

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
TAWHIRI POWER LLC)
)
For a Declaratory Ruling.)
_____)

DOCKET NO. 2009-0304

ORDER: (1) GRANTING HAWAII ELECTRIC LIGHT COMPANY, INC.'S
MOTION TO INTERVENE; AND (2) DENYING TAWHIRI POWER LLC'S
PETITION FOR DECLARATORY RULING

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PUBLIC UTILITIES
COMMISSION

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TAWHIRI POWER LLC) Docket No. 2009-0304
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PETITION FOR DECLARATORY RULING

By this Decision and Order, the commission: (1) grants
HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO")'s Motion to
Intervene, filed on November 9, 2009;¹ and (2) denies
TAWHIRI POWER LLC's ("Petitioner" or "Tawhiri Power") Petition
for Declaratory Ruling, filed on October 19, 2009.²

I.

Background

Tawhiri Power Holding Company, LLC, a Delaware limited
liability company, is the managing member of Tawhiri Power.

¹Motion to Intervene; and Certificate of Service, filed
on November 9, 2009 (collectively, "Motion to Intervene"). The
Parties are Tawhiri Power, Intervenor HELCO, 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).

²Petition for Declaratory Ruling; Declaration of
Eric T. Lee; Exhibits A - J; Verification; and Certificate of
Service, filed on October 19, 2009 (collectively, "Petition").

Apollo Energy Corporation ("Apollo"), in turn, is the sole member of Tawhiri Power Holding Company, LLC.³

HELCO is the franchised provider of electric utility service on the island of Hawaii.

A.

Dockets No. 00-0135 and No. 04-0346

On April 28, 2000, in In re Apollo Energy Corp., Docket No. 00-0135 ("Docket No. 00-0135"), Apollo filed a petition seeking the commission's assistance and guidance in negotiating and finalizing a new or amended power purchase agreement ("PPA") with HELCO.⁴ The commission, in response, issued a multitude of orders which addressed the substance of the issues in dispute between Apollo and HELCO.⁵ Subsequently, on November 26, 2004, HELCO filed a formal application in In re Hawaii Elec. Light Co., Inc., Docket No. 04-0346 ("Docket No. 04-0346"), requesting the commission's approval of: (1) the Restated and Amended Power Purchase Contract, dated October 13, 2004, between HELCO and

³See Verification of Steven J. Pace, dated October 1, 2009; see also Verification of Eric T. Lee, dated October 1, 2009 (describing Tawhiri Power as a sister company of Apollo).

⁴The active parties in Docket No. 00-0135 were Apollo and HELCO. The Consumer Advocate did not actively participate in Docket No. 00-0135.

⁵Docket No. 00-0135, Decision and Order No. 18568, filed on May 30, 2001; Order No. 18644, filed on June 27, 2001; Decision and Order No. 21227, filed on August 9, 2004; and Order No. 21337, filed on September 10, 2004.

Apollo ("RAC"); and (2) other related matters.⁶ On March 10, 2005, the commission, by Decision and Order No. 21693, approved the RAC and other matters requested by HELCO.⁷

Footnote 24 of Decision and Order No. 21693 states:

The \$782,300 amount is the difference between HELCO's estimated costs for a one (1)-breaker and three (3)-breaker switching station. See Decision and Order No. 21227, at 15 - 16. Since HELCO's \$782,300 fixed cost contribution to Apollo exceeds the net total estimated interconnection costs, HELCO will pay Apollo \$279,300, the difference between those two (2) amounts. The PPA Parties must comply with the terms of the RAC regarding the reconciliation of the total estimated interconnection cost and the total actual interconnection cost.

Docket No. 04-0346, Decision and Order No. 21693, at 16 n.24.

Section 20(n) of the RAC states:

Settlement of Disputes. Except as otherwise expressly provided, any dispute or difference arising out of this RAC or concerning the performance or the non-performance by either party of its obligations under this RAC shall be determined in accordance with the dispute resolution procedures set forth in Appendix G attached hereto and made a part hereof.

RAC, Section 20(n), at 18.

Appendix G of the RAC, in turn, culminates in binding arbitration between the contracting parties:

Dispute Resolution Procedures

If the parties are unable to resolve any dispute under this RAC under the procedures of Section 1 of this Appendix G, such dispute shall be resolved in Hawaii by binding arbitration in accordance with the requirements of this Section

⁶The parties in Docket No. 04-0346 were HELCO and the Consumer Advocate.

⁷Docket No. 04-0346, Decision and Order No. 21693, filed on March 10, 2005.

