

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

WAIKOLOA SANITARY SEWER
COMPANY, INC., dba
WEST HAWAII SEWER COMPANY

DOCKET NO. 05-0329

For Expedited Review and Approval
to Increase Rates.

ORDER DENYING MOTION FOR PARTIAL
RECONSIDERATION AND MODIFICATION, AND APPROVING REFUND PLAN

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WAIKOLOA SANITARY SEWER
COMPANY, INC., dba
WEST HAWAII SEWER COMPANY

Docket No. 05-0329

ORDER DENYING MOTION FOR PARTIAL
RECONSIDERATION AND MODIFICATION, AND APPROVING REFUND PLAN

By this Order,¹ the commission: (1) denies the Motion for Partial Reconsideration and Modification filed by the Consumer Advocate on October 6, 2008;² and (2) approves WHSC's Refund Plan, filed on October 1, 2008.

I.

Background

A.

Procedural Summary

By its Decision and Order filed on September 23, 2008 ("Decision and Order"), the commission approved an increase in

¹The Parties are WAIKOLOA SANITARY SEWER COMPANY, INC., dba WEST HAWAII SEWER COMPANY ("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).

²Motion for Par[tial] Reconsideration and Modification of [the] Decision and Order Filed on September 23, 2008; and Certificate of Service, filed on October 6, 2008 (collectively, "Motion for Partial Reconsideration").

revenues of \$275,337 over present rates (41.67 percent) for WHSC, based on the 2006 calendar test year ("2006 Test Year"). The increase of \$275,337 in revenues over present rates was less than the interim increase in revenues of \$276,926 over present rates (41.91 percent) authorized by the commission in Interim Decision and Order No. 23940, filed on December 28, 2007. "Thus, WHSC's monthly standby charge . . . decreased from the current interim monthly standby charge of \$36.77 per equivalent residential unit ('per unit') to \$36.67 per unit."³ Accordingly, the commission required WHSC to "refund to its ratepayers the amounts it has collected that are in excess of the increase authorized by this Decision and Order, together with interest, pursuant to HRS § 269-16(d)."⁴

The commission, in its Ordering Paragraphs, concluded:

THE COMMISSION ORDERS:

1. WHSC may increase its rates to such levels as will produce \$275,337 in additional revenues for the 2006 Test Year (approximately 41.67 percent over revenues at present rates).

2. By October 1, 2008, WHSC shall file its revised tariff sheets that reflect the new non-tariff rules and the wastewater rates approved by the commission in this Decision and Order, for the commission's review and approval, with copies served on the Consumer Advocate.

3. By October 1, 2008, WHSC shall file a refund plan that includes the amount of interest to be paid, the proration of the refund amongst its ratepayers, and the amortization period of the refund, with copies served on the Consumer Advocate.

³Decision and Order, at 2 (footnote and text therein omitted).

⁴Decision and Order, at 2.

4. By October 8, 2008, the Consumer Advocate shall file its comments to WHSC's refund plan, with a copy served on WHSC.

5. The failure to comply with Ordering Paragraphs Nos. 2 and 3, above, may constitute cause to void this Decision and Order, and may result in further regulatory action as authorized by State law.

Decision and Order, Ordering Paragraphs No. 1 to No. 5, at 108.

As part of its Decision and Order, the commission also:

(1) found reasonable the request made by WHSC in its post-hearing Opening Brief, filed on June 2, 2008, to include, as part of its overall regulatory expense for the 2006 Test Year, the \$25,498 in costs associated with the hearing and briefing phases of this proceeding, amortized over a five-year period, which resulted in a net increase of \$5,100 in WHSC's 2006 Test Year general and administrative account; and (2) rejected the Consumer Advocate's proposed contributions-in-aid-of-construction ("CIAC") adjustment for the Paniolo Estates Project.

On October 1, 2008, WHSC filed its: (1) Refund Plan;⁵ and (2) revised tariff sheets, with an effective date of October 1, 2008, consistent with the deadline date to file the revised tariff sheets. On October 6, 2008, the Consumer Advocate filed its Motion for Partial Reconsideration.

⁵WHSC's Refund Proposal Submitted in Compliance with the Decision and Order Filed on September 23, 2008; Exhibits 1 - 3; and Certificate of Service, filed on October 1, 2008 (collectively, "Refund Plan"). The Consumer Advocate did not file any comments in response to WHSC's Refund Plan. See Decision and Order, Ordering Paragraph No. 4, at 108 (by October 8, 2008, the Consumer Advocate shall file comments to WHSC's refund plan).

On October 16, 2008, WHSC filed its Memorandum in Opposition to the Consumer Advocate's Motion for Partial Reconsideration.⁶

B.

Motion for Partial Reconsideration

By its motion filed on October 6, 2008, the Consumer Advocate seeks the partial reconsideration and modification of the commission's Decision and Order which: (1) reflected an upward adjustment of \$25,498 for WHSC's regulatory commission expense; and (2) rejected the Consumer Advocate's proposed CIAC adjustment for the Paniolo Estates Project. The Consumer Advocate asserts that, in light of the commission's erroneous findings on these two matters, the commission's Decision and Order is unreasonable because ratepayers are harmed by having to pay rates that are in excess of the rates that should be determined to be just and reasonable.

