

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----- In the Matter of -----)
WAIKOLOA SANITARY SEWER)
COMPANY, INC., dba)
WEST HAWAII SEWER COMPANY)
For Approval of Rate Increases)
and Revised Rate Schedules.)
_____)

DOCKET NO. 00-0440

ORDER NO. 23939

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DIVISION OF PUBLIC UTILITIES
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STATE OF HAWAII

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

Gleaner P. Linares

----- In the Matter of -----)

WAIKOLOA SANITARY SEWER)

COMPANY, INC., dba)

WEST HAWAII SEWER COMPANY)

For Approval of Rate Increases))

and Revised Rate Schedules.)

Order No. 23939

By this Order, the commission: (1) grants in part and denies in part the Motion for Reconsideration and Vacation of Order No. 23635, filed by WAIKOLOA SANITARY SEWER COMPANY, INC., dba WEST HAWAII SEWER COMPANY ("WHSC"), on September 19, 2007; and (2) as discussed in Section III, below, of this Order, defers its ruling on WHSC's proposed refund plan, filed on September 28, 2007.¹

¹The Parties are WHSC and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

I.

Background

WHSC is a public utility that provides wastewater collection and treatment service to residences, condominiums, commercial establishments, and public facilities located at Waikoloa Village on the island of Hawaii.

A.

Procedural Summary

1.

Docket No. 00-0440

On February 27, 2002, the commission issued Decision and Order No. 19223, and on April 10, 2002, the commission issued Order No. 19294. On December 29, 2005, the Hawaii Supreme Court ("Court") issued its opinion reversing Decision and Order No. 19223 and Order No. 19294, and remanding the case to the commission for appropriate disposition.²

Following the entry of the Notice and Judgment on appeal, the commission, on February 7, 2006, issued Order No. 22275, vacating: (1) Section IV.B and Ordering Paragraph No. 3 of Decision and Order No. 19223; and (2) Order No. 19294. On March 7, 2006, the Consumer Advocate filed a Motion for Partial Reconsideration and Modification of Order No. 22275. On March 29, 2006, WHSC filed a Memorandum in Opposition to the

²In re Waikoloa Sanitary Sewer Co., Inc., dba West Hawaii Sewer Co., 109 Hawai'i 263, 125 P.3d 484 (Haw. 2005) ("In re WHSC").

Consumer Advocate's Motion for Partial Reconsideration and Modification.

On September 7, 2007, the commission issued Order No. 23635, in which the commission stated:

By [Order No. 23635], the commission grants the [Consumer Advocate's] Motion for Partial Reconsideration and Modification of Order No. 22275, filed on March 7, 2006.

Upon reconsideration, the commission grants the Consumer Advocate's request to recalculate [WHSC's] rate base, revenue requirement, and resulting rates; and issues a revised revenue requirement schedule that establishes a new monthly standby charge of \$19.94 per unit for WHSC, to take effect on October 15, 2007.

In addition, with respect to the refund issue raised by the Consumer Advocate, the commission finds that, given the recalculation of WHSC's monthly standby charge to \$19.94 per unit, a refund of the amounts over-collected by WHSC from its ratepayers, between November 7, 2001 and October 15, 2007, with interest, is required by Chapter 269, [HRS].

The actual amount of the refund, however, was not calculated or claimed by the Consumer Advocate. Thus, the commission instructs the Parties to: (1) promptly calculate and reach agreement on the amount of the refund, including interest, and the repayment terms, given the findings and parameters described herein; and (2) submit their joint agreement on these matters for the commission's review and consideration, by September 28, 2007. In the event that an agreement is not reached, each of the Parties shall submit their individual plans (including the refund amounts and repayment terms) and calculations for the commission's review and consideration by the same date.

The commission strongly encourages the parties to reach a reasonable agreement that is fair and equitable to the utility and its ratepayers, which allows utility services to continue.

Order No. 23635, at 1-2.

Thus, as set forth in Ordering Paragraphs No. 2 and 3 of Order No. 23635, the commission held:

2. WHSC's new standby monthly charge of \$19.94 per unit shall take effect on October 15, 2007. Consistent thereto, WHSC shall file by September 28, 2007, its updated tariff sheets to reflect the new charge, with the applicable issued and effective dates.

3. The Parties shall: (A) promptly calculate and reach an agreement on the amount of the refund, including interest, and the repayment terms, given the monthly standby charge amounts of \$24.82, \$27.13, and \$19.94 per unit; and (B) submit their joint agreement on these matters for the commission's review and consideration, by September 28, 2007. In the event that an agreement is not reached, each of the Parties shall submit their individual plans (including the refund amounts and repayment terms) and calculations for the commission's review and consideration by the same date.

Order No. 23635, Ordering ¶¶s 2 and 3, at 29-30.

On September 19, 2007, WHSC filed a Motion for Reconsideration and Vacation of Order No. 23635,³ and a Motion to Stay Order No. 23635.⁴ By its Motion for Reconsideration, WHSC requests that the commission vacate Order No. 23635, and instead, issue an order denying the Consumer Advocate's motion for reconsideration. WHSC filed its Motion for Reconsideration pursuant to HAR §§ 6-61-41 and 6-61-137.⁵

³WHSC's Motion for Reconsideration and Vacation of Order No. 23635; Declaration of Richard Terminello; Certificate of Service; and Exhibits A - B, filed on September 19, 2007 (collectively, "Motion for Reconsideration").

⁴WHSC's Motion to Stay Order No. 23635; and Certificate of Service, filed on September 19, 2007 (collectively, "Motion to Stay").

⁵WHSC also cites to HAR § 6-61-139. See WHSC's Motion for Reconsideration, at 16 n.6.

By letter dated September 24, 2007, commission counsel informed the Consumer Advocate that pursuant to HAR § 6-61-140, the commission found it "desirable or necessary" for the Consumer Advocate to file replies to WHSC's motions by October 8, 2007.

On September 28, 2007, WHSC submitted its: (1) updated tariff sheets to reflect the new monthly standby charge of \$19.94 per residential unit (or per equivalent residential unit for commercial units), in compliance with Ordering Paragraph No. 2 of Order No. 23635, without prejudice;⁶ and (2) refund

⁶As explained by WHSC, WHSC made its filing without prejudice to any of the arguments made in its Motion for Reconsideration, or its Motion to Stay:

In Order No. 23635, the Commission directed that [WHSC's] standby monthly charge be reduced to \$19.94 per unit, effective October 15, 2007. The Commission also directed that [WHSC] file by September 28, 2007 its updated tariff sheets, to reflect the new charge, with the applicable issued and effective dates.

[WHSC] timely filed a Motion to Stay Order No. 23635, but the Commission has declined to act on the Motion to Stay.

Accordingly, as required by Order No. 23635, enclosed please find an original and eight copies of [WHSC's] Fourth Revised Sheet 30, to be included within the Company's Tariff No. 1, issued September 28, 2007, and effective October 15, 2007.

This submittal is without prejudice to any of the contentions or arguments in [WHSC's] Motion for Reconsideration and Vacation of Order No. 23635, filed September 19, 2007, or the Company's Motion to Stay Order No. 23635.

WHSC's letter, dated September 28, 2007, at 1-2.

proposal in compliance with Ordering Paragraph No. 3 of Order No. 23635, without prejudice.⁷

On October 5, 2007, the Consumer Advocate filed its: (1) Memorandum in Opposition to WHSC's Motion for Reconsideration and Vacation of Order No. 23635;⁸ and (2) Memorandum in Support of WHSC's Motion for Stay. The Consumer Advocate stated that "it supports [WHSC's] request to stay Order No. 23635 until WHSC's Motion for Reconsideration is decided."⁹ On October 9, 2007, the commission stayed Order No. 23635, pending the commission's adjudication of WHSC's Motion for Reconsideration.¹⁰

2.

