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Decision 97-02-040 February 19, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

West San Martin Water Works, Inc., )  
Complainant, )  
vs. )  
San Martin County Water District, )  
Defendant. )

**ORIGINAL**

Case 96-06-042  
(Filed June 24, 1996)

Jose E. Guzman, Jr., Attorney at Law, of  
the law firm of Nossaman, Guthner, Knox  
& Elliott, and Robert Ukestad, for West  
San Martin Water Works, Inc., complainant.  
Marc G. Hynes, Attorney at Law, of the law  
offices of Atkinson, Tarasyn, LLP, and  
Alan Black, for San Martin County Water  
District, defendant.

### O P I N I O N

#### Background and Statement of Facts

In the late 1970's period the area in and around the small rural community of San Martin, approximately 20 miles south of San Jose in Santa Clara County, was served by two small water public utilities, San Martin Water Works (SMWW), and West San Martin Water Works, Inc. (WSMWW). Their respective service areas lay east and west of old Monterey Highway and the adjacent Southern Pacific railroad tracks.

#### The SMWW System

To the east the SMWW system was divided into two areas, with essentially separate but interconnected water systems. The larger served the approximate 100 residential and small business customers in the village area located between old Monterey Highway and Llegas Creek from two wells and a hydropneumatic pressure tank

in the village. SMWW's other service area lay to the east of Llegas Creek, extending for two miles along both sides of San Martin Road, and serving its approximate 70 customers by gravity flow from a hillside spring located at the eastern end of San Martin Road on an adjacent property owner's ranch. Both SMWW's service areas were poorly served by inadequate mains in the town area, and a 85-year old 2-inch main from the spring in the eastern area.

In 1977, after numerous complaints by customers, the Santa Clara County Fire Marshal, and the County Environmental Health Services Department about poor service, lack of pressure, no chlorination, and frequent outages, the Commission after a hearing ordered Earl Powell, the owner of SMWW, to formulate and file rehabilitation and financing plans for SMWW. By June of 1979, additional complaints and Powell's failure to address the earlier order led the Commission to issue its Order No. 52 instituting an investigation into all aspects of SMWW's problems.

#### The WSMWW System

On the west side of old Monterey Highway, the WSMWW system by 1979 served its 85 customers from two wells through a hydropneumatic pressure tank system. The system had been updated to Commission General Order 103 standards in 1961 and was well maintained and efficiently managed. By 1978, the Hays Ranch adjoining WSMWW was being developed as the "Elestan Project." The developer, installing wells and elevated storage tanks as part of the project, also sought to incorporate his water system into WSMWW's system. By doing so the WSMWW system would be converted into a gravity flow system with abundant water. Accordingly, early in 1979 WSMWW sought Commission authorization for the expansion and integration.

#### The County of Santa Clara Transportation Agency (Agency)

Meanwhile, in a parallel set of events, Agency had secured funding to double its bus fleet, and had determined to add

office, maintenance, fueling, and bus washing facilities to service 60 buses on a multi-acre site located on Murphy Avenue off San Martin Avenue in SMWW's service territory. The County's South County Airport was located to the south of San Martin Avenue. The airport had no water for fire protection, being dependent on a small well on the airport premises for its supply. Water was needed for both the bus terminal facility and the airport, according to Agency.

A proposal had been made to form an assessment district to construct a new water system to connect with WSMWW's system and to be operated by WSMWW. This would have also served a proposed South County Office project which was to be located on the south periphery of the proposed assessment district. At its January 1979 meeting, the Santa Clara Board of Supervisors considered this assessment district project, but refused to sanction it, indefinitely tabling the request.

Agency, not wanting to develop, maintain, and operate its own wells and distribution system to serve the bus terminal and South County Airport, was equally determined that it wanted nothing to do with the uncertainties inherent in the aged, dilapidated, and misrun SMWW's system. Faced with having to act promptly or lose federal Urban Mass Transportation Agency (UMTA) funds, Agency sought to obtain its needed water from the WSMWW system.

To get water from the WSMWW system west of old Monterey Highway to Agency's facilities would require some adaptation of WSMWW's system, the construction of approximately 4,000 feet of 12-inch and 10-inch mains, and necessitate boring under old Monterey Highway and the Southern Pacific tracks, as well as hanging a water main under the bridge spanning Llegas Creek on San Martin Avenue. But most importantly, it would require Commission authorization for WSMWW to encroach into SMWW's territory if it were to serve.

