

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
WAIKOLOA SANITARY SEWER COMPANY,)
INC., dba WEST HAWAII SEWER COMPANY)
)
For Approval of Amended)
Contribution-in-aid-of-Construction)
Fee. Transmittal No. 06-01.)
_____)

DOCKET NO. 2006-0090

ORDER NO. 23300

Filed March 14, 2007
At 10 o'clock A.M.

Karen Higashi
Chief Clerk of the Commission

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

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Commission, State of Hawaii.

Karen Higashi

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Order No. 23300

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. 2006-0090,¹ filed on February 20, 2007.²

²The Parties are WAIKOLOA SANITARY SEWER COMPANY, INC., dba WEST HAWAII SEWER COMPANY ("WHSC"), 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), and Waikoloa Mauka.

I.

A.

Background

On the island of Hawaii: (1) West Hawaii Utility Company provides water and wastewater utility services to the Waikoloa Beach Resort service territory; (2) West Hawaii Water Company ("WHWC") provides water utility service to the Waikoloa Village service territory; and (3) 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.³

On March 21, 2006, WHSC filed Transmittal No. 06-01, seeking to amend its contribution-in-aid-of-construction ("CIAC") CIAC Rule XI assessed to developers and commercial applicants.⁴ Specifically, WHSC proposes to increase the CIAC fee from the current \$7.25 per gallon of estimated annual average daily sewage discharge ("EDSD") to \$32.39 per gallon of EDSD.

³Waikoloa Mauka states:

. . . From the outset, it has been Waikoloa Mauka's intent to construct infrastructure improvements on the unimproved lands, and then sell 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.

⁴WHSC's Transmittal No. 06-01; Exhibits 1 - 11; and Certificate of Service, filed on March 21, 2006 ("Transmittal No. 06-01"). WHSC served copies of Transmittal No. 06-01 upon the Consumer Advocate.

On April 3, 2006, the Consumer Advocate filed its Protest, recommending that the commission suspend Transmittal No. 06-01 for further review and hold a public hearing, pursuant to HRS § 269-16(b), for the proposed increase in WHSC's CIAC fee.⁵ The Consumer Advocate disagreed with WHSC's assessment that the proposed amended CIAC fee does not involve a rate increase to existing customers.⁶ On April 5, 2006, Waikoloa Mauka filed its Protest, recommending that the commission suspend and investigate Transmittal No. 06-01.⁷ On April 12 and 13, 2006, WHSC filed its respective responses to the Protests, urging the commission to allow Transmittal No. 06-01 to take effect, as proposed.⁸

⁵Consumer Advocate's Protest; and Certificate of Service, filed on April 3, 2006 (collectively, "Consumer Advocate's Protest").

⁶As asserted by WHSC in its transmittal, "[a]dopting this 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)." WHSC's Transmittal No. 06-01, at 6, ¶ 15.

⁷Waikoloa Mauka's Protest of Transmittal No. 06-01; and Certificate of Service, filed on April 5, 2006 (collectively, "Waikoloa Mauka's Protest").

⁸WHSC's Memorandum in Opposition to the Consumer Advocate's Protest, and Certificate of Service, filed on April 12, 2006; and WHSC's Reply to Waikoloa Mauka's Protest, and Certificate of Service, filed on April 13, 2006.

On April 17, 2006, the commission suspended Transmittal No. 06-01 and opened an investigation to examine the merits of WHSC's transmittal.⁹ On May 5, 2006, Waikoloa Mauka filed a timely Motion to Intervene, pursuant to HAR §§ 6-61-41 and 6-61-55.¹⁰ On May 10, 2006, WHSC filed its Opposition to Waikoloa Mauka's Motion to Intervene.¹¹

On May 18, 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) granted Waikoloa Mauka's Motion to Intervene; and (3) instructed the Parties to submit a stipulated procedural schedule for the commission's review and consideration.¹²

On June 19, 2006, the commission issued Stipulated Procedural Order No. 22539, which adopted the Parties' proposed stipulated procedural order, without change. Thereafter, the Parties engaged in discovery, with WHSC filing their responses to information requests issued by the Consumer Advocate and Waikoloa Mauka, respectively.

⁹Order No. 22392, filed on April 17, 2006. Interested persons were allowed to file a timely motion to intervene or participate with the commission within twenty (20) days from the date of this Order, pursuant to HAR § 6-61-57(3)(B).

¹⁰Waikoloa Mauka's Motion to Intervene; Affidavit of Kevin C. Kellow; and Certificate of Service, filed on May 5, 2006 (collectively, "Motion to Intervene").

¹¹WHSC's Opposition to Waikoloa Mauka's Motion to Intervene; Exhibit A; and Certificate of Service, filed on May 10, 2006 (collectively, "Opposition").

