ORIGINAL

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

2009 OCT 28 P 3:03
PUBLIC UTILITIES COMMISSION

MOLOKAI PROPERTIES LIMITED'S MOTION FOR RECONSIDERATION OF PORTIONS OF ORDER GRANTING INTERVENTION TO THE COUNTY OF MAUI, WEST MOLOKAI ASSOCIATION, AND STAND FOR WATER ENTERED OCTOBER 16, 2009

MEMORANDUM IN SUPPORT OF MOTION

and

CERTIFICATE OF SERVICE

CHUN KERR DODD BEAMAN & WONG,
a Limited Liability Law
Partnership

ANDREW V. BEAMAN
745 Fort Street, 9th Floor
Honolulu, Hawaii 96813
Telephone: (808) 528-8200

Attorney for MOLOKAI
PROPERTIES LIMITED

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

MOLOKAI PROPERTIES LIMITED'S MOTION FOR RECONSIDERATION OF PORTIONS OF ORDER GRANTING INTERVENTION TO THE COUNTY OF MAUI, WEST MOLOKAI ASSOCIATION, AND STAND FOR WATER ENTERED OCTOBER 16, 2009

MOLOKAI PROPERTIES LIMITED ("MPL"), by and through its attorneys, Chun Kerr Dodd Beaman & Wong, a Limited Liability Law Partnership, hereby respectfully moves the Hawaii Public Utilities Commission (the "Commission"), pursuant to Hawaii Administrative Rules ("HAR") §§ 6-61-41 and 6-61-137, for reconsideration of portions of its Order Granting Intervention To The County Of Maui, West Molokai Association, And Stand For Water entered October 16, 2009 (the "Intervention Order").[1]

[1] The Intervention Order was served on the movant, Molokai Public Utilities, Inc., on October 16, 2009, by mail. In accordance with HAR §§ 6-61-137, 6-61-21(e) and 6-61-22, a motion for reconsideration of the Intervention Order should be filed with the Commission no later than October 28, 2009.

Specifically, as further discussed in the memorandum attached hereto, MPL seeks reconsideration of Ordering Paragraph 5 and Section II.B of the Intervention Order, in which MPL is named as a party to this proceeding.

Pursuant to HAR § 6-61-41, MPL does not request a hearing on this Motion.

DATED: Honolulu, Hawaii, October 28, 2008.

ANDREW V. BEAMAN

Chun Kerr Dodd Beaman & Wong,
a Limited Liability Law
Partnership

Attorneys for MOLOKAI
PROPERTIES LIMITED

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

MEMORANDUM IN SUPPORT OF MOTION

On August 14, 2008, the Hawaii Public Utilities Commission (the "Commission") issued an order approving temporary rate relief to applicant Molokai Public Utilities, Inc. ("MPU") in Docket No. 2008-0115. As part of that order, the Commission ordered MPU to file an application for a rate increase within six months. In compliance with that order, as later amended, MPU filed an application for a rate increase under Hawaii Revised Statutes ("HRS") § 269-16 in this docket.

Under HRS § 269-16, MPU, as the regulated utility, is the party in interest and has the burden of proof in providing information in the proceeding to support its requested relief for an increase in rates.

No claims or request for relief, other than MPU's application for a rate increase, have been asserted by any party to this docket.

On October 16, 2009, the Commission issued its Order Granting Intervention To The County of Maui, West Molokai Association, And Stand For Water (the "Intervention Order") herein. In particular, Ordering Paragraph 5 of the Intervention Order states the following: "MPL is named as a party to this proceeding." Intervention Order at 33.

MPL simply has no role to play in this case. Under Hawaii Administrative Rules ("HAR") § 6-61 (the Rules of Practice and Procedure Before the Public Utilities Commission), "[p]arty has the same meaning as in section 91-1(3), HRS" and "includes a participant where the context requires." HAR § 6-61-2. Pursuant to HRS §91-1(3), "[p]arty means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding."