Earlier, when the Elestan Project was still on the drawing boards, Agency had initiated discussions with WSMWW on ways to obtain water from WSMWW. WSMWW offered to purchase SMWW, but the latter's owner, Earl Powell, steadfastly refused to sell the utility. Frustrated with Powell's delays, promises, and inability to address his service problems, the County Fire Marshal and the County's Environmental Health Services Department supported Agency's concept of a WSMWW encroachment into SMWW's service territory, not only to serve Agency's needs but also to provide an alternative extension opportunity to existing and potential customers who wanted the alternative of a constant, adequate volume of water under adequate pressure. Faced with the fact that small WSMWW did not have financial resources to incur the \$130,000 cost of the proposed Agency's 12-inch main extension, the understanding reached between WSMWW and Agency was that Agency would contract for and provide the funds (80% from federal UMTA funds and 20% from a combination of State Transportation Development Act gasoline sales tax shares to the County and local Transit District sales tax funds) to build the main extension as a contribution in aid of construction to WSMWW with the facilities becoming the property of WSMWW after construction.

Agency, to qualify to receive the federal funds, was under pressure to award the contract (bids had already been received) as soon as possible. But before it could do this there had to be application to the Commission, and Commission approval for WSMWW to encroach into the adjacent SMWW territory to serve Agency. WSMWW's standard tariff extension rules permitted the utility to take contributions in aid of construction extensions without refunds to the contributor. Thus, the main extension would be a simple contributed main extension to secure service; in this instance from the County Agency rather than a developer. Accordingly, WSMWW filed Application (A.) 58540 on December 21,

1978 for Commission authorization to encroach into SMWW's service territory to serve Agency and others within SMWW's territory.

Public hearing was held in Morgan Hill on July 24, 25, and 26, 1979 before Administrative Law Judge (ALJ) John B. Weiss. But the ALJ would not submit the proceeding for decision until Agency, a party to the proceeding, provided assurance that once installed, the main extension would be contributed to WSMWW as part of the latter's water supply system without provision for refund. By letter dated July 30, 1979, Louis Montini, Director of Transportation Development of Santa Clara County's Transportation Agency, affirmed the County's position (Exhibit No. 11 in the proceeding) that the main once installed would be a contribution to the utility without provision for reimbursement. With receipt of this late-filed exhibit, the matter was submitted. Decision (D.) 91496 was issued on April 2, 1980 by the Commission authorizing the requested encroachment by installation of the 12-inch main to Agency's Murphy Avenue property, and WSMWW was authorized not only to provide service under its tariff rates to Agency, but also through subsequent extensions from that 12-inch main to any and all customers who applied, including existing and potential customers of SMWW, whether in the village or eastern areas of SMWW's service territory.

Thereafter, the main extension was completed and in February of 1981 WSMWW commenced public utility water service (pursuant to its filed tariff) to Agency. On February 27, 1981 Agency's Utilities Coordinator, Del Bechtoldt, wrote releasing the main to the utility (Tab D to complaint). From February 27, 1981 until May 28, 1996, WSMWW provided service from this main to Agency, paid annual franchise fees to the County for it, and maintained the main as its property. In the 1981-1982 time frame, an 8-inch lateral off the 12-inch main was installed by WSMWW, north to south, in the Depot Avenue right of way, and in the 1988-1989 time frame, an 8-inch lateral off the same 12-inch main

was installed by WSMWW, north to south, in the Llegas Avenue right of way. These 2 laterals served 10 customers through 12 separate meters until May 28, 1996.

The San Martin County Water District (District)

By 1985, it became apparent that Earl Powell, SMWW's owner, essentially had abandoned operation of his system, creating a crisis situation. By D.85-08-020 issued August 7, 1985 in an interim order (made permanent by D.86-08-045 on August 16, 1986), the Commission authorized WSMWW to interconnect the two systems and to provide water service to SMWW's customers. Thereafter WSMWW operated SMWW. However, under that arrangement, with Powell's estate in a Court-appointed Conservatorship, funds could not be obtained to rehabilitate the antiquated SMWW system, and WSMWW indicated it could not indefinitely operate and serve SMWW. Accordingly, in November of 1986, the County Health Services Department initiated steps to get a county services district organized to legally acquire the SMWW system from Powell's estate; such a district being better able to obtain grants and/or Safe Drinking Water Bond Act (SDWBA) loans to reconstitute the system than could a privately owned public utility such as WSMWW.