In its Opposition filed on October 16, 2008, WHSC counters that "[b]ecause the Commission did not err in approving a \$25,498 upward adjustment to WHSC's regulatory commission expense and rejecting the Consumer Advocate's recommended \$366,723 upward adjustment in CIAC associated with

⁶WHSC's Memorandum in Opposition to the Consumer Advocate's Motion for Partial Reconsideration and Modification of [the] Decision and Order Filed on September 23, 2008; and Certificate of Service, filed on October 16, 2008 (collectively, "Opposition"). By letter dated October 7, 2008, commission counsel informed WHSC that pursuant to HAR § 6-61-140, the commission found it "desirable or necessary" for WHSC to file a response to the Consumer Advocate's Motion for Partial Reconsideration by October 16, 2008. By this Order, the commission formally adopts said finding, consistent with HAR § 6-61-140.

the Paniolo Estates project, there is no risk that WHSC's ratepayers will be harmed by having to pay rates that are in excess of rates determined to be just and reasonable."⁷ Thus, WHSC concludes that the Consumer Advocate's Motion for Partial Reconsideration should be denied.

1.

Regulatory Commission Expense

With respect to the upward adjustment for WHSC's regulatory commission expense, the Consumer Advocate contends that the commission's Decision and Order is erroneous and unlawful. In support of its position, the Consumer Advocate states:

1. In its application, WHSC proposed to recover \$120,585 in regulatory commission expense, amortized over a five-year period. The Consumer Advocate recommended that WHSC only be allowed to recover \$75,828 in regulatory commission expense, amortized over a five-year period. The reduction in regulatory commission expense amount reflected two adjustments proposed by the Consumer Advocate, including the disallowance of \$25,498 for the evidentiary hearing and preparation of post-hearing briefs.

In Proposed Decision and Order No. 23688, filed on October 1, 2007, the commission found reasonable the two adjustments proposed by the Consumer Advocate for

⁷WHSC's Opposition, at 11.

regulatory commission expense. As a result, the commission found that WHSC should only be allowed to recover \$75,828 in regulatory commission expense, amortized over a five-year period, resulting in a 2006 Test Year expense of \$15,165.

On October 15, 2007, WHSC filed its Notice of Partial Acceptance and Notice of Partial Non-Acceptance of Proposed Decision and Order No. 23688 ("Notice of Partial Acceptance"). In its Notice of Partial Acceptance, WHSC stated in part that "[a]lthough WHSC strongly disagrees with Proposed Decision and Order No. 23688's findings and conclusions regarding [general and administrative] expenses and rate of return, in the interest of expediting the contested case hearing WHSC will not contest those items."⁸

According to the Consumer Advocate, "[i]n spite of [WHSC's] Notice of Partial Acceptance of the regulatory commission expense amounting to \$75,8[2]8 as set forth in the Commission's Proposed Decision and Order No. 23688, WHSC subsequently changed its position and proposed an upward adjustment of \$25,[4]98 in WHSC's Opening Brief filed on June 2, 2008."⁹ "WHSC's attempt to change its position on [this] matter and include an upward adjustment to the \$15,165 after the conclusion of the evidentiary hearing is clearly inappropriate."¹⁰

⁸WHSC's Notice of Partial Acceptance, at 8.

⁹Consumer Advocate's Motion for Partial Reconsideration, at 6.

¹⁰Consumer Advocate's Motion for Partial Reconsideration, at 11.

2. The commission failed to provide notice to the Parties that the scope of the issues to be addressed in the contested case phase of the proceeding would be expanded to include regulatory commission expense, which is beyond the issues set forth in Order No. 24036, filed on February 13, 2008. The commission's actions are inconsistent with the requirements set forth in HRS § 91-9, governing contested cases.¹¹ In effect,

¹¹HRS § 91-9 states in part:

Contested cases; notice; hearing; records. (a) Subject to section 91-8.5, in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include a statement of:

.

(4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;

.

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

.

(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein.

HRS § 91-9. The Consumer Advocate also cites to In re Kauai Elec. Div. of Citizens Util. Co. ("In re Kauai Elec. Div."), 60 Haw. 166, 590 P.2d 524 (1978). The Supreme Court of Hawaii ("Court"), in In re Kauai Elec. Div., noted that "a 'full hearing' . . . is 'one in which ample opportunity is afforded to all parties to make, by evidence and argument,

"the Commission denied the Consumer Advocate due process by failing to provide the Consumer Advocate with any notice that the matter was to be addressed. Thus, the Commission's actions denied the Consumer Advocate an opportunity to be heard or cross-examine WHSC's witness at the evidentiary hearing on the matter."¹²

3. The commission's rationale for addressing the regulatory commission expense issue creates bad precedence for future dockets and uncertainty for the parties "as to what is to be addressed in the contested case phase of the proceeding, a situation that is in violation of the requirements of HRS § 91-9."¹³

4. In its Decision and Order, the commission states that "each of the Parties have raised and discussed certain issues that appear beyond the scope of the issues agreed-upon by them."¹⁴ The Consumer Advocate notes that "the CIAC adjustments for the 17th Fairway and Paniolo Estates fall within the Parties' agreed to issue 1, which the Commission adopted since both adjustments deal with the appropriate CIAC adjustment required for the instant proceeding."¹⁵ "Therefore, contrary to

a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken.'" In re Kauai Elec. Div., 60 Haw. at 182, 590 P.2d at 536 (citations and brackets omitted).

