

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

----- In the Matter of ----- )  
 )  
PUBLIC UTILITIES COMMISSION )  
 )  
Instituting a Proceeding to )  
Investigate Competitive Bidding )  
for New Generating Capacity in )  
Hawaii. )  
\_\_\_\_\_ )

DOCKET NO. 03-0372

ORDER NO. 24035

Filed Feb. 13, 2008  
At 10 o'clock A .M.

Karen Higashi  
Chief Clerk of the Commission

DIVISION OF PUBLIC UTILITIES  
2008 FEB 14 A 9:06  
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for KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.  
Gleaner P. Luasoga

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

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PUBLIC UTILITIES COMMISSION ) Docket No. 03-0372  
Instituting a Proceeding to ) Order No. 24035  
Investigate Competitive Bidding )  
for New Generating Capacity in )  
Hawaii. )  
\_\_\_\_\_ )

ORDER

By this Order,<sup>1</sup> the commission denies HREA's Motion for Clarification and Partial Reconsideration of Order No. 23794, filed on January 29, 2008.

I.

Background

A.

Procedural Background

On December 8, 2006, the commission issued Decision and Order No. 23121, in which it adopted a Framework for Competitive

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<sup>1</sup>The Parties are HAWAIIAN ELECTRIC COMPANY, INC. ("HECO"), HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), MAUI ELECTRIC COMPANY, LIMITED (collectively, the "HECO Companies"), KAUAI ISLAND UTILITY COOPERATIVE ("KIUC"), HAWAII RENEWABLE ENERGY ALLIANCE ("HREA"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a). HECO and HELCO are collectively referred to as the "HECO/HELCO Companies."

Bidding as a mechanism for acquiring or building new energy generation in the State ("CB Framework" or "Framework").<sup>2</sup>

Part II.A.3.e of the CB Framework states:

This Framework does not apply to: (i) the three utility projects currently being developed: Hawaiian Electric Company, Inc.'s Campbell Industrial Park CT-1, Hawaii Electric Light Company, Inc.'s Keahole ST-7, and Maui Electric Company, Ltd.'s Maalaea M-18; (ii) offers to sell energy on an as-available basis by non-fossil fuel producers that were submitted to an electric utility before this Framework was adopted; and (iii) offers to sell firm energy and/or capacity by non-fossil fuel producers that were submitted to an electric utility before this Framework was adopted, or that resulted from negotiations with respect to offers to sell energy on an as-available basis by non-fossil fuel producers that were submitted to an electric utility before this Framework was adopted; provided that negotiations with respect to such firm energy and/or capacity offers are concluded no later than December 31, 2007.

CB Framework, Part II.A.3.e (emphasis added).

Footnote 10 of Decision and Order No. 23121 states:

The offers from non-fossil fuel producers that are exempt from competitive bidding under Part II.A.3.e of the Framework are limited to those set forth in: (1) KIUC's Oral Argument Hearing Exhibit A, dated June 19, 2006; and (2) the HECO [Companies'] list submitted to the commission and the Consumer Advocate under confidential protective order on June 27, 2006, as updated by the HECO [Companies] on September 11, 2006. See HECO's Comments, at 11; and confidential Exhibit A attached thereto.

Decision and Order No. 23121, at 7 n.10 (emphasis added).

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<sup>2</sup>Decision and Order No. 23121, filed on December 8, 2006, with the Framework for Competitive Bidding, dated December 8, 2006, attached.

In addition, Part VIII of the CB Framework states in relevant part, with respect to a qualifying facility or facilities ("QF" or "QFs"):

VIII. QUALIFYING FACILITIES

- A. For any resource to which the competitive bidding requirement does not apply (due to waiver or exemption), the utility retains its traditional obligation to offer to purchase capacity and energy from a QF at avoided cost upon reasonable terms and conditions approved by the Commission.
  
- B. For any resource to which the competitive bidding requirement does apply, the utility shall apply to the commission to waive or modify the time periods described in [HAR] § 6-74-15(c) (1998) for the utility to negotiate with a QF pursuant to the applicable provisions of [HAR] § 6-74-15(c) (1998), and upon approval of the commission, the utility's obligation to negotiate with a QF shall be deferred pending completion of the competitive bidding process.

. . . . .

CB Framework, Part VIII (emphasis added).

On December 31, 2007, written requests were filed by the HECO Companies and the HECO/HELCO Companies, respectively, with confidential attachments, that included requests to extend the December 31, 2007 deadline date set forth in Part II.A.3.e(iii) of the CB Framework.