A party to a proceeding is one who seeks relief or against whom relief is sought. Under Hawaii law, the "real party in interest" is the party who has the right sought to be enforced. Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 113 Haw. 251, 151 P.3d 732 (Haw. 2007). In this case, the "right sought to be enforced" is the right to a rate increase under HRS § 269-16, and the party who has the right to seek a

rate increase is MPU, the regulated utility holding the Certificate of Public Convenience and Necessity ("CPCN"), not MPL. While MPU is indirectly owned by MPL, through its subsidiary Kaluakoi Water, LLC, the fact remains that MPL has not sought any relief from this Commission and no party has sought any relief from this Commission against MPL. Therefore, MPL should not be a party.

MPL is not a "public utility" as defined in HRS § 269-1 and does not hold a CPCN. MPL did not ask to be named as a party to this docket, and no other party asked the Commission to join MPL as a party. Hence the Commission has neither general supervisory powers nor investigative powers over MPL under HRS Chapter 269. Therefore, as Commissioner Kondo correctly noted, the Commission has no jurisdiction over MPL. *See, e.g.*, P.U.C. v. Honolulu Rapid Transit, 56 Haw. 115, 119, 530 P.2d 742, 745 (1975) (Commission's authority limited to 'public utilities').

HAR § 6-61-137 states that "[a] motion seeking any change in a decision, order, or requirement of the [C]ommission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful or erroneous."

By this motion, MPL requests reconsideration of Ordering Paragraph 5 of the Intervention Order, which names MPL as a party to this proceeding. The Commission's decision to name MPL as a party in this type of proceeding is unprecedented, unreasonable, unlawful and erroneous, for the reasons set forth below.

In its motion to intervene, the County asserted that a Hawaii Department of Health ("DOH") hearing officer had determined that MPU and MPL were "one and the same" and that the First Circuit Court had affirmed that decision. Intervention Order at 8.[2] The County failed to note, however, that MPL has taken an appeal from that decision, as stated in MPL's letter to the Commission dated August 27, 2008 in Docket No. 2008-0115. The decision therefore is not binding upon the parties. Robinson v. Ariyoshi, 65 Haw. 641, 651, 658 P.2d 287, 296 (1982). The decision of the DOH hearing officer was incorrect for both substantive and procedural reasons, and the Intermediate Court of Appeals will hear those issues in due course.

The County argued that, because the corporate veil had been pierced by the DOH hearing officer, MPL's finances "must be considered" here. Intervention Order at 8. Apparently the

---

[2] MPL cites here to the Commission's characterization in the Intervention Order of Intervenors' representations and arguments. MPL was not served with any of the instant motion papers, since no party sought to name MPL herein.

Commission agreed. In Section II.B of the Intervention Order, the Commission stated:

> "[B]ecause 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, "[a]ny alleged outstanding obligations . . . which require MPL's participation in [Docket No.2008-0115."
>
> Here, consistent with the commission's rationale in Docket No. 2008-0115 and MPU's inability to sufficiently respond to the commission's questions concerning the Well 17 and MIS matters, the commission, on its own motion, names MPL as a party to this proceeding. MPU, whether individually or jointly through its parent entity, MPL, should be able to provide the commission and other parties with the information needed in developing a complete record in this proceeding.

Intervention Order at 31-32 (footnotes omitted).

MPL respectfully disagrees. Since MPU, not MPL, has the burden of proof under HRS § 269-16, it is unnecessary to join MPL. In MPL's view, the issue of whether the corporate veil should be pierced is: (1) beyond the jurisdiction of the Commission; and (2) completely irrelevant to the rate making process. Nor will it serve the interest of any party to litigate the issue of whether the corporate veil should be pierced in this forum. Rather, that issue should be left to the courts.

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.

The Intervention Order refers to a number of other unsubstantiated allegations raised by the Intervenors. The Commission's rules require consideration of facts not of record to be substantiated by affidavit. HAR § 6-61-41(b). These allegations do not provide a sufficient basis for involuntary joinder of MPL.

