

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----In the Matter of the----)
)
 PUBLIC UTILITIES COMMISSION)
)
 Instituting a Proceeding to)
 Investigate Whether Act 59,)
 Session Laws of Hawaii 1974,)
 Invalidates, Voids, or Renders)
 Unenforceable the 1961 Agreement)
 Between the Trustees Under the)
 Will and of the Estate of)
 Bernice P. Bishop, Deceased;)
 Kaiser Hawaii Kai Development)
 Co.; and The City and County of)
 Honolulu.)
 _____)

Docket No. 2006-0021

DECISION AND ORDER NO. 23725

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

Filed Oct. 16, 2007

At 1 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.

Karen Higashi

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DECISION AND ORDER

By this Decision and Order, the commission determines that: (1) the rates set forth in the 1961 agreement between the Trustees Under the Will and of the Estate of Bernice P. Bishop, Deceased (the "Trustees"); Kaiser Hawaii Kai Development Co. ("Kaiser"), predecessor-in-interest to HAWAII-AMERICAN WATER COMPANY ("HAWC"); and the CITY AND COUNTY OF HONOLULU ("City") are unenforceable and unlawful to the extent that they conflict with HAWC's tariff filed with and approved by the commission; and (2) all of HAWC's customers must pay rates set forth in the tariffs filed with and approved by the commission.

I.

Background

HAWC is a public utility authorized to provide wastewater collection, treatment, and disposal services to residences, condominiums, and commercial establishments in the Hawaii Kai community on the island of Oahu.

By Order No. 22254, filed on February 1, 2006 ("Order No. 22254"), the commission initiated this investigation to determine whether Act 59, Session Laws of Hawaii 1974 ("Act 59"), which placed the regulation of sewer companies under the jurisdiction of the commission through an amendment of Hawaii Revised Statutes ("HRS") § 269-1 ("1974 Amendment"), invalidates, voids or renders unenforceable, that certain agreement entered into by and between Kaiser, the Trustees, and the City, which provides for, among other matters, sewerage services at no charge to the City and related beneficiaries ("1961 Agreement").¹ The parties to this proceeding are HAWC; the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

¹By Order No. 21888, filed on June 23, 2005, in Docket No. 05-0140 ("Order No. 21888"), the commission denied HAWC's June 7, 2005 request for a declaratory ruling regarding the validity of the 1961 Agreement ("Docket No. 05-0140"). In Order No. 21888, the commission declared its intent to initiate a separate proceeding to investigate and examine HAWC's allegation that the 1961 Agreement was invalidated by the 1974 Amendment (i.e., this docket). This proceeding shall be referred to, when applicable, as the "Investigation Docket."

This Investigation Docket was initiated pursuant to HRS §§ 269-7, 269-15, and 269-16, Hawaii Administrative Rules ("HAR") § 6-61-71, and Order No. 21888.

("Consumer Advocate")²; the City; and the STATE OF HAWAII ("SOH")³ (collectively, the "Parties").⁴

The commission notes that HAWC pursued its case regarding the validity of the 1961 Agreement in civil court. By status report filed on February 21, 2006, in this docket ("Status Report"), HAWC informed the commission that the related substantive matters that have been raised in Hawaii-American Water Company v. City and County of Honolulu et al., Civil No. 04-1-2244-12 (GWBC) (Declaratory Relief); and Hawaii-American Water Company v. State of Hawaii et al., Civil No. 04-1-2243-12 (KSSA), (Declaratory Relief) have been stayed pending the outcome of the commission's proceeding in Docket No. 05-0140.⁵ As noted above, the commission in Docket No. 05-0140 stated that it would initiate this proceeding to examine HAWC's allegations regarding the 1961 Agreement.

²Pursuant to HRS § 269-51, the Consumer Advocate is statutorily mandated to represent, protect and advance the interests of all consumers of utility service and is an ex officio party in all proceedings before the commission. See also HAR § 6-61-62.

³The acronym "SOH" will be used when referring to the State of Hawaii in its capacity as a party to this proceeding; however, "State" will be used when referring to the State of Hawaii in generic terms.

⁴The commission named HAWC, the Consumer Advocate, and the City, as parties to this proceeding in Order No. 22254; while the commission granted the SOH's February 21, 2006 Motion to Intervene. See Order No. 22317, filed on March 10, 2006 ("Order No. 22317").

⁵See Status Report, Exhibit 1 (copies of the executed Stipulation to Stay the Case Pending the Public Utilities Commission Proceedings and Order filed in the separate circuit court proceedings).

On March 29, 2006, the commission issued Stipulated Procedural Order No. 22359 approving the Parties' proposed stipulated procedural order, filed on March 17, 2006 ("Stipulated Procedural Order").

A.

