

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
KAUAI ISLAND UTILITY COOPERATIVE)
)
For Approval of Power Purchase)
Contract for As-Available Energy)
And Interconnection Agreement with)
Green Energy Hydro, LLC and to)
Include Costs in its Energy Rate)
Adjustment Clause.)
_____)

Docket No. 2007-0059

DECISION AND ORDER NO. 24177

Filed May 6, 2008
At 1 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

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PUBLIC UTILITIES DIVISION
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ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii
Karen Higashi

KIUC acquiring renewable energy, the price that KIUC has agreed to pay for that renewable energy under the PPC is not de-linked from the price of fossil fuel as required by statute. Accordingly, the commission denies KIUC's request without prejudice and encourages KIUC and Green Energy to negotiate an agreement on payment rates that comply with HRS § 269-27.2.

I.

Background

A.

KIUC and Green Energy

KIUC is a Hawaii not-for-profit electric cooperative engaged in the production, transmission, distribution, purchase, and sale of electric energy on the island of Kauai.³

Green Energy is a Hawaii limited liability company primarily formed for the purpose of constructing and operating a hydroelectric generation plant ("Facility")

Protective Order, filed on March 23, 2007, at 1. Accordingly, on March 30, and April 10, 2007, KIUC produced to the commission and Consumer Advocate under confidential seal, the portions of the Application it designates as confidential.

³See Application, at 3. KIUC has been an operating public utility since November 1, 2002, when it purchased substantially all of the assets and assumed the operations of the Kauai Electric Division of Citizens Communications Company. See In re Citizens Comm. Co., Docket No. 02-0060, Decision and Order No. 19658, filed on September 17, 2002, as amended by Decision and Order No. 19755, filed on October 30, 2002.

on the island of Kauai.⁴ Fifty percent (50%) of Green Energy's membership interest is owned by Green Energy Kauai, LLC and fifty percent (50%) by Hawaiian Mahogany, Inc.⁵

B.

Application

On March 6, 2007, KIUC filed an application, requesting that the commission: (1) approve the PPC dated January 12, 2007 between KIUC and Green Energy, pursuant to HRS § 269-27.2; (2) approve the related Interconnection Agreement dated December 18, 2006; (3) find that the energy payments are reasonable; (4) find that the terms and conditions under the PPC, pursuant to which KIUC shall purchase renewable energy from Green Energy, are prudent and in the public interest; and (5) approve the inclusion of the purchased energy payments and related revenue taxes that are incurred by KIUC under the PPC, in KIUC's Energy Rate Adjustment Clause ("ERAC"), for the term of the PPC pursuant to HAR § 6-60-6(2); (6) waive paragraph III.D.5 of the Integrated Resource Planning Framework, to the extent necessary and applicable; and (7) grant other relief as may be just and reasonable.⁶

⁴See Application, at 4.

⁵See Application, at 4.

⁶Application, at 1-2 and Attachments A and B, as supplemented by confidential material submitted on March 20, 2007.

As described in the Application, Green Energy will construct, own, and operate the Facility.

Pursuant to the PPC, Green Energy will construct, own, operate and maintain an approximately 150 kilowatt ("kW") hydroelectric generation plant [Facility]. Green Energy's Facility will be located on Eric A. Knudsen Trust lands, targeted to be placed on a parcel (TMK No. 2-7-002-001) near Knudsen Gap on the island of Kauai, as described in the map attached hereto as Attachment C. The water source will be derived from an approximately 40 million gallon reservoir, located approximately 1.0 mile north of Koloa. See Attachment C. The water from this reservoir will be released through approximately 4,000 feet of 18 inch pipes to the Facility.

Application, at 4.

1.

Terms of the PPC

Pursuant to the terms of the PPC:

A. The PPC shall commence upon the In-Service Date⁷ and shall remain in effect for an initial term as designated in the PPC (said information was filed under seal).⁸ The PPC shall continue until terminated by either party at any time after the initial term, and not less than one hundred eighty (180) days' advance written notice to the other party.⁹

⁷Pursuant to Appendix D of the PPC, "In-Service Date" is the date that Green Energy's Facility has successfully met all of the requirements of the Interconnection Agreement. See PPC, Appendix D at D-3.

