

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
 MAUI ELECTRIC COMPANY, LIMITED)
)
 For Approval of a Building License)
 Agreement With the County of Maui.)
 _____)

DOCKET NO. 2006-0412

DECISION AND ORDER NO. 23326

Filed March 29, 2007
At 2 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

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

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Commission, State of Hawaii.

Karen Higashi

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DECISION AND ORDER

By this Decision and Order, the commission approves the Building License Agreement between MAUI ELECTRIC COMPANY, LIMITED ("MECO")¹ and the COUNTY OF MAUI ("County"), dated April 7, 2006 ("the License Agreement"), under which MECO will allow the County non-exclusive use of microwave bandwidth and spare fiber optic cables between the Pu'u Nianiau communications site and Maui County Police Department ("MPD") in exchange for the County allowing the collocation of MECO's microwave and fiber equipment in the County's Hana Airport Facilities. In addition, the commission finds that MECO is not subject to commission regulation as a telecommunications carrier by virtue of its execution of the License Agreement.

¹MECO is a corporation duly organized under the laws of the Territory of Hawaii on or about April 28, 1921, and now exists under and by virtue of the laws of the State of Hawaii. MECO is an operating public utility that produces, purchases, transmits, distributes and sells electricity on the island of Maui; produces, transmits, distributes and sells electricity on the island of Molokai; and produces, distributes and sells electricity on the island of Lanai.

I.

Background

A.

Application

On October 13, 2006, MECO filed an application requesting commission approval of the License Agreement between MECO and the County. MECO desires to add a microwave link for internal communications (e.g., supervisory control and data acquisition ("SCADA"), automatic generation control, and trunked land mobile radio) between MECO's Hana Substation and MECO's Pu'u Nianiau communications site in order to connect the Hana Substation with the rest of MECO's system. There is no acceptable MECO microwave path between the Pu'u Nianiau communications site and the Hana Substation. However, MECO identified an acceptable microwave path from the Pu'u Nianiau communications site to the Hana Airport. A communications facility to house the microwave equipment at the Hana Airport would have to be established and fiber optic cables installed from the Hana Airport to the Hana Substation to connect the Hana Substation. The initial projected cost by MECO of this project is \$377,400.

MECO contends that MPD was planning to install its own microwave equipment at the Hana Airport, and learned of MECO's microwave plans for the same location. MECO represents that MPD has offered MECO the use of MPD's planned communications shelter at the Hana Airport in return for MPD's use of MECO's microwave bandwidth and fiber cables for official MPD purposes.

MPD proposes to use MECO's fiber cables between the Hana Airport, MECO's Hana Substation, and MPD's Hana Station. MECO projects the cost for this project, if facilities are shared, to be \$177,500.

On April 7, 2006,² MECO and the County of Maui entered into a License Agreement, whereby MECO is granting the County non-exclusive use of microwave bandwidth and spare fiber optic cables between the Pu'u Nianiau communications site and the MPD building in Hana, in exchange for the County allowing the collocation of MECO's microwave and fiber equipment ("Microwave Equipment") in the County's Hana Airport facilities. Commission approval is sought under the provisions of HRS § 269-19.

MECO also requests that in the event that the commission deems the licensing of the MECO facilities to constitute telecommunications service, the commission approve a waiver of the HAR § 6-80-17(c) requirements.

B.

Consumer Advocate's Statement of Position

On December 8, 2006, the Consumer Advocate filed its Statement of Position ("Statement of Position") pursuant to HAR § 6-61-62, informing the commission that it does not object to the commission's approval of MECO's Application.

²Although the License Agreement was entered into on April 7, 2006, § 2.1 provides that the term shall commence no earlier than the date of a any required, final non-appealable commission order, and § 13.12 provides that the "Agreement is subject to and shall become effective only upon receipt of any and all required consents and regulatory and governmental approvals, including, without limitation, those of the Hawaii Public Utilities Commission."

II.

Discussion

A.

Approval of the License Agreement under HRS § 269-19

HRS § 269-19 provides in relevant part that

No public utility corporation shall . . . lease . . . or otherwise dispose of or encumber . . . any part of its . . . property necessary or useful in the performance of its duties to the public . . . 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.

