BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of WAI`OLA O MOLOKA`I, INC. For Review and Approval of Rate Increases; Revised Rate Schedules; And Revised Rules.	DOCKET NO. 2009-0049

ORDER DENYING MOLOKAI PROPERTIES LIMITED'S
MOTION FOR RECONSIDERATION

AND

DISSENTING OPINION OF LESLIE H. KONDO, COMMISSIONER

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of WAI`OLA O MOLOKA`I, INC. For Review and Approval of Rate Increases; Revised Rate Schedules; And Revised Rules.	)	Docket No. 2009-0049

ORDER DENYING MOLOKAI PROPERTIES LIMITED'S
MOTION FOR RECONSIDERATION

By this Order, the commission denies MOLOKAI PROPERTIES, LIMITED ("MPL"), dba MOLOKAI RANCH'S Motion for Reconsideration of Portions of Order Granting the Motions to Intervene filed by the County of Maui and Stand for Water Entered October 16, 2009, filed on October 28, 2009.

I.

Background

On July 29, 2009, WAI`OLA O MOLOKA`I, INC. ("WOM")[1] filed its amended application ("Amended Application")[2] seeking

[1]The DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate") is an ex officio party to this proceeding pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62.

[2]WOM is ultimately a wholly owned subsidiary of MPL. See Amended Application, Exhibit WOM 2, Schedule 2.

additional revenues of $473,431, or an approximate 382.85% increase, over the pro forma revenue amount of $123,660.[3]

On September 11, 2009, the County of Maui (the "County") timely filed its Motion to Intervene in this proceeding.[4] Shortly thereafter, on September 14, 2009, Stand for Water ("SFW") also timely filed a Motion to Intervene.[5]

On October 16, 2009, the commission issued its Order Granting the Motions to Intervene Filed by the County of Maui and Stand For Water ("Intervention Order") in which it granted the County and SFW's motions to intervene. In addition, the commission, on its own motion, designated MPL as a party to this proceeding.

On October 28, 2009, MPL timely filed its Motion for Reconsideration of Portions of Order Granting the Motions to

[3]On June 16, 2008, the commission, on its own motion, initiated Docket No. 2008-0115 to consider temporary rate relief for MPL's public utilities (i.e., WOM, Molokai Public Utilities, Inc. ("MPU"), and Mosco, Inc.) following MPL's announcement that it would cease providing utility services within six months ("Docket No. 2008-0115"). On August 14, 2008, the commission issued its Order Approving Temporary Rate Relief for Molokai Public Utilities, Inc. and Wai`ola O Moloka`i, Inc. in Docket No. 2008-0115 approving, among other things, a temporary increase in WOM's User Charge from $1.85 per 1,000 gallons (approved in Decision and Order No. 12125) to $5.15 per 1,000 gallons (effective September 1, 2008, until February 28, 2009, unless ordered otherwise by the commission). Subsequently, the February 28, 2009 date was extended to August 2009 or until the commission rules on the general rate increase applications filed by MPU and WOM. See Order Approving Extension of Temporary Rate Relief and Request for an Extension to File General Rate Case Applications, filed on February 24, 2009, in Docket No. 2008-0115.

[4]On September 18, 2009, WOM filed a Memorandum in Opposition to County of Maui's Motion to Intervene.

[5]On September 21, 2009, WOM filed a Memorandum in Opposition to Stand for Water's Motion to Intervene.

Intervene filed by the County of Maui and Stand for Water Entered October 16, 2009 ("Motion") and Memorandum in Support of Motion ("Memorandum") (collectively, "Motion for Reconsideration"), under HAR §§ 6-61-41 and 6-61-137.[6] Specifically, MPL seeks reconsideration of Ordering Paragraph 3 and Section II of the Intervention Order, naming MPL as a party to this proceeding.

On November 4, 2009, the County filed its response to MPL's Motion for Reconsideration ("County's Response").

By letter dated November 5, 2009, the commission acknowledged the filing of the County's Response and deemed replies to MPL's Motion for Reconsideration to be desirable and necessary in this case, pursuant to HAR § 6-61-140. In so doing, the commission stated that it would allow all other parties to this proceeding to submit their replies to MPL's Motion for Reconsideration by November 13, 2009.

On November 13, 2009, the Consumer Advocate filed its reply to MPL's Motion for Reconsideration ("Consumer Advocate's Reply").[7]

A.

MPL's Motion for Reconsideration

In its Motion for Reconsideration, MPL requests that the commission issue an order "modifying Ordering Paragraph 3 of the Intervention Order by deleting the requirement that MPL be a

[6]MPL does not request a hearing on its Motion for Reconsideration.

[7]SFW did not submit a reply to MPL's Motion for Reconsideration within the time allotted for such filings.

party to this proceeding."[8] MPL contends that the commission's decision naming MPL as a party to this proceeding is unprecedented, unreasonable, unlawful, and erroneous.

