

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
PU'UIWAIWA, LLC)
For a Declaratory Ruling.)
_____)

DOCKET NO. 2007-0303

PREHEARING ORDER NO. 23827

Filed Nov. 13, 2007
At 1 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

RECEIVED

2007 NOV 15 A 8:26

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

In the Matter of the Petition of)
))
))
))
))
For a Declaratory Ruling.)
)

Prehearing Order No. 23827

The commission issues this Prehearing Order to govern the issues, procedural schedule, and procedures for this proceeding.¹

WHWC is a public utility that provides water service within its service area of Waikoloa Village, island of Hawaii. See In re Waikoloa Water Co., Inc., dba West Hawaii Water Co., Docket No. 04-0373; see also In re Waikoloa Water Co., Inc., dba West Hawaii Water Co., Docket No. 97-0066, Decision and Order No. 15495, filed on April 11, 1997 (WHWC started operations prior to 1978, and thus, is exempt by law from the requirement to obtain a certificate of public convenience and necessity); and HRS § 269-7.5(d).

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 this section.

HRS § 269-7.5(d).

I.

Background

A.

Procedural Background

On August 29, 2007, Petitioner filed its Petition for Declaratory Ruling.² Based on the information set forth in its Petition, Petitioner requests that "a declaratory order be issued stating that it may develop its own private water system within WHWC's service territory and that since the Land Owners' water system will only serve its owners; i.e. Petitioner, Land Owners, or members of the Water Association, the [Land Owners' private, non-potable] Water System is not a public utility and is not subject to the Commission's jurisdiction."³

On September 18, 2007, WHWC filed a Motion to Intervene. On September 25, 2007, Petitioner filed a Memorandum in Opposition to WHWC's Motion to Intervene. WHWC, in its Motion to Intervene, opposed the Land Owners' proposed establishment of a de facto public water system within WHWC's service territory, intimating that it has the exclusive right to provide water service within its service territory.

²Petition for Declaratory Ruling and Memorandum in Support; Exhibits A - C; Verification; Consent in Writing of the Managing Member of Pu'uiwaiwa, LLC; and Certificate of Service, filed on August 29, 2007 (collectively, "Petition"). Petitioner: (1) filed its Petition pursuant to HAR chapter 6-61, subchapter 16, governing declaratory orders; and (2) served copies of its Petition upon the Consumer Advocate and WHWC. The term "Land Owners," as used in the Petition, refers to Petitioner, Kilauea Trust I, and Waimea Limited Partnership, the owners of six parcels of land, consisting of approximately 4,200 acres, within WHWC's service territory.

³Petition, at 9-10.

Conversely, Petitioner asserted that the Land Owners may establish and develop a private water system within WHWC's service territory.

By Order No. 23697, filed on October 4, 2007, the commission: (1) granted intervention to WHWC; (2) declined to issue a declaratory ruling within forty-five days following the filing of the Petition, and instead, set this matter for a hearing (unless waived by the Parties), following the completion of the pre-hearing process; and (3) instructed the Parties to submit, by October 29, 2007, a stipulated prehearing order, or separate proposals by the same date, in the event that they were unable to agree on a joint prehearing order.

Petitioner and the Consumer Advocate (collectively, the "Stipulating Parties") reached agreement on a proposed procedural order, but were unable to reach an agreement with WHWC.⁴ Thus, on October 29, 2007: (1) the Stipulating Parties filed their Proposed Procedural Order; and (2) WHWC filed its Proposed Prehearing Order.

B.

Stipulating Parties' Proposal

The Stipulating Parties' explain:

In formulating their Stipulated Procedural Order, the Petitioner and the Consumer Advocate included Information Request[s] as an accommodation to the Intervenor. Additionally, the Petitioner and Consumer Advocate affirmatively waive an

⁴See Petitioner's Transmittal Letter, dated October 29, 2007, at 1 ("Transmittal Letter"); and Preamble to WHWC's Proposed Prehearing Order, dated October 29, 2007 ("Proposed Prehearing Order").

evidentiary hearing in this Docket. It is the Petitioner and Consumer Advocate's position that the issues in this case are clear and that no evidentiary hearing is necessary. In fact an evidentiary hearing in this Docket would be an inefficient use of the Commission's and the Parties' resources. However, if the Commission is inclined to have an evidentiary hearing in the Docket, the Petitioner and the Consumer Advocate would agree to December 20, 2007.

