

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
PASHA HAWAII TRANSPORT LINES LLC)
For Issuance of a Certificate of)
Public Convenience and Necessity)
and Approval of its Local Tariff)
No. 1 for Service Between and)
Among the Ports of Honolulu,)
Kahului, Hilo and Nawiliwili)
_____)

DOCKET NO. 2009-0059

ORDER DENYING YOUNG BROTHERS, LIMITED'S
MOTION TO CLARIFY OR MODIFY THE STIPULATION FOR
PROTECTIVE ORDER FILED ON APRIL 7, 2009 TO INCLUDE
YOUNG BROTHERS, LIMITED AS A "QUALIFIED PERSON"

PUBLIC UTILITIES
COMMISSION

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PROTECTIVE ORDER FILED ON APRIL 7, 2009 TO INCLUDE
YOUNG BROTHERS, LIMITED AS A "QUALIFIED PERSON"

By this Order, the commission denies YOUNG BROTHERS, LIMITED's ("YB") Motion to Clarify or Modify the Stipulation for Protective Order Filed on April 7, 2009 to Include Young Brothers, Limited as a "Qualified Person", filed on July 31, 2009 ("Motion to Clarify").

I.

Background

On March 13, 2009, PASHA HAWAII TRANSPORT LINES LLC ("Pasha") filed an Application for issuance of a Certificate of Public Convenience and Necessity ("CPCN").¹ Pasha served copies of its Application on the DIVISION OF CONSUMER ADVOCACY,

¹Pasha's Application; PHTL Exhibit A - F; Verification; and Certificate of Service, filed on March 13, 2009 ("Application").

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), which is an ex officio party to this docket pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62.² The Consumer Advocate subsequently filed its Preliminary Statement of Position on April 2, 2009.

On April 7, 2009, the commission approved the Stipulated Protective Order between Pasha and the Consumer Advocate ("Protective Order").³ On April 9, 2009, Pasha filed PHTL - Exhibit F under seal, pursuant to the Protective Order.

On April 27, 2009, YB timely filed a Motion to Intervene ("Motion to Intervene"). On May 28, 2009, over Pasha's opposition, the commission filed an order granting YB's Motion to Intervene.⁴

To clarify its status under the Protective Order and its ability to obtain confidential information filed in this proceeding, YB filed its Motion to Clarify on July 31, 2009. In response, Pasha timely filed its opposition to Young Brothers' Motion to Clarify on August 7, 2009 ("Pasha's Opposition").⁵

²"Parties" collectively refers to Pasha, the Consumer Advocate, and YB.

³See Protective Order; Stipulation for Protective Order; Exhibit A; and Certificate of Service, filed on April 7, 2009.

⁴See Order Granting Intervention, filed on May 28, 2009 ("Intervention Order").

⁵On August 14, 2009, YB filed a letter with the commission, responding to certain factual matters raised in Pasha's Opposition. See Letter filed on August 14, 2009, from YB to the commission, ("YB's August 14, 2009 letter"). The commission notes that HAR § 6-61-41 does not allow for replies, and that

A.

Motion to Clarify

In its Motion to Clarify, YB states that "[w]hile the Protective Order in its current form appears to contemplate allowing parties, such as [YB], access to confidential information, it does not appear to include full party intervenors, such as [YB], within the definition of a 'qualified person' entitled to disclosure of confidential information."⁶ Because YB was unsuccessful in resolving this issue by stipulation amongst the Parties,⁷ it now seeks an order clarifying or modifying the Protective Order "to include [YB], its staff, counsel (including employees directly employed by such counsel) and any consultants retained by [YB] in this proceeding" as a "qualified person" under paragraph 12 of the Protective Order.⁸

YB argues that in granting YB's Motion to Intervene, the commission "did not limit [YB's] ability to engage in the Docket or restrict [YB's] access to confidential information."⁹ YB further claims that "[t]he [c]ommission has clearly stated, and its subsequent actions have demonstrated, that it intends for

leave must be obtained prior to filing a reply brief. Therefore, YB's August 14, 2009 letter will not be considered by the commission.

⁶See Motion to Clarify, at 1.

⁷Id. at 1, 5.

⁸Id. at 1-2, 7-8.

⁹Id. at 4.

[YB] to be an active party in this proceeding."¹⁰ YB thus contends that the Protective Order should be clarified or modified "to allow the clear entitlement of all parties, including intervenors, to all confidential information produced in this proceeding."¹¹

B.

Pasha's Opposition to YB's Motion to Clarify

In its opposition, Pasha argues that YB's Motion to Clarify should be denied because Pasha's confidential information is not relevant to the areas in which the commission seeks assistance from YB, as set forth in the Intervention Order.¹²

Second, Pasha states that the commission specifically approved the deletion of Paragraph 12(e) from its sample form Protective Order after being openly informed that Pasha sought to protect its confidential information from third parties, including potential competitors such as YB.¹³ In its opposition, Pasha asserts that YB, as a potential competitor, should not be allowed to obtain Pasha's confidential information:

It would be entirely improper to allow a future competitor to have access to [Pasha's] confidential information, which includes sensitive financial information. [Pasha] is a privately held limited liability company. While the company understands that, in the course of this proceeding, it is required to provide

¹⁰Id.

