BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

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

DECISION AND ORDER NO. 22282

Filed Feb. 10, 2006

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

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DECISION AND ORDER

By this Decision and Order, the commission finds that KUILIMA RESORT COMPANY ("KRC") operated as a public utility without commission authority by providing wastewater service to the Kuilima Estates East and Kuilima Estates West condominiums.

The commission also finds that NORTH SHORE WASTEWATER TREATMENT, L.L.C.'s ("NSWT") 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. Those rates are permanently suspended, unless and until new wastewater rates are approved by the commission following the conclusion of a general rate case.

In addition, the commission finds that KRC and NSWT's regulatory violations were not willful or intentional, and, therefore, declines to impose sanctions.

I.

Background

KRC, a Hawaii general partnership,[1] is the current owner of the Hotel at Turtle Bay Resort, the Turtle Bay Resort Golf Club, and certain surrounding properties on the North Shore of Oahu. KRC also owns all of the land within the applicable area, and was the provider of wastewater service prior to NSWT.

NSWT is a Delaware limited liability company authorized to do business in the State of Hawaii ("State"). NSWT's sole member is Turtle Bay Holding, L.L.C., a Delaware limited liability company. Turtle Bay Holding, L.L.C. is also the ninety-nine (99) percent general partner of KRC.

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[1]KRC's general partners are: (1) Turtle Bay Holding, L.L.C., a Delaware limited liability company; and (2) A.J. Plaza Hawaii Co., Ltd., a Hawaii corporation. Turtle Bay Holding, L.L.C. is the sole member of NSWT. The sole shareholder of A.J. Plaza Hawaii Co., Ltd. is Turtle Bay A.J. Plaza, L.L.C. Oaktree Capital Management, LLC is the present manager of: (1) Turtle Bay Holding, L.L.C.; (2) Turtle Bay A.J. Plaza, L.L.C.; and (3) NSWT. NSWT-T-100, at 4. See also NSWT's responses to PUC-IR-101, dated August 24, 2005 (IC-05-103) and August 26, 2005 (IC-05-119); and Transcript of Proceedings held on November 15, 2005, in Docket No. 05-0238 ("Transcript"), at 21 - 22 and 40.

In 1998, under a joint venture agreement with certain affiliates of a local developer, Oaktree Capital Management, LLC, as the general partner or investment manager of certain investment funds, provided the equity and debt financing to enable the joint venture to acquire Asahi Jyuken's interests in KRC. An affiliate of the local developer was the managing member of KRC and handled the daily operations. In 1999, disputes arose between the joint venture's members. By the end of 2000: (1) the local developer's affiliates withdrew from the joint venture; and (2) Oaktree Capital Management, LLC, obtained control of and became the manager of Turtle Bay Holding, L.L.C., Turtle Bay A.J. Plaza, L.L.C., and by extension, KRC. NSWT-T-100, at 4 - 5. See also Transcript, at 40 - 41.

In the early 1970's, a wastewater treatment plant was constructed to serve the improvements for the then master-planned Kuilima Resort, which commenced operations in 1972. The Kuilima Hotel, a golf course, and club house opened soon thereafter. In addition, the nearby Kuilima East and Kuilima West condominium projects were completed around 1972 by a separate developer, unrelated to the original developer of the Kuilima Resort. Both condominiums were served by the initial treatment plant.

The Kuilima Estates East condominium consists of one-hundred sixty-eight (168) residential units, ranging from studios to two (2)-bedroom units, while the Kuilima Estates West condominium consists of two-hundred (200) residential units, ranging from studios to three (3)-bedroom units.[2]

The Kuilima Estates East and Kuilima Estates West condominiums are located on leasehold land owned by KRC. Both the ASSOCIATION OF APARTMENT OWNERS of the Kuilima Estates East and Kuilima Estates West (collectively, "AOAOs") are presently in negotiations with the landowner for the purchase of the fee simple interest in the underlying land.[3]

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[2]See Decision and Order No. 21864, Exhibit C, Schedule 3.

[3]IC-05-103, dated July 21, 2005, at 1 - 2; IC-05-119, dated August 5, 2005, and filed on August 9, 2005, at 1.

In 1988, Kuilima Development Company, the then owner and developer of the Kuilima Resort, deeded the Turtle Bay improvements and properties to KRC. KRC then updated the master plan for developing the resort; and obtained approval to construct up to five (5) hotels (comprised of up to 2,000 rooms) and 2,000 resort condominiums.

In conjunction with the future developments, KRC constructed a new treatment plant at a cost in excess of ten million dollars in or around 1991. When the treatment plant was placed into service, KRC retired and removed the initial plant from service.

In 2004, the development plans for the Ocean Villas condominium project, the first development project in the Turtle Bay area in which the fee simple interest in the underlying land would be sold to third-party purchasers, were being finalized. In early 2004, KRC was advised by its consultants that it "would need to obtain a certificate of public convenience and necessity ("CPCN") to provide sewer service especially since units in the soon to be constructed Ocean Villas condominium project would be sold to third party purchasers."[4]

NSWT was formed to provide the wastewater service and to acquire the treatment plant after it obtained a CPCN.

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[4]NSWT-T-100, at 5. See also Transcript, at 17 - 18, 24 - 26, and 35 - 38.

A.

Docket No. 04-0298

By application filed on October 5, 2004, NSWT sought commission approval to provide wastewater service to the Hotel at Turtle Bay Resort, the Turtle Bay Golf Club, the Kuilima East and Kuilima West condominiums, the proposed Ocean Villas condominium project, and approximately three hundred (300) acres of resort zoned lands that are planned for development within the next ten (10) years.[5] NSWT did not request to increase the wastewater rates or charges assessed by KRC, and no public hearing or contested case proceeding was requested by NSWT and none was held.

At the time NSWT prepared its application for a CPCN in 2004, NSWT attempted to determine whether and to what extent KRC was charging the two AOAOs for sewer service. NSWT was unable to locate any documentation to suggest that a separate rate or payment arrangement with the AOAOs had been established.[6]

NSWT, however, was advised by its consultant that "it was likely that any sewer charges and some maintenance charges for the common areas utilized by the condominium associations (i.e. roadway, entry way landscaping etc.) were included within the monthly lease rent payments made for the underlying fee interest." Nonetheless, the ground lease document did not

[5]NSWT's Application for a CPCN, Exhibits "A" through "G", Verification, and Certificate of Service, filed on October 5, 2004.

[6]NSWT-T-100, at 6; and Transcript, at 19, 27, and 41 - 42.

include any breakdown of the amounts. Based on the lack of any agreement to the contrary, NSWT "believed that to be the arrangement."[7]

On June 14, 2005, the commission approved: (1) NSWT's application for a CPCN to provide wastewater service within the Kahuku area, island of Oahu; and (2) NSWT's initial rate structure and wastewater charges, as agreed-upon between NSWT and the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"), the parties in Docket No. 04-0298.[8] In Docket No. 04-0298, the commission took no position on NSWT's rationale that KRC was not required to obtain a CPCN.[9]

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[7]NSWT-T-100, at 6 - 7. See also Transcript, at 18, 27, 41 - 42, 44 - 45, 57 - 59, and 65 - 70.

[8]In re North Shore Wastewater Treatment, L.L.C., Docket No. 04-0298, Decision and Order No. 21864, filed on June 14, 2005; and Order No. 21905, filed on July 1, 2005.