2; provided that, this agreement to arbitrate shall be specifically enforceable and this Appendix G shall not preclude either party from pursuing its equitable remedies to enforce this agreement to arbitrate, including without limitation, seeking injunctive relief

RAC, Appendix G, Section 2, at G-1 (emphasis in original).

B.

Procedural Background

On October 19, 2009, Tawhiri Power filed its Petition seeking a declaratory ruling from the commission as a result of an on-going dispute with HELCO. As described by Tawhiri Power, "[s]ince the Dispute involves the interpretation of the Commission's order approving the RAC, Petitioner believes the only way to resolve the same is to request [that] the Commission issue a declaratory ruling on this issue."⁸

On November 9, 2009, HELCO filed its Motion to Intervene, and on November 10, 2009, HELCO filed its Motion to Dismiss.⁹ By its substantive motion, HELCO "requests that the

⁸Petition, at 4; see also Petition, at 16 (since the Dispute centers around the scope and intent of the commission's order approving the RAC, Tawhiri Power believes that the only way to resolve the same is to request the issuance of a declaratory ruling by the commission).

Footnote 6 of the Tawhiri Power's Petition states:

By letter dated September 23, 2009, HELCO has demanded this issue be arbitrated pursuant to Appendix G of the RAC. However, as explained in Section E hereof the same is unsuitable for arbitration.

Petition, at 5 n.6.

⁹Motion to Dismiss, for Denial of Petition or for Refusal to Issue Declaratory Order; Memorandum in Support of Motion;

Commission dismiss Tawhiri [Power's] Petition, or in the alternative, deny with prejudice and/or refuse to issue a declaratory order pursuant to the Petition, on the grounds that Tawhiri [Power's] request for declaratory relief is precluded by the binding arbitration provision included in Appendix G [of the RAC]."¹⁰

On November 18, 2009, Tawhiri Power filed its Memorandum in Opposition to the Motion to Dismiss of HELCO.¹¹ In its written opposition, Tawhiri Power contends that: (1) because HELCO was not a party to this docket as of November 10, 2009, the date the electric utility filed its Motion to Dismiss, HELCO had no standing to file such motion; and (2) the true-up dispute is not covered by and is unsuitable for arbitration.

II.

Discussion

HRS § 91-8, governing declaratory rulings by administrative agencies, states:

§91-8 Declaratory rulings by agencies. Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in

Exhibits A - C; and Certificate of Service, filed on November 10, 2009 (collectively, "Motion to Dismiss").

¹⁰HELCO's Memorandum in Support, at 1-2.

¹¹Memorandum in Opposition to Motion to Dismiss of HELCO; and Certificate of Service, filed on November 18, 2009.

such cases shall have the same status as other agency orders.

HRS § 91-8.

HAR chapter 6-61, subchapter 16, in turn, governs declaratory orders issued by the commission. HAR §§ 6-61-159, 6-61-162, and 6-61-164, provide:

§6-61-159 Who may apply. On the petition of an interested person, the commission may issue a declaratory order as to the applicability of any statute or any rule or order of the commission.

. . . .

§6-61-162 Commission action. (a) Within forty-five days after the submission of a petition for declaratory ruling, the commission shall:

- (1) Deny the petition in writing, stating the reasons for that denial;
- (2) Issue a declaratory order on the matters contained in the petition; or
- (3) Set the matter for hearing, as provided in subchapter 3.

(b) If the matter is set for hearing, the commission shall render its findings and decision, unless otherwise indicated at the time of the hearing, within thirty days after the close of the hearing or, if briefs are filed, thirty days after the last brief is filed.

. . . .

§6-61-164 Refusal to issue declaratory order. The commission may, for good cause, deny the petition or refuse to issue a declaratory order by giving specific reasons for that determination. Without limiting the generality of the foregoing, the commission may so refuse where:

- (1) The question is speculative or purely hypothetical and does not involve existing facts or facts that can be expected to exist in the near future;

- (2) The petitioner's interest does not give it standing to maintain an action if petitioner [was] to seek judicial relief;
- (3) The issuance of the declaratory order may affect the interest of the State in pending litigation or in litigation that may reasonably be expected to arise; or
- (4) The matter is not within the jurisdiction of the commission.

HAR §§ 6-61-159, 6-61-162, and 6-61-164.

The forty-five day deadline governing the commission's action in this proceeding is December 3, 2009.

A.

HELCO's Intervention

Pursuant to HAR § 6-61-55(d), "[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." Moreover, intervention "is not a matter of right but is a matter resting within the sound discretion of the commission." In re Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975).

The commission finds that HELCO, as a party to the RAC, has a direct and financial interest in this proceeding which does not appear to be represented by the Consumer Advocate, which represents, protects, and advances the interests of all consumers of utility services pursuant to HRS § 269-51. The commission, thus, grants HELCO's Motion to Intervene.

