

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

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In the Matter of the Petition of)  
POWERLIGHT CORPORATION )  
For a Declaratory Ruling. )  
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DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII  
DOCKET NO. 02-0182

DECISION AND ORDER NO. 20633

Filed Nov. 13, 2003  
At 2:00 o'clock P.M.

Karen Higashi.  
Chief Clerk of the Commission

ATTEST: A True Copy  
KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

K. Higashi.

BEFORE THE PUBLIC UTILITIES COMMISSION  
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In the Matter of the Petition of)	
POWERLIGHT CORPORATION )	Docket No. 02-0182
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DECISION AND ORDER

I.

Introduction

POWERLIGHT CORPORATION ("Petitioner") seeks a declaratory ruling on the applicability of Hawaii Revised Statutes ("HRS") § 269-1.<sup>1</sup> Petitioner makes its request in accordance with Hawaii Administrative Rules ("HAR") chapter 61, subchapter 16.

The commission served copies of the petition upon Hawaiian Electric Company, Inc. ("HECO") and the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate").<sup>2</sup> On August 6, 2002, HECO, Hawaii Electric Light Company, Inc. ("HELCO"), and Maui Electric Company, Limited ("MECO") (collectively, "Movants"), filed a joint motion to intervene, pursuant to HAR §§ 6-61-55 and 6-61-57(3).

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<sup>1</sup>Petition filed on July 17, 2002.

<sup>2</sup>See commission's transmittal letter, dated July 18, 2002.

Petitioner responded to the: (1) commission's three sets of information requests, on July 31, August 22, and September 27, 2002; and (2) Consumer Advocate's information requests, on January 15, 2003.

The Consumer Advocate states that Petitioner "should not be considered a public utility for purposes of this petition."<sup>3</sup>

This decision and order addresses the petition and joint motion to intervene.

## II.

### General Background

#### A.

Petitioner seeks a ruling from the commission that it is not a public utility under HRS § 269-1 (definition of "public utility"). It represents that, on the island of Hawaii, it intends to:

1. Construct a photovoltaic, renewable energy facility on a customer's site, i.e., at the Natural Energy Laboratory of Hawaii Authority ("NELHA"); and
2. Generate energy utilizing photovoltaic technology, for the purpose of selling to NELHA, all of the available energy generated by Petitioner's on-site facility.

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<sup>3</sup>Consumer Advocate's position statement, filed on October 31, 2003.

Petitioner further states that:

1. It will own and operate the photovoltaic facility, and its business and property are not devoted to a public use.
2. It is not owned or affiliated in any way with NELHA.
3. The energy that the Petitioner generates will be sold only to NELHA. No sales of energy to HELCO are anticipated.
4. The energy transmitted to NELHA is intended for NELHA's daytime, daily use, and is not intended for resale. Specifically, NELHA: (A) will use the energy to power water pumps and other associated loads; and (B) will not resell or distribute any portion of the energy generated by Petitioner to NELHA's tenants.
5. No public rights-of-way will be utilized to deliver the energy generated to NELHA.

B.

NELHA is an agency of the State of Hawaii. HRS

§ 227D-2(a) states:

The purpose of [NELHA] shall be to facilitate research, development, and commercialization of natural energy resources and ocean-related research, technology, and industry in Hawaii and to engage in retail, commercial, or tourism activities that will financially support that research, development, and commercialization at a research and technology park in Hawaii.

NELHA's duties, as set forth in HRS § 227D-2(a), include "[p]roviding support, utilities, and other services to facility tenants and government agencies[.]"

III.

HRS § 269-1: Public Utility

A.

HRS § 269-1 defines "public utility" in relevant part as follows:

"Public utility" includes every person who may own, control, operate, or manage as owner, . . . any plant or equipment, or any part thereof, directly or indirectly for public use, . . . for the production, conveyance, transmission, delivery, or furnishing of light, power, heat, cold, water, gas, or oil[.]

HRS § 269-1 (emphasis added).

In In re Wind Power Pacific Investors-III ("Wind Power"), 67 Haw. 342, 345 (1984), the Hawaii Supreme Court ("Court") noted that "[t]he term 'public utility' implies a public use." The Court then applied the following test to determine whether an entity is a public utility:

[W]hether 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.

Wind Power, 67 Haw. at 345 (quoting 73B Corpus Juris Secundum, Public Utilities § 3) (emphasis added).

