

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of)  
HAWAII-AMERICAN WATER COMPANY )  
For a Declaratory Ruling )  
Regarding the Validity of the )  
1961 Agreement Between and Among )  
The Trustees Under the Will and )  
Of the Estate of Bernice P. )  
Bishop, Deceased; Kaiser Hawaii )  
Kai Development Co.; and the )  
City and County of Honolulu of )  
The State of Hawaii, which )  
Provides Sewerage Services at No )  
Charge to the City and County of )  
Honolulu of the State of Hawaii )  
And/or State of Hawaii. )  
\_\_\_\_\_ )

DOCKET NO. 05-0140

ORDER NO. 21888

Filed June 23, 2005  
At 2 o'clock P.M.

Karen Higashi  
Chief Clerk of the Commission

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

K. Higashi

OFFICE OF CONSUMER AFFAIRS  
BUREAU OF UTILITIES AND  
PUBLIC UTILITIES  
STATE OF HAWAII

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Docket No. 05-0140

Order No. 21888

ORDER

By this Order, the commission: (1) refuses to issue a declaratory order as requested by HAWAII-AMERICAN WATER COMPANY ("HAWC") in its petition filed on June 7, 2005 ("Petition"), pursuant to Hawaii Administrative Rules ("HAR") § 6-61-164; and (2) orders that it will, by its own motion and by separate order, initiate a separate proceeding to investigate and examine HAWC's allegation that the 1974 amendment of Hawaii Revised Statutes ("HRS") Chapter 269 which includes sewerage companies as public utilities under the commission's regulation ("1974 Amendment")<sup>1</sup>

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<sup>1</sup>Specifically, Act 59 Session Laws of Hawaii 1974 amended HRS § 269-1 to include the provision of sewerage services by a private individual under the definition of a public utility--essentially placing the regulation of rates and charges for sewerage services provided by a private person or entity under the jurisdiction of the commission.

invalidates the 1961 agreement between and among the Trustees under the Will and of the Estate of Bernice P. Bishop, Deceased; Kaiser Hawaii Kai Development Co.; and the City and County of Honolulu of the State of Hawaii ("City") which provides for the provision of sewerage services to the City and/or State of Hawaii ("State") at no charge ("1961 Agreement")<sup>2</sup> and other related matters, under HRS §§ 269-7 and 269-15 and HAR § 6-61-71.

### I. Background

HAWC's Petition requests that the commission issues a declaratory order ruling that: (1) the 1961 Agreement is no longer valid, due to, in part, the 1974 Amendment; and HAWC's commission approved tariff ("Tariff"); and (2) the City and State are subject to the Tariff and are required to pay their arrears and future sewerage fees in accordance to the Tariff. HAWC filed its Petition under HAR Chapter 6-61, Subchapter 16.

Copies of HAWC's Petition, with its attachments,<sup>3</sup> were served on the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY.

### II. Discussion

Before delving into the substantive aspects of HAWC's Petition, if at all, the commission must first determine whether

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<sup>2</sup>While HAWC refers to the 1961 Agreement throughout its Petition and various attachments, HAWC did not attach a copy of the 1961 Agreement to its Petition for the commission's review.

<sup>3</sup>In support of its Petition, HAWC attached its Memorandum in Support of Petition, the Tariff, and the Declaration of Lee Mansfield to its Petition.

the Petition, as filed, is a matter that the commission will undertake under HAR Chapter 6-61, Subchapter 16.

HAR Chapter 6-61, Subchapter 16 governs the filing and disposition of commission declaratory orders. Specifically, under HAR § 6-61-164, the commission may, for good cause, deny or refuse to issue a declaratory order by giving specific reasons for such a determination. Among a non-exhaustive list, under HAR § 6-61-164(3), the commission may refuse to issue a declaratory order where "[t]he issuance of the declaratory order may affect the interest of the State in pending litigation or in litigation that may reasonably be expected to arise[.]"

The commission takes official notice, pursuant to HAR § 6-61-48, of the Complaint for Declaratory Relief and Damages; Exhibit A; Summons filed by HAWC against the State, the Hawaii State Department of Education, the Hawaii State Department of Land and Natural Resources, and various unnamed individuals and entities ("Named Defendants") with the clerk of the Circuit Court of the First Circuit of the State of Hawaii ("Circuit Court") on December 3, 2004, Civil No. 04-1-2243-12 ("Legal Complaint"). In its Legal Complaint, HAWC alleges that "[a]n actual controversy exists as to whether HAWC is required to provide sewerage services to [the Named D]efendants and, if so, whether [the Named D]efendants are required to pay HAWC the rates specified in the Tariff and/or are otherwise liable to HAWC for the sewerage services provided and to be provided."<sup>4</sup> To the best

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<sup>4</sup>See, Plaintiff's, HAWC, *Compliant for Declaratory Relief and Damages* at 3; Civil No. 04-1-2243-12.

of our knowledge, HAWC's Legal Complaint is still a pending matter before the Circuit Court.

The issues in controversy alleged by HAWC in its Legal Complaint are directly related to the matters of HAWC's Petition. A declaratory order, as requested by HAWC in its Petition, may affect the interest of the State in HAWC's Legal Complaint against the State. We note that the State did not join HAWC in HAWC's Petition to the commission. Moreover, we do not believe that the parameters and limitations of a declaratory proceeding is the proper means to address the HAWC's central issue of whether the 1974 Amendment invalidates the 1961 Agreement. Accordingly, in light of the above, we find good cause to refuse to issue a declaratory order, as requested in HAWC's Petition.

Nonetheless, in light of the allegations stated in HAWC's Petition, the commission finds that it is in the public interest to further examine HAWC's allegation that the 1974 Amendment invalidates the 1961 Agreement and other related matters under its investigative powers. In particular, HRS §§ 269-7 and 269-15 and HAR § 6-61-71 authorizes the commission to institute and examine proceedings on any matter relating to a utility's practices and services or otherwise affecting the relations and transactions between the utility and the public. Accordingly, the commission will, on its own motion and by separate order, initiate a new proceeding to investigate and examine HAWC's allegation that the 1974 Amendment invalidates the 1961 Agreement and other related matters, under HRS §§ 269-7 and

269-15 and HAR § 6-61-71, shortly after the issuance of this Order.

### III. Declaration and Orders

#### A. Declaration

THE COMMISSION, pursuant to HAR § 6-61-164, refuses to issue a declaratory order, as requested in HAWC's Petition.

#### B. Orders

THE COMMISSION ORDERS:

1. The initiation of a new and separate proceeding, on its own motion and by a separate order, to investigate and examine HAWC's allegation that the 1974 Amendment invalidates the 1961 Agreement and other related matters, under HRS §§ 269-7 and 269-15 and HAR § 6-61-71. Further commission action is to follow in a separate docket to be opened subsequent to the issuance of this Order.


2. This docket is closed, unless otherwise ordered by the commission.

DONE at Honolulu, Hawaii JUN 23 2005.


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

05-0140.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 21888 upon the following Petitioners, 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 23 2005