

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----In the Matter of the----)
)
PUBLIC UTILITIES COMMISSION)
)
Instituting a Proceeding to)
Investigate Whether Act 59,)
Session Laws of Hawaii 1974,)
Invalidates, Voids, or Renders)
Unenforceable the 1961 Agreement)
Between the Trustees Under the)
Will and of the Estate of Bernice)
P. Bishop, Deceased; Kaiser)
Hawaii Kai Development Co.; and)
The City and County of Honolulu.)
_____)

DOCKET NO. 2006-0021

ORDER NO. 22254

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

BEFORE THE PUBLIC UTILITIES COMMISSION
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Hawaii Kai Development Co.; and)	
The City and County of Honolulu.)	
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ORDER

By this Order, the commission initiates an investigation to determine whether Act 59, Session Laws of Hawaii 1974, which amended Hawaii Revised Statutes ("HRS") § 269-1 ("1974 Amendment"), invalidates, voids, or renders unenforceable, that certain agreement entered into by and between the Trustees Under the Will and of the Estate of Bernice P. Bishop, deceased (the "Trust"); Kaiser Hawaii Kai Development Co., a Nevada corporation ("Kaiser"); and the City and County of Honolulu ("City"). The 1961 agreement at issue in this matter provides for, among other matters, sewerage services at no charge to the City and the State of Hawaii ("State") ("1961 Agreement"). The commission initiates this investigation pursuant to HRS §§ 269-7, 269-15, and 269-16, Hawaii Administrative Rules

("HAR") § 6-61-71, and Order No. 21888, filed on June 23, 2005, in Docket No. 05-0140 ("Order No. 21888").

I.

Background

HAWAII-AMERICAN WATER COMPANY ("HAWC") is a public utility authorized to provide wastewater collection, treatment, and disposal services to the residences, condominiums, and commercial establishments in the Hawaii Kai community on the island of Oahu, State of Hawaii.

On June 7, 2005, HAWC filed a petition for a declaratory ruling that the 1961 Agreement between HAWC's predecessor in interest, Kaiser, and the City is no longer valid due, in part, to the 1974 Amendment, and, as a result, the City and the State are subject to HAWC's tariffs filed with the commission and are required to pay their arrears and future sewerage fees ("Petition"). The City and State do not pay for sewerage services for their respective facilities under the terms of the 1961 Agreement. HAWC, however, claims that the 1961 Agreement was invalidated by the 1974 Amendment to HRS § 269-1, which included sewerage companies as public utilities subject to commission regulation.

By Order No. 21888, the commission denied HAWC's request for a declaratory ruling regarding the validity of the 1961 Agreement. The commission, however, stated its intention to initiate a new and separate proceeding to investigate and examine

HAWC's allegation that the 1961 Agreement was invalidated by the 1974 Amendment.

On August 25, 2005, HAWC filed an application for commission approval to increase its rates and revise its rate schedules and rules for service in Docket No. 05-0103 ("Docket No. 05-0103"). Arguing, in part, that the rate increase and certain rule changes proposed by HAWC in Docket No. 05-0103 are contrary to the provisions of the 1961 Agreement, the City filed a motion to intervene in Docket No. 05-0103, which was granted on January 31, 2006, in Order No. 22252.¹ In connection with the motion to intervene, HAWC and the City acknowledged that the validity of the 1961 Agreement was an issue in the rate case proceeding.

II.

Discussion

A.

Investigation

HRS § 269-7 states, in relevant part:

- (a) The public utilities commission and each commissioner shall have the power to examine the condition of each public utility, the manner in which it is operated with reference

¹In Docket No. 05-0103, HAWC and the City both stated their support of commission action to consolidate this proceeding with Docket No. 05-0103. See HAWC's Memorandum in Response to the City's Motion to Intervene, filed on November 14, 2005, in Docket No. 05-0103; City's Reply in Support of its Motion to Intervene filed on November 28, 2005, in Docket No. 05-0103. The commission, however, will not address this issue at this time.

to the safety or accommodation of the public, the safety, working hours, and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies, or corporations, its compliance with all applicable state and federal laws and with the provisions of its franchise, charter, and articles of association, if any, its classifications, rules, regulations, practices, and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations . . .

.

- (c) Any investigation may be made by the commission on its own motion, and shall be made when requested by the public utility to be investigated, or by any person upon a sworn written complaint to the commission, setting forth any prima facie cause of complaint. A majority of the commission shall constitute a quorum.

HRS § 269-7(a) and (c) (emphasis added).²

Under HRS Chapter 269, the commission is vested by law with "general supervision . . . over all public utilities",³ and specifically, under HRS § 269-16, the commission is authorized to regulate the rates, fares, charges, classifications, schedules, rules, and practices of a public utility and the procedures involved in its ratemaking. In short, any rate, fare, charge, classification, schedule, rule, and practice of a regulated public utility must be approved by the commission.

²Commission investigatory authority is also set forth in HRS § 269-15 and HAR § 6-61-71.

³See HRS § 269-6.

HRS § 269-16 states, in relevant part:

- (a) All rates, fares, charges, classifications, schedules, rules, and practices made, charged, or observed by any public utility, or by two or more public utilities jointly, shall be just and reasonable and shall be filed with the public utilities commission. . . .
- (b) No rate, fare, charge, classification, schedule, rule, or practice, other than one established pursuant to an automatic rate adjustment clause previously approved by the commission, shall be established, abandoned, modified, or departed from by any public utility, . . . The commission, upon notice to the public utility, may suspend the operation of all or any part of the proposed rate, fare, charge, classification, schedule, rule, or practice or any proposed abandonment or modification thereof or departure therefrom . . . and do all things in addition which are necessary and in the exercise of such power and jurisdiction, all of which as so ordered, regulated, fixed, and changed shall be just and reasonable, and such as shall provide a fair return on the property of the utility actually used or useful for public utility purposes.

HRS § 269-16(a) and (b) (emphasis added).

Here, HAWC claims that the 1961 Agreement, which requires HAWC to provide the City and State with sewerage fees at no cost, is invalid as a result of the 1974 Amendment. This assertion, if proven, would affect the rates, rules, and practices of HAWC, as well as the legal rights, duties, or privileges of the parties to the 1961 Agreement. Accordingly, the commission initiates this investigative proceeding to examine HAWC's allegation that the 1974 Amendment invalidated the 1961 Agreement, and other related matters,

pursuant to HRS §§ 269-7, 269-15, and 269-16, HAR § 6-61-71, and Order No. 21888.

B.

Named Parties

In light of Docket No. 05-0140, the commission names as parties to this proceeding, the parties to Docket No. 05-0140, HAWC and the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate").⁴

The commission also names the City as a party to this proceeding. The City is a party to HAWC's rate case proceeding, Docket No. 05-0103, and has an interest in the outcome of this investigatory proceeding as a named party to the 1961 Agreement.⁵

At this time, the commission is uncertain as to the interests of the Trust, a party to the 1961 Agreement, and the State, which receives sewerage services from HAWC at no cost under the 1961 Agreement. Rather than naming the Trust and the State as parties, the commission will serve them with a copy of this Order initiating this proceeding. If these entities are interested in participating in this proceeding, they may file a motion to intervene or to participate without intervention in

⁴The Consumer Advocate is statutorily mandated to represent, protect, and advance the interests of all consumers of utility service and is an ex officio party to any proceeding before the commission. See HRS § 269-51 and HAR § 6-61-62.

⁵By letter dated June 30, 2005, and filed on July 5, 2005, from Maile R. Chun, Deputy Corporation Counsel, to Kris N. Nakagawa, Chief Commission Counsel, the City requested that it be included as a party to this investigatory docket.

accordance with the requirements of HAR Chapter 6-61, Subchapter 4.