¹¹Id. at 5.

¹²See Pasha's Opposition, at 3-5.

¹³Id. at 5-6.

financial information to this [c]ommission and the Consumer Advocate, YB should not be allowed access to such private confidential information under the guise of an intervenor in these proceedings.

. . .

Pasha's Opposition, at 5.

Third, Pasha notes that intervenors in other proceedings have been limited in terms of the scope of their participation and access to confidential information. Specifically, Pasha cites to In re Application of Hawaii Superferry, Inc., Docket No. 04-0180, Order No. 21391, filed on October 1, 2004 ("Order No. 21391"). In Docket No. 04-0180, Hawaii Superferry, Inc. filed an application for a CPCN to operate as a water carrier pursuant to HRS § 271G-10 and HAR § 6-61-81.¹⁴ Order No. 21391 granted YB's Motion to Participate in that proceeding, but limited YB's access to only non-confidential information.¹⁵

II.

Discussion

In its Motion for Intervention, YB argued that it has a "substantial interest" in this docket because of the anticipated impact on its inter-island shipping business if Pasha is

¹⁴See In re Application of Hawaii Superferry, Inc., Docket No. 04-0180, Application; Exhibits 1-27, filed on July 22, 2004.

¹⁵See Order No. 21391, at 5.

permitted to "cherry-pick" profitable routes.¹⁶ Based on its experience in providing inter-island shipping services in the State of Hawaii, YB further claimed that, as an intervenor, it would assist in the development of the record with respect to the issue of whether Pasha's proposed service to selective islands will negatively impact inter-island shipping services, particularly service to Molokai and Lanai.¹⁷

Based on these arguments, the commission granted YB's Motion to Intervene. In doing so, the commission expressly stated the following:

Specifically, the commission finds that as a water carrier, YB may be impacted by the results of this proceeding. Also, because of its long-time involvement as a water carrier in Hawaii, YB is uniquely situated to provide evidence regarding the state of the inter-island shipping market to assist the commission in developing a sound record in this proceeding.

Intervention Order, at 7 (emphasis added). Therefore, YB's involvement in this proceeding was specifically to assist the commission in examining the state of the inter-island shipping market and the potential impacts of Pasha's proposed service overall.

Confidential information, such as Pasha's financial information, is not relevant to the specific issues with which YB, as intervenor, is concerned. Pasha's financial fitness, willingness and ability to properly perform the proposed service,

¹⁶See YB's Motion to Intervene, filed on April 27, 2009 ("Motion to Intervene"), at 13-14.

¹⁷Id. at 20-21.

in accordance with HRS Chapter 271G and the applicable requirements, rules, regulations and decisions of the commission thereunder, are issues that will be properly addressed by the Consumer Advocate. In light of this, the commission finds that YB, as an intervenor, has no reasonable need to obtain any confidential information that may be produced by Pasha in this proceeding.

Furthermore, Pasha correctly notes that in prior proceedings the commission has limited other intervenors' scope of involvement and their access to confidential information.¹⁸ For example, in In re Application of Hawaiian Electric Company, Inc., Docket No. 2007-0346, Order No. 24145, filed on April 10, 2008 ("Order No. 24145"), the commission adopted Hawaiian Electric Company, Inc.'s proposed protective order, as modified, and limited the intervening party's (Life of the Land's) access to certain confidential information regarding contract pricing and related pricing provisions specific to the proposed biodiesel supply contract.¹⁹ There, the commission found that the confidential information regarding contract pricing was not relevant to Life of the Land's environmental concerns.²⁰

¹⁸The commission, however, notes that Pasha's reference to Order No. 21391 is not directly on point. To clarify, Order No. 21391 granted YB's request to participate in the Hawaii Superferry docket; YB did not seek to intervene in that proceeding.

¹⁹Order No. 24145, at 11-14.

²⁰Id. at 11.

See In re Application of Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975) (holding that intervention "is not a matter of right but is a matter resting within the sound discretion of the commission"). Accordingly, the commission declines to clarify or modify the Protective Order to include YB as a "Qualified Person".

III.

Order

YB's Motion to Clarify or Modify the Stipulation for Protective Order Filed on April 7, 2009 to Include Young Brothers, Limited as a "Qualified Person" is denied.


DONE at Honolulu, Hawaii SEP 15 2009.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By: 
John E. Cole, Commissioner

APPROVED AS TO FORM:


By: Leslie H. Kondo, Commissioner


Bonita Y.M. Chang
Commission Counsel

2009-0059.laa

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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