

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

WAIMANA ENTERPRISES, INC.,      )  
                                      )  
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Complainant,      ) DOCKET NO. 6954  
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                                      )  
                                      )  
vs.                                )  
                                      )  
MAUI ELECTRIC COMPANY, LTD.,    )  
                                      )  
                                      )  
Respondent.      )  
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PROPOSED DECISION AND ORDER NO. 21929

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

Filed July 20, 2005  
At 2:30 o'clock P.M.

Karen Higashi.  
Chief Clerk of the Commission

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

K. Higashi.

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

WAIMANA ENTERPRISES, INC.,      )  
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                                    Complainant,      )      Docket No. 6954  
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MAUI ELECTRIC COMPANY, LTD.,    )  
                                    )  
                                    Respondent.     )  
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)

PROPOSED DECISION AND ORDER

By this Proposed Decision and Order, the commission, pursuant to Hawaii Revised Statutes ("HRS") § 91-11, submits its proposed decision and order stating, among other things: (1) that by WAIMANA ENTERPRISES, INC.'s ("Waimana") formal complaint ("Complaint") cannot be dismissed as moot because it falls under an exception to the mootness doctrine; (2) that Stipulated Issues Nos. 1 and 2, described below, cannot be determined because the oral testimonies and other documentary evidence presented in this proceeding are stale and may no longer be reliable; and (3) that MAUI ELECTRIC COMPANY, LTD. ("MECO") must informally meet and confer with Waimana, the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), and other stakeholders, if any, who may be interested in participating (i.e., existing Qualified Facilities ("QFs") that have purchase power agreements ("PPAs") executed with MECO or potential QFs who desire to enter into PPAs with

MECO), and collaboratively develop and submit recommendations to the commission as to how the negotiation process could be further improved and streamlined to ensure that it is implemented consistent with the spirit and intent of the Public Utilities Regulatory Policies Act of 1978 ("PURPA")<sup>1</sup> and the corresponding state laws, rules and regulations (i.e., HRS § 269-27.2 and Hawaii Administrative Rules ("HAR") Chapter 6-74) within one hundred twenty (120) days from the date of this Proposed Decision and Order.

I.

Procedural History

On March 28, 1991, Waimana filed a Complaint with the commission against MECO. Among other things, Waimana requests the commission to issue an order compelling MECO to comply with the commission's administrative rules and to execute the March 19, 1991 version of a PPA for as-available energy from Waimana.

On April 17, 1991, the commission ordered MECO to either satisfy the matters complained of, or file an answer to the Complaint with the commission within ten (10) days after the date of service of the order.<sup>2</sup>

On April 29, 1991, MECO filed its answer to the Complaint.<sup>3</sup>

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<sup>1</sup>See, Title 17, Chapter 12 of the United States Code.

<sup>2</sup>Order No. 11036, filed on April 17, 1991.

<sup>3</sup>Exhibit A to MECO's answer was filed on May 8, 1991.

On May 17, 1991, the Consumer Advocate submitted its Statement of Position advising the commission, Waimana, and MECO that it would participate in this proceeding.<sup>4</sup>

On July 22, 1991, the commission issued Stipulated Prehearing Order No. 11186 which, among other things, set forth the issues and procedural schedule with respect to this proceeding.

On September 23, 1991, the commission held an evidentiary hearing on this matter. Subsequent to the evidentiary hearing and pursuant to the procedural schedule set forth in Stipulated Prehearing Order No. 11186, the Parties submitted opening and reply briefs addressing the issues of this proceeding.

On September 10, 2004, the commission, by Order No. 21336, directed the Parties to review the evidence and information of this docket, and provide the commission with a brief status report within sixty (60) days of the date of Order No. 21336 ("Status Report Deadline")<sup>5</sup> as to whether the record needs to be further updated or supplemented and whether their positions have changed since 1991.

On November 23, 2004, the Parties submitted their respective status reports ("Status Reports") in accordance with Order No. 21336.

