

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
MILLER AND LIEB WATER COMPANY, INC.)
)
and HAWAIIAN BEACHES WATER COMPANY,)
)
INC.)
)
For Approval of the Sale and)
Transfer of Assets of Miller and)
Lieb Water Company, Inc. and)
Related Matters.)
_____)

DOCKET NO. 2006-0437

DECISION AND ORDER NO. 23313

Filed March 21, 2007

At 11 o'clock A.M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy

KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

Karen Higashi

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

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DECISION AND ORDER

By this Decision and Order, the commission approves MILLER AND LIEB WATER COMPANY, INC. ("Miller and Lieb") and HAWAIIAN BEACHES WATER COMPANY, INC.'s ("HBWC") (collectively "Applicants") requests to (1) issue HBWC a certificate of public convenience and necessity ("CPCN") to provide water service within the Hawaiian Beaches Subdivision, located in Pahoia, Puna District, island of Hawaii, and (2) approve the sale and transfer of Miller and Lieb's utility assets and operations to HBWC, subject to certain conditions as described herein.¹ In addition, the commission approves Miller and Lieb's financing leases for the two vehicles that are currently used as part of its utility operations, effective from the date of this Decision and Order, with no express or implied retroactive effect.

¹The Parties are Miller and Lieb, HBWC, and the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

I.

Background

A.

Application

1.

Description of the Subject Entities²

Miller and Lieb is authorized by the commission to operate as a public utility providing water service within the Hawaiian Beaches Subdivision located in Pahoia, Puna District, island of Hawaii.³ Miller and Lieb currently provides water

²See Joint Application; Exhibits A - B; Verification; and Certificate of Service, filed on November 3, 2006, as supplemented on November 9, 2006; and Amended and Restated Application; Exhibits A - C; Verification; and Certificate of Service, filed on February 12, 2007 (collectively, "Joint Application"). Applicants served copies of their Joint Application upon the Consumer Advocate.

³On July 15, 1975, Miller and Lieb was incorporated under the laws of Hawaii for the purpose of conducting operations and business as a water distribution company within the Hawaiian Beaches Subdivision. See Joint Application, at 3 - 4; and In re Miller & Lieb Water Co., Inc., Docket No. 2748, Decision and Order No. 4098, filed on December 26, 1975, at 1.

On December 26, 1975, the commission, in Docket No. 2748: (1) held that the operations of Miller and Lieb constituted a public utility by definition; and (2) authorized Miller and Lieb to publish, establish, and assess an interim rate of \$6.00 per month, effective from October 24, 1975. Docket No. 2748 was initiated by an application filed by Miller and Lieb on October 14, 1975, requesting the commission's "authorization and approval of rates and charges applicable to its water distribution service within the Hawaiian Beaches Subdivision located in the Puna District, Pahoia, Hawaii. Authorization and approval [was] sought under Sections 269-1 and 269-16, [HRS]." Decision and Order No. 4098, at 1. As noted by the commission in Decision and Order No. 4098:

Pursuant to Section 269-1, [HRS], the distribution and sale of water to the general public falls within the definition of a public utility. Accordingly, [Miller and Lieb] is required to comply with Section 269-16, [HRS],

service to approximately 1,100 customers within the Hawaiian Beaches Subdivision, at a flat rate of \$12.00 per month.⁴ The

concerning the filing and publication of rates, charges, rules, and practices made for its sale of water distribution services.

Docket No. 2748, Decision and Order No. 4098, at 2. See also Docket No. 2748, Decision and Order No. 4103, filed on January 16, 1976 (authorizing Miller and Lieb to place into effect on or after December 15, 1975, its proposed tariff rules as amended by the commission); and Decision and Order No. 4221, filed on April 20, 1976 (authorizing a rate of \$8.75 per month and approving Miller and Lieb's tariff rules).

As explained by Applicants, Miller and Lieb does not hold a CPCN. See Joint Application, at 4 n.5. Rather, in October 1975, the commission, in effect, authorized Miller and Lieb to operate as a public utility of water service to the Hawaiian Beaches Subdivision. See Docket No. 2748, commission's letter, dated November 4, 1975 (at the October 24, 1975 quorum meeting, the commission granted interim approval to allow Miller and Lieb to provide basic water distribution services at an interim rate of \$6.00 per month, effective from October 24, 1975, with a formal decision and order forthcoming); and Decision and Order No. 4098, filed on December 26, 1975.

The requirement for a person holding itself out to the general public as a public utility to obtain a CPCN from the commission, as codified in HRS § 269-7.5, took effect on May 16, 1978. See Act 72, Haw. Sess. Laws 1978, § 1. HRS § 269-7.5, subsection (d), provides:

No public utility that holds a franchise or charter enacted or granted by the legislative or executive authority of the State or its predecessor governments, or that has a bona fide operation as a public utility heretofore recognized by the commission, shall be required to obtain a certificate of public convenience and necessity under [section 269-16].

HRS § 269-7.5(d) (emphasis added).

Thus, under the grandfather exception codified in HRS § 269-7.5(d), Miller and Lieb is authorized by the commission to operate as a public utility of water service within the Hawaiian Beaches Subdivision.