According to MPL, while WOM is a wholly owned subsidiary of MPL, MPL should not be a party to this proceeding since: (1) it has "no role to play in this case"[9]; and (2) "MPL has not sought any relief from this Commission and no party has sought any relief from this Commission against MPL."[10] In addition, MPL states that the commission has neither general supervisory powers nor investigative powers over MPL under HRS Chapter 269 since MPL is not a "public utility" as defined by HRS § 269-1 nor does it hold a certificate of public convenience and necessity ("CPCN").

MPL further contends that the suggestion in the Intervention Order that MPL "promised" to fund WOM's losses in perpetuity is inaccurate since, among other things, "[n]othing in the original CPCN application docket, Docket No. 7122, suggests that Wai'ola ever waived its right to seek a rate increase under HRS § 269-16."[11] Moreover, MPL contends that WOM indicated in the original CPCN application, that its parent company could not be expected to fund the utility at a loss in perpetuity. MPL also states that:

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[8] See MPL's Memorandum at 12.

[9] Id. at 2.

[10] Id. at 3.

[11] Id. at 5-6.

> Since Wai'ola, not MPL, has the burden of proof under HRS § 269-16, it is unnecessary to join MPL. In MPL's view, the issue of whether the corporate veil should be pierced is: (1) beyond the jurisdiction of the Commission; and (2) completely irrelevant to the rate making process. Nor will it serve the interest of any party to litigate the issue of whether the corporate veil should be pierced in this forum. Rather, that issue should be left to the courts. In any event, Wai'ola can and will provide all information requested by the Commission relevant to its rate application.[12]

Moreover, references made in the Intervention Order to "unsubstantiated allegations" (e.g., poor water quality and lack of authority to pump from Well No. 17) made by the County and SFW do not, according to MPL, provide a sufficient basis for the "involuntary joinder" of MPL. MPL also contends that these issues are irrelevant to this case. In addition, MPL states that, while the Intervention Order warns the County and SFW against unreasonably expanding the scope and issues of this case, "it is not clear just what that means or what issues the Commission expects the parties to address."[13]

Noting that it is unaware of any other rate case proceeding in which an entity was required to be a party "simply" because of its relationship with the applicant, MPL alleges that the commission based its decision to name MPL as a party to this proceeding on its rationale in Docket No. 2008-0115. In that proceeding, MPL states that it was named a party based on its: (1) affiliation with the utility; (2) ownership of property associated with the utility's service territory; and

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[12] Id. at 7.

[13] Id. at 8-9.

(3) "supposed promise in its CPCN proceeding to cover operational losses through additional capital contributions or by loans."[14] However, MPL contends that the "circumstances surrounding this rate case proceeding are entirely different from those that faced the Commission in the temporary rate proceeding which it initiated in Docket No. 2008-0115" and thus, the reasons relied upon to justify naming MPL as a party to this proceeding are "no longer valid."[15]

Finally, MPL argues that naming MPL as a party to this proceeding without prior notice or an opportunity to be heard is a violation of MPL's due process rights. MPL alleges the following:

> Due to the nature of these proceedings, i.e., a rate case filed pursuant to HRS § 269-16, MPL had no notice or expectation, reasonable or otherwise, that it would be made a party to this proceeding given that: (a) it is not a public utility; (b) it is not subject to regulation by the Commission; (c) it was not an applicant in this docket; and (d) it did not seek to become a party. None of the interveners moved to join MPL as a party, nor did the Commission initiate any proceeding to address the issue and provide MPL notice and an opportunity to weigh in on the issue.[16]

According to MPL, the commission is obligated to provide the parties with notice of the issues in this proceeding. MPL further argues that if it is to be joined as a party, due process and HRS § 91-9(a) require the commission to give MPL "sufficient

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[14] Id. at 10.

[15] Id.

[16] Id.

advance notice" of the claims made against it to allow MPL to meaningfully respond.

B.

County's Response

Through its response, the County requests that the commission deny MPL's Motion for Reconsideration. The County states that the commission has the authority to designate MPL, WOM's parent, as a party to this proceeding. Specifically, the County argues that MPL has voluntarily subjected itself to the commission's authority by providing the commission with assurances, during the CPCN proceeding, "that it would cover [WOM's] debts when the Commission authorized [WOM] to operate as a utility."[17]

In addition, according to the County, HRS § 269-16 authorizes that commission in a ratemaking proceeding to consider the financial status of MPL and make adjustments, if appropriate, in considering WOM's financial status. The County specifically refers to the following provisions of the statute:

> In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the State of Hawaii, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the commission may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among the organizations, trades, or businesses, if it determines that the distribution, apportionment, or allocation is necessary to adequately reflect the income of any such organizations, trades, or businesses to carry

[17]See County's Response at 1.

out the regulatory duties imposed by this section.[18]

The County argues that, "[g]iven that MPL previously participated in proceedings before the Commission, made promises to capitalize and fund its subsidiary utility company, and that the Commission has the authority to consider MPL's financials in this ratemaking proceeding, the Commission has the authority to designate MPL as a party."[19]

Moreover, the County states that MPL meets the definition of an "affiliated interest" under HRS § 269-19.5, and that various provisions under the statute authorize commission oversight and "supervisory control" over contracts between a utility and affiliated interests.[20] The County contends that the financial statements in Docket No. 2008-0115 "reveal" a number of transfers of funds and assets between WOM and its parent. The County argues that, "[a]s the utility's dealings with affiliated interests directly affect the proposed rates, MPL is of necessity 'involved' in the ratemaking proceeding, whether as a willing or unwilling participant."[21]

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[18]Id. at 2 (citing HRS § 259-16(e); emphasis in original).