Docket No. 05-0329

On October 1, 2007, the commission, in In re Waikoloa Sanitary Sewer Co., Inc., dba West Hawaii Sewer Co., Docket No. 05-0329, WHSC's 2006 test year rate case, issued Proposed

⁷WHSC notes that it did not reach an agreement with the Consumer Advocate on the amount of the refund, including interest, and the repayment terms. Based on certain assumptions, WHSC calculates the refund amount as \$805,228.14, including interest.

⁸Consumer Advocate's Memorandum in Opposition to WHSC's Motion for Reconsideration and Vacation of Order No. 23635; and Certificate of Service, filed on October 5, 2007 (collectively, "Memorandum in Opposition").

⁹Consumer Advocate's Memorandum in Support of Stay, at 1.

¹⁰Order No. 23701, filed on October 9, 2007. By Order No. 23701, the commission also formally adopted its finding that it was "necessary or desirable" for the Consumer Advocate to file replies to WHSC's motions by October 8, 2007, consistent with HAR § 6-61-140.

Decision and Order No. 23688.¹¹ The commission, in effect, proposed to increase WHSC's monthly standby charge to \$36.73 per unit, effective from October 15, 2007 (or as otherwise ordered by the commission), as follows:

. The commission approves a general rate increase of \$277,439, or 42.1 percent over revenues at present rates for West Hawaii Sewer, based on a total revenue requirement of \$937,052 for the test year. In so doing, the commission authorizes an increase in West Hawaii Sewer's monthly standby charge from \$19.94 per equivalent residential unit to \$36.73 per equivalent residential unit, effective October 15, 2007.

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As discussed above, effective October 15, 2007, the monthly standby charge at present rates will be reduced from \$27.13 per unit to \$19.94 per unit, pursuant to Order No. 23635. In light of this reduction in the monthly standby charge, the commission approves the Consumer Advocate's proposal to recover the entire increase solely through the monthly standby charge. The commission agrees with the Consumer Advocate that under these circumstances, allocating the entire increase to the monthly standby charge will provide West Hawaii Sewer with the best opportunity to recover the Company's fixed expenses. Furthermore, assigning the entire increase to the monthly standby charge will not result in rate shock for West Hawaii Sewer's customers. Accordingly, the commission approves a monthly standby charge of \$36.73 per equivalent residential unit and a consumption charge of \$1.33 per thousand gallons of water consumed.

Finally, in order to avoid rate fluctuation and to prevent the need for a refund in this docket, the commission determines that the rates established in this Proposed Decision and Order will be effective on the same date that the rates established in Order No. 23635 are effective (i.e., October 15, 2007, or as otherwise ordered by the commission).

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¹¹Similar to Docket No. 00-0440, the parties in Docket No. 05-0329 are WHSC and the Consumer Advocate.

2. No later than October 15, 2007, West Hawaii Sewer shall file its revised tariff sheets and rate schedules for the commission's review and approval, which implement the tariff changes and increases in rates and charges authorized by this Proposed Decision and Order, with copies served upon the Consumer Advocate. West Hawaii Sewer's tariff changes and increases in its rates and charges shall take effect upon the commission's review and approval of said filing.

In re Waikoloa Sanitary Sewer Co., Inc., dba West Hawaii Sewer Co., Docket No. 05-0329, Proposed Decision and Order No. 23688, at 1, 46-47, and 51 (emphasis added). The deadline for the parties in Docket No. 05-0329 to "notify the commission as to whether it accepts, in toto, or does not accept, in whole or in part, [the] Proposed Decision and Order," was October 15, 2007.¹²

On October 15, 2007, in Docket No. 05-0329: (1) WHSC filed its Notice of Partial Acceptance and Notice of Partial Non-Acceptance of Proposed Decision and Order No. 23688, and its updated tariff sheets; and (2) the Consumer Advocate filed a letter informing the commission that "it accepts in toto, the merits of the discussion contained in said proposed Decision and Order and the Commission's findings with regard to the differences between the parties."¹³ Both of these filings are currently pending before the commission in Docket No. 05-0329.

¹²Docket No. 05-0329, Proposed Decision and Order No. 23688, Ordering ¶ 3, at 51; see also id., Section XIV, Acceptance or Non-Acceptance, at 50-51.

¹³Docket No. 05-0329, Consumer Advocate's letter, dated October 15, 2007, at 1.

B.

WHSC's Motion for Reconsideration

In seeking the reconsideration of Order No. 23635, WHSC contends:

1. The commission mischaracterizes the Consumer Advocate's failure to timely seek the reconsideration of Decision and Order No. 19223, filed on February 27, 2002 (Argument No. 1).

2. The commission mischaracterizes the Court's Opinion as well as the Consumer Advocate's failure to timely seek reconsideration of the Court's finding in that opinion (Argument No. 2).

3. The commission failed to make findings of fact and conclusions of law necessary to support Order No. 23635, as required by HRS § 91-12 (Argument No. 3).

4. Order No. 23635 is arbitrary and capricious in that even if the commission's rate base reduction was supported by findings of fact and was justified, the commission failed to include any corresponding adjustment for amortization (Argument No. 4).

5. The commission exceeded its statutory authority in ordering a refund for the time period between Decision and Order No. 19223 and Order No. 23635 (Argument No. 5).

6. Order No. 23635 violates the Court's decision that the CIAC tax gross-up funds were non-refundable under the filed rate doctrine (Argument No. 6).

7. Order No. 23635 retroactively imposes rates that are unjust and unreasonable under HRS § 269-16 (Argument No. 7).

8. Order No. 23635 constitutes a taking of WHSC's property without compensation (Argument No. 8).

9. Based on the commission's statements in Order No. 19335, closing Docket No. 7287 as moot, the commission is estopped from imposing, or in the alternative has waived any right to impose, a belated rate base reduction against WHSC five years later (Argument No. 9).

C.

Consumer Advocate's Opposition

In its Memorandum in Opposition, the Consumer Advocate disagrees with WHSC's request to vacate Order No. 23635 in its entirety, and instead, asserts that WHSC's Motion for Reconsideration should be denied. In sum, the Consumer Advocate contends:

1. The commission acted properly and consistent with generally accepted ratemaking principles when it: (A) gave effect to the Court's Opinion in In re WHSC, and decided that WHSC's revenue requirement for the 2001 test year should be adjusted to reflect the impact of WHSC's CIAC income tax gross-up amount on WHSC's test year rate base; and (B) recalculated WHSC's rates to account for the CIAC income tax gross-up amount in determining WHSC's 2001 test year revenue requirement.

2. The commission acted properly and consistent with its statutory authority when it decided that WHSC must return to

its customers the amounts WHSC collected that were in excess of the rates established by the commission in its recalculation of WHSC's wastewater rates, as set forth in Order No. 23635.

II.

Reconsideration

HAR §§ 6-61-137, 6-61-138, and 6-61-139 state:

§6-61-137 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, 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.

§6-61-138 Effect of filing. (a) The filing of a motion for reconsideration or rehearing shall not stay a commission decision and order. However, if a motion for a stay accompanies the motion, the commission shall act on the motion for a stay promptly. If a stay is granted, the stay shall remain in effect until disposal of the motion for reconsideration.