The 1961 Agreement

Kaiser, the initial developer of HAWC's sewerage system that serves East Honolulu (the "Sewerage System"), agreed to provide sewer services to all City facilities in Hawaii Kai without charge pursuant to the 1961 Agreement ("Free Service"). The agreement also stated that Kaiser would provide sewer fees based on a certain formula contained in the 1961 Agreement if the City constructed sewers in the Portlock, Kuliouou Valley, Paiko and certain others areas of Hawaii Kai (collectively, "Portlock and Related Areas").⁶

The SOH, while not a party to the 1961 Agreement, received free sewerage services for the public schools situated in HAWC's service territory as a claimed beneficiary of the 1961 Agreement. Additionally, Lunalilo Homes, a charitable institution for the aged administered by the Trustees Under the Will and of the Estate of William Charles Lunalilo, Deceased ("Lunalilo Trust"), became entitled to be treated as a City facility under a December 4, 1969 Agreement between Lunalilo Trust and the Hawaii Kai Community Services Co., a Nevada

⁶Customers living in these areas are directly served by the City's sewer system (which is connected to HAWC's system), and pay their sewer bills directly to the City instead of HAWC.

corporation, a subsidiary created by Kaiser to own and operate the Sewerage System.⁷ The commission served Lunalilo Homes and Lunalilo Trust with copies of Order No. 22317 and invited them to file motions to intervene or participate without intervention in this proceeding in accordance to the commission's rules within twenty days of the date of that order. However, neither Lunalilo Homes nor Lunalilo Trust moved to intervene or participate without intervention in this proceeding or filed any other type of pleadings with the commission regarding this matter, to date.

The 1961 Agreement was executed at a time when providers of wastewater collection, treatment, and disposal services were not regulated by the commission. Subsequently, Act 59 amended the definition of a "public utility" under HRS § 269-1 to include private owners and operators of sewer companies and sewer facilities. Due to this amendment, Kaiser's subsidiary, Hawaii Kai Community Services Co., became a public utility under the regulation of the commission and subject to HRS chapter 269. In turn, HAWC, the current owner and operator of the Sewerage System, is similarly subject to HRS chapter 269 and regulated by the commission.

During HAWC's 2005 general rate increase proceeding (the "Rate Case Docket"), the Free Service issue and the rate to be assessed for service in the Portlock and Related Areas (known as the "Public Authority - Dwelling" rate classification) were both discussed. At one time, the parties of the Rate Case Docket requested a stay of the commission's determination of this

⁷See Order No. 22317 at 8.

proceeding.⁸ The parties to the Rate Case Docket ultimately agreed to defer resolution of Free Service issue to this proceeding and agreed to a volumetric rate of \$2.93 per thousand gallons for the Public Authority - Dwelling classification.⁹ HAWC advised in its September 2006 Status Letter that a commission determination regarding the validity of the 1961 Agreement and related matters in this docket is necessary since a determination regarding the Free Service issue and

⁸On July 7, 2006, a signed Settlement Letter was filed in the Rate Case Docket in which the parties to that proceeding (i.e., HAWC, the Consumer Advocate, and the City) informed the commission that they have resolved their outstanding issues regarding all rate case related items, in principle; and had agreed that the remaining issues were more appropriately addressed in the Investigation Docket. Additionally, the parties to the Rate Case docket indicated that HAWC and the City needed additional time to reach an agreement on a volumetric rate for the Public Authority - Dwelling classification and time to further explore whether a settlement can be reached on the "Free Service" provision for the Public Authority - Other class without the commission issuing a determination in the Investigation Docket. Thus, the parties to the Rate Case Docket requested that the commission not issue its determination in the Investigation Docket for a period of thirty days at which time they will file a status letter with the commission as to whether a commission determination regarding the validity of the 1961 Agreement is still necessary ("Status Letter"). The commission issued Interim Decision and Order No. 22642 on July 25, 2006, in Docket No. 05-0103 ("Interim Decision and Order"), upon receipt of the July 14, 2006 Stipulated Interim Relief Letter in lieu of Evidentiary Hearing in the Rate Case Docket.

On August 7, 2006, HAWC filed a letter on behalf of the parties to request an extension from August 7, 2006, until August 21, 2007, to file the Status Letter, which the commission approved through a letter dated August 15, 2006. On August 21, 2007, HAWC, the Consumer Advocate, and the City requested and received an additional two weeks (i.e., until September 5, 2006) to complete HAWC's discussions with the City regarding the rates for the Public Authority classifications, which was then extended to September 6, 2006.

⁹See HAWC's September 6, 2006 letter filed in Docket No. 05-0103 ("September 2006 Status Letter").

whether the agreed-upon volumetric rate for the Public Authority - Dwelling classification should be reflected as an amendment to the 1961 Agreement or as a separate rate in HAWC's tariff have not been resolved between the parties.¹⁰

B.

Issues

The issues of this proceeding, as set forth in the Stipulated Procedural Order are as follows:

1. Whether the rates established by the 1961 Agreement are enforceable to the extent they conflict with HAWC's tariff.
 - a. Whether the 1974 Amendment invalidates, voids, or renders unenforceable the 1961 Amendment.
 - b. What are the public interest considerations related to the resolution of whether the 1974 Amendment invalidate, voids, or renders unenforceable the 1961 Agreement?

C.

Parties' Positions

1.

