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ORIGINAL

Decision No. 91274 JAN 29 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

EASTON ROTHWELL, PLANT BROS. CORP., PETER H. BEHR, and JOAN PHELAN, Complainants, vs. INVERNESS WATER COMPANY, and CITIZENS UTILITIES COMPANY OF CALIFORNIA, Defendants.	Case No. 10734 (Filed April 17, 1979)

Richard Massa, Attorney at Law, for Easton Rothwell, Plant Bros. Corp., Peter H. Behr, and Joan Phelan; complainants.
Jack H. Grossman (Attorney at Law, New York), for Inverness Water Company and Citizens Utilities Company of California; defendants.
Peter Fairchild, Attorney at Law, for the Commission staff.

O P I N I O N

By Advice Letter No. 17, dated November 7, 1975 and filed November 10, 1975, Inverness Water Company (Inverness) sought the Commission's authority to deviate from the provisions of its main extension rule. The deviation was sought on behalf of the owners of seven large parcels of

land, which were to be subdivided into about 20 parcels.[1/] The plan proposed in the advice letter (the master plan) called for the construction of about 2,500 feet of 6-inch main, a storage tank, and modifications at an existing booster station at an average cost per lot of $2,500. The advice letter stated that the "facilities planned will enable the utility to provide fire flows and pressures as required by the Commission's General Order No. 103." However, in the advice letter Inverness stated that since "several owners desire immediate water service to their parcels, it is requested that the utility be authorized to offer water service to such parcels at whatever pressures and flows may now be available upon receipt of an advance to the utility by the land owner of the pro rata estimated cost of the ultimate facilities planned. [R] As monies are advanced for the planned facilities, they will be constructed in usable increments until ultimately completed."

By Resolution No. W-1836, dated November 18, 1975, the Commission approved the deviation from the main extension rule after finding that "the deviation will be beneficial to the owners of each lot and will not be adverse to the public interest and is justified". The resolution and the staff memorandum in support thereof recited the allegations in the advice letter practically verbatim.

1/ The map attached to the advice letter shows 21 numbered lots with title in 8 different owners.

Pursuant to Advice Letter No. 17 and Resolution No. W-1836, main extension agreements were executed by Plant Bros. Corp. (Plant Bros.) on February 20, 1976, by Charles E. Rothwell on April 4, 1976, by Peter H. Behr on February 10, 1976,[2/] and by Joan Phelan on March 23, 1976. Each of the four agreements called for the construction of the first increment of the master plan, which consisted of 2,500 feet of 6-inch main on Sterling, Vision, Madrone, and Woodhaven, including twelve 3/4-inch services, one public fire hydrant, and necessary booster modifications. The first increment of the master plan was estimated by Inverness to cost $30,650 of which $10,100 was advanced by Plant Bros., $5,000 by Rothwell, $5,200 by Behr, and $10,350 by Phelan. Inverness later refunded $100 to Plant Bros., $200 to Behr, and $350 to Phelan, reducing total advances to $30,000.

The advances were made to Inverness in proportion to the number of lots to be served at the rate of $2,500 per lot, as illustrated below:

2/ Peter H. Behr did not date the agreement when he signed. The date of February 10, 1976 is the date the agreement was signed by W. B. Stradley for Inverness.

Owner	No. of Lots	Advances
Plant Bros.	4	$10,000
Rothwell	2	5,000
Behr	2	5,000
Phelan	4	10,000
Totals	12	$30,000

In 1976, following the execution of the agreements, Inverness caused the first increment of the master plan to be constructed at a cost of $44,924, as indicated below:

Area*	Length Of Main (Linear Feet)	No. of Services	No. of Hydrants	Total Cost
A	426	7	1	$ 7,589
B	1,060	4	1	16,437
C	1,154	1	1	15,222
Booster Modifications	-	-	-	5,676
Totals	2,640	12	3	$44,924

* Area A relates to the Rothwell and Phelan properties; Area B relates to the Plant Bros. property; and Area C relates to the Behr property.

