

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

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

In the Matter of the Application of)  
)  
WAIKOLOA RESORT UTILITIES, INC., )  
dba WEST HAWAII UTILITY COMPANY )  
)  
For Approval of Amended )  
Contribution-in-aid-of-Construction) )  
Fee. Transmittal No. 05-01. )  
\_\_\_\_\_) )  
)

In the Matter of the Application of)  
)  
WAIKOLOA WATER COMPANY, INC., )  
dba WEST HAWAII WATER COMPANY )  
)  
For Approval of Amended )  
Contribution-in-aid-of-Construction) )  
Fee. Transmittal No. 05-01. )  
\_\_\_\_\_) )  
)

DOCKET NO. 05-0288

(CONSOLIDATED)

ORDER NO. 23299

Filed March 14, 2007

At 10 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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Docket No. 05-0288

Order No. 23299

(Consolidated)

ORDER

By this Order, the commission denies Intervenor WAIKOLOA MAUKA, LLC's ("Waikoloa Mauka") Motion to Allow Commissioner John Cole to Participate in Deliberations and Decision-Making in Docket No. 05-0288,<sup>1</sup> filed on February 20, 2007.<sup>2</sup>

<sup>1</sup>Waikoloa Mauka, LLC's Motion to Allow Commissioner John Cole to Participate in Deliberations and Decision-Making in Docket No. 05-0288; Memorandum in Support of Motion; Declarations of Lee Pappernow, Kevin C. Kellow, and Sidney Fuke (Exhibits A - C); and Certificate of Service, filed on February 20, 2007, as supplemented on February 22, 2007 (collectively, "Motion").

<sup>2</sup>The Parties in this proceeding are WAIKOLOA RESORT UTILITIES, INC., dba WEST HAWAII UTILITY COMPANY ("WHUC"), and WAIKOLOA WATER COMPANY, INC., dba WEST HAWAII WATER COMPANY ("WHWC") (collectively, the "Utilities"), the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"), an ex officio party to this proceeding,

I.

A.

Background

On the island of Hawaii: (1) WHUC provides water and wastewater utility services to the Waikoloa Beach Resort service territory; (2) WHWC provides water utility service to the Waikoloa Village service territory; and (3) West Hawaii Sewer Company ("WHSC") provides wastewater utility service to the Waikoloa Village service territory. In September 2005, Waikoloa Mauka purchased and acquired approximately 14,000 acres of unimproved land located within the Waikoloa Village area served by WHWC and WHSC, respectively.<sup>3</sup>

On October 31, 2005, the Utilities filed their respective transmittals, proposing certain changes to their contribution-in-aid-of-construction ("CIAC") tariff rules for water utility service.<sup>4</sup> Specifically, the Utilities seek to:

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pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a), and Waikoloa Mauka.

<sup>3</sup>Waikoloa Mauka states:

. . . From the outset, it has been Waikoloa Mauka's intent to construct certain infrastructure improvements on the unimproved lands, and then sell some of these lands to third parties. A major portion of the land would not be sold, but be eventually developed by Waikoloa Mauka alone, or in partnership with others.

Waikoloa Mauka's Memorandum in Support of Motion, filed on February 20, 2007, at 5.

<sup>4</sup>WHUC's Transmittal No. 05-01, Exhibits 1 - 17, and Certificate of Service, filed on October 31, 2005 (collectively, "WHUC's Transmittal No. 05-01"); and WHWC's Transmittal No. 05-01, Exhibits 1 - 17, and Certificate of Service, filed on October 31, 2005, as amended by letter dated November 1, 2005 05-0288

(1) increase the CIAC fee assessed for the provision of water utility service; and (2) amend the present guidelines used to estimate water consumption in calculating the amount of CIAC owed by the developer or commercial applicant.

On November 14, 2005, the Consumer Advocate filed Protests of both transmittals.<sup>5</sup> In its Protests, the Consumer Advocate recommended that the commission suspend both transmittals and hold a public hearing, pursuant to HRS § 269-16(b), for the proposed increase in the Utilities' CIAC fee. The Consumer Advocate disagreed with the Utilities' assessment that the proposed amended CIAC fee did not involve a rate increase to existing customers.<sup>6</sup>

On November 17, 2005, the commission: (1) consolidated and suspended the Utilities' transmittals; and (2) instructed the Utilities to file a joint position statement addressing the matters raised by the Consumer Advocate in its Protests.<sup>7</sup>

On December 2, 2005, the Utilities filed their response to the Consumer Advocate's Protest, asserting that: (1) they

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(collectively, "WHWC's Transmittal No. 05-01"). The Utilities served copies of their transmittals upon the Consumer Advocate.

