

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
MOLOKAI PUBLIC UTILITIES, INC.)
For Review and Approval of Rate)
Increases, Revised Rate Schedules,)
and Revised Rules.)

DOCKET NO. 2009-0048

ORDER DENYING MOLOKAI PROPERTIES LIMITED'S
MOTION FOR RECONSIDERATION

AND

DISSENTING OPINION OF LESLIE H. KONDO, COMMISSIONER

PUBLIC UTILITIES
COMMISSION

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FILED

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OF THE STATE OF HAWAII

In the Matter of the Application of)
MOLOKAI PUBLIC UTILITIES, INC.) Docket No. 2009-0048
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ORDER DENYING MOLOKAI PROPERTIES LIMITED'S
MOTION FOR RECONSIDERATION

By this Order, the commission denies the Motion for Reconsideration of the Portions of the Order Granting Intervention to the County of Maui, West Molokai Association, and Stand for Water Entered on October 16, 2009, filed by MOLOKAI PROPERTIES LIMITED ("MPL") on October 28, 2009.¹

¹Motion for Reconsideration of the Portions of the Order Granting Intervention to the County of Maui, West Molokai Association, and Stand for Water Entered on October 16, 2009; Memorandum in Support of Motion; and Certificate of Service, filed on October 28, 2009 (collectively, "Motion for Reconsideration").

The Parties are MOLOKAI PUBLIC UTILITIES, INC. ("MPU" or "Applicant"), MPL, the COUNTY OF MAUI ("County"), WEST MOLOKAI ASSOCIATION ("WMA"), STAND FOR WATER ("SFW"), and 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).

I.

Background

On June 29, 2009, MPU filed its completed amended application seeking a general rate increase based on the July 1, 2009 to June 30, 2010 test year. The commission subsequently granted intervention to the County, WMA, and SFW, and named MPL as a party to this proceeding.²

On October 28, 2009, MPL filed its Motion for Reconsideration. On October 29, 2009, MPU filed its responses to the commission's information requests. On November 4, 2009, the County filed its Response to MPL's motion,³ and on November 6, 2009, the commission issued its procedural order to govern the issues, schedule, and procedures for this proceeding.⁴ On November 13, 2009, WMA and the Consumer Advocate filed their respective Responses to MPL's motion.⁵

²Order Granting Intervention to the County of Maui, West Molokai Association, and Stand for Water, filed on October 16, 2009 ("Intervention Order"); and Commission's correspondence, dated October 16, 2009.

³County's Response to Molokai [Properties] Limited's Motion for Reconsideration of Portion of Order Granting Intervention to the County of Maui, West Molokai Association, and Stand for Water Entered October 16, 2009; Exhibit A; and Certificate of Service, filed on November 4, 2009 ("County's Response");

⁴Order Approving Proposed Procedural Order, as Modified, filed on November 6, 2009 ("Procedural Order").

⁵WMA's Response to MPL's Motion for Reconsideration; Declaration of William W. Milks; and Certificate of Service, filed on November 13, 2009 ("WMA's Response"); and Consumer Advocate's Reply to MPL's Motion for Reconsideration; and Certificate of Service, filed on November 13, 2009 ("Consumer Advocate's Response").

By letter dated November 5, 2009, commission counsel informed the Parties that replies to MPL's Motion for

A.

Motion for Reconsideration

MPL seeks the reconsideration of Ordering Paragraph No. 5 and Section II.B of the commission's Intervention Order, by which the commission, on its own motion, named MPL as a party to this proceeding. In support of its Motion for Reconsideration, MPL contends:

1. The commission's decision to name MPL as a party is unprecedented, unreasonable, unlawful, and erroneous.

2. MPL has no role to play in this rate case proceeding; MPU, as the regulated utility and the holder of the certificate of public convenience and necessity ("CPCN"), is the real party in interest, not MPL; MPL is not a public utility as defined in HRS § 269-1, and it does not hold a CPCN; and the commission lacks general supervisory powers or investigative powers over MPL under HRS chapter 269, and thus, has no jurisdiction over MPL.⁶

3. Since MPU has the burden of proof under HRS § 269-16, it is not necessary to join MPL. In this regard, the issue of whether the corporate veil should be pierced, as referenced by the County in its motion to intervene, is beyond the commission's jurisdiction and irrelevant to the ratemaking

Reconsideration were necessary and desirable pursuant to HAR § 6-61-140, and thus, the deadline to file such replies was November 13, 2009. By this Order, the commission reaffirms this finding under HAR § 6-61-140.