⁸See Application, at 4-5 and Attachment A, at 4-5.

⁹See Application, at 4-5 and Attachment A, at 4-5.

B. KIUC will accept and pay for all the net energy generated by the Green Energy Facility and delivered by Green Energy to KIUC at the "Energy Rate" defined below; provided that the instantaneous megawatt output shall not exceed the Allowed Net Capacity¹⁰ at any given time, and KIUC shall not be obligated to pay for energy in excess of such amount.¹¹

C. The Energy Rate for the delivery of energy for sale to KIUC is described in the Application and Appendix B of the PPC.¹²

D. Green Energy shall obtain all permits and licenses required for the construction and operation of the Facility, including but not limited to rights-of-way, easements or leases.¹³ Green Energy shall install, operate and maintain the Facility in compliance with all applicable laws and regulations.¹⁴ Green Energy shall provide KIUC access to occupy a designated space, and operate, maintain, modify, and remove interconnection facilities as needed.¹⁵

¹⁰As described in Appendix A of the PPC, "Allowed Net Capacity" shall be the lower of (i) 130 kW, or (ii) the net nameplate capacity (net for export) of Green Energy's Facility that are installed and have successfully completed the Control System Acceptance Test by the In-Service Date. See PPC Appendix at A-2

¹¹See Application, at 5 and PPC, at Appendix B, B-1.

¹²See Application, at 5 and PPC, at Appendix B, B-1.

¹³See Application, at 6 and PPC, at 4-5.

¹⁴See Application, at 6 and PPC, at 4-5.

¹⁵See Application, at 6 and PPC, at 5.

E. Green Energy shall provide KIUC with certification as a qualifying facility ("QF") on or before the In-Service Date and thereafter as requested or KIUC shall not be obligated to accept or pay for any energy delivered by Green Energy and the PPC may be terminated as set forth in the PPC's Appendix C.¹⁶

F. The Green Energy Facility shall maintain a continuous rated power output at the point of interconnection at a power factor within the range of 0.95 leading and 0.95 lagging.¹⁷ If KIUC requests or requires the Facility to accept or provide reactive power outside the range specified, one-half (1/2) of one percent (1%) shall be added to the meter kWh during the period the Facility is outside the range specified.¹⁸

G. Green Energy shall release, indemnify, and hold harmless KIUC, its directors, officers, agents, and representatives against and from any and all loss, claims, actions or suits, including costs and attorney's fees resulting from, or arising out of the operation and maintenance of the Facility and the point of interconnection.¹⁹ Green Energy shall, at its own expense, maintain certain types and amounts of insurance as described in the PPC.²⁰

¹⁶See Application, at 6 and PPC, at 12.

¹⁷See Application, at 6 and PPC, at Appendix B, at B-1.

¹⁸See Application, at 6 and PPC, at Appendix B at B-1.

¹⁹See Application, at 7 and PPC, at 7-8.

²⁰See Application, at 7 and PPC, at 8-9.

H. The terms and conditions under which Green Energy's Facility will interconnect to KIUC's system will be governed by the Interconnection Agreement, dated December 18, 2006 and attached to the Application as Attachment B.²¹

I. The Contracting Parties agreed to a number of conditions in the PPC, among other things, for KIUC to exercise its right to seek certain approvals or else waive certain rights to terminate the PPC.²² In addition, the PPC may be terminated if, among other things, it is not approved (including by the commission) by January 12, 2008.²³ On January 10, 2008, KIUC informed the commission that KIUC and Green Energy agreed to extend KIUC's termination rights for an additional six months (until July 12, 2008).²⁴

2.

Terms of the Interconnection Agreement

The December 18, 2006 Interconnection Agreement sets forth the terms and conditions under which Green Energy's Facility will interconnect with, and operate in parallel with, KIUC's system, consistent with the PPC. Attachment 3 of the

²¹See Application, at 7 and Attachment B.

²²See Application, at 8 and PPC, at 5-7.

²³See Application, at 8 and PPC, at 5-7.

²⁴KIUC's Letter to the Commission, dated January 10, 2008.