HAWC's Arguments

On April 6, 2006, HAWC filed its Position Statement ("HAWC's Statement") in this docket. Primarily, HAWC argues that

¹⁰Id.

the provisions of the 1961 Agreement are unenforceable under the filed rate doctrine. HAWC submits that the "1961 Agreement was subject to the exercise of the State of Hawai'i police power to regulate sewer services and that the rates set forth in the 1961 Agreement were abrogated when the . . . [commission] approved tariffs which conflicted with the rates in the 1961 Agreement."¹¹ In turn, HAWC concludes that all of HAWC's customers must pay the rates set forth in its tariffs filed with the commission.

HAWC contends that passage of the 1974 Amendment merely placed private sewerage companies under the commission's jurisdiction. It argues that the commission's approval of a tariff that conflicts with the 1961 Agreement made the provisions of the 1961 Agreement unenforceable under the filed rate doctrine. HAWC explains that its current tariff, which the commission approved in Decision and Order No. 20966, filed on May 6, 2004, in Docket No. 03-0025 was filed with the commission on May 11, 2004, and became effective on May 6, 2004 ("2004 Tariff").¹² HAWC contends that the 2004 Tariff does not mention the 1961 Agreement nor contain any provisions allowing HAWC to provide free service to the City, SOH, or Lunalilo Homes, or to charge fees based on a formula set forth in the agreement. HAWC states that prior to the 2004 Tariff, its rates were controlled by the 1991 Tariff with certain amendments made pursuant to Decision and Order No. 15170, filed

¹¹See HAWC's Statement at 9.

¹²Pursuant to the Interim Decision and Order filed in the Rate Case Docket, HAWC filed certain tariff revision pages to its 2004 Tariff on July 28, 2006.

on November 18, 1996, in Docket No. 7718. Similar to the 2004 Tariff, HAWC contends that the 1991 Tariff did not mention or contain any provision allowing HAWC to provide services at rates set forth in the 1961 Agreement.

HAWC asserts that "[o]nce approved by the appropriate regulatory agency, the tariff of a public utility is considered to be the law with respect to the service provided and the utility may not charge rates for its services that differ from the tariff."¹³ According to HAWC, this principle, known as the filed rate doctrine or filed tariff doctrine, originated under federal law and is applied to tariffs approved by state regulatory agencies regarding rates and non-rate provisions of a tariff.

HAWC argues that once a tariff is approved by the regulatory agency the utility must strictly comply with it and may not deviate from the rates and charges for any reason since the regulatory agency when approving rates considers the number of customers being served and their usage, and applies a formula and a balance to allow the utility to recover its expenses and realize a certain level of return. Thus, "if price discrimination occurs or a customer is able to deviate from the approved rate, the balance and rate of return established by the regulatory agency will be altered and the purpose of the tariff will be defeated."¹⁴

¹³See HAWC's Statement at 5 (internal quotes and citations omitted).

¹⁴Id. at 6.

According to HAWC, under HRS chapter 269 and the filed rate doctrine, it is not only entitled to collect the amounts in its tariff but is actually required to do so since providing service on different terms or at different rates would be unlawful. HAWC contends that the courts have held that "settlement agreements pertaining to rates are unenforceable as no act of the carrier, except allowing the statute of limitations to run, will estop or preclude it from enforcing payment of the full amount legally payable under the applicable tariff."¹⁵ In particular, HAWC states that the Hawaii Supreme Court held in Molokoa Village Development Co., Ltd. v. Kauai Electric Co., Ltd., 60 Haw. 582, 593 P.2d 375 (1979) ("Molokoa Village"), that "a public utility can enforce payment for its services in accordance with its established tariff, notwithstanding any agreement to charge less and that the carrier will not be barred by equitable doctrines such as promissory estoppel and unclean hands."¹⁶ HAWC also contends that some courts have held that a carrier may not deviate from the terms of the tariff "no matter how eager the carrier and its customer are to strike a special, off-tariff deal, or even when the customer reasonably relies on the carrier's promise to file the negotiated rate as a tariff."¹⁷

Additionally, HAWC asserts that "[t]he fact that the 1961 Agreement was executed and was in existence before HAWC became a public utility is immaterial as all contracts are

¹⁵Id. at 7 (citations omitted).

¹⁶Id. (citing Molokoa Village at 587).

¹⁷Id. (citation omitted).

subject to the possible exercise by state governments of their police powers."¹⁸ Related to this, HAWC maintains that the United States Supreme Court ("US Supreme Court") has repeatedly held that action which results in the modification of existing contracts between a public utility and its customers does not violate the Constitution.¹⁹ Further, HAWC offers that there is no violation of due process or contract clauses of the Constitution when state regulation of a public service results in the abrogation or modification of the existing contractual obligations since the exercise of state police powers may impose limitations on property rights and all contracts are subject to the possible exercise of police powers. With regards to this, HAWC highlights the matters in Union Dry Goods in which a public utility entered into a 5 year contract to provide electricity at a stipulated rate but began, less than two years later, billing its customer a higher rate which was approved by the government regulator. Upon appeal of the Georgia Supreme Court's ruling that the pre-existing contract was superceded by the new rates, the US Supreme Court affirmed the Georgia Supreme Court's "holding that the right of private contract must yield to the exigencies of public welfare when determined in an appropriate manner by the authority of the state."²⁰ HAWC represents that

¹⁸Id. at 8 (citations omitted).