¹²Consumer Advocate's Motion for Partial Reconsideration, at 10; see also id., Section II.B.1(d), at 16-17.

¹³Consumer Advocate's Motion for Partial Reconsideration, 14-15.

¹⁴Decision and Order, at 65.

the Commission's statement, the Consumer Advocate did not violate the terms of the Parties' agreement on the issues to be addressed in the contested case phase of the proceeding."¹⁶

WHSC counters:

1. The Consumer Advocate, in its Motion for Partial Reconsideration, presents no new evidence and/or arguments that it did not previously assert or could have asserted before.¹⁷ In particular, the commission, in its Decision and Order, already considered, ruled on, and rejected the Consumer Advocate's due process argument. Thus, any attempt by the Consumer Advocate to relitigate this matter is inappropriate.

2. The Consumer Advocate's due process rights were not violated.¹⁸ In this regard:

¹⁵Consumer Advocate's Motion for Partial Reconsideration, at 15-16.

¹⁶Consumer Advocate's Motion for Partial Reconsideration, at 16.

¹⁷WHSC cites to Sousaris v. Miller, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (Haw. 2000).

¹⁸WHSC cites to In re Hawaii Elec. Light Co., Inc. ("In re HELCO"), 67 Haw. 425, 690 P.2d 274 (1984). In In re HELCO, the Court noted:

. . . . The nature and complexity of rate-making proceedings make it impractical to adopt a particularistic standard of issue identification. Each item and calculation used in arriving at the proposed rate schedule is an inherent and integral part of the proceeding. The utility should expect that all items relative to the stated general issues are subject to PUC review. Particularized notice may be required where further evidence is needed to decide the issue, or where the regulatory agency is contemplating a change in long-standing policy which would adversely affect the utility.

In re HELCO, 67 Haw. at 429, 690 P.2d at 277 (citations omitted).

A. The Consumer Advocate was not entitled to particularized notice that adjustments to WHSC's regulatory commission expense would be considered. Instead, the commission was only obligated to give the parties particularized notice if it determined that it needed further evidence to decide the issue or where it was contemplating a change in a long-standing policy.

B. While the Consumer Advocate appears to argue that it would have presented evidence on this issue if given the opportunity, the Consumer Advocate's dissatisfaction with the evidence in the record does not, per se, establish that the commission does not have all the evidence it needs to decide the regulatory commission expense issue.

C. The Consumer Advocate was afforded due process under HRS § 91-9. "Here, not only was the Consumer Advocate afforded the opportunity to conduct discovery and to submit evidence and argument on WHSC's requested \$25,498 in regulatory commission expense associated with the hearing and briefing phases of this docket, but the Consumer Advocate took full advantage of this opportunity Indeed, the Commission itself expressly concluded that [the] Consumer Advocate was afforded the opportunity to conduct discovery and to submit evidence and argument on this issue. See D&O, p. 74. The Consumer Advocate therefore exercised its right to submit evidence and argument on the issues pursuant to HRS § 91-9."¹⁹

¹⁹WHSC's Opposition, at 7-8.

D. "Even assuming the Consumer Advocate was entitled to cross-examine a WHSC witness or submit rebuttal evidence, the Consumer Advocate's right to do so is 'limited by considerations of relevancy, materiality, and repetition.' Thus, to the extent that the Commission believed that it had all the facts relevant and material to its determination of this issue, the Commission did not violate the Consumer Advocate's right to due process pursuant to HRS Chapter 91. Accordingly, the Consumer Advocate's due process rights were not violated."²⁰

3. While WHSC, in its post-hearing Opening Brief, did request that an adjustment be made to its regulatory commission expense, this adjustment was conditional in nature - "that is, neither the Consumer Advocate nor the Commission wanted to include the costs of an evidentiary hearing and briefing in WHSC's regulatory commission expense unless and until it was certain that WHSC would, in fact, incur these expenses."²¹

4. Even assuming that WHSC's regulatory commission expense issue was outside of the issues agreed-upon by the Parties, the Consumer Advocate likewise violated this agreement by requesting upward adjustments to WHSC's CIAC balance for the 17th Fairway Villas Project and Paniolo Estates Project. In effect, "the Consumer Advocate engaged in the same behavior it accuses WHSC of."²²

²⁰WHSC's Opposition, at 8 (citations therein omitted).

²¹WHSC's Opposition, at 9.

²²WHSC's Opposition, at 10.