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§6-61-139 Additional evidence. When, in a motion filed under this subchapter, a request is made to introduce new evidence, the evidence adduced shall be stated briefly, that evidence must not be cumulative, and an explanation must be given why that evidence was not previously adduced.

HAR §§ 6-61-137, 6-61-138, and 6-61-139.

"[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 (Haw. Ct. App. 2005). However, "[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." 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 (Haw. 2002) and quoting Sousaris v. Miller, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (Haw. 2000)).

As discussed below, the commission finds that WHSC's Arguments Nos. 1 through 3 and 5 through 9 provide no discernible basis to support the reconsideration of Order No. 23635. With respect to Argument No. 4, the commission, by this Order, issues the new revenue requirement schedule to properly reflect the amortization of CIAC. Accordingly, the commission grants in part and denies in part WHSC's Motion for Reconsideration, consistent with the terms of this Order.

A.

Arguments No. 1 and No. 2

1.

Argument No. 1

WHSC, in Argument No. 1 of its Motion for Reconsideration, essentially restates the same argument it previously made in its opposition to the Consumer Advocate's motion for reconsideration; that the Consumer Advocate did not challenge Decision and Order No. 19223 by filing a timely motion for reconsideration, and thus, is now barred from seeking to offset the CIAC income tax component by reducing WHSC's rate

base. As noted by the Consumer Advocate in its Memorandum in Opposition, this argument was addressed and rejected by the commission in Order No. 23635:

WHSC argues that the Consumer Advocate's Motion for Reconsideration should be dismissed as it "(1) is untimely and procedurally improper; (2) wrongly seeks to relitigate issues finally and completely resolved by the Hawaii Supreme Court in Opinion No. 25087; and (3) violates the Commission's Order No. 22309." The commission disagrees on all three points.

First, WHSC argues that the Motion for Reconsideration is untimely and procedurally improper. According to WHSC, in Decision and Order No. 19223, the commission rejected the Consumer Advocate's request that the income tax gross-up component be reflected in WHSC's revenue requirement and a corresponding adjustment be made to WHSC's rate base. Since the Consumer Advocate did not challenge Decision and Order No. 19223 by filing a timely motion for reconsideration with the commission, WHSC thus argues that the Consumer Advocate is now barred from resurrecting and re-litigating this matter by way of its Motion for Reconsideration.

WHSC mischaracterizes the commission's ruling in Decision and Order No. 19223. The Consumer Advocate's primary contention was that WHSC should be required to return the CIAC balance to the affected contributors. In the alternative, "[i]f the refund[ing] of the balance to the affected contributors [was] not feasible, the only remaining option, the Consumer Advocate maintain[ed, was] to recognize this amount as: (1) an adjustment to rate base; or as revenue." The commission, in Decision and Order No. 19223, accepted the Consumer Advocate's primary argument to refund the \$681,400 to the contributors. Contrary to WHSC's claim, the commission did not "reject" the Consumer Advocate's alternative proposal in Decision and Order No. 19223. Instead, the commission's acceptance of the Consumer Advocate's primary contention in Decision and Order No. 19223 rendered moot the Consumer Advocate's alternative proposal, until the Court's subsequent decision holding that the entire \$9.50 per gallon of EDSD (including the \$2.25 per gallon of EDSD for income tax payments) represented non-refundable CIAC.

Order No. 23635, at 13-14.

WHSC, in its Motion for Reconsideration, expands on its argument by stating that the commission mischaracterizes the Consumer Advocate's reduction in rate base position as an "alternative theory." Instead, WHSC contends that from the beginning of this docket, the Consumer Advocate advocated its reduction in rate base theory.

In response to WHSC's contention, the commission notes that the Consumer Advocate, in its Statement of Position Concerning the Issue of Contributions in Aid of Construction/Tax Gross-Up, filed on December 17, 2001 ("Statement of Position") stated that it "believe[d that] the most reasonable treatment for the CIAC tax collected from a contributor that was not paid to the taxing authorities would be to return the CIAC tax portion to the contributor since it was the contributor who paid out the CIAC tax assessment."¹⁴ If the commission was not inclined to return the CIAC tax gross-up to the contributor, the Consumer Advocate advanced two possible alternatives, including its reduction in rate base theory:

WHSC collected the CIAC tax from developers, has use of this money, and continues to have access to this cost-free capital since 1988. If, under the existing tariff regulations, the CIAC tax collected from developers cannot be returned to the developer, the Consumer Advocate believes that the CIAC tax portion not paid to taxing authorities should be recognized as a ratepayer benefit for rate setting purposes. Not recognizing the Company's use of these funds in the ratemaking process results in a windfall to

¹⁴Consumer Advocate's Statement of Position, at 18; see id., Section IV.A, Return Excess CIAC Representing the Income Taxes Not Paid to the Developer, at 18-19.

WHSC. The two possible alternatives discussed below to reflect the CIAC taxes collected from contributors in revenue requirements are:

1. Recognize the amount as an adjustment to Rate base; or
2. Recognize the amount as Revenue.

Consumer Advocate's Statement of Position, at 20; see id., Section IV.B, CIAC and Related Income Taxes Should be Reflected in the Test Year Revenue Requirements, at 20-22.

2.

Argument No. 2

WHSC, in Argument No. 2 of its Motion for Reconsideration, argues that the commission mischaracterized the Court's Opinion and the Consumer Advocate's failure to seek reconsideration of the Court's Opinion in In re WHSC; and wrongly seeks to re-litigate issues finally and completely resolved by the Court in In re WHSC. WHSC further notes that the commission, by not filing a motion for reconsideration of the Court's Opinion, was also barred under the principles of res judicata and collateral estoppel from resurrecting the reduction in rate base issue raised by the Consumer Advocate in its motion for reconsideration.¹⁵

¹⁵In its opposition to the Consumer Advocate's motion for reconsideration, WHSC argued that the Consumer Advocate failed to file a motion for reconsideration with the Court. Subsequently, in its pending Motion for Reconsideration, WHSC argues that neither the Consumer Advocate nor the commission moved for reconsideration with the Court.

WHSC contends that the commission mischaracterizes footnote 13 of the Court's Opinion in In re WHSC. WHSC asserts that, as noted by the Court in footnote 13, both the commission and Consumer Advocate failed to provide any evidence to the Court that WHSC had in fact used the \$681,400 to purchase regulatory assets. In WHSC's view, "[b]ecause the Consumer Advocate and the Commission raised the argument regarding a rate base reduction, but failed to support the argument with any evidence, the Supreme Court expressed 'no opinion' on the issue and went on to make its determination as to how the \$681,400 was used based on the evidence that was presented."¹⁶

The commission disagrees with WHSC's interpretation of footnote 13. In effect, as noted by the Consumer Advocate in its Memorandum in Opposition, the issues raised by WHSC in its Argument No. 2 were addressed and rejected by the commission in Section III of Order No. 23635, and WHSC "presented no new or additional evidence or argument that calls into question the Commission's conclusions or reasoning in Order No. 23635."¹⁷ Moreover, the Court, in holding that the entire \$9.50 per gallon of estimated daily sewage discharge ("EDSD") (including the \$2.25 per gallon of EDSD for income tax payments) represented CIAC, reasoned in part that WHSC's use of CIAC payments to pay income taxes constituted paying for new or expanded sewage

¹⁶WHSC's Motion for Reconsideration, at 5-6.

¹⁷Consumer Advocate's Memorandum in Opposition, at 10 (footnote and text therein omitted).

treatment plant facilities, consistent with the language set forth in WHSC's CIAC Tariff Rule XI.¹⁸

B.