By Order No. 23974, filed on January 17, 2008, the commission denied the relief requested by the HECO Companies, as follows:

II.

Discussion

A.

Request No. 1

By letter dated December 31, 2007, the HECO Companies request the commission's approval to further update their list of non-fossil fuel producers that are exempt from the CB Framework, by adding three non-fossil fuel power purchase offers that were received by the HECO Companies in October 2006, prior to the adoption of the CB Framework on December 8, 2006, but were not included in the lists previously submitted to the commission under confidential seal on June 27, 2006 and September 11, 2006.

The three offers consist of two as-available energy proposals, and a firm capacity biomass proposal. Accordingly, "since one of the proposals is for a firm capacity biomass plant, the HECO Companies further request that [they] be allowed to continue negotiations with this developer beyond the December 31, 2007 deadline to December 31, 2008."

. . . . .

1.

Request to Update List

At the time of the commission's adoption of the CB Framework on December 8, 2006, the HECO Companies' list of offers from non-fossil fuel producers that were potentially exempt from the CB Framework consisted of the initial list submitted by the HECO Companies to the commission on June 27, 2006, as updated on September 11, 2006 (collectively, the "Updated List"). Thus, the HECO Companies' Updated List, as specifically referenced in footnote 10 of Decision and Order No. 23121, did not include the three non-fossil fuel power purchase offers that were received by the HECO Companies in October 2006.

. . . . .

The HECO Companies' request, if it is construed as a motion for enlargement of time, is untimely, and the HECO Companies do not offer or

state any excusable neglect to justify the enlargement of time by which to consider their request, more than one year after the issuance of Decision and Order No. 23121. Moreover, even if the request is treated as a motion for reconsideration, it is also untimely, and the HECO Companies do not sufficiently state the basis for their belief that Decision and Order No. 23121 is "unreasonable, unlawful, or erroneous."<sup>3</sup> Accordingly, the commission denies the HECO Companies' request to further update their list of non-fossil fuel purchase offers that are exempt from the CB Framework, to include the three non-fossil fuel purchase offers referenced in their Request No. 1.

2.

Extension of Time for the  
Firm Capacity Biomass Proposal

The commission's denial of the HECO Companies' underlying request to further update their Updated List renders moot their corresponding request for a one-year extension of time, from December 31, 2007 to December 31, 2008, to allow the HECO Companies to continue their negotiations with a firm capacity biomass developer under Part II.A.3.e(iii) of the CB Framework.

B.

Request No. 2

By letter dated December 31, 2007, the HECO/HELCO Companies jointly request an extension of time "to conclude negotiations for a power purchase agreement with a Big Island non-fossil fuel developer."

. . . . .

Upon review, the commission concurs with the Consumer Advocate's assessment, and finds that no good cause exists in this instance to grant the HECO/HELCO Companies' requested relief. Here, following the commission's issuance of Decision and Order No. 23121 on December 8, 2006, the HECO/HELCO Companies were well aware of the

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<sup>3</sup>HAR § 6-61-137.

December 31, 2007 deadline date by which to complete their negotiations with the Big Island non-fossil fuel developer, in order to avail themselves of the specific exemption to the competitive bidding process under Part II.A.3.e(iii) of the CB Framework. Accordingly, the commission denies the HECO/HELCO Companies' request for an extension of time. This denial, however, is without prejudice to any other relief that may be available under the CB Framework.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. This docket is re-opened on the commission's own motion for the limited purpose of addressing the two written requests, both filed on December 31, 2007.

2. The HECO Companies' request to further update their list of non-fossil fuel purchase offers that are exempt from the CB Framework, to include the three non-fossil fuel purchase offers referenced in their written request, dated December 31, 2007, is denied.

3. The HECO Companies' corresponding request, dated December 31, 2007, for a one-year extension of time, from December 31, 2007 to December 31, 2008, to allow the HECO Companies to continue their negotiations with a firm capacity biomass developer under Part II.A.3.e(iii) of the CB Framework, is rendered moot.

4. The HECO/HELCO Companies' request, dated December 31, 2007, for an extension of time to conclude their negotiations of a power purchase agreement with a Big Island non-fossil fuel developer, is denied.

5. By February 22, 2008, the HECO Companies shall submit to the commission, with copies served on the Consumer Advocate, an updated status report on the non-fossil fuel power purchase offers described in their Updated List.

Order No. 23974, at 3-10 (footnotes, text, and citations therein omitted) (emphasis added).<sup>4</sup>

On January 29, 2008, HREA filed a Motion for Clarification and Partial Reconsideration of Decision and Order No. 23794.<sup>5</sup>

B.