[9]According to Decision and Order No. 21864:

> NSWT represents that: (1) although KRC did not own or develop the Kuilima East and Kuilima West condominiums, KRC still owns the fee interest of the underlying lands; (2) KRC continued the practice of its predecessor by providing sewer service, landscape maintenance, and select common areas maintenance services to both condominiums for a monthly lump sum payment from the respective condominium associations as part of the monthly land lease charge; and (3) because KRC and its predecessor owned the fee simple interest of the land underlying the respective condominium projects, KRC was not aware of any requirement to obtain a commission-issued CPCN.
>
> The Consumer Advocate, in response, states:
>
> While there is merit to the assessment that KRC and its predecessor was not required to obtain a CPCN for wastewater treatment service provided to the Kuilima Resort, the

In August 2005, after NSWT informed the property manager of the commission's approval of NSWT's CPCN and initial wastewater rates in Docket No. 04-0298, NSWT stated that it learned of a possible sewer services payment arrangement, which was different from the arrangement previously discussed, from the property manager for one of the AOAOs.[10] According to the property manager, the AOAOs "had been sending separate payments to KRC at Oaktree's office in New York - one check for the ground lease rent and another check for sewer charges."[11] None of the payments were sent to KRC's Hawaii office.[12]

> Consumer Advocate does not agree that a CPCN was not required for the service provided to the Kuilima Condos. The reason is KRC or its predecessor did not own the Kuilima Condos. Thus service was being provided to the general public requiring a CPCN.
>
> Consumer Advocate's position statement, at 3, footnote 5.
>
> The commission, in this Decision and Order [No. 21864], takes no position on NSWT's rationale that KRC was not required to obtain a CPCN. According to NSWT, negotiations are on-going to sell the fee simple interest to the owners of the condominium units in both the Kuilima East and Kuilima West projects. See Parties' Stipulation, at 7, footnote 6.

Decision and Order No. 21864, at 5 n.6.

[10]NSWT states that at one time, the property manager managed both AOAOs, NSWT-T-100 at 7, but is currently the property manager for the Kuilima Estates East AOAO. Transcript, at 18.

[11]NSWT-T-100, at 7. See also Transcript, at 18 - 19, 27, and 58 - 60.

[12]Transcript, at 42 and 49.

To date, NSWT stated that it has been unable to locate a copy of any agreement that establishes the assessment of a separate sewer fee to the AOAOs, despite NSWT's efforts to locate or obtain a copy of any such agreement from: (1) the files it "inherited from [the local developer/affiliate] and Asahi Jyuken and its predecessors[;]" (2) the property manager; and (3) the AOAOs.[13]

B.

IC-05-103, IC-05-119, and the Petition

Following the commission's issuance of NSWT's CPCN, NSWT notified the AOAOs of the wastewater rates NSWT intended to charge the respective AOAOs. In response, both AOAOs filed informal complaints with the commission (IC-05-103 and IC-05-119, respectively),[14] followed by a Petition to Reopen Docket No. 04-0298 and to Defer the Effective Date of [the] Tariff Rates

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[13]NSWT-T-100, at 7 - 8. See also Transcript, at 18 - 19, 27, 41 - 42, and 66 - 67.

[14]IC-05-103, dated July 21, 2005 (Kuilima Estates West AOAO); Commission's letter, dated July 22, 2005; NSWT's response to IC-05-103, dated August 8, 2005; Consumer Advocate's response to IC-05-103, dated August 11, 2005; Commission's information requests, dated August 12, 2005; Consumer Advocate's letter, dated August 12, 2005; NSWT's letter, dated August 22, 2005; NSWT's responses to the Commission's information requests, dated August 24, 2005; Commission's letters, dated August 26 and 29, 2005.

IC-05-119, dated August 5, 2005, and filed on August 9, 2005 (Kuilima Estates East AOAO); Commission's letter and information requests, dated August 12, 2005; NSWT's responses to the Commission's information requests, dated August 26, 2005; Commission's letter, dated August 29, 2005.

Approved in Decision and Order No. 21864 (the "Petition").[15] The AOAOs, in their Petition, contended that KRC provided sewer service to the AOAOs and assessed them a monthly sewer fee. Accordingly, the AOAOs alleged that KRC operated as a *de facto* public utility.[16]

The Kuilima Estates East AOAO claimed that: (1) pursuant to an agreement with KRC, it paid a monthly fee of $865 to KRC for wastewater treatment from 1998; and (2) in July 2005, NSWT informed the Association that its monthly sewerage rate would increase by $9,000 per month, or over 1,000 percent, to $9,865 per month, effective from August 1, 2005.[17]

Likewise, the Kuilima Estates West AOAO claimed that: (1) pursuant to an agreement with KRC, it paid a monthly fee of $1,041 to KRC for sewerage from 1998; and (2) in July 2005, NSWT informed the Association that its monthly sewerage rate would increase by a factor of twelve (12), to $12,000 per month, effective from August 1, 2005.[18]

Both AOAOs further stated that: (1) Oaktree Capital Management, LLC did not previously seek to increase the monthly sewerage fee; and (2) they had no prior knowledge of NSWT's

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[15]The Petition was filed on August 26, 2005 by the AOAOs. The respective AOAOs are jointly represented by their attorney of record who filed the Petition. On September 15, 2005, the AOAOs' attorney filed a written verification in support of the Petition, in response to the commission's directive.

[16]See Petition, at 2, 5, and 7.

[17]IC-05-119 at 1.

[18]IC-05-103 at 2.

formation or of NSWT's application for an operating permit and new rates.[19]

The AOAOs also challenged NSWT's assertion that the AOAOs' payments for sewer service were embedded in the monthly land lease charge assessed by KRC:

> . . . It was alleged by [NSWT] that payments for sewer service by each of the AOAOs [were] embedded in the land lease rental and that such amount had to be extracted from the monthly amount paid by each of the AOAOs. That is not the case: a specific amount was paid by each AOAO, each month, in addition to the land lease rent, was regularly recorded, and the amount was actually increased by Oaktree, starting November, 2001, to add the state's general excise tax to the established rate. . . .

Petition, at 7 (emphasis in original) (footnotes and text therein omitted).

The commission noted that the information set forth in the informal complaints, related filings, and the Petition, raised numerous issues that merited further investigation, and posed the following questions to NSWT:

> In PUC Docket No. 04-0298, *In re North Shore Wastewater Treatment, L.L.C.*, NSWT explained that: (1) KRC charged a monthly land lease amount to cover the lease of the land, collection and treatment of wastewater, landscape maintenance, and maintenance of the common areas; (2) the monthly land lease charge ranged from $40 to $66 per unit, depending on the size of the unit; and (3) KRC intends to eliminate from the monthly land lease charge the portion that is related to wastewater collection and treatment, once NSWT initiates wastewater service.[20] NSWT was unable to

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[19]IC-05-103 at 2; IC-05-119 at 1 - 2.

[20]In re North Shore Wastewater Treatment, L.L.C., Docket No. 04-0298, Decision and Order No. 21864, filed on June 14, 2005, Section II(F), at 9.

identify or segregate what portion of the KRC-assessed monthly land lease amount is related to the collection and treatment of wastewater.[21]

Kuilima Estates West AOAO

A. Complainant [Kuilima Estates West AOAO] identifies a monthly sewerage rate of $1,041, since 1998, indicating apparent segregation between the monthly land lease amount and the portion related to wastewater collection and treatment. Please respond.

B. Please explain how the monthly sewerage rate of $1,041 was calculated by KRC.

C. Complainant [Kuilima Estates West AOAO] characterizes the monthly sewerage rate NSWT intends to assess, at $12,000 per month, as a rate increase, when compared to the monthly sewage rate of $1,041 charged by KRC. Please respond.[22]

D. Please explain how the monthly sewerage rate of $12,000 was calculated by NSWT.

PUC-IR-102, dated August 12, 2005, in IC-05-103 (footnotes and text therein included). See also PUC-IR-102, dated August 12, 2005, in IC-05-119.

