

~~CONFIDENTIAL~~

Decision 83 01 058 JAN 19 1983

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the Application of)	
Easton Rothwell, Plant Brothers)	
Corporation, Peter H. Behr, and)	Application 59697
Joan Phelan to enforce D.91274 and)	(Filed May 28, 1980)
modify, if necessary, D.90436,)	
D.91274, and D.91315, Inverness.)	

OPINION AND ORDER DISMISSING APPLICATION

By this application, Easton Rothwell, Plant Brothers Corporation, Peter H. Behr, and Joan Phelan (applicants) seek an advisory opinion that the Commission has jurisdiction to enforce Decision (D.) 91274, dated January 29, 1980, and, to that end, to extend the time for applicants to comply with a condition precedent in D.91274 from April 28, 1980 to 45 days after rendition of the said opinion.

This application was originally labeled Petition for Rehearing or Modification of D.91274 and for an Extension of Time to Make Deposits. So entitled, it was verified and mailed to Inverness Water Company (Inverness) and Citizens Utilities Company (Citizens) on May 28, 1980, but filed with the Commission on that date captioned only "application". Neither Citizens nor Inverness filed a formal pleading in the matter until it was set for hearing by Administrative Law Judge (ALJ) Orville Wright, to whom the application was referred. A Motion To Dismiss was filed on July 10, 1980 by Inverness alleging, inter alia, failure to perform a condition precedent.

Upon receipt of this motion, the ALJ took the matter off calendar temporarily and gave applicants until August 15, 1980

to respond to the motion and, particularly, to state what facts or conduct on the part of Citizens or Inverness they relied upon to excuse performance by them of the tender of funds required of them by D.91274 as a condition precedent.

Applicants' Memorandum and Declaration in Opposition to Motion to Dismiss Application was filed on August 14, 1980. Inverness was allowed a Reply to Response in Opposition to Motion to Dismiss, which was filed September 18, 1980. Applicants were then permitted a Supplemental Response Re Motion to Dismiss filed September 19, 1980, and Inverness, a Supplemental Reply, filed September 29, 1980.

We have considered all of the allegations of the pleadings and declarations in the light most favorable to applicants and have concluded that good cause has not been shown for modifying D.91274. Accordingly, a public hearing is not required, and the application must be dismissed.

This matter was first formally brought to the Commission's attention on April 17, 1979 when applicants filed Case 10734 seeking to require Inverness and Citizens to complete certain line extensions in the Inverness service territory. After hearing, D.91274 was issued on January 29, 1980. We ordered Inverness to construct the remainder of the facilities contemplated by the master plan at its own expense, provided that each of the complainants (applicants here) first advanced to Inverness an additional \$1,310 per lot within sixty days after the effective date of that order. The effective date of D.91274 was February 28, 1980; payment of the stated sums was thus due on or before April 28, 1980.

Applicants have not advanced or tendered the required sums to Inverness.

In a letter to our general counsel, dated March 17, 1980, applicants acknowledged that the sum of \$1,310 was due for each lot by April 28, 1980. However, the letter expressed the concern of the applicants that Citizens might refuse to comply with D.91274 because Citizens sold the water company on December 28, 1979 "and may no longer be under the control of the P.U.C." On April 8, 1980 our counsel answered applicants, stating that D.90436, effective June 19, 1979, contained the following ordering paragraph:

"Upon compliance with all the terms and conditions of this order, seller shall be relieved of its public utility obligations in connection with the water system transferred."

Our counsel concluded that if Citizens (Inverness) had complied with the quoted ordering paragraph of D.90436, it had terminated its public utility obligations prior to the time D.91274 was issued.

This concern of applicants for our possible loss of jurisdiction of the subject matter in litigation could properly have been formally brought to our attention by a petition for rehearing filed prior to the effective date of the order. (Public Utilities (PU) Code Section 1731; Rule 85, Rules of Practice and Procedure.) No party to the proceeding filed such a petition. Certainly Inverness should have done so if it intended not to comply with the decision on grounds of lack of Commission jurisdiction. Applicants, stating they were satisfied with the order, had merely to comply with its terms. This they did not do.

On April 16, 1980 complainants addressed a lengthy letter to President Bryson asserting that the earlier letter from Commission counsel gave applicants "no choice but to withhold sending funds to the utility by April 28, 1980" - no choice, of course, save tendering the funds to Inverness as required by the order.

