

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
KEALIA WATER COMPANY HOLDINGS LLC)
)
For a Certificate of Public)
Convenience and Necessity to)
Provide Water Services on the)
Island of Kauai, District of)
Kealia, and for Approval of Rules,)
Regulations, and Rates.)
_____)

DOCKET NO. 03-0246

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

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ORDER NO. 20970

Filed May 12, 2004
At 3:00 o'clock P .M.

Karen Higuel.
Chief Clerk of the Commission

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
KEALIA WATER COMPANY HOLDINGS LLC)	Docket No. 03-0246
For a Certificate of Public Convenience and Necessity to Provide Water Services on the Island of Kauai, District of Kealia, and for Approval of Rules, Regulations, and Rates.)	Order No. 20970
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ORDER

I.

Background

KEALIA WATER COMPANY HOLDINGS LLC ("KWCH" or "Applicant") requests a certificate of public convenience and necessity ("CPCN") authorizing it to provide water service on the Island of Kauai, District of Kealia, and approval of its proposed rates, rules, and regulations. KWCH makes its request in an application filed on August 29, 2003, under Hawaii Revised Statutes ("HRS") §§ 269-7.5 and 269-16 and Hawaii Administrative Rules ("HAR") §§ 6-61-74 and 6-61-75.

The DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate") was served copies of KWCH's application.

Notice of KWCH's CPCN application was published on November 13, 2003, pursuant to HAR § 6-61-57(2). HAR § 6-61-57(2) requires a motion to intervene or participate in a proceeding regarding an application for the issuance or

transfer of a CPCN to be filed not later than twenty (20) days after the notice of the pending application is published.

KEALIA PLANTATION COMPANY, LLC ("KPC") filed a motion to intervene as a party to this proceeding on December 3, 2003, pursuant to HRS chapter 269, HAR § 6-61-55, and "all relevant documents on file with the commission" ("Motion").¹ On December 12, 2003, KWCH filed a memorandum in opposition to the Motion ("Opposition"). KPC filed a letter on December 19, 2003, requesting leave to submit its reply to the Opposition ("Leave Request"), as incorporated ("Reply" or "Letter"). By letter filed on December 29, 2003, KWCH objected to the submission of the Reply and requested that the commission strike the Letter from the record ("Strike Request"), or in the alternative, time for KWCH to submit substantive responses to the issues raised in the Reply ("Response").

The commission denied KWCH's Strike Request and granted KPC's Leave Request in Order No. 20743, filed on January 8, 2004. In that order, the commission also established filing procedures for KWCH to submit its Response and for KPC, at its option, to file its reply comments to the Response ("Comments"). KWCH filed its Response on January 15, 2004, and KPC filed its Comments on January 22, 2004, pursuant to Order No. 20743.

¹No other persons moved to intervene in this proceeding.

II.

KPC's Motion

KPC states that it should be allowed to intervene in this proceeding for various reasons. First, KPC states that important infrastructure necessary for Applicant's proposed service lies on or below land owned by KPC. KPC contends that Applicant has no recorded interest to the land or an easement to gain access to or use of the land. KPC argues that it has a unique financial and property interest in the easements and KWCH's potable water, and contends that issues related to these interests should be resolved in this proceeding.

Second, KPC represents that it is potentially the largest unaffiliated consumer of Applicant's water service, and as such, it has a definite financial interest in this proceeding. KPC states that it wishes to ensure that Applicant's rules treat it equitably and that it not be required to subsidize Applicant's affiliated companies or other users.

Third, KPC argues that while Applicant has an obligation to provide KPC with 300,000 gallons of water per day, pursuant to an April 1, 2001 partition agreement between KPC and Applicant's parent company, Cornerstone Hawaii Holdings, LLC, ("Partition Agreement"), Applicant's proposed rules are inconsistent with and disregard its obligations to KPC and are unclear. KPC is also concerned that Applicant's proposed rules are silent on the rates to be charged commercial users. KPC states that while it is entitled to water from Applicant, KPC and Applicant have not reached an agreement on the rates to be

charged for the water. KPC argues that this proceeding is the appropriate forum to determine the rates, rules, and regulations to govern applicable usage and delivery of Applicant's water service.