Kuilima Estates East AOAO

A. Complainant [Kuilima Estates East AOAO] identifies a monthly sewage rate of $865, since 1998, indicating apparent segregation between the monthly land lease amount and the portion related to wastewater collection and treatment. Please respond.

B. Please explain how the monthly sewerage rate of $865 was calculated by KRC.

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[21] In re North Shore Wastewater Treatment, L.L.C., Docket No. 04-0298((1) NSWT's Application, Exhibit D, at 5 - 6; (2) NSWT's response to CA-IR-22; and (3) NSWT's response to CA-SIR-14(b)).

[22] See [HRS] § 269-1, "Public Utility," Paragraph 1(A), in Act 164, 2005 [Haw. Sess. Laws 413]; and Act 59, 1974 [Haw. Sess. Laws 109].

C. Complainant [Kuilima Estates East AOAO] characterizes the monthly sewerage rate NSWT intends to assess, at $9,865 per month, as a rate increase, when compared to the monthly sewage rate of $865 charged by KRC. Please respond. (See HRS § 269-1, "Public Utility," Paragraph 1(A), in Act 164, 2005 Session Laws of Hawaii; and Act 59, 1974 Session Laws of Hawaii.)

D. Please explain how the monthly sewerage rate of $9,865 was calculated by NSWT.

PUC-IR-102, dated August 12, 2005, in IC-05-119 (footnotes 1 and 2 and text therein omitted).

Because NSWT's responses to PUC-IR-102, filed on August 24, 2005 (IC-05-103) and August 26, 2005 (IC-05-119), respectively, did not adequately address the commission's concerns, the commission opened this investigative proceeding.

C.

Docket No. 05-0238

On September 21, 2005, the commission initiated the present investigation of NSWT and its predecessors-in-interest, including KRC (collectively, "Respondents"), and named the AOAOs and Consumer Advocate as parties to this proceeding.[23]

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[23]Order No. 22045, filed on September 21, 2005. Respondents, the AOAOs, and the Consumer Advocate are collectively referred to as the "Parties."

As stated in Order No. 22045:

> As part of its investigation, the commission, at the outset, takes official administrative notice of the filings in IC-05-103, IC-05-119, and Docket No. 04-0298, including the Petition. Said filings are incorporated by reference as part of the docket record in this investigation.

Order No. 22045, at 10 (footnote and text therein omitted).

In Section I of the Order, the commission identified the following issues for this proceeding:

1. Whether the provision of wastewater service by NSWT's predecessors-in-interest, including KRC, without a CPCN or commission authority violates applicable regulatory law, including but not necessarily limited to: (A) HRS § 269-1, "Public Utility," Paragraph 1(A), in Act 164, 2005 Haw. Sess. Laws 413, codified at HRS § 269-1(1)(A); (B) Act 59, 1974 Haw. Sess. Laws 109; (C) HRS § 269-7.5; and (D) HRS § 269-16.

2. Whether NSWT's initial wastewater rates, as approved by the commission in Docket No. 04-0298, constitute a *de facto* rate increase, thus requiring: (A) a public hearing and notice thereof, including notice by KRC or NSWT to the consumers, consistent with HRS §§ 269-12(c) and 269-16(b) and (c); and (B) a contested case proceeding, to the extent applicable under HRS § 269-16.[24]

3. Whether any of the alleged violations by KRC or NSWT of regulatory law constitute willful conduct.

4. Whether to impose any penalties, sanctions, or other regulatory action, including the modification, suspension, or revocation of NSWT's CPCN.

5. Any other issues of regulatory law that may arise during the course of the commission's investigation.

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[24]In general, a contested case proceeding is not required: (1) when the public utility seeking a rate increase has annual gross revenues of less than $2 million, and the applicable conditions set forth in HRS § 269-16(f) apply; or (2) when the proceeding is otherwise waived by the parties.

The commission also ordered NSWT to: (1) immediately cease and desist from charging ratepayers its initial tariff wastewater rates previously approved by the commission in Docket No. 04-0298; and (2) revert to the wastewater rates charged by KRC prior to the transfer of the wastewater operations to NSWT. In addition, the commission ordered Respondents to appear before the commission and show cause as to why the commission should not suspend NSWT's initial tariff rates on a permanent basis, and to address the issues identified in Section I of the Order.

On October 3, 2005, Respondents notified the commission that NSWT had informed its ratepayers of the commission's order instructing NSWT to: (1) cease and desist from charging the commission-approved initial tariff wastewater rates; and (2) revert to the wastewater rates charged by KRC prior to the transfer of the wastewater operations to NSWT.[25]

On November 8, 2005, NSWT filed its written testimonies and exhibits.[26] On November 10, 2005: (1) a prehearing conference was held with the Parties' attorneys; and (2) the commission issued Order No. 22120, memorializing the agreements reached and actions taken at the prehearing conference. On November 14, 2005, the AOAOs filed with the commission and served on the other parties their Joint Filing of Hearing Exhibits, Witness List, and

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[25]Respondents' letter, dated October 3, 2005. Respondents state that: (1) it notified the AOAOs by letter to the AOAOs' counsel; and (2) "[t]he other customers within the service area are either related to, affiliated with, or under the common control of KRC and have been notified." Id. at 1 n.1.

[26]NSWT filed written testimonies of KRC's project director (NSWT-T-100) and NSWT's consultant (NSWT-T-101).

Probable Areas of Cross-Examination, in compliance with Order No. 22120.

D.

OSC Hearing

The Order to Show Cause ("OSC") hearing was held on November 15, 2005.[27] Appearing before the commission were: (1) Michael H. Lau, Esq., representing the Respondents; (2) William W. Milks, Esq., representing the AOAOs; and (3) Jon S. Itomura, counsel for the Consumer Advocate.[28]

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[27]The OSC hearing, initially scheduled for October 26, 2005, was re-scheduled to November 15, 2005, pursuant to the Parties' request. See Order No. 22067, filed on October 11, 2005.

[28]Chairman Carlito P. Caliboso presided over the OSC hearing, with Commissioner Janet E. Kawelo present. Commissioner Wayne H. Kimura was absent and excused.

Two preliminary matters were addressed at the outset of the OSC hearing: (1) Respondents withdrew the written testimony of NSWT's consultant, NSWT-T-101, and portions of the written testimony of KRC's project director, NSWT-T-100 (portions of pages 2 and 3); and (2) the Parties stated they would not object to Commissioner Wayne H. Kimura's participation in this Decision and Order, notwithstanding his absence from the hearing, subject to Respondents' proviso that no significant delay result in the issuance of the Decision and Order based on the participation of the absent commissioner. Respondents noted that the complete and partial withdrawal of their written testimonies was based on their review of Order No. 22120, which made clear that "Docket No. 04-0238 is not a general rate case proceeding, and NSWT's rate design approved by the commission in Docket No. 04-0298, and the methodology used in calculating the rate design, will not be at issue in the OSC hearing." Order No. 22120, at 2. See Transcript, at 5 - 8.

Respondents' complete and partial withdrawal of their written testimonies was orally approved by Chairman Caliboso, with the condition that the physical documents that comprise the written testimonies would remain intact as part of the docket record as government documents, consistent with HRS §§ 92F-3 (concerning "government records") and 92F-11. Transcript, at 7.