Petitioner's Transmittal Letter, at 1.

C.

WHWC's Proposal

WHWC states:

Pursuant to Order No. 23697, the Parties attempted to reach an agreement on a prehearing order. On October 23, 2007, WHWC communicated a proposed prehearing schedule to the CA and to Petitioner, proposing one round of information requests, statements of position, and an evidentiary hearing. WHWC noted that one round of information requests was not only reasonable, but necessary in this matter. Moreover, WHWC states that WHWC could not waive an evidentiary hearing until it has first been given the opportunity to review the information received in response to its information requests.

In response, Petitioner stated that it would agree to one round of information requests in addition to statements of position, but rejected the evidentiary hearing as unnecessary. Petitioner further stated that if WHWC did not waive an evidentiary hearing, Petitioner and the CA would submit a proposed hearing order requesting statements of position and would not agree to information requests. Accordingly, the Parties were unable to reach an agreement on the prehearing schedule.

First, WHWC notes that pursuant to Order No. 23697, the Commission instructed the Parties to include a hearing in their proposed prehearing order unless "affirmatively waived by the Parties." Since WHWC has not waived the evidentiary hearing, WHWC respectfully requests that the Commission schedule this matter

for an evidentiary hearing, consistent with HAR §§ 6-61-162(a)(3) and 6-61-165, in its Prehearing Order.

Second, WHWC submits that one round of information requests is reasonable and necessary in this proceeding. Although Petitioner contends that its proposed private waver system would only be used for fire protection, livestock, and planting, see Petition, p.8, Petitioner later admits it may "further subdivide the parcels into 47 large agricultural lots," selling the system water to at least 47 different customers. Id., p.9. Furthermore, Petitioner states that any "potable water demand will be met with bottled water." See Petition, p.6, n.9, (emphasis added). Without more, WHWC is at a loss as to what exactly Petitioner is proposing and how it will affect WHWC's "direct interest" in this proceeding. WHWC therefore submits that it is necessary to conduct at least one round of information requests in this proceeding.

Preamble to WHWC's Proposed Prehearing Order, at 2-3 (emphasis added).

II.

Discussion

The commission, in Order No. 23697, granted intervention to WHWC, subject to certain conditions, and instructed the Parties to incorporate certain matters into the stipulated prehearing order:

WHWC is expressly cautioned that its participation as an intervenor in this docket will be limited to the issues raised in this proceeding. The commission will preclude any effort by WHWC to unreasonably broaden the issues, or unduly delay the proceeding, and will reconsider its participation in this docket if, at any time during the course of this proceeding, the commission determines that WHWC is unreasonably broadening the pertinent issues raised or unduly delaying the proceeding.

The Parties shall submit for the commission's review and consideration a stipulated prehearing order by October 29, 2007, provided that if the Parties are unable to agree on a joint prehearing order, each party shall submit its own proposal by the same date. The stipulated prehearing order shall: (1) incorporate the issues raised in this proceeding, as identified on page 2, paragraph 3, of the Petition; and (2) include a hearing, consistent with HAR §§ 6-61-162(a)(3) and 6-61-165, unless a hearing is affirmatively waived by the Parties. Thus, by this action, the commission declines to issue a declaratory order within forty-five days following the filing of the Petition, and instead, sets this matter for a hearing, following the completion of the pre-hearing process.

Order No. 23697, at 13-14.

Upon review, the commission issues this Prehearing Order that identifies the issues, procedural schedule, and procedures to govern this proceeding. Of particular note, the commission: (1) adopts the issues raised by Petitioner on page 2, paragraph 3, of its Petition, as restated on pages 1 - 2 of the Stipulating Parties' Proposed Procedural Order; and (2) sets forth the issuance of one round of information requests and the filing of simultaneous position statements in lieu of written testimonies, as proposed by the Parties.⁵

The commission will also schedule this matter for an evidentiary hearing, at a date and time to be determined by the commission, preceded by a deadline date for WHWC to notify the commission and other parties as to whether it waives the evidentiary hearing. The evidentiary hearing, if not waived,

⁵The Stipulating Parties propose the issuance of information requests by all of the Parties, while WHWC proposes the issuance of information requests by the Consumer Advocate and WHWC. The commission, by this Prehearing Order, allows for the issuance of information requests by all of the Parties.

will be preceded by a prehearing conference with the Parties. Lastly, the commission will establish a deadline date for the filing of simultaneous post-hearing briefs, as proposed by WHWC, in the event that an evidentiary hearing is held in this matter.