Interconnection Agreement consists of a schematic diagram that depicts Green Energy's Facility, the Interconnection Facilities, and the Point of Interconnection with KIUC's system.²⁵

The responsibilities of the Contracting Parties include:

- 1.5.1 The Parties shall perform all obligations of this Agreement in accordance with all Applicable Laws and Regulations, Operating Requirements, and Good Utility Practice.²⁶

²⁵See Application, at Exhibit B. As defined in Attachment B (Interconnection Agreement), at Attachment 1:

Interconnection Facilities - [KIUC's] Interconnection Facilities and [Green Energy's] Interconnection Facilities [(collectively, "Interconnection Facilities")] include all facilities and equipment between the Small Generating Facility and the Point of Interconnection, including any modification, additions or upgrades that are necessary to physically and electrically interconnect the Small Generating Facility to [KIUC's] Transmission and/or Distribution System. Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades or Network Upgrades.

.....

Point of Interconnection - the point where the Interconnection Facilities connect with [KIUC's] Transmission and/or Distribution System.

²⁶Good Utility Practice is defined as any of the practices, methods and acts engaged in or approved by a significant portion of the electric industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region. See Application, at Attachment B, Attachment 1.

- 1.5.2 [Green Energy] shall construct, interconnect, operate and maintain its Small Generating Facility and construct, operate, and maintain its Interconnection Facilities in accordance with the applicable manufacturer's recommended maintenance schedule, and in accordance with this Agreement, Good Utility Practice, and any other requirements imposed by [KIUC].
- 1.5.3 [KIUC] shall construct, operate, and maintain its Transmission and Distribution System and Interconnection Facilities in accordance with this Agreement, and with Good Utility Practice.
- 1.5.4 [Green Energy] agrees to construct and operate its facilities or systems in accordance with applicable specifications that meet or exceed those provided by the National Electrical Safety Code, the American National Standards Institute, IEEE, Underwriter's Laboratory, and Operating Requirements and other applicable national and state codes and standards. [Green Energy] agrees to design, install, maintain, and operate its Small Generating Facility so as to minimize the likelihood of a disturbance adversely affecting or impairing the system or equipment of [KIUC].
- 1.5.5 Each Party shall operate, maintain, repair, and inspect, and shall be fully responsible for the facilities that it now or subsequently may own unless otherwise specified in the Attachments to this Agreement. Each Party shall be responsible for the safe installation, maintenance, repair and condition of their respective lines and appurtenances on their respective sides of the point of change of ownership. [KIUC] and [Green Energy], as appropriate, shall provide Interconnection Facilities that adequately protect [KIUC's] Transmission and/or Distribution System, personnel, and other persons from damage and injury. The allocation of responsibility for the design, installation, operation, maintenance and ownership of Interconnection Facilities shall be delineated in the Attachments to this Agreement.

See Application, at Attachment B, 2.

KIUC's Arguments in Support of its Application

In support of its Application, KIUC states:

1. With respect to the PPC and Interconnection Agreement, the Contracting Parties have agreed to energy charges for the delivery of energy for sale to KIUC calculated at an agreed upon rate.²⁷ Such agreements have been previously approved by the commission in other proceedings. KIUC contends that the terms of the PPC are just and reasonable, and consistent with HRS § 269-27.2 and the applicable provisions of HAR Chapter 6-74.²⁸

KIUC also notes that the specific terms and conditions of the PPC and Interconnection Agreement "were negotiated by the [Contracting Parties] at arms-length and contain indemnification, insurance and other provisions which will serve to protect KIUC and its members from certain risks associated with interconnecting with the Green Energy Facility. Moreover, the terms and conditions of the PPC and the Interconnection Agreement will not affect KIUC's ability to provide electric service to its members and is not discriminatory to other small power producers. For these reasons, KIUC requests [c]ommission approval of the PPC and the related Interconnection Agreement"²⁹

²⁷See Application, at 9.

²⁸See Application, at 9.

²⁹See Application, at 9-10.