⁴See In re Miller and Lieb Water Co., Inc., Docket No. 3822, Decision and Order No. 6354, filed on August 28, 1980 (authorizing an increase to a flat rate of \$12.00 per month, effective from September 9, 1980).

issued and outstanding shares of stock in Miller and Lieb are presently owned by Paul S. Miller and Rita L. Miller, Paul Lieb, and Mary M. Prescott (collectively, the "Miller and Lieb shareholders").

Title to the real property on which Miller and Lieb's water facilities (i.e., office, warehouse, storage tanks, wells, and reservoir) are located is held by World Electric Corp. ("World Electric"), a Hawaii corporation, and P.M.E., Inc. ("PME"), an involuntarily dissolved Hawaii corporation. All of the shares of stock of World Electric and PME are individually owned by Paul Miller and Paul Lieb, respectively.

HBWC is a Hawaii corporation recently formed for the purpose of acquiring Miller and Lieb's utility assets and taking over the operations and business of providing water service to the Hawaiian Beaches Subdivision. HBWC's shareholders are Katherine M. Prescott and Mark J. Prescott (collectively, the "HBWC shareholders").⁵

2.

Water Utility Operations

Applicants state that:

1. The Miller and Lieb shareholders, after owning and operating the water system for over thirty years, have decided to sell the utility operations to HBWC because the shareholders are no longer able and willing to operate the water system.

⁵According to Applicants, Mary M. Prescott, one of the Miller and Lieb shareholders, is the paternal grandmother of Katherine M. Prescott and Mark J. Prescott.

Specifically, the Miller and Lieb shareholders are: (A) unable or unwilling to make the financial commitment to undertake the much needed repairs to the water system or to commit the necessary funding required to upgrade and expand the water system to meet current and future customer demands; and (B) unable to provide the assistance and support needed to continue the utility operations, or to respond to and address any unexpected emergencies that may occur.

2. Since January 2006, HBWC's shareholders have been involved in Miller and Lieb's utility operations, pursuant to a verbal agreement with Miller and Lieb's shareholders. In addition, HBWC's shareholders and Chad J. Prescott were named as acting directors of Miller and Lieb, pursuant to the unanimous written consent of the Miller and Lieb shareholders. In turn, Katherine M. Prescott (President and Secretary), Mark J. Prescott (Vice President), and Chad J. Prescott (Chief Financial Officer) were named as officers of Miller and Lieb.⁶

3. From January 2006 through December 20, 2006, HBWC's shareholders have invested approximately \$264,650 into Miller and Lieb "to sustain the operations, as well as to make much needed replacements, repairs and improvements. Efforts are also being made to retrofit and refurbish or install water meters [for] existing customers, as well as on all new installations, pursuant to a meter installation program, in which all customers should have meters by the end of 2009."⁷

⁶Katherine M. Prescott and Mark J. Prescott also serve as President and Vice President, respectively, of HBWC.

Asset Purchase Agreement

On October 1, 2006, Miller and Lieb, World Electric, PME, and HBWC, entered into an Asset Purchase Agreement (the "Agreement"), a copy of which is attached as Exhibit A to the Joint Application.

Pursuant to the terms of the Agreement:

1. Miller and Lieb agrees to sell and transfer to HBWC, free and clear of all liens, all of its rights, title, and interests in its water utility assets, operations, and operating authority (including the fee simple interest in the real property underlying Miller and Lieb's utility operations owned by World Electric and PME, and Miller and Lieb's office, warehouse, storage tanks, wells, and reservoir) to HBWC, for a purchase price of one dollar.⁸ The subject assets, operations, and operating authority are collectively referred to as the "Acquired Assets" in Section 1.1 of the Agreement.⁹

2. HBWC will assume the public service obligation to provide water utility service to Miller and Lieb's customers.

⁷Joint Application, at 7, as updated by Applicants' responses to CA-IR-2 and CA-IR-4(a), and Attachment CA-IR-2(a) (\$264,650 through December 20, 2006).

⁸Applicants state that the nominal purchase price of one dollar is due in part to the recognition by the Miller and Lieb shareholders that significant improvements to the water system are necessary in the very near future.

⁹Certain assets, consisting primarily of Miller and Lieb's corporate and financial documents and records, except for those records that relate to Miller and Lieb's utility operations, are excluded from the sale and transfer to HBWC. See Agreement, Section 1.2, Excluded Assets.

The Agreement and sale of the Acquired Assets to HBWC are subject to certain conditions, including the commission's approval.¹⁰ The subject transaction is scheduled to close "ten business days after the receipt of the approval on the transfer of assets" from the commission.¹¹

4.

Relief Requested

By their Joint Application, Applicants request commission action:

1. Approving the Agreement.
2. Approving the sale and transfer of Miller and Lieb's Acquired Assets, including its operating authority, to HBWC, pursuant to HRS § 269-19.¹²
3. Approving the sale and transfer of certain assets held by World Electric and PME that are utilized by Miller and Lieb as part of its utility operations, to HBWC, pursuant to HRS § 269-7, to the extent applicable. These assets include the fee simple interest in the real property underlying Miller and Lieb's utility operations owned by World Electric and PME, and Miller

¹⁰See Agreement, Recitals, and Sections 8.1(e) and 8.2(d).

¹¹Agreement, Section 4.

