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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

PUUWAAWAA WATERWORKS, INC.)

DOCKET NO. 00-0005

For a Certificate of Public)
Convenience and Necessity Pursuant)
to Hawaii Revised Statutes)
§ 269-7.5, to Provide Water)
Services to Portions of Puuwaawaa)
and Puuanahulu Homesteads at)
North Kona, Hawaii, and for)
Approval of Proposed Rates.)

ORDER NO. 19979

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

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Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

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Services to Portions of Puuwaawaa)
and Puuanahulu Homesteads at)
North Kona, Hawaii, and for)
Approval of Proposed Rates.)
_____)

ORDER

I.

On January 12, 2000, PUUWAAWAA WATERWORKS, INC. (PWI) filed an application for a certificate of public convenience and necessity (CPCN) to provide water service for portions of Puuwaawaa and Puuanahulu homesteads and for approval of its proposed rates. PWI and the DIVISION OF CONSUMER ADVOCACY of the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS (Consumer Advocate) are the sole parties to this docket.¹

PWI first amended its application through a filing on August 10, 2000, and then filed a second amended application on September 24, 2001. Pursuant to Prehearing Order No. 17841, filed

¹Pu'u Lani Ranch Homeowners Association (PLRHA) was granted intervenor status to this proceeding. However, upon the parties' stipulation filed on August 16, 2001, by Order No. 19152, filed on January 18, 2002, PLRHA's status was changed to that of a participant, within the parameters set forth in Order No. 19152.

on July 18, 2000, as amended, which governs this proceeding, the commission held an evidentiary hearing on the outstanding issues of PWI's CPCN application on July 24, 2002.

On July 16, 2002, the Consumer Advocate filed its Motion for Sanctions and/or Civil Penalties (Motion) in this docket. On July 23, 2002, PWI filed its response to the Motion (Response). Then, with commission approval, the Consumer Advocate filed its reply to the Response on August 13, 2002 (Reply). On August 27, 2002, with proper notice issued on July 30, 2002, the commission conducted an evidentiary hearing on the matters raised in the Motion, pursuant to Hawaii Revised Statutes (HRS) Chapter 91 and HRS § 269-28.

By this order, the commission will only address the matters raised in the Motion and argued during the August 27, 2002 evidentiary hearing. A separate commission order will address the specific matters surrounding PWI's CPCN application in this docket.

II.

In its Motion, the Consumer Advocate argues that, under HRS § 269-28, civil penalties should be imposed on PWI for its failure to comply with applicable regulatory laws, rules, and commission orders; and for operating as a public utility without a CPCN. The Consumer Advocate specifically alleges that PWI has: (1) raised its rates in direct contravention to Order No. 18670, filed on July 6, 2001, in this docket; (2) violated HRS § 269-16(b) by changing rates without prior commission approval; (3) failed to

timely file its application for a CPCN; and (4) continuously disregarded the commission's authority.

Based on these alleged violations, the Consumer Advocate requests that the commission order PWI to:

1. Pay civil penalties, under HRS § 269-28, for violating Order No. 18670, and for its failure to comply with applicable regulatory laws, rules, and commission orders;
2. Pay civil penalties, under HRS § 269-28, for engaging in the business of a public utility without a CPCN; and
3. Reimburse ratepayers, with interest, for amounts unlawfully charged by changing its rates without prior commission approval.

III.

A. Order No. 18670 and HRS § 269-16(b) Alleged Violations

1.

The Consumer Advocate argues that PWI should be assessed civil penalties for violating Order No. 18670, and for its continuous violation of HRS § 269-16(b). By Order No. 18670, the commission addressed certain unauthorized actions instituted by PWI. One such action was that PWI increased its present rates on an interim or temporary basis without first obtaining commission

approval to do so, pursuant to HRS § 269-16(b).² Order No. 18670 required PWI to file a motion for commission approval of interim or temporary rates and ordered PWI to "immediately cease and desist instituting" the unauthorized actions.³

The Consumer Advocate contends that PWI disregarded the commission's directive in Order No. 18670 to "immediately cease and desist instituting" unauthorized actions and that PWI continued to increase/change rates without prior commission approval in violation of HRS § 269-16(b). The Consumer Advocate argues that on July 6, 2001 (the issuance date of Order No. 18670), PWI was charging a base rate of \$5.70 per thousand gallons (TG) and a power cost fluctuation (PCF) charge of \$2.45 for a total consumption charge of \$8.15 per TG, and a minimum charge of \$37.50, which the Consumer Advocate contends are unauthorized rates.⁴

²HRS § 269-16(b) states, among other things, that no rate, fare, or charge shall be established, abandoned, modified, or departed from by any public utility without 30-days prior notice to the commission and without commission approval for any increases in rates, fares, or charges.

