

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAII ELECTRIC LIGHT COMPANY, INC.)
For Authority to Grant an After the)
Fact Grant of Perpetual Easement)
Over Its Anaehoomalu Substation)
Site to Time Warner Entertainment)
Company, doing business as Oceanic)
Time Warner Cable of Hawaii, for)
The Purpose of Installing)
Underground Fiber Optic Cable.)

DOCKET NO. 05-0228

DECISION AND ORDER NO. 22553

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

Filed June 22, 2006
At 1 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

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

Charles P. Luiaesopa

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Docket No. 05-0228
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DECISION AND ORDER

By this Decision and Order, the commission approves HAWAII ELECTRIC LIGHT COMPANY, INC.'s ("HELCO") grant of a perpetual easement to Time Warner Entertainment Company, dba Oceanic Time Warner Cable of Hawaii ("Oceanic Cable") over HELCO's Anaehoomalu Substation in Waikoloa, on the island of Hawaii, as described herein.

I.

Background

A.

Application

HELCO is a Hawaii corporation, which was initially organized under the laws of the Republic of Hawaii on or about December 5, 1894. HELCO, a public utility as defined by Hawaii Revised Statutes ("HRS") § 269-1, is engaged in the

production, purchase, transmission, distribution, and sale of electricity on the island of Hawaii in the State of Hawaii.

On September 8, 2005, HELCO filed an application seeking commission approval of an after the fact grant of a perpetual easement over its Anaehoomalu Substation property in Waikoloa to Oceanic Cable (the "Easement") for the installation of underground fiber optic cable ("Application").¹ HELCO filed the Application pursuant to HRS § 269-19.²

1.

The Easement

HELCO's Anaehoomalu Substation is located on 1.71 acres of land in Waikoloa, District of South Kohala, on the island of Hawaii. The substation is situated on land identified as Parcel 28 on Tax Map 6-8-01, Third Division, of the State of Hawaii. The land was "acquired in 1981 from First Hawaiian Bank, Trustee."³

In 1999, Oceanic Cable completed a fiber optic cable project to augment the provision of its cable television service to subscribers located along the South Kohala coast including, but not limited to, the Waikoloa Beach Resort and Mauna Lani Resort. This fiber optic cable system also provides

¹Copies of HELCO's Application were served on the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an *ex officio* party to this docket pursuant to HRS § 269-51 and Hawaii Administrative Rules § 6-61-62.

²No persons moved to intervene or participate in this proceeding.

³See Application at 2.

HELCO's facilities located in South Kohala and North Kona with access to telecommunications services.

Oceanic Cable installed the fiber optic cable on an existing joint utility pole from Waikoloa to and through HELCO's Anaehoomalu Substation. In the substation, the fiber optic cable was installed within an existing underground conduit that passes through the site and crosses under Queen Kaahumanu Highway. HELCO states that it did not originally require an easement in 1999 since the fiber optic cable was being used to provide HELCO with telecommunications services. However, HELCO states that Oceanic Cable, at this time, is requesting an easement to validate the presence of its fiber optic cable within HELCO's Anaehoomalu Substation. A copy of the Easement is attached to the Application as Exhibit I.

2.

HELCO's Justification for Approval

HELCO contends that Oceanic Cable paid for all improvements associated with the fiber optic cable located on HELCO's property. It states that the Anaehoomalu Substation is currently carried in HELCO's rate base at \$78.81 and that it intends to grant the easement for \$1.00 since the fiber optic cable provides HELCO with telecommunications services. HELCO represents that the perpetual Easement being granted to Oceanic Cable will not adversely affect its ability to perform its duties to the public.

B.

Consumer Advocate's Statement of Position

On November 30, 2005, the Consumer Advocate filed its Statement of Position informing the commission that it does not object to approval of HELCO's Application ("CA's Statement of Position"). In sum, the Consumer Advocate states that: (1) the Easement will not adversely impact HELCO's operations; (2) the terms and conditions of the Easement appear reasonable; and (3) the proposed charge of \$1.00 for the Easement appears reasonable. Specifically, with regard to the Easement's terms and conditions, the Consumer Advocate asserts that the "Easement contains broad indemnification requirements . . . [which] should protect HELCO, its customers, and the public from the risks caused by property damage, injuries to persons, or anything arising out of the construction or maintenance of Oceanic [Cable]'s fiber optic cable system."⁴ The Consumer Advocate also states that the proposed \$1.00 charge appears reasonable since there is no anticipated increase to HELCO's cost of service as a result of the Easement, and Oceanic Cable's service is in the public interest.

Nonetheless, the Consumer Advocate notes that it was initially concerned that HELCO did not file for approval of the Easement in 1999, when Oceanic Cable started occupying HELCO's property. However, in response to the Consumer Advocate's concern, HELCO explained in its information request ("IR") responses, that it did not require a separate document with

⁴See CA's Statement of Position at 6.