¹²At the outset, Applicants represent that: (1) the subject transaction involves the purchase and sale of assets, not stock, thus, HRS § 269-18 does not apply; (2) because the transaction does not involve the transfer of stock, HRS § 269-17.5 does not apply; and (3) HRS § 269-17.5 is inapplicable, because the transaction does not involve nor require the issuance of any stocks and stock certificates, bonds, notes, or other evidences of indebtedness.

and Lieb's office, warehouse, storage tanks, wells, and reservoir.

4. Ordering that: (A) a new tariff to be proposed by Miller and Lieb in In re Miller and Lieb Water Co., Inc., Docket No. 2006-0442, be approved to govern HBWC's provision of water utility service following the closing of the transaction;¹³ or in the alternative: (B) Miller and Lieb's current tariff remain in effect following closing, until such time as a new tariff is approved by the commission.

Applicants make their requests pursuant to HRS § 269-19 and HAR chapter 6-61, subchapters 6 and 10.

B.

Applicants' Position

1.

Fitness, Willingness, and Ability to
Perform the Water Utility Operations

Applicants represent that HBWC "is or will be sufficiently fit, willing and able to provide service to Miller and Lieb's service territory, to satisfy all of its public utility obligations, and to conform to the terms, conditions, rules, and regulations of the Commission, and that the subject transaction is reasonable and in the public interest."¹⁴

¹³On November 8, 2006, in In re Miller and Lieb Water Co., Inc., Docket No. 2006-0442, Miller and Lieb filed an application for approval of: (1) a general rate increase, utilizing the 2007 calendar test year; and (2) certain financing arrangements. Docket No. 2006-0442 is currently pending before the commission.

¹⁴Joint Application, at 10.

Applicants specifically state:

1. HBWC's shareholders "have the financial wherewithal and personal commitment to invest in and undertake the much needed repairs to the system, to pursue the overdue capital improvements required to install the system in the near future, as well as to respond and address any unexpected emergencies that may occur."¹⁵ HBWC, through its infusion of capital into Miller and Lieb from January 2006 through December 2006 (approximately \$264,650 to-date), has demonstrated its financial commitment and fitness to operate as a public utility. Moreover, HBWC will not utilize any outside financing to consummate the subject transaction.¹⁶

Furthermore, HBWC will have the financial fitness and ability to fund the continuing operations of the Acquired Assets through the revenues generated from the utility operations, should the commission approve the transaction; and HBWC and Miller and Lieb are presently negotiating with various lenders, including Bank of Hawaii ("BOH"), to obtain financing for its new well and storage facilities.¹⁷ More importantly, Miller and Lieb, when compared with HBWC, "certainly did not have the financial ability or commitment to operate the water company in a manner

¹⁵Joint Application, at 11.

¹⁶Nonetheless, Applicants make it clear that Miller and Lieb, HBWC, or both, will be obtaining financing to fund some or all of the necessary capital improvements to the water system. See Docket No. 2006-0442.

¹⁷See Applicants' response to CA-SIR-3, filed under partial confidential seal (referring to BOH's letter, dated January 29, 2007, expressing BOH's interest in considering the proposed financing).

that was conducive to delivering reliable and quality water in the quantities required for the service territory."¹⁸

2. HBWC's "willingness to assume the above responsibilities and obligations is evident from the considerable time, effort, and energy spent operating the Miller and Lieb operations since January 2006, the significant amount of funds expended and anticipated to be expended in connection with the proposed acquisition, and by its joinder in the filing of this Application requesting regulatory approval of the subject transaction."¹⁹

3. HBWC agrees to offer employment to all of Miller and Lieb's existing employees, effective as of the closing of the Agreement, at no less than the same or substantially similar compensation packages.²⁰ The retention of these existing employees should ensure a smooth transition of the utility's assets and operations, and HBWC will also "gain the benefit of these employees' experience and knowledge of the unique aspects of operating Miller and Lieb's system and providing service to Miller and Lieb's customers."²¹ In effect, Applicants refer to the "extensive experience and resources that will be available

¹⁸Applicants' response to CA-IR-4(a).

¹⁹Joint Application, at 11.

²⁰Miller and Lieb presently employ two full-time employees (consisting of the HBWC shareholders) and three part-time employees. Applicants represent that upon the completion of the subject transaction: (1) HBWC's shareholders will become the owners and executive employees; and (2) the three part-time employees will remain in their same employment positions. See Applicants' response to CA-IR-5.

²¹Joint Application, at 12.

within [HBWC] and [HBWC's] Shareholders' existing experience with operating the utility system," as evidence of HBWC's ability to properly assume the water utility operations.²²

4. Applicants are committed to ensuring a successful and smooth transition of the ownership of the utility assets and operations from Miller and Lieb to HBWC that should be relatively seamless and transparent to existing customers, with minimal interruption in service, with the overall intent of improving the utility's operations and quality of service.

5. HBWC will continue to be subject to and abide by all rights and obligations currently imposed on Miller and Lieb in connection with applicable commission rules and orders. Moreover, upon closing, HBWC commits and agrees to abide by and conform to all applicable commission rules and orders.

Applicants, in their response to PUC-IR-201, also confirm that:

1. The water utility service HBWC proposes to assume is required by the present convenience and necessity (i.e., 1,100 existing customers) and will be required by the future public convenience and necessity (approximately 150 potential customers awaiting service due to the recent increase in development of residences).

