

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

WAIMANA ENTERPRISES, INC., )  
 )  
 Complainant )  
 )  
 vs. )  
 )  
 MAUI ELECTRIC COMPANY, LTD., )  
 )  
 Respondent )  
 \_\_\_\_\_ )

DOCKET NO. 6954

DECISION AND ORDER NO. 22556

Filed June 23, 2006  
At 11 o'clock A .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.

for

Gleaner R. Luu

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

WAIMANA ENTERPRISES, INC.,	)	
	)	
Complainant	)	Docket No. 6954
	)	
vs.	)	Decision and Order No. 22556
	)	
MAUI ELECTRIC COMPANY, LTD.,	)	
	)	
Respondent	)	
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DECISION AND ORDER

By this Decision and Order, the commission dismisses the formal complaint ("Complaint") filed by WAIMANA ENTERPRISES, INC. ("Waimana") against MAUI ELECTRIC COMPANY, LTD. ("MECO") and closes this docket.

I.

Background

A.

Procedural History

On March 28, 1991, Waimana filed a Complaint against MECO requesting that the commission issue an order compelling MECO to execute the March 19, 1991 version of a purchase power agreement ("PPA") for as-available energy between Waimana and

MECO, and to "set the effective date of the PPA as March 21, 1991."<sup>1</sup>

On April 17, 1991, the commission ordered MECO to either satisfy the Complaint, or file an answer to the Complaint with the commission within ten (10) days of the date of service of the order.<sup>2</sup> On April 29, 1991, MECO filed its answer to the Complaint.<sup>3</sup>

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>

B.

Stipulated Issues

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. The issues identified by the Parties for disposition in this docket were as follows:

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<sup>1</sup>See Complaint, filed on March 28, 1991, at 9. Waimana served copies of its Complaint on MECO and the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party to all commission proceedings pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62.

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

<sup>3</sup>MECO's Answer, filed on April 29, 1991. Exhibit A to MECO's Answer was filed on May 8, 1991.

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

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 (the "form of 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?

Stipulated Prehearing Order No. 11186, at 2.

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.

C.

Status Reports

On September 10, 2004, the commission, by Order No. 21336, directed the Parties to review the evidence and information in 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

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<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.

record needs to be further updated or supplemented and whether the Parties' positions have changed since 1991.

On November 23, 2004, the Parties submitted their respective status reports in accordance with Order No. 21336.

1.

MECO

In its status report, MECO argues that Waimana's Complaint is moot and requests an order dismissing the Complaint. According to MECO, Waimana had requested in its Complaint that the commission "compel MECO to enter into a specific form of power purchase contract with Waimana for the purchase of energy on an as-available basis to be generated by the former Onsite Biomass facility ("Facility") at MECO's Palaau power plant site on the island of Molokai."<sup>6</sup> MECO states that, the "Onsite Biomass facility has been sold to an entity other than Waimana, and has been removed from the island of Molokai and the State of Hawaii."<sup>7</sup> According to MECO, "Onsite worked out an arrangement to remove the Facility, the Appurtenant Equipment and an old control room shared with MECO, and to sell the removed property to a third party. Removal of the Facility, the Appurtenant Equipment and the old control room was completed by March 1996."<sup>8</sup> As the

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<sup>6</sup>MECO's Status Report, filed November 23, 2004, at 1.

<sup>7</sup>MECO's Status Report, filed November 23, 2004, at 1.

<sup>8</sup>MECO's Status Report, filed November 23, 2004, at 3.

Facility is no longer available, MECO argues that the Complaint is moot and should be dismissed.<sup>9</sup>

2.

Waimana

In its status report, Waimana states that, although certain circumstances have changed since the filing of its Complaint on March 28, 1991, the pertinent facts and its position in this proceeding remain the same. 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 ("QF")."<sup>10</sup>

3.

Consumer Advocate

The Consumer Advocate also contends in its status report that its position has not changed since 1991, and that 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

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<sup>9</sup>MECO's Status Report, filed November 23, 2004, at 3.

<sup>10</sup>Waimana's Status Report, filed November 23, 2004, at 1.