³PWI filed its Motion for Approval of Interim Rates and Waiver of Public Hearing (motion for interim rates) on September 28, 2001. Upon deliberation and review of PWI's motion for interim rates; PLRHA's objections, filed on October 5, 2001; the Consumer Advocate's response to PWI's motion for interim rates, filed on October 11, 2001; and PWI's reply to the Consumer Advocate's response, filed on October 23, 2001; by Order No. 19152, filed on January 18, 2002, the commission denied PWI's motion for interim rates.

⁴However, upon review of the Consumer Advocate's diagram on page 4 of its Motion, it appears that the Consumer Advocate misstated the consumption rate being charged during July 6, 2001. Based on the diagram, it appears that PWI was charging its ratepayers a consumption rate of \$8.55 per TG (a base rate of \$5.70 with a PCF of \$2.85), as oppose to \$8.15 per TG. Nonetheless, it appears that the Consumer Advocate's argument is not affected by this minor misstatement.

The Consumer Advocate argues that despite charging these unauthorized rates, PWI increased its base consumption rate to \$9.70 per TG and informed its ratepayers that a PCF would be added when electricity costs exceed \$0.20 per kwh in January 2002. Thus, it argues that PWI violated Order No. 18670 and HRS § 269-16(b), by increasing its base consumption rate by \$4.00 (or by 70 per cent). Furthermore, the Consumer Advocate argues that civil penalties should be imposed since PWI has a long history of changing its water rates without prior commission approval in violation of State law. The Consumer Advocate describes PWI's numerous unauthorized rate changes in a diagram on page 4 of its Motion.⁵

The Consumer Advocate argues that PWI should be assessed \$250 per day for each day that PWI charged unlawful rates. It argues that PWI first began charging unlawful rates on January 1, 2001; thus, the Consumer Advocate recommends that we assess PWI civil penalties totaling \$140,250.⁶ In the alternative, the Consumer Advocate provides the commission with the following options to assess civil penalties totaling either, \$93,750 or \$49,000.⁷

⁵The source of the Consumer Advocate's diagram appears to be PWI's response to CA-RIR-13, Exhibit H, filed on April 1, 2002.

⁶The Consumer Advocate multiplied \$250/day by 561 days (561 days is arrived by taking into account the days from January 1, 2001 through July 15, 2002).

⁷See Consumer Advocate's Motion at 10-11.

In opposition, PWI first argues that it increased its rates to keep PWI financially viable and in business. It contends that faced with the dilemma of ceasing its operations or increasing rates without commission approval, it chose to increase rates; thus, it contends that it increased rates for a "good cause" and acted in good faith. In its Reply, the Consumer Advocate argues that PWI's actions were unlawful regardless of its intent and criticizes PWI's argument that it had no option, but to increase rates.

Second, PWI asserts that the Consumer Advocate should be precluded from arguing that PWI unlawfully increased its rates, particularly because the Consumer Advocate's position in this matter is inconsistent with the position the Consumer Advocate took during PWI's September 28, 2001 motion for interim rates. In reply, the Consumer Advocate claims that this argument is groundless since its position in this matter is based on the requirements of HRS § 269-16(b), while the position it took during PWI's motion for interim rates was based on HRS § 269-16(c) and (d).

Third, PWI contends that due process requires, at a minimum, that a person be afforded notice and an opportunity to be heard before depriving him/her of a significant property interest. PWI argues that Order No. 18670 was not issued in accordance with due process requirements. In reply, the Consumer Advocate argues that due process is not afforded to just any interests. The Consumer Advocate cites Sandy Beach Defense Fund v.

City Council of the City and County of Honolulu, 70 Haw. 361 (1989) (Sandy Beach), which held that a person must "have a legitimate claim of entitlement to" the property to have a property interest to it.⁸ The Consumer Advocate asserts that the interest (i.e., the right to operate its business unlawfully) PWI wishes to protect is not a "property" requiring due process protection. The Consumer Advocate further argues that PWI had sufficient notice that failure to comply with HRS Chapter 269 could result in civil penalties and was given sufficient opportunity to present its position to the commission.