<sup>5</sup>Protest by the Division of Consumer Advocacy, filed on November 14, 2005, of WHUC's Transmittal No. 05-01; and Protest by the Division of Consumer Advocacy, filed on November 14, 2005, of WHWC's Transmittal No. 05-01.

<sup>6</sup>As asserted by the Utilities in their respective transmittals, "[a]dopting th[eir] amended CIAC fee does not involve any rate increase to the existing ratepayers and, therefore, subject to the discretion of the Commission, may be established after thirty (30) days prior notice, provided in accordance with HRS § 269-16(b)." WHUC's Transmittal No. 05-01, at 7, ¶ 17; WHWC's Transmittal No. 05-01, at 7, ¶ 17.

<sup>7</sup>Order No. 22126, filed on November 17, 2005.  
05-0288

filed Transmittals No. 05-01 in accordance with HAR § 6-61-111 and customary practice; and (2) there was no statutory basis for imposing the requirement of a public hearing under HRS § 269-16(b).<sup>8</sup>

On January 27, 2006, Waikoloa Mauka filed a Motion to Intervene, pursuant to HAR §§ 6-61-41 and 6-61-55.<sup>9</sup> On February 6, 2006, the Utilities filed their Opposition to Waikoloa Mauka's Motion to Intervene.<sup>10</sup>

On February 28, 2006, the commission: (1) held that a public hearing was not required under HRS § 269-16(b) and the facts and circumstances of this case; (2) instituted an investigation to examine the merits of the Utilities' transmittals; (3) authorized interested persons to timely file a motion to intervene or participate, pursuant to HAR § 6-61-57(3)(B); (4) granted Waikoloa Mauka's Motion to Intervene; and (5) instructed the Parties to submit a stipulated procedural schedule for the commission's review and consideration.<sup>11</sup>

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<sup>8</sup>WHUC's and WHWC's Joint Position Statement in Response to Order No. 22126, Dated November 17, 2005, Exhibit A, and Certificate of Service, filed on December 2, 2005.

<sup>9</sup>Waikoloa Mauka's Motion to Intervene and Certificate of Service, filed on January 27, 2006; Affidavit in Support of Waikoloa Mauka's Motion to Intervene and Certificate of Service; and Waikoloa Mauka's letter transmitting affiant's original signature, dated January 31, 2006 (collectively, "Motion to Intervene").

<sup>10</sup>Utilities' Opposition to Waikoloa Mauka's Motion to Intervene and Certificate of Service, filed on February 6, 2006; and Amended Certificate of Service, filed on February 6, 2006. See also commission's letter, dated February 6, 2006.

<sup>11</sup>Order No. 22300, filed on February 28, 2006.

On April 7, 2006, the commission issued Stipulated Procedural Order No. 22377, which adopted the Parties' proposed stipulated procedural order, without change. Thereafter, the Parties engaged in discovery, with the Utilities filing their responses to information requests issued by the Consumer Advocate and Waikoloa Mauka, respectively.

On June 13, 2006, the Parties filed their Statements of Position,<sup>12</sup> and on June 27, 2006, the Consumer Advocate filed its Amended Statement of Position, which superseded its initial Statement of Position, filed on June 13, 2006.<sup>13</sup> On June 30, 2006, the Utilities filed a Response to the Consumer Advocate's Amended Statement of Position.<sup>14</sup>

On February 20, 2007, Waikoloa Mauka filed a Motion to Allow Commissioner John Cole to Participate in Deliberations and

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<sup>12</sup>WHUC's and WHWC's Consolidated Statement of Position, Exhibits 18 - 20, and Certificate of Service, filed on June 13, 2006; Waikoloa Mauka's Position Statement, Attachments 1 - 6, and Certificate of Service, filed on June 13, 2006; and Consumer Advocate's Statement of Position and Certificate of Service, filed on June 13, 2006.

<sup>13</sup>Consumer Advocate's transmittal letter, dated June 27, 2006, and Amended Statement of Position and Certificate of Service, filed on June 27, 2006 (collectively, "Amended Statement of Position").

<sup>14</sup>WHUC's and WHWC's Response and Certificate of Service, filed on June 30, 2006 (collectively, "Response"). Following the filing of the position statements and the Utilities' Response, the Parties affirmatively confirmed that an evidentiary hearing was not requested to adjudicate the merits of this proceeding. See commission's letter, dated November 6, 2006; Utilities' letter, dated November 9, 2006; Waikoloa Mauka's letter, dated November 15, 2006; and Consumer Advocate's letter, dated November 16, 2006.