Soon after the completion of these facilities, it began to appear to Rothwell, Plant Bros., Behr, and Phelan (the complainants) that the remaining facilities contemplated in the master plan were not likely to be built in the reasonably foreseeable future. This realization prompted a lengthy, but inconclusive correspondence with the Commission staff,

the purpose of which was to induce Inverness to complete the facilities and thus make fire flows and pressures available to the complainants. When this informal complaint procedure did not produce results, the complainants filed a formal complaint on April 17, 1979. Inverness filed its answer on May 21, 1979.

A prehearing conference and two days of public hearing were held before Administrative Law Judge Baer and the matter was submitted August 1, 1979, subject to the filing of late-filed exhibits, which have been received.

The Complaint

The complaint contains various allegations of fact, many of which are summarized above. However, the central contention is that:

> "...defendants fraudulently induced the Commission to allow deviation from the law (General Order 103). Then, with Advice Letter 17 in hand, defendants fraudulently induced complainants to advance money for service at less than 103 levels, knowing full well that the 'temporary deviation' authorized by Advice Letter 17 would be permanent." (Complaint, page 4.)

The facts supporting the contention of fraudulent inducement are that:

> "At the time the Advice Letter was submitted and at the time the above individuals [complainants] were induced to advance the $30,650 referred to, defendants knew full well that the owners of 6 of the remaining 9 parcels had no intention of participating in any line extension agreement because they already had water on their property. The owners of the remaining 3 lots were not and have not been approached by defendants with regard to participating in the line extension as outlined in Advice Letter 17." (Complaint, page 4.)

The Relief Sought

In their prayer, the complainants request an order revoking Advice Letter No. 17 and the deviation from the requirements of General Order No. 103 (G.O. 103). They also request an order requiring the defendants to complete the facilities contemplated by Advice Letter No. 17. Moreover, they request the refund of the advances made by Behr. Finally, they request that attorney fees and costs be awarded to them.

The request for a refund of Behr's advance is apparently based upon the theory that the 6-inch main constructed between Sir Francis Drake Boulevard and Woodhaven Road was a rate base improvement totally unrelated to Behr's property.

Discussion

It is immediately apparent from the foregoing recitation of facts that both parties have proceeded upon a significant misconception of what the Commission authorized in Resolution No. W-1836. Since it is brief, Resolution No. W-1836 is reproduced in full as follows:

"SUBJECT: Order authorizing Inverness Water Company to deviate from Rule 15, Main Extensions, to serve an anticipated 20 lots in Inverness, Marin County.

"WHEREAS: INVERNESS WATER COMPANY by Advice Letter No. 17, received November 10, 1975 requests authority under Section 532 of the Public Utilities Code to deviate from the main extension rule by allowing it to accept advances for approximately 20 lots in proportion to the pro rata estimated cost of the planned facilities, and

"WHEREAS: The estimated average cost for each lot is $2,500 to pay for 2,500 feet of 6-inch pipe, a storage tank and additional booster facilities, and

"WHEREAS: Each advance will be refunded under Section C.2.a and b of the main extension rule, and

"THE COMMISSION FINDS that the deviation will be beneficial to the owners of each lot and will not be adverse to the public interest and is justified,

"IT IS ORDERED that Inverness Water Company is authorized to deviate from its filed main extension rule as referred to above and filed with Advice Letter No. 17." (Exhibit 3.)

The resolution does not grant the requested authority "to offer water service to such parcels at whatever pressures and flows may now be available". (Advice Letter No. 17; Exhibit 1.) Accordingly, the resolution did not authorize Inverness to deviate from the provisions of G.O. 103.3/

Since the resolution did not authorize the requested deviation from the provisions of G.O. 103, the issues are: (1) Is such a deviation now necessary? (2) If so, should the deviation now be granted? 3(a) If so, on what terms and conditions? 3(b) If not, what relief should be offered to the complainants?