C.

Preliminary Issues

The commission sets forth the following preliminary issues to be addressed in this proceeding:

1. Whether the 1974 Amendment invalidates, voids, or renders unenforceable the 1961 Agreement?
2. What are the public interest considerations related to the resolution of whether the 1974 Amendment invalidates, voids, or renders unenforceable the 1961 Agreement?

These are preliminary issues for consideration. During the development of the prehearing (or procedural) order for this proceeding, the parties (and intervenors and participants, if any) shall have the opportunity to restructure these preliminary issues, stipulate to eliminate them, or suggest other issues for resolution in this proceeding for the commission's review and consideration.

D.

Procedural Matters

Any interested individual, entity, or community or business organization is invited to file a motion to intervene or participate without intervention in this docket in compliance

with the commission's rules set forth in HAR Chapter 6-61, Subchapter 4.

The parties (and intervenors and participants, if any) shall develop a stipulated protective order, if necessary, and a stipulated prehearing (or procedural) order to govern the matters of this investigation for the commission's review and approval within forty-five (45) days of the date of this Order. If the parties (and intervenors and participants, if any) are not able to stipulate, each of them shall file proposed orders for the commission's consideration by such date. In formulating the stipulated prehearing (or procedural) order, the parties (and intervenors and participants, if any) should be mindful of the deadline for commission deliberations in Docket No. 05-0103, pursuant to HRS § 269-16(d).

The commission expects all parties to this proceeding to participate fully in the development of the necessary procedures and issues for the orderly conduct of this investigatory proceeding, consistent with all applicable State laws and commission rules and regulations. Moreover, if necessary or appropriate, the parties to this proceeding will be expected to actively participate in a commission hearing or other procedures authorized by State law including, but not limited to, those set forth in HRS § 269-15.6.

To fulfill the purposes of this docket, the commission will take official administrative notice of the filings of Docket No. 05-0140. The matters of Docket No. 05-0140 are

incorporated by reference as part of the record of this investigative docket.

Within twenty (20) days of the date of this Order, HAWC shall file: (1) a copy of the 1961 Agreement; and (2) a status report of any independent proceeding(s) (i.e., not before the commission) related to the substantive matters raised in this docket.

III.

Orders

THE COMMISSION ORDERS:

1. An investigative proceeding is initiated to examine whether the 1974 Amendment invalidates, voids, or renders unenforceable, the 1961 Agreement, along with any other relevant and related matters.

2. The commission, *sua sponte*, designates HAWC, the Consumer Advocate, and the City as parties to this investigative proceeding.

3. Any individual, entity, or organization desiring to intervene as a party or to participate without intervention in this proceeding shall file a motion to intervene or participate without intervention not later than twenty (20) days from the date of this Order. Motions to intervene or participate without intervention must comply with all applicable rules of HAR Chapter 6-61, Rules of Practice and Procedure Before the Public Utilities Commission.

4. Within twenty (20) days of the date of this Order, HAWC shall file: (1) a copy of the 1961 Agreement; and (2) a status report of any independent proceeding(s) (i.e., not before the commission) related to the substantive matters raised in this docket.

5. Within forty-five (45) days of the date of this Order, the parties (and intervenors and participants, if any) shall develop a stipulated protective order, if necessary, and a stipulated prehearing (or procedural) order to govern the matters of this investigation for the commission's review and approval. If the parties (and intervenors and participants, if any) are not able to stipulate, each of them shall file proposed orders for the commission's consideration by such date. In formulating the stipulated prehearing (or procedural) order, the parties (and intervenors and participants, if any) should be mindful of the deadline for commission deliberations in Docket No. 05-0103, pursuant to HRS § 269-16(d).

DONE at Honolulu, Hawaii this FEB - 1 2006.


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Ji Sook Kim
Commission Counsel

pucact59.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22254 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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(Certificate of Service - Continued)

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DATED: February 1, 2006