Decision-Making in Docket No. 05-0288.<sup>15</sup> On February 27, 2007, WHWC filed a Memorandum in Opposition to Waikoloa Mauka's Motion.<sup>16</sup>

B.

Waikoloa Mauka's Position

By its Motion, Waikoloa Mauka asserts:

. . . there is currently only one commissioner qualified to participate in the proceedings in this docket. No action can be taken by this sole commissioner. Therefore, with respect to this docket, Waikoloa Mauka is without a tribunal to hear this case and render a decision.

. . . .

The only procedural item remaining is for the PUC to deliberate and render a decision in this docket. Thus, the participation of Commissioner Cole can have an immediate and real impact on the status of this docket.

Waikoloa Mauka's Memorandum in Support of Motion, at 2 - 3 and 5;<sup>17</sup> see also WHWC's Memorandum in Opposition, at 4 (presently, only one commissioner is available to adjudicate this proceeding).

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<sup>15</sup>Waikoloa Mauka served copies of its Motion upon the Utilities and Consumer Advocate.

<sup>16</sup>WHWC's Memorandum in Opposition to Waikoloa Mauka, LLC's Motion to Allow Commissioner John Cole to Participate in Deliberations and Decision-Making in Docket No. 05-0288; and Certificate of Service (collectively, "Memorandum in Opposition"). The Consumer Advocate did not file a response to Waikoloa Mauka's Motion.

<sup>17</sup>As part of its overall assertion, Waikoloa Mauka refers to a "Memorandum dated July 24, 2006, addressed to all parties," which is not filed in the docket record. See Waikoloa Mauka's Memorandum in Support of Motion, at 2; see also WHWC's Memorandum in Opposition, at 5.

Waikoloa Mauka requests that Commissioner Cole immediately participate in deliberations and decision-making in this docket, notwithstanding any real or perceived basis for his disqualification from participation. In support thereto, Waikoloa Mauka contends that: (1) the rule of necessity demands Commissioner Cole's participation;<sup>18</sup> and (2) awaiting the appointment of a third commissioner is unacceptable, given that Waikoloa Mauka is suffering, and will continue to suffer concrete and identifiable harm resulting from the lack of commission decision-making in this proceeding.<sup>19</sup>

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<sup>18</sup>Waikoloa Mauka's Memorandum in Support of Motion, Section II, at 3 - 4. Waikoloa Mauka cites to In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (Haw. 2000), and Schwab v. Ariyoshi, 57 Haw. 348, 555 P.2d 1329 (1976), in support of its position.

<sup>19</sup>Waikoloa Mauka's Memorandum in Support of Motion, Section III, at 4 - 7.

Waikoloa Mauka's Motion is supported by the written declarations of: (1) a real estate agent for Waikoloa Mauka; (2) Waikoloa Mauka's manager; and (3) a planning consultant to Waikoloa Mauka. See Exhibits A to C of Waikoloa Mauka's Motion. Based on these declarations, Waikoloa Mauka avers that: (1) its real estate agent has been unable to successfully secure and close on a purchase agreement for any parcels of land for the Waikoloa Ranchlands, Waikoloa Highlands, and Waikoloa Town Center Multi-Family Parcels, due in large part to the seller's inability to advise the buyer of the CIAC fees to be charged by WHWC and WHSC; (2) while Waikoloa Mauka awaits the commission's decision on the increase in CIAC fees requested by WHWC and WHSC, Waikoloa Mauka is incurring and will continue to incur several hundred thousand dollars in interest payments to its mortgage lender due to the delay in closing a sales transaction with a third-party for 45 acres of land; and (3) with respect to the development of 398 one-acre lots for the Highland Golf Estates, Waikoloa Mauka is unable to obtain final subdivision approval from the County of Hawaii until the commission issues its decision in this docket.



C.

WHWC's Opposition

WHWC adamantly objects to Waikoloa Mauka's request, and urges the commission to deny Waikoloa's Mauka's Motion. WHWC asserts that:

1. Commissioner Cole was the former executive director of the Division of Consumer Advocacy during the period when: (A) WHWC filed Transmittal No. 05-01; and (B) the Consumer Advocate filed its Protest (and Amended Statement of Position), opposing WHWC's requested relief in this proceeding. Thus, a direct conflict exists, and Commissioner Cole has rightfully recused himself from this proceeding.