¹²Order No. 22474, filed on May 18, 2006.

On August 25, 2006, the Consumer Advocate¹³ and Waikoloa Mauka¹⁴ filed their respective Statements of Position. On September 8, 2006, WHSC filed its Statement of Position.¹⁵

On February 20, 2007, Waikoloa Mauka filed a Motion to Allow Commissioner John Cole to Participate in Deliberations and Decision-Making in Docket No. 2006-0090.¹⁶ On February 27, 2007, WHSC filed a Memorandum in Opposition to Waikoloa Mauka's Motion.¹⁷

B.

Waikoloa Mauka's Motion

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

¹³Consumer Advocate's Statement of Position; and Certificate of Service, filed on August 25, 2006.

¹⁴Waikoloa Mauka's Position Statement; Exhibit A; and Certificate of Service, filed on August 25, 2006, as supplemented on August 28, 2006.

¹⁵WHSC's Statement of Position; Declaration of Richard Terminello; Exhibits 12 - 17; and Certificate of Service, filed on September 8, 2006. Following the filing of the position statements, 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; WHSC's letter, dated November 9, 2006; Waikoloa Mauka's letter, dated November 15, 2006; and Consumer Advocate's letter, dated November 16, 2006.

¹⁶Waikoloa Mauka served copies of its Motion upon WHSC and the Consumer Advocate.

¹⁷WHSC'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. 2006-0090; and Certificate of Service, filed on February 27, 2007 (collectively, "Memorandum in Opposition"). The Consumer Advocate did not file a response to Waikoloa Mauka's Motion.

commissioner. Therefore, with respect to this docket, Waikoloa Mauka is without a tribunal to hear this case and render a decision.

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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 3 and 5;¹⁸ see also WHSC's Memorandum in Opposition, at 4 (presently, only one commissioner is available to adjudicate this proceeding).

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;¹⁹ and (2) awaiting the appointment of a third commissioner is unacceptable, given that Waikoloa Mauka is suffering, and will continue to suffer concrete

¹⁸As 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 WHSC's Memorandum in Opposition, at 5.

¹⁹Waikoloa 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.

and identifiable harm resulting from the lack of commission decision-making in this proceeding.²⁰

C.

WHSC's Opposition

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

1. Commissioner Cole was the former executive director of the Division of Consumer Advocacy during the period when: (A) WHSC filed Transmittal No. 06-01; and (B) the Consumer Advocate filed its Protest and Statement of Position, opposing WHSC'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

²⁰Waikoloa 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; and (2) Waikoloa Mauka's manager. See Exhibits A and B 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; and (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.

actual conflict of interest, given the former executive director's opposition to WHSC'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 (1976) (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. WHSC, 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 WHSC, not all of the parties have waived Commissioner Cole's disqualification,²¹ and in fact, applicant WHSC affirmatively opposes the commissioner's participation. Thus, Commissioner Cole is disqualified from participating in this proceeding, and the commission will not compel his

²¹See Waikoloa Mauka's Memorandum in Support of Motion, Section I.B, at 2 - 3; WHSC's Memorandum in Opposition, at 6; and the Judicial Code of Conduct, Canon 3F, Remittal of Disqualification.

participation.²² 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.²³

Based on the foregoing reasons, the commission denies Waikoloa Mauka's Motion.²⁴

III.

Order

THE COMMISSION ORDERS:

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


²²See 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.").

²³This 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.

²⁴Pursuant 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.


DONE at Honolulu, Hawaii MAR 14 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
John E. Cole, Commissioner

APPROVED AS TO FORM:


Michael Azama
Commission Counsel

2006-0090.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 23300 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

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

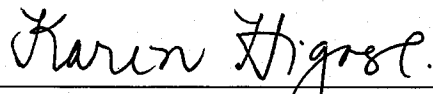
Counsel for WAIKOLOA SANITARY SEWER CO., INC., dba
WEST HAWAII SEWER COMPANY

WAIKOLOA SANITARY SEWER COMPANY, INC.
dba WEST HAWAII SEWER COMPANY
150 Waikoloa Beach Drive
Waikoloa, HI 96738-5703

MICHAEL H. LAU, ESQ.
KRIS N. NAKAGAWA, ESQ.
YVONNE Y. IZU, ESQ.
MORIHARA LAU & FONG LLP
841 Bishop Street
Suite 400
Honolulu, HI 96813

Counsel for WAIKOLOA MAUKA, LLC

WAIKOLOA MAUKA, LLC
120 Aspen Oak Lane
Glendale, CA 91207



Karen Higashi

DATED: MAR 14 2007