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<sup>4</sup>Waimana, MECO and the Consumer Advocate, hereinafter collectively referred to as "Parties."

<sup>5</sup>In response to the Parties' November 9, 2004 request for an extension of time, the commission extended the Status Report Deadline to November 23, 2004.

II.

Stipulated Issues

Stipulated Prehearing Order No. 11186, filed on July 22, 1991, governs the proceedings in this docket. Pursuant thereto, the issues agreed by the Parties are as follows:

1. Whether MECO should be compelled to enter into the form of PPA for As-Available Energy from a Qualifying Facility that was provided by MECO to Waimana on March 19, 1991 (hereinafter, "PPA", which is Attachment C to Waimana's Complaint)?
2. If MECO is required to enter into the form of PPA, should the commission set the effective date of the PPA as March 19, 1991?
3. Whether Waimana's Complaint should be dismissed?

III.

Summary of Parties' Status Reports

A. Waimana

In its Status Report, Waimana states that, although certain circumstances have changed since the filing of its Complaint on March 28, 1991, its position in this proceeding remains the same. Waimana also claims that the pertinent facts" of this matter also have not changed. As a result, Waimana "seeks a determination from the [commission] that [MECO] should

be compelled to enter into a Purchase Power Contract for As-Available energy from a Qualifying Facility."<sup>6</sup>

B. Consumer Advocate

The Consumer Advocate also contends in its Status Report that its position has not changed since 1991, and the record does not need to be updated or supplemented in order for the commission to decide the issues posed in this docket. In particular, the Consumer Advocate states:

[T]here is a disagreement on whether MECO's offer of March 19, 1991 constituted a valid offer for purpose of execution; or whether the March 19, 1991 offer served as a basis for negotiating the terms of a contract to be executed, once agreement on all terms and conditions was reached by Waimana and MECO. Subsequent changes to the availability of the generating facility should not be determining factor in whether there was a valid offer and acceptance for purposes of claiming that a contract existed.

As a result, the Consumer Advocate claims that the record is complete and does not require further information to decide on the issues, noted above.<sup>7</sup>

C. MECO

In its Status Report, MECO requests that the commission issue an order dismissing the Complaint in light of the fact that the Complaint has been rendered moot. In particular, MECO asserts that the Complaint is now moot and should be dismissed "because the Onsite Biomass facility has been sold to an entity

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<sup>6</sup>Waimana's Status Report, dated November 23, 2004.

<sup>7</sup>Consumer Advocate's Status Report, dated November 23, 2004.

other than Waimana, and has been removed from the island of Molokai and the State of Hawaii."<sup>8</sup>

#### IV.

##### Discussion

###### A. Stipulated Issue No. 3

We note that MECO's request to dismiss the Complaint as moot in its Status Report is not an appropriate mechanism to request relief or an order by the commission. Instead, MECO's request should have been filed in a form of a motion that complies with the requirements set forth under HAR § 6-61-41.<sup>9</sup> Nonetheless, since mootness is a jurisdictional issue,<sup>10</sup> we must initially determine whether Waimana's Complaint should be dismissed as moot. As such, we find it necessary to address Stipulated Issue No. 3 first rather than address each of issues in numerical order.

It is well-established that

[a] case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness

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<sup>8</sup>MECO's Status Report, dated November 23, 2004.

<sup>9</sup>HAR § 6-61-41 states, in relevant part that all motions shall: (1) Be in writing; (2) State the grounds for the motion; (3) Set forth the relief or order sought; and (4) Be accompanied by a memorandum in support of the motion, if the motion involves a question of law.