On June 19, 1987, the County had Bob Ukestad (Manager of WSMWW) appointed as Receiver for SMWW pending formation of a district. After the Local Agency Formation Commission on June 8, 1988 approved formation of a county services district, the Board of Supervisors of Santa Clara County held public hearing on July 12, 1988, ordering an election on September 27, 1988, which resulted in the Supervisors constituting the District as of October 4, 1988.

On March 18, 1993, Superior Court authorized the Powell estate to sell the SMWW system to the naissant District for \$32,000, and accordingly, the Court-appointed Conservator of the Powell estate filed A.93-06-004 for authorization of the Commission

for sale of the system to District.<sup>1</sup> On September 1, 1993, the Commission issued D.93-09-011 authorizing the sale and transfer to District of the system, exclusive of its well.

District thus acquired the SMWW system and service territory, apart from the WSMWW encroachments and their facilities. To serve the remainder of the SMWW system, District acquired a new well site and obtained an SDWBA loan; installed a new well and pump; and constructed an 8-inch main eastward from the Murphy Avenue area to serve its customers along San Martin Avenue, approximately 70 in number. In May of 1994, Ukestad requested to be relieved as Receiver as District became operational. As the new well was not in operation until early 1996, District purchased water for this eastern area from WSMWW, taking delivery off WSMWW's 12-inch main acquired 14 years earlier from Agency. To serve its 100 village area customers, District continued purchasing water from WSMWW's 12-inch main, as it lacked any connection from its well to the village area.

#### The Present Situation

Having brought its own well into operation in 1996, District initiated discussions with WSMWW with the objective of acquiring WSMWW's 12-inch main, the 8-inch mains, and the WSMWW customers served directly or indirectly from those mains. Such acquisition would enable District to serve all customers in the District's area from District's own new well, and obviate the necessity for future water purchases from WSMWW. The latter offered to sell the 12-inch main for \$100,000. Of necessity, such a sale would effectively remove WSMWW's service east of old

<sup>1</sup> Pursuant to provisions of Public Utilities (PU) Code § 851, no public utility other than a railroad may sell or otherwise dispose of the whole or any part of its system necessary or useful in performance of its public utility obligations without first having secured from the Commission authorization to do so.

Monterey Highway and transfer the Agency and WSMWW's customers on the two 8-inch mains off the 12-inch main to SMWW (in essence, the encroachment area would have to transfer to District).<sup>2</sup> When asked for evidence of title to the 12-inch main, WSMWW produced the July 30, 1979 Montini letter and the February 27, 1981 Bechtoldt letter (respectively, Exhibit No. 11 in the 1979 proceeding and Tab C to the present complaint). District discussed ownership of the 12-inch main with certain County personnel including a Deputy County Counsel, and assertedly was informed that as the County Board of Supervisors had not adopted any measure authorizing the earlier transfer to WSMWW, the main still belonged to County. Interestingly enough, it appears that Agency, as the consequence of record destructions and office moves over the intervening many years, no longer had complete records relating to the circumstances of the earlier transfer.

District also contacted the Commission's Water Branch and assertedly was told that any such contribution to WSMWW should have been pursuant to provisions of Rule 15, Main Extension Agreements, and be recorded in the utility's files available for public inspection. District asserts it was told that in the absence of any such record, District could and should go ahead and take over the 12-inch main and use it.

Accordingly, District concluded that WSMWW had no ownership interest in the 12-inch main, and on April 8, 1996 had its attorney write WSMWW's manager Ukestad that as of April 10, 1996 District would take over the main and thereafter invoice all users receiving water from the main - water which would come from District's new well. Ukestad asked for delay to discuss the

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<sup>2</sup> And such a sale and transfer of this portion of WSMWW's system would require prior authorization by the Commission before it could be accomplished.



matter. However, on May 28, 1996 (Memorial Day), District called again to inform Ukestad that it was immediately taking over the main. A confrontation occurred at the main and a County Deputy Sheriff arrived.

Without display of any evidence of legal process or of any other written authority, the Deputy Sheriff allowed District to take control of the 12-inch main. By this action WSMWW also lost control of its 4,150 feet of 8-inch lateral mains in Depot and Llegas Avenues, and lost Agency and its ten other customers on those avenues as well. District took over possession and control east of old Monterey Highway.