2. No other entity appears capable of providing water utility service within the service territory. At this juncture, the County of Hawaii does not provide municipal water service within the existing service territory, and Applicants are unaware

²²Joint Application, at 12.

of any other water companies or entities that are willing and able to provide the existing water service. "Although the County of Hawaii and an adjacent community association presently provide water services to areas near and outside of [Miller and Lieb's] existing service territory, Applicants' understanding is that neither the County of Hawaii nor the adjacent community association is willing and/or able to provide such water services."²³

2.

Sale and Transfer of Assets

Applicants contend that the subject transaction is reasonable and in the public interest. In support thereto, Applicants state:

1. HBWC's shareholders "have the financial wherewithal, ability and willingness to assume and provide the assistance and support necessary to continue the utility operations and to undertake the much needed repairs and overdue capital improvements needed to ensure the continued safe and reliable operation of the utility system, as well as to respond to unexpected emergency situations."²⁴

2. HBWC's shareholders have invested \$264,650 into the water system to undertake needed repairs and improvements the Miller and Lieb shareholders were unable to contribute.

²³Applicants' response to PUC-IR-201.

²⁴Joint Application, at 13.

3. No external financing will be utilized by HBWC in acquiring Miller and Lieb's utility assets and operations. Thus, shareholders and ratepayers will not be burdened with the need to repay any financed debt associated with the subject transaction.

C.

Consumer Advocate's Statement of Position

In its Statement of Position filed on February 20, 2007, the Consumer Advocate informs the commission that, subject to certain recommended conditions, it does not object to the commission's approval of the issuance of a CPCN to HBWC, or to the sale and transfer of the Acquired Assets from Miller and Lieb to HBWC.

1.

Fitness, Willingness, and Ability to
Perform the Water Utility Operations

The Consumer Advocate states that HBWC is fit, willing, and able to provide reliable water distribution service to Miller and Lieb's customers. Specifically, the Consumer Advocate asserts:

1. Through December 2006, HBWC's shareholders "have infused approximately \$264,650 into the operations of [Miller and Lieb] to sustain the day-to-day operations of [Miller and Lieb] since the existing rates are insufficient to cover the operating

expenses and make the necessary repairs to the water distribution system."²⁵

2. A family-related entity of HBWC's shareholders is committed to loaning up to \$500,000 to Miller and Lieb on HBWC's behalf. Moreover, the family-related entity is willing to continue to provide financial support beyond the initial \$500,000 commitment to sustain Miller and Lieb's operations, until such time that the utility rates charged are sufficient to cover the utility's operating expenses.

3. HBWC is in the process of obtaining financing for the construction of new plant facilities that will enable the utility to meet future customer demands.

4. Since January 2006, HBWC's shareholders have been involved in Miller and Lieb's daily operations and have made the necessary repairs to the water distribution system, evidencing their willingness and ability to operate and maintain the water distribution system in a manner that ensures the continued provision of water service to Miller and Lieb's customers.

5. Following closing, the current employees of Miller and Lieb will remain as employees of HBWC.

6. As a public utility, HBWC will have the ability to seek the commission's approval "to increase the rates charged for the water service if the existing rates are insufficient to recover the operating costs, pay debt service obligations, and generate a return on investment for [HBWC's] shareholders."²⁶

²⁵Consumer Advocate's Statement of Position, at 13 (footnote and citation therein omitted).

Based on the foregoing reasons, the Consumer Advocate recommends the issuance of a CPCN to HBWC.

2.

Sale and Transfer of Assets

The Consumer Advocate states that the terms of the Agreement appear reasonable and consistent with the public interest. In particular, the Consumer Advocate states:

1. The purchase price reflects the need to undertake and complete substantial repairs to the existing water system; and is well below the remaining net book value of the assets, adjusted for the liabilities to be transferred. Based on the monies expended by HBWC to-date to sustain Miller and Lieb's operations, the purchase price appears reasonable. "In addition, [HBWC's] assumption of the liabilities is reasonable since the liabilities were incurred to sustain the day-to-day operations of [Miller and Lieb]." ²⁷

2. Applicants represent that Miller and Lieb's shareholders are no longer able and willing to operate the water system, and are unable or unwilling to make the necessary financial commitments to maintain or repair the water system. By contrast, HBWC has demonstrated that it is fit, willing, and able "to assume responsibility for the operation and management of the water utility company and the reasonableness of the terms of the Asset Purchase Agreement, [such that] approval of the Asset

²⁶Consumer Advocate's Statement of Position, at 13.

²⁷Consumer Advocate's Statement of Position, at 9.

Purchase Agreement is in the public interest. Such approval will ensure the continued provision of reliable water service to residents in the Hawaiian Beaches subdivision, which is necessary for [the] public health and welfare."²⁸

3.

Recommended Conditions

The Consumer Advocate recommends three conditions as part of the commission's approval of the subject transaction:

1. Consistent with past commission decisions, Applicants should be required to maintain an accounting of the costs incurred to process the Joint Application to ensure that no such transaction costs are passed on to ratepayers.

2. The subject transaction will result in a purchase discount since the net book value of the acquired assets, adjusted for the assumed liabilities at closing, is expected to exceed the nominal purchase price. HBWC should not be required to reduce the net book value of the assets simply because the price paid to acquire the ownership of such assets is lower than the net book value of the acquired assets. By analogy, the commission has consistently disallowed the recognition of an acquisition premium in the rate setting process.