Finally, KIUC requests that the commission find that the purchased energy charges to be paid by KIUC are reasonable and that the purchased power arrangements, pursuant to which KIUC purchases energy from Green Energy, are prudent and in the public interest.³⁰

2. With respect to including the purchased energy charges and related revenue taxes that are incurred under the PPC with Green Energy in KIUC's ERAC, KIUC states:

KIUC presently implements a fuel adjustment clause (aka, ERAC) through its applicable rate schedules set forth in Tariff No. 1 to recover fuel and purchased energy costs previously approved by the [c]ommission.

See Application, at 10.

3. With respect to the Integrated Resource Planning ("IRP") process, the deadline for KIUC to file its third Integrated Resource Plan ("3rd IRP") is December 20, 2008,³¹ in In re Public Util. Comm'n, Docket No. 2006-0165. In this regard, KIUC explains:

KIUC's predecessor submitted its 2nd IRP in Docket No. 96-0266 and KIUC's 3rd IRP is currently under development and scheduled to be submitted to the [c]ommission for its review and approval in Docket No. 2006-0165 on or about [December 20, 2007]. Neither the 2nd IRP nor 3rd IRP specifically addresses the purchased power pursuant to the PPC with Green Energy primarily due to its small size (e.g., 150 kW). Although renewable energy projects of this size may be reviewed to retain the integrity of KIUC's IRP process, it will not likely be considered as part of KIUC's next IRP cycle in Docket No. 2006-0165 as these projects are simply too small and

³⁰See Application, at 10.

³¹By Order No. 23944, filed on December 28, 2007 in Docket No. 2006-0165, the commission granted KIUC's request for extension of time from December 20, 2007 to December 20, 2008.

spontaneous to align with KIUC's IRP activities and model effectively. Notwithstanding these impracticalities in considering these small projects, KIUC contends that the PPC with Green Energy was executed to be consistent with [Public Utility Regulatory Policies Act of 1978 ("PURPA")] and the State's Renewable Portfolio Standard[s ("RPS")], as set forth in HRS §§ 269-91 et seq. Thus, for these reasons, KIUC also requests a waiver of Paragraph III.D.5 of the IRP Framework, to the extent necessary and applicable.

KIUC's Application, at 11-12 (footnote and text therein omitted).

C.

Consumer Advocate's Position

On October 11, 2007, the Consumer Advocate filed its Statement of Position ("Statement of Position"). The Consumer Advocate states that it does not object to the commission's approval of the PPC, related Interconnection Agreement, and the inclusion of the energy payments and related revenue taxes incurred pursuant to the terms PPC, in KIUC's ERAC.³²

In support of its recommendations, the Consumer Advocate states:

1. Green Energy's Facility, as a small power production facility, meets the criteria of a QF under HAR §§ 6-74-4, 6-74-5, and 6-74-7. In particular:

³²Consumer Advocate's Statement of Position, at 1-2.

A. The Facility has a power rating of 150 kW, far below the maximum size criteria of 80 megawatts set forth in HAR § 6-74-5(a).³³

B. The primary energy source of the Facility will be water flow. The fuel source for the Facility is considered a renewable resource, which meets the fuel criteria set forth in HAR § 6-74-5(e).³⁴

C. To the Consumer Advocate's knowledge, KIUC does not possess any equity interest in Green Energy or the Facility, thereby meeting the ownership restriction criteria set forth in HAR §§ 6-74-4(a)(3) and 6-74-7.³⁵

2. The key provisions of the PPC are reasonable and in the public interest. Of particular note:

A. The energy payment rate is reasonable since it is established at or below KIUC's avoided cost, thereby meeting the requirement set forth in HRS § 269-27.2(c)³⁶

B. With respect to the duration of the PPC, although the PURPA rules do not prescribe a term requirement, the Consumer Advocate recognizes that without a long-term PPC, project financing for the Facility may be difficult to obtain.³⁷

³³Consumer Advocate's Statement of Position, at 9-10.

³⁴Consumer Advocate's Statement of Position, at 9-10.

³⁵Consumer Advocate's Statement of Position, at 9-10.

³⁶Consumer Advocate's Statement of Position, at 10-11.

³⁷Consumer Advocate's Statement of Position, at 10-11.