Argument No. 3

In its Argument 3, WHSC asserts that the commission failed to make findings of fact and conclusions of law necessary to support Order No. 23635, as required by HRS § 91-12. HRS § 91-12 of the Hawaii Administrative Procedures Act states:

Decisions and orders. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or to the party's attorney of record.

HRS § 91-12.

"The requirement that the Commission set out findings of fact and conclusions of law is no mere technical or perfunctory matter. The purpose of the statutory requirement that the agency set forth separately its findings of fact and conclusions of law is to assure reasoned decision making by the agency and enable judicial review of agency decisions." In re Hawaii Elec. Light Co., Inc., 60 Haw. 625, 641-42, 594 P.2d 612, 623 (1979) (citations omitted).

¹⁸See In re WHSC, 109 Hawai'i at 274, 125 P.3d at 495.

"[T]he agency must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency." In re Water Use Permit Applications, 94 Hawai'i 97, 157, 9 P.3d 409, 469 (Haw. 2000), recon. denied, appeal after remand, 105 Hawai'i 1, 93 P.3d 643 (Haw. 2004) (citing In re Kauai Elec. Div. of Citizens Util. Co., 60 Haw. 166, 183, 590 P.2d 524, 537 (1978)).

In Argument No. 3 of its Motion for Reconsideration, WHSC contends that Order No. 23635 is invalid on its face because it does not contain findings of fact and conclusions of law, as required by HRS § 91-12. In particular, WHSC asserts that Order No. 23635 contains no finding of fact by the commission that the CIAC tax gross-up funds were in fact used to purchase regulatory assets. Thus, as a matter of law, the commission's conclusion that WHSC's rate base must be retroactively reduced by \$732,990 is invalid. In addition, WHSC reiterates that the CIAC income tax gross-up funds were used to pay income taxes, and not to purchase regulatory assets.

In WHSC's view, Order No. 23635 ignores the fact that CIAC can be collected for reasons other than plant expansion and improvement, and that allowing for CIAC funds to be used for other than the purpose of acquiring plant assets, and specifically for the payment of income taxes, is consistent with the Court's Opinion and the definition of Account No. 271, Contributions in Aid of Construction, set forth in the National

Association of Regulatory Commissioners, Uniform System of Accounts for Class B Water Utilities, 1996. Thus, WHSC asserts that the commission and Consumer Advocate are "just plain wrong when they contend that because the Hawaii Supreme Court ruled that all of the tax component of the CIAC fees were collected under the CIAC tariff provision and were non-refundable, all such funds automatically reduce rate base."¹⁹

The Consumer Advocate, in its Memorandum in Opposition, counters that in Order No. 23635, "the Commission made clear its understanding that the \$9.50 per gallon EDSD charge was non-refundable CIAC under the Court's decision and that the ratemaking treatment of [WHSC's net operating losses ("NOL")] had not been addressed by the Court."²⁰ Moreover, Order No. 23635 extensively details the commission's analysis and reasoning, and "set[s] forth separate findings of fact and conclusions of law which assure reasoned decision making and enables intelligent review of Order No. 23635 on appeal Consequently, the Consumer Advocate disagrees that Order No. 23635 is invalid on its face."²¹

The underlying basis of WHSC's Argument No. 3 is its opposition to the commission's treatment of the entire \$9.50 per gallon of EDSD as CIAC for ratemaking purposes. The commission's decision in this regard is based on the findings and rationale set forth by the Court in In re WHSC. The commission's

¹⁹WHSC's Motion for Reconsideration, at 10.

²⁰Consumer Advocate's Memorandum in Opposition, at 11 (emphasis omitted).

²¹Consumer Advocate's Memorandum in Opposition, at 11-12.

supporting findings and conclusions, though not individually or separately numbered as such, are amply set forth in Order No. 23635, and enable judicial review of Order No. 23635 on appeal. Moreover, as previously noted by the commission, above, the Court reasoned in part that WHSC's use of CIAC payments to pay income taxes constituted paying for new or expanded sewage treatment plant facilities, consistent with the language set forth in WHSC's CIAC Tariff Rule XI.

C.

Argument No. 4

In Argument No. 4 of its Motion for Reconsideration, WHSC contends that Order No. 23635 imposes a \$732,990 rate base reduction without any amortization adjustment, "even though the Commission acknowledged that the CIAC tax gross-up funds were received by WHSC between 1987 and 1996."²²

The Consumer Advocate, in its Memorandum in Opposition, responds:

In its Motion for Reconsideration, WHSC contends that the Commission failed to recognize any amortization of the CIAC amounts associated with the income tax portion of the CIAC fee collected. WHSC's assertions are not entirely correct.

As noted in Revised Exhibit A, page 1 of 4 [of Order No. 23635], the test year depreciation expense is \$58,152, which is \$14,660 less than the depreciation expense reflect on Exhibit A, page 1 of 4, for Decision and Order No. 19223. The \$14,660 reduction in depreciation expense represents one year's amortization of the \$732,990 CIAC adjustment made by the Commission to properly

²²WHSC's Motion for Reconsideration, at 11.

reflect the income tax portion of the \$9.50 CIAC fee in the test year rate base.

The Commission inadvertently did not reflect the amortization amount in determining the December 31, 2001 CIAC balance. Instead, the Commission adjusted both the beginning and 2001 ending test year balance by \$732,990. The Commission should have reduced the \$732,990 by \$14,660 and instead reflect an adjustment of \$718,330 at December 31, 2001. The result would be an increase to the average test year rate base of \$7,340, resulting in an increase in the test year revenue requirement of \$1,141 (i.e., \$629,347 less \$628,206). The revised monthly standby rate based on a revised 2001 test year revenue requirement of \$629,347 is \$20.01 or [\$0.07] more than the \$19.9[4] set forth in Order 23635. Given the existing workload of the Commission, it is understandable that the Commission inadvertently failed to recognize the amortization taken in the test year as a reduction to the CIAC adjustment reflected in the test year rate base.

Consumer Advocate's Memorandum in Opposition, at 19-20 (emphasis added).

The revised revenue requirement schedule attached to this Order properly reflects an adjustment of \$718,330 for the unamortized CIAC balance, on December 31, 2001.²³ As a result of this adjustment: (1) WHSC's average test year rate base increases by \$7,330;²⁴ (2) WHSC's test year revenue requirement increases by \$1,141, to \$629,347;²⁵ and (3) the monthly standby charge based on the revised test year requirement of \$629,347 is \$20.01 per unit, \$0.07 more than the \$19.94 amount set forth in Order No. 23635.

"[O]n November 5, 2001, the commission issued Interim Decision and Order No. 18995 in which WHSC's monthly standby

²³\$732,990 - \$14,660 = \$718,330.

²⁴\$461,312 - \$453,982 = \$7,330.

²⁵\$629,347 - \$628,206 = \$1,141.

charge of \$24.82 per unit took effect as of November 7, 2001. Thereafter, on February 27, 2002, the commission issued Decision and Order No. 19223, . . . in which WHSC's monthly standby charge increased to \$27.13 per unit as of March 8, 2002."²⁶

Based on the recalculated monthly standby charge of \$20.01 per unit: (1) ratepayers paid \$4.81 per unit/per month in excess of the \$20.01 per unit/per month established by this Order, between the period from November 7, 2001 (when the interim rate increase was set) to March 7, 2002 (when the "final decision" took effect);²⁷ and (2) ratepayers paid and will be paying \$7.12 per unit/per month in excess of the final \$20.01 per unit/per month amount established by this Order, from March 8, 2002, up to the effective date of the \$20.01 per unit/per month charge, as established by Section III of this Order, below.²⁸

D.