3. HBWC should be required to: (A) expedite and complete by December 31, 2007, its efforts to install meters for existing and new customers; and (B) immediately install a meter at the well head ("Condition No. 3"). "The completion of these

²⁸Consumer Advocate's Statement of Position, at 14 - 15.

tasks will provide HBWC with critical data for the efficient operation of the water utility and allow the Company to implement sound rate making principles by being able to charge the customer for the costs incurred to serve the customer."²⁹

4.

Tariff Matters

The Consumer Advocate recommends that Miller and Lieb's proposed new tariff, filed in Docket No. 2006-0442, be reviewed in the context of that proceeding, Miller and Lieb's pending general rate case.

D.

Applicants' Reply

In their Response filed on March 5, 2007,³⁰ Applicants inform the commission that they do not object to the Consumer Advocate's recommended conditions, subject to one clarification for Condition No. 3. Specifically, while Applicants concur with the Consumer Advocate's assessment that the meter installation program should be expedited, Applicants propose the end of 2008 as the deadline to complete the meter installation program. Applicants represent that the Consumer Advocate is agreeable with

²⁹Consumer Advocate's Statement of Position, at 18.

³⁰Applicants' Statement in Response to Consumer Advocate's Statement of Position, Dated February 20, 2007; and Certificate of Service, filed on March 5, 2007 (collectively, "Response").

and does not object to a deadline set at the end of 2008 (December 31, 2008).³¹

II.

Discussion

A.

CPCN

As part of the Joint Application, Applicants initially requested the commission's approval to transfer Miller and Lieb's authority to operate as a public utility under HRS § 269-7.5(d) to HBWC. Concomitantly, Applicants did not oppose the issuance of a CPCN to HBWC in lieu of transferring or assigning Miller and Lieb's existing "grandfathered" operating authority to HBWC. Now, Applicants specifically request the issuance of a CPCN to HBWC, pursuant to HRS § 269-7.5.³²

HRS § 269-7.5(a) provides that no public utility shall commence business in the State of Hawaii ("State") without first having obtained a CPCN from the commission. Pursuant to HRS § 269-7.5(c), a CPCN shall be issued if the holder "is fit, willing, and able properly to perform the service proposed and to

³¹Applicants' Response, at 3 - 4.

³²In their response to PUC-IR-202, Applicants clarify that: (1) a CPCN, if issued by the commission, should be issued in the name of HBWC; and (2) HBWC will not utilize the trade name Miller & Lieb Water Company. In effect, the new name of the water utility will be Hawaiian Beaches Water Company, Inc.

Applicants also clarify that the requested effective date of HBWC's CPCN is the effective date of this Decision and Order, and not upon the closing of the subject transaction. See commission counsel's telephone conversation with Applicants' regulatory counsel, on March 6, 2007.

conform to the terms, conditions, and rules adopted by the commission, and that the proposed service is, or will be, required by the present or future public convenience and necessity[.]"

Here, the commission finds that HBWC is fit, willing, and able to properly perform the water utility service within the service territory, and to conform to the terms, conditions, and rules adopted by the commission, as evidenced by: (1) the involvement of HBWC's shareholders in the utility's daily operations since January 2006; (2) the infusion of \$264,650 in capital from January to December 2006 by HBWC's shareholders in order to sustain the utility's operations and undertake needed improvements and repairs; (3) the commitment of an HBWC-related entity to loan up to \$500,000 to Miller and Lieb on HBWC's behalf, and the entity's willingness to provide financial support beyond the initial \$500,000 commitment in order to sustain Miller and Lieb's utility operations, until such time that the utility rates charged are sufficient to cover the utility's operating expenses; (4) HBWC's ability to fund the utility operations through the revenues generated from its provision of water utility service; (5) HBWC's plan to obtain external financing for its new well and storage facilities; (6) the retention of the utility's existing employees following the approval of the subject transaction; (7) HBWC's commitment to ensuring a seamless and transparent transition for its existing customers, with minimal service interruptions and with the overall goal of improving the utility's operations and quality of service; and

(8) HBWC's representation that it will continue to be subject to and abide by all rights and obligations currently imposed on Miller and Lieb in connection with applicable commission rules and orders, and will abide by and conform to all applicable commission rules and orders.

The commission also finds that the water utility service is required by the present public convenience and necessity, and will be required by the future public convenience and necessity, as evidenced by: (1) the provision of water utility service to the existing 1,100 customers; (2) the utility's plan to increase its capacity in order to serve approximately 150 potential new customers; and (3) Applicants' representation that no other water company or entity, including the County of Hawaii, appears willing to or capable of providing water service within the utility's existing service territory.

Unlike Miller and Lieb, HBWC is not subject to the grandfather exception under HRS § 269-7.5(d). Thus, in this instance, the commission finds it prudent and feasible to: (1) terminate Miller and Lieb's operating authority; and (2) issue a CPCN to HBWC,³³ authorizing HBWC to operate as a public utility of water service within its authorized service

³³HRS § 269-7.5(a) provides that an application for a CPCN "shall include the type of service to be performed, the geographical scope of the operation, the type of equipment to be employed in the service, the name of competing utilities for the proposed service, a current financial statement of the applicant, and the rates or charges proposed to be charged including the rules governing the proposed service." In this context, the commission finds that the Joint Application, together with Applicants' responses to information requests, and the information filed in Docket No. 2006-0442 (including Miller and Lieb's unaudited financial statements), are consistent with the CPCN application requirements under HRS § 269-7.5(a).

area of the Hawaiian Beaches Subdivision. Moreover, consistent with HRS § 269-7.5(c), the commission finds it reasonable, in this instance, for HBWC to continue to utilize the same water rates and tariff presently used by Miller and Lieb, until such time that new water rates (if any) and a new tariff are approved by the commission in Docket No. 2006-0442.³⁴

B.

