

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. 24180

Filed May 7, 2008
At 12 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

DIVISION OF CONSUMER PROTECTION
DEPARTMENT OF PUBLIC UTILITIES AND
COMMUNICATIONS AFFAIRS
STATE OF HAWAII

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Karen Higashi

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Docket No. 03-0372

Order No. **24180**

ORDER

By this Order,¹ the commission denies the HECO Companies' Motion for Reconsideration of Order No. 23974, filed on February 29, 2008.

I.

Background

On December 8, 2006, the commission issued Decision and Order No. 23121, in which it adopted a Framework for Competitive Bidding as a mechanism for acquiring or building new energy generation in the State ("CB Framework" or "Framework").²

¹The 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 § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

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

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.

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

On December 3, 2007, the commission closed this docket.³ On December 31, 2007, written requests were filed by the HECO Companies and the HECO/HELCO Companies,⁴ respectively, that included requests to extend the December 31, 2007 deadline

³Order No. 23865, filed on December 3, 2007.

⁴HECO and HELCO are collectively referred to as the "HECO/HELCO Companies."

date set forth in Part II.A.3.e(iii) of the CB Framework for certain projects.

On January 17, 2008, the commission issued Order No. 23974, which addressed the two written requests 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.

Order No. 23974, Ordering Paragraphs Nos. 2, 3, and 4, at 9.⁵

On January 29, 2008, HREA filed a Motion for Clarification and Partial Reconsideration of Order No. 23794, which the commission denied on February 13, 2008.⁶

On February 29, 2008, the HECO Companies filed their Motion for Reconsideration of Order No. 23974.⁷ In their motion, the HECO Companies informed the commission:

⁵The HECO Companies' written request, as referred to in Ordering Paragraphs Nos. 2 and 3 of Order No. 23974, was designated "Request No. 1," while the HECO/HELCO Companies' written request, as referred to in Ordering Paragraph No. 4 of Order No. 23974, was designated "Request No. 2." Puna Geothermal Venture ("PGV") has disclosed that is the Big Island non-fossil fuel developer that is the subject of Request No. 2.

⁶Order No. 24035, filed on February 13, 2008.

If the requested reconsideration is not granted, the HECO Companies will request waivers for the [independent power producer ("IPP")] proposed projects identified in the HECO Companies' December 31, 2007 filings from the Competitive Bidding Framework based on the projects satisfying certain criteria specified in the framework. The HECO Companies will file the waiver request[] within seven days of the filing of this Motion so that the waiver request can be considered concurrently with this Motion.

Motion for Reconsideration, at 3.⁸

On April 3, 2008, in In re Hawaiian Elec. Co., Inc., Hawaii Elec. Light Co., Inc., and Maui Elec. Co., Docket No. 2008-0061, the HECO Companies jointly filed an application seeking waivers from the competitive bidding process for three independent power producer projects, pursuant to Part II.A.3 and 4 of the Framework.

⁷Motion for Reconsideration of Order No. 23974; Memorandum in Support of Motion; Exhibits A - B; Declaration of Daniel Ching; and Certificate of Service, filed on February 29, 2008, as supplemented on March 4, 2008 with the original signature page of the declarant (collectively, "Motion for Reconsideration"). By letter dated 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. See Commission's letter, dated February 1, 2008.

⁸On March 11, 2008, the HECO Companies jointly filed their Request for Waivers from the Competitive Bidding Framework. See also HECO Companies' letter, dated March 7, 2008 (informing the commission that the utilities will file their written request by March 11, 2008). On March 18, 2008, the commission advised the HECO Companies that their requested relief "should be sought in a separate application for waivers, consistent with Part II.A.4 of the CB Framework; or in a petition for declaratory ruling, or in the alternative, a waiver." Commission's letter, dated March 18, 2008, at 2 (footnote, text, and citations therein omitted). Thus, "no action will be taken by the Commission on the HECO Companies' Request for Waivers filed in Docket No. 03-0372." Id. at 3.

Also on April 3, 2008, in In re Hawaiian Elec. Co., Inc., and Hawaii Elec. Light Co., Inc., Docket No. 2008-0063, the HECO/HELCO Companies jointly filed a petition for declaratory relief, seeking: (1) an order declaring that the proposed PGV project is exempt from the competitive bidding process, pursuant to Part II.A.3(g)(iv) of the Framework; or (2) in the alternative, a waiver from the competitive bidding process for the proposed PGV project, pursuant to Part II.A.3.d of the Framework.

II.

Discussion

A.

HECO Companies' Motion

Sections 6-61-137, 6-61-139, and 6-61-140 of HAR chapter 6-61, subchapter 14, 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 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 6-61-140.⁹

HAR § 6-61-23(a), governing enlargements of time, states:

§6-61-23 Enlargement. (a) When by this chapter or by notice or by order of the commission, any act is required or allowed to be done at or within a specified time, the commission for good cause shown may at any time, in its discretion:

- (1) With or without motion or notice, order the period enlarged, if written request is made before the expiration of the period originally prescribed or as extended by a previous order; or
- (2) Upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action on jurisdictional matters and where any order expressly provides that no enlargement shall be granted.

HAR § 6-61-23(a).

The HECO Companies, by their Motion for Reconsideration, seek reconsideration of the commission's rulings set forth in Ordering Paragraphs Nos. 2, 3, and 4 of Order No. 23974. In support of their request for reconsideration, the HECO Companies contend:

1. Footnote 10 of Decision and Order No. 23121 should not be deemed to qualify the express language set forth in the

⁹The commission notes that, consistent with its authority under HAR § 6-61-140, replies to the HECO Companies' motion from the other parties are not necessary in this instance.

