounds only, ruled that Sunseri's agreement entitled him to only agricultural water, not domestic service. Besides denying service to Sunseri, Jones also denied service to Sharp, who owned land adjacent to Reider's property over on nearby Chaboya Road, and to Sordello, who owned the multi-acre property adjacent to Jones' property on the east, but further up Aborn Road.

In the meanwhile, ever since the Humfeld era, Perrotta, with a marginal well of his own, has been obtaining supplemental water from a company-metered service for his own domestic use and for that of a rental apartment on his 14-acre property as well as for agricultural purposes. Perrotta has two 5,000-gallon storage tanks which are valved to draw from both his own well and from this metered service. But in addition to this first metered service, sometime about 1970 Perrotta obtained from Jones a second metered service to provide water for agricultural purposes to Gutierrez, a Perrotta tenant, who, although he did not live on the Perrotta property, rented part of the 14 acres to raise horses and other animals. In 1977, Gutierrez gone, Perrotta determined that he wanted to place a mobile home on a hillside site above the midpoint of the southern border of his property (adjacent to the Shoblo Tract).[5/] Application was made to Santa Clara County

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5/ Perrotta states that the grass growing on the hillside during the arid summer months creates a fire hazard, and he wants to rent out some of the acreage. A residence would help to rent the land but he lacks funds to put up a permanent structure now. So for the time being, he has elected to place a mobile home there. The mobile home, incidentally, is the same unit that Adcock previously had on his property for a year or so while he constructed his permanent home. Later Perrotta hopes to sell the mobile unit and some land to the renter.

for a special conditional permit for residential occupancy of a mobile home, and in due course a public hearing was held as part of the environmental assessment. Jones and Weeks appeared in opposition. After numerous conditions were met, the County granted a special conditional permit for a period of five years. The permit became effective on December 13, 1979,[6] and thereafter Perrotta placed a mobile home on the site.

One of the County's requirements for issuance of the permit was that Perrotta had to have a water source and a 5,000-gallon storage tank. After Perrotta had made application, and Jones had informed Charles Perrotta (Perrotta's son) that the Company would not supply service to the proposed mobile home, Perrotta had informed the county authorities that he would supply the water from his own well.[7] On July 7, 1979, while Perrotta was engaged in

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6/ Jones and Weeks objected to a mobile home in the area for aesthetic reasons, concern it would devalue existing homes and lead to more mobile units, concern over adequacy of the water supply, and fear that it would lead to people of a more transient type. However, the county permit became final when Jones and Weeks failed to appeal its granting in timely fashion. They now contend they did not receive notice. (This latter matter is beyond our jurisdiction). No evidence was presented regarding adequacy of the water supply other than concern that some seismic disturbance might interrupt the supply - a potentiality common to all Bay Area water sources. The well has performed well throughout its existence, including the severe recent drought years.

7/ Perrotta testified that he had spent $2,000 in an effort to materially improve the flow from his own well, but that he had obtained only slight improvement. He insists, however, that his own well has sufficient production to supply the mobile home unit without drawing on the water obtained from the Jones' system connection.

digging a pipeline trench from his own well to the mobile home site, Mr. and Mrs. Jones came by the Perrotta property. The two Joneses concluded that Perrotta was intending to hook up the mobile home to the storage tanks which in turn draw on Jones' water through Perrotta Meter No. 1. There were angry words and Jones told Perrotta he was not to hook up to or touch their water system.

The next day the Joneses left the area and moved to Arnold, California where they have since resided.[8/] They have rented out their Aborn Road - Lazy Acres properties, and are in turn themselves renting in Arnold. Meanwhile the water system is under the care of Edens. In March 1980 Jones learned that Perrotta had received county approval for a mobile home. Concluding from earlier observations that Perrotta was using Company water for the mobile home, Jones wrote the county fire marshall reiterating that his company had not agreed to supply water and summarizing his view of the situation. In concluding his letter he stated: "We will, therefore, discontinue water service to the Perrotta properties on or about Thursday, March 20, 1980." Jones then instructed his local representative Edens to disconnect the service to Perrotta. On March 20, 1980 service was disconnected.