A.

Issues

The scope of this proceeding is limited to the "applicability of any statute or any rule or order of the commission," consistent with HAR § 6-61-159.⁶ The issues, as presented by Petitioner in its Petition, are:

1. Whether or not the Land Owners (consisting of Petitioner, Kilauea Trust I, and Waimea Limited Partnership) may establish a private water system within its service territory of WHWC?

2. If the Land Owners may establish a private water system within the service territory of WHWC, would their private water system be deemed to be a public utility, and thus, within the jurisdiction of the commission and requiring the filing of an application for certificate of public convenience and necessity pursuant to HRS § 269-7.5 and the provisions of HAR chapter 6-61.

⁶See also HRS § 91-8 ("Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency.")

B.

Schedule of Proceedings

The Parties shall adhere to the Schedule of Proceedings set forth below:

<u>Procedural Steps</u>	<u>Deadline Date</u>
Issuance of information requests by the Parties	November 26, 2007
Responses to information requests	December 17, 2007
Parties' Statements of Position*	January 7, 2008
*To the extent applicable, the Statements of Position shall identify the witness or witnesses who are sponsoring the facts set forth in the respective Statements of Position.	
WHWC to notify the commission and other parties on whether it waives the evidentiary hearing**	January 14, 2008
**In the event that WHWC does not waive the evidentiary hearing, the commission may, on its own motion, amend this Prehearing Order by requiring the Parties to file written testimonies prior to the evidentiary hearing.	
Prehearing conference	To be scheduled by the commission
Evidentiary hearing	To be scheduled by the commission
Parties' Post-Hearing Briefs	Three weeks following the filing of the official transcripts

C.

Requests for Information

A party may submit information requests to another party within the time schedule specified in this Prehearing Order.

If a Party is unable to provide the information requested within the prescribed time period, it should so indicate to the inquiring Party as soon as possible. The Parties shall then endeavor to agree upon a later date for submission of the requested information. If the Parties are unable to agree, the responding Party may timely seek approval for the late submission from the commission upon a showing of good cause. It is then within the commission's discretion to approve or disapprove such late filings and take any additional action that may be appropriate, such as extending the date for the Party to respond.

In lieu of responses to information requests that would require the reproduction of voluminous documents or materials (e.g., documents over 50 pages), the documents or materials may be made available for reasonable inspection and copying at a mutually agreeable designated location and time. In the event such information is available electronically on computer disc or other readily usable electronic medium, the Party responding to the information request shall make the computer disc or such electronic medium available to the other parties, and the commission. A Party shall not be required, in a response to an information request, to provide data that is or are already on file with the commission, or otherwise part of the public record, or that may be stipulated to pursuant to Section II.D, Matters of Public Record, below. The responding Party shall, in lieu of production of a document in the public record, include in its response to the information request an

identification of the document with reasonable specificity sufficient to enable the requesting Party to locate and copy the document. In addition, a Party shall not be required, in a response to an information request, to make computations, compute ratios, reclassify, trend, calculate, or otherwise rework data contained in its files or records.

A Party may object to responding to an information request that it deems to be irrelevant, immaterial, unduly burdensome, onerous or repetitious, or where the response contains information claimed to be privileged or subject to protection (confidential information). If a Party claims that information requested is confidential, and withholds production of all or a portion of such confidential information, the Party shall: (1) provide information reasonably sufficient to identify the confidential information withheld from the response, without disclosing privileged or protected information; (2) state the basis for withholding the confidential information (including, but not limited to, the specific privilege applicable or protection claimed for the confidential information and the specific harm that would befall the Party if the information was disclosed); and (3) state whether the Party is willing to provide the confidential information to some or all representatives of the Party pursuant to a protective order.

A Party seeking production of documents notwithstanding a Party's claim of confidentiality may file a motion to compel production with the commission.

The responses of each Party to information requests shall adhere to a uniform system of numbering agreed upon by the Parties. Each response shall be provided on a separate page and shall recite the entire question asked and set forth the response and reference the attached responsive document.

D.