3.

HRS § 269-28(a) states the following, in pertinent part:

Any public utility violating or neglecting or failing in any particular [way] to conform to or comply with this chapter or any lawful order of the public utilities commission shall be subject to a civil penalty not to exceed \$25,000 for each day such violation, neglect, or failure continues, to be assessed by the commission after a hearing in accordance with chapter 91.

Upon careful review and consideration of the evidence and arguments proffered by the parties, the commission finds the Consumer Advocate's allegations that PWI failed to adhere to the requirements of Order No. 18670 and continuously violated HRS § 269-16(b) in this docket to have merit. As argued by the Consumer Advocate, the record clearly demonstrates that PWI increased rates without prior commission approval in violation of

⁸Sandy Beach at 377.

Order No. 18670 and HRS § 269-16(b). PWI's arguments with regards to this matter are unpersuasive. For example, PWI's claim that it increased rates without commission approval for "good cause" since it needed to increase rates to stay in business is an argument for mitigation; it does not excuse PWI's violations. Additionally, we find that the Consumer Advocate is not precluded from arguing its position that PWI increased rates in violation of HRS § 269-16(b) in the Motion since the Consumer Advocate's position with regards to PWI's motion for interim rates was based on specifically different sub-sections of the law. Finally, we are not convinced with PWI's due process argument particularly because we do not find that PWI was deprived of any legitimate property interest resulting from the issuance of Order No. 18670.

Based on the foregoing violations, the commission finds that an imposition of civil penalties pursuant to HRS § 269-16(a) is warranted. However, upon due consideration of all factors (i.e., mitigating evidence) related to this matter, the commission views the imposition of civil penalties, as recommended by the Consumer Advocate, to be excessive. We also find the Consumer Advocate's argument that the commission should find PWI's sole shareholder personally liable for any civil penalties or refunds to be unwarranted. PWI is a corporation. While the Consumer Advocate suggests that we "pierce the corporate veil," neither the record on this issue nor the law governing it appears

to sanction or warrant such an action.⁹ Thus, the commission finds the "alter ego" doctrine to be inapplicable. Under HRS § 269-28(a), the commission recognizes that it is authorized and has the discretion to impose civil penalties, up to and not to exceed \$25,000 for each day of noncompliance. However, in lieu of assessing civil penalties for each day of noncompliance, we believe that the imposition of a one-time civil penalty totaling \$10,000 to be reasonable and appropriate based on the totality of the circumstances that surrounds this issue including, but not limited to, the consideration that PWI is a small utility with approximately only 60 customers.

Accordingly, the commission concludes that a civil penalty of \$10,000 should be assessed on PWI for violating

⁹The record in this proceeding addressing this matter is very limited and appears incomplete. For example, in the Reply, while Consumer Advocate sets forth the law regarding the "alter ego" doctrine, it does not clearly articulate the reasons and factors for applying the doctrine in this case. The Consumer Advocate simply "jumps" to the conclusion that the factors needed to apply the doctrine "are present in this case and supported by the record and proceedings in this docket." (Consumer Advocate's Reply at 13). We find this to be inadequate. As the movant, the Consumer Advocate has the burden of persuasion regarding this issue; a burden that it failed to meet.

Additionally, the Hawaii Supreme Court reminds us that "[c]ourts apply the alter ego doctrine with great caution and reluctance [and that . . . i]n fact many courts require exceptional circumstances before disregarding the corporate form." (Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transportation Company, Inc., 91 Hawai'i 224, 241 (1999)). This Court held that "a corporation will be deemed the alter ego of another where recognition of the corporate fiction would bring about injustice and inequity when there is evidence that the corporate fiction has been used to perpetrate a fraud or defeat a rightful claim." (Id. at 241-2, referenced matter and quotes omitted.) While the commission recognizes that certain aspects of Docket No. 00-0005 are extraordinary, we did not find nor was it ever argued that PWI perpetrated a fraud or that a third-party had a rightful claim that was being denied.

Order No. 18670, and for its failure to comply with applicable regulatory laws, rules, and commission orders, specifically HRS § 269-16(b).

B. Failure to Timely Submit CPCN Application Allegation

1.