Arguments No. 5 and No. 7

1.

Argument No. 5

In its opposition to the Consumer Advocate's motion for reconsideration, WHSC contended that a refund was clearly unwarranted and in excess of any regulatory authority, without expanding on its latter position. The commission, in Order

²⁶Order No. 23635, at 23.

²⁷\$24.82 - \$20.01 = \$4.81 per unit/per month.

²⁸\$27.13 - \$20.01 = \$7.12 per unit/per month.

No. 23635, "disagree[d] with WHSC that a refund is unwarranted and in excess of its regulatory authority."²⁹

Now, in Argument No. 5 of its Motion for Reconsideration, WHSC contends that the commission exceeded its statutory authority in ordering a refund for the time period between Decision and Order No. 19223 (March 8, 2002) and Order No. 23635 (October 15, 2007), by citing to a disjointed chain of authority, none of which grant the commission the power to order a refund of rates from a "final decision."³⁰

WHSC, in its Argument No. 5, restates in part the arguments set forth in its opposition to the Consumer Advocate's motion for reconsideration. Moreover, WHSC presents no new evidence or argument that could not have been presented in connection with its opposition to that motion. As such, the commission reaffirms its statutory authority to order WHSC to refund to its affected ratepayers the amounts it over-collected.

2.

Argument No. 7

In its Argument No. 7, WHSC contends that Order No. 23635 retroactively imposes rates that are unjust and unreasonable, and thus, outside the boundaries of HRS § 269-16. Specifically, by WHSC's calculation, the amount of the refund,

²⁹Order No. 23635, at 21.

³⁰WHSC cites to and discusses two cases in support of its position, cases which WHSC did not refer to in its opposition to the Consumer Advocate's motion for reconsideration. TIG Ins. Co. v. Kauhane, 101 Hawai'i 311, 67 P.3d 810 (Haw. Ct. App. 2003); and Niagra Mohawk Power Corp. v. Public Serv. Comm'n, 388 N.Y.S.2d 157 (N.Y. App. Div. 1976).

with interest, ordered by the commission, is \$805,228.14, as of October 15, 2007.³¹ WHSC expresses concern that the impact of refunding this amount, which WHSC states is more than the combined net income of WHSC for its entire history as a company, will be devastating.³²

The Consumer Advocate, in its Memorandum in Opposition, counters that the relevant period at issue is the 2001 test year period. Under this ratemaking principle, "WHSC fail[s] to set forth any arguments pertaining to the reasonableness of specific 2001 test year revenue requirement elements (e.g., the revenue, expense, rate base, or rate of return projections) in support of its claim that the rates set forth in Order No. 23635 are unreasonable and unjust."³³

"Instead, WHSC focuses upon the actual operations of [WHSC] subsequent to the 2001 test year to support its assertion that the rates set forth in Order No. 23635 are not just and reasonable. This argument fails to recognize that the rates determined in Order No. 23635 are properly based on the 2001 test year revenue requirements."³⁴ In the Consumer Advocate's view, "[i]n recalculating WHSC's 2001 test year revenue requirement and

³¹See WHSC's Motion for Reconsideration, Section VIII, Order No. 23635 Retroactively Imposes Rates That are Unjust and Unreasonable, at 15-18; Declaration of Richard Terminello; and Exhibit A, Estimated Revenue Adjustments.

³²See WHSC's Motion for Reconsideration, Section VIII, Order No. 23635 Retroactively Imposes Rates That are Unjust and Unreasonable, at 15-18; Declaration of Richard Terminello; and Exhibit B, Operating Results and Estimated Rate of Return (Before Interest Expense), 2002 - 2007 (Projected).

³³Consumer Advocate's Memorandum in Opposition, at 16.

³⁴Consumer Advocate's Memorandum in Opposition, at 16.

2001 test year rate base, the Commission is simply completing the 2001 test year rate case using the appropriate CIAC amounts. In essence, the Commission is completing the 2001 test year rate calculations and is not engaging in retroactive ratemaking."³⁵

Along the same lines, the Consumer Advocate asserts that the amount of monies subject to refund by WHSC pursuant to Order No. 23635 does not constitute a basis for concluding that the new wastewater rate set forth in Order No. 23635 is unjust or unreasonable. Instead, the Consumer Advocate reiterates that "the determination of the reasonableness of a utility's rates focuses upon the specific revenue requirement elements that are considered for the 12 month test year period, which was 2001 in the instant docket."³⁶ The Consumer Advocate concludes by noting that the magnitude of the refund is directly attributable to the passage of time resulting from WHSC's appeal of this rate case.

The commission agrees with the Consumer Advocate. "[A]s a result of the Court's Opinion, generally accepted ratemaking principles require[d] the commission to recalculate WHSC's revenue requirement and resulting rates[]" for WHSC's 2001 test year rate case.³⁷ As for the estimated amount of the refund, as calculated by WHSC, the commission provided for mitigation and "strongly encourage[d] the parties to reach a reasonable

³⁵Consumer Advocate's Memorandum in Opposition, at 15 n.38 (emphasis omitted).

³⁶Consumer Advocate's Memorandum in Opposition, at 17.

³⁷Order No. 23635, at 17.

agreement that is fair and equitable to the utility and its ratepayers, which allows utility services to continue."³⁸

E.

Argument No. 6

In Argument No. 6 of its Motion for Reconsideration, WHSC contends that under the filed rate doctrine, the CIAC tax gross-up monies paid pursuant to its CIAC Rule XI were non-refundable under the plain language of the tariff rule. Thus, WHSC states that Order No. 23635 is inconsistent with the Court's Opinion that the CIAC tax gross-up funds were non-refundable under the filed rate doctrine. In essence, WHSC anticipates and disagrees with the commission's position that "the refund is not direct and the refund is given to more ratepayers than just the original contributors."³⁹

The Consumer Advocate, in its Memorandum in Opposition, disagrees with WHSC's position, noting that: (1) the text of Order No. 23635 makes it clear that the CIAC income tax gross-up amount is not being returned to the affected contributors; (2) Order No. 23635 attempts to make WHSC's customers whole after WHSC over collected monies from its customers pending its appeal; and (3) the resolution of the CIAC income tax gross-up issue on appeal resulted in the reduction of WHSC's rates by the commission, consistent with generally accepted ratemaking principles.

³⁸Order No. 23635, at 28.

³⁹WHSC's Motion for Reconsideration, at 15.

WHSC, in its Argument No. 6, presents no new evidence or arguments that could not have been presented in connection with the underlying motion. Order No. 23635 requires WHSC to refund to its affected ratepayers the amounts over collected by WHSC from its ratepayers between November 7, 2001 and October 15, 2007. The commission held that these amounts, with interest, are refundable to WHSC's ratepayers pursuant to Chapter 269, HRS.

F.

Argument No. 8

In Argument No. 8 of its Motion for Reconsideration, WHSC contends:

By ignoring the purpose and WHSC's actual use of the CIAC tax gross-up fees, Order No. 23635 effectively transfers the economic benefit of WHSC's shareholder owned NOLs from WHSC to WHSC's customers. That is a clearly erroneous and unjust result, but more importantly for the Commission, it is a taking of WHSC's property without just compensation under the Fifth Amendment.

WHSC's Motion for Reconsideration, at 19 (emphasis added).