Partial Voluntary Disclosures

Requests No. 1 and No. 2 both included confidential attachments that disclosed to the commission and the Consumer Advocate only, and not to HREA or KIUC: (1) the identities and current status of negotiations with

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<sup>4</sup>For Request No. 1: (1) the Consumer Advocate did not object to the three subject projects being exempted from the CB Framework, but it objected to the HECO Companies' request for additional time to continue their negotiations with the firm capacity biomass developer beyond the December 31, 2007 deadline; (2) HREA did not object; and (3) KIUC took no position. See Order No. 23974, at 4.

For Request No. 2, the Consumer Advocate objected to the HECO/HELCO Companies' request, HREA did not object, and KIUC took no position. See Order No. 23974, at 8.

<sup>5</sup>Motion for Clarification and Partial Reconsideration of Decision and Order No. 23794; Memorandum in Support; Affidavit of Richard Horn; Exhibits A and B; Affidavit of Ian Robertson; Exhibits C and D; and Certificate of Service, filed on January 29, 2008 (collectively, "Motion for Clarification and Partial Reconsideration").

Also on January 29, 2008, the HECO Companies filed a Motion for Enlargement of Time to File a Motion for Clarification and/or Partial Reconsideration of Order No. 23974. On February 1, 2008, the commission approved the HECO Companies' request for an enlargement of time, from January 29, 2008 to February 29, 2008, to file their Motion for Clarification and/or Partial Reconsideration of Order No. 23974. See Commission's letter, dated February 1, 2008.

three non-fossil fuel producers, for Request No. 1; and (2) the identity and current status of negotiations with the Big Island non-fossil fuel developer, for Request No. 2.

Subsequently, by letter dated January 7, 2008, Puna Geothermal Venture ("PGV") informed the commission that it "is the developer referred to in the letter, and concurs with HELCO's and HECO's request[,]" i.e., Request No. 2.<sup>6</sup> Thereafter, HREA, in its Motion for Clarification and Partial Reconsideration, discloses that, with respect to Request No. 1, two of the three non-fossil producers are its members, Site Constructors, Inc., and Na Makani Moa'e Ku, respectively. HREA also discloses, from its viewpoint, the status of negotiations for these two member entities.

As a result of the voluntary disclosures by PGV and HREA, respectively, the commission notes that, with respect to the HECO Companies' confidential attachments filed with the commission on December 31, 2007 (with copies served upon the Consumer Advocate), the identity of only one non-fossil producer remains under confidential seal.

C.

HREA's Requests

HREA's requested relief is two-fold, the partial reconsideration and clarification, respectively, of Order No. 23974:

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<sup>6</sup>Order No. 23974, at 7 n.8 (quoting from PGV's letter, dated January 7, 2008, at 1).

HREA is seeking relief in the form of the reconsideration of the Commission's decision to deny the HECO Companies' written request of December 31, 2007 to update its list of non-fossil fuel purchase offers by adding three non-fossil fuel purchase offers. Specifically, HREA is seeking relief in the case of two of its members, Site Constructors, Inc. ["(SCI)"], a principal in Waikoloa Wind Power LLC ("Waikoloa"), and Na Makani Moa'e Ku ("Na Makani") which are two of the three non-fossil fuel purchase offers referenced above. [HREA does not take a position with respect to the third non-fossil fuel purchase offer.] HREA believes that both Waikoloa and Na Makani met the requirements set out by the Commission in its D&O 22588, and should therefore be grandfathered as projects exempt from the competitive bidding process.

HREA is seeking relief in the form of a clarification of the impact of the Competitive Bidding Framework on [QFs]. In the Commission's [Order] 23794, HREA understands the Commission to state that [QFs] in Hawaii will no longer be able to negotiate power purchase agreements ("PPAs") directly with the utility under our state PURPA law except in cases where the competitive bidding requirement does not apply due to waiver or exemption. Specifically, HREA is seeking clarification as to other possible waivers or exemptions for QFs that are not addressed directly in the Commission['s] D&O 23121, such as periods during when the utility is not conducting or planning to conduct a competitive bidding process.

HREA's Motion for Clarification and Partial Reconsideration, at 3 (emphasis added); see also HREA's Memorandum in Support, at 1-2 and 4.

HREA's motion is supported by the affidavits of Mr. Richard Horn, Vice President of SCI, and Mr. Ian Robertson, a Managing Member of Na Makani, plus various exhibits.<sup>7</sup>

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<sup>7</sup>The original, signed affidavit of Mr. Horn was attached to HREA's Motion for Clarification and Partial Reconsideration. On January 31, 2008, HREA submitted the original, signed affidavit of Mr. Robertson.