⁶MPL cites to Kahala Royal Corp. v. Goodsill Anderson Quinn and Stifel, 113 Hawai'i 251, 151 P.3d 732 (Haw. 2007), and Public Util. Comm'n v. Honolulu Rapid Transit Co., Ltd., 56 Haw. 115, 530 P.2d 742 (1975).

process. Rather, MPL has appealed the First Court Court's decision which affirmed the Department of Health hearing officer's decision to pierce the corporate veil. "The decision therefore is not binding upon the parties."⁷

4. "There is no need to determine 'the amount of funds furnished to the Utilities by MPL and hence, any alleged outstanding obligations . . . which require MPL's participation' (Intervention Order at p.31). MPU has not included debt service to MPL as part of its expenses in calculating its rates, so that issue is completely irrelevant. In any event, MPU can and will provide all information requested by the Commission relevant to its rate application."⁸

5. The Intervention Order also refers to a number of other allegations raised by the Intervenors, including matters which are subject to the respective jurisdictions of the Commission on Water Resource Management, Department of Agriculture, and the Second Circuit Court, and which are not substantiated by affidavits. These allegations do not provide a sufficient basis for the involuntary joinder of MPL. "None of these issues should be relevant in this case. MPU has not included the expenses associated with these legal and regulatory proceedings in its operating expenses."⁹

⁷Memorandum in Support of Motion, at 4. MPL cites to Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982).

⁸Memorandum in Support of Motion, at 6.

⁹Memorandum in Support of Motion, at 7. MPL cites to In re Hawaiian Tel. Co., 67 Haw. 370, 689 P.2d 741 (1984).

6. The commission, in its Intervention Order, is not clear as to: what issues the Parties are expected to address; whether MPL must introduce evidence related to the County's allegation that the corporate veil should be pierced; or whether MPL must address WMA's allegation that MPU does not have the right to pump water from Well 17. "None of those issues has anything to do with the rate application that MPU filed in compliance with the Commission's order of August 14, 2008."¹⁰

7. 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. The reasons relied upon to justify naming MPL as a party to this proceeding are therefore no longer valid."¹¹

8. In response to MPU's inability, at the public hearing, to sufficiently respond to the commission's questions concerning Well 17 and the Molokai Irrigation System ("MIS"), "[t]o MPL's knowledge, the Commission did not request that MPU submit any response to such questions after the public hearing. Had such a request been made, MPU would have complied and provided the requested information."¹²

9. The commission's action of naming MPL as party without prior notice or the opportunity to be heard violates MPL's due process rights. MPL did not have any notice pursuant

¹⁰Memorandum in Support of Motion, at 8.

¹¹Memorandum in Support of Motion, at 9.

¹²Memorandum in Support of Motion, at 10.

to HRS § 91-9(a) of the issues in this proceeding, and "[it] is not at all clear from the Intervention Order what claims are being made against MPL or what facts or issues the Commission expects the parties to present evidence on."¹³ "If MPL is to be joined as a party, due process and the statute require the Commission to give MPL sufficient advance notice of the claims made against it to allow MPL to respond meaningfully."¹⁴

Based on the reasons articulated by MPL in its motion, MPL requests that the commission "issue an order modifying Ordering Paragraph 5 of the Intervention Order by deleting the requirement that MPL be a party to this proceeding."¹⁵

B.

Responses to Motion for Reconsideration

The County, in its Response, incorporates by reference the response it filed on the same date in In re Wai'ola O Moloka'i, Inc., Docket No. 2009-0049. The County contends that MPL's Motion for Reconsideration is without merit and should be denied. In support of its position, the County asserts:

1. HRS § 269-16(e) authorizes the commission to consider the financial status of MPL.

¹³Memorandum in Support of Motion, at 11. MPL cites to In re Hawaiian Elec. Co., Inc., 5 Haw. App. 445, 698 P.2d 304 (1985).

¹⁴Memorandum in Support of Motion, at 12. MPL cites to In re Hawaii Elec. Light Co., Inc., 67 Haw. 425, 690 P.2d 274 (1984).

¹⁵Memorandum in Support of Motion, at 12.

