

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of)  
MOLOAA WATER DISTRIBUTION )  
COMPANY, LLC )  
For a Declaratory Ruling. )  

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DOCKET NO. 2007-0181

DECISION AND ORDER NO. 23642

Filed Sept. 10, 2007

At 2 o'clock P.M.

Karen Higashi.  
Chief Clerk of the Commission

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

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

Karen Higashi.

BEFORE THE PUBLIC UTILITIES COMMISSION  
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In the Matter of the Petition of)  
MOLOAA WATER DISTRIBUTION )  
COMPANY, LLC )  
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Docket No. 2007-0181  
Decision and Order No. 23642

DECISION AND ORDER

By this Decision and Order, the commission declares that MOLOAA WATER DISTRIBUTION COMPANY, LLC's ("Petitioner") provision of non-potable bulk water service to Moloaa Hui Lands, Inc. ("Moloaa Hui"), and the County of Kauai, Department of Water ("County DOW"), does not render it a public utility under Hawaii Revised Statutes ("HRS") § 269-1, under the facts presented to the commission in this docket. Accordingly, Petitioner is not required to obtain a commission-issued certificate of public convenience and necessity ("CPCN") under HRS § 269-7.5, for its provision of non-potable bulk water to Moloaa Hui and the County DOW.

With respect to the possibility of Petitioner supplying non-potable bulk water in the future to a yet-to-be-formed regulated water utility that will be owned or controlled by Petitioner's sole member, the commission declines to issue a declaratory ruling on this matter at this time, pursuant to Hawaii Administrative Rules ("HAR") § 6-61-164(1). Instead, Petitioner may file a separate petition for a declaratory ruling,

once the ownership structure of the regulated water utility and the terms surrounding the provisioning of water service from Petitioner to the regulated water utility are finalized.

I.

Background

A.

Procedural Background

On July 3, 2007, Petitioner filed its Petition seeking a declaratory ruling from the commission by August 16, 2007.<sup>1</sup> On July 23, 2007, the commission issued its information requests, to which Petitioner responded to on August 7, 2007. On August 15, 2007, the Consumer Advocate filed its Statement of Position.<sup>2</sup> On August 16, 2007, the commission approved: (1) the Parties' waiver of the forty-five day deadline for the commission to issue its declaratory ruling by August 16, 2007; and (2) their corresponding agreement to extend by one-month, until September 17, 2007, said deadline.<sup>3</sup>

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<sup>1</sup>Petition for Declaratory Ruling; Verification; and Certificate of Service, filed on July 3, 2007 (collectively, "Petition"). Petitioner: (1) filed its Petition pursuant to HAR chapter 6-61, subchapter 16, governing declaratory orders; and (2) served copies of its Petition upon the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to HRS § 269-51 and HAR § 6-61-62(a).

<sup>2</sup>Consumer Advocate's Statement of Position; and Certificate of Service, filed on August 15, 2007 (collectively, "Statement of Position").

<sup>3</sup>See Order No. 23609, filed on August 16, 2007.

B.

Description of Petitioner  
and its Water System

By its Petition and its responses to the commission's information requests, Petitioner represents:

1. Petitioner is a newly-formed Hawaii limited liability company whose sole member is Jeff Lindner.

Revocable Permit No. S-7088

2. Through Mr. Lindner, Petitioner holds a month-to-month Revocable Permit No. S-7088 ("Revocable Permit") issued by the State of Hawaii, Department of Land and Natural Resources ("DLNR"), on October 1, 2006.

3. Pursuant to the terms and conditions of the Revocable Permit:

A. Petitioner leases certain land in Moloaa, Kauai, from the DLNR. Improvements to the land include an existing non-potable well site and related transmission pipelines (the "Moloaa Water System"); and

B. Petitioner is required to continue its provision and delivery of non-potable water to Moloaa Hui, a non-profit farmers' cooperative, and to the County DOW. The members of Moloaa Hui are farmers on lands originally leased from Amfac Communities-Hawaii.<sup>4</sup>

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<sup>4</sup>To Petitioner's knowledge and belief: (1) the Moloaa Water System was developed by Lihue Plantation Company, the previous holder of a revocable permit issued by the DLNR; and (2) non-potable bulk water service has been provided to the

Water Purchase Agreement with Moloaa Hui

4. Petitioner provides non-potable water in bulk to Moloaa Hui pursuant to a Water Purchase Agreement that was assumed and subsequently modified by Petitioner.<sup>5</sup> Petitioner, under the terms of the Water Purchase Agreement, is required to deliver the non-potable bulk water to Moloaa Hui's storage tank.