We now address the first issue, whether a deviation from G.O. 103 is now necessary. Since Inverness concedes that the facilities installed pursuant to Advice Letter No. 17 do not provide 500 gallons per minute (gpm) of fire flow, the first issue will be decided by determining what is the appropriate level of fire flow.

3/ Resolution No. W-1836 was signed November 18, 1975. Since no application for rehearing was filed, the resolution is a final order of the Commission and is conclusive. (Public Utilities Code, Section 1709.)

In the advice letter Inverness stated that fire flow of 500 gpm plus 10-20 gpm were required for its system. This statement is consistent with G.O. 103,[4/] Section VIII(1)(a)(2), which requires a minimum fire flow of 500 gpm where the land use involves a lot density of less than one single-family residential unit per acre.

At the hearing, Stradley, the general manager of Inverness and the signer of the advice letter, changed his position. It was his opinion that the fire flow of 500 gpm was not now required but that 250 gpm was required. This contention corresponds with G.O. 103, Section VIII(1)(a)(1), which requires a minimum fire flow of 250 gpm where the land use is: "Rural, residential with a lot density of two or less per acre primarily for recreational and retirement use."

Stradley testified that in 1975 the county zoning ordinance allowed eight houses on two acres (approximately 10,000 square feet per lot), whereas now the zoning ordinance allows only one house for every two acres. No documentary evidence was introduced to support his contention with respect to the requirements of the past or current zoning ordinances, and he was unable to testify whether the new zoning ordinance applicable to the Inverness area had merely been recommended by the Planning Commission or had actually been passed by the Board of Supervisors. In any event, the provisions of Sections VIII(1)(a)(1) and (a)(2) of G.O. 103 make the size of lots irrelevant. If the zoning ordinance in fact

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4/ See Appendix A for Section VIII(1)(a) of G.O. 103.

required a density of one house for every two acres, that density is within the terms of both Subsection (a)(1) and (a)(2). What really distinguishes between Subsections (a)(1) and (a)(2) for the purposes of this proceeding is not lot size but land use. Subsection (a)(1) involves rural, residential property primarily for recreational and retirement use, whereas Subsection (a)(2) involves single-family residential uses.

Stradley's testimony on the question of land use was based on his general observation of the way the area is actually developing. He mentioned specifically that he observed horses and fences to accommodate horses and recreational facilities like tennis courts. He further testified that "there are a lot of retired people" in Inverness.5/ Many of the customers, he said, use no water during many months of the year apparently due to extensive traveling. Others live elsewhere and come to Inverness on weekends or occasionally. However, Stradley did not know what percentage of people in Inverness are over 65. He did not know what percentage of the houses served were second houses as opposed to principal places of residence.

5/ Counsel for Inverness conceded, however, that "Mr. Stradley doesn't have intimate knowledge of whether or not the people living in those houses are retired or not". (Tr. 117.)

In the absence of some factual study of Inverness' customers, perhaps based on billing records, we are not inclined to credit Stradley's poorly supported opinion of the land use in the Inverness area. In addition, such testimony is entirely too convenient. Since the utility cannot show that the facilities now in place produce 500 gpm of fire flow, a facile way of avoiding that requirement is to contend that only 250 gpm is required. We conclude that Inverness is bound by its statements in the advice letter to supply 500 gpm of fire flow. No credible facts of record impeach its original determination that 500 gpm is the appropriate level of fire flow for the land uses in this area. Accordingly, Inverness is in violation of G.O. 103 in that the facilities installed pursuant to Advice Letter No. 17 do not provide the appropriate level of fire flow. Therefore, the Commission must either authorize Inverness to deviate from G.O. 103 or order Inverness to remedy the violation.