Sale and Transfer of Assets

HRS § 269-19 provides that no public utility shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public, nor by any means, directly or indirectly, merge or consolidate with any other public utility, without first having secured from the commission "an order authorizing it so to do. Every such sale, lease, assignment . . . [or] disposition . . . made other than in accordance with the order of the commission shall be void." The purpose of HRS § 269-19 is to safeguard the public interest. In re Honolulu Rapid Transit Co., Ltd., 54 Haw. 402, 409, 507 P.2d 755, 759 (1973).

In addition, HRS § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial

³⁴HRS § 269-7.5(c) states in relevant part that "[t]he reasonableness of the rates, charges, and tariff rules and regulations proposed by the applicant shall be determined by the commission during the same proceeding examining the present and future conveniences and needs of the public and qualifications of the applicant, in accordance with the standards set forth in [HRS] section 269-16."

transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations."

Applicants seek commission approval of the Agreement and the sale and transfer of Miller and Lieb's Acquired Assets to HBWC. Moreover, as part of their request, Applicants state that if the commission's approval to sell and transfer the assets held by World Electric and PME is also necessary, Applicants request such approval pursuant to HRS § 269-7, to the extent applicable.

Here, the Miller and Lieb shareholders, after owning and operating the water system for over thirty years, have decided to sell the utility operations to HBWC because the shareholders are no longer able and willing to operate the water system, including their unwillingness to secure and expend funds to undertake repairs, expand the capacity of the water system to meet current and future demands, and to respond to any unexpected emergencies. In effect, HBWC's shareholders have actively assumed Miller and Lieb's daily operations, invested funds to continue Miller and Lieb's operations, and plan to obtain external financing for its new well and storage facilities.

Moreover, the nominal purchase price reflects the HBWC's shareholders' investment of funds in the utility and their assumption of the utility's liabilities, as well as Miller and Lieb's intent to divest itself from its public utility duties and obligations. As noted by the Consumer Advocate, the commission's approval of the subject transaction "will ensure the continued provision of reliable water service to residents in the Hawaiian

Beaches subdivision, which is necessary for [the] public health and welfare."³⁵

Therefore, the commission finds that the sale and transfer of Miller and Lieb's Acquired Assets is consistent with the public interest, and, as such, will approve the Agreement and the sale and transfer of the Acquired Assets to HBWC, subject to the following conditions:³⁶

1. Transaction costs shall not be passed on to ratepayers, and Applicants shall maintain an accounting of the costs incurred to process the Joint Application, to ensure that no such transaction costs are passed on to ratepayers.

2. HBWC shall not be required to reduce the net book value of the acquired assets to reflect the actual purchase price.

3. HBWC agrees to immediately install a meter at the well head, and to expedite and complete the meter installation program by December 31, 2008. In the event HBWC is unable to complete the meter installation program by December 31, 2008, HBWC shall promptly notify the commission and the Consumer Advocate in writing, with an explanation as to why it is unable to meet the deadline, the new expected completion date of

³⁵Consumer Advocate's Statement of Position, at 14 - 15.

³⁶While the phrase Acquired Assets includes Miller and Lieb's operating authority, Applicants no longer seek the commission's approval to sell and transfer Miller and Lieb's operating authority to HBWC. Instead, Applicants seek the issuance of a CPCN to HBWC. See Section II(A), above. Thus, the commission's approval of the sale and transfer of Miller and Lieb's Acquired Assets does not include Miller and Lieb's operating authority.

the meter installation program, and HBWC's action plan to complete said program.

C.

Tariff

Miller and Lieb's proposed new tariff is presently subject to review in Docket No. 2006-0442. Accordingly, the commission finds it practical to order that the current tariff remain in effect until such time as a new tariff is approved by the commission in Docket No. 2006-0442; subject to the requirement that following the issuance of this Decision and Order, HBWC shall promptly file its initial tariff that reflects the change in name and ownership to HBWC.

D.

Financing Leases

HRS § 269-17 provides that, upon the commission's prior approval, a public utility corporation may issue stocks and stock certificates, bonds, notes, and other evidences of indebtedness, payable at periods of more than twelve (12) months after the date thereof, for the following purposes, and no other:

for the acquisition of property or for the construction, completion, extension, or improvement of or addition to its facilities or service, or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in its treasury not secured by or obtained from the issue of its stocks or stock certificates, or bonds, notes, or other evidences of indebtedness, for any of the aforesaid purposes except maintenance of service, replacements, and substitutions not constituting capital expenditure

in cases where the corporation has kept its accounts for such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which the expenditures were made, and the sources of the funds in its treasury applied to the expenditures.

HRS § 269-17.

Conversely, "[a] public utility corporation may not issue securities to acquire property or to construct, complete, extend or improve or add to its facilities or service if the commission determines that the proposed purpose will have a material adverse effect on its public utility operations." HRS § 269-17. "All stock and every stock certificate, and every bond, note, or other evidence of indebtedness of a public utility corporation not payable within twelve months, issued without an order of the commission authorizing the same, then in effect, shall be void." Id.