C. The non-price terms and conditions do not appear to discriminate against other independent power producers and are otherwise appropriate. In particular, the "indemnification and insurance provisions of the PPC are reasonable because [they] ensure that any claim with respect to the Facility - up to and including the point of interconnection - is covered by Green Energy and its insurance policies."³⁸ The PPC will enable KIUC to comply with the State's renewable portfolio standards and complies with the state energy policy of reducing the state's dependence on fossil fuels.³⁹

3. The terms of the interconnection agreement are reasonable. Significantly:

A. They require Green Energy to construct, interconnect, operate and maintain its interconnection facility in accordance with the applicable manufacturer's recommended maintenance schedule, and in accordance with Good Utility Practices;⁴⁰

B. Green Energy is required to design, install, maintain, and operate its facility so as to minimize the likelihood of a disturbance adversely affecting or impairing the system or equipment of KIUC.⁴¹

³⁸Consumer Advocate's Statement of Position, at 10-11.

³⁹Consumer Advocate's Statement of Position, at 10-12.

⁴⁰Consumer Advocate's Statement of Position, at 12.

⁴¹Consumer Advocate's Statement of Position, at 12.

4. The inclusion of the PPC energy payment rates and related revenue taxes in KIUC's ERAC, pursuant to HAR § 6-60-6(2), is reasonable.⁴²

5. The Consumer Advocate does not object to waiving Paragraph III.D.5. of the IRP Framework to the extent necessary or applicable. In particular:

A. The IRP does not specifically address the purchase of energy pursuant to the PPC since the 2nd IRP was submitted in Docket No. 96-0266 approximately 9 years ago and the 3rd IRP is not expected to be submitted for commission review and approval until December 20, [2008].⁴³

B. KIUC notes that due to the relatively small size of the project, it would be unlikely to be considered as part of the IRP.⁴⁴

II.

Discussion

HAR § 6-60-6(2) states:

No changes in fuel and purchased energy costs may be included in the fuel adjustment clause unless the contracts or prices for the purchase of such fuel or energy have been previously approved or filed with the commission.

HAR § 6-60-6(2). In addition, with regard to the utilization of electricity generated from nonfossil fuels, HRS § 269-27.2 states:

⁴²Consumer Advocate's Statement of Position, at 13.

⁴³Consumer Advocate's Statement of Position, at 13-14.

⁴⁴Consumer Advocate's Statement of Position, at 13-14.

- (a) The public utilities commission shall investigate and determine the extent to which electricity generated from nonfossil fuel sources is available to public utilities that supply electricity to the public, where electricity is in excess of that utilized or otherwise needed by the producers for their internal uses and which the producers are willing to make available to the electric public utilities.
- (b) The public utilities commission may direct public utilities that supply electricity to the public to arrange for the acquisition of and to acquire electricity generated from nonfossil fuel sources as is available from and which the producers of same are willing and able to make available to the public utilities, and to employ and dispatch the nonfossil fuel generated electricity in a manner consistent with the availability thereof to maximize the reduction in consumption of fossil fuels in the generation of electricity to be provided to the public.
- (c) The rate payable by the public utility to the producer for the nonfossil fuel generated electricity supplied to the public utility shall be as agreed between the public utility and the supplier and as approved by the public utilities commission . . .

In the exercise of its authority to determine the just and reasonable rate for the nonfossil fuel generated electricity supplied to the public utility by the producer, the commission shall establish that the rate for purchase of electricity by a public utility shall not be more than one hundred percent of the cost avoided by the utility when the utility purchases the electricity energy rather than producing the electrical energy.

The commission's determination of the just and reasonable rate shall be accomplished by establishing a methodology that removes or significantly reduces any linkage between the price of fossil fuels and the rate for the nonfossil fuel generated electricity to potentially enable utility customers to share in the benefits of fuel cost savings resulting from the use of nonfossil fuel generated electricity. As the

commission deems appropriate, the just and reasonable rate for nonfossil fuel generated electricity supplied to the public utility by the producer may include mechanisms for reasonable and appropriate incremental adjustments, such as adjustments linked to consumer price indices for inflation or other acceptable adjustment mechanisms.

. . . .