Each of the Parties proceeded with opening statements, pursuant to Order No. 22120.[29] Most notably, the AOAOs' counsel conceded that NSWT's existing wastewater rate (i.e., the rate charged by KRC) was too low and non-compensatory, and indicated their willingness to pay more for wastewater service.[30]

Respondents' two witnesses orally testified: KRC's project director and NSWT's consultant. During direct examination, KRC's project director stated:

> To the extent that the PUC allows [NSWT's] previous approved rates back into effect, [NSWT] is willing to phase in the rates in one-third increments, starting in January 2006, July 1st, 2006, and January 1st, 2007.

Transcript, at 20.

KRC's project director was cross-examined by the AOAOs' counsel. Both witnesses also responded to the commissioners' questions.

One witness orally testified for the AOAOs, the president of the Kuilima Estates East AOAO ("AOAOs' witness"). She testified that in preparing the majority of the AOAOs' Hearing Exhibits,[31] she reviewed: (1) documents from her personal files; (2) documents located at the property management firm; and (3) information provided by her neighbors and from the resident manager's office. See Transcript, at 70 - 88 and 96 - 97. She

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[29]Transcript, at 8 - 16.

[30]Transcript, at 12.

[31]Specifically, Exhibits AOAO-001 to AOAO-010 and AOAO-013 to AOAO-015. Transcript, at 70 - 88 and 96 - 97. Exhibits AOAO-011 and AOAO-012, which are documents from Docket No. 04-0298, were sponsored by the AOAOs' counsel. Transcript, at 83 - 84.

also testified that for the Kuilima Estates East monthly lease rental payment, the individual owners send their payments to the property management firm, which in turn sends one lump sum check to Oaktree. Transcript, at 73 - 74. With respect to the sewer fees, the AOAOs' witness explained:

> Q . . . Now, relative to the - what you believe to be the sewer fees that the association pays, is that the same process that Certified [Management Inc.] pays it on your behalf?
>
> A Certified pays all of our bills on our behalf. With the sewage fee, though, it's not an individual amount per apartment, like it is with the lease rent; it's a lump sum for the association.

Transcript, at 74. See also Transcript, at 103.

The AOAOs' witness has lived at the Kuilima Estates East complex since 1984. Transcript, at 71, 89, and 102. On direct examination, she stated that she understood the Kuilima Estates East AOAO has been paying for its sewer service on a monthly basis:

> Q So for that - the 21 years you have resided at Kuilima, have you been with the understanding throughout that the association was paying for its sewer service on a monthly basis?
>
> A Yes.
>
> . . . .
>
> Q Are you with the understanding that whatever amount is paid, that it is a payment for things in addition to sewer, such as landscaping or the covering of a portion of common costs?
>
> A No. It's sewage.
>
> . . . .

> Q . . . you remain steadfast in your belief that the association pays a specific amount each month specifically for and only for sewage services?
>
> A That's correct.

Transcript, at 80 - 82.

With respect to the issuance of an invoice for sewer service, the AOAOs' witness testified:

> Q Had you ever received an invoice for the sewer services that were provided, or are you aware of finding any invoice?
>
> A. We wouldn't get individual invoices as owners, and invoices wouldn't - 99 per cent of the time go directly to our managing agent.
>
> Q Do you know whether or not they had received invoices?
>
> A As far as I know, they have never received an invoice.

Transcript, at 80 - 81. See also Transcript, at 101.

The AOAOs' witness: (1) was cross-examined by counsel for Respondents and the Consumer Advocate, respectively; (2) responded to the commissioners' questions; and (3) sponsored some of the AOAOs' Hearing Exhibits.

The Consumer Advocate did not present any witnesses or documentary evidence.

The AOAOs' Hearing Exhibits were accepted into evidence over Respondents' objections and the Consumer Advocate's stated concerns.[32] Consistent with Order No. 22120, the OSC hearing concluded with no closing statements.

[32]Transcript, at 104 - 06.

E.

Post-Hearing Briefs

On December 22, 2005, the Parties filed their respective Post-Hearing Briefs.

1. The AOAOs' Post-Hearing Brief

The AOAOs contend that the original concerns, which prompted the commission's issuance of Order No. 22045 remain unanswered. They assert that NSWT and its predecessors-in-interest, including KRC, have violated applicable regulatory law for over thirty (30) years by providing sewer service and owning and operating sewer facilities since the early 1970s, without commission authority or oversight.

The AOAOs disagree with Respondents' argument that until 2005, KRC was not required to obtain a CPCN because it was not providing sewer service to any third parties who held fee simple interests in the underlying land. The AOAOs contend that: (1) the sale of fee simple land interests to third-parties has no connection to the requirements of HRS §§ 269-1 (definition of "public utility") and 269-7.5 (CPCN); and (2) the sale of a utility service to third parties makes KRC a public utility, irrespective of the fact that the AOAOs lease the underlying land owned by KRC.

The AOAOs assert that: (1) they made monthly payments for sewer service, separate and apart from land lease payments or resort fees; and (2) NSWT's initial tariff wastewater rates substantially increased the rates the AOAOs had previously paid

for sewer service. As such, the AOAOs contend that the provisions of HRS §§ 269-12(c) and 269-16(b) and (c) apply.

The AOAOs also note that while HRS chapter 269 is silent on the topic of initial rates, they point out that in Otter Tail Power Co. v. Federal Energy Regulatory Comm'n, 583 F.2d 399 (8th Cir. 1978) ("Otter Tail Power"), the Eighth Circuit Court of Appeals reviewed policy considerations of the Federal Energy Regulatory Commission's ("FERC") jurisdiction to suspend a purported initial rate filed by an electric utility:

> When a utility seeks to change the schedule the [Federal Power] Act provides [FERC] with the authority to preserve the rate for five months in order to give [FERC] time to assess the new rate. This supplemental suspension power is not available when considering initial rates since there is no service status quo to maintain. Thus "initial rates," although the Act does not specifically use this phrase, would appear to be rates that are set in the first instance by the public utility to cover new services rendered to new customers. A changed rate, on the other hand, would apparently exist any time a newly filed rate schedule purports to modify or supersede a preexisting schedule. Accordingly, under the literal terms of the Act, if a rate schedule purports to change any "rate, charge, classification, or service," it would presumably constitute a rate change that would be subject to [FERC's] suspension and refund authority.

Otter Tail Power, 583 F.2d at 406 (footnotes and citations therein omitted).

Citing to Otter Tail Power, the AOAOs contend that NSWT is not proposing a new service and any anticipated new customers have yet to subscribe to the utility service. Thus, the AOAOs argue that with NSWT offering the same service to the same customers, NSWT's initial tariff wastewater rate constitutes a rate increase, and not an initial rate.

That said, the AOAOs: (A) readily concede that they are paying less than compensable rates for wastewater service; and (B) propose a phase-in of NSWT's rates, with a cap of thirty dollars ($30) per month per EU.

2. Respondents' Post-Hearing Brief

Respondents reiterate that because KRC and its predecessors-in-interest owned the fee simple interest in the lands underlying the Kuilima Estates East and Kuilima Estates West condominiums, KRC was unaware of any requirement to have a CPCN to provide the sewage service to the AOAOs. From a broader perspective, Respondents reason that "since KRC or its predecessors owned the entire Turtle Bay Resort, including the land underlying the condominium projects, KRC would essentially be serving itself, and not the public."[33]

As Respondents explain:

> In KRC's situation, aside from serving its own operations, it was serving at most two customers - [Kuilima Estates East and Kuilima Estates West]. KRC did not bill or otherwise issue invoices for handling the sewage from these two projects, although KRC and NSWT initially believed a small portion of the monthly ground lease rent included a component for handling the sewage. Given that only two customers were being served and no explicit charges were being assessed by KRC, it is reasonable to conclude that KRC was not serving the public and, therefore, was not in violation of any regulatory laws related to obtaining a CPCN.