Paniolo Estates

The Consumer Advocate contends that the commission's Decision and Order is erroneous because the commission's position on the Consumer Advocate's proposed adjustment for the Paniolo Estates Project is inconsistent with the commission's findings on an identical CIAC adjustment for the Kekumu Projects. In support of its position, the Consumer Advocate states:

1. While the Consumer Advocate concurs that the commission's finding on the Paniolo Estates CIAC issue in In re Waikoloa Sanitary Sewer Co., Inc., dba West Hawaii Sewer Co., Docket No. 00-0440 ("Docket No. 00-0440"), Decision and Order No. 19223, represents a final decision, "the finding in Decision and Order No. 19223 should not be deemed to be a final decision as it relates to the adjustment proposed in the instant docket. The Commission fails to provide any legal basis for its conclusion that the Commission is precluded from making a finding on the Paniolo Estates CIAC issue based on the facts that are presented in the instant proceeding or any future proceedings."²³

2. "The Commission is not bound to any final judgment nor precluded from rendering a decision on the issue of determining the appropriate amount of CIAC that should have been collected for both the Kekumu Projects and the Paniolo Estates project on a prospective basis to ensure the establishment

²³Consumer Advocate's Motion for Partial Reconsideration, at 18-19 (boldface and underscore in original).

of just and reasonable rates for ratepayers in future rate proceedings. Thus, . . . the Commission can consider such an adjustment in the determination of the test year revenue requirement for the instant proceeding."²⁴

3. It appears reasonable for the commission to consider the merits of the Consumer Advocate's proposed CIAC adjustment for the Paniolo Estates Project, similar to the commission's in-depth discussion of the Kekumu Projects, which included the filed rate doctrine. In this regard, "for the Paniolo Estates project, the Commission ignores its argument that the filed rate doctrine should support an adjustment to reflect the payment that should have been made pursuant to WHSC's then effective CIAC tariff and paragraph 4 of the [Memorandum of Agreement]."²⁵

4. To not consider the CIAC adjustment for the Paniolo Estates Project will effectively overturn the commission's decision in In re Public Util. Comm'n, Docket No. 2006-0021 ("Docket No. 2006-0021").²⁶

The Consumer Advocate concludes by noting that it "is not seeking to reopen this adjustment for Docket No. 00-0440. Rather the Consumer Advocate contends that since the adjustment

²⁴Consumer Advocate's Motion for Partial Reconsideration, at 19.

²⁵Consumer Advocate's Motion for Partial Reconsideration, at 20.

²⁶The commission, on pages 82 and 83 of its Decision and Order, discussed Docket No. 2006-0021, Decision and Order No. 23725, filed on October 16, 2007.

impacts the test year CIAC balance for the instant docket, the Commission should correct the previous inconsistency on a prospective basis, beginning with the instant docket. In the instant record, the Commission erred by simply relying on its position in Docket No. 00-0440, when such reliance is in contradiction to the Commission's position on a similar adjustment (i.e., the CIAC adjustment for the Kekumu Projects)."²⁷

WHSC counters:

1. The Consumer Advocate, in its Motion for Partial Reconsideration, presents no new evidence and/or arguments that it did not previously assert or could have asserted before.²⁸ In particular, the commission, in its Decision and Order, already considered, ruled on, and rejected the Consumer Advocate's argument. Thus, to the extent that the Consumer Advocate fails to present new evidence and/or argument, the Consumer Advocate's Motion for Partial Reconsideration should be denied.

2. The commission did not err in rejecting the Consumer Advocate's recommended adjustment in CIAC associated with the Paniolo Estates Project. Specifically:

. . . . The Consumer Advocate therefore appears to argue that this Commission should take an inconsistent position on the CIAC associated with the Paniolo Estates project to avoid taking an inconsistent position on the CIAC associated with the Paniolo Estates project and the Kekumu projects in this docket. The Consumer Advocate's argument is without merit. If, as the Consumer Advocate contends, the Commission is not precluded

²⁷Consumer Advocate's Motion for Partial Reconsideration, at 20.

²⁸WHSC cites to Sousaris v. Miller, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (Haw. 2000).

from taking a position inconsistent with its previous position, then WHSC questions why the Consumer Advocate challenges the Commission's position on the CIAC associated with the Paniolo Estates project and the Kekumu projects. Because [the] Consumer Advocate fails to advance an argument which legitimately calls into question the Commission's decision on this issue, WHSC submits that [the] Commission did not err in rejecting the Consumer Advocate's recommended \$366,723 upward adjustment in CIAC associated with the Paniolo Estates project.

WHSC's Opposition, at 9.

3. The Consumer Advocate violated the Parties' agreement on the stipulated issues for the evidentiary hearing by requesting upward adjustments to WHSC's CIAC balance for the 17th Fairway Villas Project and Paniolo Estates Project. In effect, "the Consumer Advocate engaged in the same behavior it accuses WHSC of."²⁹

II.

Discussion

A.

Motion for Partial Reconsideration

HAR § 6-61-137 states:

§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.

HAR § 6-61-137.

²⁹WHSC's Opposition, at 10.

"[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. 2000). 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 at 513, 993 P.3d at 547).

1.

Regulatory Commission Expense

HRS chapter 91 requires that the parties in a contested case proceeding have notice of the issues. Particularized notice may be required where further evidence is needed to decide the issue, or where the regulatory agency is contemplating a change in long-standing policy which would adversely affect the public utility. In re HELCO, 67 Haw. at 429, 690 P.2d at 277 (citations omitted).