On April 15, 1980, Perrotta filed the instant complaint with the Commission for (1) a declaration that the water system is a public utility, (2) immediate restoration of service, (3) an

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8/ At the hearing Jones testified that he and his wife anticipate making Arnold their permanent home. They would like to sell their properties on Aborn Road and Lazy Lane, including the water system. While several prospective buyers have expressed more than mere interest, financing has so far proved to be the problem.

order enjoining future disconnections and prohibiting discrimination between customers, (4) exemplary and punitive damages, and (5) actual damages.

On April 21, 1980, this Commission issued Decision (D.) 91716, our interim order that Jones immediately restore service and file an answer to the complaint. Jones complied fully.[9/] A duly noticed public hearing was held on May 16, 1980 before Administrative Law Judge (ALJ) John B. Weiss in San Francisco. Both parties appeared and presented testimony and evidence substantially as set forth in the foregoing. At conclusion of the hearing the matter was submitted.

Discussion

The threshold issue to be resolved in this complaint is whether or not Jones' Water System is really a public utility. He asserts that neither he nor Humfeld ever intended their water purveyance activities to be construed so as to render their system a public utility. He strongly insists that the intentions were to furnish water merely as an accommodation to neighbors, and points to the agreements he and Humfeld signed with some of these neighbors, agreements which described the arrangements as "neighborly accommodations" which could be broken at any time by either party.

Public Utilities (PU) Code § 216 defines a "public utility" as including every "water corporation, ...where the service is performed for or the commodity delivered to the public or any portion thereof" and "for which any compensation or payment whatsoever is received." Section 2701 further states that "Any person, firm...owning...any water system...who sells...water to any person ...is a public utility, and is subject...to the jurisdiction, control,

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9/ Nonetheless, the water was still turned off for a period of 20 days to Perrotta's home and rental apartment.

and regulation of the commission." And finally, § 2704(c) of the Code provides in relevant part that "Any owner of a water supply not otherwise dedicated to public use and primarily used for domestic or industrial purposes by him..., who...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...purposes is equally available, is not subject to the jurisdiction, control, and regulation of the commission."

Certainly in the instant matter defendant and his predecessor both provided water for compensation. But in essence Jones contends that there was no dedication, that the sales were merely as an accommodation matter to neighbors.

Years ago, the California Supreme Court in Del Mar Water etc. Co. N. Eshleman (1914) 167 C 666, 680 stated "Even a constitutional declaration cannot transform a private enterprise or a part thereof into a public utility and thus take property for public use without condemnation and payment." Consequently, definitions of public utilities contained in the PU Code must be construed as applicable only to properties as have, in fact, been dedicated to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto (Allen v Railroad Commission (1918) 179 C 68, 69). But dedication can be manifested in many different ways, and § 2704(c) cannot be applicable in a water supply situation where at least some of the recipients take water, not as an accommodation, but rather as a matter of right. Such a system has become one "otherwise dedicated to public use". In the situation at bar, some of these neighbors purchased their properties from Humfeld with the availability of water a named inducement to purchase (for example, Faltersack, Weeks and Jones). In his turn, Jones too has sold land using the availability of water as an inducement (for example, Rupert and Rumph). The principal determinative characteristic of a public utility is that of service to, or readiness to

serve, an indefinite general public, or a portion of that public, which has a legal right to demand and receive service (Story v Richardson (1921) 186 C 162). The fact that the owner of the water system may have entertained a different intention is of no consequence, for when land is sold to members of the public coupled with the inducement of water service, and the seller continues to furnish water services to the land purchasers for compensation, there has been a dedication to the public use (Rose v Campbell (1961) 58 CPUC 734). It matters not what the understandings or agreements with the other customers provide, it is a public utility (In Re The Summit Group (1967) 67 CPUC 7). Furthermore, once dedicated to public service, subsequent attempts to confine operations to strictly private agreements to supply water will not deprive the Commission of jurisdiction (Boiseau et al. v Loyola Water Co. and Los Altos Country Club Properties, Inc. (1929) 32 CRC 548). The Jones Water Company is a public utility.