KPC contends that party intervention in this docket will allow it the opportunity to protect its interests. It states that its interests are unlike that of the general public since KPC has a direct financial interest in Applicant as a large consumer of potable water and as a landowner, and contends that no other party, including the Consumer Advocate, has the same interests. KPC argues that the outcome of this proceeding could be significantly adverse to KPC without intervention and contends that there is no other means for it to protect its interests. KPC represents that its allegations are reasonably pertinent to and will not unreasonably broaden the issues or delay this proceeding and states that its participation will assist the commission in developing a sound record.

III.

KWCH's Opposition

KWCH argues that KPC's Motion should be denied since KPC raises concerns that are irrelevant to this docket and that its participation in this proceeding will unnecessarily broaden the issues and delay this proceeding. KWCH also contends that KPC's interests are adequately represented by the Consumer Advocate.

KWCH asserts that KPC's argument regarding its lack of an easement to use KPC's property, and KPC's need to protect its property interests are not pertinent to the issues of this docket. KWCH argues that the negotiations and enforcement of the Partition Agreement are not within the jurisdiction of the commission. Moreover, it insists that it has a legal right to use KPC's land since under the terms of the Partition Agreement, KPC is required to convey fee simple title to the lands or grant KWCH easements to use it. KWCH states that it fully intends to honor the water commitments made in the Partition Agreement, and that KPC's concerns are speculative since it is not an existing customer for water service nor is it aware of any uses KPC may have for the water.

KWCH further represents that KPC will be charged the same rates that other customers are charged. KWCH also states that it is not aware of any commercial users in the service area and contends that lack of water rates for nonresidential and agricultural uses should not be a basis for allowing KPC to intervene since this is an issue that can be raised by the Consumer Advocate.

IV.

Additional Filings

KPC and KWCH advanced their positions in their respective additional filings in this docket. For instance, in its Reply, while reiterating its request to intervene as a party in this proceeding, KPC also requests, in the alternative, that

the commission stay KWCH's CPCN application or dismiss it, without prejudice ("Stay or Dismissal Request"). KPC makes its request based on its argument that KWCH cannot meet the HRS § 269-7.5 requirement that it is "fit, willing and able to properly perform the service proposed" since it does not have recorded easements to use KPC's land on which KWCH's facilities are located. KPC further argues that the cost of the easements is relevant to this docket. KWCH, in its Response, argues that KWCH's Stay or Dismissal Request is unnecessary and unwarranted since KWCH has a legal right to use KPC's land. KWCH asserts that KPC's inference that KWCH has no legal right to use the land is incorrect pursuant to the addendum of the Partition Agreement. KWCH further states that the cost of the easements is irrelevant to this proceeding since KWCH has not included such costs in its rate base nor is it seeking to do so in this case.

Furthermore, in its Response, KWCH: (1) asserts that KPC's interests are no different from other water consumers; (2) restates that it intends to fully uphold the water commitments that it made; and (3) states that it intends to charge KPC the same rates and charges that it will assess other water consumers, once they are approved by the commission. In its Comments, KPC insists that its interests are unique. KPC argues that while KWCH states that it intends to meet its water obligations to KPC, KWCH fails to guarantee that these obligations shall be met. KPC also asserts that the Reply incorrectly argues that KPC interests can be adequately represented without countering the argument that the commission

has allowed large customers of a utility to intervene in proceedings involving the utility in the past.

V.