5. Petitioner renders a single monthly bill to Moloaa Hui, which covers a pro rata share of Petitioner's fixed and variable costs related to the operation and maintenance of the Moloaa Water System. The rates charged by Petitioner to Moloaa Hui are cost-based, with no cross-subsidization. The members of Moloaa Hui, in turn, pay Moloaa Hui for the non-potable water delivered by Moloaa Hui, based on the members' metered water usage. Based on Petitioner's pertinent representations, although not explicitly stated by Petitioner, there is no privity of contract between Petitioner and the members of Moloaa Hui.

Agreement with the County DOW

6. Petitioner also provides non-potable water in bulk to the County DOW, pursuant to a written agreement (the "County DOW Agreement").<sup>6</sup> Petitioner, under the terms of the County DOW

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non-profit farmers' cooperative and the County DOW for many years. "A second, but currently inactive, production well (the 'Keats Well') has been connected to the Moloaa Water System since sometime from the 1970's, and has been utilized only as a backup source of water in the past. Mr. Lindner acquired the land underlying the Keats Well in 2002." Petition, at 2 n.1.

<sup>5</sup>See Petition, at 7; and Petitioner's responses to PUC-IR-105 and PUC-IR-106.

<sup>6</sup>See Petition, at 6.

Agreement, is required to deliver the non-potable bulk water to the County DOW's water system.

7. The County DOW purchases the non-potable bulk water from Petitioner based on meter readings from a County DOW master meter. Petitioner charges the County DOW a pro rata share of Petitioner's fixed and variable costs related to the operation and maintenance of the Moloaa Water System. The rates charged by Petitioner to the County DOW are cost-based, with no cross-subsidization.

8. The bulk water delivered to the County DOW's system is chlorinated for the eventual delivery to and use by the County DOW's seven end-users. The County DOW bills each end-user individually, based on a rate set by the County DOW. There is no privity of contract between Petitioner and the County DOW's seven end-users.

#### Future Bulk Water Service

9. Petitioner holds an option to acquire from Mr. Lindner an additional production water well located on lands currently owned by Mr. Lindner. Petitioner is evaluating the possible connection of this additional water well to the Moloaa Water System, inclusive of the Keats Well, for redundancy purposes, and to provide non-potable bulk water service to a yet-to-be-formed commission regulated water utility company (the "Regulated Water Utility").

10. The Regulated Water Utility: (A) will be owned or controlled by Mr. Lindner; and (B) will construct all the necessary treatment facilities (chlorination), storage tanks, and

water distribution facilities in order to eventually provide potable water service to a future residential development. With respect to the ownership or control of the Regulated Water Utility, Petitioner specifically explains:

At the present time, Mr. Lind[n]er has not fully determined how the to-be-formed regulated water utility company will be established and structured (e.g., corporation, limited liability company, etc.). As such, it would be difficult to identify the other members and/or shareholders, if any, that that will have an ownership interest in the to-be-formed utility company. In any case, this to-be-formed regulated water utility will be structured so that Mr. Lind[n]er will at least own a majority interest (i.e., 51% and greater) in the utility company and is expected to always have control of the utility company. Furthermore, consistent with the response to PUC-IR-103, the rates Petitioner will charge the to-be-formed regulated water company will be cost-based to ensure that no cross-subsidization will occur.

Petitioner's response to PUC-IR-104 (emphasis added).

B.