The Consumer Advocate also contends that PWI should be assessed a civil penalty pursuant to HRS § 269-28(c), which allows the commission to impose civil penalties of up to \$5,000 per day to persons operating as a public utility without a commission issued CPCN to do so. The Consumer Advocate argues that PWI did not timely file its CPCN application. It notes that by letter dated December 9, 1997, the commission notified PWI that its operations fell within the statutory definition of a public utility and that it could not operate as a public utility without a CPCN. The Consumer Advocate argues that PWI took over two years to file its initial application, which only occurred through further prompting. The Consumer Advocate suggests that PWI be assessed \$20,000 per year for operating without a CPCN, and cites to the commission's decision in In re All-Tech Telecom., Inc., Docket No. 7070, In re Freedom Communications, Inc., v. All-Tech Telecom., Inc., Docket No. 7109, consolidated, Decision and Order No. 11772, filed on September 3, 1992 (All-Tech). The Consumer Advocate pleads that PWI should be made aware that its failure to submit its application in a timely manner is a serious violation. Contending that three months is sufficient to complete

and file an application, the Consumer Advocate requests that PWI be assessed \$35,000 for this violation (1.75 years x \$20,000).

2.

In response, PWI contends that the Motion with regards to this matter should also be denied since PWI believed in good faith that it did not meet the definition of a public utility. PWI argues that the December 9, 1997 commission letter did not clearly require it to file a CPCN application since the letter just "strongly suggested" that it apply for a CPCN; and that it submitted its application when the commission specifically "directed" it to do so. PWI states that it was not disregarding commission authority, but that it was vigorously defending its position, in good faith. PWI also contends that imposing sanctions on it for operating without a CPCN serves no useful purpose, at this time, since it already applied for a CPCN. Furthermore, PWI argues that it is unable to pay the level of penalties suggested by the Consumer Advocate and implies that "financial ability to pay" is a mitigating factor.

The Consumer Advocate counters that the commission's December 9, 1997 letter constituted more than a mere strong suggestion, since the letter specifically stated that: (1) the commission concluded that PWI meets the HRS § 269-1 definition of a public utility; (2) PWI must comply with HRS § 269-7.5 by obtaining a CPCN from the commission; and (3) failure to comply with HRS § 269-7.5 could result in civil penalties. The Consumer Advocate questions PWI's contention that its inaction

until further commission communication constituted a good faith, vigorous defense of its position, since such a defense would entail some sort of correspondence or filing with the commission, which does not exist. For example, the Consumer Advocate asserts that PWI should have filed for a declaratory ruling and a motion for a temporary authority to provide service at an interim rate pending issuance of a final order. The Consumer Advocate argues that imposing civil penalties on PWI at this time will serve the purpose of deterrence since it will send a message to PWI and other public utilities that they must comply with the State's public utilities laws.

3.

Upon review, we find that PWI did not act in good faith and that it ignored the commission's December 9, 1997 directive to file an application for a CPCN. PWI's arguments are unpersuasive. PWI's contention that it did not file its CPCN application on receipt of the commission's December 9, 1997 letter since the letter only "strongly suggested" it to do so is absurd. We agree with the Consumer Advocate that the December 9, 1997 letter clearly stated that the commission found PWI to be a public utility within the commission's jurisdiction, and plainly stated that it must obtain a CPCN from the commission. Moreover, the letter also clearly stated that inaction could result in civil penalties. In the alternative, if PWI was unclear about the commission's directive, PWI could and should have obtained clarification of the directive through either a declaratory ruling or an informal

opinion. The record clearly indicates the PWI failed to ask for a clarification of the December 9, 1997 letter, in any form. This inaction does not constitute a good faith, vigorous defense of PWI's position. PWI's CPCN application was filed on January 12, 2000. Thus, even after receiving notice, PWI operated for over two years without applying for a CPCN.

Based on the above, we conclude that PWI deliberately ignored the commission's December 9, 1997 directive to timely file its CPCN application, and operated without authority to do so in violation of HRS § 269-7.5.¹⁰ Thus, we conclude that PWI should pay civil penalties pursuant to HRS § 269-28, for violating HRS § 269-7.5 by engaging in the business of a public utility without a commission issued CPCN. Notwithstanding the above, the commission disagrees with the level of civil penalties proposed by the Consumer Advocate. Upon review and consideration of all relevant matters and various mitigating evidence in the record,¹¹ the commission finds and concludes that an assessment of \$5,000 should be imposed on PWI, pursuant to HRS § 269-28(c), for engaging in the business of a public utility without a CPCN issued in accordance with HRS § 269-7.5.