Oceanic Cable in 1999 since: (1) Oceanic Cable was providing HELCO with direct service; and (2) Hawaiian Telcom, Inc. ("Hawaiian Telcom"), through a master agreement, allowed Oceanic Cable to use its easement within HELCO's Anaehoomalu Substation. While it would have preferred that HELCO had filed for approval of the instant matter earlier, the Consumer Advocate states "that its concern has been addressed as Oceanic [Cable]'s use of the easement property was allowed through its master agreement with Hawaiian Telcom."⁵

II.

Discussion

HRS § 269-19 states:

No public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit, or any right thereunder, nor by any means, directly or indirectly, merge or consolidate with any other public utility corporation without first having secured from the public utilities commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation, made other than in accordance with the order of the commission shall be void.

HRS § 269-19 (emphasis added).

Here, the approval of the Easement appears reasonable and in the public interest. The terms and conditions of the Easement should sufficiently indemnify HELCO, its customers, and

⁵Id. at 7.

the public from any loss or damage to property or injury or death to persons associated with the construction, maintenance, operation, repair, or removal of Oceanic Cable's fiber optic cable system.⁶ The nominal fee of \$1.00 in consideration for the Easement is appropriate under the facts and circumstances of this case since, among other things: (1) HELCO's Anaehoomalu Substation is currently carried in its rate base at \$78.81⁷; (2) HELCO's facilities in the area are being provided access to telecommunications services through Oceanic Cable's fiber optic cable system⁸; and (3) Oceanic Cable provides the public in the area with cable television service through the cable system.

Moreover, based on the description of the Easement which is "located entirely outside of HELCO's secure (i.e., fenced) area"⁹ on the property, the grant of the Easement should not interfere with HELCO's ability to service the public. As the Consumer Advocate noted, since Hawaiian Telcom and Oceanic Cable have been using the Easement area since the 1990s, there does "not appear to have been any incidents that have adversely affected HELCO's ability to provide electric service to its customers in the area."¹⁰

However, like the Consumer Advocate, the commission is concerned that HELCO did not request approval of the Easement

⁶See Application; Exhibit I at 2.

⁷See Application at 3.

⁸Id. at 2-3.

⁹See HELCO's response to CA-IR-3, filed on October 13, 2005.

¹⁰See CA's Statement of Position at 4.

when Oceanic first began placing its facilities on HELCO's property. Nonetheless, the commission acknowledges, in this instance, HELCO's explanation that it did not initially seek approval since Oceanic Cable was utilizing Hawaiian Telcom's easement over HELCO's Anaehoomalu Substation, which the commission approved in 1992,¹¹ under a master agreement with Hawaiian Telcom.¹²

More importantly, the approval of the Easement appears to be in the public interest, since the Easement is necessary to enable Oceanic Cable to continue maintaining its existing fiber optic cable system on HELCO's property, which provides HELCO's facilities with access to telecommunications services in the South Kohala and North Kona areas and cable television services to Oceanic Cable's subscribers in the area. Nevertheless, HELCO is cautioned that the commission expects HELCO and all of its affiliated entities to adhere to the requirements of HRS § 269-19 in all similar applicable future matters, or obtain a commission ruling that the provision is not applicable to a given situation.

Based on the foregoing, the commission concludes that HELCO's grant of a perpetual easement over its Anaehoomalu Substation property in Waikoloa to Oceanic Cable for

¹¹See In re Hawaii Electric Light Company, Inc., Docket No. 7150, Decision and Order No. 11490, filed on February 21, 1992.

¹²As HELCO explains, HELCO and Hawaiian Telcom's fiber optic cables are in separate conduits; however, both conduits are owned by Hawaiian Telcom and are in the same trench located in the Easement area described in the Application. See HELCO's responses to CA-IR-1 and CA-IR-2, filed on October 13, 2005.

the installation of underground fiber optic cable should be approved as of the date of this Decision and Order.¹³

III.

Orders

THE COMMISSION ORDERS:

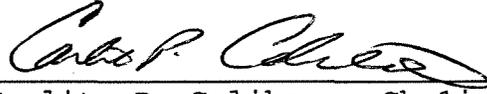
1. HELCO's grant of a perpetual easement over its Anaehoomalu Substation property in Waikoloa to Oceanic Cable for the installation of underground fiber optic cable, as described in the Application, is approved, effective as of the date of this Decision and Order.

2. This docket is closed, unless ordered otherwise by the commission.

¹³As an approval, *nunc pro tunc*, would not be appropriate in this case, this approval is effective only as of the date of this Decision and Order, with no express or implied retroactive effect. See, e.g., In re Acceris Communications Corp., Docket No. 04-0347, Decision and Order No. 21648, filed on February 15, 2005; In re Sea Link of Hawaii, Inc., Docket No. 02-0212, Decision and Order No. 21085, filed on June 25, 2004.

DONE at Honolulu, Hawaii JUN 22 2006.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Ji Sook Kim
Commission Counsel

05-0228.eh

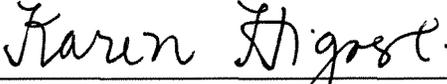
CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22553 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

JOHN E. COLE
EXECUTIVE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
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Karen Higashi

DATED: JUN 22 2006