For example, Intervenors have raised such issues as:

- whether MPU is authorized under existing orders issued by the courts and the Commission on Water Resource Management ("CWRM") to pump water from Well No. 17 (Intervention Order at 9-10, 13) -- an issue that is within the jurisdiction of CWRM;
- whether unspecified "misrepresentations attributable to the owner of MPU/MPL may be attributable to the Singapore-based parent of MPL" (Intervention Order at 11) -- a complete falsehood;

- whether unspecified "intentions need to be discussed" (Intervention Order at 11);
- whether MPU "should cease using the agricultural Moloka'i Irrigation System (MIS) for transmission of water" (Intervention Order at 13) -- an issue that is within the jurisdiction of the Department of Agriculture; and
- whether MPL has failed to honor "more than 30 contractual promises" to the County (Intervention Order at 13) -- an issue that is before the Second Circuit Court.[3]

The Intervenors have also asserted that MPU's water quality fails to meet federal and state standards. There is absolutely no evidence to support that allegation; and even if there were a legitimate concern about water quality, the obvious solution would be to raise the water rates in order to make MPU financially viable.

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. "[O]rthodoxy in public utility rate making suggests four sequential determinations should precede the ultimate rate decision." In Re Hawaiian Telephone Co., 67 Haw. 370, 378, 689 P.2d 741, 747 (1984). These four determinations are: (1) the gross utility revenues; (2) the operating expenses; (3) the rate base; and (4) the rate of return. *Id.* For that reason, "[o]ur function in

---

[3] *See* note 2 above.

rate making is a limited one." *Id.*, 67 Haw. at 379, 689 P.2d at 747.

While the Commission, in the Intervention Order, warns the Intervenors against "unreasonably" expanding the scope of the issues in this case (Intervention Order at 33), it is not clear what that means or what issues the Commission expects the parties to address. It is not clear whether MPL must introduce evidence related to the County's allegation that the corporate veil should be pierced. It is not clear whether MPL must address West Molokai Association ("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.

The Commission then appears to blame the whole state of affairs on MPL, noting that "this general rate case proceeding arises out of MPL's 'announcement' in late March 2008 of its intent to cease . . . its public utility operations" (Intervention Order at 24). Again, MPL respectfully disagrees. MPU informed the Commission of its financial troubles in March 2008, consistent with its legal obligation to keep the Commission informed of its financial condition. And by letter to the Commission dated September 8, 2008, after the Commission had issued its temporary rate order, MPU rescinded all prior notices of intent to terminate operations.

MPL is not aware of any other rate case proceeding in which an entity that is **not** regulated by the Commission or subject to its regulations is required to be a party simply because it is related to a regulated utility. The Intervention Order appears to utilize that rationale by citing to the temporary rate proceeding in Docket No. 2008-0115 in which MPL was named a party, given: (a) its indirect ownership of the utility; (b) that it owns property associated with the utility's service territory; and (c) it has in the past provided capital to the utility. Intervention Order at 31. 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.[4] The reasons relied upon to justify naming MPL as a party to this proceeding are therefore no longer valid.

The Commission also cites MPU's "inability to sufficiently respond to the commission's questions concerning Well 17 and MIS matters" (Intervention Order at 31-32) at the public hearing as partial justification for naming MPL as a party to this proceeding.[5] The Commission suggests that MPU, whether

---

[4] The Commission's denial of WMA's Motion to Intervene in Docket No. 2008-0115 is inconsistent with its decision in the instant docket to grant WMA's request to intervene here.

[5] Note 42 of the Intervention Order noted that MPU's representative at the public hearing deferred the Commission's questions regarding Well 17 and the MIS to Mr. Peter Nicholas, president of MPU, who was unable to attend the public hearing since he was traveling outside the United States.

individually or jointly through its parent MPL, should be able to provide the Commission and other parties with the information needed to develop a complete record in this proceeding.

It is not uncommon for the representative of a utility appearing at a public hearing to be unable to respond to questions posed by the audience or the Commission. In such a situation, the representative often responds that he or she does not know the answer, that he or she is not qualified to answer, and/or that the company or another representative will respond to the Commission in writing, after the hearing, when the requested information is obtained. To 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.[6]

A party who appears before the Commission has the right to due process. In Re Hawaiian Electric Co., Inc., 5 Haw.App. 445, 448, 698 P.2d 304, 308 (Haw.App. 1985). "The utility's due process right includes a meaningful opportunity to be heard." *Id.* Naming MPL as a party to these proceedings without prior notice or an opportunity to be heard is a violation of MPL's due process rights. Due to the nature of these proceedings, *i.e.*, a rate case filed pursuant to HRS § 269-16, MPL had no notice or

