

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
HIGHLANDS SERVICES, LLC)
)
For Declaratory Ruling.)
_____)

DOCKET NO. 2007-0071

DECISION AND ORDER NO. 23414

Filed May 3, 2007
At 12 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

RECEIVED

2007 MAY -4 A 9:05

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

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

Karen Higashi

serve members of the Water Association, the Water System is not a public utility and is not subject to the commission's jurisdiction.

By Decision and Order No. 23239, filed on February 1, 2007, in Docket No. 2006-0485 ("Decision and Order No. 23239"), the commission declared that the Water Association, based on the particular facts presented in the Initial Petition and established law, would not be a public utility as defined by HRS § 269-1.¹ Accordingly, the commission stated that the Water Association would not be subject to the commission's jurisdiction and would not require a certificate of public convenience and necessity ("CPCN"), pursuant to HRS § 269-7.5, to provide the proposed water service as described.² In footnote 17 of Decision and Order No. 23239, however, the commission cautioned Petitioner that "if one or more members of the Water Association has, retains, or is guaranteed a disproportionate or unreasonable amount of 'control' over the Water System (which is not mentioned in the [Initial] Petition) further analysis and development of the commission's position may be warranted."³

¹See Decision and Order No. 23239 at 8.

²Id. at 9.

³Id. at 8 n.17 (emphasis omitted). This provision hereafter will be referred to as "footnote 17 of Decision and Order No. 23239."

B.

Subsequent Petition

On March 20, 2007, Petitioner filed a subsequent petition ("Subsequent Petition")⁴ requesting that a "declaratory order be issued stating that since its Water System will only serve members of the Water Association, and since neither Petitioner nor the Ranch retain [a] disproportionate or unreasonable control over the Water System, the Water System is not a public utility and is not subject to the [c]ommission's jurisdiction."⁵

Petitioner states that it filed the Subsequent Petition to clarify the procedure to add Water Association members and to provide the commission with additional facts regarding the Water System operator ("Operator") for further review and development of the commission's position in light of footnote 17 of Decision and Order No. 23239.

In its Subsequent Petition, the Petitioner again states that it is proposing to develop and construct the Water System to serve the new Haleakala Greens Subdivision in Kihei, Maui, Hawaii ("Haleakala Greens"), which will be comprised of 152 units in the Na Hokulani Golf Villas Condominium ("Na Hokulani") and 68 units

⁴Petitioner served copies of the Initial Petition and the Subsequent Petition on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex-officio party to all proceedings before the commission. See HRS § 269-51; Hawaii Administrative Rules § 6-61-62.

⁵See Subsequent Petition at 10-11.

in the Nu`u Aina Estates Condominium ("Nu`u Aina").⁶ Additionally, consistent with its prior representations, Petitioner reiterates that:

1. The Water System will be developed and operated on land owned by the Ranch.

2. The Ranch, as the owner of the Water System's well site, conveyed to Petitioner the right and license to draw ground water for the potable water use of Haleakala Greens in the aggregate amount of net 99,000 gallons per day, subject to adjustment.

3. The Ranch will have the permanent, perpetual right to all water that may be pumped in excess of Haleakala Greens' allocation ("Excess Water").⁷

4. Once the condominium units in Haleakala Greens are built and sold, the Water System will be "turned over" to the Water Association, a community membership-owned association.

5. The Water System will be owned and operated by the Water Association, a non-profit corporation, and everyone served

⁶Na Hokulani is being developed by Signature Development of Hawaii, LLC ("Signature Development") while Maui Highlands Properties LLC ("Maui Highlands") is the developer of Nu`u Aina. Signature Development and Maui Highlands formed Petitioner to develop and construct the Water System, a private single common potable water system, to serve both developments. See Subsequent Petition at 3-4 n.2.