#### Petitioner's Requests

Petitioner requests that the commission issue an order declaring that:

1. Petitioner's provision of non-potable bulk water to Moloaa Hui and the County DOW does not render it a public utility under HRS § 269-1, and thus, Petitioner is not required to obtain a CPCN under HRS § 269-7.5; and

2. Petitioner's proposal to connect an additional water production well to the Moloaa Water System (including the Keats Well), and eventually provide non-potable bulk water service to a regulated water utility company owned or controlled

by Mr. Lindner, Petitioner's sole member, does not render it a public utility under HRS § 269-1, and thus, Petitioner is not required to obtain a CPCN under HRS § 269-7.5.

Petitioner contends that, with respect to Moloaa Hui and the County DOW, "its intent is to service only" these two entities, and that "Petitioner is not holding itself out to serve the public and, therefore, should not be deemed to be a public utility subject to Commission regulation."<sup>7</sup> Petitioner reiterates that "[i]n this case, Petitioner, through arrangements assumed under prior contracts, is obligated to provide bulk non-potable water services to the Moloaa Hui and the [County] DOW."<sup>8</sup>

Petitioner also contends that, with respect to the possibility of providing non-potable bulk water in the future to a regulated water utility that will be owned or controlled by Petitioner's sole member, it will likewise not be a public utility. In this regard, Petitioner asserts: (1) by limiting its supplying of bulk water to the regulated water utility, and not directly to the end-user lot owners of the future residential development, it is not holding itself out to serving the public; and (2) it will provide non-potable bulk water "to a public utility within the same 'ownership' circle[.]"<sup>9</sup>

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<sup>7</sup>Petition, at 7.

<sup>8</sup>Petition, at 8.

<sup>9</sup>Petition, at 9. Petitioner elaborates on this argument by representing that it will be providing bulk non-potable water to an affiliate organization that Petitioner "will have control over decisions concerning the water service." Petition, at 11.

Petitioner concludes by noting that the general public should not be harmed under either scenario.

C.

Consumer Advocate's Position

In its Statement of Position, the Consumer Advocate states that Petitioner's action of supplying non-potable bulk water to Moloaa Hui and the County DOW, pursuant to the respective water service agreements, does not render it a public utility within the meaning of HRS § 269-1, and thus, Petitioner is not required to apply for a CPCN under HRS § 269-7.5. In support thereto, the Consumer Advocate reasons that: (1) Petitioner only provides non-potable bulk water service to Moloaa Hui and the County of DOW, pursuant to the terms of the respective water service agreements; (2) Petitioner has no privity of contract with the members of Moloaa Hui or with the County DOW's end-users; and (3) Petitioner is not holding itself out as serving the public or a limited portion of the public.

With respect to the possibility of providing non-potable bulk water in the future to a regulated water utility that will be owned or controlled by Petitioner's sole member, the Consumer Advocate contends that "[u]ntil the arrangement under which such water service is to be provided and the ownership of the yet-to-be-formed water utility is finalized, any determination as to whether such future arrangement would render

[Petitioner] to be [a] public utility would be speculative, at best."<sup>10</sup>

The Consumer Advocate reasons that "[t]he relationship of [Petitioner] to the yet-to-be-formed utility company and the rates at which service is provided to be yet-to-be-formed utility company and its customers are essential components in determining whether [Petitioner] will be deemed to be a 'public utility' within the meaning of HRS § 269-1 . . . . Only when an actual contractual relationship between [Petitioner] and the yet-to-be-formed water utility company exists and the terms under which water service will be provided to the utility company and its customers [are known], can the Consumer Advocate and the Commission properly assess whether [Petitioner's] arrangement would result in a determination that [Petitioner] is or is not a public utility under HRS § 269-1."<sup>11</sup> The Consumer Advocate concludes by stating that Petitioner should be required to file a separate petition for a declaratory ruling "when [its] arrangements to provide water service to the yet-to-be-formed water utility company are finalized."<sup>12</sup>

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<sup>10</sup>Consumer Advocate's Statement of Position, at 10. The Consumer Advocate cites to Petitioner's response to PUC-IR-104 in support of its position.

<sup>11</sup>Consumer Advocate's Statement of Position, at 10-11 (footnotes, citation, and text therein omitted).

<sup>12</sup>Consumer Advocate's Statement of Position, at 11.

II.