---

[6] It should be noted that, pursuant to informal discovery conducted by the Consumer Advocate during the period preceding the issuance of the Intervention Order, MPU provided detailed responses to the Consumer Advocate's various information requests, including matters concerning Well 17 and the MIS.

expectation, reasonable or otherwise, that it would be made a party to this proceeding given that: (a) it is not a public utility; (b) it is not subject to regulation by the Commission; (c) it was not an applicant in this docket; and (d) it did not seek to become a party. None of the intervenors moved to join MPL as a party, nor did the Commission initiate any proceeding to address the issue and provide MPL notice and an opportunity to weigh in on the issue.

It is the Commission's obligation to provide the parties with notice of what the issues will be. In Re Hawaiian Electric Co., Inc., *supra*. Under HRS § 91-9(a), "all parties *shall be afforded an opportunity for hearing after reasonable* notice," which at a minimum must include "an explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof." Here, MPL has had no such notice. As noted above, the Commission's Intervention Order cites a litany of largely unsubstantiated allegations made by the Intervenors -- all of which, if accepted, would justify an increase and not a decrease in the water rates charged by MPU -- but does not explain why or how these unsubstantiated allegations relate to the rate-making process. 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.

"Of course, due process and HRS § 91-9 requires that parties be given a meaningful opportunity to be heard. This implies the right to submit evidence and argument on the issues." Application of Hawaii Electric Light Co., Inc., 67 Haw. 425, 690 P.2d 274 (1984). 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.

For the reasons set forth above, MPL respectfully 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.

DATED: Honolulu, Hawaii, October 28, 2008.

ANDREW V. BEAMAN

Chun Kerr Dodd Beaman & Wong,
a Limited Liability Law
Partnership

Attorneys for MOLOKAI
PROPERTIES LIMITED

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was duly served on the following parties, by hand delivery or mail, postage prepaid, to their last known addresses set forth below, on this date:

MS. CATHERINE P. AWAKUNI (3 copies, Hand Deliver)
Executive Director
Department of Commerce and Consumer Affairs
Division of Consumer Advocacy
335 Merchant Street, Room 326
Honolulu, HI 96813

TIMOTHY BRUNNERT (1 copy, U.S. Mail)
PRESIDENT
Stand for Water
P.O. Box 71
Maunaloa, HI 96770

MICHAEL H. LAU., ESQ. (1 copy, U.S. Mail)
YVONNE Y. IZU ESQ.
SANDRA L. WILHIDE, ESQ.
Morihara Lau & Fong LLP
841 Bishop Street, Suite 400
Honolulu, HI 96813

Attorneys for
MOLOKAI PUBLIC UTILITIES, INC.

MICHAEL J. HOPPER, ESQ. (1 copy, U.S. Mail)
Dept. of the Corporation Counsel
County of Maui
200 South High Street
Wailuku, HI 96793

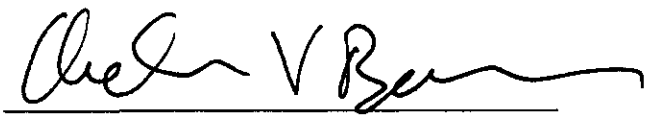
MARGERY S. BRONSTER, ESQ. (1 copy, U.S. Mail)
JEANETTE H. CASTAGNETTI, ESQ.
Bronster Hoshibata
Pauahi Tower, Suite 2300
1033 Bishop Street
Honolulu, HI 96813

Attorneys for
COUNTY OF MAUI

WILLIAM W. MILKS, ESQ. (1 copy, U.S. Mail)
Law Offices of William W. Milks
American Savings Bank Tower
1001 Bishop Street, Suite 977
Honolulu, HI 96813

Attorney for
WEST MOLOKAI ASSOCIATION

DATED: Honolulu, Hawaii, October 28, 2008.



ANDREW V. BEAMAN

Chun Kerr Dodd Beaman & Wong,
a Limited Liability Law
Partnership

Attorneys for MOLOKAI
PROPERTIES LIMITED