The Consumer Advocate, in its Memorandum in Opposition, responds that Order No. 23635 does not constitute a taking of WHSC's property:

In its Motion for Reconsideration, WHSC argues that the NOL is a shareholder asset and does not belong to [WHSC's] ratepayers. This is not a new argument and the Commission properly addressed it in Order No. 23635. The Commission is not recognizing any of the NOL in determining [WHSC's] test year income tax expense. Therefore, there is no attempt by the Commission to apply the NOL to WHSC's ratepayer benefit in determining the rates set forth in Order No. 23635.

Consumer Advocate's Memorandum in Opposition, at 19.

As noted by the Consumer Advocate, WHSC's Argument No. 8 restates certain arguments previously raised by WHSC in its opposition to the Consumer Advocate's motion for reconsideration, and rejected by the commission in Order No. 23635. Specifically, the commission held in relevant part:

Here, the commission agrees with the Consumer Advocate that, as a result of the Court's opinion, generally accepted ratemaking principles require the commission to recalculate WHSC's revenue requirement and resulting rates. The Court in In re WHSC held that the entire \$9.50 per gallon of EDSD (including the \$2.25 per gallon of EDSD for income tax payments) represented CIAC. As such, the commission is required to treat the entire \$9.50 (including the \$2.25 from income taxes) as CIAC for ratemaking purposes. WHSC's test year CIAC, however, was reported net of income tax. Thus, an adjustment should be made to include the income tax component as part of WHSC's test year CIAC, consistent with In re WHSC.

.

WHSC, however, argues that it used the CIAC income tax gross-up fees to reimburse itself for the use of its shareholder-owned NOLs that had been used to pay the tax liability, instead of paying the tax component directly to the taxing authorities. As such, WHSC argues that the Consumer Advocate's Motion for Reconsideration, if granted, will effectively transfer the shareholder NOLs to ratepayers without compensation to WHSC and at WHSC's expense. As noted by the Consumer Advocate, "[i]n recording the cost of utility plant in service, no distinction is made between property purchased with shareholder versus non-shareholder or contributed funds. Therefore, for ratemaking purposes, regulatory commissions eliminate the cost of contributed property when calculating a rate base by reducing the plant in service costs by the amount of contributions received to acquire such assets."

Order No. 23635, at 17-19 (footnotes and citations therein omitted) (emphasis in original). Consistent with Order

No. 23635, the commission rejects this same argument on reconsideration.

G.

Argument No. 9

In Argument 9, WHSC asserts that the commission is estopped from imposing, or in the alternative has waived, any right to impose, a belated rate base reduction against WHSC five years later, based on the commission's statements in Order No. 19335, closing Docket No. 7287 as moot.

"[T]he party invoking equitable estoppel must show that 'he or she has detrimentally relied on the representation or conduct of the person sought to be estopped, and that such reliance was reasonable. Such requirement, however, may be dispensed with in order to prevent manifest injustice.'" Zane v. Liberty Mut. Fire Ins. Co. 115 Hawai'i 60, 70 n.12, 165 P.3d 961 (Haw. 2007) (citing AIG Hawaii Ins. Co. v. Smith, 78 Hawai'i 174, 891 P.2d 261 (Haw. 1995)). The doctrine of equitable estoppel is fully applicable against the government if it is necessary to invoke the doctrine to prevent manifest injustice. However, significant limitations have been placed on the doctrine in this context. One of the recognized limitations is that the doctrine of equitable estoppel may not be used in such a way as to hinder the state in the exercise of its sovereign powers. Dir. of Taxation v. Med. Underwriters of California, 115 Hawai'i 180, 193-94, 166 P.3d 353, 366-67 (Haw. 2007) (citations omitted).

Docket No. 7287 was an investigative proceeding initiated by the commission on April 13, 1992, to consider the CIAC income tax gross-up issue.⁴⁰ On May 3, 2002, the commission terminated its investigation and closed Docket No. 7287 stating that:⁴¹

Upon careful review of the full record in this proceeding and considering other matters including, but not limited to, the present federal income tax requirements and the commission's prior rate case decisions regarding the issue of CIAC and customer advances, the commission, at this time, finds the matters of this investigative docket to be moot. As set forth above, with the passage of the [Small Business Job Protection Act of 1996], water and sewer utilities are no longer required to include the receipt of CIAC and customer advances as taxable income. Furthermore, since the inception of this docket, the commission directly or indirectly found in various concluded rate proceedings that the respective treatment of the receipt of CIAC and customer advances is reasonable, as applicable, for ratemaking purposes. The commission made its determinations on a case-by-case basis, taking into consideration the unique circumstances and requirements of each utility in its respective rate proceedings, under the various federal and state requirements of that time. We find no need to now deviate from this practice. Thus, it is clear that the matters of this investigative docket are, at this time, moot.

Based on the above, the commission finds good cause to terminate the investigation of this docket. Thus, the commission concludes that this investigation should be terminated and that this docket should be closed.

⁴⁰In re Public Util. Comm'n, Docket No. 7287, Order No. 19335, filed on May 3, 2002. In addition to WHSC, the parties in Docket No. 7287 included: (1) the Consumer Advocate; (2) electric utilities; (3) incumbent telecommunications carrier; (4) gas utility; (5) numerous water and wastewater utilities; and (6) the federal Department of Defense.

⁴¹Docket No. 7287 was also discussed by the Court in In re WHSC.

In re Public Util. Comm'n, Docket No. 7287, Order No. 19335, Section III, at 7-8.

WHSC's Argument No. 9 is a matter that was not, but could have been presented by WHSC in its opposition to the Consumer Advocate's motion for reconsideration. Moreover, WHSC mischaracterizes the scope of Docket No. 7287, which applied to "various concluded rate proceedings." By contrast, at the time of the commission's issuance of Order No. 19335 on May 3, 2002, in Docket No. 7287, Docket No. 00-0440 was still an active proceeding. Specifically, by letter dated May 1, 2002, WHSC noted that it was "exploring alternatives to address the requirement for refund[,]" including the filing of "an appeal of the matter to preserve its options."⁴² Thereafter, on May 10, 2002, WHSC filed its Notice of Appeal.

Moreover, of particular note, the commission, on November 14, 2001, expressly rejected the Parties' agreement to defer the resolution of the CIAC income tax gross-up issue to Docket No. 7287. Instead, the commission instructed the Parties to file their respective position statements on the CIAC income tax gross-up issue in Docket No. 00-0440.⁴³ As noted by the Consumer Advocate in its Statement of Position:

Regarding the disputed CIAC accounting procedures at issue in the present proceeding [Docket No. 00-0440], the record in Docket No. 7287 does not indicate that the parties discussed procedures for the collection, recording and tracking of the income tax portion for CIAC for regulatory purposes. In addition, it does not appear the parties contemplated a situation where

⁴²WHSC's letter, dated May 1, 2002.

⁴³Order No. 19015, filed on November 14, 2001.

the income tax portion collected from the cost causer would not be remitted to a taxing authority because the utility company would not be required to pay income taxes due to its reported net operating losses which fully offset any taxable income in a given year.

Consumer Advocate's Statement of Position, at 12 (emphasis added).

In sum, based on the foregoing reasons, the commission finds that any reliance by WHSC on the commission's representations in Order No. 19335, closing Docket No. 7287 as moot, is misplaced and constitutes an insufficient basis to prevent the commission from taking its actions as set forth in Order No. 23635 and this Order.

H.

Conclusion

In conclusion, to reiterate, the commission finds that WHSC's Arguments Nos. 1 through 3 and 5 through 9 provide no discernible basis to support the reconsideration of Order No. 23635. With respect to Argument No. 4, the commission issues a new revenue requirement schedule to properly reflect the amortization of CIAC. Accordingly, the commission grants in part and denies in part WHSC's Motion for Reconsideration.