<sup>10</sup>See, *McCabe Hamilton & Renny Co., Ltd. v. Chung*, 98 Hawai'i 107, 117, 43 P.3d 244, 254 (Haw. App. 2002) (stating that the court may not decide moot questions or abstract propositions of law, and will not consume time deciding these types of cases, and have no jurisdiction to do so.) (citing *Wong v. Board of Regents, Univ. of Hawaii*, 62 Haw. 391, 395, 616 P.2d 201, 204 (1980) ("Wong"); and *Life of the Land v. Burns*, 59 Haw. 244, 250, 580 P.2d 405, 409 (1978) ("Burns")).

doctrine is properly invoked where 'events . . . have so affected the relations between the parties that the two conditions for justifiability on appeal - adverse interest and effective remedy - have been compromised.'

*CARL Corp. v. State, Dept. of Educ.*, 93 Hawai'i 155, 164, 997 P.2d 567, 576 (2000) ("Carl II") (quoting *In re Application of Thomas*, 73 Haw. 223, 226, 832 P.2d 253, 254 (1992) ("In re Thomas")). The Hawaii Supreme Court further stated that "historically the objection to decide moot cases was that the judgment of the court could not be carried into effect, or that relief was impossible to grant. Mootness was then a remedial issue related to the ability of the court to grant prospective relief. . . ." *Wong*, 62 Haw. at 395, 616 P.2d at 204.

An exception to the mootness doctrine, described above, are cases involving questions that affect the public interest and are "capable of repetition yet evading review." *Carl II*, 93 Hawai'i at 165, 997 P.2d at 577 (quoting *In re Thomas*, 73 Haw. at 226, 832 P.2d at 255); accord *Mahiai v. Suwa*, 69 Haw. 349, 356, 742 P.2d 359, 365 (1987); *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 87, 734 P.2d 161, 165 (1987); *Wong*, 62 Haw. at 395-96, 616 P.2d at 204; *Burns*, 59 Haw. at 252, 580 P.2d at 409-10; and *Johnston v. Ing*, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968).

In the instant matter, there appears to be no factual dispute by the Parties of the following:

1. Waimana's prayer for relief is limited to requesting the commission to "order to compel MECO to comply with PUC rules and execute [MECO's] March 19, 1991 version of the PPA" and that the commission "set the effective date of the PPA[.]"<sup>11</sup>
2. The MECO's March 19, 1991 version of the PPA in question involves Waimana's intention to generate electricity utilizing the biomass generating facility, located on MECO's Palaau generating plant site ("Palaau Site") and owned and formerly operated by Onsite Molokai Limited Partnership ("Onsite Biomass Facility"), and to sell As-Available Energy generated from the Palaau Site as a QF to MECO in accordance with PURPA, HRS § 269-27.2 and HAR Chapter 6-74.<sup>12</sup>
3. The Onsite Biomass Facility has been sold to an entity other than Waimana, and has been removed from the island of Molokai.<sup>13</sup>

In light of the above facts and circumstances, MECO contends in its Status Report that Waimana's Complaint should be dismissed as moot. We agree with MECO to the extent that without

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<sup>11</sup>Waimana's Complaint at 9.

<sup>12</sup>MECO's Statement of Position at 10.

<sup>13</sup>MECO's Status Report, dated November 23, 2004 at 3. See also, Waimana's Statement of Position, dated November 23, 2004 at 2 and Consumer Advocate's Statement of Position, dated November 23, 2004 at 2.

the QF at the Palaau Site, the Onsite Biomass Facility, it would be impossible and infeasible to grant the relief requested by Waimana -- to issue an order to compel MECO to comply with PURPA and commission rules and execute MECO's March 19, 1991 version of the PPA and set the effective date of the PPA.

However, we find and conclude that the facts and circumstances described in this docket fall within the exception to the mootness doctrine because the purchase of energy and capacity, which is made available from a QF (such as Waimana) in accordance with PURPA, HRS § 269-27.2 and HAR Chapter 6-74, clearly involves matters of public concern and affects the public interest. In addition, we believe similar legal issues relating to negotiating and executing PPAs, as advocated by the Parties in this proceeding, are capable of repetition yet evading review. For these reasons and other reasons discussed further below, we are unable to dismiss the Complaint as moot.