"Purposes 1 and 2 of [HRS § 269-17] contemplate situations where funds for capital acquisition or construction are to be expended after or nearly contemporaneously with the issuance of securities."³⁷

In their response to CA-SIR-4, Applicants confirm that: (1) Miller and Lieb, in 2005 and 2006, executed financing leases for two of its vehicles that are currently used as part of its utility operations; (2) the financing leases are for terms of more than twelve months and are secured; and (3) the financing leases may be subject to the commission's approval under HRS

³⁷In re Mauna Lani STP, Inc. and Hawaii-Am. Water Co., Docket No. 05-0229, Decision and Order No. 22299, filed on February 28, 2006, at 31 (quoting In re Waikoloa Resort Util., Inc., dba West Hawaii Util. Co., Docket No. 98-0090, Decision and Order No. 16340, filed on May 21, 1988, at 5).

§ 269-17. Thereafter, by their Joint Amended and Restated Application, filed on February 12, 2007, Applicants seek the commission's after-the-fact approval of both financing leases, pursuant to HRS §§ 269-17 and 269-19, to the extent applicable.³⁸

Applicants contend that the financing leases are reasonable and consistent with the public interest.³⁹ In addition, in response to PUC-IR-102, Applicants state that, in their view, the financing leases will not have a materially adverse effect on Miller and Lieb's utility operations. In support thereto, Applicants represent:

1. The execution of the financing leases have substantially benefited Miller and Lieb's utility operations since the time both vehicles were placed into service, by providing daily transport services for the utility employees to respond to customer service needs and requests.

2. The security for the financing leases solely affect the utility's personal property (e.g., the vehicles, business equipment, and fixtures) and do not affect the utility's real property or fixtures (e.g., the land, wells, tanks, and pipelines), which are integral to the water utility's operations.

The Consumer Advocate, in its Statement of Position, does not object to the commission's approval of the financing leases under HRS § 269-17, "[g]iven the need for the leases to

³⁸See Joint Amended and Restated Application, at 15 - 16; and Applicants' response to CA-SIR-4.

³⁹Joint Amended and Restated Application, at 15.

acquire transportation equipment needed for the daily operations of the water utility[.]”⁴⁰

Based on the foregoing, the commission finds that: (1) the financing leases will be used for the purposes permitted under HRS § 269-17; and (2) there appears to be no evidence in the docket record that the financing leases will have a materially adverse effect on public utility operations. Thus, the commission will approve the financing leases, effective from the date of this Decision and Order.⁴¹

⁴⁰Consumer Advocate's Statement of Position, at 20.

⁴¹The commission's approval in this case is effective only as of the date of this Decision and Order, with no express or implied retroactive effect. See In re Hawaii Elec. Light Co., Inc., Docket No. 05-0228, Decision and Order No. 22553, filed on June 22, 2006, at 8 n.13 (citing to In re Acceris Comm. Corp., Docket No. 04-0347, Decision and Order No. 21648, filed on February 15, 2005; and In re Sea Link of Hawaii, Inc., Docket No. 02-0212, Decision and Order No. 21085, filed on June 25, 2004).

In addition, the docket record appears to indicate that Applicants filed their Joint Amended and Restated Application after the Consumer Advocate had already filed and served upon Applicants one or more responsive pleadings to the initial Application. See HAR § 6-21-20 (any pleading may be amended at any time before service of a responsive pleading). Thus, the new relief sought in the Joint Amended and Restated Application would normally be precluded under HAR § 6-61-20. Nonetheless, given the Consumer Advocate's lack of objection to both the amended application and the newly requested relief, the commission, in this limited instance, will adjudicate the new relief requested by Applicants in their Joint Amended and Restated Application. In effect, the commission will not require Miller and Lieb or HBWC to file a separate application for after-the-fact approval of the financing leases. See HAR § 6-61-1 (just, speedy, and inexpensive determination of every proceeding).

III.

Summary of Findings and Conclusions

The commission's findings and conclusions are summarized as follows:

1. HBWC is fit, willing, and able to properly perform the water utility service within the Hawaiian Beaches Subdivision service territory, and to conform to the terms, conditions, and rules adopted by the commission. The water utility service is required by the present public convenience and necessity, and will be required by the future public convenience and necessity.

2. A CPCN is issued to HBWC to operate as a public utility of water service within the Hawaiian Beaches Subdivision, located in Pahoa, Puna District, island of Hawaii, subject to the conditions as described in this Decision and Order. Miller and Lieb's authority to operate as a public utility of water service, pursuant to HRS § 269-7.5(d), is terminated, upon the issuance of the CPCN to HBWC.

3. The sale and transfer of Miller and Lieb's Acquired Assets to HBWC (excluding Miller and Lieb's "grandfathered" operating authority under HRS § 269-7.5(d)) are consistent with the public interest, and are approved, consistent with HRS §§ 269-19 and 269-7(a) (to the extent applicable), and subject to certain conditions as described in this Decision and Order.

4. Miller and Lieb's financing leases, executed in 2005 and 2006 for the two vehicles that are currently used as part of its utility operations, are approved, pursuant to HRS

§ 269-17, effective from the date of this Decision and Order, with no express or implied retroactive effect.

IV.