Due process and HRS § 91-9 require that the parties in a contested case proceeding be given a meaningful opportunity to be heard. This implies the right to submit evidence and argument on the issues. Nonetheless, the right to present evidence under HRS Chapter 91 is limited by considerations of relevancy,

materiality, and repetition. In re HELCO, 67 Haw. at 430, 690 P.2d at 278.

On July 6, 2004, Act 168, 2004 Session Laws of Hawaii ("Act 168"), took effect. The underlying purpose of Act 168, codified at HRS § 269-16(f), is to streamline and expedite the ratemaking process for public utilities with annual gross revenues of less than \$2 million. Since the inception of Act 168, the commission has issued a multitude of proposed decision and orders in rate cases involving public utilities with annual gross revenues of less than \$2 million, which have been accepted by the parties involved in the particular rate case proceeding.³⁰ Thus, "[i]f all parties to the proceeding accept the proposed decision and order, the parties shall not be entitled to a contested case hearing, and [HRS] section 269-15.5 shall not apply."³¹

By contrast, to the commission's knowledge, Docket No. 05-0329 represents the first public utility rate case application filed pursuant to Act 168, upon which due to the non-acceptance of the commission's proposed decision and order by one or more of the parties, the docket proceeded to

³⁰See, e.g., In re Puhi Sewer & Water Co., Inc., Docket No. 2006-0423, Decision and Order No. 23412, filed on May 3, 2007; and Proposed Decision and Order No. 23376, filed on April 20, 2007; In re Pukalani STP Co., Ltd., Docket No. 05-0025, Decision and Order No. 22052, filed on September 28, 2005; and Proposed Decision and Order No. 22015, filed on September 7, 2005; and In re Waikoloa Water Co., Inc., dba West Hawaii Water Co., Docket No. 04-0373, Decision and Order No. 21919, filed on July 15, 2005; and Proposed Decision and Order No. 21885, filed on June 22, 2005.

³¹HRS § 269-16(f)(3).

a contested case hearing. In this regard, as noted in HRS § 269-16(f)(3):

If a party does not accept the proposed decision and order, either in whole or in part, that party shall give notice of its objection or nonacceptance within the timeframe prescribed by the commission in the proposed decision and order, setting forth the basis for its objection or nonacceptance; provided that the proposed decision and order shall have no force or effect pending the commission's final decision. If notice is filed, the above six-month period shall not apply and the commission shall make every effort to complete its deliberations and issue its decision within the nine-month period from the date the public utility's completed application was filed as set forth in subsection (d). Any party that does not accept the proposed decision and order under this paragraph shall be entitled to a contested case hearing; provided that the parties to the proceeding may waive the contested case hearing.

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HRS § 269-16(f)(3) (emphasis added); see also Decision and Order, at 64-65.

Thus, as advised by the commission in its Proposed Decision and Order No. 23688:

In the event that one (1) or both of the Parties do not accept, in whole or in part, the Proposed Decision and Order, the commission advises that it may review de novo the entire docket and all issues therein, including the Parties' areas of agreement.

Proposed Decision and Order No. 23688, at 51; see also Decision and Order, at 66; Interim Decision and Order No. 23940, at 10; and In re Hawaiian Elec. Co., Inc., 5 Haw. App. 445, 447, 698 P.2d 304, 307 (1985) (an agreement between the parties in a rate case cannot bind the commission, as the commission has an

independent obligation to set fair and just rates and arrive at its own conclusions).

Here, the commission's proposed disallowance of the \$25,498 in expenses for the hearing and post-hearing briefing phases of this proceeding, as reflected in Proposed Decision and Order No. 23688, was premised in part on the Consumer Advocate's statements in CA-T-1 that: (1) the need to have an evidentiary hearing has been all but eliminated; (2) for rate case applications filed by water and wastewater utilities over the past fifteen years or so, the applicants and the Consumer Advocate have been able to resolve their differences, thereby all but eliminating the need for an evidentiary hearing; and (3) any remaining differences between the applicant and the Consumer Advocate are argued in written briefs, in lieu of an evidentiary hearing.³² The Consumer Advocate's statements strongly suggested that, based on the Consumer Advocate's collaborative efforts in past water and wastewater utility proceedings, the need for an evidentiary hearing in this proceeding, Docket No. 05-0329, was all but eliminated, even if one or both of the Parties were to object, in whole or in part, to the commission's proposed decision and order. Ultimately, the Consumer Advocate's pertinent statements in this regard did not materialize, at least for this particular proceeding. Instead, as noted by the commission in its Decision and Order, the Parties prepared and filed direct testimonies, appeared and participated in the prehearing conference and the evidentiary hearing, and

³²See Proposed Decision and Order No. 23688, at 31-32; see also WHSC's Opposition, at 9-10.

prepared and filed post-hearing opening and reply briefs.³³ In effect, because the evidentiary hearing was not waived by the Parties, the commission proceeded with an evidentiary hearing pursuant to HRS § 269-16(f)(3).