1.

The License Agreement will not have an adverse effect on MECO's operations

MECO represents that the License Agreement will not interfere in any way with MECO's ability to provide electric utility service to the public and will provide MECO with a communications shelter for its Microwave Equipment.³ The Consumer Advocate states that it does not believe that approval of the License Agreement will adversely affect MECO's operations:

- MECO will install and maintain its own microwave equipment and antennae in and on County facilities.
- MECO will have access to County facilities during normal working hours and emergencies.

³Application at 8; see also id. at 4.

- MECO will have sufficient capacity in the microwave system and fiber optic cables involved for its current and future public utility operational requirements.
- MECO may terminate the License Agreement with or without cause upon one-hundred eighty (180) days' prior written notice should any adverse effects occur.
- The County acknowledges that restoration of the County's electric utility services following a disaster may occur before restoration of the County's microwave services.
- MECO is primarily an electric power public utility, and the License Agreement deals mainly with a telecommunications arrangement for internal communications.⁴

Based on the foregoing, the commission finds that, in this instance, the License Agreement will not have an adverse effect on MECO's operations.

2.

The terms and conditions of the License Agreement appear reasonable

MECO attached a copy of the License Agreement as an Exhibit to the Application. The Consumer Advocate states that it believes the terms and conditions of the License Agreement to be reasonable for the following reasons:

- The License Agreement affirms that the parties shall comply with all applicable laws, governmental rules, regulations, orders, ordinances and standards.

⁴Consumer Advocate Statement of Position at 4-5.

- The License Agreement allows for non-exclusive reciprocal use of the parties facilities and/or equipment to the mutual benefit of both parties of the agreement for a term of 15 years from the commencement date. MECO will benefit from the use of MPD's Hana Maui Airport Facilities, while MPD will benefit from the use of MECO's microwave and fiber optic cable facilities.
- The specific privileges in the License Agreement are granted to both parties at no charge due to the public safety nature and mutual benefits that accrue to both parties.
- The License Agreement sets forth that the facilities involved will be used solely for the purpose of carrying MPD and MECO official telecommunications and other related business.
- The License Agreement affirms that Licensor and Licensee will both be responsible for the cost of building and maintaining their respective facilities.
- The License Agreement provides conditions requiring approval by both parties for the addition or change of any equipment or facilities outside of that covered by the instant agreement.
- The License Agreement indicates that either party may terminate the agreement with or without cause upon one hundred eighty (180) days' prior written notice to the other party.
- The License Agreement has broad indemnification, insurance, and hazardous material requirements. Moreover, MECO and the County will not be liable to and will release each other from any interruption of service, microwave, or otherwise, in any manner whatsoever.⁵

⁵Consumer Advocate Statement of Position at 6-7.

In addition, the parties will not assign, transfer or sublet the License Agreement, or any of the privileges granted, without the prior written consent of the other.⁶ In the event of a natural disaster which damages the Hana Maui Airport Facilities or Microwave Equipment, both parties shall cooperate with each other's disaster plans and make every effort to restore communications as expeditiously as possible.⁷ Each party and anyone acting under its direction or control or on its behalf, including but not limited to any contractor or other entity engaged by same, shall at its own expense, procure and maintain in full force at all times during the term of this Agreement, insurance, or provide sufficient evidence of self insurance, to protect each other from and against any and all claims and demands and from and against any and all actions, judgments, costs, expenses and liabilities of every kind and nature which may arise or result, directly or indirectly, from or by reason of the acts or omissions of each other hereunder.⁸

Based on the foregoing, the commission finds that, in this instance, the terms and conditions of the License Agreement appear reasonable.

⁶License Agreement § 13.1.

⁷License Agreement § 5.3.

⁸License Agreement § 8.1.

Approval of the License Agreement is in the public interest

MECO maintains that due to the public safety nature (i.e., improved utility and MPD communications, efficiency in power restoration, and enhanced reliability) of the telecommunications requirements of both parties, the County and MECO agreed to grant each other at no charge the privilege of installing MECO's microwave equipment in the Hana Maui Airport Facilities and use by the County of a portion of MECO's microwave bandwidth and fiber optic cables.

