

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

----- In the Matter of the ----- )  
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 PUBLIC UTILITIES COMMISSION )  
 )  
 Instituting a Proceeding to )  
 Investigate North Shore )  
 Wastewater Treatment, L.L.C. )  
 and its Predecessors-in-Interest, )  
 including Kuilima Resort Company. )  
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DOCKET NO. 05-0238

ORDER NO. 22548

Filed June 21, 2006  
At 12 o'clock P .M.

Karen Higashi  
Chief Clerk of the Commission

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

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KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

K. Higashi

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ORDER

By this Order, the commission denies the Motion for Reconsideration and/or Clarification of Portions of Decision and Order No. 22282, filed by Respondents NORTH SHORE WASTEWATER TREATMENT, L.L.C. ("NSWT") and KUILIMA RESORT COMPANY ("KRC") (collectively, "Respondents") on March 6, 2006.<sup>1</sup>

I.

Background

On February 10, 2006, the commission issued Decision and Order No. 22282, which adjudicated the five (5) issues arising out of this investigative proceeding of Respondents' provision of wastewater service in the Kahuku area, island of Oahu. Specifically, the commission determined that KRC operated

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<sup>1</sup>The Parties in this investigative proceeding are Respondents, Petitioners ASSOCIATION OF APARTMENT OWNERS for the KUILIMA ESTATES EAST and KUILIMA ESTATES WEST ("AOAOs"), and the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate").

as a public utility without commission authority by providing wastewater service to the Kuilima Estates East and Kuilima Estates West condominiums. The commission also found that NSWT's initial wastewater rates, approved by the commission in Docket No. 04-0298 constituted a *de facto* rate increase under the facts and circumstances of this case. As such, the commission permanently suspended those rates, unless and until new wastewater rates were approved by the commission following the conclusion of a general rate case. In addition, the commission found that KRC and NSWT's regulatory violations were not willful or intentional, and, therefore, declined to impose sanctions.

On March 6, 2006, Respondents filed a Motion for Reconsideration and/or Clarification in which Respondents seek the reconsideration and/or clarification of Decision and Order No. 22282, relating to: (1) the commission's finding that NSWT's initial tariff rates approved in Docket No. 04-0298 constituted a *de facto* rate increase; and (2) the commission's permanent suspension of NSWT's initial tariff rates, unless and until new wastewater rates are approved by the commission following the conclusion of a general rate case.<sup>2</sup>

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<sup>2</sup>Respondents' Motion for Reconsideration and/or Clarification of Portions of Decision and Order No. 22282 Filed February 10, 2006; Memorandum in Support of Motion ("Memorandum"); and Certificate of Service, filed on March 6, 2006 (collectively, "Motion").

On February 17, 2006, Respondents filed a "Motion to Enlarge Time for Filing [a] Motion for Reconsideration and/or Clarification of Decision and Order No. 22282." Respondents requested an extension of time until March 6, 2006, to file a motion for reconsideration and/or clarification. The commission granted Respondents' request for an extension of time until March 6, 2006, to file a motion for reconsideration and/or

In its Motion, Respondents contend that Decision and Order No. 22282: (1) is inconsistent with Hawaii Revised Statutes ("HRS") § 269-16 and the filed-rate doctrine; (2) fails to follow prior established commission precedent in cases involving utilities obtaining an after-the-fact certificate of public convenience and necessity; (3) causes unwarranted uncertainty for future applicants; (4) places the burden of establishing whether a public hearing is required in a case on the utility instead of on the commission; and (5) creates a significant financial hardship on NSWT in contravention of regulatory law, by permanently suspending NSWT's initial tariff wastewater rates, until new wastewater rates are approved by the commission in a rate case.

The commission found it "desirable [and] necessary", pursuant to Hawaii Administrative Rules ("HAR") § 6-61-140, to allow the Consumer Advocate and the AOAOs to file responses to Respondents' Motion.<sup>3</sup>

On March 9, 2006, the Consumer Advocate filed a joinder in Respondents' Motion in which it did not elaborate on the arguments made by Respondents.<sup>4</sup>

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clarification of Decision and Order No. 22282. See Order No. 22311, filed on March 7, 2006.