¹⁹Id. (citing Union Dry Goods Co., v. Georgia Public Service Corporation, 248 U.S. 372, 39 S.Ct. 117 (1919) ("Union Dry Goods"); Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109, 57 S.Ct. 345 (1937); et al.).

²⁰Id. at 9.

after Union Dry Goods, the US Supreme Court upheld Kansas and Utah state court decisions based on Union Dry Goods regarding similar cases without further comment.²¹ Furthermore, HAWC contends that the fact that the City is a municipal government is immaterial since states have the power to set aside contracts of their political subdivisions without their consent.

Thus, HAWC concludes that the 1961 Agreement is subject to the exercise of the State's police power to regulate the provision of sewer services and that rates of the 1961 Agreement were abrogated upon the commission's approval of tariffs that conflict with the rates of the 1961 Agreement. Accordingly, HAWC asserts that the provisions of the 1961 Agreement are unenforceable.

2.

The City's Arguments

On May 1, 2006, the City filed its Position Statement ("City's Statement") arguing that contrary to HAWC's claims, the "1961 Agreement remains in full force and effect."²² The City asserts that the: (1) US Supreme Court has held that a contract between a utility and a municipality is binding; and (2) the City is specifically excluded from the requirements of HRS chapter 269, under HRS § 269-31. Moreover, the City alleges

²¹Id. (citing Kansas City Bolt & Nut Company v. Kansas City Light & Power Company, 252 U.S. 571, 40 S.Ct. 392 (Mem) (1920); Ogden Portland Cement Company v. Public Utilities Commission of Utah, 258 U.S. 609, 42 S.Ct. 381 (Mem) (1922)).

²²See City's Statement at 4.

that the invalidation of the 1961 Agreement would interfere with the City's ability to self-govern.

The City contends that US Supreme Court in Railroad Commission of California v. Los Angeles Ry. Corporation, P.U.R. 1930A, 1, 50 S.Ct. 71 (1929) ("Railroad Commission"), held that a contract between a public utility company and a municipality is binding, and that "the courts may not relieve the utility from its obligation to serve at the agreed rates, however inadequate they may prove to be."²³ Likewise, the City maintains that "the Ohio Supreme Court stated, [that a] contract between the city and the utility company for its product and service at the stipulated price, and for the period named, was thus made, and is binding upon both parties."²⁴ The City argues that unlike the cases referenced by HAWC, its line of cases focus on a municipality's power to contract with the public utility.

Moreover, the City alleges that HRS § 269-31 which "states in relevant part, [that t]his chapter shall not apply to . . . public utilities owned and operated by the State, or any county, or other political subdivision" specifically exempts the City from the commission's authority and rules.²⁵ According to the City, this provision "memorializes the legislature's intent to reserve to the State and local governments their ability [to] address their own infrastructure needs, including sewerage

²³Id. (citing Railroad Commission).

²⁴Id. (citing Link v. Public Utilities Commission of Ohio, 102 Ohio St. 336, 131 N.E. 796 (1921)) (additional citations and internal quotes omitted).

²⁵Id. at 5 (internal quotes omitted).

disposal."²⁶ Thus, the City reasons that the enactment of Act 59 did not limit the City's ability to address its own sewerage needs through a contract with Kaiser and that HRS chapter 269 actually recognized it.

Finally, the City contends that an invalidation of the 1961 Agreement by the commission will interfere with its ability to self-govern. The City states that the concept of its self-governance is derived from Article VIII, Section 1 of the Hawaii State Constitution which authorizes the State Legislature to create counties which shall have and exercise powers conferred to it by law. The law, the City claims, provides it with the power to address its sewer needs, and the power to contract.²⁷ The City, thus, contends that this commission should not interfere with its ability to manage its own affairs and, based on the foregoing, requests that the commission finds the 1961 Agreement to remain in full force and effect.

3.

The SOH's Arguments

On May 1, 2006, the SOH filed its Position Statement ("SOH's Statement"). In its statement, the SOH recommends that the commission should find that the 1961 Agreement is a necessary operating cost of HAWC; or, in the alternative, should deduct the cost the 1961 Agreement from whatever profits the commission allows the utility.

²⁶Id.

²⁷The City cites to HRS §§ 46-1.5(4), (14), and (19).
Id. at 6.

With regards to HAWC's argument that tariffs approved by the commission after the enactment of the 1974 Amendment caused the abrogation of the 1961 Agreement, the SOH contends that HAWC failed to point to any specific tariff reference regarding the 1961 Agreement which could be interpreted to abrogate the agreement. Moreover, the SOH contends that prior to 2004 the issue regarding the enforceability of the 1961 Agreement was never raised by HAWC or its predecessors. The SOH asserts that for nearly 30 years, the commission did not interpret that the tariffs abrogated the 1961 Agreement. It states that "one assumes that the costs related to the 1961 Agreement were submitted to the . . . [commission] as some form of fixed cost or expense on the part of HAWC in order to perform its functions, similar to the fixed cost of a lease for property which HAWC is required to pay."²⁸ The SOH asserts that it is unclear what has occurred to cause HAWC to change its position and speculates that HAWC, during settlement discussions with the Consumer Advocate, chose to no longer treat the 1961 Agreement costs as operating expenses.