We now address the second issue, whether a deviation from G.O. 103 should be granted to Inverness. Although we may have inadvertently failed to authorize the requested deviations in 1975, we should not now turn back the clock and act in the manner we would have acted then, given the information then available to us. Rather, the requested deviation will be analyzed in the light of all the facts and circumstances revealed and of record in this proceeding.

It should first be noted that the master plan concept originated with Inverness. However, from the time it was first proposed to the Commission in Advice Letter No. 17, it should have been suspect. The equivocal language of the advice letter suggested that Inverness did not know what parcels and owners would participate in the master plan nor when the plan would

be fully executed. Inverness stated that "approximately seven large parcels of land" were involved, which were to be split into "about 20 parcels". (Emphasis added.) The map attached to Advice Letter No. 17 lists 8 owners and 21 numbered lots under the title "Planned Lot Splits". The 21 numbered lots, with the exception of Lots 13 and 21, are outlined in yellow. A legend on the map indicates that the lots outlined in yellow are the lots to be split. The advice letter as a whole leaves us wondering which and how many lots are subject to the master plan.

While the advice letter itself is confusing, the evidence makes it clear that Inverness did not have a reasonable expectation that it could obtain main extension agreements from many of the lot owners within a reasonable period of time.

Conner (Lots 9 and 10)

In the year 1974 Inverness was negotiating with Edward Conner for a main extension to his property. Those negotiations were terminated by a letter from Inverness to Conner dated March 13, 1974, which stated:

> "This is to confirm our telephone conversation, and to avoid any misunderstanding. You stated that you have decided to install your own on-site water facilities on your own property in Inverness, California, and do not need water supplied by the Inverness Water Company. Consequently, we will now consider your project closed. Maybe at some later date we can be of service to you."

Thus, the year prior to the submission of Advice Letter No. 17 to the Commission, Inverness knew that Conner did not want service from it. But this is not all. By letter dated August 15, 1975 Inverness gave notice of a meeting concerning its proposed master plan to persons it thought might be interested. Notice was mailed to Edward Conner, but he did not respond or attend the meeting on September 11, 1975. By letter dated September 19, 1975 Inverness informed one of the other active participants in the master plan project (Phelan) that it would be contacting other potential participants in the near future. There is, however, no evidence of any contact having been made with Conner.

Stradley did testify that:

> "We had discussions with Mr. Conners subsequently that indicated he was continuing to develop his property.
>
> "We had information from the county, and from the Coastal Commission, that they would not allow development with private wells.
>
> "We had every reason to believe that Mr. Conners was going to continue development and need water from us." (Tr. 54.)

Stradley was asked the question:

"Now, did you have any specific information, prior to the time you put Mr. Conners' name upon the map that you sent to the Commission, that Mr. Conners was going to participate in this line extension?"

Stradley replied:

"I believe we did. I am not sure whether it's in writing or my own mind, or in my staff's mind.

"But we were in touch with Mr. Conners on an ongoing basis."
(Tr. 54.)

It may be inferred that if any documentary evidence of such "ongoing" contacts existed, Inverness would have produced it. If such contacts were oral, Stradley presumably could have been more specific about them. As it was, Stradley was not able to relate whether such contacts were with himself or his staff.

We can only conclude that Inverness did not have a reasonable basis for believing that Mr. Conner would participate in the master plan within a reasonable period of time.

Lewis (Lots 11 and 12)

Stradley further testified that Inverness did not have letters from Lewis requesting service for Lots 11 and 12. He did remember, vaguely, that "Mr. Lewis was either the owner, or had an intent to develop, or had some connection with the planned development of Lots 11 and 12" (Tr. 37). The only mention of Lewis' name in the documentary evidence appears on Exhibit 32, a letter from Inverness to several property owners presumably interested in the master plan. A notation on the certificate of service indicates that M. Lance Cerny replied with the information that Lewis of Tecumseh, Michigan, was the new owner.