B. Stipulated Issue Nos. 1 and 2

In 1978, Congress enacted PURPA to, among other things, "encourage the development of cogeneration and small power production facilities, and thus to reduce American dependence on fossil fuels by promoting increased energy efficiency. To accomplish this objective, Congress sought to eliminate two (2) significant barriers to the development of alternative energy resources: (1) the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional facilities, and (2) the financial burdens imposed

upon alternative energy resources by state and federal utility authorities. *Independent Energy Producers Assoc., Inc et al. v. California Public Utilities Commission et al.*, 36 F.3d 848, 850 (9<sup>th</sup> Cir. 1994) (quoting *Federal Energy Regulatory Comm'n v. Mississippi*, ("Mississippi") 456 U.S. 742, 750-51, 102 S.Ct 2126, 2132-33 (1982)). In order to overcome these perceived problems, PURPA requires the Federal Energy Regulatory Commission ("FERC"), in consultation with state regulatory authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from these types of QFs. *Mississippi*, 456 U.S. at 751, 102 S.Ct at 2133. PURPA also requires each State regulatory authority to implement such FERC rules by, among other things, adopting its own rules and regulations, which sets forth a process to resolve disputes between QFs and electric utilities or any other action reasonably designed to implement PURPA. 18 C.F.R. § 292.401(a); See, *Afton Energy, Inc. v. Idaho Power Company et al.*, 107 Idaho 781, 784-84, 693 P.2d 427, 430-31 (1984).

In response to PURPA, the commission promulgated administrative rules in 1982 (as amended in 1985 and 1998) setting forth, among other things, dispute resolution procedures, standards, and certain obligations relating to the sales and purchases between QFs and electric utilities in the State.  
HAR Chapter 6-74.

Upon review of the entire record including the Status Reports, and contrary to the Consumer Advocate's assertion, we

are unable to factually determine Stipulated Issue Nos. 1 and 2 for the following reasons. First, because the evidentiary hearing on this matter was held over thirteen (13) years ago, the evidence and information (e.g., disputed oral testimonies and other documents) submitted in this docket are now stale and may no longer be reliable. In fact, the Parties admit in their Status Reports that certain facts (i.e., facility in question has been removed from the site on Molokai) did change since the hearing was held in 1991. Furthermore, it is apparent that the former Commissioners<sup>14</sup> who heard and considered the oral direct examination and cross-examination of witnesses presented at the September 23, 1991 evidentiary hearing are no longer with the commission. Although the Commissioners that presently sit on the commission as of the date of this Proposed Decision and Order ("Commissioners") are able to examine the written evidence presented by the Parties, the Commissioners did not hear the live testimonies presented in 1991, and, thus, are unable to weigh and appraise the credibility of such oral evidence set forth in the record.<sup>15</sup> Accordingly, we are unable to grant the relief desired by Waimana under Stipulated Issues Nos. 1 and 2.

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<sup>14</sup>The record indicates that the September 23, 1991 evidentiary hearing was held before Chairman Yukio Naito ("Chairman Naito"), Commissioner Clyde Dupont ("Commissioner Dupont"), and Commissioner Patsy Young ("Commissioner Young"). We take official notice, pursuant to HAR § 6-61-48, that Chairman Naito, Commissioner Dupont and Commissioner Young are no longer with the commission as of the date of this Proposed Decision and Order.

<sup>15</sup>See, *Covell v. Department of Social Services*, 439 Mass. 766, 787, n.19, 791 N.E.2d 877, 893 n.19 (2003) (stating that in cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of

However, our inability to decide on Stipulated Issue Nos. 1 and 2 should not prevent the commission from addressing a more compelling and far-reaching concern of the commission that emanated from this proceeding: the QFs' negotiation process in drafting and executing a contract or PPA with a electric utility, pursuant to PURPA, may be discouraging potential producers of renewable energy from investing and developing renewable energy resource facilities in Hawaii such as on the island of Molokai.