Respondents' Post-Hearing Brief, at 8 - 9 (footnote, text, and citations therein omitted).

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[33]Respondents' Post-Hearing Brief, at 7. See also id., at 1 - 2.

Respondents contend that: (1) the requirements of a public hearing and notice to consumers are only triggered when there is an increase in a commission-authorized utility rate under HRS § 269-16(b); and (2) since no prior wastewater rates were authorized by the commission for KRC or its predecessors, the wastewater rates approved by the commission in Docket No. 04-0298 were initial rates. Thus, Respondents argue that NSWT's initial rates, as established in Docket No. 04-0298, do not constitute a rate increase, *de facto* or otherwise. Respondents further assert that nothing in the legislative history of Act 59 suggests that any charges which may have been previously assessed by a non-regulated sewer facility, which are "increased" when the commission establishes the utility's initial rates, constitute a *de facto* rate increase, thus triggering the statutory requirements of a public hearing and notice thereof to consumers.

Respondents also reject the AOAOs' contention that KRC had established a five-dollar ($5) per month sewage rate for each Kuilima condominium unit. Specifically:

1. To date, KRC's project director has yet to receive a copy of any agreement related to the purported separate charge for sewer service or similar documents.

2. The AOAOs' witness has not located any written agreement that details the purported sewer charge, and the AOAOs' Hearing Exhibits do not establish the existence of an agreement for a separate charge for sewer service.

3. As KRC's project director testified, "without actually seeing a sewer agreement, he could not determine if the [approximate $5 per month] charge might be something akin to what is considered today to be a resort fee given that there are a number of services that are provided to the two condominium associations that share common landscaping, a common entrance, and sewer."[34]

4. There is no evidence that Respondents entered into any type of written agreement to establish any particular charge for sewer service.

Respondents request that NSWT's initial tariff wastewater rates take effect anew. At the same time, NSWT expresses its willingness to implement a three (3)-step phase-in of its wastewater rates, in order to minimize "rate shock" upon the AOAOs.

3. Consumer Advocate's Post-Hearing Brief

The Consumer Advocate states that "there may be sufficient facts to question whether the provision of wastewater services by NSWT's predecessor-in-interest, including KRC, without a CPCN did violate applicable regulatory provisions as provided in HRS Chapter 269. The primary factor, however, is a determination of whether any third party was in fact paying a sewage fee rather than a comprehensive fee based upon a lease arrangement."[35]

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[34]Respondents' Post-Hearing Brief, at 12 (citing Transcript, at 41 - 42). See also Respondents' Post-Hearing Brief, at 17.

[35]Consumer Advocate's Post-Hearing Brief, at 3. See also Transcript, at 13.

The Consumer Advocate asserts that, "notwithstanding any prior determination on the sewage company's public utility status, a CPCN proceeding, by definition does not contemplate an existing rate and therefore does not serve to impose a rate increase. Pursuant to the purpose of a CPCN, [NSWT] merely applied to become a utility and the Commission consequently determined the initial rates to be charged for the regulated service. The public notice requirements, therefore, were adequately met and a public notice for contested hearing was not required under the applicable statutory provisions."[36]

The Consumer Advocate also notes that at the OSC hearing, the AOAOs' witness "testified that she could not locate or confirm evidence of a contract, agreement or invoice setting forth a specific rate charged by NSWT's predecessor for wastewater service."[37] "Thus, no evidence could be provided in this record to support [the AOAOs'] contention that NSWT's predecessor, was in fact, assessing a specific agreed upon rate for wastewater treatment service."[38]

The Consumer Advocate, for its part, finds the absence of any willful violation of regulatory law by NSWT.

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[36]Consumer Advocate's Post-Hearing Brief, at 3 - 4. See also id. at 2, and Section III(A), Commission's Notice Complied with Applicable Statutes and Rules, at 4 - 5; Consumer Advocate's response, dated August 11, 2005, to IC-05-103; Transcript, at 13 - 14.

[37]Consumer Advocate's Post-Hearing Brief, at 6.

[38]Consumer Advocate's Post-Hearing Brief, at 6. See also id., at 7.

F.

Post-Hearing Motion

On December 22, 2005, the AOAOs, in conjunction with their Post-Hearing Brief, also filed a Motion to Receive as Evidence an Otherwise Unauthorized Document, i.e., Hearing Exhibit AOAO-021.[39] Respondents and the Consumer Advocate did not file any responses to the AOAOs' Motion.[40] On January 24, 2006, the commission denied the AOAOs' Motion.[41]

II.

Discussion

A.

Issue No. 1

Whether the provision of wastewater service by NSWT's predecessors-in-interest, including KRC, without a CPCN or commission authority violates applicable regulatory law, including but not necessarily limited to: (A) HRS § 269-1(1)(A); (B) Act 59, 1974 Haw. Sess. Laws 109; (C) HRS § 269-7.5; and (D) HRS § 269-16.

The phrase "regulatory law," as defined in HAR § 6-68-4, includes HRS chapter 269 and the commission's applicable rules and orders.

[39]Motion to Receive as Evidence an Otherwise Unauthorized Document, Affidavit of William W. Milks; Exhibit AOAO-021; and Certificate of Service, filed on December 22, 2005 (collectively, "Motion"). Because the Certificate of Service was not attached to the Motion, the commission, on December 23, 2005, instructed the AOAOs to promptly file a signed Certificate of Service, evidencing the service of the AOAOs' Motion upon the other Parties. On December 27, 2005, the AOAOs filed their Certificate of Service, certifying their service of the Motion by hand-delivery on December 22, 2005.

[40]See Hawaii Administrative Rules ("HAR") § 6-61-41(c) and (d).

[41]See Order No. 22235, filed on January 24, 2006.

The term "public utility" includes:

> (1) . . . every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, . . . or the disposal of sewage; provided that the term shall include:
>
> (A) Any person insofar as that person owns or operates a private sewer company or sewer facility[.]

HRS § 269-1(1)(A)(emphasis added). The specific definition of "public utility" set forth in HRS § 269-1(1)(A) took effect on May 28, 1974, by Act 59, 1974 Haw. Sess. Laws 109 ("Act 59").[42]

HRS § 269-7.5 governs the commission's issuance of CPCNs to public utilities, unless otherwise exempted by HRS § 269-7.5, subsection (c). See also HRS §§ 269-7(b) and 269-28(c). HRS § 269-7.5(b), states in part:

> A [CPCN] shall be issued to any qualified applicant, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the terms, conditions, and rules adopted by the commission, and that the proposed

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[42]The purpose of Act 59 "is to regulate the rates and charges for sewerage services provided by a private person." Act 59, Section 1. 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." House Stand. Comm. Rpt. No. 640-74, on S.B. No. 2118-74, in 1974 House Journal, at 800 - 801. "Under this new system, the consumers will be given reasons for any rate increases." Senate Stand. Comm. Rpt. No. 587-74, on S.B. No. 2118-74, in 1974 Senate Journal at 978 - 979; and Senate Stand. Comm. Rpt. No. 777-74, on S.B. No. 2118-74, in 1974 Senate Journal at 1048.

> service is, or will be, required by the present or future public convenience and necessity; otherwise the application shall be denied . . . .

HRS § 269-7.5(b).