Findings and Conclusions

HAR § 6-61-55 governs party interventions in commission proceedings. Specifically, under HAR §6-61-55(d), party intervention shall not be granted except on allegations that are reasonably pertinent to and do not unreasonably broaden the issues. The Supreme Court of Hawaii clarified that intervention as a party in a proceeding before the commission "is not a matter of right but is a matter resting within the sound discretion of the commission."²

KPC's contention that the Consumer Advocate cannot adequately address its interests appears to have merit. KPC owns the land upon which KWCH's facilities are located and, when operational, KPC has the potential of being one of KWCH's largest customers. Thus, it appears that KPC's interests differ from those of the general public. However, we also recognize that certain matters raised by KPC in its Motion appear to be outside of the commission jurisdiction, as argued by KWCH.³ Nevertheless, we believe that KPC's participation in this docket can assist us in developing a sound record. Additionally, we recognize that

²See, In re Hawaiian Electric Company, Inc., 56 Haw. 260, 262 (1975).

³The commission is not the forum to address unresolved matters related to the terms and conditions of the Partition Agreement or to enforce them.

the commission, in its discretion, has granted intervention to large customers of utilities in certain matters in the past, as alluded to by KPC.⁴ In this case, KPC has satisfactorily established that it has substantial interests that can be affected by the outcome of this case, and that the Consumer Advocate may not directly address KPC's interests.

Based on these factors, the commission concludes that KPC has sufficiently established that its intervention is reasonably pertinent to and does not unreasonably broaden the issues of this docket. Our decision to grant KPC's request to intervene as a party to this docket solely addresses this narrow matter. KPC is reminded that its participation in this docket is limited to matters that are reasonably pertinent to the matters of this docket.⁵ We caution KPC that its participation in this docket may be reconsidered if we later find that KPC's participation is either unreasonably broadening the issues of this proceeding or unduly delaying the proceedings.⁶

⁴See, In re Hawaiian Electric Company, Inc., Order No. 13136, filed on February 22, 1994, in Docket No. 94-0010; and In re Citizens Utilities Company, Kauai Electric Division, Order No. 13596, filed on October 13, 1993, in Docket No. 94-0097.

⁵KPC is specifically prohibited from raising unresolved matters of the Partition Agreement in this docket.

⁶At this juncture, we find KPC's Stay or Dismissal Request to be moot. We, thus, believe that it is unnecessary to further address this matter.

VI.

Orders

1. KPC's motion to intervene is granted.

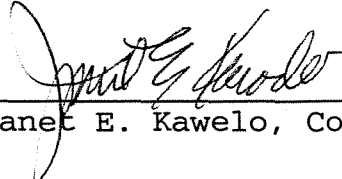
2. The parties to this proceeding (Applicant, the Consumer Advocate, and KPC) shall meet informally to formulate the issues, a schedule of proceedings, and all other procedural matters necessary to govern this docket in a stipulated prehearing order. The stipulated prehearing order shall be filed with the commission within thirty (30) days of the date of this order for the commission's review and approval. If unable to stipulate to such an order, each party shall submit a proposed prehearing order for the commission's consideration.


DONE at Honolulu, Hawaii this 12th day of May, 2004.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By  By 
Carlito P. Caliboso, Chairman Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

By 
Janet E. Kawelo, Commissioner


Ji Sook Kim
Commission Counsel

03-0246.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 20970 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

C. CLARK LIPSCOMB
PRESIDENT, REAL ESTATE DIVISION
CORNERSTONE HAWAII HOLDINGS, LLC
132 West Main Street
Aspen, CO 81611

J. DOUGLAS ING, ESQ.
PAMELA J. LARSON, ESQ.
TERI Y. KONDO, ESQ.
WATANABE ING KAWASHIMA & KOMEIJI LLP
999 Bishop Street, 23rd Floor
Honolulu, HI 96813

JUSTIN HUGHES
KEALIA PLANTATION COMPANY, LLC
c/o Law Offices of Walton D.Y. Hong
3135-A Akahi Street
Lihue, HI 96766

CRAIG I. NAKANISHI, ESQ.
RUSH MOORE CRAVEN SUTTON MORRY & BEH
737 Bishop Street, Suite 2400
Honolulu, HI 96813



Karen Higashi

DATED: May 12, 2004