The Consumer Advocate concurs with the public safety nature of the License Agreement, and believes that approval of the License Agreement would serve the public interest by (1) enhancing the public's safety via law enforcement protection and electric service through the improved telecommunications for both MPD and MECO, and (2) reducing costs to both MECO and the MPD, resulting in financial savings to the public, either as real property tax payers and/or utility customers.⁹

Based on the foregoing, the commission finds that, in this instance, approval of the License Agreement is in the public interest. Accordingly, the commission approves the License Agreement, as of the date of this Decision and Order, pursuant to HRS § 269-19.¹⁰

⁹Consumer Advocate Statement of Position at 8.

¹⁰Under § 13.12 of the License Agreement, it is not effective until all regulatory approvals and consents are issued, including a final non-appealable order from the commission under § 2.1 of the License Agreement. Accordingly, the License Agreement entered into on April 7, 2006 is not void under HRS § 269-19 for

B.

MECO is Not a "Public Utility" With Respect
To the Provision of Telecommunications Services

HRS § 269-1 defines a "public utility" as an entity that provides a service for public use:

every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for . . . the transmission of telecommunications messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air within the State, or between points within the State, . . . provided that the term: . . . shall include telecommunications carrier or telecommunications common carrier.

HRS § 269-1 defines "telecommunications service" or "telecommunications" as follows:

"Telecommunications service" or "telecommunications" means the offering of transmission between or among points specified by a user, of information of the user's choosing, including voice, data, image, graphics, and video without change in the form or content of the information, as sent and received, by means of electromagnetic transmission, or other similarly capable means of transmission, with or without benefit of any closed transmission medium, and does not include cable service as defined in section 440G-3.

HAR § 6-80-17(c) provides in relevant part that "[a]ny person, other than the incumbent telecommunications carrier, seeking to offer, initiate, or provide intrastate telecommunications service

MECO not having first secured an order from the commission before entering into the License Agreement.

must apply in writing to the commission for a certificate of authority."

The Hawaii Supreme Court provides further clarification in In re Wind Power Pacific Investors-III, 67 Haw. 342, 686 P.2d 831 (1984) ("Wind Power"), by adopting the following test:

Whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.¹¹

MECO states that under the License Agreement, "it would not be holding itself out, either expressly or impliedly, to engage in the business of supplying telecommunications services to the public in Hawaii, as a class, or to any limited portion of the public."¹² Rather, MECO states that it "would only be making certain channels of microwave and dark fiber available to the County/MPD on the terms negotiated in the License Agreement."¹³ MECO states, "[i]n this instance, MECO holds itself out to be [a]

¹¹Id. at 345 (quoting 73B C.J.S. Public Utilities § 3).

¹²Application at 11.

¹³Application at 11.

public utility provider of electricity, not telecommunications."¹⁴ In addition, MECO states that its proposed activities "would not implicate concerns for the protection of consumers against unreasonable rates and charges since the sole consumer of the services rendered by MECO's facilities would be the County."¹⁵ Therefore, MECO argues that it "lack[s] the necessary elements of public use."¹⁶

In addition, MECO argues that it is not a "telecommunications carrier" with respect to the proposed licensing activities.¹⁷ HRS § 269-1 defines "telecommunications carrier" or "telecommunications common carrier" as an entity that provides telecommunications services for profit to the public:

"Telecommunications carrier" or "telecommunications common carrier" means any person that owns, operates, manages, or controls any facility used to furnish telecommunications services for profit to the public, or to classes of users as to be effectively available to the public, engaged in the provision of services, such as voice, data, image, graphics, and video services, that make use of all or part of their transmission facilities, switches, broadcast equipment, signaling, or control devices.¹⁸

MECO points to section 7.1 of the License Agreement to show that its telecommunications facilities will not be used for a profit:

¹⁴Application at 10.

¹⁵Application at 11.

¹⁶Application at 11.

¹⁷Application at 10, 12.

¹⁸Emphases added.

