



WAILUKU WATER CO.

WAIKAPU IAO WAIHEHU WAIHEE

Na Wai Eha

Application for SWUP – Hoopii
Agenda Item B.3

Wailuku Water Company, LLC
August 11, 2023

Chairperson Chang and Commissioners,

In the agenda published for its August 15, 2023 meeting, the Commission listed Approval of Surface Water Use Permit Application (SWUP.5934.6) for New Uses with Special Conditions, Michele Hoopii for 256,555 gpd; and Find that Amendment to SWUP.2157.6 issued to the Wailuku Water Company is Not Required, Waihe'e Stream, Waihe'e Surface Water Management Area, Maui as Action Item B.3. CWRM August 15, 2023 Agenda, page 2. As a staff report was not available to Wailuku Water Company (Company) as of the time a response was due, we may supplement this statement at the time of your meeting.

While the Company is not taking a position concerning the quantity of water being requested, the application raises issues that require review and analysis by the Commission concerning (1) overlapping jurisdiction with the Public Utilities Commission and (2) installation and operational conditions.

Company raised objections to the issuance of SWUPs based on the overlapping jurisdiction over Company by the Public Utilities Commission (PUC). Specifically, HRS § 269-16 places regulation of, and regulatory oversight over, utilities, including water companies. Company is a regulated water company, subject to the PUC. In 2009, the PUC ordered that Company and its affiliates “(i) shall maintain current rates and the current supply of water to customers; (ii) are prohibited from adding any new customers; and (iii) are prohibited from selling or transferring any of their assets.” Attachment 1, portion of Order Suspending Docket and Dismissing as Moot Request for Leave to File Reply, filed January 9, 2009, p. 15. The Commission’s action on this permit application may place the Company in a position that it must violate the PUC order to comply with the Commission’s action.

Company raised this issue in the SWUPA contested case and in the appeal that is pending before the Hawaii Supreme Court. Oral arguments on the appeal are set for September

14, 2023. At a minimum the Commission must consider the overlapping jurisdictional issue in its review of the application and deferral of a final decision on the SWUPA until a decision on the appeal is issued should be considered.

Company believes the Commission is aware of the issue as it authorized the Chairperson to enter into a Memorandum of Understanding with the PUC in September, 2022. The unsigned Memorandum of Understanding (MOU) provided, among other things, consistency of the PUC Certificate of Public Convenience and Necessity (CPCN) with water permit allocations and conditions within water management areas. Attachment 2, Memorandum of Understanding, p 2. Given the PUC Order and the terms of the MOU, consideration must be given to achieve consistency of the review of the SWUPA and the PUC Order. It is unclear to Company whether Commission reviewed and addressed the consistency requirement.

A second issue that should be considered in review of the SWUPA is clarification of operational conditions. Company understands applicant intends to construct and install a pipe within Waihee Ditch to deliver water to an existing pipe that is buried. While the process seems simple, the design, construction, installation and maintenance are complex. Flows within Waihee Ditch vary based on Waihee River flows. The variation of flow results in a variation in pressures within the ditch. This in turn results in a variation of the amount of water that will pass through a pipe. A greater flow results in more water being withdrawn from Waihee Ditch; a lower flow results in less water being withdrawn from Waihee Ditch. The SWUPA does not provide sufficient information by which the Commission can determine how much and in what manner water will be withdrawn from Waihee Ditch.

In order to withdraw the amount authorized by a permit, the withdrawal point must have a control device capable of adjustment based on ditch flows. Additionally, a device by which the amount withdrawn is measured is required. The SWUPA does not provide information to the Commission on how withdrawals will be adjusted or measured.

In addition to control and measurement, monitoring and reporting is required. The SWUPA does not contain information from which the Commission can determine whether and how the applicant will monitor and report withdrawals.



Any intake within the Waihee Ditch will require maintenance. The SWUPA does not provide any information on how the applicant will maintain and operate the intake. A permit should include conditions on how the intake will be maintained and operated.