Are the Perrottas entitled to receive water from the Company? PU Code § 453 prohibits any public utility from discriminating or granting "any preference or advantage" to any person. A public utility has an obligation to serve all customers in its service area who may desire service, and such service must be at its established rates (San Gorgonio Water Co. (1913) 2 CRC 706). A public utility may not gerrymander its service area extensions to exclude certain properties; rather it must be guided by the rule of reasonableness to follow logical natural boundaries and avoid creating small unserved enclaves or peninsulas (Radisavljevic v Cal-Am Water Co., D.90262 dated May 8, 1979 in Applications 58345 and 58464). If there are disputes over boundary determinations this Commission has exclusive jurisdiction. In the instant case the Perrottas are within the boundaries of the Company's service territory and are entitled to receive domestic and/or agricultural water service both to their home and rental apartment, and

to their mobile home.[10] Whether service should be by one or more meters is for the Company to determine. As long as Perrotta has a permit for his mobile home from the county, it must be served if service is requested. The county, not Jones or this Commission, is the authority to determine what structures may be erected, or the use to which the land may be put.

As noted earlier, by D.91716 we ordered immediate restoration of service to the Perrottas. Defendants fully complied and service was restored immediately after defendants were served with our interim order and talked to our ALJ. This service continues.

Complainants ask that we make an order enjoining future discontinuations and prohibiting discrimination between customers.[11] We do not believe such an order to be necessary in the instant situation. It would appear that much of the problem in the present matter arose out of the basic misunderstanding held by the Joneses of their status vis-a-vis their customers and would-be customers in the service area. Now that defendants know their status as a public utility, we believe they will fully meet their responsibilities and obligations as a public utility, given patience and understanding on all sides.

10/ For example, this would also take care of Sunseri. Certainly if Sunseri now desires water service, domestic or otherwise, he need only make application and he would be entitled to service, this notwithstanding the result in the Sunseri-Jones lawsuit in 1975 in Superior Court. Although before the Commission has acted, a Superior Court may have jurisdiction to determine rights among parties before it, and to render a judgment binding among the parties, a later decision by the Commission within its jurisdiction will have the effect of superseding the prior judgment and rendering it of no effect whatsoever insofar as it conflicts with the Commission's order (Hickey v Robey (1969) 273 CA 2d 752).

11/ The law already provides that a public utility may not discriminate in any manner (PU Code § 453).

Finally, complainants ask that we assess exemplary and punitive damages against defendants, as well as actual damages in the amount of $1,000. This we have no jurisdiction to determine. Therefore, complainants' request for damages is brought in the the wrong forum.

Findings of Fact

1. In or about 1950, Humfeld, a rancher-farmer owning land located on Aborn Road in the highlands area east of San Jose, constructed a well and thereafter began operating a water system supplying water for compensation to neighbors, initially as an accommodation.

2. In or about 1949 Perrotta purchased land adjacent to that of Humfeld in the area. Beginning in 1953 Perrotta purchased water from the Humfeld system, initially for agricultural purposes and to augment inadequate supplies from his own well.

3. In 1958 Perrotta constructed his home on his land and since then has purchased water for domestic purposes from the Humfeld system.

4. In the early 1960 period Humfeld sold parcels of his property to members of the general public, offering water service as an inducement to purchase, the buyers to receive water service as a matter of right and not as an accommodation.

5. One of the first purchasers under the arrangement was Jones.

6. In 1968 Humfeld sold the remainder of his property in the Aborn Road area, and the water system, to Jones who continued to operate the system.

7. Since 1968 Jones has sold parcels of the lands he acquired to members of the general public, also offering water service as an inducement to purchase, the buyers to receive water service as a matter of right and not as an accommodation.

8. The territory served by the water system, known today as the Jones Water Company, embraces those parcels of land now or previously held by Humfeld, Perrotta, Jones, Sunseri, Faltersack, Weeks, Rumph, Rupert, J. Wolf, Bell, Cecconi, Provedello, R. Wolf, Adcock, Edens, Reider, Stafford, and Radio Station KSJO.