1.

Reconsideration

HREA, in seeking the partial reconsideration of Ordering Paragraph No. 2 of Order No. 23974, asserts:

1. On October 3, 2006, Waikoloa submitted its non-utility generator ("NUG") application to HELCO, for a 10 megawatt ("MW") wind farm with battery storage, to be located near the village of Waikoloa, island of Hawaii.<sup>8</sup>

2. By letter dated December 21, 2006, HECO acknowledged the receipt of Waikoloa's NUG application, and indicated that Waikoloa's proposal appeared to meet one of the exemptions from the competitive bidding requirement, specifically Part II.A.3.e(ii) of the CB Framework. As a result, the HECO/HELCO Companies were prepared to continue negotiations on Waikoloa's proposal.<sup>9</sup>

3. As averred by Mr. Horn, in paragraphs 7 to 9 of his affidavit:

Prior to and subsequent to December 21, 2006, SCI/Waikoloa ha[ve] devoted numerous hours and effort with (a) time and resources expended in negotiations, (b) [s]pecific engineering, design for power storage, and development that is tailored to the Waikoloa location and cannot be utilized elsewhere, (c) SCI/Waikoloa stand to lose considerable engineering time and money as well as credibility as a developer if we are not grandfathered in as a project exempted from competitive bidding as requested [by] HECO/HELCO.

SCI with its partners (on another renewable energy project within the HELCO system) have developed considerable insight and respect for the tight system[] constraints that the island utilities

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<sup>8</sup>HREA's Exhibit A.

<sup>9</sup>HREA's Exhibit B.

must operate within. To that end we have developed for Waikoloa, significant system controls and power storage that will better protect the quality of delivered power and control of the ramp rate via storage means that are not duplicated anywhere in the Hawaiian Island.

Waikoloa feels that the advances made through the development and implementation of the refined power control system will benefit all of the utilities in the islands. Ramp rate controls and storage have been the main detractors for the utilities to realize the benefits of as available renewable energy. The Waikoloa project will demonstrate a great stride to minimizing those negative effects.

Affidavit of Richard Horn, at 1-2.

4. On October 6, 2006, Na Makani submitted its NUG application to HELCO, for a 4.5 MW wind farm with pumped hydro storage, to be located on Kahua Ranch, North Kohala, island of Hawaii.<sup>10</sup>

5. By letter dated December 21, 2006, HECO acknowledged the receipt of Na Makani's NUG application, and indicated that its proposal appeared to meet one of the exemptions from the competitive bidding requirement, specifically Part II.A.3.e(ii) of the CB Framework. As a result, the HECO/HELCO Companies were prepared to continue negotiations on Na Makani's proposal.<sup>11</sup>

6. As averred by Mr. Robertson, in paragraphs 7 to 9 of his affidavit:

Prior to and subsequent to December 21, 2006, Na Makani has devoted significant time[, ] energy and economic resources in an effort not only to supply 4.5 MW of clean renewable power to HELCO and the Big Island consumers, but also to work

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<sup>10</sup>HREA's Exhibit C.

<sup>11</sup>HREA's Exhibit D.

with HELCO and HECO to address grid integration and stability concerns that if not unique to the Big Island, have not been adequately solved elsewhere, and which, if a competitive market is to emerge must be solved.

Na Makani desires that the Commission recognizes that its NUG was submitted in a timely manner and acknowledged as such by HECO, and that it is to the advantages of all parties[;] the consumer; the utility; the owners of Kahua Ranch (who pioneered renewable energy in Hawaii); and Na Makani[.]

Na Makani requests that its NUG of 6 October 2006 for 4.5 MW of renewable energy generation be grandfathered in as requested by HECO on December 31, 2007[.]

Affidavit of Ian Robertson, at 1-2.

7. Considerable financial harm will come to SCI, Waikoloa, and Na Makani, should the relief HREA seeks on their behalf not be granted.

8. Both wind farm projects provide specific benefits to HELCO, its ratepayers, and to the State of Hawaii, including assisting the HECO/HELCO Companies in meeting the Renewable Portfolio Standards set forth in HRS Chapter 269, Part V.

2.

#### Clarification

HREA seeks clarification of Part VIII of the CB Framework, governing Qualified Facilities. In effect, HREA's request for clarification is two-fold.

First, HREA seeks clarification from the commission as to when, i.e., in what situations will Part VIII.A of the CB Framework apply.