Retlines (Lot 13)

Again, Stradley testified that he had no document requesting service for Lot 13, but added that Lot 13 was not included within the master plan boundaries. While it is true that the original map filed with the Commission showed lot 13 to be outside the master plan boundaries, nevertheless, it was listed on that map as one of the planned lot splits. In addition, the map attached to the main extension agreements, the one upon which the complainants relied, did not contain a boundary line but did list Lot 13 as one of the planned lot splits.

Inverness did not have a reasonable basis for believing that either Lewis or Retlines would participate in the master plan.

Rothwell (Lots 5, 6, 7, and 8)

Rothwell testified that he acquired Lots 5 and 6 in 1962 when they were a single parcel and that he acquired Lots 7 and 8 as a single parcel from the Logemanns in 1973. He subdivided both of the original parcels into two lots each in 1974. Rothwell lives on Lot 6. In 1963 he constructed his own water supply system on Lot 6, which consists of a well 220 feet deep, two water tanks holding 4,000 gallons, and necessary piping.

Water service was at all times relevant to this proceeding provided to Lot 7 by Inverness. While the Logemanns owned Lot 7, they rented the lot and the house thereon to Nancy Blunk. Her father, Howard Waite, constructed a water system to deliver water from Inverness' main on Madrone Avenue

across the intervening property of James King[6/] to lot 7. Howard Waite built a catch tank on Madrone Avenue into which water was pumped at relatively low pressure from the mains on Madrone Avenue. A pump then pushed the water from the catch tank to a holding tank, which served the residence. The evidence indicates that Inverness consented to this arrangement. Inverness' own records show that Nancy Blunk was given service from 1970 through August 15, 1975. Rothwell testified that Inverness knew about its service to Lot 7 because it was billing Nancy Blunk monthly for that service. When she moved out, the billing was shifted to W. Parmer Fuller III, who bought Lot 7 from Rothwell on August 8, 1975.

Rothwell testified that, because of the existence of a private water supply to Lot 6 and Inverness service to Lot 7, he never requested that Inverness provide water to four parcels. He stated that, before the master plan was envisioned, he approached Inverness to see if the utility could supply the two parcels which did not already have water. He talked with engineers of Inverness in Sacramento for a period of some months about service to his two lots. Inverness presented a map indicating the extension of the line to his properties. Rothwell stated that the line extension on that map showed three outlets, the third of which he asked to be designated tentative and which he later withdrew. He originally thought that he might like a backup line for his own system on Lot 6 but finally decided that he did not need a backup line and withdrew that request. His final request was for two connections to the main on Madrone Avenue.

6/ Howard Waite built and maintained this system on James King's property pursuant to a license agreement with James King. Rothwell has a similar license agreement with James King.

Eventually, Rothwell learned about the master plan proposed by Inverness for this same area. This plan superseded his individual negotiations with Inverness.

Rothwell was not pleased with the master plan or with Advice Letter No. 17. However, by letter dated December 22, 1975 Stradley partially excused Rothwell from participating in the master plan based upon the existing supply on Lot 6 and service to Lot 7. Eventually, Rothwell advanced $5,000 to Inverness and became a participant in the master plan.

It is inconceivable that in a small water utility of only 433 metered customers 7/ the employees would not know that Rothwell's Lot 7 had been served by Inverness for several years and that Rothwell had his own water supply. Rothwell's testimony is uncontroverted on this point. No other conclusion can be reached but that Inverness knew, or should have known in the exercise of reasonable diligence, that Rothwell's Lots 6 and 7 would not be participating in the master plan.

Burd (Lots 20 and 21)

It was stipulated by counsel that at the time of mailing of Advice Letter No. 17, Lots 20 and 21, as shown on the map attached to the advice letter, were served by Inverness. (Tr. 187) Inverness, nevertheless, argues that it had information from which it could reasonably conclude that Burd had undeveloped property in the immediate area of Lots 20 and 21 that needed water service. Inverness introduced into evidence a document (Exhibit 36) from the Marin County Planning Department, which requests reports from other governmental entities on the proposed land division of Burd. The document is dated

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7/ Decision No. 90436 dated July 19, 1979 in Application No. 58857, page 1 (Exhibit 4).