Matters of Public Record

To reduce unnecessary reproduction of documents and to facilitate these proceedings, identified matters of public record, such as reports that the Parties have filed with the commission, published scientific or economic statistical data, material and textbooks, technical or industry journals relating to utility matters, and specified parts of the record in previous commission dockets, shall be admissible in this proceeding without the necessity of reproducing each document; provided that: (1) the document to be admitted is clearly identified by reference to the place of publication, file or docket number, and the identified document is available for inspection by the commission and the Parties; and (2) any Party has the right to explain, qualify, or conduct an examination with respect to the identified document. The commission can rule on whether the identified document can be admitted into evidence when a Party proffers such document for admission as evidence in this case.

From time to time, the Parties may enter into stipulations that such documents, or any portion of such documents, may be introduced into evidence in this case.

E.

Order of Examination of Witnesses

The order of presentation of witnesses shall be determined at the prehearing conference to be held pursuant to Section II.B, Schedule of Proceedings, above.

The examination of any witness shall be limited to one attorney or Party representative for each Party. The Parties shall avoid duplicative or repetitive cross-examination. Cross-examination shall be limited to witnesses whose testimony is adverse to the Party desiring to cross-examine. Recross-examination shall be limited to the extent of material covered in redirect examination, unless permitted otherwise by the commission.

F.

Copies of Documents

1. Copies:

Commission:	Original + 8 copies
Petitioner:	3 copies*
Consumer Advocate:	3 copies
WHWC:	2 copies*

*Refer to the Certificate of Service, attached.

2. All documents required to be filed with the commission shall comply with the formatting requirements prescribed in HAR § 6-61-16, and shall be filed at the office of

the commission in Honolulu within the time limit prescribed in HAR § 6-61-15. All documents filed in this proceeding shall be served on the opposing party, as referenced in Section II.F.1, Copies, above.

3. Copies of all document filings shall be served on the other parties by hand delivery or United States mail (first class, postage prepaid). In addition, if available, all Parties shall provide copies of their filings to the other parties via diskette, compact disc, or electronic mail in a standard electronic format that is readily available by the Parties. However, if work papers, documentation, or exhibits attached to any filing are not readily available in electronic format, a Party shall not be required to convert such work papers, documentation, or exhibits into electronic format. In the event a copy of a filing is delivered to a Party via diskette, compact disc, or electronic mail, unless otherwise agreed to by such Party, the same number of copies of such filing must still be delivered to such Party by hand delivery or United States mail (first class, postage prepaid).

G.

Communications

HAR § 6-61-29 concerning ex parte communications is applicable to any communications between a Party and the commission. However, the Parties may communicate with commission counsel through their own counsel or designated party representative only as to matters of process and procedure.

Communications between the Parties should either be through counsel or through designated Party representatives.

H.

General

This Prehearing Order shall control the course of this proceeding, unless modified by the Parties in writing and approved by the commission consistent with HAR § 6-61-23, to the extent applicable, or upon the commission's own motion.

III.

Order

THE COMMISSION ORDERS:

This Prehearing Order shall control the course of this proceeding, unless modified by the Parties in writing and approved by the commission, or upon the commission's own motion.

DONE at Honolulu, Hawaii NOV 13 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

APPROVED AS TO FORM:

Michael Azama
Michael Azama
Commission Counsel

By Leslie H. Kondo
Leslie H. Kondo, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Prehearing Order No. 23827 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

SANDRA-ANN Y.H. WONG, ESQ.
1050 Bishop Street #514
Honolulu, HI 96813

Counsel for PU'UIWAIWA, LLC

ROGER A. HARRIS
PU'UIWAIWA, LLC
P. O. Box 803
Kamuela, HI 96743

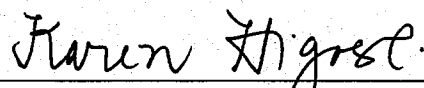
JEFF PARKER
KILAUEA TRUST I AND WAIMEA LIMITED PARTNERSHIP
1801 White Hawk Court
Las Vegas, NV 89134

BRUCE MOORE
DEVELOPMENT MANAGER
WEST HAWAII WATER COMPANY
150 Waikoloa Beach Drive
Waikoloa, HI 96738-5703

Certificate of Service
Page 2

BRUCE D. VOSS, ESQ.
LORI N. TANIGAWA, ESQ.
BAYS, DEEVER, LUNG, ROSE & HOLMA
Alii Place, 16th Floor
1099 Alakea Street
Honolulu, HI 96813

Counsel for WEST HAWAII WATER COMPANY



Karen Higashi

DATED: NOV 13 2007