CB Framework. "The HECO Companies did not focus on footnote 10 in D&O No. 23121, which differs from the language in Part II.A.3.e of the Competitive Bidding Framework. The HECO Companies viewed the Competitive Bidding Framework as a self-contained document whose provisions were not limited by language found outside the framework. More importantly, the express language in the Competitive Bidding Framework should not be found to be subject to a footnote in the adopting decision and order."¹⁰

2. If footnote 10 is deemed to qualify the express language in the CB Framework, then excusable neglect should be found to allow this portion of Decision and Order No. 23121 to be reconsidered at this time.¹¹ Specifically:

. . . . The determination that footnote 10 qualifies the express language in the Competitive Bidding Framework should be reconsidered at this time as [IPPs] have engaged in discussions in reliance on the language in the Competitive Bidding Framework. The IPPs devoted time and resources in submitting their proposals and engaging in discussions with the HECO Companies These IPPs should be permitted to rely on the language in the Competitive Bidding Framework and have their projects proceed outside of the framework.

If it is determined that the proposed projects are not exempt from the competitive bidding process under Part II.A.3.e of the framework, the IPP developers would have to examine other options (if any) to have their

¹⁰Memorandum in Support, at 7.

¹¹See Memorandum in Support, at 3-7; see also Memorandum in Support, at 7 n.6 ("While the Commission can find that the HECO Companies should have requested clarification with respect to the ambiguity introduced by footnote 10 within 10 days after D&O No. 23121 was served on the parties (see HAR §6-61-137), such a finding does not serve the public interest.").

projects proceed outside of the competitive bidding process. If other options are not available to the IPP developers, then the time and resources the developers devoted to these projects could go to waste.

Allowing negotiations to continue with the developers of the proposed projects will also help HELCO and MECO meet their obligations to nonfossil fuel producers under HRS §269-27.2 and to qualifying facilities under [PURPA] and rules adopted by the Federal Energy Regulatory Commission and the Commission's rules promulgated pursuant to PURPA. This is particularly significant to the developers that proposed projects to HELCO as HELCO does not presently have a renewable energy [request for proposal ("RFP")] on-going or planned for the near future. (Since HELCO does not presently have a renewable energy RFP on-going or planned for the near future, allowing negotiations to continue with these developers should not negatively impact a party that was planning to submit a response to a HELCO renewable energy RFP).

Memorandum in Support, at 7-9 (footnotes, text, and citation therein omitted).

4. In the alternative, the commission, on its own motion, should modify Decision and Order No. 23121.

5. In seeking the reconsideration of Ordering Paragraph No. 3 of Order No. 23974, "[t]he reasons why such an extension should be granted are addressed in the HECO Companies' December 31, 2007 filing."¹²

6. In seeking the reconsideration of Ordering Paragraph No. 4 of Order No. 23974, "[t]he reasons why such an extension should be granted are addressed in Exhibit A to the Motion [for Reconsideration.]"¹³ In addition, HECO's Director of the Power Purchase Division, declares:

¹²Memorandum in Support, at 9.

3. On January 9, 2008, HECO/HELCO and [PGV] had a technical meeting to discuss PGV's proposed project and the HELCO system. HELCO understood based on the January 9, 2008 technical meeting that PGV's proposal would improve the operational features of PGV's existing facility as well as provide beneficial operational features for the proposed expansion of its facility.

4. On January 25, 2008, PGV sent HECO/HELCO a letter that included a more detailed discussion of the operational features that PGV was proposing.

Declaration of Daniel Ching, Paragraphs Nos. 3 and 4, at 1.

Lastly, as additional support for their overall requested relief, the HECO Companies attach as Exhibit B to their Motion for Reconsideration, a letter of support from the Director of the State of Hawaii, Department of Business, Economic Development & Tourism, to HECO, dated February 28, 2008.

As with HREA's motion for partial reconsideration of Order No. 23974, the commission finds nothing in the HECO Companies' motion meets the requisite standards for granting reconsideration under HAR § 6-61-137, or for granting an enlargement of time under HAR § 6-61-23(a)(2). Accordingly, the commission denies the HECO Companies' Motion for Reconsideration of Order No. 23974.¹⁴

¹³Memorandum in Support, at 9.

¹⁴The commission also declines to modify, on its own motion, Decision and Order No. 23121. Instead, the commission notes that: (1) the HECO Companies' application for waivers with respect to Request No. 1 is pending in Docket No. 2008-0061; and (2) the HECO/HELCO Companies' petition for a declaratory ruling with respect to Request No. 2 is pending in Docket No. 2008-0063.

III.

Order

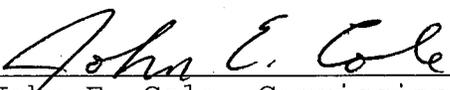
THE COMMISSION ORDERS:

The HECO Companies' Motion for Reconsideration of Order No. 23974, filed on February 29, 2008, is denied.

DONE at Honolulu, Hawaii MAY - 7 2008.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

By 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Michael Azama
Commission Counsel

03-0372.cp

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 24180 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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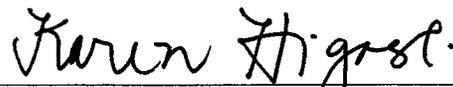
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Certificate of Service

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DATED: **MAY - 7 2008**