The Present Complaint

On June 24, 1996, WSMWW filed Case (C.) 96-06-042 alleging an unlawful takeover and assumption of control of certain of its public utility functions, property, and customers by District in direct violation of D.91496, a taking without just compensation or due process. By its complaint WSMWW asked that the Commission issue a Cease and Desist Order requiring District to cease and desist from interference, and to return control to WSMWW. It further asks for an order confirming that the main, the lateral mains, and the customers are WSMWW's property, and that District be required to turn over to WSMWW any charges billed and collected from customers served from the main and the lateral mains, as well as costs.

District's Answer

By its September 16, 1996 answer, District asserted that it was entitled to ownership of the disputed property because no legal transfer had been made to WSMWW; that because of its entitlement to ownership, it had also taken action to operate it and to serve the customers receiving service from the facilities taken. District asked that the Commission deny the complaint and request for a Cease and Desist Order.

The October 11, 1996 Public Hearing

A duly noticed public hearing was held in San Francisco on October 11, 1996 before ALJ Weiss. Both WSMWW and District were represented by counsel. Evidence was received from both WSMWW's manager Ukestad and District's Chairman Black. After closing argument, the matter was submitted for decision.

Discussion

After three days of hearing in Morgan Hill in 1979, as an integrated resolution of numerous related issues from five consolidated proceedings, the Commission on April 2, 1980 issued D.91496. Utility officials from both WSMWW and SMWW, County and Agency officials, customers, and interested parties all participated in the evidentiary hearing. Central and fundamental to the resolution of the issues, and the cornerstone of the Commission's decision, was the accepted Agency inducement in a quasi-judicial proceeding to provide and turn over to WSMWW the crucial 12-inch main without charge or requirement for reimbursement. County and Agency officials with apparent authority offered the inducement, constructed, and turned over the 12-inch main to WSMWW, and for the past 15 years Agency has paid for the water delivered to Agency.

Clearly, at the time, without having represented and induced the Commission to grant encroachment authority to WSMWW on condition of contribution of the main, County's Agency could not have obtained the reliable water service it required in time to have obtained the federal funds it counted on for its bus expansion program.

Agency's facilities were sited within the filed service territory of a Commission regulated water public utility, albeit one mismanaged and under concurrent Commission investigation, but a utility clearly unable to deliver water to its existing customers much less to meet Agency's needs. As the County Supervisors did not want to create a new services district to serve Agency, and

thus become involved with PU Code § 1501 compensation claims,<sup>3</sup> and Agency did not wish to develop and maintain a water system of its own; the only reasonable and timely available service was neighboring WSMWW which in turn could serve only if authorized to encroach by the Commission. And, given the requirement to serve not only Agency, but also any and all then present or potential SMWW customers, the conditions for such encroachment authorization had to be a contribution so as not to impair WSMWW's financial integrity, and relieving, at least to some degree, the service pressures on moribund SMWW.

The keystone was contribution of the 12-inch main. WSMWW was unable financially to itself finance the estimated \$130,000 cost to install a 12-inch main eastward from its existing facilities west of old Monterey Highway, crossing the highway and Southern Pacific tracks and the Llegas Avenue bridge, via San Martin Avenue. Without the incentive of the contribution it would have been fruitless for WSMWW to have filed A.58540 to encroach. Both County and Agency knew this.

Historically, the Commission has protected service territories of water utilities within its jurisdiction as long as there is reasonably satisfactory service. The SMWW area of the village (between old Monterey Highway and Llegas Creek) was being served by SMWW, albeit poorly. The eastern area beyond Llegas Creek, the area where Agency's Murphy Avenue bus terminal was to be expanded, was in dire straits without any adequate water source locally available and no financing reasonably available to immediately ameliorate the situation even if Powell could be legally dislodged as owner. To bring in WSMWW as Agency wanted,

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<sup>3</sup> PU Code § 1501 provides that a regulated privately owned public utility must be compensated for damages where a political subdivision extends facilities into the service area of the privately owned public utility.

meant Commission authorization to stretch across and invade a significant portion of SMWW's territory. But WSMWW lacked the financial resources to bridge the intervening space to serve without contribution from some source of the 3,000 plus feet of 12-inch main extension. Commission authority to encroach depended upon Agency contribution of the needed mains. And that precisely was why the Commission held up submission of the WSMWW application to encroach proceeding in 1979. Commission would not proceed until furnished with the written confirmation from Agency of such contribution as Agency had offered as the inducement. The Montini letter on County letterhead was provided to the Commission in response. Contribution of the 12-inch main to WSMWW was the key ingredient that induced the Commission to permit encroachment, since the main would not only serve Agency's needs, but would also provide a means to bring a well-spring of water to the eastern area of SMWW and provide a basis for lateral extensions as WSMWW customer demand and financing developed.