The SOH also argues that in terms of notice, "there was nothing about the consideration of the 2004 [T]ariff which would serve as notice to the City or the . . . [SOH] that the 1961 Agreement was being considered for abrogation[sic] by the . . . [commission]."²⁹ Moreover, the SOH contends that it understands that the commission never before addressed the issue of whether a

²⁸See SOH's Statement at 3-4.

²⁹Id. at 4.

contract entered into prior to commission regulation is abrogated by the issuance of a tariff. The SOH further alleges that given this present investigation, the commission did not consciously consider whether the 1961 Agreement should be abrogated when HAWC tariff was issued.

Furthermore, the SOH argues that there are significant consequences to allowing the abrogation of the 1961 Agreement on all future developments. In particular, the SOH contends that if the commission finds the 1961 Agreement, which it contends benefits the public by allowing HAWC to provide sewerage services in Hawaii Kai area, to be void, "then arguably the [S]ewerage [S]ystem would revert to the City for the cost of \$1.00 pursuant to [Section 9 of] the agreement".³⁰ Related to this, the SOH argues that HAWC does not have an independent claim to provide sewerage services in Hawaii Kai without the 1961 Agreement. Additionally, the SOH contends that a finding that a public utility could not be held to any agreement it enters into with a governmental entity would mean that such entities would find it difficult to obtain necessary building and use permits.

The SOH concludes by arguing that there should be no difference between the City asking for free service and asking for a specific amount of money each month to defray the City's costs related to allowing the development in the area. On this matter, the SOH maintains that "[o]ne assumes, if the agreement

³⁰Id. According to the SOH, Section 9 of the 1961 Agreement provides that the City shall have the right to purchase the Sewerage System for \$1.00 if Kaiser terminates its operations and ownership. Id. at 2.

had stated a specific dollar amount to be paid by Kaiser verses the City being exempt from sewerage fees, the costs related to the agreement would be considered a necessary fixed cost" for HAWC's operations and the 1961 Agreement would be considered valid.³¹

Based on the foregoing, the SOH recommends that the commission find that the 1961 Agreement is a necessary operating cost of HAWC or, in the alternative, deduct the cost of the 1961 Agreement from profits the commission allows the utility.

D.

HAWC's Rebuttals

On May 15, 2006, HAWC filed separate replies to the position statements filed by the City and the SOH ("HAWC's Reply to City's Statement" and "HAWC's Reply to SOH's Statement", respectively). In its replies, HAWC maintains that the provisions of the 1961 Agreement are unenforceable and that all of its customers, including the City and the SOH, must pay rates that are provided in the tariffs approved by and filed with the commission.

1.

Reply to the City's Statement

In response to the City, HAWC contends that the City in its Position Statement: (1) failed to recognize the exercise of

³¹Id. at 5.

the State's police powers and the filed rate doctrine on the 1961 Agreement and erroneously relied on an inapplicable general contract principle to assert the "overbroad" statement that contracts entered into between a municipality and utility are enforceable; and (2) misconstrued the provisions of HRS § 269-31.

In particular, HAWC asserts that the City's reliance on a small excerpt of the US Supreme Court's decision in Railroad Commission to imply that all contracted rates between a municipality and a utility are enforceable and that the courts may not relieve a utility from its contractual obligations is erroneous. HAWC contends that further on in its decision the US Supreme Court "recognize[d] the state's power with respect to public services and held that the state may terminate a contract between a municipality and utility that fixes rates."³² Thus, HAWC argues that Railroad Commission supports HAWC's position that contracts between a municipality and utility may be abrogated by state-exercised powers.

HAWC also argues that City's interpretation of the HRS § 269-31 exemption is misapplied and contrary with its interpretation of the exemption. HAWC states that the purpose HRS § 269-31 is to allow a State, county, or political subdivision to own and operate a public utility without being regulated and subject to various commission approval and oversight requirements imposed in HRS chapter 269. It asserts that the exemption was not intended to be so broad as to exempt

³²See HAWC's Reply to City's Statement at 3 (citing Railroad Commission at 73-74, 280 U.S. at 156).

or shield the City or any political subdivision from the commission's "authority or decisions that are made within the context of being a customer of the public utility."³³ HAWC contends that: (1) the City's interpretation of HRS § 269-31 is inconsistent with the plain-language reading of the statute; and (2) the statute neither states nor even implies that a political subdivision is exempt from the commission's authority where the basis of the authority is as a public utility customer. HRS § 269-31, HAWC argues, is unambiguous and the statute in "no way suggests an intent to bar . . . [the commission] from making regulatory decisions that impact a contract entered into by a political subdivision when that subdivision was itself not acting in the capacity of a utility, but rather as a customer receiving service."³⁴ Further, HAWC contends that there is nothing in the legislative history of HRS § 269-31 to justify departing from the plain-language meaning of the statute.

2.

Reply to the SOH's Statement

HAWC allege that the SOH's arguments are unpersuasive and irrelevant. Specifically, HAWC asserts that: (1) the SOH's implication that the 1961 Agreement is an impact fee is irrelevant; (2) the abrogation of the 1961 Agreement would not cause HAWC's sewer system to revert to the City for \$1.00; and

³³Id. at 5 (emphasis in original).