Orders

THE COMMISSION ORDERS:

1. A CPCN is issued to HBWC to operate as a public utility of water service within the Hawaiian Beaches Subdivision, located in Pahoa, Puna District, island of Hawaii. Miller and Lieb's authority to operate as a public utility of water service, pursuant to HRS § 269-7.5(d), is terminated, upon the issuance of the CPCN to HBWC.

2. The Asset Purchase Agreement, the sale and transfer of Miller and Lieb's Acquired Assets to HBWC, and the sale and transfer of certain assets held by World Electric and PME that are utilized by Miller and Lieb as part of its utility operations are approved, pursuant to HRS §§ 269-19 and 269-7(a) (to the extent applicable), subject to the following conditions:

A. Transaction costs shall not be passed on to ratepayers, and Applicants shall maintain an accounting of the costs incurred to process the Amended and Restated Application, to ensure that no such transaction costs are passed on to ratepayers.

B. HBWC shall not be required to reduce the net book value of the acquired assets to reflect the actual purchase price.

C. HBWC agrees to immediately install a meter at the well head, and to expedite and complete the meter installation program by December 31, 2008. In the event HBWC is unable to complete the meter installation program by December 31, 2008, HBWC shall promptly notify the commission and the Consumer Advocate in writing, with an explanation as to why it is unable to meet the deadline, the new expected completion date of the meter installation program, and HBWC's action plan to complete said program.

3. Miller and Lieb shall file its annual financial report for 2006 by March 30, 2007, and pay the public utility fees due (by July 31 and December 31, 2007), based on its 2006 gross revenues.

4. Pursuant to HRS § 269-8, HBWC shall file with the commission and serve upon the Consumer Advocate an annual financial report in accordance with the Uniform System of Accounts - 1996, of the National Association of Regulatory Utility Commissioners, covering its water utility service operations, commencing with the year ending December 31, 2007, and each calendar year thereafter. The annual financial reports shall be filed no later than March 31 of each year, for the immediate past calendar year, with the first report for HBWC due no later than March 31, 2008.

5. Within thirty days from the date of this Decision and Order, HBWC shall pay a public utility fee of \$60, pursuant to HRS § 269-30(b). In addition, beginning July 31, 2008 and December 31, 2008, and each calendar year thereafter, HBWC shall

pay a public utility fee that shall be equal to one-fourth of one percent (0.25%) of the gross income from its public utility business during the preceding year, or a sum of \$30, whichever is greater, in accordance with HRS § 269-30(b).

6. HBWC shall promptly file with the commission and serve upon the Consumer Advocate its initial tariff, consisting of its charges, rules, and regulations, and reflecting the change in name and ownership to HBWC. In the event any tariff provision conflicts with State law, State law shall prevail. Unless ordered otherwise, HBWC's initial tariff shall: (A) take effect upon the change in name and ownership to HBWC; (B) incorporate the applicable issued and effective dates, consistent with the terms of this Decision and Order; and (C) remain in effect until such time that a new tariff is approved by the commission in Docket No. 2006-0442.

7. Promptly after closing of the subject transaction, HBWC shall provide written notice to its customers of the sale and change in ownership and operation of Miller and Lieb. HBWC shall provide copies of its written notice to the commission and the Consumer Advocate.

8. Miller and Lieb's financing leases, executed in 2005 and 2006 for the two vehicles that are currently used as part of its utility operations, are approved, pursuant to HRS § 269-17, effective from the date of this Decision and Order, with no express or implied retroactive effect.

9. The commission's applicable orders, rules, and terms and conditions related to Miller and Lieb's water utility


operations shall continue in effect, as applied to HBWC, including the annual financial reports and public utility fees.

10. The failure to comply with any of the requirements noted in the ordering paragraphs, above, may constitute cause to void this Decision and Order, HBWC's CPCN, and the subject transaction, and may result in further regulatory action as authorized by law.

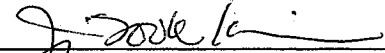
DONE at Honolulu, Hawaii MAR 21 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By: 
Carlito P. Caliboso, Chairman

By: 
John E. Cole, Commissioner

APPROVED AS TO FORM:


for Michael Azama
Commission Counsel

2006-0437.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23313 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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

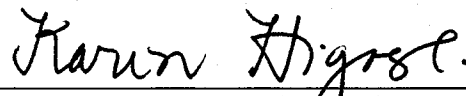
KATHERINE M. PRESCOTT
MARK J. PRESCOTT
P. O. Box 22
Pahoa, HI 96778

MICHAEL H. LAU, ESQ.
KENT D. MORIHARA, ESQ.
KRIS N. NAKAGAWA, ESQ.
RHONDA L. CHING, ESQ.
MORIHARA LAU & FONG LLP
841 Bishop Street
Suite 400
Honolulu, HI 96813

Joint Regulatory Counsel for MILLER AND LIEB WATER COMPANY,
INC. and HAWAIIAN BEACHES WATER COMPANY, INC.

THOMAS R. SALTARELLI, ESQ.
SALTARELLI LAW CORPORATION
P. O. Box 10367
4695 MacArthur Court, Suite 310
Newport Beach, CA 92658-0367

Counsel for MILLER AND LIEB WATER COMPANY, INC. and HAWAIIAN
BEACHES WATER COMPANY, INC.



Karen Higashi

DATED: MAR 21 2007