As WSMWW took over the contributed main and began providing service through it with water from its facilities west of old Monterey Highway to the Murphy Avenue bus terminal, the area served, including the bus terminal area, ceased being part of SMWW's service territory and became part of the WSMWW's service territory. And when during the years following, as authorized by D.91496, WSMWW constructed and put into operation an additional 4,150 feet of 8-inch lateral mains off the 12-inch main to serve additional customers on Depot and Llegas Avenues, these further areas also ceased being SMWW's territory, and became part of WSMWW's territory.

During the 15 years of WSMWW's possession and maintenance, all the customers served, including Agency, from the 12-inch and lateral mains, have been WSMWW's customers; the utility has paid the costs of maintenance, extensions, meter reading, billing and franchise taxes. It is unconscionable that County

representatives would today, 17 years after its representatives with apparent authority made the inducement and transfer, and after receiving the benefits of service it otherwise could not get, and receiving taxes, infer and inform District that County and Agency representatives had deliberately misled the Commission in 1979 in a formal proceeding, in violation of Rule 1 of the Commission's Rules of Practice and Procedure.<sup>4</sup>

In addition, it appears that there had to have been some County authorization for the use of a Deputy Sheriff, without any apparent due process, to assist an outside party, the District, (an entity with absolutely no color of right whatsoever to either the 12-inch main or the 8-inch lateral mains, much less the acquired WSMWW customers, including Agency) to enter upon WSMWW's service territory, shut off the service valve, and usurp WSMWW's service and revenues. This appears to have been an inexcusable and excessive use of the County's police powers.

The Commission makes no claim to adjudicate any question of the validity of the 1979-81 transfer and contribution of the 12-inch main from Agency to WSMWW. We are construing, for purpose of our regulatory authority, the existing rights of WSMWW, a regulated water utility under our jurisdiction. Much more than that transfer and contribution are at issue. The financial impact

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<sup>4</sup> Rule 1 of the Commission's Rules of Practice and Procedure stated in 1979-81:

"Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

upon WSMWW is not insignificant. Loss, not only of its own financed 8-inch laterals off the 12-inch main, and the customers taken with this unauthorized seizure of its service territory, is significant and can impact the ability of the utility to serve.

It seems sufficient to say that, finding, as we do that WSMWW has been in possession with at least a very strong color of rights thereto for a long 15 years past, and repeatedly has exercised acts of ownership over the 12-inch main (including adding over 4,000 feet of the lateral 8-inch mains off that 12-inch main, maintaining the 12-inch main, and regularly paying the County franchise taxes on that main while selling water over that 12-inch main to Agency from WSMWW's well facilities enhanced for that service), that the Commission must indulge in the presumption that WSMWW is the owner of the 12-inch main.

But apart from any possible issue of the 12-inch main, the 8-inch lateral mains and services were the property of WSMWW. And the customers of all the mains, including the 12-inch main, were and are customers of WSMWW. They are part and parcel of the service territory extension approved by the Commission in D.91496 and continue to be part of the WSMWW system and service territory customers. Neither the County, Local Agency Formation Commission, nor District has any legal authority or color of right to regulate or determine any issue concerning use of these mains or who serves these customers. The abrupt seizure and severance of service, usurping WSMWW without Commission authorization is an unreasonable interference with the Commission's jurisdiction and regulatory authority. County representatives and District appear to have overlooked the legal fact that the designation and regulation of the service territories, as well as the construction, design, operation, and maintenance of such public utilities, are a matter of statewide concern: Control of these aspects of utility extent and operation is not a County or District affair. Article XI, Section 8 of the California Constitution declares that:

"A City, County, or other public body may not regulate matters over which the Legislature grants power to the Commission..."