Standard

HAR §§ 6-61-162, 6-61-164, and 6-61-166, governing the issuance of declaratory rulings by the commission, provide in relevant part:

§6-61-162 Commission action. (a) Within forty-five days after the submission of a petition for declaratory ruling, the commission shall:

- (1) Deny the petition in writing, stating the reasons for that denial;
- (2) Issue a declaratory order on the matters contained in the petition; or
- (3) Set the matter for hearing, as provided in subchapter 3.

.....

§6-61-164 Refusal to issue declaratory order. The commission may, for good cause, deny the petition or refuse to issue a declaratory order by giving specific reasons for that determination. Without limiting the generality of the foregoing, the commission may so refuse where:

- (1) The question is speculative or purely hypothetical and does not involve existing facts or facts that can be expected to exist in the near future;

.....

§6-61-166 Applicability of order. An order disposing of a petition for a declaratory order applies only to the factual situation described in the petition or if, a hearing is held, as set forth in the decision and order.

HAR §§ 6-61-162, 6-61-164, and 6-61-166.

III.

Discussion

Under HRS § 269-7.5, a public utility, as defined in HRS § 269-1, must obtain a CPCN from the commission prior to commencing its utility operations. HRS § 269-1 defines the term "public utility" in relevant part as follows:

"Public utility":

- (1) Includes 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 public or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telecommunications messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air within the State, or between points within the State, or for the production, conveyance, transmission, delivery, or furnishing of light, power, heat, cold, water, gas, or oil, or for the storage or warehousing of goods, or the disposal of sewage; . . . .

HRS § 269-1 (emphasis added).

The Hawaii Supreme Court clarified 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) (emphasis added).

In In re South Shore Comm. Serv., Inc., Docket No. 7743 ("South Shore, Inc."), South Shore Community Services, Inc. ("South Shore, Inc."), the owner of a private sewer facility, intended to serve homes and businesses that were planned for development within its development area. Until the developments were completed, however, the facility owner planned to provide bulk sewage treatment service to one customer, the County of Kauai, pursuant to a written contract between both entities.<sup>13</sup>

The commission held that, under the narrow facts of the case, the facility owner was not a public utility with respect to the bulk sewage treatment service it planned to provide to the County of Kauai:

In the case before us, [South Shore, Inc.] plans to provide bulk sewage service to the County pursuant to a contract strictly between [South Shore, Inc.] and the County. [South Shore, Inc.] is not holding itself out to serve the public. [South Shore, Inc.] intends to service only one particular individual, namely, the County. The County, in turn, will hold itself out as the provider of sewage treatment service to residents of the Paanau project at rates set by the County.

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<sup>13</sup>The County of Kauai, in turn, planned to provide sewage treatment service to the Paanau residential housing project that was subject to development by the County of Kauai and the Hawaii Housing Authority.

By Act 59 of the 1974 Hawaii Session Laws, codified under HRS § 269-1 private sewer companies fall within the definition of public utilities. One of the purposes of the act was to protect consumers from unreasonable rates and charges for private sewer service. The County has sufficient bargaining power to negotiate, at arms length, with private sewer companies for fair and reasonable rates. Residents of the Paanau project, in turn, have recourse to County administrative procedures to protect their interests with respect to sewage treatment service. The commission's non[-]regulation of rates in these limited circumstances does not undermine the intent of Act 59.

South Shore, Inc., Docket No. 7743, Order No. 12548, filed on July 30, 1993, at 4.<sup>14</sup>

Noting the facility owner's representation that it would apply for a CPCN before offering its sewage treatment services to the public, the commission expressly reserved its right to "revisit this case to determine whether [the facility owner's] service to the County should continue to be unregulated, or whether the County merely becomes one of [the facility owner's] customers in its regulated activities."<sup>15</sup>

Thereafter, in In re South Shore Comm. Serv. LLC ("South Shore LLC"), Docket No. 99-0031, South Shore, Inc.'s successor-in-interest, South Shore Community Services LLC ("South Shore LLC"), applied for a CPCN to provide sewage treatment service to residential and commercial customers. In granting a CPCN to South Shore LLC, the commission held that

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<sup>14</sup>The commission also noted that no privity of contract existed between the facility owner and the County of Kauai's potential customers.