<sup>3</sup>By letter dated March 8, 2006, commission counsel informed the AOAOs and Consumer Advocate that the commission would allow them to file responses to Respondents' Motion by March 28, 2006.

<sup>4</sup>Consumer Advocate's Joinder in Respondents' Motion; and Certificate of Service, filed on March 9, 2006.

On March 28, 2006, the AOAOs filed their Opposition to Respondents' Motion.<sup>5</sup> The AOAOs urge the denial of Respondents' Motion, asserting that Decision and Order No. 22282: (1) is legally sound, factually correct and eminently fair and reasonable; (2) establishes a new and sound practice; and (3) "has a harsh impact on NSWTC, but not unfairly so."<sup>6</sup> In other words, the AOAOs contend that the evidentiary record in Docket No. 05-0238, applicable law, governing policy, and fundamental fairness mandate and support the affirmation of Decision and Order No. 22282.<sup>7</sup> The AOAOs state that only after it disclosed pertinent information in their informal complaints and formal petition "did the Commission have reason to believe that statutorily prescribed notices, public hearing, interventions, and an evidentiary hearing may have been required" in Docket No. 04-0298.<sup>8</sup>

This Order addresses Respondents' Motion.

## II.

### Discussion

HAR § 6-61-137 provides:

Motion for reconsideration or rehearing. A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration,

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<sup>5</sup>AOAOs' Memorandum in Opposition to Respondents' Motion; Exhibits; and Certificate of Service, filed on March 28, 2006 (collectively, "AOAOs' Opposition").

<sup>6</sup>AOAOs' Opposition, at 3.

<sup>7</sup>See AOAOs' Opposition, at 5 - 8.

<sup>8</sup>AOAOs' Opposition, at 7.

rehearing, further hearing, or modification, suspension, vacation, or a combination thereof. The motion shall . . . set[] forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

HAR § 6-61-137. Thus, to succeed on a motion for reconsideration, the movant must demonstrate that the commission's decision or order was "unreasonable, unlawful, or erroneous." See id.

"[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Tagupa v. Tagupa, 108 Hawai'i 459, 465, 121 P.2d 924, 930 (2005). "Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." Id. (citing Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002) and quoting Sousaris v. Miller, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (2000)).

Respondents request that the commission: (1) find that NSWT's initial tariff wastewater rates, as a matter of law, did not constitute a *de facto* rate increase; and (2) remove the suspension and immediately reinstate NSWT's initial tariff wastewater rates, either anew or as a phase-in approach.

In essence, Respondents take issue with the commission's adjudication of Issues No. 2 and No. 5. Respondents do not challenge the commission's findings and conclusions with respect to Issues No. 1, No. 3, and No. 4.

A.

Issue No. 2

1.

HRS § 269-16

Respondents request that the commission find that NSWT's initial tariff wastewater rates, as a matter of law, did not constitute a *de facto* rate increase. Specifically Respondents contend that under HRS § 269-16(a), rates and charges must be just and reasonable and filed with the commission. Hence, Respondents assert that the amount assessed by KRC for the sewer component of the monthly resort fee that was not filed with the commission, was an illegal and unenforceable rate that did not constitute an initial rate (HRS § 269-16(a)) that was previously approved by the commission (HRS § 269-16(b)).<sup>9</sup>

HRS § 269-16(a) and (b) provide in respective part:

**Regulation of utility rates; ratemaking procedures.** (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. The rates, fares, classifications, charges, and rules of every public utility shall be published by the public

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<sup>9</sup>Respondents also contend that the federal case cited by the AOAOs, Otter Tail Power Co. v. Federal Energy Regulatory Comm'n, 583 F.2d 399 (8<sup>th</sup> Cir. 1978) ("Otter Tail Power"), "is inapposite to this case." Respondents' Memorandum, at 7. The commission, however, notes that its discussion of Otter Tail Power in Decision and Order No. 22282 was limited to referencing it as one of the arguments advanced by the AOAOs in their Post-Hearing Brief. See Decision and Order No. 22282, at 20.

utility in such manner as the public utilities commission may require, and copies furnished to any person on request.

. . . . .  
(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, except after thirty days' notice as prescribed in section 269-12(b) to the commission and prior approval by the commission for any increases in rates, fares, or charges . . . . .