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.<sup>11</sup>

As a result, the Consumer Advocate claims that the record is complete and does not require further information to decide the issues noted above.<sup>12</sup>

## II.

### Discussion

Although the vehicle for MECO's request to dismiss the Complaint was procedurally incorrect,<sup>13</sup> the commission will address the issue as mootness is a jurisdictional issue.<sup>14</sup>

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

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<sup>11</sup>Consumer Advocate's Status Report, dated November 23, 2004, at 2.

<sup>12</sup>Consumer Advocate's Status Report, dated November 23, 2004, at 1.

<sup>13</sup>MECO's request should have been filed in the form of a motion that complies with the requirements set forth in HAR § 6-61-41.

<sup>14</sup>See McCabe Hamilton & Renny Co., Ltd. v. Chung, 98 Hawai'i 107, 117, 43 P.3d 244, 254 (Haw. Ct. App. 2002) ("Courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so.") (quoting 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").

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")). According to the Hawaii Supreme Court:

The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation, remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal - adverse interest and effective remedy - have been compromised.

Wong, 62 Haw. at 394, 616 P.2d at 203-04. Further, "[t]he duty and the inclination of courts, it is clear, are to decide actual controversies only and not 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" Anderson v. W.G. Rawley Co., 27 Haw. 150, 152 (1923) (quoting Murphy v. McKay, 26 Haw. 171, 173 (1921)); see also Wong, 62 Haw. at 395, 616 P.2d at 204 ("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").

Here, the second requirement for justiciability, an effective remedy, is not met. It is undisputed that the Onsite

Biomass Facility has been sold to an entity other than Waimana, and has been removed from the island of Molokai.<sup>15</sup>

In its Complaint, Waimana's prayer for relief was limited to requesting the commission to "compel MECO to comply with PUC rules and execute [MECO's] March 19, 1991 version of the PPA" and to "set the effective date of the PPA[.]"<sup>16</sup> MECO's March 19, 1991 version of the PPA involves Waimana's intention to generate electricity utilizing the Onsite Biomass Facility located on MECO's Palaau generating plant site ("Palaau Site"), and to sell As-Available Energy generated from the Palaau Site as a Qualified Facility ("QF") to MECO in accordance with the Public Utilities Regulatory Policies Act of 1978 ("PURPA"),<sup>17</sup> HRS § 269-27.2 and HAR Chapter 6-74.<sup>18</sup> As the Onsite Biomass Facility has been sold to an entity other than Waimana, and has been removed from the island of Molokai, the commission cannot grant Waimana the relief that it requested in its Complaint. See, e.g., Carl II, 93 Hawai'i at 165, 997 P.2d at 577 (affirming dismissal of an unsuccessful bidder's appeal as moot because the contract at issue had been terminated); Wong, 62 Haw. at 396, 616 P.2d at 205 (finding an appeal moot where "there [was] nothing left to grant [the] appellant").

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<sup>15</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.

<sup>16</sup>Waimana's Complaint at 9.

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

<sup>18</sup>MECO's Statement of Position at 10.

In light of the above facts and circumstances, it is clear that the Complaint is moot. Without the Onsite Biomass Facility at the Palaaau Site, 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.<sup>19</sup> Accordingly, the commission finds that the Complaint should be dismissed.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. Waimana's Complaint is dismissed as moot.
2. This docket is closed.

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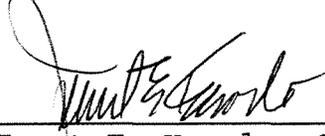
<sup>19</sup>An exception to the mootness doctrine exists for cases that involve questions that affect the public interest and are "capable of repetition yet evading review." Carl II, 93 Hawai'i at 165, 997 P.2d at 577 (quoting In re Thomas, 73 Haw. at 226, 832 P.2d at 255). "The phrase, 'capable of repetition, yet evading review,' means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit." Carl II, 93 Hawai'i at 165, 997 P.2d at 577. This case does not fall under the exception, as the requirements for the exception are not met. Indeed, even the Parties do not argue that the exception applies.

DONE at Honolulu, Hawaii JUN 23 2006

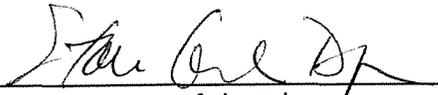
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By (EXCUSED)  
Wayne H. Kimura, Commissioner

By   
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

  
Stacey Kawasaki Djou  
Commission Counsel

6954.cs

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22556 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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Certificate of Service  
Page 2

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DATED: JUN 23 2006