³⁴Id.

(3) the SOH is wrong in maintaining that HAWC has no independent claim to provide sewer services without the 1961 Agreement.

First, HAWC argues that even assuming that the 1961 Agreement is an impact fee, as the SOH appears to imply, the State is still free to exercise its police powers with respect to public utilities and change the terms of the agreement. HAWC contends that the State changed the terms of the agreement when it exercised its police powers by enacting HRS chapter 269 and including sewage companies under the commission's jurisdiction through the passage of Act 59. Under the regulatory scheme, the filed rate doctrine became applicable, abrogating the 1961 Agreement due to its contradictory terms. On this matter, HAWC asserts that regardless of whether the 1961 Agreement is an impact fee or was enforceable when it was originally executed, the State's action of placing sewer companies under the commission's jurisdiction, whether knowingly or unknowingly, rendered the 1961 Agreement unenforceable.

In support of its position, HAWC highlights City of Plainfield v. Public Service Electric and Gas Company, 82 N.J. 245, 412 A.2d 759 (1980) ("Plainfield"), wherein an electric utility contracted to provide free utility service to the city in exchange for use of the city's streets to place and maintain its poles and conduits for the distribution of electric service. After entering into the contract, the electric utility became regulated by the state's public utility or service commission, and with this regulation came a legislative prohibition of preferential utility rates. HAWC maintains that

the New Jersey Supreme Court in this case "held that even rates set between the utility and city prior to the statute's enactment are subject to the new statutory scheme."³⁵ HAWC notes that in Plainfield the court specifically held that the law prohibiting discriminatory rates must be applied uniformly to all rates including those set prior to the enactment of the statute since doing otherwise would completely frustrate the purpose of the statute. Moreover, HAWC stress that the Plainfield court stated that in light of constantly changing circumstances, it is unreasonable that rates would remain constant and that "[t]his conclusion is particularly compelling where, as here, the contractual rates or preferences purport to be indefinite in duration and, if unaltered, would inevitably become progressively unfair and distorted with the passage of time and changing circumstances."³⁶

Second, HAWC states that the SOH's claim that they were not given any notice of the abrogation since there is no reference in the tariff abrogating the 1961 Agreement is irrelevant. HAWC asserts that "[r]egardless of whether anyone, even the . . . [commission], was aware that the tariff and application of the filed rate/tariff doctrine would render the 1961 Agreement unenforceable, the fact of the matter is, such is the legal consequence."³⁷ On this matter, HAWC maintains that the

³⁵See HAWC's Reply to SOH's Statement at 3 (citing Plainfield at 253, 412 A.2d at 763).

³⁶Id.

³⁷Id. at 4.

State exercised its police powers by regulating sewer companies and the resulting effect of the filed rate doctrine on the tariff approved by and filed with the commission is unwavering.

Similarly, HAWC contends that the timing of HAWC's decision to collect the sewer fees attributable to the facilities of the City and the SOH is irrelevant. HAWC maintains that "[t]he fact that HAWC may not have sought collection of these fees prior to 2004 does not change the fact that, under the filed rate/tariff doctrine, HAWC was and is legally entitled to payment for the services provided."³⁸

Third, HAWC counters the SOH's argument that a commission determination that the 1961 Agreement is void or unenforceable would trigger Section 9 of the agreement or a reversion of the Sewerage System to the City for \$1.00 is erroneous. HAWC argues that Section 9 of the 1961 Agreement allows the City to have the right to purchase the system if the operations and ownership of the sewer system is abandoned. With regards to this, HAWC asserts that it never expressed an intent to abandon its operations and ownership of the sewer system. HAWC elaborates that it fully intends to provide service to all of its customers, but that it is merely seeking to no longer provide services free of charge to the SOH's facilities and "to instead receive just compensation for the services provided at the rates set forth in its tariffs, consistent with the filed tariff doctrine and the principles established thereunder."³⁹

³⁸Id. at 5.

³⁹Id. at 6.

Lastly, HAWC claims that the SOH's allegation that HAWC has no independent claim to conduct sewer services in the Hawaii Kai area without the 1961 Agreement is mistaken. HAWC states that this allegation may have been true prior to 1974; however, due to the change in legislation since 1974 and the regulation of sewer companies by the commission, HAWC's authority to provide sewer services in Hawaii Kai stems directly from the commission and not from any agreement.

II.

Discussion

State law confers the supervision and regulation of "all public utilities" and the administration of HRS chapter 269 on the commission.⁴⁰ The definition of a "public utility" in HRS § 269-1 was amended in 1974 through Act 59 to include private owners and operators of sewer facilities. Specifically, HRS § 269-1, in relevant part, states that a public utility includes "[a]ny person insofar as that person owns or operates a private sewer company or sewer facility[.]"⁴¹ HAWC provides wastewater collection, treatment, and disposal services in the Hawaii Kai area and, thus, is a public utility under the commission's jurisdiction subject to, by law, the provisions set forth in HRS chapter 269. In particular, HRS § 269-16 sets forth the parameters for the regulation of utility rates and ratemaking

⁴⁰See HRS § 269-6.