III.

WHSC's Refund Proposal

In Order No. 23635, the commission directed WHSC and the Consumer Advocate to: (1) promptly calculate and reach an agreement on the amount of the refund, including interest, and

the repayment terms, given the monthly standby charge amounts of \$24.82, \$27.13, and \$19.94 per unit; and (2) submit their joint agreement for the commission's review and consideration, by September 28, 2007.

Based on certain assumptions, WHSC's estimate of the total refund amount is \$805,228.14, calculated as follows:

In WHSC's Motion for Reconsideration and Vacation of Order No. 23635, which is incorporated herein by this reference, WHSC attached as Exhibit A . . . an "Estimated Revenue Adjustments" worksheet prepared by WHSC accounting manager Richard Terminello, reflecting his preliminary estimate of decreased revenues and additional interest expense for the period from November 7, 2001 through October 15, 2007 resulting from the implementation of Order 23635. The decreased revenues were calculated on a monthly basis, from November 7, 2001 through March 8, 2002, by multiplying the average number of customers (equivalent residential units) for each year by the suggested \$4.88 standby charge reduction. The decreased revenues were calculated on a monthly basis, for the period from March 9, 2002 through October 15, 2007, by multiplying the average number of customers for each year by the suggested \$7.19 standby charge reduction. Interest was calculated on the cumulative amount of the standby charge reduction as of the date of each monthly interest calculation for each month from November 7, 2001 through October 15, 2007. Simple interest was calculated for each month by applying the First Hawaiian Bank prime rate of interest in effect for each period and dividing by 12.

Using those assumptions, Order No. 23635 would require WHSC to refund \$805,228.14 (hereafter referred to as "the Refund Amount"). As noted in WHSC's Motion, looking at WHSC's aggregated profits and losses over the years, that total is more than the combined net income of WHSC for its entire history as a company. As the Commission knows, WHSC has no cash reserves to pay any "refund."

WHSC's Refund Proposal, at 2-3 (emphasis and underscore in original); see also WHSC's Motion for Reconsideration, at 16.

WHSC proposes the following refund plan:

1. Having reset the fixed monthly standby charge as of October 15, 2007, no additional fees or interest will be calculated and the Refund Amount will be fixed as of that date;

2. Any refunds will be made from WHSC's regulatory income, net of the estimated income taxes attributable to such income, in excess of the net regulatory income allowed by the Commission pursuant to WHSC's approved rate base, determined as of December 31 of each calendar year. For example: Order No. 23635 permits WHSC to earn regulatory net income of \$45,398, based upon the Commission's recalculation of WHSC's rate base. Thus, until Order No. 23635 is superseded by further order recalculating WHSC's rate base and permitted regulatory net income, refunds will be made to the extent WHSC's annual regulatory net income exceeds \$45,398, calculated as of December 31 of that calendar year. If and when the Commission recalculates WHSC's rate base and permitted regulatory net income, whether in Docket No. 05-0329 or otherwise, refunds will be made to the extent WHSC's annual regulatory net income exceeds the new threshold amount;

3. Refunds will be recognized to WHSC customers of record at the time the refund is made by means of a monthly credit to each customer account. The amount of the monthly credit will be calculated by dividing the total regulatory net income from the prior calendar year in excess of the threshold amount as determined in paragraph 2 above, divided by 12;

4. Total annual credits will be deducted from the Refund Amount until the entire Refund Amount has been refunded; and

5. The prior year's income adjustments will be included in the calculation of subsequent years' net regulatory income for purposes of determining whether regulatory net income exceeds the threshold amount as determined in paragraph 2 above. Specifically, in calculating regulatory net income during any calendar year in which a refund payment is made, any refund payments made during the year shall be deducted from that year's income in determining the final regulatory net income.

WHSC's Refund Proposal, at 3-4.

WHSC filed its refund proposal without prejudice to any of its arguments in its Motion for Reconsideration, or its Motion to Stay. Should the commission decline to vacate Order No. 23635 in its entirety, WHSC finds it "necessary and appropriate to have the matter reviewed by the appellate courts."⁴⁴

WHSC's refund proposal lacks certain information for the commission's review and consideration. For example, WHSC: (1) does not explain why it utilizes the prime rate of interest in calculating interest, instead of the rate equal to its authorized rate of return, consistent with HRS § 269-16(d); and (2) does not provide supporting data or worksheets to show how the decreased revenues and additional interest amounts, as reflected in Exhibit A of its Motion for Reconsideration, were calculated. Accordingly, the commission instructs WHSC to: (1) re-calculate its refund plan, by including "interest, at a rate equal to the rate of return on [WHSC's] rate base found to be reasonable by the commission," HRS § 269-16(d); and (2) provide the commission and the Consumer Advocate with the data and worksheets in support of WHSC's calculations. WHSC shall file its revised refund plan and supporting data and worksheets with the commission by January 25, 2008, with copies served on the Consumer Advocate. The Consumer Advocate, in turn, shall have the opportunity to review and comment on WHSC's revised refund plan. The Consumer Advocate's comments, if any, shall be due by February 11, 2008.

⁴⁴WHSC's Motion to Stay, at 4.

In seeking further information and clarification on WHSC's proposed refund plan, the commission, once again, "strongly encourages the parties to reach a reasonable agreement that is fair and equitable to the utility and its ratepayers, which [will] allow[] utility services to continue. This allowance for mitigation is consistent with the spirit and intent of Chapter 269, HRS, and the commission's ratemaking function of making pragmatic adjustments called for by the particular circumstances[.]"⁴⁵

The new monthly standby charge of \$20.01 per unit shall take effect on January 9, 2008. No action will be taken by the commission on the updated tariff sheets filed by WHSC on September 28, 2007.

IV.

Orders

THE COMMISSION ORDERS:

1. WHSC's Motion for Reconsideration, filed on September 19, 2007, is granted in part and denied in part, consistent with the terms of this Order.

2. WHSC's request for reconsideration with respect to its Argument No. 4 (adjustment for amortization) is granted. The revised revenue requirement schedule that establishes the new monthly standby charge of \$20.01 per unit is attached hereto.

3. WHSC's request for reconsideration with respect to its other remaining arguments is denied.

⁴⁵Order No. 23635, at 28.

4. Order No. 23701, filed on October 9, 2007, which stayed Order No. 23635 pending the commission's adjudication of WHSC's Motion for Reconsideration, is hereby dissolved, consistent with HAR § 6-61-138.

5. The new monthly standby charge of \$20.01 per unit shall take effect on January 9, 2008.

6. WHSC shall: (A) re-calculate its refund plan, by including interest at its authorized rate of return, consistent with HRS § 269-16(d); and (B) provide the commission and the Consumer Advocate with the data and worksheets in support of WHSC's calculations. WHSC shall file its revised refund plan and supporting data and worksheets with the commission by January 25, 2008, with copies served on the Consumer Advocate.

7. The Consumer Advocate shall have the opportunity to review and comment on WHSC's revised refund plan. The Consumer Advocate's comments, if any, shall be due by February 11, 2008.