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

As noted in Decision and Order No. 22282, the requirements of HRS § 269-16(b) are not limited to commission-authorized rates. A plain reading of the statute clearly demonstrates that the reference to "previously approved by the commission" refers to an "automatic rate adjustment clause previously approved by the commission," not "rates" as asserted by Respondents, even when read together with HRS § 269-16(a).<sup>10</sup> Although not dispositive given the plain language of the statute, the legislative history of HRS § 269-16 confirms this interpretation.<sup>11</sup>

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<sup>10</sup>See In re Hawaiian Elec. Co., Docket No. 6965, Order No. 11681, filed on June 22, 1992, at 5 (citing Hawaiian Beaches, Inc. v. Kondo, 52 Haw. 279, 281, 474 P.2d 538, 540 (1970)).

<sup>11</sup>"It is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. Instead, our sole duty is to give effect to the statute's plain and obvious meaning." T-Mobile USA, Inc. v. County of Hawaii Planning Comm'n, 106 Hawai'i 343, 353, 104 P.3d 930, 940 (Haw. 2005). However, even if the statute were ambiguous, the legislative history supports the commission's interpretation of the provision. Act 10, which took effect on April 9, 1976, inserted the "other than one established pursuant

As a public utility,<sup>12</sup> KRC *should* have filed its wastewater rate with the commission under HRS § 269-16(a). KRC's failure to file its wastewater rate provided the commission and Consumer Advocate with no meaningful opportunity to review and determine the justness and reasonableness of KRC's wastewater rate. Likewise, the users of KRC's sewer service had no meaningful opportunity to comment on the charges assessed by KRC throughout the years that KRC (and by extension, its predecessors) operated illegally as an unregulated utility without a CPCN required under Chapter 269, HRS.<sup>13</sup> Thus, the

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to an automatic rate adjustment clause previously approved by the commission" language into HRS § 269-16(b). Compare Act 10, 1976 Haw. Sess. Laws 13 with Act 149, 1973 Haw. Sess. Laws 230. One of the purposes of Act 10 was "to clarify the authority of the [commission] in authorizing automatic rate adjustment clauses" as part of the commission's regulation of rates and charges assessed by public utilities for the provision of utility services. House Stand. Comm. Rpt. No. 513-76, on H.B. No. 2374-76, in 1976 House Journal, at 1501.

<sup>12</sup>The commission held that KRC's provision of wastewater service to the Kuilima Estates East and Kuilima Estates West condominiums rendered it a public utility under HRS § 269-1, and subject to commission regulation. This conclusion is unchallenged by Respondents.

<sup>13</sup>The specific definition of "public utility" set forth in HRS § 269-1(1)(A), applicable to owners or operators of private sewer companies or facilities, took effect on May 28, 1974, by Act 59, 1974 Haw. Sess. Laws 109 ("Act 59"). As previously explained by the commission:

The purpose of Act 59 'is to regulate the rates and charges for sewerage services provided by a private person.' Act 59, as promulgated, 'permit[s] the commission to regulate the rates charged by such person and afford the consumers an opportunity to be heard with regard to such charges.' 'Under this new system, the consumers will be given reasons for any rate increases.'

Order No. 22045, filed on September 21, 2005, at 9 n.10 (citations omitted); and Decision and Order No. 22282, at 26 n.42 (citations omitted).

commission rejects as unpersuasive Respondents' argument under HRS § 269-16(a). In addition, the commission finds no basis for reconsidering its ruling in Decision and Order No. 22282 that rejected Respondents' argument under HRS § 269-16(b).

2.

### The Filed Rate Doctrine

Expanding on their position, Respondents also assert that the concept of a *de facto* rate increase is incompatible with the filed-rate doctrine.<sup>14</sup> Specifically, Respondents reason that the sewer charges paid for by the AOAOs prior to the issuance of the CPCN to NSWT did not meet certain criteria under the filed-rate doctrine: the charges were not established under commission authority, the commission had no opportunity to review the reasonableness of the charges, and the commission was not cognizant of the charges.<sup>15</sup>

The filed-rate doctrine applies to rates filed at regulatory agencies, and conversely, "does not apply to rates not filed at a regulatory agency."<sup>16</sup> Thus, the filed-rate doctrine is inapplicable to this case, which deals with "unfiled rates" assessed by KRC and its predecessors for many years for sewer

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<sup>14</sup>See In re Waikoloa Sanitary Sewer Co., Inc., dba West Hawaii Sewer Co., 109 Hawai'i 263, 125 P.3d 484 (Haw. 2005) ("In re WHSC"); and Balthazar v. Verizon Hawaii, Inc., 109 Hawai'i 69, 123 P.3d 194 (Haw. 2005) ("Balthazar").