⁴¹See HRS § 269-1.

procedures. HRS § 269-16, in relevant part, states the following:

(a) All rates, fares, charges, classifications, schedules, rules, and practices made, charged, or observed by any public utility or by two or more public utilities jointly shall be just and reasonable and shall be filed with the public utilities commission. The rates, fares, classifications, charges, and rules of every public utility shall be published by the public utility in such manner as the public utilities commission may require, and copies shall be furnished to any person on request.

.....

(b) 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 to the commission as prescribed in section 269-12(b), and prior approval by the commission for any increases in rates, fares, or charges. The commission, in its discretion and for good cause shown, may allow any rate, fare, charge, classification, schedule, rule, or practice to be established, abandoned, modified, or departed from upon notice less than that provided for in section 269-12(b).

.....

HRS § 269-16 (emphasis added).

The matters set forth above are not disputed by the Parties. Also undisputed is that HAWC's current tariff,⁴² filed with and approved by the commission, does not mention the 1961 Agreement nor contain provisions allowing HAWC to provide free service or at special terms to the City, the SOH, or Lunalilo Homes. The primary issue in dispute in this case is whether the

⁴²HAWC's 2004 Tariff as amended by revised tariff sheets filed on July 28, 2006, pursuant to the Interim Decision and Order.

rates established in the 1961 Agreement are enforceable to the extent that they conflict HAWC's tariff.

Upon review, the commission finds the rates of the 1961 Agreement to be unenforceable and unlawful to the extent that they conflict HAWC's tariff. The provisions of HRS § 269-16 are clear: all rates, fares, charges, classifications, schedules, rules, and practices made, charged, or observed by any public utility must be filed with and approved by the commission. HAWC's tariff filed with and approved by the commission does not mention the provisions of the 1961 Agreement. Additionally, as explained by HAWC, under the filed rate doctrine, once approved by a regulatory agency, the tariff of a public utility is considered to be the law with respect to the service provided and the public utility may not charge rates that are different from the tariff. The Hawaii Supreme Court made clear in Balthazar v. Verizon Hawaii, Inc., 109 Hawaii 69, 77, 123 P.3d 194, 202 (2005) ("Balthazar"), that the filed rate doctrine is applicable in a case involving a public utility subject to the commission's jurisdiction. Thus, the 1961 Agreement which provides for free sewer services to all City facilities in Hawaii Kai and rates based on a certain formula for the Portlock and Related Areas is unenforceable and unlawful.

HAWC's argument that the 1961 Agreement was subject to the exercise of the State's police power to regulate sewer services through the passage of the 1974 Amendment, and that the rates set forth in the 1961 Agreement were abrogated through the application of the filed rate doctrine when the commission

approved tariffs which conflicted with the 1961 Agreement rates is sound, and is based on reliable case authority. As HAWC maintains, the Hawaii Supreme Court states in Molokoa Village that "[i]t is well established that a public utility can enforce payment for its services in accordance with its established tariff, notwithstanding any agreement to charge less."⁴³ Aside from relying on Molokoa Village and countless other cases, HAWC asserts that the matters of this case is similar to that of a 1980 New Jersey case wherein the supreme court in that state "held that even rates set between the utility and city prior to the statute's enactment are subject to the new statutory scheme."⁴⁴ Akin to this case, among other things, the agreement in question in Plainfield: (1) was entered into between a utility and a municipality; (2) involved the provision of free utility service for municipal facilities for use of city property in the provision of utility service; and (3) was entered into prior to the enactment of the relevant state statute. Thus, the commission finds the application of the holding in Plainfield to the matters of this case to be appropriate. Moreover, the court in Plainfield observed that:

Rates must be fixed, and their fairness and reasonableness evaluated, against the backdrop of current conditions. . . . it can hardly be that with changing circumstances those rates and practices would forever remain just and reasonable. We are admonished by present-day conditions that . . . old rates (may have become) unreasonably low, and . . . old practices (may have become) unjust to the public. And if the

⁴³See Molokoa Village at 587, 593 P.2d at 379.

⁴⁴See HAWC's Reply to SOH's Statement at 3 (citing Plainfield at 253, 412 A.2d at 763).

rates become unreasonable and the practices unjust, they would cease to be lawful.

Plainfield at 252-53, 412 A.2d at 763.

In contrast, the arguments presented by the City and the SOH in their respective position statements are unpersuasive, erroneous, and inapplicable. First, the City's reliance on Railroad Commission to argue that a contract between a public utility and a municipality is binding is unpersuasive and does not fully support the City's case, since as HAWC mentions in its reply, the US Supreme Court in Railroad Commission "recognize[d] the state's power with respect to public services and held that the state may terminate a contract between a municipality and utility that fixes rates."⁴⁵

Second, the City's argument that HRS § 269-31 specifically excludes it from the provisions of HRS chapter 269 is erroneous. HRS § 269-31 states the following:

This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except insofar as the same may be permitted under the Constitution and laws of the United States; nor shall it apply to public utilities owned and operated by the State, or any county, or other political subdivision.