DONE at Honolulu, Hawaii DEC 28 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By (EXCUSED)
John E. Cole, Commissioner

By Leslie H. Kondo
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

Michael Azama

Michael Azama
Commission Counsel

Revised

Waikoloa Sanitary Sewer Company, Inc., dba West Hawaii Sewer Company
Revenue Requirements
Test Year Ending December 31, 2001

	<u>Present Rates</u>	<u>Additional Amount</u>	<u>Approved Rates</u>
Revenues:			
Sewer Revenues	\$ 600,418	28,929	\$ 629,347
Miscellaneous Service Revenue	-	-	-
Other Operating Revenues	-	-	-
Total Operating Revenues	<u>600,418</u>	<u>28,929</u>	<u>629,347</u>
O & M Expenses			
Chemicals	23,814		23,814
Contractual Services	40,112		40,112
Insurance	20,241		20,241
Materials/Supplies	34,448		34,448
Power	42,262		42,262
Rent	13,313		13,313
Salaries & Wages	270,429		270,429
Transportation Expense	1,795		1,795
Regulatory Commission Expense	15,481		15,481
Depreciation	58,152 *		58,152 *
Bad Debt	723		723
Miscellaneous Expense	1,155		1,155
Total O&M Expenses	<u>521,925</u>	<u>0</u>	<u>521,925</u>
Taxes Other Than Income Taxes	38,337	1,847	40,184
Interest on Customer Deposits	0	-	0
Income Taxes	12,605	8,501	21,107
Total Operating Expenses	<u>572,867</u>	<u>10,348</u>	<u>583,216</u>
Operating Income	<u>\$ 27,551</u>	<u>\$ 18,581</u>	<u>\$ 46,131</u>
Average Rate Base	<u>\$ 461,312</u>		<u>\$ 461,312</u>
Return on Rate Base	<u>5.97%</u>		<u>10.00%</u>

* Depreciation expense reduced by 1/50th of \$732,990

Revised

Waikoloa Sanitary Sewer Company, Inc., dba West Hawaii Sewer Company Analysis of Rate Increase

	<u>Amount</u>	<u>% Increase</u>
Rate Increase:		
Recon Rate Increase	28,929	4.82%
Less:		
Interim Rate Increase (D&O No. 18995)	103,944	17.31%
Rate Increase (D&O No. 19223)	36,021	6.00%
Increase (Decrease)	<u><u>(111,036)</u></u>	-18.49%

Revised

Waikoloa Sanitary Sewer Company, Inc., dba West Hawaii Sewer Company
Taxes Other Than Income Taxes
Test Year Ending December 31, 2001

		<u>Present Rates</u>	<u>Approved Rates</u>
<u>Revenue Taxes:</u>			
Public Service Company Tax	5.885%	\$ 35,335	\$ 37,037
PUC Fee	0.5%	<u>3,002</u>	<u>3,147</u>
Total Taxes Other Than Income Taxes		<u>\$ 38,337</u>	<u>\$ 40,184</u>

Revised

Waikoloa Sanitary Sewer Company, Inc., dba West Hawaii Sewer Company

Income Tax Expense

Test Year Ending December 31, 2001

	<u>Present Rates</u>	<u>Approved Rates</u>
Revenues:		
Sewer Revenues	\$ 600,418	\$ 629,347
Miscellaneous Service Revenue	-	-
Other Operating Revenues	-	-
Total Operating Revenues	<u>600,418</u>	<u>629,347</u>
O & M Expenses		
Chemicals	23,814	23,814
Contractual Services	40,112	40,112
Insurance	20,241	20,241
Materials/Supplies	34,448	34,448
Power	42,262	42,262
Rent	13,313	13,313
Salaries & Wages	270,429	270,429
Transportation Expense	1,795	1,795
Regulatory Commission Expense	15,481	15,481
Depreciation	58,152	58,152
Bad Debt	723	723
Miscellaneous Expense	1,155	1,155
Total O&M Expenses	<u>521,925</u>	<u>521,925</u>
Taxes Other Than Income Taxes	38,337	40,184
Interest on Customer Deposits	-	-
Total O&M Expenses Before Income Taxes	<u>560,262</u>	<u>562,109</u>
Adjustments:		
Interest Expense	-	-
Meals and Entertainment	-	-
Taxable Income	40,156	67,238
Income Tax Provision Effective tax rate of 31.3910%	12,605	21,107
Less Amortization of :		
State ITC Amortization	<u>0</u>	<u>0</u>
Income Tax Expense	<u>\$ 12,605</u>	<u>\$ 21,107</u>

Revised

Waikoloa Sanitary Sewer Company, Inc., dba West Hawaii Sewer Company

Average Rate Base

Test Year Ending December 31, 2001

	<u>12/31/2000</u>	<u>12/31/2001</u>	
Plant In Service	\$ 3,636,757	\$ 3,665,929	
Less: Accumulated Depreciation	<u>962,107</u>	<u>1,070,593</u>	
Net Plant in Service	2,674,650	2,595,336	
Deduct:			
Unamortized CIAC	1,888,545 *	1,838,211 **	
Customer Advances	-	-	
Customer Deposits	-	-	
Accumulated Deferred Income Tax	260,386	285,083	
Deferred Hi Cap Goods Credit	77,760	74,672	
Unamortized Gain on Sale of Land	-	-	
Subtotal	<u>2,226,691</u>	<u>2,197,966</u>	
Add:			
Property Held for Future Use	-	-	
Material & Supply Inventory	-	-	
Fuel Oil Inventory	-	-	
Regulatory Asset	-	-	
Subtotal	<u>-</u>	<u>-</u>	
Subtotal	447,959	397,370	
Average			\$ 422,665
Working Cash at Present Rates			<u>38,648</u>
Rate Base at Present Rates			461,312
Change in Working Cash			<u>-</u>
Rate Base at Proposed Rates			<u><u>\$ 461,312</u></u>

* Unamortized CIAC increased by \$732,990

** Unamortized CIAC increased by \$718,330

Revised

Waikoloa Sanitary Sewer Company, Inc., dba West Hawaii Sewer Company
Working Cash Calculation
Test Year Ending December 31, 2001

At Present Rates

Operating Expenses	
Chemicals	\$ 23,814
Contractual Services	40,112
Insurance	20,241
Materials/Supplies	34,448
Power	42,262
Rent	13,313
Salaries & Wages	270,429
Transportation Expense	1,795
Regulatory Commission Expense	15,481
Bad Debt	723
Miscellaneous Expense	<u>1,155</u>
Total O & M Expenses	\$ 463,773
Number of Months in a Year	<u>12</u>
Working Cash	<u><u>\$ 38,648</u></u>

Waikoloa Sanitary Sewer Company, Inc., dba West Hawaii Sewer Company

Average Customers for the Test Year

2001 Customers (Stipulated)	1,301
x 12 Months	12
Annual	15,612

Present Standby Charge/Mo.	18.16
	283,513.92

Customer Usage 2001 (Stipulated)	238,274.00
Present Usage Rate	1.33
Usage Revenues	316,904.42

Present Usage Rate	1.33	Present Usage Rate	1.33
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Present Rates	600,418.00
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Interim D&O 11/5/01	103,944.00	D&O 2/27/02	36,021.00	Revised Increase	28,929.00
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Total Revenues at Approved Rates	704,362.00	Total Revenues at Proposed Rates	740,383.00	Total Revenues at Proposed Rates	629,347.00
less Usage Revenues	<u>316,904.42</u>	less Usage Revenues	<u>316,904.42</u>	less Usage Revenues	<u>316,904.42</u>
Standby Revenues	387,457.58	Standby Revenues	423,478.58	Standby Revenues	312,442.58

Standby Rate Effective 11/7/01	24.82	Standby Rate Effective 3/8/02	27.13	Revised Standby Rate	20.01
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CERTIFICATE OF SERVICE


I hereby certify that I have this date served a copy of the foregoing Order No. 23939 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
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Waikoloa, HI 96738-5703

for 
Karen Higashi

DATED: DEC 28 2007