HRS § 269-27.2. Therefore, HRS § 269-27.2 requires the commission to establish a methodology that removes or significantly reduces any linkage between the price of fossil fuels and the rate for the nonfossil fuel generated electricity.

In response to an information request from the commission, KIUC acknowledges that the rates in the PPC are based on fossil fuel prices. KIUC states:

As indicated in its Application, filed on March 6, 2007, the proposed Energy Payment Rates, as agreed to in the [PPC] with [Green Energy], was based on KIUC's Schedule "Q" modified payment tariff rates ("Schedule Q standard rates") as calculated and reported in the monthly [ERAC] filed with the Commission, pursuant to the Federal Energy Regulatory Commission [] rules implementing [PURPA].

Although Green Energy's proposed 150kW hydroelectric generation plant did not technically qualify for Schedule Q standard rates for purchases from qualified facilities with a design capacity of 100kW or less under KIUC's Schedule "Q" tariff, . . . KIUC treated Green Energy as a QF and negotiated energy payment rates that were at or below avoided energy costs, thereby agreeing to a Schedule "Q" modified payment rate as calculated and reported in the monthly ERAC filed with the Commission . . .

KIUC's Response to PUC-IR-100, filed on April 3, 2008.

Here, the commission finds that KIUC's inclusion in its ERAC of the costs of purchased energy under its Contract with Green Energy are not appropriate. As explained in Decision and Order No. 24099, filed on March 20, 2008, in In re Hawaii Electric Light Co., Inc., Docket No. 2007-0220 ("Docket No. 2007-0220"):

Having participated in the legislative process associated with the passage of Act 162, it is the commission's interpretation that Act 162 requires the significant reduction or removal of the linkage between the price of fossil fuels and the purchase rate for nonfossil fuel generated electricity for all new purchased power contracts and agreements. To clarify further, it is the commission's interpretation that Act 162 requires a significant reduction or removal of the linkage between the price of fossil fuels and non-fossil fuel generated electricity, even in those cases where the purchase rate is agreed-upon by the public utility and the supplier of non-fossil fuel generated electricity.

Despite its position that Act 162 is only implicated if there is a disagreement on the rate for purchase, HELCO states that the HECO Companies (i.e., HELCO, Hawaiian Electric Company, Inc. and Maui Electric Company, Ltd.) "are willing to propose a new methodology to calculate Schedule Q payment rates which will result in fixed payment rates over the term of the Schedule Q contract," but that the "proposed new methodologies to compute Schedule Q payment rates should be examined in detail in a new Commission proceeding instead of this docket." The commission agrees with HELCO in this respect and will open a new docket to examine the methodology for calculating Schedule Q rates.

Docket No. 2007-0220, Decision and Order No. 24099, at 4 n.4. Therefore, despite KIUC and Green Energy's agreement, pursuant to HRS § 269-27.2, the commission must review the proposed rate to ensure that it is just and reasonable and not substantially linked to the price of fossil fuel. The commission finds that

KIUC and Green Energy have agreed upon a rate which is substantially linked to the price of fossil fuels, therefore, the commission cannot approve the PPC. As noted above, this denial is without prejudice and the commission would encourage KIUC and Green Energy to negotiate energy payment rates that comply with HRS § 269-27.2.

III.

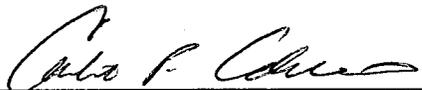
Order

THE COMMISSION ORDERS:

KIUC's Application For Approval of Power Purchase Contract for As-Available Energy and Interconnection Agreement with Green Energy Hydro, LLC and to Include Costs in its Energy Rate Adjustment Clause, filed on March 6, 2007, is denied without prejudice.

DONE at Honolulu, Hawaii MAY - 6 2008 .

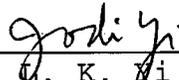
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

APPROVED AS TO FORM:


By Leslie H. Kondo, Commissioner


Jodi G. K. Yi
Commission Counsel

2007-0059.iaa

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 24177 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

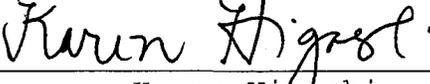
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DATED: **MAY - 6 2008**