Finally, the SWUPA does not address alternative sites for an intake. An auwai with sufficient capacity to serve the applicant's requests exists. No analysis of use of the existing auwai is included in the SWUPA. It is unclear to Company whether Commission staff is aware of the existing auwai and/or whether Commission staff made an assessment of the use of the existing auwai, that has an existing intake and sufficient capacity. Attachment 3. Map showing location of existing auwai and subject property.

As noted, Company does not take a position on the use or the amount being sought in the SWUPA. Company does believe that jurisdictional and operational issues exist that should be reviewed and addressed by the Commission in its review of the SWUPA.

Sincerely,

A handwritten signature in black ink, appearing to read 'Avery B. Chumbley', with a large, stylized 'B' and a long horizontal stroke extending to the right.

Avery B. Chumbley

President, Wailuku Water Company



BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
WAILUKU WATER DISTRIBUTION COMPANY,)
LLC, and WAILUKU WATER COMPANY, LLC)
For a Certificate of Public)
Convenience and Necessity to)
Provide Non-Potable Water)
Distribution Service in the Waihee,)
Waiehu, Puuohala, Wailuku, and)
Waikapu Areas and for Approval of)
Rules and Regulations Pursuant to)
Section 269-7.5, Hawaii Revised)
Statutes; Approval of Rates and)
Contracts Pursuant to Section)
269-16, Hawaii Revised Statutes;)
Approval of Waivers Pursuant to)
Section 6-61-92, Hawaii)
Administrative Rules; and Approval)
Of Affiliate Transactions Pursuant)
To Sections 269-19 and 269-19.5,)
Hawaii Revised Statutes.)

DOCKET NO. 2008-0025

ORDER SUSPENDING DOCKET
AND DISMISSING AS MOOT REQUEST FOR LEAVE TO FILE REPLY

2008-0025
PUBLIC UTILITIES COMMISSION
HAWAII
JUL 1 2008

III.

Orders

THE COMMISSION ORDERS:

1. This docket is suspended until the CWRM issues a decision in the **IFS** Proceeding and Applicants obtain the necessary water use permits in the SWMA Proceeding, unless otherwise ordered by the commission.

2. During the suspension period, the following conditions and requirements shall apply:

(a) The status quo shall be maintained. Accordingly, Applicants and their affiliates: (i) shall maintain current rates and the current supply of water to customers; (ii) are prohibited from adding any new customers; and (iii) are prohibited from selling or transferring any of their assets. Thus, Applicants shall not proceed with the Proposed Lease and the Proposed Land Sale, as requested in the Application.

(b) Applicants shall be required to file semi-annual financial statements, which shall include a balance sheet and income statement. The first report shall be due thirty days after the reporting period covering January 1, 2009 to June 30, 2009.

(c) Applicants shall file a new or amended application immediately after the necessary water use permits have been obtained from the CWRM.

(d) Applicants shall file status reports every three months addressing the status of the **IFS** Proceeding and the SWMA Proceeding.