Under these circumstances, the Consumer Advocate should have reasonably known that WHSC would seek to recover the costs associated with the evidentiary hearing and briefing phases of this proceeding. Furthermore, as noted by WHSC:

. . . . Because the instant docket is a rate-making proceeding, the Commission was only obligated to give the parties particularized notice if it determined that it needed further evidence to decide the issue or where it was contemplating a change in a long-standing policy In this docket, the Consumer Advocate appears to argue that it would have presented evidence on this issue if given the opportunity, see Motion, p. 17, but the Consumer Advocate's dissatisfaction with the evidence in the record does not, per se, establish that the Commission does not have all the evidence it needs to decide the issue. Inasmuch as the Commission approved the \$25,498 upward adjustment, the Commission clearly believed that it was in possession of all the evidence it needed to decide the issue.

WHSC's Opposition, at 7.

The commission also disagrees with the Consumer Advocate's contention that it lacked a meaningful opportunity to be heard on the matter of WHSC's request to recover the costs associated with the evidentiary hearing and briefing phases of this proceeding. Instead, as noted by WHSC:

. . . . Here, not only was the Consumer Advocate afforded the opportunity to conduct discovery and to submit evidence and argument on WHSC's requested \$25,498 in regulatory commission expense associated with the hearing and briefing phases of this docket, but the Consumer Advocate

³³See Decision and Order, at 73-74.

took full advantage of this opportunity by: (a) issuing an information request to WHSC, requesting a detailed estimate of the costs associated with the evidentiary hearing and briefing phase, see CA-IR-18, filed herein on March 10, 2006; (b) submitting testimony in support [of] the contention that the \$25,498 in regulatory commission expense should be excluded, see Division of Consumer Advocacy's Direct Testimony, Exhibits and Supporting Workpapers filed herein on May 12, 2006, pp. 30-33; and (c) submitting argument that such costs should be excluded from WHSC's regulatory commission expense, see Division of Consumer Advocacy's Statement of Probable Entitlement filed herein on November 28, 2006, p. 12 and Division of Consumer Advocacy's Reply Brief filed herein on June 23, 2008, pp. 21-22

WHSC's Opposition, at 7-8; see also Decision and Order, at 74 (as part of the discovery process, the Consumer Advocate did issue, and WHSC subsequently responded to, an information request on the utility's test year regulatory commission expense).

Lastly, the commission reaffirms its finding that the evidence in the docket record supports the \$25,498 in regulatory commission expense associated with the evidentiary hearing and briefing phases of this proceeding.³⁴

Based on the foregoing reasons, the commission declines to reconsider its ruling on WHSC's regulatory commission expense for the 2006 Test Year.

2.

Paniolo Estates

The Consumer Advocate's witness, during cross-examination, indicated that the Consumer Advocate was "not making an adjustment for the Paniolo [Estates]; although,

³⁴See Decision and Order, at 72-74.

arguably [it] could have."³⁵ Thereafter, the Consumer Advocate, in its post-hearing Opening Brief filed on June 2, 2008, raised for the first time its proposed Paniolo Estates CIAC adjustment for the 2006 Test Year, as follows:

A \$366,723 adjustment for the Paniolo Estates project, similar to the Kekumu Projects³⁶ (see discussion in Section III.A.1. below).

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In summary, the filed rate doctrine requires the recognition of the adjustment proposed by the Consumer Advocate for the Kekumu projects. In addition, the Commission should make a corresponding adjustment for the CIAC that should have been collected for the Paniolo Estates. Although not raised by the Consumer Advocate in its written direct testimony, there is a need to be consistent in the treatment of the CIAC fees for both the Kekumu and Paniolo Estates project.

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³⁵Transcript of the Evidentiary Hearing held on April 17, 2008 ("Transcript"), at 78; see also Transcript, at 93 (the Consumer Advocate is not proposing an adjustment for Paniolo Estates, although in hindsight, maybe it should have).

³⁶Footnote 5 of the Consumer Advocate's Opening Brief states:

As discussed in Section III.A.1. below, the Consumer Advocate did not raise this adjustment in its Written Direct Testimony filed on March 3, 2008. However, the appropriateness of the adjustment was raised by WHSC during cross-examination of the Consumer Advocate's witness at the Evidentiary Hearing held on April 17, 2008. As a result, to remain consistent with the Consumer Advocate's and Commission's positions on the adjustment for the Kekumu Projects, the Consumer Advocate believes that the record is complete for the Commission to determine the appropriateness of recognizing the additional adjustment required to reflect the CIAC that should have been collected for the Paniolo Estates project pursuant to WHSC's effective CIAC tariff at the time the CIAC payment was remitted in 1992 and the terms of the MOA.

Consumer Advocate's Opening Brief, at 10 n.5.

As discussed in Section III.A.1. above, the 2006 Test Year CIAC balance must be adjusted to reflect the CIAC that WHSC should have collected pursuant to WHSC's effective CIAC tariff at the time the payment for the Paniolo Estates project was made in 1994. This adjustment would be consistent with the adjustment proposed for the Kekumu Project

Consumer Advocate's Opening Brief, at 10, 15-16, and 33; see also Consumer Advocate's Reply Brief, filed on June 23, 2008, at 2-3 and 15 (an inconsistent result should be avoided between the Kekumu Projects and Paniolo Estates).