9. The water supply available has always been adequate to serve the service territory.

10. In more recent years Jones on occasion has refused to furnish water service to adjoining property owners or to expand his service territory.

11. About 1977 Perrotta proposed to erect a mobile home for rental purposes on a portion of his acreage and sought county approval to do so. Jones and Weeks appeared in opposition to this proposal and Jones refused water service for it.

12. Perrotta, after obtaining county approval, placed a mobile home on a portion of his acreage and for water supply purposes connected the mobile home to his own well. By valving the lines between his well and tanks, Perrotta could draw water for the mobile home from Jones' water system.

13. When Jones learned of the placement of the mobile home, he caused Perrotta to be disconnected from the Jones' water system.

14. Perrotta obtained a temporary order (D.91716) restoring service to his property.

15. This Commission by PU Code § 2106 is denied jurisdiction to find and award damages to one injured by acts of a public utility.

Conclusions of Law

1. By offering water service rights as an inducement to purchase land and subsequently furnishing water service for compensation to the purchasers, defendants and their predecessor in interest manifestly dedicated their water system to public use, and today the system meets the definition of a water corporation "public utility" as set forth in PU Code §§ 216 and 2701.

2. PU Code § 2704(c) does not serve to remove the water system from public utility status in that at least a portion of the water system is "otherwise dedicated to public use."

3. The Jones Water Company is a public utility subject to the supervision and regulation of this Commission.

4. As a public utility, under the provisions of PU Code § 453, the Jones Water Company may not discriminate by denial of service to any person within its service territory.

5. As a property owner or tenant within the existing service territory of the Jones Water Company, complainants are entitled to receive water service for each and every legally established residence on their property, including the mobile home.

6. Complainants are in the wrong forum to obtain damages; the appropriate forum is any court of competent jurisdiction in this State.

7. Defendants should be required to file tariffs with the Commission under PU Code § 489, and to comply with PU Code § 584.

8. Although the rates set forth in Appendix B are not conducive to conservation objectives, based as they are on a declining block design, we do not address that issue in this type of a complaint proceeding. However, defendants are on notice that at such time as application may be made for rate relief, a change in the rate structure and rate design will be required.

O R D E R

IT IS ORDERED that:

1. Within 15 days after receipt of an application from Frank and Virginia Perrotta (complainants) for water service to their mobile home, William E. Jones and Edna M. Jones (defendants) shall provide a separate individual service to that mobile home. When that additional service connection is provided, the temporary order contained in D.91716 restoring service will stand dissolved.

2. The damages awards requested are denied.

3. Within 30 days after the effective date of this order, defendants shall file a tariff schedule with the Commission, such schedule to consist of rate schedules, attached as Appendix B, service area map (to a scale of approximately 1 inch equals 100 feet), rules, and copies of printed forms to be used in dealing with customers. Such filings shall comply with General Order Series 96 and shall become effective four days after filing.

4. Defendants shall prepare and keep current system maps of the water facilities as required by § 1.10.a. of General Order Series 103. Within six months after the effective date of this order, defendants shall file with this Commission two copies of the map for the system.

5. Defendants shall set up formal books of account in conformity with the Uniform System of Accounts for Class D water utilities as prescribed by this Commission and record therein the appropriate charges to plant accounts.

This order becomes effective 30 days from today.