When a County with an agency situated within the Commission determined service territory of a public utility under the jurisdiction of the Commission wants water service, it has several choices: it must either construct and maintain its own well source, storage, and distribution system within the agency's site; purchase the water it desires from the public utility under terms of that utility's tariff; negotiate and contract with the public utility (subject to Commission authorization pursuant to provisions of PU Code § 851) for a purchase and transfer of all or part of the utility; or institute in Superior Court an appropriate eminent domain action subject to constitutionally guaranteed compensation for such taking as will be determined in the proceedings.

Neither the County, the Local Agency Formation Commission, nor any other public body may determine the extent of a public utility's service territory where that utility is under Commission jurisdiction. In 1979, Agency's facilities at issue were within the service territory of a Commission regulated public utility, SMWW. After the inducement of a main contribution by County and Agency officials, the Commission authorized an encroachment by neighboring WSMWW, another public utility under Commission jurisdiction, in an effort not only to assist County's Agency, but to bring some relief as well to under-served customers of SMWW as the latter's problems were explored. The encroachment authorization was not temporary. The facilities added and customers acquired, as well as the territory transferred by encroachment, remain WSMWW's system today.

By its formation as a county services district in 1988, District acquired nothing but recognition as a legal entity. Formation alone did not authorize it to obtain a system, service territory, or customers belonging to others. It obtained the SMWW

residue after D.91496 by a Superior Court and Commission authorized sale and transfer (D.93-09-011) from the Powell estate of the SMWW system. It did not acquire the encroachment facilities, territory, or customers authorized to WSMWW by D.91496 in 1980.

District's acts and actions in entering upon WSMWW's territory on May 28, 1996, and seizing and taking over possession, operation, and control of the 12-inch main, the associated 8-inch main laterals, and service to the customers of these facilities, including Agency, were without even a color of legality and cannot be condoned. The impact cannot but adversely affect WSMWW's financial well-being with consequences to its ratepayers. It is the duty of this Commission to see to it that the public utilities under its jurisdiction are so financially constituted as to be able to provide reasonably adequate service at reasonable rates and charges, and to protect their areas of operation from unauthorized encroachments which might lessen their ability to sustain their operations in the public interest.

In the instant situation, if a question should be raised by County as to validity of WSMWW's title to the 12-inch main, considering the circumstances of the 1979-81 transfer from Agency and WSMWW's unquestioned exercise of numerous acts of ownership over the intervening 15 years with no County objection, that issue should be determined by a court of competent jurisdiction. Until then, the facts and equity lead this Commission to regard WSMWW as the legitimate owner of the 12-inch main.

As a State agency of constitutional origin, this Commission has far reaching duties, functions, and broad powers. In addition, however, in the exercise of its plenary power to confer additional authority and jurisdiction upon the Commission, the Legislature long ago enacted PU Code § 701, conferring expansive authority to do all things, whether specifically designated in the Public Utilities Act, or in addition thereto, which are necessary or convenient in the supervision and regulation



of public utilities, subject only to the requirement that such exercise be cognate and germane to its regulation. While the Commission is not strictly a judicial tribunal, it does possess well-established and understood judicial powers. It may also exercise equitable powers in aid of jurisdiction specifically conferred upon it (Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 C 3d 891). Restoration of the status quo is within these powers.

Accordingly, we will order District to return possession, control, and operation of all seized facilities taken May 28, 1996, including the 12-inch main, the two 8-inch lateral mains, and all appurtenant valves, etc.; the illegally entered upon service territory of WSMWW, and all customers receiving services from these facilities, to WSMWW. Further, District will be required to provide WSMWW with a full accounting, customer by customer, of all revenues charged and collected from these customers, including Agency, since May 28, 1996, and to arrange a reimbursement schedule for all such revenues and charges to provide for a return to WSMWW of all such funds within a six-month period after the effective date of the order that follows.

Finally, District will be ordered to cease and desist from further interference with WSMWW's facilities, service territory, and customers.

Findings of Fact

1. For numerous years prior to 1979, adjoining entities WSMWW and SMWW were, and today WSMWW continues to be, water public utilities under the jurisdiction and regulation of the Commission.

2. In the years immediately prior to 1979, SMWW's system was in very poor condition but without the means or management able to rehabilitate it.

3. Portions of SMWW, particularly those east of Llegas Creek, lacked access to a reliable source of water and depended upon a deteriorated inadequate distribution system unable to supply the existing customers.

4. In the 1979 period, County's Agency urgently required access to a reliable water service in order to qualify for funding for an expanded county bus system, and unwilling to take service from SMWW in whose service territory Agency was sited, or to develop, maintain, and operate its own system, determined to obtain water service from the neighboring utility WSMWW.

