

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
 HAWAIIAN ELECTRIC COMPANY, INC.)
)
 For a Declaratory Order Declaring)
 That Hawaiian Electric's Bifurcation)
 For Further Consideration of the)
 Two Non-Conforming Large Wind Farm)
 Proposals from the Conforming)
 Proposal That Were Submitted Through)
 A Competitive Bidding Process in)
 Docket No. 2007-0331 Was Proper.)
 _____)

DOCKET NO. 2009-0327

ORDER DENYING HECO'S MOTION
FOR RECONSIDERATION OF ORDER DENYING HECO'S REQUEST AND
DIRECTING HECO TO SUBMIT A DRAFT RFP PURSUANT TO FRAMEWORK

PUBLIC UTILITIES
COMMISSION

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FILED

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By this Order, the commission denies HAWAIIAN ELECTRIC COMPANY, INC.'s ("HECO") Motion for Reconsideration of Order Denying HECO's Request and Directing HECO to Submit a Draft RFP Pursuant to Framework, filed on July 26, 2011 ("Motion for Reconsideration").

I.

Background

On May 23, 2011, HECO filed a letter request with the commission, seeking Confirmation that Supplementation is

Acceptable ("Assignment Motion"). Through the Assignment Motion, HECO sought commission approval to supplement the existing term sheet between Castle and Cooke Resorts, LLC ("Castle & Cooke") and HECO ("Term Sheet"),¹ to reflect an assignment of 200 Megawatts ("MW") to a new developer, Molokai Renewables, LLC. ("Molokai Renewables"). By Order, filed on July 14, 2011, the commission denied HECO's Assignment Motion, and directed HECO to submit a draft Request for Proposal ("RFP") pursuant to the Framework for Competitive Bidding for the 200 MW ("Denial Order").²

On July 26, 2011, HECO filed a Motion for Reconsideration of the Denial Order. The DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), the only other party to this proceeding, did not file a position with respect to HECO's Motion for Reconsideration.³

¹See Power Purchase Contract Term Sheet, dated as of March 18, 2011 by and between HECO and Castle & Cooke, filed March 21, 2011.

²See Order Denying HECO's Request and Directing HECO to Submit a Draft RFP Pursuant to Framework, filed July 14, 2011. The Competitive Bidding Framework ("Framework") was adopted by the commission by Decision and Order No. 23121, filed on December 8, 2006, in Docket No. 03-0372.

³The Consumer Advocate is an ex officio party pursuant to Hawaii Revised Statutes § 269-51, and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

II.

Discussion

HAR § 6-61-137 states:

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 . . . set[] forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.⁴

"[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Tagupa v. Tagupa, 108 Hawaii 459, 465, 121 P.2d 924, 930 (Haw. Ct. App. 2000). However, "[r]econsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." Id. (citing Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawaii 97, 110, 58 p.3d 608, 621 (Haw. 2002) and quoting Sousaris v. Miller, 92 Hawaii at 513, 993 P.3d at 547).

In its Motion for Reconsideration, HECO seeks reconsideration of the following portions of the commission's Denial Order:

⁴Id.

- 1) the non-recognition and forfeiture of Castle and Cooke's rights under the Term Sheet to the Incremental 200 MW (i.e. for a 400 MW Lanai project);
- 2) the denial of the assignment by Castle & Cooke to Molokai Renewables of the Incremental 200 MW;
- 3) the determination that the commission's previously granted waiver from the Competitive Bidding Framework only covers Castle & Cooke's proposed 200 MW wind farm project on Lanai and not the Incremental 200 MW; and
- 4) the determination that there should be a new competitive bidding process for at least the Incremental 200 MW.⁵

HECO requests commission reconsideration based primarily on the following equitable and policy-based factors:

- (1) substantial equitable reasons, including:

- (a) avoiding an unfair forfeiture of Castle and Cooke's rights under the Term Sheet to the Incremental 200 MW and its rights to assign, and for Molokai Renewables to develop, the Incremental 200 MW of wind in accordance with the contractual terms of the Bifurcation Agreement⁶ and the Term Sheet filed with the commission;

- (b) avoiding the loss of numerous years of studies, work and investment by HECO, Castle & Cooke and other interested and related

⁵See HECO's Motion for Reconsideration, at 2.

⁶On December 31, 2008, HECO, Castle & Cooke, and FWH executed an agreement seeking to bifurcate the Castle & Cooke and FWH wind farm proposals from the Final Oahu RFP ("Bifurcation Agreement"). A copy of the Bifurcation Agreement was submitted to the commission by letter filed March 16, 2009 in Docket No. 2007-0331. The Bifurcation Agreement was filed under confidential seal, pursuant to Protective Order No. 23875, filed on December 6, 2007 in the same docket.

parties and stakeholders who had reasonable justification to participate in and fund studies based on a Lanai and a Molokai wind solution;

(c) avoiding resultant delays in a timely two island solution to facilitate public policy and the interests of rate payers; and

(d) furthering State of Hawaii public policy in expeditiously achieving the "Big Wind" project without unnecessary further delay by providing 400 MW of renewable energy to the Oahu grid;