October 25, 1973. The land division relates to Assessor's Parcels Nos.112-330-06, 08, 09, and 12. The document contains a recommendation of the Marin County Fire Department that a 6-inch fire hydrant be located at the intersection of Kehoe Way and Woodhaven Road.

A letter dated May 21, 1974 from Inverness to Burd (Exhibit 33) indicated that on that date, Burd was interested in water service to property in the Woodhaven Road area.

On August 15, 1975 a letter was mailed by Inverness to persons presumably interested in the master plan. Burd was one of the addressees. There is no evidence of any response by Burd, and he did not attend the meeting held on September 11, 1975.

Inverness also introduced a parcel map dated July 23, 1979 (Exhibit 34) showing the various parcels owned by Burd. The map depicts three of the four parcels (06, 08, and 09) mentioned in Exhibit 36. Exhibit 34 was allegedly based upon an assessor's parcel map dated February 29, 1972 (Exhibit 35a). However, the assessor's parcel map shows Parcel 12 (the fourth parcel mentioned in Exhibit 36), but the alleged derivative map dated July 23, 1978 (Exhibit 34) shows Parcels 06 and 12 as a single parcel labeled "06". Still another assessor's parcel map (Exhibit 35b) was introduced by Inverness. It is dated February 28, 1973 and shows Parcel 06 divided into Parcels 34 and 35, and Parcel 12 divided into Parcels 33 and 36.

It appears to be true that during 1972 and 1973 there was a process of subdivision taking place on the property described as Lots 20 and 21 on the map attached to Advice Letter No. 17. Exhibits 5 and 6 suggest that parts of Lots 20 and 21 had been sold to others. The names associated with Lot 20 on Exhibits 5 and 6 are "Welch" with "(Burd)" below. The names associated with Lot 21 are "Brownbach" with "(Burd)" below.

Neither Brownbach nor Welch were invited to the meeting on September 11, 1975 and neither attended. It might be inferred that they were the owners of lots that Burd had sold.

Stradley testified that he understood that Burd was receiving water service on Parcel 08 and that he assumed that Burd was going to develop Parcels 06 and 09. However, this testimony does not jibe with other testimony that Burd was receiving service from Inverness in early 1960 nor with Exhibit 36, which shows Burd in the process of obtaining a subdivision approval for Parcel 08 on October 25, 1973.

In summary, the information Stradley relied upon in adding Burd's name to the list of planned lot splits was dated, at least insofar as this record reflects information available to him, in November 1975. At best, the latest information of a positive nature was the letter of May 21, 1974, one and a half years before Advice Letter No. 17 was mailed to the Commission. However, the best evidence of Burd's level of interest in the master plan is his failure to respond to the notice of the meeting and his failure to attend. This lack of response should have prompted Inverness to investigate the readiness of Burd to participate in the master plan. No such investigation was apparently made. Inverness, nevertheless, represented to the Commission and to the parties to the main extension agreements that Burd was a potential participant in the master plan. At the time of such representation Inverness did not have reasonable grounds for believing that Burd would be a participant within the reasonably foreseeable future.

Having concluded that Inverness did not have before it facts from which it could have reasonably concluded that Conner, Lewis, Retlines, Rothwell (as to Lots 6 and 7), or Burd would become participants in the master plan within a reasonable time after its approval, we believe it would be inappropriate to grant a deviation from G.O. 103.

Advice Letter No. 17 was no doubt submitted to the Commission based on the premise that only a temporary deviation from G.O. 103 was contemplated by Inverness. That premise was unfounded then, and it remains unfounded today.

Issue 2, "should a deviation now be granted?", has been answered in the negative. Issue 3(a), "upon what terms and conditions should a deviation be granted?", is thus moot. We next address issue 3(b), "what relief should be afforded to the complainants?"

