





I.

Procedural Background

On November 5, 2005, the commission held an Order to Show Cause ("OSC") hearing in this docket. Prior to the hearing, the commission filed Order No. 22120 on November 10, 2005, detailing the procedures for the OSC hearing. In Paragraph 2 of Order No. 22120, the commission stated:

As early as practicable on Monday morning, November 14, 2005, Petitioners and the Consumer Advocate shall deliver to each of the Parties, copies of their respective exhibits and exhibit list (if any), and file the same with the commission.

Order No. 22120, at 2 - 3.

On November 14, 2005, Petitioners timely filed Exhibits AOA0-001 through AOA0-015 with the commission, and served copies upon Respondents and the Consumer Advocate, in compliance with Order No. 22120.<sup>2</sup>

At the conclusion of the OSC hearing on November 15, 2005, Petitioners' Hearing Exhibits AOA0-001 through AOA0-015 were accepted into evidence over the Respondents' objections and the Consumer Advocate's stated concerns.<sup>3</sup>

Over a month after the OSC hearing, on December 22, 2005, Petitioners filed their Motion pursuant to Hawaii Administrative Rules ("HAR") § 6-61-41. Petitioners, by their Motion, seek to introduce into the evidentiary record Exhibit AOA0-021, consisting of twelve (12) pages, "which became

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<sup>2</sup>See Petitioners' Joint Filing, filed on November 14, 2005.

<sup>3</sup>Transcript of Proceedings held on November 15, 2005, at 104 - 106.

available to [Petitioners] subsequent to the November 15, 2005, evidentiary hearing."<sup>4</sup> In support of the Motion, Petitioners' counsel avers in respective part:

1. Your Affiant . . . is personally familiar with facts asserted herein, and is otherwise competent to testify.

. . . .

4. Your Affiant knows that the president of the Kuilima Estates West AOA was out-of-state for approximately one month, returning to Hawaii on or about December 7, 2005.

5. Your Affiant first learned of the documents attached to this Affidavit at an AOA Board meeting on November 15, 2005 and upon reviewing the documents determined that they are material and relevant to the Commission's proceeding.

6. Your Affiant has marked the documents as Exhibit AOA - 021.

7. Your Affiant knows the documents to be probative of the fact that since January, 2005 representatives of Oak Tree Financial have received the originals of Exhibit AOA - 021, which documents clearly indicate Kuilima Estates West's regular monthly payments are for sewer services.

8. Your Affiant has been informed that the real estate management company issuing such checks has used the same forms and format for years prior to 2005.

Affidavit of William W. Milks, at 1 - 2.

The same day as Petitioners filed their Motion, Petitioners, Respondents and the Consumer Advocate (collectively, the "Parties") timely filed their Post-Hearing Briefs, in compliance with Order No. 22120.<sup>5</sup>

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<sup>4</sup>Respondents' Motion at 1.

<sup>5</sup>See also commission letter, dated December 8, 2005 (Post-Hearing Briefs due December 22, 2005).

Respondents and the Consumer Advocate did not file any responses to Petitioners' Motion.<sup>6</sup>

II.

Discussion

Paragraph 2 of Order No. 22120 states in relevant part:

As early as practicable on Monday morning, November 14, 2005, Petitioners and the Consumer Advocate shall deliver to each of the Parties, copies of their respective exhibits and exhibit list (if any), and file the same with the commission.

Order No. 22120, at 2 - 3.

In addition, HAR § 6-61-49 provides that, with respect to additional evidence:

At the hearing, the presiding officer may require the production of further evidence upon any issue or may call other competent witnesses to testify upon any issue. The presiding officer may authorize a party to file documentary evidence as part of the record within a fixed time after conclusion of a hearing.

HAR § 6-61-49 (emphasis added).

Petitioners' attempt to belatedly introduce as part of the evidentiary record Exhibit AOA0-021 violates Paragraph 2 of Order No. 22120. In addition, at the hearing the presiding officer did not authorize any party to "file documentary evidence

<sup>6</sup>HAR § 6-61-41(c) and (d) states in respective part:

(c) An opposing party may serve and file counter affidavits and a written statement of reasons in opposition to the motion and of the authorities relied upon not later than five days after being served the motion, . . . .

(d) A party who does not oppose a motion or who intends to support a motion or who desires a continuance shall notify the commission and the opposing attorneys within five days after being served . . . .

as part of the record within a fixed time after [the] conclusion of [the OSC] hearing[,] as allowed by HAR § 6-61-49. Moreover, Petitioners offer no explanation as to why they waited until December 22, 2005, more than a month after the OSC hearing, to seek to admit Exhibit AOA0-021 into the evidentiary record.<sup>7</sup> Accordingly, the commission denies Petitioners' Motion.

III.

Order

THE COMMISSION ORDERS:

1. Petitioners' Motion to Receive as Evidence an Otherwise Unauthorized Document, i.e., Exhibit AOA0-021, filed on December 22, 2005, is denied.

DONE at Honolulu, Hawaii JAN 24 2006.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By (EXCUSED)  
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

Michael Azama  
Michael Azama  
Commission Counsel

By Janet E. Kawelo  
Janet E. Kawelo, Commissioner

05-0238.cs

<sup>7</sup>Affiant first learned of Exhibit AOA0-021 on November 15, 2005, presumably following the conclusion of the OSC hearing. Affidavit of William W. Milks, at 2.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22235 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: JAN 24 2006