WHSC, in its post-hearing Opening Brief, also filed on June 2, 2008, did not address or discuss the Consumer Advocate's proposed Paniolo Estates CIAC adjustment for the 2006 Test Year, ostensibly because the Consumer Advocate had represented during the evidentiary hearing that it was not making or proposing an adjustment for Paniolo Estates. Nonetheless, the Consumer Advocate proposed its Paniolo Estates CIAC adjustment for the first time in its Opening Brief simultaneously filed on June 2, 2008. Thereafter, WHSC responded to the Consumer Advocate's proposed adjustment in its post-hearing Reply Brief, filed on June 23, 2008.

In its Decision and Order, the commission rejected the Consumer Advocate's proposed CIAC adjustment for the Paniolo Estates Project.³⁷ By this Order, the commission declines to reconsider its ruling on the Paniolo Estates Project.

³⁷Decision and Order, Section II.C.1, at 77-79; and In re Hawaiian Elec. Co., Inc., 81 Hawai'i 459, 467-68, 918 P.2d 561, 569-70 (Haw. 1996) (administrative decisions made under the commission's adjudicatory powers can have a precedential effect and be used to guide the commission in future decisions).

In so doing, the commission recognizes that by denying the Consumer Advocate's proposed CIAC adjustment for Paniolo Estates in its Decision and Order issued in Docket No. 05-0329, the commission, in effect, declined to include this proposed adjustment in WHSC's 2006 Test Year CIAC balance for this proceeding, Docket No. 05-0329. The Consumer Advocate, in its Motion for Partial Reconsideration, presents no new evidence or arguments from those it previously raised or could have presented during the procedural steps undertaken and completed in this proceeding.³⁸

3.

Denial of Motion for Partial Reconsideration

Based on the foregoing reasons, the commission denies the Consumer Advocate's Motion for Partial Reconsideration.³⁹

³⁸See Stipulated Procedural Order No. 22370, filed on April 4, 2006; Order No. 24036, filed on February 12, 2008; Order No. 24123, filed on April 4, 2008; and Order No. 24183, filed on May 7, 2008.

³⁹While the Parties did stipulate to the issues for the contested case phase of this proceeding, it is clear from the docket record that there is no meeting of the minds as to the scope of the issues agreed-upon by them. In particular, WHSC contends that the Consumer Advocate's proposed CIAC adjustments for the Paniolo Estates and 17th Fairway Villas Projects are beyond the scope of the Parties' stipulated issues. See Transcript, at 144-147 (17th Fairway Villas); WHSC's Opening Brief, Section VIII, at 20-21 (17th Fairway Villas); and WHSC's Opposition, Section VI, at 9-10 (17th Fairway Villas and Paniolo Estates).

The commission reaffirms its statement that the Consumer Advocate, as part of the contested case phase of this proceeding, raised and discussed certain issues that appear beyond the scope of the issues agreed-upon by the Parties - specifically, the Consumer Advocate's proposed CIAC adjustments for the Paniolo Estates and 17th Fairway Villas Projects. See Decision and Order,

B.

Revised Tariff Sheets and Refund Plan

On October 1, 2008, WHSC filed its revised tariff sheets in accordance with the commission's Decision and Order.⁴⁰ The effective date of the revised tariff sheets, as noted therein, was October 1, 2008. The commission acknowledges the receipt of WHSC's revised tariff sheets.

With respect to WHSC's Refund Plan, WHSC states that it considered "all amounts received under the interim rate of \$36.77 in excess of the new monthly standby charge of \$36.67 for the period between January 9, 2008 and October 1, 2008[.]"⁴¹

WHSC then explains:

Based on a period between January 9, 2008 and October 1, 2008, WHSC calculated an excess amount of \$1,258.61 and interest of approximately \$45.32, for a total refund amount of **\$1,303.93**. First, WHSC calculated the decreased revenues on a monthly basis by multiplying the number of customers (equivalent residential units) for each month by \$.10, the excess amount received under the interim rate. See WHSC Refund Exhibit 1, attached hereto. For example, there were 1,440 customers in February 2008. Multiplying the customer count of 1,440 by \$.10 results in a monthly adjustment of \$144.10 for February 2008.

at 65-66. The Consumer Advocate first raised these proposed adjustments in its post-hearing Opening Brief (Paniolo Estates) and written Direct Testimony (17th Fairway Villas), respectively. See Decision and Order, at 65-66 n.101; see also Transcript, at 78 and 93 (Paniolo Estates), and at 144-147 (17th Fairway Villas).

⁴⁰The two non-rate provisions approved by the commission in its Decision and Order now constitute part of WHSC's Rule VIII, Company's Equipment on Customer's Premises.

⁴¹WHSC's Refund Plan, at 3; see also Docket No. 00-0440, Order Denying Refund Proposal, filed on October 9, 2008 (the January 9, 2008 effective date of WHSC's interim rate for the 2006 Test Year).