2. MPL meets the definition of "affiliated interest" under HRS § 269-19.5.

3. "HRS § 269-17.5 places restrictions on ownership and control of a public utility by a foreign corporation of a nonresident alien. The extent to which Officer and Director Peter Nicholas (a New Zealand national) holds voting stock in the utility is (or should be) of concern to the Commission, as well as the extent of ultimate control over the utility exerted by MPL's parent company (a foreign corporation)."¹⁶

WMA in its Response, likewise asserts that the commission has jurisdiction over MPL pursuant to HRS §§ 269-16(e) and 269-19.5(d). WMA also asserts:

1. MPL and its affiliates have funded MPU in the past, and MPU's \$3.6 million note of indebtedness must be examined and clarified.

2. MPL is a necessary and essential party, and the commission's action of naming MPL as a party is lawful and correct.

Meanwhile, the Consumer Advocate, in its Response: (1) states that it is without sufficient information to determine whether it is able to reasonably represent MPL's interest; and (2) "takes no position to oppose or support MPL's Motion for Reconsideration."¹⁷

¹⁶County's Response, at 3.

¹⁷Consumer Advocate's Response, at 2.

II.

Discussion

HAR § 6-61-137 states:

§6-61-137 Motion for reconsideration or rehearing. 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.

As set forth in the commission's Procedural Order, the issues governing this rate case are as follows:

1. Are MPU'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?
2. Does the Applicant's water service comply with applicable federal, state and county water quality laws, rules and regulations?

As noted by the commission, these stated issues incorporate the following issues:¹⁸

- 1g. Whether MPU's financials adequately reflect the income of MPU and if not, whether, to adequately reflect the income of MPU, the commission should distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among entities that own or control MPU, directly or indirectly?
- 1h. Whether any contracts between MPU 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 unreasonably or otherwise contrary to the public interest, and whether any payments made by MPU pursuant to the contracts or transactions are unreasonable and should be excluded by the commission for ratemaking purposes?
3. Do the projected expenses or projected rate base reflect assurances of reliable delivery of potable water at reasonable rates?

Contrary to MPL's claim, MPL has ample notice of the issues in this rate case, which are set forth in the commission's Procedural Order and re-stated herein. Of particular note, 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. Moreover, 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.

¹⁸There is no Issue No. 1(f). See Procedural Order, Section II.A, Statement of the Issues (Section I), at 4.

Lastly, the commission reaffirms its underlying rationale for naming MPL as a party to this proceeding:

"Because MPL is affiliated with the Utilities, and owns property associated with the Utilities' service territories," the commission named MPL as a party to Docket No. 2008-0115. The commission reaffirmed its decision to name MPL as a party to Docket No. 2008-0115 in a subsequent order, reasoning that an integral part of the commission's consideration of MPU's revenues, expenses, and amount of rate relief required by the water utility "is the amount of funds furnished to the Utilities by MPL," and hence, "any alleged outstanding obligations . . . which require MPL's participation in Docket No. 2008-0115."

Intervention Order, at 31 (brackets, footnotes, and citations therein omitted).

In this regard, the commission notes that MPU's response to CA-IR-75, filed on November 23, 2009, refers to MPU's parent company's action of providing funds to MPU for plant additions:

CA-IR-75

CA-IR-27 requested information on how plant additions were financed and where the applicable obligations are reflected in the Company's filing. The Company's response indicates that the Company's parent provided the funds, but does not indicate where those obligations are identified. Please identify the financial instrument, the terms of that instrument and where it is located.

Response

The funds provided by the Company's parent were provided in the form of advances and were reflected in the intracompany accounts recorded on MPU's accounting records in the "Due to Affiliates" account.

MPUC's response to CA-IR-75, filed on November 23, 2009, (emphasis in original); see also MPU's amended application, filed on June 29, 2009, Exhibit MPU 2, Schedule 4, Independent Auditor's Report for the year ending December 31, 2008, at 9 (management will apply for future rate increases with the commission as deemed necessary and appropriate to ensure MPU's future financial viability, until that time MPL will provide financial support, as needed); and MPU's response to CA-IR-27(a), filed on November 23, 2009 (the funds required to provide for capital expenditures and to cover operating losses were provided by MPU's parent company).

The commission, in conclusion, denies MPL's Motion for Reconsideration.

III.

Order

THE COMMISSION ORDERS:

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


DONE at Honolulu, Hawaii NOV 25 2009.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

APPROVED AS TO FORM:


Michael Azama
Commission Counsel

2009-0048.cp

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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 NOV 25 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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