

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
 )  
PUUWAAWAA WATERWORKS, INC. )  
 )  
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. )  
\_\_\_\_\_ )

DOCKET NO. 00-0005

ORDER NO. 22570

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

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At 9:30 o'clock A.M.

Karen H. gosh.  
Chief Clerk of the Commission

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

K. H. gosh.



are PWI and the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate") (collectively, the "Parties").<sup>2</sup>

B.

Order No. 19979

On July 16, 2002, the Consumer Advocate filed a Motion for Sanctions and/or Civil Penalties ("Motion for Penalties")<sup>3</sup> regarding various matters related to PWI's CPCN proceeding. PWI filed its response to the Consumer Advocate's Motion for Penalties on July 23, 2002 ("Response to CA's Motion for Penalties"). The Consumer Advocate filed a reply to

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August 10, 2000, and September 24, 2001. PWI's initial CPCN application and subsequent amended CPCN applications filed respectively on January 12, 2000, August 10, 2000, and September 24, 2001, are collectively referred to as the "Application."

<sup>2</sup>The Consumer Advocate is an ex-officio party to all proceedings before the commission. See Hawaii Revised Statutes ("HRS") § 269-51; Hawaii Administrative Rules ("HAR") § 6-61-62. By Order No. 17637, filed on March 29, 2000, the commission granted Puu Lani Ranch Homeowners Association ("PLRHA") intervenor party status to this docket. Thereafter, the commission approved the August 16, 2001 stipulation filed by PWI, the Consumer Advocate, and PLRHA to change PLRHA's status in this proceeding from an intervenor to a participant. See Order No. 19152, filed on January 18, 2002.

<sup>3</sup>In its Motion for Penalties, the Consumer Advocate requested that the commission order PWI to: (1) pay civil penalties under HRS § 269-28, in the amount of \$140,250 (or in the alternative \$93,750, or in the alternative \$49,000) for violating Order No. 18670, and for failing to comply with applicable regulatory laws, rules, and commission orders; (2) pay civil penalties under HRS § 269-28, in the amount of \$35,000, for engaging in the business of a public utility without a CPCN; and (3) reimburse ratepayers, with interest, for amounts unlawfully charged after changing rates without prior commission approval. See Consumer Advocate's Motion for Penalties at 18.

PWI's Response to CA's Motion for Penalties on August 13, 2002.

On January 22, 2003, the commission issued Order No. 19979 granting in part and denying in part, the Consumer Advocate's Motion for Penalties ("Order No. 19979"), and assessing PWI the following penalties pursuant to HRS § 269-28<sup>4</sup>:

1. A civil penalty of \$10,000 for violating Order No. 18670 and HRS § 269-16(b); and
2. A civil penalty of \$5,000 for violating HRS § 269-7.5 for engaging in the business of a public utility without a CPCN.

The commission denied all other aspects of the Consumer Advocate's Motion for Penalties and ordered PWI to

HRS § 269-28 states, in relevant part:

- (a) 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 . . . .  
    . . . .
- (c) Notwithstanding the provisions of subsection (a), any person acting in the capacity of or engaging in the business of a public utility in the State without having a certificate of public convenience and necessity or other authority previously obtained under and in compliance with this chapter and the rules promulgated thereunder may be subject to a civil penalty not to exceed \$5,000 for each such offense, and, in the case of a continuing violation, \$5,000 for each day that uncertified activity continues.

HRS § 269-28.

remit a certified check in the amount of \$15,000 within thirty (30) days of the date of the order.

That same day, January 22, 2003, the commission granted PWI a CPCN to provide potable water service as a public utility and approved its initial authorized rates ("Authorized Rates") in Decision and Order No. 19980.

C.

PWI's Motion for Mitigation

On February 10, 2003, PWI filed its Motion for Mitigation pursuant to HRS § 269-28(d) and HAR § 6-61-41. PWI contends in its motion that remission or mitigation of the assessed penalties is warranted since: (1) PWI increased its rates on an interim basis without first obtaining commission approval for good cause; and (2) PWI is financially unable to pay the assessed \$15,000 in penalties.

PWI elaborates that its financial statements clearly show that there was good cause to increase the rates without prior commission approval since the "need to increase rates was urgent."<sup>5</sup> The unauthorized rate increases, PWI contends, were necessary for it to stay financially viable while its CPCN Application was pending commission resolution. Moreover, PWI represents that the \$15,000 in assessed penalties constitutes roughly 65% of the funds currently in its bank account and that PWI's "biggest" asset is its water system, which if sold would require PWI to cease operations.

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<sup>5</sup>See PWI's Motion for Mitigation at 3.

D.