See id. Taken together, the decreased revenues over a period between January 9, 2008 and October 1, 2008 total \$1,258.61. See id. Second, WHSC calculated simple interest on a monthly basis by applying an interest rate equal to WHSC's authorized rate of return of 8.85% and dividing by 12. See WHSC Refund Exhibit 2. Based on this formula, WHSC estimates that the interest for the period between January 9, 2008 and October 1, 2008 is approximately \$45.32. See id. Third, WHSC calculated the amount to be refunded to each customer by splitting the \$1,303.93 amount over the average number of customers which, in this case, is 1,440. See WHSC Refund Exhibit 3. This results in approximately \$.91 per customer. See id. WHSC therefore proposes to credit all customers of record at its next billing cycle **\$.91.**

WHSC's Refund Plan, at 3-4 (boldface and underscore in original).⁴²

Upon review, the commission finds that WHSC's Refund Plan appears consistent with HRS § 269-16(d) and the commission's pertinent instructions set forth in its Decision and Order. The commission, thus, approves as reasonable WHSC's Refund Plan.

III.

Orders

THE COMMISSION ORDERS:

1. The Consumer Advocate's Motion for Partial Reconsideration and Modification, filed on October 6, 2008, is denied.

2. WHSC's Refund Plan, filed on October 1, 2008, is approved. WHSC shall: (A) implement its Refund Plan during its next billing cycle; and (B) file for purposes of

⁴²Copies of WHSC's exhibits are attached to this Order.

confirmation, written proof of the implementation and completion of its Refund Plan, within five days following the completion of the Refund Plan.

3. This docket is closed unless ordered otherwise by the commission.

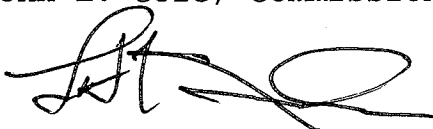
DONE at Honolulu, Hawaii

DEC 17 2008


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
John E. Cole, Commissioner

By 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Michael Azama
Commission Counsel

05-0329.laa

West Hawaii Sewer Company
Customer Count (Equivalent Residential Units)

Month	Customer Count (Equivalent Residential Units)	Estimated Adjustment (\$0.10 Per ER Per Month)	Cummulative Estimated Adjustment
1/9/08-1/31/08	1,441	\$ 144.10	\$ 106.91
2/1/08-2/29/08	1,440	\$ 144.00	\$ 250.91
3/1/08-3/31/08	1,440	\$ 144.00	\$ 394.91
4/1/08-4/30/08	1,440	\$ 144.00	\$ 538.91
5/1/08-5/31/08	1,440	\$ 144.00	\$ 682.91
6/1/08-6/30/08	1,440	\$ 144.00	\$ 826.91
7/1/08-7/31/08	1,439	\$ 143.90	\$ 970.81
8/1/08-8/31/08	1,440	\$ 144.00	\$ 1,114.81
9/01/08-9/30/08	1,438	\$ 143.80	\$ 1,258.61

WEST HAWAII SEWER COMPANY
DOCKET NO. 05-0329
ORDER, SEPTEMBER 24, 2008

Interest on Customer Refunds January 9, 2008 to September 30, 2008

Beginning Period	Ending Period	Interest Rate	Cummulative Fixed Charge Adjustment	Interest	Cummulative Interest
1/9/2008	1/31/2008	8.85%	106.91	0.79	0.79
2/1/2008	2/28/2008	8.85%	250.91	1.85	2.64
2/29/2008	3/31/2008	8.85%	394.91	2.91	5.55
4/1/2008	4/30/2008	8.85%	538.91	3.97	9.52
5/1/2008	5/31/2008	8.85%	682.91	5.04	14.56
6/1/2008	6/30/2008	8.85%	826.91	6.10	20.66
7/1/2008	7/31/2008	8.85%	970.81	7.16	27.82
8/1/2008	8/31/2008	8.85%	1,114.81	8.22	36.04
9/1/2008	9/30/2008	8.85%	1,258.61	9.28	45.32
				45.32	

Cummulative Fixed Charge Adjustment	1,303.93
Average Number of ER's	1,440
Refund Per ER (\$1,732.30/1,440 ER's)	0.91

West Hawaii Sewer Company
Estimated Revenue Adjustments
Order September 24, 2008

	Jan-08	Feb-08	Mar-08	Apr-08	May-08	Jun-08	Jul-08	Aug-08	Sep-08	Total
Fixed Charge Decrease	106.91	144.00	144.00	144.00	144.00	144.00	143.90	144.00	143.80	1,258.61
Interest	0.79	1.85	2.91	3.97	5.04	6.10	7.16	8.22	9.28	45.32
Total Revenue Decrease	<u>107.70</u>	<u>145.85</u>	<u>146.91</u>	<u>147.97</u>	<u>149.04</u>	<u>150.10</u>	<u>151.06</u>	<u>152.22</u>	<u>153.08</u>	<u>1,303.93</u>

Cummulative Fixed Charge Adjustment 1,303.93
Average Number of ER's 1,440
Refund Per ER (\$1,732.30/1,440 ER's) 0.91

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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