HRS § 269-31 (emphasis added). The Sewerage System is owned and operated by HAWC and not the City. The City's implication that the statute set forth above exempts it, HAWC's customer, from the regulation of the commission is overly-broad and inaccurate. As articulated by HAWC, the City's interpretation of HRS § 269-31 is inconsistent with the plain-language reading of the statute and,

⁴⁵See HAWC's Reply to City's Statement at 3 (citing Railroad Commission at 73-74, 280 U.S. at 156).

according to HAWC, there is nothing in the legislative history of the statute to justify a departure from the plain-language meaning of the statute. The commission agrees.

Third, the City's contention that an invalidation of the 1961 Agreement would interfere with its ability to self-govern is unpersuasive. The ability of the City to govern itself is not affected by a commission finding that an agreement, to which the City may be a party, is not enforceable.

Fourth, the SOH's implication that the 1961 Agreement is an impact fee, and argument that it was provided no notice of the abrogation of the agreement since there is no reference of it made in the tariff is immaterial. As HAWC correctly states, HAWC is required to charge and collect sewer fees pursuant to the tariff rates for its customer classes, and thus the rates of the 1961 Agreement cannot stand. Similarly, the timing of HAWC's decision to collect the sewer fees attributable to the facilities of the City and the SOH is also irrelevant since the 1961 Agreement became legally unenforceable with the regulation of sewer companies and the resulting affect of the filed rate doctrine. Moreover, continuing to apply rates pursuant to the 1961 Agreement would be a violation of HRS § 269-16.

Fifth, the SOH's claim that a commission determination that the 1961 Agreement is void or unenforceable would trigger Section 9 of the agreement⁴⁶ and, thus, allowing the City to

⁴⁶Section 9 of the 1961 Agreement states, in relevant part:

[i]f at any time Kaiser intends to abandon its operations and ownership hereunder, it shall, at least 60 days prior to the date of abandonment,

purchase the Sewerage System for \$1.00 appears to be inaccurate since Section 9 of the agreement would only be triggered if the owner and operator of the system intends to abandon its operations and ownership. HAWC assures the commission that this is not the case, and elaborates that it fully intends to continue providing services to all of its customers.

Sixth, the SOH's contention that HAWC would not have an independent claim to provide sewer services in the Hawaii Kai area without the 1961 Agreement is also inaccurate. As HAWC correctly states, while the SOH's allegation would have been proper prior to 1974, due to the change in the law and the regulation of sewer companies by the commission through passage of Act 59, the commission under Chapter 269, HRS, and not the 1961 Agreement authorizes HAWC to provide sewerage services in the Hawaii Kai area.

Finally, the SOH's request that the commission find that the 1961 Agreement is a necessary operating cost of HAWC; or, in the alternative, should deduct the cost the 1961 Agreement from whatever profits the commission allows the utility is not sufficiently supported. Under the circumstances, it is questionable whether such a finding by the commission would be "just and reasonable" and in the public interest. The SOH in its

give written notice of such intention to both Bishop and the City. In that event the City shall have the right to purchase all of Kaiser's rights and operations hereunder, including all of Kaiser's right, title and interest in the sewerage system and all facilities there of for the sum of ONE DOLLAR (\$1.00). . . .

Status Report, Exhibit 2 (copy of the 1961 Agreement).

position statement did not fully elaborate on why the commission should grant its request and how grant of its request is just and reasonable and in the public interest. Additionally, the SOH did not satisfactorily counter HAWC's arguments regarding the applicability of the filed rate doctrine and HAWC's obligation under the doctrine and HRS chapter 269 to collect the rates set forth in its approved tariff.

The principles that underlie the filed rate doctrine are: (1) preventing price discrimination and ensuring all customers pay the same rates; and (2) preserving the regulatory agency's exclusive role in approving rates and to ensure that the filed rates are the exclusive source of the terms and conditions by which the utility provide services to its customers. These principles are well established⁴⁷ and in the public interest.

Based on the foregoing, the commission concludes that the rates established by the 1961 Agreement are unenforceable and unlawful to the extent that they conflict with HAWC's tariff filed with and approved by the commission. Additionally, the commission further concludes that all of HAWC's customers must pay rates set forth in tariffs filed with and approved by the commission.

⁴⁷See HAWC Statement at 6 (citing AT&T Co. v. Central Office Telephone, Inc., 524 U.S. 214, 222-23 (1998); Balthazar; Verizon Delaware, Inc. v. Covad Communications Co., 377 F.3d 1081, 1085-86 (9th Cir. 2004)).

III.

Orders

THE COMMISSION ORDERS:

1. The rates established by the 1961 Agreement are unenforceable and unlawful to the extent that they conflict with HAWC's tariff filed with and approved by the commission.

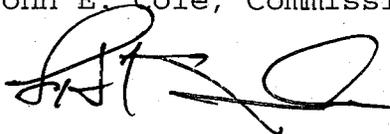
2. All of HAWC's customers must pay rates set forth in the tariffs filed with and approved by the commission.

DONE at Honolulu, Hawaii OCT 16 2007.

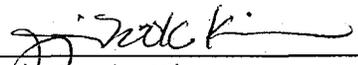
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
John E. Cole, Commissioner


By
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Ji Sook Kim
Commission Counsel

2006-0021.cp

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23725 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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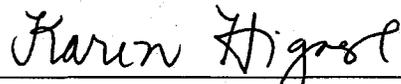
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