HRS § 269-16(a) and (b) mandate that all rates, charges, and rules made, charged, or observed by any public utility be: (1) just and reasonable; and (2) filed with and authorized by the commission. See also HRS § 269-12(b).

As noted above, HRS § 269-1 defines a "public utility" as "every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise . . . any plant or equipment, or any part thereof, directly or indirectly for public use, for . . . the disposal of sewage." The Hawaii Supreme Court provided further clarification of the definition of a public utility in In re Wind Power Pacific Investors-III, 67 Haw. 342, 686 P.2d 831 (1984) ("Wind Power"), by adopting the following test:

> Whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

Wind Power, 67 Haw. at 345, 686 P.2d at 834 (quoting 73B C.J.S. Public Utilities § 3).

The commission examined the control of a facility as another critical factor that distinguishes a facilities operator from a "public utility" in In re Poipu Kai Water Reclamation Corp.[43] In Poipu Kai, the commission found that a private wastewater company is not a public utility with respect to services that it provides to persons who control the sole shareholder of the company. The commission reasoned under the facts of that case that the private wastewater company was providing services to itself, rather than to the general public, or any portion thereof.

The commission acknowledged in Poipu Kai that the legislative intent for placing private wastewater companies under the commission's jurisdiction was "to protect the public to whom private sewerage service is rendered who have no control over the decision made by the provider of the service."[44] However, the commission concluded that the Poipu Kai Reclamation Corporation would be a public utility if it provided service to a nearby condominium project since the owners of units in the condominium project were not members of the Poipu Kai Association, did not have the right to vote, had no control over the decisions made by the association, and did not have the same input into the rates and conditions for service as the owner-occupants in the Poipu Kai subdivision.

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[43]In re Poipu Kai Water Reclamation Corp., Docket No. 6939, Decision and Order No. 11184, filed on July 22, 1991 ("Poipu Kai").

[44]Poipu Kai, Decision and Order No. 11184, at 5-6 (citing Act 59, 1974 Haw. Sess. Laws 109 and Standing Committee Report 777 of the Senate Ways and Means Comm.), 1974 Sen. Journal 1048)

Likewise, in In re Poipu Wastewater Corp., the commission held that two of the three owners in the Poipu water reclamation facility were not public utilities, as each of the two owners provided water treatment service only to an entity or entities it owned:

> Standing alone, neither CTF [Hotel Sewage Treatment Corporation] nor [Obayashi Hawaii Corporation (OHC)] is a public utility within the meaning of Hawaii Revised Statutes, section 269-1. Each provides water treatment services only to an entity or entities that it owns. CTF provides service only to Waiohai Resort and Poipu Beach Hotel, which CTF owns; and OHC services only the Sheraton Kauai Hotel, which OHC owns. Neither owns any part of the Poipu water reclamation facility for public use. [Poipu Wastewater Corporation (PWC)] is the only party that provides service to the public. Thus, standing alone, neither CTF nor OHC is subject to our regulation. However, PWC is a public utility and subject to our jurisdiction.

Poipu Wastewater Corp., Decision and Order No. 16079, filed on November 14, 1997, at 7 - 8.

Consistent with Wind Power, Poipu Kai, and Poipu Wastewater Corp., the commission in In re Hokuli'a Community Serv., Inc.[45] determined that a nonprofit corporation that owns and operates a water system and reclamation facility for the sole use of its members that control the corporation is not a public utility since the owner-customers of the corporation have the same control over the corporation as was demonstrated in Poipu Kai.[46]

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[45] In re Hokuli'a Community Serv., Inc., Docket No. 00-0009, Decision and Order No. 17557, filed on February 22, 2000 ("Hokuli'a").

[46] See Hokuli'a at 4-5.

In this case, like Poipu Kai and Poipu Wastewater Corp., if KRC provided wastewater service only to the Hotel at the Turtle Bay Resort and the Turtle Bay Golf Club, such operations would likely not have rendered it a public utility under HRS § 269-1. KRC owns the Hotel at the Turtle Bay Resort and the Turtle Bay Golf Club. Thus, KRC essentially provided wastewater service to entities it owned when it serviced these two (2) entities.

However, KRC also provided wastewater service to the Kuilima Estates East and Kuilima Estates West condominiums, which the commission finds, did render it a public utility under HRS § 269-1. The Kuilima Estates East condominium consists of one-hundred sixty-eight (168) residential units, ranging from studios to two (2)-bedroom units, while the Kuilima Estates West condominium consists of two-hundred (200) residential units, ranging from studios to three (3)-bedroom units.[47] The Kuilima condominiums, therefore, consist of approximately three-hundred sixty-eight (368) end users of KRC's wastewater service, who were not affiliated with KRC during KRC's provision of wastewater service prior to June 2005, the effective date of NSWT's CPCN and resulting transfer of the wastewater operations to NSWT.[48] As such, the commission finds that KRC's provision of wastewater service to these end users rendered KRC "as [being] engaged in

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[47]See Decision and Order No. 21864, Exhibit C, Schedule 3.

[48]The commission notes that during cross-examination, KRC's project director testified that he owned two (2) Kuilima condominium units (East and West, respectively) as an investor. Transcript, at 24 and 45.

the business of supplying [its] product or service to the public, as a class, or to any limited portion of it[.]" See Wind Power, 67 Haw. at 345, 686 P.2d at 834. Accordingly, KRC, in providing wastewater service to the Kuilima condominium units, was operating as a public utility as defined by HRS § 269-1.

Respondents argue that KRC and its predecessors-in-interest did not operate a public utility because KRC and its predecessors-in-interest owned the fee simple interest in the lands underlying the Kuilima Estates East and Kuilima Estates West condominiums, and KRC was unaware of any requirement to have a CPCN to provide the sewage service to the AOAOs. From a broader perspective, Respondents reason that "since KRC or its predecessors owned the entire Turtle Bay Resort, including the land underlying the condominium projects, KRC would essentially be serving itself, and not the public."[49]

The commission rejects as unpersuasive Respondents' contention that because KRC and its predecessors owned the fee simple interest in the land underlying the Kuilima condominiums, KRC was essentially providing wastewater service to itself. The commission notes that, under the facts and circumstances of this case, KRC's ownership of the land underlying the Kuilima condominiums is not dispositive in rendering KRC a non-utility.

Respondents also rely on In re Waimea Wastewater Co. in support of their argument that KRC was not operating as a public utility. In Waimea Wastewater Co., the Parker Ranch Foundation

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[49]Respondents' Post-Hearing Brief, at 7. See also id., at 1 - 2.

Trust ("PRFT") proposed to develop a town center and industrial area on the island of Hawaii. Waimea Wastewater Company, Inc. ("Waimea WCI"), a wholly-owned subsidiary of the PRFT, constructed a wastewater treatment facility for the purpose of providing sewage treatment service to the: (1) town center; (2) industrial area; and (3) North Hawaii Community Hospital, a hospital then under construction and a beneficiary of the PRFT.

The commission held that while a CPCN was required for the provision of sewer service to the town center and industrial area, a CPCN was not required for Waimea WCI to accept and process sewage from commercial cesspool pumping contractors. The commission noted that "the service to be provided by Waimea WCI to cesspool pumping contractors is not a sewage disposal or sewerage service[]" as defined in HRS § 269-1.[50] Instead, the commission reasoned that, with respect to the cesspool pumping contractors, Waimea WCI was operating as a depository of cesspool waste.[51]

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[50]Waimea Wastewater Co., Decision and Order No. 14413, filed on December 11, 1995, at 3.