<sup>15</sup>See Respondents' Memorandum, Section II(A)(2), at 5 - 7.

<sup>16</sup>See AOAOs' Opposition, at 10.

service. The filed-rate doctrine, by definition, applies to tariff rates and charges filed with the commission.<sup>17</sup>

3.

Prior Relevant Commission Decisions

Respondents contend that Decision and Order No. 22282 deviates from past commission decisions, in which the commission granted after-the-fact CPCNs to entities that had been previously operating illegally, in violation of Chapter 269, HRS, as public utilities without CPCNs, and established initial tariff rates for these entities when the commission issued CPCNs for each of the respective applicants.<sup>18</sup> Specifically, Respondents point to In re Puuwaawaa Waterworks, Inc., Docket No. 00-0005 ("Puuwaawaa"), In re Poipu Wastewater Corp., Docket No. 7265, and In re Kaanapali Water Corp., Docket No. 3700, as examples of instances where the commission granted an unregulated provider a CPCN and approved its initial rates, even though the newly approved rates may have been different than the rates the provider had previously been charging on an unregulated basis. Respondents also contend that in past commission cases involving an application for a CPCN and the approval of the applicant's initial rates where a public

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<sup>17</sup>See In re WHSC, 109 Hawai'i at 271 - 272, 125 P.3d at 492 - 493; Balthazar, 109 Hawai'i at 72 - 76, 123 P.3d at 197 - 201.

<sup>18</sup>See In re Puuwaawaa Waterworks, Inc., Docket No. 00-0005, Decision and Order No. 19980, filed on January 22, 2003; In re Poipu Wastewater Corp., Docket No. 7265, Decision and Order No. 16079, filed on November 14, 1997; and In re Kaanapali Water Corp., Docket No. 3700, Decision and Order No. 6230, filed on June 9, 1980.

hearing was held, such a hearing was discretionary and not mandated by HRS § 269-7.5.<sup>19</sup>

Contrary to Respondents' claim, the commission's decision to treat the Respondents' request for a CPCN and initial rates higher than what the applicant had been charging while operating illegally without a CPCN, as a rate case is supported by commission precedent. Specifically, in one of the CPCN cases cited by Respondents, In re Keauhou Comm. Serv., Inc., Docket No. 7291 ("Docket No. 7291"), the commission: (1) held a public hearing in accordance with HRS § 269-16;<sup>20</sup> and (2) the deadline for interested persons to file a motion to intervene or participate was ten (10) days after the public hearing, consistent with "a public utility[']s rate increase case" under

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<sup>19</sup>Respondents cite to Puuwaawaa, Docket No. 00-0005; In re Keauhou Comm. Serv., Inc., Docket No. 7291, Decision and Order No. 12820, filed on November 8, 1993; and In re Pukalani STP Co., Ltd., Docket No. 6210, Decision and Order No. 10264, filed on June 30, 1989.

<sup>20</sup>See Docket No. 7291, Decision and Order No. 12820, at 2; and Interim Decision and Order No. 12466, filed on June 28, 1993, at 1. See also Docket No. 7291, Notice of Public Hearing, published on August 19 and 26, 1992, and September 7, 1992 (HRS § 269-16); and Transcript of Public Hearing held on September 9, 1992 (statute requires public hearing; applicant's proposed sewage rates represent an increase over the rates charged by the County of Hawaii, the current provider).

With respect to the public hearing, HRS § 269-16(b) provides in respective part that "[a] contested case hearing shall be held in connection with any increase in rates and such hearing shall be preceded by a public hearing as prescribed in section 269-12(c) at which the consumers or patrons of the public utility may present testimony to the commission concerning the increase." This is the same language presently set forth in HRS § 269-16(b) and at the time of the filing of the application for a CPCN on April 16, 1992. See Act 195, 1998 Haw. Sess. Laws 695, § 2.