¹⁰As stated in All-Tech, we give PWI the benefit of doubt for its inaction before the commission's notification or directive and considers such inaction to have occurred under PWI's good faith belief that it was acting within the law. However, PWI's inaction or dilatory action after the commission's notification was in willful disregard of the commission's notice.

¹¹See pages 8 and 9 of this order for more discussion on the imposition of civil penalties.

C. Reimburse Ratepayers Relief

Finally, the Consumer Advocate requests that the commission require PWI to reimburse ratepayers, with interest, all amounts that PWI unlawfully charged by increasing its rates without prior commission approval. The Consumer Advocate suggests that: (1) such refunds be provided in a lump sum payment or as adjustments to future charges, and (2) PWI be ordered to perform the necessary calculations to refund ratepayers; and requests that it be allowed to provide comments on PWI's calculations.

Primarily, the Consumer Advocate argues that PWI has benefited at the expense of its ratepayers and that it believes that a refund of unlawful charges is the only equitable remedy regarding this matter. On the other hand, PWI fails to provide any specific arguments regarding this issue; however, PWI's objections to this issue appear to be encompassed in its arguments on the other issues.

Upon review, the commission concludes that we are unable to entertain the Consumer Advocate's request to order PWI to reimburse ratepayers with interest any amounts deemed "unlawful" since the commission is not statutorily authorized to do so. HRS § 269-28 does not allow the commission to act, as requested by the Consumer Advocate. For the most part, past commission directives to utilities to reimburse ratepayers with interest were based on explicit statutory authority. For example, the commission requires utilities, granted interim rate relief under HRS § 269-16(d), to refund ratepayers, with interest, any amounts collected in excess upon a final determination of just and

reasonable rates.¹² HRS § 269-16(d) explicitly requires the commission to order such adjustments in the event interim rates are made effective. Absent similar explicit statutory authority, the commission is unable to act on this matter.

Thus, due to lack of statutory authority, the commission concludes that the Consumer Advocate's request that we order PWI to reimburse ratepayers, with interest, should be denied.

IV.

THE COMMISSION ORDERS:

1. The Consumer Advocate's Motion for Sanctions and/or Civil Penalties, filed on July 16, 2002, is granted in part and denied in part consistent with our findings and conclusions in this order. Specifically, pursuant to HRS § 269-28, the Consumer Advocate's Motion is granted to the extent that PWI is assessed the following:

- (a) A civil penalty of \$10,000 for violating Order No. 18670 and HRS § 269-16(b); and

¹²See In re Citizens Communications Company, dba The Gas Company, Docket No. 00-0309, Interim Decision and Order No. 18940, October 11, 2001; and In re Hawaii Electric Light Company, Inc., Docket No. 99-0207, Interim Decision and Order No. 18008, September 1, 2000.

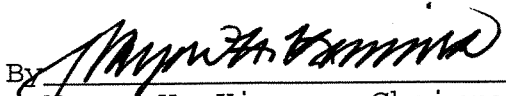
(b) A civil penalty of \$5,000 for violating HRS § 269-7.5 for engaging in the business of a public utility without a CPCN.¹³


In all other respects, the Consumer Advocate's Motion is denied.

2. Within 30 days of the date of this order, PWI shall remit a certified check in the amount of \$15,000 (the total assessed civil penalties set forth above) made payable to the Hawaii Public Utilities Commission. Failure to remit such penalties in accordance with this order may result in additional penalties or other actions authorized under HRS § 269-28.

DONE at Honolulu, Hawaii this 22nd day of January, 2003.

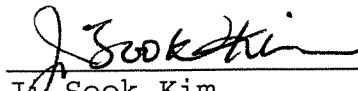
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Wayne H. Kimura, Chairman

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

By (RECUSED)
Gregg J. Kinkley, Commissioner


J. Sook Kim
Commission Counsel

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¹³PWI shall not, in any manner, pass on the payment of these civil penalties to its ratepayers. We note that the expense for the payment of civil penalties is not a recoverable expense for the purpose of determining rates.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 19979 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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Karen Higashi

DATED: January 22, 2003