⁷According to Petitioner, the Ranch will be responsible for any incremental costs of constructing the Water System beyond the design and costs needed to develop the Water System to deliver Haleakala Greens' maximum water allocation; and is only allowed to draw Excess Water from the Water System's well in raw, untreated form, unless the Ranch participates in Petitioner's costs associated with storage, treatment, and/or transmission facilities.

by the Water System will be members of the Water Association, including all property owners in Haleakala Greens, the Ranch, and any future entities that may be offered Excess Water since: (a) ownership of property in Haleakala Greens requires membership in the Water Association; (b) Water Association membership will automatically be transferred to the new owner if and when the property is conveyed; (c) the Ranch will be a member of the Water Association; and (d) if the Ranch, in the future, should offer any of the Excess Water to any other entities, these entities will automatically be members of the Water Association.

6. "[A]s members of the Water Association all the entities that will receive water from the Water System will have the right to vote, have control over the decisions made by the Water Association, and have the right to input into the rates and conditions of service by the Water Association."⁸

7. "At no time, will water from the Water System be supplied to the public, as a class, or to any limited portion of it."⁹

Petitioner also clarifies that the Ranch is not related to or affiliated with Petitioner in any way. Furthermore, Petitioner represents that the Water Association will be governed by a Declaration of Covenants ("Water Association Covenants") recorded on the title to all properties whose owners are members of the Water Association. In accordance

⁸See Subsequent Petition at 9.

⁹Id. at 10.

with the Water Association Covenants, Petitioner contends that each member of the Water Association shall have the full right to participate in the management of the association and the Water System by electing a Board of Directors of the Water Association ("Board"), which will have the authority and responsibility for the management and operation of the Water System. According to Petitioner, the authority of the Board "includes [the] hiring of qualified system operators, setting budgets, reserves, and assessments, and establishment and implementation of overall [Water] Association policies, all subject to and [in] accordance with the Water Association Covenants."¹⁰ Petitioner emphasizes that "[n]either Petitioner nor the Ranch has any special rights or powers with regards to the [Water] Association's general operations."¹¹

Petitioner, however, represents that under the terms of the Water Association Covenants, the Ranch would retain the right to: (1) designate additional persons or properties to become members of the Water Association entitled to service from the Water System by virtue of membership; and (2) withhold approval of the Water Association's selection of an Operator if the Ranch determines that the Operator does not have reasonable qualifications and experience to operate the Water System with reasonable care (collectively, "Additional Rights"). According to Petitioner, these Additional Rights are related to the Ranch being the sole member that has the permanent and

¹⁰Id. at 5.

¹¹Id.

perpetual right to all Excess Water. Petitioner represents that "[t]he Ranch's narrow rights do not include any special authority or power over the Water Association's management or control of the Water System, including day-to-day operations and setting of budgets, reserves, and assessments, all of which are controlled by the Board of Directors elected by the Water Association members."¹² Additionally, Petitioner states that the Ranch will not have any special voting rights or powers that would indirectly give it control over the affairs of the Water Association. Thus, Petitioner argues that the Ranch's limited rights related to the Excess Water do not give it a disproportionate or unreasonable amount of control of the Water Association since the rights are "reasonably related to its rights as holder of the Water Systems' Excess Water, and in no way affects or limits the full democratic control by the remaining Water Association members over its operations[.]"¹³ Accordingly, it concludes that neither Petitioner, the Ranch nor the Water Association will be subject to the commission's jurisdiction and, as such, they are not required to submit an application for a CPCN.

C.

Consumer Advocate's Position

In response to the Initial Petition, the Consumer Advocate filed its Statement of Position in Docket No. 2006-0485

¹²Id. at 9.

¹³Id. at 10.

on January 23, 2007, informing the commission that Petitioner should not be considered a public utility as defined by HRS § 269-1.

On April 25, 2007, the Consumer Advocate filed its Statement of Position ("CA's Statement of Position") in this docket stating that it "continues to contend" that Petitioner is not a public utility under the definition set forth in HRS § 269-1 since the water service will not be provided directly or indirectly for public use. The Consumer Advocate also states that "it does not appear that the Ranch, as the owner of the well site, will retain any disproportionate or unreasonable control over the Water System."¹⁴ Thus, according to the Consumer Advocate, the Ranch should not be deemed to be a public utility.

II.