[51]The commission then noted:

> . . . cesspool pumping contractors are small in number. While the number of persons serviced is not determinative of whether a person providing service to that number is a public utility, in the case here, the smallness in the number of contractors involved would create an unnecessary administrative burden on Waimea WCI, should this commission employ the broader definition of sewage disposal.

Waimea Wastewater Co., Decision and Order No. 14413, at 4.

Citing to Waimea Wastewater Co., Respondents assert that "the number of persons serviced is not [necessarily] determinative of whether a person providing service to that number is a public utility."[52] While true, the commission notes that this criteria is but one factor the commission examines in determining whether a specific entity is in fact operating as a public utility.

In this regard, the commission also finds that the AOAOs, and by extension the Kuilima condominium end users, did not have any control over KRC and its wastewater operations during the pre-June 2005 time period at issue herein. See Poipu Kai and Hokuli'a. There is no evidence that the AOAOs and Kuilima condominium end users had any voting or ownership interests in KRC or its wastewater operations. Instead, KRC provided wastewater service to the Kuilima condominiums, independent of any control by the AOAOs or Kuilima condominium end users.

The commission concludes that KRC's provision of wastewater service to the Kuilima condominiums rendered it a public utility under HRS § 269-1, and subject to commission regulation. Accordingly, with respect to the Kuilima condominiums, KRC operated as a public utility without commission authority.

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[52]See Waimea Wastewater Co., Decision and Order No. 14413, at 4.

B.

Issue No. 2

Whether NSWT's initial wastewater rates, as approved by the commission in Docket No. 04-0298, constitute a *de facto* rate increase, thus requiring: (A) a public hearing and notice thereof, including notice by KRC or NSWT to the consumers, consistent with HRS §§ 269-12(c) and 269-16(b) and (c); and (B) a contested case proceeding, to the extent applicable under HRS § 269-16.

HRS § 269-16(b) requires the commission's prior approval "for any increases in rates, fares, or charges[]" assessed by a public utility. Moreover, "[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 [HRS] section 269-12(c) at which the consumers or patrons of the public utility may present testimony to the commission concerning the increase." HRS § 269-16(b).[53]

HRS § 269-12(c) states:

> Any public hearing held pursuant to [HRS] section 269-16(c) shall be a noticed public hearing or hearings on the island on which the utility is situated. Notice of the hearing, with the purpose thereof and the date, time, and place at which it will open, shall be given not less than once in each of three weeks statewide, the first notice being not less than twenty-one days before the public hearing and the last notice being not more than two days before the scheduled hearing. The applicant or applicants shall notify their consumers or patrons of the proposed change in rates and of the time and place of the public hearing not less than one week before the date

[53] See also HRS § 269-16(a)(contested case proceeding); and HRS § 269-16(c)(public hearing).

> set, the manner and the fact of notification to be reported to the commission before the date of hearing.[54]

HRS § 269-12(c).

Respondents contend that: (1) the requirements of a public hearing and notice thereof to consumers are only triggered when there is an increase in a commission-authorized utility rate under HRS § 269-16(b); (2) since no prior wastewater rates were authorized by the commission for KRC or its predecessors, the wastewater rates approved by the commission in Docket No. 04-0298 were initial rates; thus (3) NSWT's initial rates, as established in Docket No. 04-0298, do not constitute a rate increase, *de facto* or otherwise.

However, the requirements of HRS § 269-16(b) are not limited to commission-authorized rates. Section 269-16(b) reads, in relevant part:

> 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(b).

Taking the language of section 269-16(b) out of context, Respondents argue that the "rate, fare, charge, classification, schedule, rule, or practice" had to be "previously approved by the commission." A plain reading of the

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[54]See also HAR § 6-61-30(1)(notice of public hearing).

statute, however, 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. As such, the commission finds no merit in Respondents' argument that the requirements of notice and a public hearing are only triggered by an increase in an "existing Commission approved rate."

Respondents also argue that "despite the allegations that have been made by the [AOAOs], no one has been able to definitely identify what the fees being paid by [the AOAOs] really are for."[55] According to Respondents, the AOAOs' witness has not located any written agreement which details the purported sewer charge, and the AOAOs' Hearing Exhibits do not establish the existence of an agreement for a separate charge for sewer service. KRC's project director has yet to receive a copy of any agreement related to the purported separate charge for sewer service or similar documents. As KRC's project director testified, "without actually seeing a sewer agreement, he could not determine if the [approximate $5 per month] charge might be something akin to what is considered today to be a resort fee given that there are a number of services that are provided to the two condominium associations that share common landscaping, a common entrance, and sewer."[56]

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[55]Respondents' Post-Hearing Brief, at 12.

[56]Respondents' Post-Hearing Brief, at 12 (citing Transcript, at 41 - 42). See also Respondents' Post-Hearing Brief, at 17.

While there may not be direct written evidence in the docket record of: (1) an agreement between KRC or its predecessors-in-interest and the AOAOs or the Kuilima condominium owners that establishes a separate, specific monthly rate or charge for wastewater service;[57] or (2) the issuance of any monthly bills or invoices for wastewater service by KRC or its predecessors-in-interest to the AOAOs or the Kuilima condominium owners,[58] the lack of an agreement (written or otherwise), bills, or invoices issued by Respondents is not dispositive of the underlying issue given the other evidence presented.

Here, Respondents' own witness acknowledged that separate payments were being made, at approximately five dollars ($5) per month for each condominium unit (and not based on a unit's size), ostensibly for common maintenance, landscaping, and sewer.[59] Respondents estimate that approximately $3.50 to four dollars ($4) per month of the resort fee is allocated to the sewer component.[60] Thus, Respondents' admission of amounts paid for sewer service corroborates the AOAOs' records of separate sewer payments made by the AOAOs described above. NSWT's initial

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[57]See Transcript, at 19, 77, 79, 90 - 94, and 96 - 97. See also NSWT-T-100, at 7 - 8; Transcript, at 27 and 66 - 67; AOAOs' Post-Hearing Brief, at 5.

[58]See NSWT's responses to PUC-IR-102(A), in IC-05-103 and IC-05-119. See also Transcript, at 42, 55 - 58, 63, 80 - 81, and 101.

[59]Transcript, at 18, 57 - 61, and 65 - 70. See also NSWT-T-100, at 9 - 10; and Transcript, at 27, 41 - 42, 44 - 45, and 55 - 60. Respondents characterize this separate payment as a resort fee.

[60]See Respondents' Post-Hearing Brief, at 19 - 20.

tariff rate (suspended by the commission) is $47.83 per month per EU, with condominium units ranging from one (1) to two (2) EUs.[61]

Based on the foregoing, the commission finds that there was clearly an increase in rates, and accordingly, NSWT's initial tariff rates submitted to the commission for approval constitutes 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. Thus, the commission answers Issue No. 2 in the affirmative.

C.

Issues No. 3 and No. 4

Whether any of the alleged violations by KRC or NSWT of regulatory law constitute willful conduct.

Whether to impose any penalties, sanctions, or other regulatory action, including the modification, suspension, or revocation of NSWT's CPCN.

The AOAOs allege that based on a consistent pattern of misstatements made by Respondents in Dockets No. 04-0298 and 05-0238, "one could reasonably conclude that the misstatements were intentionally made."[62] That said, the AOAOs state that:

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[61]Decision and Order No. 21864, Section VII, NSWT's Initial Rates and Charges, at 22 - 25.