The Consumer Advocate, in its analysis of Petitioner's photovoltaic facility under Wind Power, states that Petitioner "is not holding itself out as serving the public, as a class, or to any limited portion of a class." Thus, Petitioner "should not be considered a public utility for purposes of this petition."

The commission finds that, under the facts and circumstances of this case, as represented by Petitioner, Petitioner is not a "public utility," as defined in HRS § 269-1. Petitioner intends to provide on-site energy service to a single customer, NELHA. Petitioner will not furnish energy for the public's use. Thus, Petitioner's photovoltaic electricity generating facility will not be operated "for public use" under HRS § 269-1.

However, Petitioner's reliance on the exception set forth in HRS § 269-1(8) is misplaced and is inapplicable to the instant case.<sup>4</sup> HRS § 269-1(8) states that the term "public utility" shall not include any person who:

- (A) Controls, operates, or manages plants or facilities for the production, transmission, or furnishing of power primarily or entirely from nonfossil fuel sources; and
- (B) Provides, sells, or transmits all of that power, except such power as is used in its own internal operations, directly to a public utility for transmission to the public[.]

Based on Petitioner's representations, NELHA will not provide, sell, or transmit its generated energy "directly to a

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<sup>4</sup>Petitioner cites to and relies on this exception in its: (1) petition; and (2) responses to the Consumer Advocate's information requests.

public utility for transmission to the public." HRS § 269-1(8)(B). The Consumer Advocate concurs that Petitioner's "proposed operation fails to meet the requirement set forth in HRS § 269-1, subparagraph (8)(B)."

B.

The Consumer Advocate recommends that Petitioner notify the commission and Consumer Advocate when it acquires additional customers in order "to monitor the number of customers leaving HELCO's system and quantify the expected decrease in electricity use to determine the impact, if any, on HELCO's remaining customers." Petitioner is not a public utility and therefore is not subject to the commission's notification requirements governing public utilities. Nonetheless, the commission will request that Petitioner comply with the Consumer Advocate's recommendation.

The Consumer Advocate also notes that "if [Petitioner] is able to sell the excess energy produced and not sold to [Petitioner's] customers to HELCO through the existing net energy metering statute (i.e., HRS § 269-102)," the commission and Consumer Advocate "should monitor the situation to assess the impact, if any, of the net energy metering statutes."

IV.

Joint Motion to Intervene

Movants are the electric utilities operating on the islands of Oahu (HECO); Hawaii (HELCO); Lanai, Maui, and Molokai

(MECO). They are the only franchised electric utilities that operate on each of these islands.

Movants state that if certain conditions are met, they will support the position that Petitioner's proposed business operations will not make it a public utility under HRS § 269-1. In particular, Movants seek to impose the following conditions upon the commission's declaratory ruling:

1. Petitioner's facility generates electricity from non-fossil fuel sources.
2. Petitioner's facility provides electricity to only one customer, and none of the electricity sold to the customer from a facility is resold to other customers.
3. Petitioner's facility is located on the site of the customer to which electricity is sold, and the public rights-of-way are not used to deliver the electricity to the customer to which the electricity is sold.

Petitioner's responses to the information requests confirm in the affirmative Movants' proposed conditions, and Movants' concerns appear to have been addressed. The commission's declaratory ruling, therefore, renders moot the joint motion to intervene.<sup>5</sup>

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<sup>5</sup>The commission also notes that Petitioner proposes to construct its photovoltaic facility on the island of Hawaii, where HECO and MECO do not operate.

V.

Declaratory Ruling and Orders

THE COMMISSION DECLARES that, under the facts and circumstances of this case, PowerLight Corporation is not a "public utility" as defined under HRS § 269-1, as long as the facts presented and representations made to the commission in this docket remain true and accurate.

THE COMMISSION ORDERS:

1. The joint motion to intervene, filed on August 6, 2002, by HECO, HELCO, and MECO, is dismissed as moot.

2. PowerLight Corporation should notify the commission and Consumer Advocate in writing whenever it acquires additional customers on the island of Hawaii.

3. This docket is closed.

DONE at Honolulu, Hawaii this 13th day of November, 2003.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By Wayne H. Kimura  
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

Michael Azama  
Michael Azama  
Commission Counsel

By Janet E. Kawelo  
Janet E. Kawelo, Commissioner

02-0182.sl

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 20633 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: November 13, 2003