Consumer Advocate's Response to PWI's Motion

On February 13, 2003, the Consumer Advocate filed its written statement opposing PWI's Motion for Mitigation ("Response to PWI's Motion for Mitigation"), pursuant to HAR § 6-61-41(c). The Consumer Advocate contends that PWI did not present any new arguments in its Motion for Mitigation that were not already briefed by the Parties and considered by the commission. The Consumer Advocate states that "Order No. 19979 clearly took into consideration the totality of the circumstances such as PWI's small size and low customer base, and the civil penalty of \$15,000 was set at a lesser amount than the maximum amount allowed under the statute."<sup>6</sup> The Consumer Advocate also clarifies that its request for civil penalties was to impress upon PWI that it is not above the law, and not to put PWI out of business. Accordingly, the Consumer Advocate represents that it is not opposed to payment of the \$15,000 over a reasonable period of time to reduce the financial hardship on PWI. With this in mind, the Consumer Advocate recommends that the commission require PWI to submit a payment plan for commission approval.

E.

PWI's Bankruptcy Petition and Sale of its Water System

On May 7, 2003, PWI filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District

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<sup>6</sup>See Consumer Advocate's Response to PWI's Motion for Mitigation at 2.

of Hawaii based on its belief that the Authorized Rates were insufficient to generate sufficient revenues to recover its operating costs and establish a reserve.<sup>7</sup>

On October 20, 2003, PWI filed an application for a rate increase in Docket No. 03-0369. By Decision and Order No. 21428, filed on October 25, 2004, the commission denied PWI's request to increase its volumetric rates and confirmed that PWI's Authorized Rates, rate schedules, and rules are to be in effect until otherwise ordered by the commission.

Subsequently, on June 3, 2005, PWI and Napuu Water, Inc. ("NWI"), a member-owned Hawaii nonprofit, filed a joint application for commission approval to sell PWI's water system assets to NWI in Docket No. 05-0137. NWI was formed for the specific purpose of purchasing PWI's water system and operating it "similar" to a cooperative (i.e., providing water service solely to its members).<sup>8</sup> On December 29, 2005, the commission issued Decision and Order No. 22200, which among other things: (1) approved the transfer of PWI's water system assets to NWI; and (2) determined, under the specific facts and circumstances in the proceeding, that NWI is not a public utility as defined in HRS § 269-1 and, thus, is not subject to the commission's jurisdiction under HRS chapter 269.

This Order addresses PWI's Motion for Mitigation.

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<sup>7</sup>See In re Puuwaawaa Waterworks, Inc. and Napuu Water, Inc., Docket No. 05-0137, Decision and Order No. 22200, filed on December 29, 2005 ("Decision and Order No. 22200") at 2.

<sup>8</sup>NWI stated its intent to not operate the water system as a public utility under the definition of HRS § 269-1. See Decision and Order No. 22200 at 3.

II.

Discussion

HRS § 269-28(d) states:

Upon written application filed within fifteen days after service of an order imposing a civil penalty pursuant to this section, the commission may remit or mitigate such penalty upon such terms as it deems proper.

HRS § 269-28(d). As set forth in the statute, mitigation of an award of civil penalties is discretionary.

Here, the commission has considered the briefs filed by the Parties, and given the circumstances, finds that mitigation or reduction of the assessed civil penalties is not warranted. PWI's alleged financial condition does not justify its intentional violation of the commission's rules, regulations and orders. And, its financial condition does not provide sufficient basis to mitigate the penalties, as the commission already considered the totality of the circumstances, including PWI's size and customer base, when imposing the penalties in Order No. 19979.<sup>9</sup> Based on the foregoing, the commission concludes that PWI's Motion for Mitigation should be denied, and this docket closed.

III.

Orders

THE COMMISSION ORDERS:

1. PWI's Motion for Mitigation is denied.

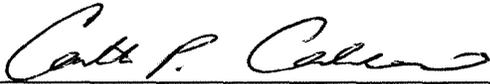
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<sup>9</sup>See Order No. 19979 at 8-9, 13.

2. This docket is closed.

DONE at Honolulu, Hawaii JUN 29 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

00-0005.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22570 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

JOHN E. COLE  
EXECUTIVE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
P. O. Box 541  
Honolulu, HI 96809

F. NEWELL BOHNETT  
PUUWAAWAA WATERWORKS, INC.  
71-1572 Puulani Drive  
Kailua-Kona, HI 96740

PHILIP J. LEAS, ESQ.  
CADES SCHUTTE LLP  
1000 Bishop Street, Suite 1200  
Honolulu, HI 96813

Attorney for PUUWAAWAA WATERWORKS, INC.

PUU LANI RANCH HOMEOWNERS ASSOCIATION  
c/o ARICK YANAGIHARA, PRESIDENT  
1001 Bishop Street, Suite 2690  
Honolulu, HI 96813

  
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Karen Higashi

DATED: JUN 29 2006