[62]AOAOs' Post-Hearing Brief, at 11 (footnote and text therein omitted). As examples, the AOAOs allege that: (1) KRC, in its attempt to determine whether the AOAOs were paying for sewer service, did not contact the AOAOs; (2) KRC knew all along that the AOAOs were paying for sewer service, though KRC - Hawaii possibly did not know the precise amounts being paid; (3) NSWT knew that 4,000 equivalent unit does not equate to the 4,000 resort units the complex is zoned to construct, and the 4,000 equivalent units favorably impacts several components of NSWT's

(1) NSWT's CPCN should stand; (2) by the AOAOs' participation in Docket No. 05-0238, they have been provided with the opportunity to be heard on the "initial rate increase in rates" controversy, and are satisfied that the commission has an adequate record to make an informed decision; and (3) the abatement must allow for the continued operations of the utility "until such time as actual operating data is compiled, analyzed, and used in the development of NSWT's revenue requirement as well as its rate design."[63] The AOAOs reason that any violation by Respondents should be waived, "because operators should be encouraged to seek certification."[64]

Respondents reiterate that: (1) KRC and its predecessors-in-interest did not believe that a CPCN was required due to KRC's and its predecessors' ownership of the fee simple interest in the lands underlying the Kuilima Estates East and Kuilima Estates West condominium projects; (2) once KRC decided to move forward with its planned development of the Ocean Villas condominium project in 2004, NSWT voluntarily applied for a CPCN; and (3) there was never any attempt by Respondents to deceive or hide the fact that sewage service was already being provided throughout the proposed service area since the early 1970s.

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case in Docket No. 04-0298; (4) despite Respondents' claim, accurate water usage data was readily available, including the number of water meters used by the AOAOs; and (5) Respondents initially claimed that the sewer fees were part of the ground lease rent, then later claimed that the sewer fees were part of a resort fee payment. See AOAOs' Post-Hearing Brief, Section V(1) to (4), at 11 - 17.

[63]AOAOs' Post-Hearing Brief, at 17.

[64]AOAOs' Post-Hearing Brief, at 3.

Respondents conclude that: (1) they did not willfully or intentionally violate any regulatory laws; accordingly (2) no penalties, sanctions, or other regulatory action should be taken against them.

The Consumer Advocate: (1) does not allege or identify any evidence of willful intent by NSWT to violate or circumvent any applicable regulatory laws; (2) has insufficient evidence or information at this time to comment on other potential issues of regulatory law; and thus (3) is unable to recommend any punitive remedies.[65] Concomitantly, the Consumer Advocate "is aware of numerous entities that have previously failed to apply for a CPCN in a timely manner but subsequently complied with no imposition of penalty or sanctions."[66]

Under the circumstances, the commission finds no evidence of any "intentional misstatements" made by Respondents. Instead, any less than accurate information provided by Respondents, if any, is likely attributed in large part to "the left hand [not] know[ing] what the right hand is doing."[67]

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[65]Consumer Advocate's Post-Hearing Brief, at 2, 4, and 6 - 7; and Transcript, at 14 - 15.

[66]Consumer Advocate's Post-Hearing Brief, at 4. See also Transcript, at 14. In this regard, Respondents cite to In re Poipu Wastewater Corp., Docket No. 7265, as an example where the commission did not impose any type of penalty or sanction for issuing an after-the-fact CPCN to Poipu Wastewater Corporation. See Decision and Order No. 16079, filed on November 14, 1997.

[67]Transcript, at 50. As an example, KRC, until very recently, was unaware of KRC's New York office's monthly receipt of checks issued by the AOAOs, ostensibly for sewer service.

Likewise, the commission finds no evidence of any willful misconduct. In 1998, KRC commenced wastewater service in the Kahuku area, upon its ownership of the wastewater operations. There appears to be no evidence in the docket record that KRC's reliance on its rationale that a CPCN was not required for providing wastewater service to the Kuilima condominiums was based on less than good faith. Once NSWT was advised by its consultant to apply for a CPCN, NSWT proceeded with preparing and filing its application in Docket No. 04-0298.

Moreover, following the commission's receipt of the informal complaints and Petition, respectively, Respondents fully cooperated with the commission's investigations (informal and formal). Respondents' two witnesses appeared and testified before the commission at the OSC hearing, with both witnesses responding to the commission's questions.

Accordingly, the commission answers Issues No. 3 and No. 4 in the negative.

D.

Issue No. 5

Any other issues of regulatory law that may arise during the course of the commission's investigation.

According to the AOAOs' calculations, $5.15 constitutes "[t]he approximate average monthly amount per household [for wastewater service], based on both AOAOs."[68] The AOAOs "readily

[68]AOAOs' Post-Hearing Brief, at 23 n.9.

acknowledge [that] the $5.15 per unit monthly sewer fee is less than the cost of providing the service[,]" and "have stated that they wish to pay a higher, compensatory fee to cover the costs associated with the service."[69]

As a remedy for Respondents' violation of regulatory law, the AOAOs recommend that the commission implement a wastewater rate of $15.94 per month per EU for an interim twelve (12)-month period, then capped at $30 per month per EU, until a new rate is approved by the commission following the conclusion of a general rate case.[70] In essence, the AOAOs propose to voluntarily pay more for wastewater service in order to ensure NSWT's financial fitness, consistent with the public interest.[71]

While recognizing the AOAOs' concern for ensuring a financially fit wastewater utility operation, the commission declines to adopt the AOAOs' proposal to implement a two (2)-part phase-in of new wastewater rates. If granted by the commission, the AOAOs' proposal will effectively bind the Ocean Villa condominium owners and any other interested third parties who are not parties to this investigation and who may not necessarily agree with the AOAOs' proposal.

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[69]AOAOs' Post-Hearing Brief, at 23 (footnote and text therein omitted).

[70]In this regard, the AOAOs are responding to NSWT's proposal to implement a three (3)-step phase in of its wastewater rate, to minimize the impact of any "rate shock" upon the AOAOs. See AOAOs' Post-Hearing Brief, at 3 - 4, 17 - 18, and 23 - 25.

[71]AOAOs' Post-Hearing Brief, at 3 - 4 and 25. See also id., Section IX, Recommended Remedy, at 23 - 25.

NSWT states its commitment to file an application for a general rate increase no later than December 31, 2007, utilizing the 2008 calendar test year.[72] Thus, NSWT, at its option, may proceed with preparing for and filing an application for a general rate increase. If filed, NSWT shall serve copies of its application for a general rate increase upon the AOAOs through their attorney of record in this matter.

III.

Orders

THE COMMISSION ORDERS:

1. KRC's provision of wastewater service to the Kuilima Estates East and Kuilima Estates West condominiums rendered it a public utility as defined by HRS § 269-1, and subject to the commission's regulation. With respect to the Kuilima condominiums, KRC operated as a public utility without commission authority.

2. NSWT's initial tariff wastewater rates, as approved by the commission in Docket No. 04-0298: (A) constitute a *de facto* rate increase under the facts and circumstances of this case; and (B) are permanently suspended by the commission, unless and until new wastewater rates are approved by the commission following the conclusion of a general rate case.

3. KRC and NSWT's regulatory violations were not willful or intentional, and, therefore, sanctions will not be imposed.

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[72]Respondents' Post-Hearing Brief, at 3 and 19.

4. No later than February 24, 2006, NSWT shall file its rate schedule, consistent with the terms of this Decision and Order, and with an effective date of June 14, 2005, the date of the commission's issuance of NSWT's CPCN in Docket No. 04-0298.

5. NSWT shall serve copies of its application for a general rate increase upon the AOAOs through their attorney of record in this matter.

DONE at Honolulu, Hawaii FEB 10 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.cs

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22282 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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DATED: FEB 10 2006