2. Commissioner Cole's participation in this proceeding will result in the appearance of impropriety and an actual conflict of interest, given the former executive director's opposition to WHWC's requested relief. Such a situation will clearly violate Canon 3E(1)(b) of the Judicial Code of Conduct.

3. Commissioner Cole remains disqualified from participating in this proceeding pursuant to Canon 3F of the Judicial Code of Conduct.

4. Contrary to Waikoloa Mauka's rule of necessity argument, this is not a situation where Waikoloa Mauka's due process rights have been violated, or where no provision for substitution exists. Rather, this proceeding will be adjudicated once a third commissioner is appointed and seated. Thus, no due process rights have been or will be denied.

## II.

### Discussion

As noted by the Hawaii Supreme Court, "the long recognized 'rule of necessity' not only allows, but requires a decisionmaker to 'act in a proceeding, when he [or she] would otherwise be disqualified, if jurisdiction is exclusive and no provision exists for substitution.'" In re Water Use Permit Applications, 94 Haw. 97, 123, 9 P.3d 409, 435 (Haw. 2000) (brackets in original) (quoting Yamada v. Natural Disaster Claims Comm'n, 54 Haw. 621, 628, 513 P.2d 1001, 1006 (1973)). In this respect:

By the great weight of authority, the rule of disqualification must yield to the demands of necessity, and a judge or an officer exercising judicial functions may act in a proceeding wherein he is disqualified by interest, relationship, or the like, if his jurisdiction is exclusive, and there is no legal provision for calling in a substitute, so that his refusal to act would destroy the only tribunal in which relief could be had and thus prevent a determination of the proceeding. Under such circumstances, it is the duty of the disqualified judge to hear and decide the controversy, however disagreeable it may be.

Schwab v. Ariyoshi, 57 Haw. 348, 352, 555 P.2d 1329, 1332 (quoting Wheeler v. Bd. of Trustees, 37 S.E.2d 322, 325 - 326 (Ga. 1946)).

Waikoloa Mauka seeks to compel Commissioner Cole's participation in this proceeding based on the rule of necessity, asserting that no provision exists under state law for the appointment of any substitute commissioners. WHWC, by contrast, adamantly opposes Commissioner Cole's participation in this proceeding.

Here, Commissioner Cole has disqualified himself from participating in this proceeding, in order to avoid any appearance of impropriety or questions as to his impartiality arising from his former position as executive director of the Division of Consumer Advocacy. Moreover, as disclosed by Waikoloa Mauka and WHWC, not all of the parties have waived Commissioner Cole's disqualification,<sup>20</sup> and in fact, applicant WHWC affirmatively opposes the commissioner's participation. Thus, Commissioner Cole is disqualified from participating in this proceeding, and the commission will not compel his participation.<sup>21</sup> The commission also concludes that the rule of necessity is inapplicable herein, as a vacancy presently exists on the commission, and the appointment of a third commissioner will provide the commission with a quorum to review and adjudicate the merits of this docket.<sup>22</sup>

Based on the foregoing reasons, the commission denies Waikoloa Mauka's Motion.<sup>23</sup>

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<sup>20</sup>See Waikoloa Mauka's Memorandum in Support of Motion, Section I.B, at 2 - 3; WHWC's Memorandum in Opposition, at 5; and the Judicial Code of Conduct, Canon 3F, Remittal of Disqualification.

<sup>21</sup>See In re Water Use Permit Applications, 94 Haw. 97, 122, 9 P.3d 409, 434 ("The appropriate remedy for any bias, conflict of interest, or appearance of impropriety is the recusal or disqualification of the tainted adjudicator.").

<sup>22</sup>This docket is also distinguishable from the relevant facts in In re Water Use Permit Applications, where no vacancy existed on the six-member Commission on Water Resource Management. By contrast, a vacancy presently exists in this commission.

<sup>23</sup>Pursuant to HAR § 6-61-41(e), motions that do not involve the final determination of a proceeding may be determined by the chairperson or a commissioner.

III.

Order

THE COMMISSION ORDERS:

Waikoloa Mauka's Motion, filed on February 20, 2007, is  
denied.

DONE at Honolulu, Hawaii MAR 14 2007.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

(EXCUSED)

By \_\_\_\_\_  
John E. Cole, Commissioner

APPROVED AS TO FORM:

Michael Azama  
Michael Azama  
Commission Counsel

05-0288.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 23299 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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\_\_\_\_\_  
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DATED: MAR 14 2007