HAR § 6-61-57(1).<sup>21</sup> Also, in that docket, the commission held an evidentiary hearing, and issued an interim decision and order on the utility's test year revenue requirement, and thereafter issued a final decision and order on the utility's test year revenue requirement and its rate schedule, tariff and rules and regulations.<sup>22</sup>

Likewise, in another case cited by Respondents, In re Kaanapali Water Corp., Docket No. 3700, Respondents claim that the commission granted Kaanapali Water Corp. ("Kaanapali Water") a CPCN and approved its initial rates, even though the newly approved rates were higher than the rates Kaanapali Water's predecessor had previously been charging while operating

<sup>21</sup>While the Notice to Interested Persons (published on April 24, 1992) informed interested persons of the filing of the utility's application for a CPCN, and that the deadline to file a motion to intervene was twenty (20) days after the publication of said Notice, i.e., by May 14, 1992, the Notice of Public Hearing (published on August 19 and 26, 1992 and September 7, 1992) indicated that the deadline to file a motion to intervene or participate was ten (10) days after the public hearing, i.e., by Monday, September 21, 1992. See HAR § 6-61-57(1). Accordingly, in Docket No. 7291, the latter date of September 21, 1992 governed the deadline to file a timely motion to intervene or participate.

<sup>22</sup>See Docket No. 7291, Decision and Order No. 12820; and Interim Decision and Order No. 12466.

While the commission in Puuwaawaa did state that "this proceeding is an application for a CPCN filed under HRS § 269-7.5 as opposed to an application to increase or change rates filed under HRS § 269-16[,]" it also stated that "the commission, in determining just and reasonable rates, 'is not limited to specific procedures or fixed formulas, but is empowered to exercise sound discretion in its review and evaluation of the evidence.'" See Decision and Order No. 19980, at 5 - 6. Puuwaawaa was an unusual docket, but even in Puuwaawaa, the utility's customers were provided with notice, and the commission conducted public hearings and an evidentiary hearing on the disputed matters; neither of which occurred in connection with NSWT's CPCN application.

illegally without a CPCN on an unregulated basis. While it is correct that Kaanapali Water was granted a CPCN in Docket No. 3700,<sup>23</sup> Respondents fail to note that the commission, on its own motion, opened Docket No. 4144 shortly after it issued Kaanapali Water its CPCN, to investigate whether Kaanapali Water's initial rates and charges were just and reasonable.<sup>24</sup> Apparently the commission had received numerous complaints by consumers in the Kaanapali area that Kaanapali Water's initial rates were 200% in excess of the rates charged by Kaanapali Water's predecessor, and that no notice had been provided to Kaanapali Water's customers that it would be charging the higher rates.<sup>25</sup> In response, Kaanapali Water filed new tariffs lowering its rates to those rates that were in existence prior to the issuance of Kaanapali Water's CPCN.<sup>26</sup> Kaanapali Water also filed an application for a rate increase.<sup>27</sup>

Like Kaanapali Water, here, the commission was not informed that KRC had been charging its customers a segregable amount for the collection and treatment of wastewater.<sup>28</sup> It was only after the commission had received informal complaints, alleging that NSWT's initial tariff rates constituted an increase

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<sup>23</sup>See In re Kaanapali Water Corp., Docket No. 3700, Decision and Order No. 6230, filed on June 9, 1980.

<sup>24</sup>See In re Kaanapali Water Corp., Docket No. 4246, Decision and Order No. 7362, filed on December 16, 1982, at 29.

<sup>25</sup>Id. at 29-30.

<sup>26</sup>Id. at 29-30.

<sup>27</sup>Id. at 30.