In short, and as aptly noted by the Consumer Advocate, the arguments raised by the Parties in this proceeding clearly illustrates that the contract negotiation process between a QF and an electric utility can often be protracted and expensive. In our view, this is problematic, particularly in light of our recent efforts to collaboratively work with the electric utilities, producers of renewable energy and other interested stakeholders in developing means and mechanisms to assist in promoting renewable energy development in the State, and also in achieving many of the other state energy policies objectives. We, thus, believe that the process should be further improved and streamlined similar to and consistent with the requirements set forth in HRS § 269-102 (aka, Hawaii's Net Energy Metering

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their relative credibility cannot be made by someone who was not present at the hearing.); and *U.S. v. Bergera*, 512 F.2d 391, 393 (9<sup>th</sup> Cir. 1975) (commenting that when the vindication of important legal rights necessarily hangs in the balance, the law must require whatever is essential to preserve the integrity of the fact-finding process, and the method most widely recognized as effective in that regard is the imposition of the requirement that the fact-finder actually observe the evidentiary process so as to properly weigh and appraise the testimony).

Law). See, *In re Hawaiian Electric Company, Inc. et al.*, Docket No. 05-0037 (Consolidated), Decision and Order No. 21877 (June 17, 2005). We recognize that an electric utility's negotiation process for large generation projects with QFs (that does not qualify as an eligible customer-generator under HRS § 269-101), may often be technical and complex due to circumstances that may be unforeseen or beyond the utility's control. However, we also believe that the process, to the extent feasible and within the parameters of the applicable laws, should be more transparent to the public than it is now, particularly to potential QFs that may be interested in investing in Hawaii.

In light of these concerns, the commission believes that it is necessary and in the public interest to instruct MECO, consistent with our obligations and powers set forth under both federal and state laws, rules and regulations relating to PURPA,<sup>16</sup> to informally meet and confer with Waimana, the Consumer Advocate and other stakeholders, if any, who may be interested in participating (i.e., existing QFs that have PPAs executed with MECO or potential QFs who desire to enter into PPAs with MECO) (collectively, hereinafter referred to as "Collaborative Group") and collaboratively develop and make recommendations to the

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<sup>16</sup>See, PURPA; HRS § 269-15; HAR § 6-74-15. Accord, *Mississippi*, 456 U.S. at 751, 102 S.Ct at 2133 (holding that "a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonable designed to give effect to FERC's rules"); *In re Island Airlines*, 47 Haw. 1, 13, 384 P.2d 536, 545 (1963) (holding that the commission has the "power and duty to examine into, and if necessary effect, compliance with federal law by all available means").

commission as to how the negotiation process could be further improved and streamlined, including how the commission can assist in the process, to ensure that it is implemented consistent with the spirit and intent of the PURPA and the corresponding state laws, rules and regulations (i.e., HRS § 269-27.2 and HAR Chapter 6-74). Within one hundred twenty (120) days from the date of this Decision and Order, MECO shall submit a written report to the commission setting forth the Collaborative Group's efforts and recommendations.

In summary, we agree with the Consumer Advocate that no one (including the commission) is blameless for the present status of this proceeding. In hindsight, we recognize that the Parties and the commission, individually or collectively, could have or should have taken certain proactive actions that potentially may have resulted in a more timely and productive resolution of this matter. Ostensibly, the complexities of the transaction, the posturing and passage of time since the inception of this proceeding likely contributed to this outcome.

Nonetheless, it our hope that we, along with all interested stakeholders and supporters of renewable resources, can all move forward in a joint effort in striving to accomplish many of the state energy policies objectives set forth under HRS § 226-18, which, in our view, includes the utilization of cost-effective renewable energy resources found in Hawaii to meet the renewable portfolio standards established in HRS § 269-92, as amended. See also, *In re Apollo Energy Corporation*, Docket No. 00-0135, Decision and Order No. 21227 (August 9,

2004). We hope to further pursue these objectives in other pending or future energy utility proceedings and collaborative efforts, if not already done so.