<sup>15</sup>South Shore, Inc., Docket No. 7743, Order No. 12548, at 5.

South Shore LLC's provision of sewer treatment service to the County of Kauai should be regulated by the commission:

In Decision and Order No. 12548, filed on July 30, 1993, in Docket No. 7743, the commission held that [South Shore, Inc.] was not a public utility as defined by HRS § 269-1 and was not required to obtain a CPCN. The commission, however, reserved the right to revisit the issue of whether services to the County should continue as unregulated or become a regulated activity, if and when [South Shore, Inc.] applied for a CPCN to offer its services to the public.

Given the potential for discriminatory rates and cross-subsidization between [South Shore LLC's] residential and large commercial customers and the County, we conclude that service to the County should be regulated and [South Shore LLC] will be required to establish a tariff rate for the County service. In Decision and Order No. 12548, the commission's primary concern was ensuring that the low-income residents of Paanau were charged reasonable sewage treatment rates and had access and recourse to the service provider to address sewage problems. Because the County was holding itself out as the service provider, the commission found that the County was able to negotiate reasonable rates through its bargaining power, and residents had access and recourse to the County through its administrative procedures. In this instance, because [South Shore LLC] is proposing to offer its services to the public, our concerns are broader. Not only must we consider the County's interests, but also the interests of other residential and large commercial ratepayers in the development area. In order to ensure equity amongst all ratepayers, we will need to review all of [South Shore LLC's] proposed rates, including its rate for the County.

South Shore LLC, Docket No. 99-0031, Decision and Order No. 17822, filed on July 11, 2000, at 10-11; see also South Shore LLC, Docket No. 99-0031, Order No. 17975, filed on August 24, 2000 (affirming the commission's ruling that South Shore LLC's sewage treatment service to the County of Kauai

was regulated, and allowing the contract rate to be used as the tariff rate).

In addition to the test articulated in Wind Power, the commission, in In re Poipu Kai Water Reclamation Corp. ("Poipu Kai"), Docket No. 6939, examined the control of a facility as another critical factor that distinguishes a facilities operator from a "public utility." 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.<sup>16</sup>

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."<sup>17</sup> 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

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<sup>16</sup>In re Poipu Kai Water Reclamation Corp., Docket No. 6939, Decision and Order No. 11184, filed on July 22, 1991.

<sup>17</sup>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).

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.

Similarly, in In re Poipu Wastewater Corp. ("Poipu Wastewater Corp."), Docket No. 7265, 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., Docket No. 7265, Decision and Order No. 16079, filed on November 14, 1997, at 7-8 (emphasis added).

Consistent with Wind Power, Poipu Kai, and Poipu Wastewater Corp., the commission, in In re Hokuli'a Community Serv., Inc. ("Hokuli'a"), Docket No. 00-0009, 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.<sup>18</sup>

Here, Petitioner presently provides non-potable bulk water to two entities, Moloaa Hui and the County DOW, and is evaluating the possibility of providing bulk water to a regulated water utility that will be owned or controlled by Petitioner's sole member, Mr. Lindner. Petitioner seeks a declaratory ruling that it is not public utility under both scenarios.

Based solely on Petitioner's representations, the commission finds and declares that Petitioner's provision of non-potable bulk water to Moloaa Hui and the County DOW does not render it a public utility under HRS § 269-1.<sup>19</sup> Thus, Petitioner is not required to apply for a CPCN under the present facts and circumstances, as described in the Application. Consistent with Wind Power and South Shore, Inc., Docket No. 7743, the commission finds that Petitioner is providing non-potable bulk water to Moloaa Hui and the County DOW, pursuant to their respective water service agreements, and is not holding itself out as serving the public or any portion of it. Moreover, Petitioner has no privity of contract with the members of Moloaa Hui or with the County

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<sup>18</sup>Hokuli'a, Docket No. 00-0009, Decision and Order No. 17557, filed on February 22, 2000.

<sup>19</sup>The scope of the Petition is limited to whether Petitioner is a public utility under HRS § 269-1. Hence, this Decision and Order does not analyze or address whether Moloaa Hui, in its supplying of water to the individuals farmers, is a public utility. With respect to the County DOW's supplying of water to the seven end-users, HRS § 269-31 states in relevant part that chapter 269, HRS, does not "apply to public utilities owned and operated by the State, or any county, or other political subdivision."