(2) furtherance of the purposes and reasoning of the Commission in granting the waiver for the Big Wind project in the November 18, 2010 Order; and

(3) furtherance of State of Hawaii public policy and the essential purpose of mitigating Hawaii's reliance on oil and achieving energy security without unnecessary delay.⁷

In addition, HECO argues that Castle & Cooke has relied to its detriment upon the commission's November 18, 2010 Order granting a waiver from the Competitive Bidding Framework ("Waiver Order") to give effect to the terms of the Bifurcation Agreement, as well as the Term Sheet filed March 21, 2011.⁸ The commission is not convinced that any of the arguments raised by HECO demonstrate that the commission's Order is "unreasonable, unlawful, or erroneous."⁹

⁷See Motion for Reconsideration, at 6-7.

⁸See Motion for Reconsideration, at 3-4, 6, 14, 19.

⁹The commission also notes that some of HECO's arguments were, or could have been, raised in the Assignment Request.

HECO's primary position in equity argues that Castle & Cooke and HECO have detrimentally relied upon the Waiver Order to give effect to the contractual agreements, which enable the assignment of Castle & Cooke's development rights. However, the commission declines to engage in the faulty logic behind a detrimental reliance argument. First, the commission reminds HECO again that it neither authorized nor approved the Bifurcation Agreement or the Term Sheet.

Next, with respect to the Bifurcation Agreement, HECO/Castle & Cooke's "reliance" on their misinterpretation of the Waiver Order that the commission blessed the assignment of development rights through the potential failure of FWH, is unreasonable.

Nowhere in the Waiver Order did the commission grant Castle & Cooke the express authority to assign FWH's forfeited project to another party. An assignment of the 200 MW was never discussed or raised with the commission prior to FWH's failure, and as indicated previously, was never the intended result of the Waiver Order. HECO's argument that HECO and Castle & Cooke detrimentally relied upon the Waiver Order to give effect to the contractual agreements is unpersuasive. Accordingly, this assertion does not support the argument that the Denial Order is "unreasonable, unlawful, or erroneous."

HECO quotes the Waiver Order to support the notion that the commission acknowledges the potential forfeiture of one developer's project rights under the Bifurcation Agreement:

[I]n its [Waiver Order], the commission noted that, under the Bifurcation Agreement, the "two developers each agreed to develop up to a 200MW wind plant on each of the two islands," where, under the Bifurcation Agreement, "if one of the developers fails, the other would get most of the total project."¹⁰

However, HECO's assertion does not show how such acknowledgment amounts to commission approval of the assignment of those forfeited rights, and clouds the distinction between a project on Lanai and one on Molokai. Castle & Cooke never "became entitled" to develop a project on Molokai by function of the Bifurcation Agreement¹¹ and the Waiver Order.

The commission cautions HECO that contractual obligations as between the utility and a project developer do not automatically bind the commission as a matter of law. Therefore, the commission determines that HECO's assertion in

¹⁰See Motion for Reconsideration, at 8 (citing Waiver Order, at 9).

¹¹HECO, in its Motion for Reconsideration, relies to a large extent on the terms of the Bifurcation Agreement. Interestingly, HECO has previously taken the position that under its own interpretation, the Waiver Order rendered the Bifurcation Agreement moot, and that the Waiver Order "became the operative process for evaluation and approval of the Lana'i/Moloka'i Wind Farms, not the process set forth in the Bifurcation Agreement, the premise of which was deemed improper by the Commission." See Letter dated May 23, 2011, from HECO to the Commission, at 4-6.

this regard similarly does not show that the Denial Order is "unreasonable, unlawful, or erroneous."

In the alternative, HECO's argument that the Denial Order places in jeopardy expenditures and efforts made in reliance on the Waiver Order in furtherance of a wind farm project on Molokai is unpersuasive. First, the new RFP required in the Denial Order does not abrogate a Molokai project, therefore it is premature to claim that any Molokai-related project expenditures and efforts are lost. Next, HECO's cost recovery for Big Wind project costs would be addressed in a separate docket, and recovery of such would be subject to commission discretion, based on a prudence review.¹²

Accordingly, for the reasons stated above, the commission denies HECO's Motion for Reconsideration.

III.

Order


THE COMMISSION ORDERS:

HECO's Motion for Reconsideration of Order Denying HECO's Request and Directing HECO to Submit a Draft RFP Pursuant to Framework, filed on July 26, 2011, is denied.


¹²See for example, Docket No. 2011-0112.

DONE at Honolulu, Hawaii AUG 24 2011

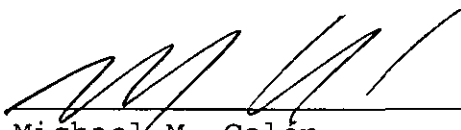
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Hermina Morita, Chair

By 
Carlito P. Caliboso, Commissioner

By 
John E. Cole, Commissioner

APPROVED AS TO FORM:



Michael M. Colon
Commission Counsel

2009-0327.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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