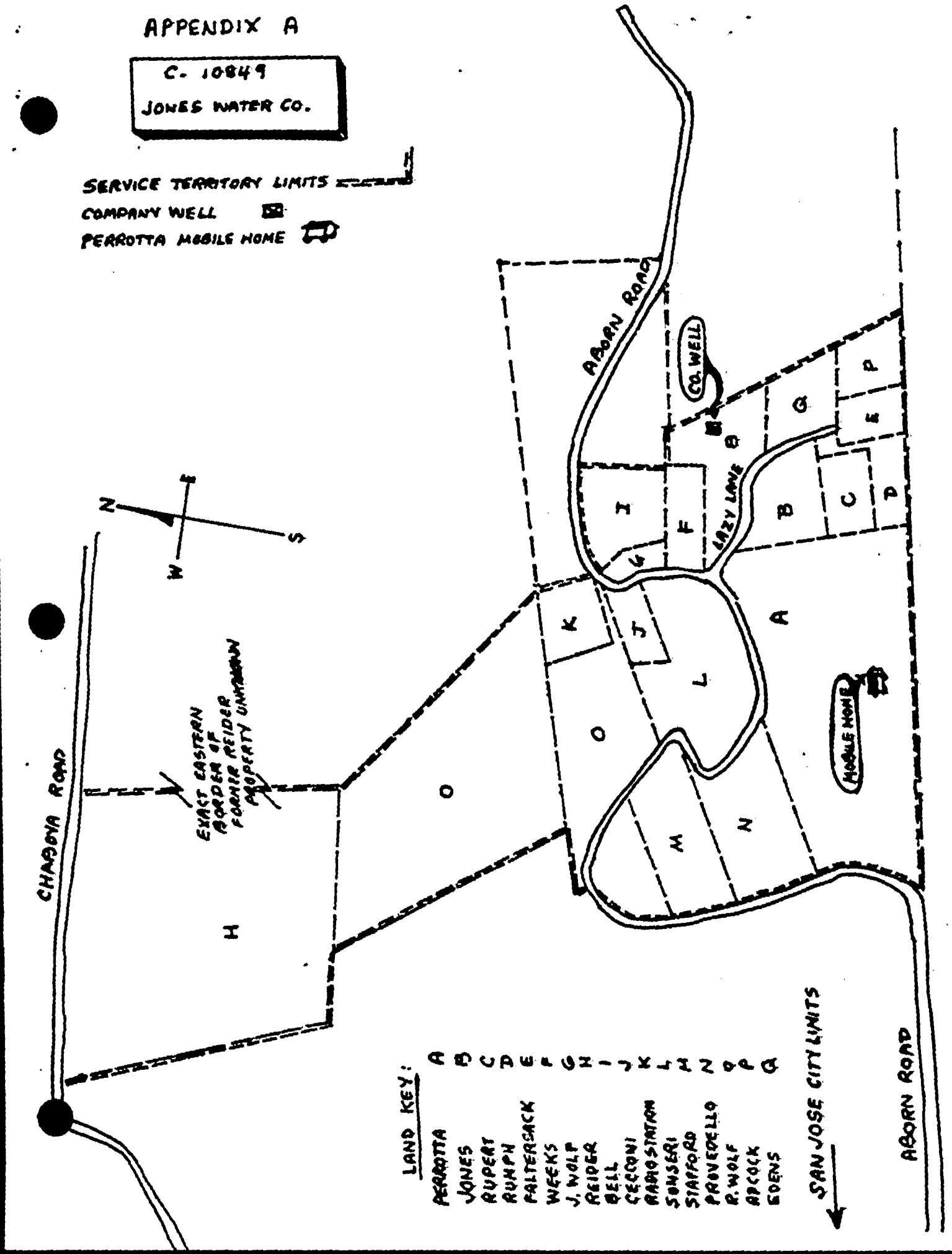
Dated AUG 18 1981, at San Francisco, California.

I concur:
This order is compelled by the law under which this Commission operates, nevertheless actually public utility status to this water company will only result in problems for the customers, the company and the Commission. This is precisely the type of company which does not benefit from our regulation.
Richard D. Gravelle

John E. Bryson, President
Richard D. Gravelle
Leonard M. Grimes, Jr.
Victor Calvo
Priscilla C. Grew
Commissioners

APPENDIX A

C. 10849
JONES WATER CO.



APPENDIX B

METERED SERVICE

APPLICABILITY

Applies to all metered water service.

TERRITORY

Jones Water Company, Aborn Road, Santa Clara County.

RATES

Monthly Quantity Rates:	Per Meter Per Month
First 500 cu.ft.	$6.00
Next 1,000 cu.ft.	6.00
Next 1,000 cu.ft.	5.00
Over 2,500 cu.ft., per 1,000 cu.ft. or portion thereof	4.00
Monthly Minimum Charge	6.00