MEMORANDUM OF UNDERSTANDING
BETWEEN

HAWAII DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

AND

THE HAWAII PUBLIC UTILITIES COMMISSION

- 1. In recognition of the regulatory responsibilities and common interests of the Hawaii Department of Land and Natural Resources, Commission on Water Resource Management ("CWRM") and the Hawaii Public Utilities Commission ("PUC"), the benefits to both organizations that result from sharing information about regulatory experiences and practices, CWRM and the PUC hereby declare their intent to cooperate in this Memorandum of Understanding ("MOU").**
- 2. This MOU identifies topics that CWRM and the PUC intend to focus on in their initial exchange of information.**
- 3. The initial topics under this MOU of interest to the CWRM include the following areas:**
 - a. Protection and prioritization of public trust uses of water by PUC, which are water in its natural state, domestic uses, water for the Department of Hawaiian Homelands, and water for the exercise of traditional and customary Native Hawaiian practice;**
 - b. Consistency of public utilities' Certificate of Public Convenience and Necessity ("CPCN") with water use permit allocations and conditions within water management areas;**
 - c. Review of CPCN of public utilities reliant on surface water within or outside of water management areas, including establishment of numeric interim instream flow standards;**
 - d. Good standing and compliance of public utilities with the State Water Code, Hawaii Revised Statutes Chapter 174C, Hawaii Administrative Rules, and orders by CWRM - identify any deficiencies or outstanding notice of violations;**
 - e. Proactive data sharing with PUC on water and wastewater public utilities;**
 - f. Letter from PUC to CWRM Chair and delegation from CWRM to Chair or Deputy to determine how and when to engage in PUC docket as a party in water and wastewater proceedings;**
 - g. Water system efficiency and conservation on both public water systems and irrigation systems including but not limited to mandatory water audits for public potable water systems, mandatory monitoring of water source, appropriate distribution systems, and gaged or metered end uses to determine economic level of loss;**
 - h. The economic impact of decisions by the CWRM, including Contested Case Hearings, on public utilities and their end users.**
- 4. The initial topics under this MOU of interest to the PUC include the following areas:**
 - a. Whether the timing and volume of water utility withdrawals (surface or groundwater) is consistent with the utility's CWRM permit (and how to review for ongoing consistency with the utility's CWRM permit);**

- b. Explore conversations about a water utility's obligation to provide service under PUC statutes/rules, as compared to the often finite or limited nature of water resources in the State;
 - c. Discuss the possibility of re-examining a water utility's current source/volume of water based on changed or changing environmental circumstances.
- 5. Cooperation under this MOU may include, but is not limited to, the following:
 - a. Information sharing and discussion of water utility issues and topics related to regulatory practices, which can include:
 - i. Information on water/wastewater utility change of control applications, and applications for a new CPCN or CPCN transfer;
 - ii. Any documentation related to water audits ordered in the course of utility rate cases;
 - iii. Any documentation related to water conservation plans ordered during utility rate cases or other proceedings;
 - iv. Geographic Information Systems ("GIS") data of utility service areas;
 - v. Data on amounts of water withdrawn from the resource as reported to CWRM and the availability of water for the proposed action;
 - vi. Hydrologic monitoring data collected by CWRM;
 - b. Joint visits that include CWRM, PUC, and other regulatory entities;
 - c. Meetings, webinars, workshops, teleconferences and/or email exchanges;
 - d. Studies on agreed-upon topics that include the participation of experts in the industry; and
 - e. Training activities

CWRM and the PUC may decide to cooperate in other areas of mutual interest.

- 6. This MOU is not intended to be a binding contract enforceable in a court of law or in an administrative forum. It is intended only to establish a process for further cooperation between the governmental entities signing this document.
- 7. Nothing contained in this MOU requires either CWRM or the PUC to take any action that would be inconsistent with any existing or future laws, regulations, and policy directives applicable to it. Activities by CWRM and the PUC under this MOU are to be subordinate to their regulatory activities and interests and should be met depending on each entities' resources and priorities.
- 8. CWRM and the PUC, unless otherwise decided upon, intend to bear their own share of financial costs of participating in the activities under this MOU. All activities are subject to approval of funding by each entity involved.

9. This MOU will take effect when signed by all the parties hereto. This MOU may be modified at any time by the mutual written agreement of the parties. CWRM and the PUC may terminate the MOU upon thirty (30) days written notice to the other. During this period, the parties shall make good-faith efforts to resolve any disagreement.

Suzanne Case, Chairperson
Hawaii Department of Land and Natural Resources
Commission on Water Resource Management

Date

Leodoloff R. Asuncion, Jr., Chair
Hawaii Public Utilities Commission

Date

Waihee Ditch Waihee Valley - Stn. #2

SWUP 5934.6

North Waiehu Ditch

Waihee Ditch - North Waiehu Intake

Waihee Ditch

Attachment 3