Due to the public safety nature of the telecommunications requirements of both parties, the privilege of placing said Licensee's Microwave Equipment in the Hana Maui Airport Facilities and use by Licensor of a portion of Licensee's microwave bandwidth is granted to each other at no charge.

Thus, MECO contends that it "should not be considered a telecommunications carrier or common carrier subject to regulation as such."¹⁹

Furthermore, in Pacific Carriage Limited, Docket No. 04-0172, Decision and Order No. 21405, filed on October 7, 2004, the commission stated that "[t]he commission finds it useful to examine the four criteria established by the FCC [when distinguishing between common carrier and non-common carriers]."²⁰ The FCC determines that an entity is offering a service on a non-carrier basis where one of the following four factors is present: (1) The entity offers the service through a long-term lease or sale; (2) The entity provides a large amount of capacity; (3) The entity provides the service through an individually negotiated contractual arrangement; or (4) The entity provides the service to a very small, hand-picked customer base.²¹ In the present docket, MECO asserts that it "satisfies not just one of the [FCC factors], which is all that is needed, but three [of the FCC factors]."²² MECO explains that

¹⁹Application at 10.

²⁰Pacific Carriage Limited, Docket No. 04-0172, Decision and Order No. 21405, October 7, 2004, at 13.

²¹Application at 13.

²²Application at 15.

it "is making an individualized decision as to whether and on what terms to provide the facility, and will not undertake to carry for all people indifferently."²³ In addition, MECO notes that if the capacity of MPD is considered "large," it arguably satisfies all four of the FCC factors."²⁴

The Consumer Advocate concurs with MECO that MECO should not be subject to regulation under HRS ch. 269 and HAR § 6-80-17(c):

- Should the License Agreement be approved, MECO would not meet the definition of a telecommunications "public utility" or "telecommunications carrier" as described in HRS § 269-1, since approval of the License Agreement in the instant proceeding would not result in MECO providing telecommunications services for public use or for profit to the public.
- Should the License Agreement be approved, MECO would satisfy at least three of the NARUC 1 tests which determine that an entity is offering a service on a non-carrier basis. Under the License Agreement, the telecommunications service would: (1) be offered through a long-term agreement (i.e., for a term of 15 years from commencement); (2) be offered pursuant to a negotiated contract; and (3) be offered only to MPD for official MPD telecommunications and related business.²⁵

Upon review of the foregoing, and based on the particular facts of this docket, the commission determines that

²³Application at 15.

²⁴Application at 15.

²⁵See Consumer Advocate Statement of Position at 9.

MECO is not a "public utility" or "telecommunications carrier" with respect to the provision of telecommunications services. See, e.g., Pacific Carriage Limited, Docket No. 04-0172, Decision and Order No. 21405, filed on October 7, 2004 (holding that Petitioner "would not be holding itself out, either expressly or impliedly, to engage in the business of supplying its capacity to the public in [the State], as a class, or to any limited portion of the public"). Accordingly, the commission denies MECO's request for waiver of the HAR § 6-80-17(c) requirements for the services contemplated by the License Agreement. The commission's determinations are based on the particular facts of the instant docket. To the extent that MECO sells, leases, assigns, mortgages, or otherwise disposes or encumbers any additional excess microwave bandwidth, fiber optic cable, or other related capacity with other external parties, MECO is required to obtain prior commission approval under HRS § 269-19.

III.

Orders

THE COMMISSION ORDERS:

1. MECO's request for approval of the License Agreement between MECO and the County, dated April 7, 2006, is approved, effective as of the date of this Decision and Order, pursuant to HRS § 269-19.

2. MECO's alternate request for waiver of the HAR § 6-80-17(c) requirements for the services contemplated by

the License Agreement is denied on the basis that MECO is not a "public utility" or "telecommunications carrier" with respect to the provision of telecommunications services.

3. This docket is closed.

DONE at Honolulu, Hawaii MAR 29 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

APPROVED AS TO FORM:

Nichole K. Shimamoto
Nichole K. Shimamoto
Commission Counsel

2006-0412.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23326 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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Karen Higashi

DATED: MAR 29 2007