Discussion

Under HRS § 269-7.5, a public utility, as defined in HRS § 269-1, must obtain a CPCN from the commission prior to commencing its business. HRS § 269-1 defines a "public utility" as:

. . . every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telecommunications messages, or the furnishing of

¹⁴See CA's Statement of Position at 5.

facilities for the transmission of intelligence by electricity by land or water or air within the State, or between points within the State, or for the production, conveyance, transmission, delivery, or furnishing of light . . . water, gas, or oil, . . .

HRS § 269-1 (emphasis added).

The Hawaii Supreme Court of the State of Hawaii clarified the definition of a public utility in In Re Wind Power Pacific Investors-III by adopting the following test:

Whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

In Re Wind Power Pacific Investors-III, 67 Haw. 342, 345, 686 P.2d 381, 834 (1984) (quoting 73B C.J.S. Public Utilities § 3).

In In re Poipu Kai Water Reclamation Corporation,¹⁵ the commission found that a private wastewater company is not a public utility with respect to service that it provides to persons that control, through the Poipu Kai Association the services of the company. Under the facts presented, the commission reasoned that the company "services itself, and not

¹⁵In re Poipu Kai Water Reclamation Corporation, Docket No. 6939, Decision and Order No. 11184, filed on July 22, 1991 ("Poipu Kai").

the general public or any portion of it."¹⁶ Nonetheless, the commission in Poipu Kai, concluded that the company was a public utility to the extent that it provided service to a nearby condominium project since the owners of units in the project were excluded from membership in the Poipu Kai Association, and, as such, these customers did not have the right to vote, had no control over the decisions made by the association, and did not have the same input into the rates and conditions for service as association members.

Subsequently, the commission in In re Hokuli`a Community Services, Inc.,¹⁷ "determined that a nonprofit corporation that owns and operates a water system and reclamation facility for the sole use of its members that control the corporation is not a public utility since the owner-customers of the corporation have the same control over the corporation as was demonstrated in Poipu Kai."¹⁸

Here, the commission in Decision and Order No. 23239 already determined that the Water Association would not be a public utility as defined by HRS § 269-1. The commission's determination was based on established law and on Petitioner's representations in the prior proceeding much of which it

¹⁶See Poipu Kai at 5.

¹⁷In re Hokuli`a Community Services, Inc., Docket No. 00-0009, Decision and Order No. 17557, filed on February 22, 2000 ("Hokuli`a").

¹⁸See In re Public Utilities Commission, Docket No. 05-0238, Decision and Order No. 22282, filed on February 10, 2006 at 29 (citing Hokuli`a at 4-5).

reiterates in its Subsequent Petition. In particular: (1) the Water Association would own and operate the Water System for the sole use of its members who control the association¹⁹; (2) the Water System "will only serve members of the Water Association"²⁰; (3) the Water System, at no time, will supply water to the public, or any class, or portion of the public²¹; and (4) all members of the Water Association will have the right to vote, control over the decisions made by the Water Association, and the right to provide input into the rates and conditions of water service.²²

At issue is the extent to which the Additional Rights retained by the Ranch, as described in the Subsequent Petition, would affect the commission's prior decision. The Additional Rights include allowing the Ranch to designate additional persons or properties to become members of the Water Association and allowing the Ranch to withhold approval of the Water Association's selection of an Operator if the Ranch determines that the Operator does not have reasonable qualifications and experience to operate the Water System. These Additional Rights are sought because the Ranch is the owner of the Water System's well site and has a permanent and perpetual right to all of the Excess Water.

¹⁹See Subsequent Petition at 10.

²⁰Id. (emphasis added).

²¹Id.

²²Id. at 9.

Having considered the facts presented in the Subsequent Petition, the Additional Rights do not appear to render the Water Association, the Ranch or Petitioner a public utility under the law. The Additional Rights retained by the Ranch appear to be distinct from the day-to-day operations of the Water System and should not infringe upon the Board's authority over the determination of rates and the overall services provided by the Water System. In addition, Petitioner represents that: (1) the Ranch and Petitioner would not have any special powers regarding the Water Association's general operations²³; (2) the Ranch will not have any special voting rights²⁴; and (3) the Water Association members through the Board will control the day-to-day operations and the setting of budgets, reserves, and assessments of the Water system.²⁵ Further, the commission notes that Petitioner, in its Subsequent Petition, did not specify any additional or special rights that it would retain with regards to the Water System.