During the first week in May, applicants received a telephone call from the President's legal advisor informing them

that a formal application to the Commission should be made requesting an extension of the time provided for in the order. Applicant's time to make the required deposit had expired by this time: and since a new decision would be necessary to reinstate their expired rights, applicants filed this application. ✓

When this Commission issued D.91274, Inverness had already completed the transfer of its public utility water system to Inverness Public Utilities District (District) pursuant to D.90436. We think applicants were justifiably hesitant, based on their past experience with Inverness documented in C.10734, to tender payment to the company for improvements ordered by this Commission, which had already, by D.90436, prospectively relieved Inverness of its service obligations, and had, by D.91315, declared that "we no longer have jurisdiction over the water company". We acknowledge that confusion may have arisen from our actions on the same day, January 20, 1980, dismissing an application for extension of service on grounds of lack of jurisdiction (D.91315) but ordering Inverness to construct facilities at its own expense upon receipt of advances from the applicants (D.91274).

The apparent inconsistency between D.91274 and D.91315 is explained by the Commission having expressly made the requirements of D.91274 "subject to the provisions of the purchase and sale agreement [between Inverness and District] if applicable". The question then becomes whether that agreement, or D.90436 which approved it, provides a basis for continuing Commission jurisdiction over Inverness (or Citizens) with respect to the obligations which D.91274 sought to impose.

We did not expressly condition D.90436, authorizing transfer of the Inverness water system to District, upon compliance with whatever orders we might subsequently have issued in the then-

pending complaint proceeding, C.10734. The purchase and sale agreement, however, did recognize that an "Inquiry regarding Line Extension Agreements", which Inverness admits to have been the informal complaint proceeding C.10734, was outstanding at the time of the agreement's January 1979 execution. The agreement contemplated that the Commission might require Inverness to remain liable for refund of customer advances pursuant to its line extension agreements. A.58857, seeking Commission approval of the agreement, provided that either Inverness or Citizens "will continue to make all refunds of advances as and when required under existing main and extension agreements". D.90436 confirmed this fact, but mentioned only Inverness' continuing obligation.

These facts persuade us that the purchase and sale agreement and D.90436 left Inverness and Citizens obliged to satisfy Inverness' obligations to refund advances previously made by its customers. D.91274 purported to impose new obligations on Inverness, obligations to complete the construction of facilities required by a master plan, upon the applicants providing further advances and subject to the purchase and sale agreement.

The fact that the agreement referred to applicants' informal complaint does not, in itself, make Inverness' compliance with any order resulting from that complaint a condition of the agreement. We do not see any way of extending the obligations of Inverness (or Citizens) under the agreement beyond those obligations contemplated by its terms. Nor would it appear proper for us to require Inverness (or Citizens) to invest further funds in plant which it will not own and from which it will derive no income.

We think applicants have not shown sufficient grounds for reopening the Inverness proceedings. Such a reopening would serve no useful purpose.

No other issues require discussion.

IT IS ORDERED THAT A.59697 is dismissed.

This order becomes effective 30 days from today.

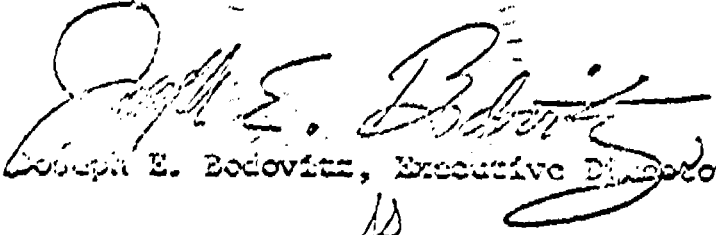
Dated JAN 19 1983 at San Francisco.

California.

LEONARD M. GRIMES, JR.
President
PRISCILLA C. CREW
DONALD VIAL
Commissioners

Commissioner Victor Calvo,
being necessarily absent, did
not participate

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director

that a formal application to the Commission should be made requesting an extension of the time provided for in the order. Applicant's time to make the required deposit had expired by this time: and since a new decision would be necessary, to reinstate their expired rights, applicants filed this application.

When this Commission issued D.91274, Inverness had already completed the transfer of its public utility water system to Inverness Public Utilities District (District) pursuant to D.90436. We think applicants were justifiably hesitant, based on their past experience with Inverness documented in C.10734, to tender payment to the company for improvements ordered by this Commission, which had already, by D.90436, prospectively relieved Inverness of its service obligations, and had, by D.91315, declared that "we no longer have jurisdiction over the water company". We acknowledge that confusion may have arisen from our actions on the same day, January 20, 1980, dismissing an application for extension of service on grounds of lack of jurisdiction (D.91315) but ordering Inverness to construct facilities at its own expense upon receipt of advances from the applicants (D.91274).

The apparent inconsistency between D.91274 and D.91315 is explained by the Commission having expressly made the requirements of D.91274 "subject to the provisions of the purchase and sale agreement [between Inverness and District] if applicable". The question then becomes whether that agreement, or D.90436 which approved it, provides a basis for continuing Commission jurisdiction over Inverness (or Citizens) with respect to the obligations which D.91274 sought to impose.

We did not expressly condition D.90436, authorizing transfer of the Inverness water system to District, upon compliance with whatever orders we might subsequently have issued in the then-