<sup>28</sup>See Decision and Order No. 22282, at 5 - 6, 10 - 11, and n.21; and Order No. 22045, at 6 - 7 and n.7.

of over 1,000 percent from the sewer fee assessed by KRC (without prior notice by Respondents),<sup>29</sup> was the commission made aware of the rate increase.<sup>30</sup>

In addition, public policy also supports the commission's decision on this issue. As a matter of fairness, the customers of an unregulated entity operating illegally without a CPCN and commission oversight should have the right to notification before the utility increases the customers' rates. This notification requirement is necessary to protect consumers. The Legislature recently confirmed the importance of such notification by the enactment of Act 9, Session Laws of Hawaii 2006, which requires that if an applicant for a CPCN has any known consumers or patrons at the time of the filing of the application, the applicant must notify the affected consumers or patrons of the rates and charges proposed to be established by the application within seven (7) days of the filing date.<sup>31</sup>

Accordingly, NSWT's proposed initial tariff rates submitted to the commission for approval in Docket No. 04-0298 constituted a rate increase, which required: (1) a public hearing and notice thereof, consistent with HRS §§ 269-12(c) and 269-16(b) and (c); and (2) a contested case proceeding, to the extent applicable under HRS § 269-16.

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<sup>29</sup>Decision and Order No. 22282, at 8 - 12; and Order No. 22045, at 6 - 8 and Exhibits 1 and 2.

<sup>30</sup>Respondents do not challenge the commission's pertinent factual findings, supported by the record, of a rate increase. See Decision and Order No. 22282, at 37 - 38.

<sup>31</sup>Act 9, signed by the Governor on April 19, 2006, will take effect on July 1, 2006.

In addition, as a general rule, in situations where an entity that is operating illegally without a CPCN seeks to increase its rates, the utility must obtain both a CPCN and approval for a rate increase in a rate case. The controlling intervention period would be as set forth in HAR § 6-61-57(1).<sup>32</sup>

B.

Issue No. 5

Impact of Decision and Order No. 22282

Respondents state that as a result of the commission's decision, NSWT may not be able to recover sufficient fees to meet its ongoing operational expenses.<sup>33</sup> In this regard, Respondents represent:

1. Prior to the transfer of the wastewater operations to NSWT, KRC did not charge any of the restaurants or other operations within the resort since it controlled those restaurants and other operations. Instead, KRC simply paid for all the operating expenses related to the wastewater plant and related operations.

2. NSWT, as a public utility, now has the responsibility and obligation to properly bill and collect for sewer service. Nonetheless:

. . . . since KRC previously paid for the cost of the wastewater operations, there is a question as to whether NSWT or KRC is obligated to meet the

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<sup>32</sup>See In re Keauhou Comm. Serv., Inc., Docket No. 7291.

<sup>33</sup>See Respondents' Memorandum, at 15 (decision denies NSWT the ability to recover the costs for any services currently being provided to customers) and 19 (NSWT may likely suffer financial harm even if it can file for a rate increase in the near term).

ongoing operating expenses. Because NSWTT is now the owner and operator of the wastewater operations, it stands to reason that NSWTT is now financially responsible for the entire wastewater operations. Since KRC absorbed the wastewater operation costs as part of the overall resort expenses, NSWTT is uncertain what it can charge KRC and each of the individual operations within the resort for sewer service. Compounding the problem is that, while KRC controlled most of the other operations at the resort, since the time that NSWTT received its certification, there has been at least one new restaurant that has opened by an outside vendor. Because there is no established rate to charge that new vendor, NSWTT may be unable to recover the costs associated with that vendor's sewerage usage.

Respondents' Memorandum, at 18.

3. The Ocean Villas condominium project came online and the purchasers moved into the project at about the time NSWTT became certified and commenced operations in June 2005. "[S]ince the Ocean Villas condominium project was not completed nor occupied at the time, KRC did not charge the Ocean Villas condominium. As a result, NSWTT does not have any ability to charge the Ocean Villas owners since it cannot 'revert to the wastewater rates charged by KRC.'"<sup>34</sup>

4. If the commission does not reconsider its decision and the previously approved rates are permanently suspended without any potential phase-in of the rates allowed, NSWTT "has little chance of obtaining any rate relief for many months to come. Without including the time that it would take to properly assemble the materials, data and exhibits required to put a rate case filing together, given that the AOAOs will likely be granted intervenor status, it will be at least 9 months under

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<sup>34</sup>Respondents' Memorandum, at 18 - 19.

HRS § 269-16(f), as amended at the earliest before NSWT will be accorded any rate relief."<sup>35</sup>

As such, NSWT seeks to charge its initial tariff wastewater rates on an interim basis until it files "a request for a general rate review in which the Commission can review and approve new rates."<sup>36</sup> In the alternative, Respondents reiterate their proposal for NSWT to implement a three (3)-step phase-in of its initial tariff wastewater rate, in one-third increments.<sup>37</sup>

Respondents, however, make the same arguments that they made before. As noted by the Hawaii Supreme Court, "[r]econsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." See Tagupa, 108 Hawai'i at 465, 121 P.2d at 930.