Complainants first requested that both Advice Letter No. 17 and the deviation from the requirements of G.O. 103 be revoked. Since Advice Letter No. 17 was only granted as to the deviation from the main extension rule, it is unnecessary for us to issue any order with respect thereto. Also, since no deviation from the requirements of G.O. 103 was granted, there is no such deviation to revoke.

Complainants' next request is that Inverness be ordered to complete the facilities contemplated by the master plan. We conclude that this is the appropriate result. The master plan was Inverness' concept. Inverness had the responsibility to make adequate preparations and to do such preliminary work and investigation as was necessary to insure its completion within a reasonable time. Inverness altogether failed to take such steps.

The record shows that if the entire project had been completed in 1976, it would have cost approximately $80,000.[8/] If the owners of all 21 lots had participated in the project, the owners would have been required to pay 1/21st per lot of the total construction cost of $80,000 or $3,810 (rounded) per lot. Therefore, if each of the four complainants advances the difference between $3,810 and $2,500 per lot, Inverness should be required to construct the facilities as yet incomplete. The difference between the total cost of construction and the amounts advanced should be borne by Inverness.

8/
$44,924 (Total expended for portion constructed)
20,000 (Storage tank - Tr. 121)
14,600 (1460 lin.ft. @ $10 per foot - Ex. 39)
$79,524

Finally, complainants request the refund of advances made by Behr. This request is based upon the claim that the portion of the master plan related to Behr's property was a plant improvement required by the State Department of Public Health, the purpose of which was to tie the Inverness system with the Sea Haven System and thus make filtration available to all parts of the system. We do not believe, however, that this claim properly states the issue. The issue is, was this plant improvement (the intertie) a proper price to exact from a person seeking water service under Inverness' main extension rule (Tariff Rule 15)? If it was, then the issue is settled adversely to complainants.

A determination of this issue must be made under the terms of the main extension rule. Section A(3)(b) of Rule No. 15, Main Extension, specifies that "any individual...that divides a parcel of land into two or more parcels" is not entitled to a main extension without payment. Accordingly, Behr, who divided his parcel into Lots 18 and 19, must pay for the main extension to his property.

Second, we believe that to require Behr to advance funds toward the cost of the intertie was a reasonable application of the main extension rule. The only other alternative[9] to building the intertie would have been approximately as costly, would not have benefited the system as a whole, and would have been costly to operate and maintain. Moreover, Behr benefited from the master plan construction to the same

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9/ A costly and complex dual booster system.

extent as the other owners who signed the main extension agreements, and those persons do not seek refunds of their advances. Finally, Behr has now sold the property to others. Presumably, the sale price of the lots reflected the increased value which resulted from water service to those lots. To now order refunds to Behr would result in a windfall to him.

One final matter must be addressed. By Decision No. 90436 dated June 19, 1979 the Commission authorized the sale of Inverness to the Inverness Public Utilities District (District). The sale price was $330,000, "subject to adjustment and reimbursement as provided in the agreement". The agreement is Exhibit 28 in this proceeding. Paragraph 5 of that agreement deals with the subject of mandatory construction, as follows:

" 5. Mandatory Construction.

"(a) Seller has been ordered by governmental agencies having jurisdiction over Seller to perform certain construction with respect to the Assets. Buyer desires to perform such construction in Seller's stead after the Closing Date. Seller and Buyer shall use their best efforts to obtain permission of such governmental agencies for deferment of said construction to a period commencing on or after the Closing Date.

"(i) If such permission is obtained, Buyer shall not be liable for any costs incurred by Seller in connection with such construction prior to the Closing Date; provided, however, that if Buyer makes use of engineering studies or plans developed by or for the benefit of Seller in connection with performance of such construction, then Buyer shall reimburse Seller for Seller's costs actually incurred in connection with such studies and plans.