DOW's end-users.<sup>20</sup> In effect, it appears that Petitioner's continued operation of the Moloaa Water System under these circumstances will not be for a "public use" under HRS § 269-1.<sup>21</sup>

With respect to the possibility of Petitioner providing non-potable bulk water in the future to a regulated water utility that will be owned or controlled by Petitioner's sole member, the commission concurs with the Consumer Advocate's analysis that such an arrangement, without definitive facts, is speculative at best.<sup>22</sup> Thus, pursuant to HAR § 6-61-164(1), the commission declines to issue a declaratory ruling on this matter at this time. Instead, Petitioner may file a separate petition for a declaratory ruling, once the ownership structure of the regulated water utility and the terms surrounding the provisioning of water

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<sup>20</sup>South Shore, Inc., Docket No. 7743, Order No. 12548, filed on July 30, 1993 (no privity of contract rationale).

<sup>21</sup>In addition, the commission notes Petitioner's representation that the rates it charges to Moloaa Hui and the County DOW for non-potable bulk water are cost-based, and that no cross-subsidization between these two entities exists. See Petitioner's response to PUC-IR-103. Thus, in effect, the concerns that led the commission to assert jurisdiction over South Shore LLC's provision of sewer treatment service to the County of Kauai, in South Shore LLC, Docket No. 99-0031, do not appear to be present herein.

<sup>22</sup>For example, Petitioner contends that it intends to supply non-potable bulk water to a regulated water utility that is within the same "ownership circle" as Petitioner. Nonetheless, at this time, while Mr. Lindner represents that he will have a majority interest in the regulated water utility, he has not determined how the regulated water utility will be established and structured, and is unable to "identify the other members and/or shareholders, if any, that will have an ownership interest in the to-be-formed utility company." Petitioner's response to PUC-IR-104. Without more definitive facts, the commission is unable to analyze Petitioner's ownership or control under Poipu Kai, Docket No. 6939; Poipu Wastewater Corp., Docket No. 7265; and Hokuli'a, Docket No. 00-0009.

service from Petitioner to the regulated water utility are finalized.

#### IV.

##### Orders

THE COMMISSION ORDERS AND DECLARES:

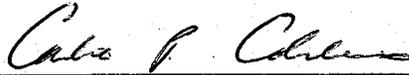
1. Petitioner's provision of non-potable bulk water service to Molooa Hui and the County DOW, does not render it a public utility under HRS § 269-1, under the facts presented to the commission in this docket. Accordingly, Petitioner is not required to obtain a CPCN pursuant to HRS § 269-7.5, for its supplying of non-potable bulk water to Molooa Hui and the County DOW.

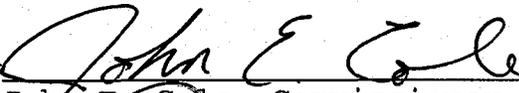
2. With respect to the possibility of Petitioner providing non-potable bulk water in the future to a regulated water utility that will be owned or controlled by Petitioner's sole member, the commission declines to issue a declaratory ruling on this matter at this time, pursuant to HAR § 6-61-164(1). Instead, Petitioner may file a separate petition for a declaratory ruling, once the ownership structure of the regulated water utility and the terms surrounding the provisioning of water service from Petitioner to the regulated water utility are finalized.

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

DONE at Honolulu, Hawaii SEP 10 2007

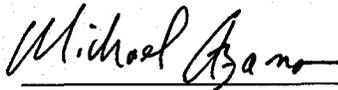
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By   
John E. Cole, Commissioner

By   
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

  
Michael Azama  
Commission Counsel

2007-0181.cp

CERTIFICATE OF SERVICE

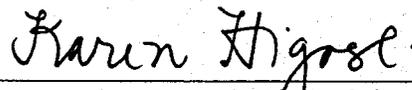
I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23642 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI  
EXECUTIVE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
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Attention: JEFF LINDNER

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\_\_\_\_\_  
Karen Higashi

DATED: **SEP 10 2007**