Second, HREA proposes to clarify Part VIII.B of the CB Framework, by adding the following language:

1. The utility shall request a waiver from its traditional QF obligation three months before it plans to release a Request For Proposals for Renewable Energy and/or Capacity; and
2. The waiver shall be rescinded upon the conclusion of the competitive bidding process, i.e., when PPAs with a winner (or winners) is (or are) approved by the Commission.

In support of its latter request for clarification, HREA states that Part VIII.B of the CB Framework "now requires the utility to notify the Commission when it wishes to waive its traditional obligation to QFs."<sup>12</sup> "However, it is not clear whether the utility is obligated to seek a waiver for QFs on a case-by-case basis or a waiver should be sought for a specific period of time, e.g., the period of time during which there are no active . . . plans for competitive bidding processes underway."<sup>13</sup>

## II.

### Discussion

HAR §§ 6-61-137, 6-61-139, and 6-61-140 state:

§6-61-137 Motion for reconsideration or rehearing. A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically

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<sup>12</sup>HREA's Memorandum in Support, at 6.

<sup>13</sup>HREA's Memorandum in Support, at 6.

the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

§6-61-139 Additional evidence. When, in a motion filed under this subchapter, a request is made to introduce new evidence, the evidence adduced shall be stated briefly, that evidence must not be cumulative, and an explanation must be given why that evidence was not previously adduced.

§6-61-140 Replies to motions. The commission may allow replies to a motion for rehearing or reconsideration or a stay, if it deems those replies desirable or necessary.

HAR §§ 6-61-137, 6-61-139, and 6-61-140.<sup>14</sup>

A.

Reconsideration

HREA's request for the partial reconsideration of Ordering Paragraph No. 2 of Order No. 23974, in effect, seeks to belatedly modify footnote 10 of Decision and Order No. 23121, by further updating the HECO Companies' Updated List to include two of the three non-fossil fuel purchase offers referenced in the HECO Companies' Request No. 1.

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<sup>14</sup>HREA's evidence in support of its motion consists of the two affidavits and various exhibits. Since HREA was not the initial movant that gave rise to the commission's issuance of Order No. 23974, HREA does not explain "why that evidence was not previously adduced[,]" as envisioned by HAR § 6-61-139. Accordingly, in this instance, the commission will accord HREA's evidence the appropriate weight in its consideration of the Motion for Clarification and Partial Reconsideration.

The commission further notes that, consistent with its authority under HAR § 6-61-140, replies to HREA's motion from the other parties in this proceeding are not necessary in this instance.

Upon careful consideration, the commission finds that while HREA's supporting reasoning is generally persuasive, it does not warrant the reconsideration of Order No. 23974 under HAR § 6-61-137. The underlying principle of the CB Framework is that "competitive bidding (unless exempted or waived by the commission for a specific project) is established as the required mechanism for acquiring a further generation resource or a block of generation resources, whether or not such resource has been identified in an electric utility's Integrated Resource Plan[.]"<sup>15</sup> The commission, thus, denies HREA's request for partial reconsideration of Ordering Paragraph No. 2 of Order No. 23974.

B.

Clarification

Similar to the commission's reasoning in Section II.A.1 of Order No. 23974, the commission finds that HREA's belated request to clarify and modify Part VIII of the CB Framework, more than a year after the issuance of Decision and Order No. 23121, is untimely. Moreover, the commission notes that HREA's broad view that Part VIII.B of the CB Framework "now requires the utility to notify the Commission when it wishes to waive its traditional obligation to QFs[.]" appears to mischaracterize Part VIII.B. Instead, as stated in Part VIII.B, "upon approval of the commission, the utility's obligation to negotiate with a QF shall be deferred pending completion of the competitive

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<sup>15</sup>Decision and Order No. 23121, at 3 (citing CB Framework, Part II.A.3).

bidding process." The commission, thus, denies HREA's request for clarification.

III.

Order

THE COMMISSION ORDERS:

1. HREA's Motion for Clarification and Partial Reconsideration of Order No. 23794, filed on January 29, 2008, is denied.

2. The HECO Companies' Request to File a Response to HREA's Motion for Clarification and Partial Reconsideration of Order No. 23794, filed on February 7, 2008, is denied.

DONE at Honolulu, Hawaii FEB 13 2008.

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:

Michael Azama  
Michael Azama  
Commission Counsel

Leslie H. Kondo  
By Leslie H. Kondo  
Leslie H. Kondo, Commissioner

03-0372.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 24035 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

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*Karen Higashi*

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Karen Higashi

DATED: FEB 13 2008