(ii) If Seller's application to defer commencement of construction is disapproved, then Seller shall proceed with such construction in accordance with orders of governmental agencies having jurisdiction, and on the Closing Date Buyer shall reimburse Seller for the actual construction costs incurred by Seller; provided, however, that Seller shall submit to Buyer all plans and contracts with respect to such construction not less than ten (10) days prior to commencement of work or execution of any such contract, and Seller shall not proceed with work or execute any contract if Buyer reasonably objects thereto within such ten (10) day period.

"(b) Except as described in paragraph (a) above, Seller shall perform no new construction with respect to the Water System unless such construction is legally required in order to serve additional customers to whom Seller is obligated to furnish service prior to the Closing Date or unless such construction is necessary to maintain service to customers at present levels. In the event such new construction is required, the actual cost of such construction, minus any customer advances paid to Seller with respect to such service, shall be reimbursed to Seller by Buyer on the Closing Date. Buyer shall assume Seller's liability to refund to any such additional customers' advances for construction in accordance with the terms of this paragraph (b). Seller shall furnish to Buyer not less than ten (10) days prior to commencement of any construction with respect to such additional customers all plans and contracts with respect to such construction, and Seller shall not proceed with such construction if Buyer reasonably objects to such plans or contracts during such ten (10) day period."

Decision No. 90436 impliedly approved the terms and conditions of the sale, as expressed in the purchase and sale agreement. Any order which issues from this proceeding should not contravene Decision No. 90436 or the agreement approved thereby.10/ Therefore, our order which follows will be subject to the provisions of the purchase and sale agreement.

Findings of Fact

1. The facilities installed by Inverness pursuant to Advice Letter No. 17 do not provide fire flow of 500 gpm.

2. The land use in the service area of Inverness is single-family residential.

3. At the time Advice Letter No. 17 was submitted to the Commission, Inverness did not have a reasonable expectation that it would be able to obtain main extension agreements from Conner, Lewis, Retlines, Rothwell (with respect to Lots 6 and 7), and Burd within the reasonably foreseeable future.

4. The inclusion of Behr in the master plan was reasonable and consistent with the main extension rule.

5. No evidence was introduced to establish the liability of Citizens Utilities Company of California for any of the acts alleged or proven.

Conclusions of Law

1. Resolution No. W-1836 did not authorize Inverness to deviate from the provisions of G.O. 103.

10/ A modification of the agreement in this proceeding would constitute a collateral attack upon a final and conclusive order of the Commission and would violate Sections 1708 and 1709 of the Public Utilities Code.

2. The provisions of G.O. 103, Section VIII(1)(a), require a minimum fire flow of 500 gpm for facilities built in Inverness' service area.

3. Inverness has violated G.O. 103 by failing to install facilities which produce the required fire flow.

4. A deviation from the provisions of G.O. 103 should not be granted to Inverness.

5. No refunds should be made to Behr.

6. Inverness should be required to construct the remainder of the facilities contemplated by the master plan at its own expense, if each of the complainants first advances to Inverness an additional $1,310 per lot within 60 days after the effective date of this order.

7. The order which follows should be subject to the provisions of the purchase and sale agreement if applicable.

8. As to Citizens Utilities Company of California, the complaint should be denied.

9. The Commission lacks jurisdiction to award attorney fees and costs to the complainants. 11/

O R D E R

IT IS ORDERED that:

1. Inverness Water Company shall construct the remainder of the facilities contemplated by the master plan at its own expense, provided that each of the complainants first advances to Inverness an additional $1,310 per lot within sixty days after the effective date of this order, and further provided that this order shall be subject to the provisions of the purchase and sale agreement if applicable.

11/ Consumers Lobby Against Monopolies v Public Utilities Comm. (1979) 25 C 3d 891 is inapplicable, since no common fund is created in the instant case.

2. The complaint is denied as to Citizens Utilities Company of California.

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

Dated JAN 29 1980, at San Francisco, California.

President

Commissioners

Commissioner JOHN E. BRYSON