V.

Ultimate Findings of Fact and Conclusions of Law

Any findings of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

1. Waimana's prayer for relief in this docket is solely limited to requesting the commission to order to compel MECO to comply with PUC rules and execute MECO's March 19, 1991 version of the PPA and that the commission set the effective date of the PPA.
2. The MECO's March 19, 1991 version of the PPA in question involves Waimana's intention to generate electricity utilizing the biomass generating facility, located on MECO's Palaau generating plant site and owned and formerly operated by Onsite Biomass Facility, and to sell As-Available Energy generated from the Palaau Site as a QF to MECO in accordance with PURPA, HRS § 269-27.2 and HAR Chapter 6-74.

3. The Onsite Biomass Facility has been sold to an entity other than Waimana, and has been removed from the island of Molokai.
4. Based on the facts and circumstances described in this docket, the exception to the mootness doctrine applies in this docket because the purchase of energy and capacity which is made available from a QF (such as Waimana) in accordance with PURPA, HRS § 269-27.2 and HAR Chapter 6-74 clearly involves matters of public concern and affects the public interest, and that similar legal issues relating to negotiating and executing PPAs, as advocated by the Parties in this proceeding, are capable of repetition yet evading review. Thus, the commission is unable to dismiss the Complaint as moot.
5. Because the oral testimonies and other documentary evidence are stale and may no longer be reliable, the commission is unable to determine Stipulated Issue Nos. 1 and 2.
6. Pursuant to the applicable federal and state laws, rules and regulations implementing PURPA, the commission is authorized to resolve disputes on a case-by-case basis, or

by taking any other action reasonable designed to give effect to PURPA.

VI.

Proposed Order

THE COMMISSION ORDERS:

1. Waimana's Complaint cannot be dismissed as moot because it falls under the exception to the mootness doctrine.

2. Stipulated Issues Nos. 1 and 2 cannot be determined because the disputed oral testimonies and documentary evidence presented in this proceeding are stale and may no longer be reliable.

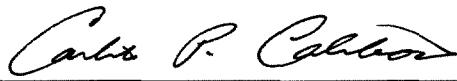
3. MECO shall informally meet and confer with the Collaborative Group, as defined above, and collaboratively develop and make recommendations to the commission as to how the negotiation process could be further improved and streamlined, including how the commission can assist in the process, to ensure that it is implemented consistent with the spirit and intent of the PURPA and the corresponding state laws, rules and regulations (i.e., HRS § 269-27.2 and HAR Chapter 6-74). Within one hundred twenty (120) days from the date of this Proposed Decision and Order, MECO shall submit a written report to the commission setting forth the Collaborative Group's recommendations.

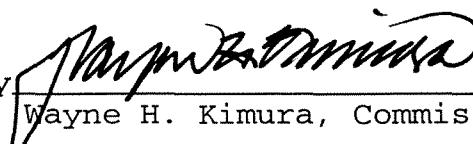
4. Consistent with HRS § 91-11 and HAR § 6-61-120, Waimana, MECO and the Consumer Advocate may file exceptions and comments to this Proposed Decision and Order within ten (10)

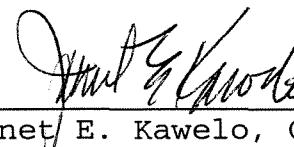
days from the date of this Proposed Decision and Order.  
Further commission to action to follow.

DONE at Honolulu, Hawaii JUL 20 2005.

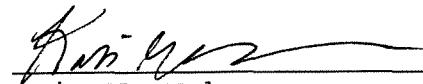
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By   
Wayne H. Kimura, Commissioner

By   
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

  
Kris N. Nakagawa  
Commission Counsel

6954.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Proposed Decision and Order No. 21929 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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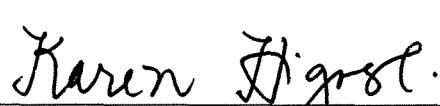
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DATED: JUL 20 2005