In Decision and Order No. 22282, the commission declined to adopt initial rates, Respondents' three (3)-step phase-in proposal, and more specifically, the AOAOs' proposal to implement a two (2)-part phase-in of new wastewater rates, reasoning that "[i]f granted by the commission, the AOAOs' proposal will effectively bind the Ocean Villas condominium

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<sup>35</sup>Respondents' Memorandum, at 19.

<sup>36</sup>Respondents' Memorandum, at 16.

<sup>37</sup>As stated by Respondents in their Post-Hearing Brief: "Starting in January 2006 (or effective when the Commission issues an Order in this proceeding), 33.33% of the prior approved rate would be assessed, with the second 33.33% of the rate being assessed starting in July 2006. The final 33.33% phase in of the approve rate would commence in January 2007." Respondents' Post-Hearing Brief, at 18 - 19. See also id. at 3.

owners and any other interested third parties who are not parties to this investigative proceeding and who may not necessarily agree with the AOA's proposal."<sup>38</sup> The commission finds no reason to reconsider this ruling.<sup>39</sup>

With respect to Respondents' overall claim that NSWTT may be unable to generate sufficient revenues to meet its operational expenses, the commission notes that in Docket No. 04-0298, NSWTT duly represented that it will have the resources of its member, Turtle Bay Holding, L.L.C., to rely on in the event of future operating losses:<sup>40</sup>

**CA-IR-1    Ref: Financial Fitness**

If the Company experiences operating losses, please discuss what resources the Company

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<sup>38</sup>Decision and Order No. 22282, at 42.

<sup>39</sup>Respondents argue that the commission "can properly craft a solution that provides NSWTT with the opportunity to recover its costs" as interested third-parties had the opportunity to intervene or participate in this proceeding, but did not. The commission is not persuaded by Respondents' argument. The commission expressly directed Respondents to notify all "ratepayers" of this proceeding in Order No. 22045, filed on September 21, 2005. The record, however, indicates that Respondents did not notify the Ocean Villa condominium owners of this proceeding. See Letter dated and filed on October 3, 2005, from Respondents' counsel to the commission, at 1 n.1. Had third-parties such as the Ocean Villa condominium owners been given notice of this proceeding as required by the commission in Order No. 22045, Respondents' argument may have warranted some consideration, but since Respondents did not serve notice as expressly required by the commission, Respondents' argument is without merit.

<sup>40</sup>The term "Company" refers to NSWTT. NSWTT, by extension, will also have the ability to rely on the financial resources of its manager and ultimate parent entity, Oaktree Capital Management, LLC. See In re Ass'n of Apartment Owners, Kuilima Estates West, IC-05-103, NSWTT's response to PUC-IR-101. See also Decision and Order No. 22282, at 2 n.1.

would rely upon to ensure that operating costs can be paid and utility services would not decrease. Your response should assume that operating losses may be small, temporary and brief, as well as the possibility of larger losses for extended periods of time.

**Response:** The Company will have the resources of its member, Turtle Bay Holding, L.L.C. to rely on in the event of future operating losses. The Company accepts the assumptions above and also that the Company will be able to file for future rate changes in the event the existing approved rates are not sufficient to provide for recovery of expenses and a fair return on the Company's investment to provide service.

Docket No. 04-0298, NSW's response to CA-IR-1 (boldface in original) (emphasis added). See also Docket No. 04-0298, Consumer Advocate's Statement of Position, at 7 n.13 (NSW's parent company has pledged to provide financial support to NSW, if necessary).

As Respondents merely reiterate arguments that they previously made, the commission denies their motion for reconsideration and/or clarification of Issue No. 5.

### III.

#### Orders

#### THE COMMISSION ORDERS:

Respondents' Motion for Reconsideration and/or Clarification, filed on March 6, 2006, is denied.

DONE at Honolulu, Hawaii JUN 21 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:

  
Michael Azama  
Commission Counsel

05-0238.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22548 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: JUN 21 2006