5. With available supplies of water at a prospective delivery point on the west side of old Monterey Highway, the boundary line between WSMWW and SMWW, WSMWW was willing to accommodate but would require Commission encroachment authorization to cross the highway and extend into SMWW territory to reach Agency's facilities.

6. Additionally, while a small but well run water utility, WSMWW lacked funds or access to the very substantial financing that would be required to extend an approximate 4,000-foot 12-inch main across old Monterey Highway, the Southern Pacific tracks, and Llegas Avenue bridge to reach Agency,

7. Any such 4,000-foot 12-inch main would also enable WSMWW to bring a water wellhead into central and eastern SMWW territory, providing potential future relief to these areas as well as serving Agency.

8. County's Agency, supported by County officials, offered to construct and contribute the 12-inch main as an inducement to WSMWW to apply to the Commission for encroachment authorization to enter upon and supplant SMWW as the immediate area vendor.

9. Responding to County Agency's inducement offer, WSMWW filed A.58540 in 1979 for encroachment authority and for approval of the contribution proposed, necessary in view of the resultant

disparate relationship between owner equity and contributions that would result.

10. During hearing of A.58540, as a condition to the requested encroachment authorization, the Commission sought and received sworn testimony and written confirmation from officials of Agency with apparent authority that the keystone element to the encroachment proposal, the 12-inch main, would be contributed by Agency to WSMWW.

11. By D.91496 issued April 20, 1980, the Commission authorized a WSMWW encroachment into SMWW's territory and provided that WSMWW could accept contribution of the 12-inch main; serve Agency and any others in SMWW's territory who would choose to transfer or take WSMWW's service, thereby supplanting SMWW as the authorized public water utility in such instances.

12. Agency constructed and turned over the 12-inch main to WSMWW in February of 1981, and WSMWW incorporated the main into its system, later adding 8-inch lateral mains from it and providing public utility water service under WSMWW tariff rates to Agency and other customers.

13. From February of 1981 until Memorial Day in 1996 WSMWW exercised ownership of the 12-inch main, paying franchise taxes to County, maintaining, and operating the main as owners.

14. In 1988, virtually abandoned by the Powell estate owners of the utility and receiving service under operation by an appointed Receiver, the remaining SMWW customers and other residents elected to form a county services district, and on October 4, 1988 District was formally constituted as a legal entity.

15. The Conservator of the Powell estate was authorized to sell the SMWW, and obtained approval by D.93-09-011 from the Commission on September 1, 1993 pursuant to provisions of PU Code §§ 851-854 to sell the system to District; the District thereby acquiring the parts of SMWW's territory, system, and customers not

to that date supplanted by WSMWW's Commission authorized encroachment.

16. Obtaining SDWBA loan funds, District installed a new well in the central area and an 8-inch main extending eastward along San Martin Avenue from Murphy Avenue, thereby enabling District to serve its customers in the eastern area.

17. Not having acquired the SMWW downtown well in the 1993 sale from the Powell estate, District purchased water from WSMWW's 12-inch main to serve its downtown customers.

18. In 1996, aided and abetted by certain County personnel who assertedly had informed District that as there apparently was no record that the County's Board of Supervisors had in some fashion ratified Agency's 1981 transfer of the 12-inch main to WSMWW, the latter could not be the legal owner, District on Memorial Day, 1996, with the aid of a County Deputy Sheriff, entered upon WSMWW's territory east of old Monterey Highway, seized possession and control of not only that 12-inch main but also WSMWW's two 8-inch lateral mains and valves, and usurped WSMWW's customers off those facilities, including County and others, and has since held, controlled, and operated these facilities and without Commission authorization or eminent domain retained WSMWW's customers illegally.

19. Based on the foregoing facts, on June 24, 1996, WSMWW filed C.96-06-042 seeking injunctive relief and damages.

20. Public hearing was held with both WSMWW and District represented by counsel on October 11, 1996.

#### Conclusions of Law

1. The Commission has exclusive statewide jurisdiction to determine the service territory of water public utilities under its jurisdiction, and to authorize acquisition or disposition of facilities, customers, and service territory of these public utilities.