B.

Denial of Petition

In Citizens Against Reckless Dev. v. Zoning Bd. of Appeals, 114 Hawai'i 184, 159 P.3d 143 (Haw. 2007) ("Citizens v. Zoning Bd."), the Hawaii Supreme Court ("Court") noted that the term "applicability" in HRS § 91-8 is presumed to denote a special type of procedure whereby an interested party can seek agency advice as to how a statute, agency rule, or order would apply to particular circumstances not yet determined. It is therefore inconsistent with the structure of HRS chapter 91 to allow declaratory orders as a means of reviewing agency decisions. Citizens v. Zoning Bd., 114 Hawai'i at 197-98, 159 P.3d at 156-57. The Court then held that the declaratory ruling procedure under HRS § 91-8: (1) is intended to allow an individual to seek an advance determination of applicability, i.e., how some law or order applies to his or her circumstances; (2) cannot be used to review agency decisions that have already been rendered; and (3) may not be used as a means to review issues that have already come before the administrative agency and been properly decided. See Citizens v. Zoning Bd., 114 Hawai'i at 196-200, 159 P.3d at 155-59.

Here, Tawhiri Power seeks a declaratory ruling on the interpretation and intent of the commission's written decision approving the RAC, issued on March 10, 2005, more than four years ago in Docket No. 04-0346. Specifically, Tawhiri Power seeks a written declaration that the commission, in its Decision and Order No. 21693 issued on March 10, 2005 in Docket No. 04-0346:

(1) directed the contracting parties to true-up the costs of the Kamao'a Switching Station and Interconnection Facilities; (2) required HELCO to reimburse Tawhiri Power \$2,228,700 as the electric utility's additional contribution toward the cost of the Switching Station; (3) required Tawhiri Power to reimburse HELCO \$100,283.56 for the difference between the estimated costs of the Interconnection Facilities and the actual cost of the Interconnection Facilities; and (4) permitted Tawhiri Power to offset the amount it owes HELCO of \$100,283.56, with the amount HELCO owes Tawhiri Power of \$2,228,700, resulting in a net amount due from HELCO to Tawhiri Power of \$2,128,416.44.¹² In the alternative, Tawhiri Power requests that the commission "find and order that the RAC was amended by its Decision and Order No. 21693 to effect the results set forth in items 1 through 4 above."¹³ In effect, Tawhiri Power theorizes that under either approach, footnote 24 of Decision and Order No. 21693 constructively amended the true-up provision of the RAC to require the contracting parties to true-up the construction costs of both the Switching Station and Interconnection Facilities.

The commission, in response, refuses to issue such a ruling pursuant to HAR § 6-61-164.

Decision and Order No. 21693, which discussed and approved the RAC, represents the commission's final decision in Docket No. 04-0346. Decision and Order No. 21693, in essence, "speaks for itself." Consistent with Citizens v. Zoning Bd., the

¹²See Petition, at 16-17 (prayer for relief).

¹³Petition, at 17 (alternative prayer for relief).

commission will not allow Tawhiri Power to utilize the declaratory ruling process to review and interpret the applicability of the commission's final decision already made and properly decided in Docket No. 04-0346. In the commission's view, such action is inconsistent with the intent of the declaratory ruling process set forth in HRS § 91-8 and HAR § 6-61-159. The fact that Tawhiri Power was not a party to Docket No. 04-0346 is of no significance to the commission's decision-making herein, as the commission is barring a non-party's attempt to utilize the declaratory ruling process to review and interpret the applicability of a final decision already made and properly decided by the commission.

Based on the commission's finding of good cause, the commission denies Tawhiri Power's petition for declaratory ruling, pursuant to HAR § 6-61-164.¹⁴

III.

Orders

THE COMMISSION ORDERS:

1. HELCO's Motion to Intervene, filed on November 9, 2009, is granted.

2. Tawhiri Power LLC's Petition for Declaratory Ruling, filed on October 19, 2009, is denied.

¹⁴At the time HELCO filed its substantive Motion to Dismiss on November 10, 2009, HELCO had still not been granted intervention by the commission. In addition, while HELCO's Motion to Dismiss "requires the consideration of facts not appearing of record," including its Exhibits B and C, its motion is not supported by affidavit, pursuant to HAR § 6-61-41(b).

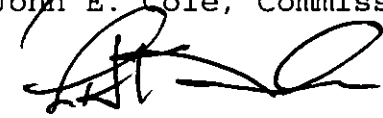
3. Unless ordered otherwise by the commission, this docket is closed.

DONE at Honolulu, Hawaii DEC - 1 2009.


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

2009-0304.cp

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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