Hence, as the commission previously determined, it continues to find that, as in Poipu Kai, the Water Association would be providing service to itself as opposed to the general public, or any portion of it. Additionally, as in Hokuli'a, it continues to appear that the Water Association would not be a public utility since the owner-members of the association will

²³Id. at 5.

²⁴Id. at 9.

²⁵Id.

have the same control over water service as was demonstrated in Poipu Kai. Moreover, based on the representations set forth in the Subsequent Petition, the commission also finds that neither the Petitioner nor the Ranch would be public utilities under the definition of HRS § 269-1 since, among other things, as represented by Petitioner, any Excess Water offered by the Ranch to any other entity will automatically make the entity members of the Water Association.²⁶

In sum, based on the particular facts presented in the Subsequent Petition, the commission concludes that the Water Association, the Ranch and Petitioner are not public utilities as defined by HRS § 269-1. Thus, they would not be subject to the commission's jurisdiction, and, hence, are not required to obtain a CPCN, pursuant to HRS § 269-7.5, to provide the proposed water service through the Water Association, as described. Our determination herein is consistent with Wind Power, Poipu Kai, and Hokuli'a, and is based on the representations set forth in the Subsequent Petition. The commission's determination, however, is based on the assumption, given the Petitioner's representations set forth in the Subsequent Petition, that all Water Association members will have sufficient control over the association to protect their interests without commission intervention.²⁷

²⁶Id. at 4-5.

²⁷Petitioner represents that each member of the Water Association "shall have the full right[s] to participate in management of the [Water] Association and the Water System" by electing a Board (see Subsequent Petition at 5), and that as

III.

Orders

THE COMMISSION ORDERS:

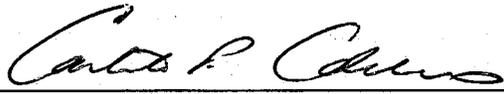
1. The commission declares that the Water Association would not be a public utility as defined by HRS § 269-1 if it is owned, operated, and controlled as represented by Petitioner in the Subsequent Petition. Thus, under these circumstances, the Water Association would not be subject to the commission's jurisdiction, and, hence, does not require a CPCN, pursuant to HRS § 269-7.5, to provide water service. In making our determination, the commission declares, based on the representations set forth in the Subsequent Petition, that neither Petitioner nor the Ranch are public utilities under the definition of HRS § 269-1.

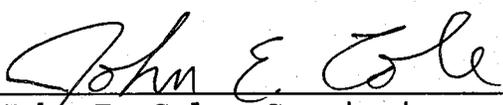
2. This docket is closed unless otherwise ordered by the commission.

"members of the Water Association all the entities that will receive water from the Water System will have the right to vote, have control over the decisions made by the Water Association, and have the right to input into the rates and conditions of service by the Water Association" (see Subsequent Petition at 9). Petitioner, however, did not specifically describe the voting rights that each member of the Water Association would have nor were copies of the Bylaws or Articles of Incorporation of Highlands Water Association, Inc., referred to in Section 3.01 of the Water Association Covenants, submitted with the Subsequent Petition.

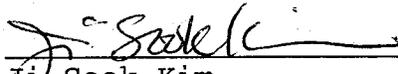
DONE at Honolulu, Hawaii MAY - 3 2007 .

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chalirman

By 
John E. Cole, Commissioner

APPROVED AS TO FORM:


Ji Sook Kim
Commission Counsel

2007-0071.eh

CERTIFICATE OF SERVICE

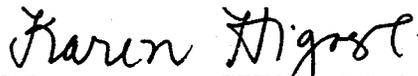
I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23414 upon the following Petitioners, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI
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Karen Higashi

DATED: MAY - 3 2007