2. Agency's contribution of the 12-inch main was structured to create for WSMWW a proprietary interest in the main, a crucial ingredient necessary to enable WSMWW to seek Commission authorization to encroach and offer public utility water service to Agency and others in the service territory of SMWW thereafter to be encroached upon

3. There was an evidentiary basis in the July 30, 1979 Montini letter to the ALJ in the A.58540 proceeding for the Commission's conclusion that Agency was contributing the 12-inch main to WSMWW; the conclusion which was the key ingredient inducing the Commission to permit WSMWW encroachment without jeopardy to WSMWW's financial integrity.

4. By Commission D.91496 issued April 2, 1980, WSMWW was authorized to encroach into SMWW's territory and to serve not only Agency's facilities located within the the SMWW territory but also to serve any and all other customers in the SMWW territory who wanted to be served by WSMWW.

5. To the extent such encroachment was made before the remainder of SMWW's service territory was acquired by District in 1993 pursuant to D.93-09-011, those service areas and customers taken by WSMWW's encroachments up to that date ceased being part of SMWW's territory, and had been annexed to and become part of WSMWW's territory.

6. An encroachment authorization is intended to accommodate not only present but future services in the area encroached upon.

7. In the years intervening between February 1981 and Memorial Day 1996, WSMWW exhibited all the indicia of its ownership of the 12-inch main; paying franchise taxes thereupon, controlling, maintaining, and operating the facility as part of its public utility service obligation.

8. To the extent County and its Agency, without benefit of any known due process, aided and/or abetted District's Memorial Day 1996 seizure of the 12-inch main and its integrated or associated

facilities in WSMWW's eastern area, County and its Agency interfered with the Commission's jurisdiction over public utility regulation in violation of Article XI, Section 8 of the California Constitution.

9. Considering County Agency's 1979-81 inducements and actions before the Commission, as well as WSMWW's 15 years of unchallenged possession, control, operation, and maintenance of the 12-inch main as well as payment of taxes, any latter day challenge to WSMWW's title to the main can only be resolved in an appropriate Superior Court action; not by unauthorized, unequitable, and egregious self-help seizure or by aiding and abetting another entity to do so.

10. County lacks any legal authority or jurisdiction whatsoever as to the two 8-inch lateral mains, valves or services, service territory or customers assigned by this Commission's order to WSMWW, and any County action or participation involving these WSMWW system ingredients constitutes interference with this Commission's exclusive constitutionally granted jurisdiction.

11. District's egregious actions without a Court order of possession in appropriate eminent domain proceedings, or authorization by this Commission, in entering upon WSMWW's service areas on Memorial Day 1996, and seizing, controlling, and thereafter operating the 12-inch main, associated 8-inch lateral mains, and other facilities, and taking and thereafter retaining WSMWW customers, including Agency, are a direct and unacceptable infringement of this Commission's exclusive jurisdiction which requires immediate remedial action by the Commission.

12. The Commission lacks jurisdiction to award damages.

O R D E R

IT IS ORDERED that:

1. Within seven days of the effective date of this order, the San Martin County Water District (District) shall remove itself and return possession, control, and operation to the West San Martin Water Works, Inc. (WSMWW) of the WSMWW facilities and customers District seized on May 28, 1996; to wit: the 12-inch main connecting the WSMWW facilities in the area of old Monterey Highway to the Murphy Avenue area on San Martin Avenue; the two 8-inch lateral mains on Depot and Llegas Avenues; related valves and customer services; and the respective customers who received service from the seized facilities, including the Santa Clara County Transportation Agency (Agency) customer.

2. Concurrent with compliance with Ordering Paragraph 1, District shall cease and desist from further unauthorized interference with the operation, control, possession, and maintenance by WSMWW of the returned facilities and customers of WSMWW, or other WSMWW facilities and customers.

3. Within two weeks of the effective date of this order, District shall provide WSMWW with a full accounting of all revenues charged and collected since May 28, 1996 from District's unauthorized operation of the seized WSMWW facilities in providing service to Agency and other WSMWW's customers usurped by District's unauthorized and illegal actions on and since May 28, 1996; the accounting to be customer by customer.

4. Within three weeks of the effective date of this order, District shall arrange a reimbursement schedule satisfactory to WSMWW, for a return over six months of the effective date of this order of all the revenues charged and collected during the period since May 28, 1996 of District's unauthorized and illegal seizure.

5. Case 96-06-042 is closed.

This order is effective today.

Dated February 19, 1997, at San Francisco, California.

P. GREGORY CONLON  
President  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
RICHARD A. BILAS  
Commissioners