[19]Id.

[20]The County refers to HRS §§ 269-19.5(c), 269-19.5(d), and 269-19.5(e).

[21]See County's Response at 3.

C.

Consumer Advocate's Reply

In its Reply, the Consumer Advocate states that it takes no position in opposition or support of MPL's Motion for Reconsideration. However, the Consumer Advocate does state that it "is without sufficient information to determine whether the Consumer Advocate is able to reasonably represent the interest of MPL in the current docket."[22]

II.

Discussion

HAR § 6-61-137 states:

> A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or a combination thereof. The motion shall . . . set[] forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

HAR § 6-61-137.

Upon review, the commission finds that MPL has failed to meet its burden of establishing that the Intervention Order naming it a party to this proceeding is unreasonable, unlawful, or erroneous under HAR § 6-61-137. MPL's arguments for reconsideration are, under the circumstances, unpersuasive.

[22]See Consumer Advocate's Reply at 1.

The issues governing this rate case proceeding, as set forth in the commission Procedural Order,[23] are as follows:

1. Are WOM's proposed rates increases just and reasonable?

    a. Are the proposed tariffs, rates and charges just and reasonable?

    b. Are the revenue forecasts for the July 1, 2009 to June 30, 2010 Test Year ("Test Year") at present rates and proposed rates just and reasonable?

    c. Are the projected operating expenses for the Test Year just and reasonable?

    d. Is the projected rate base for the Test Year just and reasonable, and are the properties included in the rate base used or useful for public utility purposes?

    e. Is the rate of return requested fair?

As noted by the commission, these stated issues incorporate the following issues:

1(g) Whether WOM's financials adequately reflect the income of WOM and if not, whether, to adequately reflect the income of WOM, the commission should distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among entities that own or control WOM, directly or indirectly.

1(h) Whether any contracts between WOM and affiliated companies entered into after July 1, 1988 are valid and effective for purposes of HRS § 269-19.5, whether the terms and conditions of such contracts are unreasonable or otherwise contrary to the public interest, and whether any payments made by WOM pursuant to the contracts or transactions are unreasonable and should be excluded by the commission for ratemaking purposes.

[23] See Order Approving Proposed Procedural Order, as Modified, issued on November 6, 2009.

Thus, contrary to MPL's claim, MPL has notice of the issues in this rate case, which are set forth in the commission's Procedural Order and re-stated herein. Specifically, as referenced by the County: (1) Issue No. 1(g) is consistent with HRS § 269-16(e); and (2) Issue No. 1(h) is consistent with HRS § 269-19.5. Also, contrary to MPL's other claim, MPL will have ample opportunities to be heard, including the ability to participate in the information request process, file written testimonies, appear and testify at the evidentiary hearing, and submit a post-hearing brief, pursuant to the terms of the procedural schedule set forth in the commission's Procedural Order.

In addition, MPL's argument that the circumstances of this rate case are "entirely different" from those of Docket No. 2008-0115 is unpersuasive. WOM's Amended Application was filed pursuant to the commission's orders in Docket No. 2008-0115[24] and this rate case arose out of that proceeding. Thus, contrary to MPL's contention, the commission finds that the circumstances that resulted in MPL being named a party in Docket No. 2008-0115 are similarly applicable to MPL's designation as a party to this proceeding.

Based on the foregoing, the commission concludes that MPL's Motion for Reconsideration should be denied.

[24] See Amended Application at 1.

III.

Order

THE COMMISSION ORDERS:

MPL's Motion for Reconsideration, filed on October 28, 2009, is denied.

DONE at Honolulu, Hawaii DEC - 2 2009.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By _____
Carlito P. Caliboso, Chairman

By _____
John E. Cole, Commissioner

APPROVED AS TO FORM:

_____
Ji Sook Kim
Commission Counsel

2009-0049.sl

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DISSENTING OPINION OF LESLIE H. KONDO, COMMISSIONER

I respectfully dissent. Based on the reasons set forth in my dissenting opinion dated October 16, 2009, I continue to believe that MOLOKAI PROPERTIES LIMITED ("MPL") should not be a party to this proceeding. Accordingly, I would grant MPL's motion for reconsideration.

DONE at Honolulu, Hawaii DEC - 2 2009.

By: _____
Leslie H. Kondo, Commissioner

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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