

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
PUBLIC UTILITIES COMMISSION)
)
Instituting a Proceeding to Investigate)
Competitive Bidding for New Generating)
Capacity in Hawaii.)

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DIVISION OF CONSUMER ADVOCACY'S

OPENING BRIEF

AND

CERTIFICATE OF SERVICE

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Pursuant to the Modified Regulatory Schedule approved in Order No. 22459, the Division of Consumer Advocacy ("Consumer Advocate") files its Opening Brief in the above docketed matter.

I. INTRODUCTION.

On October 21, 2003, the Public Utilities Commission of the State of Hawaii ("Commission") issued Order No. 20583 opening this investigative proceeding "to evaluate competitive bidding as a mechanism for acquiring or building new generating capacity in Hawaii." Order No. 20583, filed on October 21, 2003, at 1. HAWAIIAN ELECTRIC COMPANY, INC. ("HECO"), MAUI ELECTRIC LIGHT COMPANY, INC. ("MECO"), HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), (HECO, MECO, and HELCO collectively may be referred to as the "HECO Companies") and KAUAI ISLAND UTILITY COOPERATIVE ("KIUC") (to be collectively referred to with the HECO Companies as the "Electric Utility Companies"), and the Division of Consumer Advocacy ("Consumer Advocate") were made parties to the docket, and as discussed in the

Procedural History discussion below, are currently the remaining parties to this docket in addition to HAWAII RENEWABLE ENERGY ALLIANCE (“HREA”).

The three issues to be addressed in this proceeding are as follows:

1. What are the benefits and impacts of competitive bidding?
2. Whether a competitive bidding system should be developed for acquiring or building new generation in Hawaii? If the answer is “yes”, then:
 - a. How can a fair competitive bidding system be developed that ensures that competitive benefits result from the system and ratepayers are not placed at undue risk?
 - b. What are the specific competitive bidding guidelines and requirements for prospective bidders, including the evaluation system to be used and the process for evaluation and selection?
 - c. How can a fair competitive bidding system encourage broad participation from a range of prospective bidders?
3. What revisions should be made to the integrated resource planning process?

Upon review of the initial statements of position filed by the other parties, the Consumer Advocate noted that there was substantial agreement amongst the parties on a broad range of issues. Issues on which the parties appeared to be in agreement included the following:

- Properly implemented, competitive bidding will yield numerous important benefits for Hawaii;
- Parties (i.e., the Commission, Consumer Advocate utility, and interested stakeholders) are able to identify best options to

addressing a utility's need for generation if resource options are allowed to compete;

- Exceptions should be available where competitive bidding may not be desirable;
- Competitive bidding should proceed within context of the Commission's IRP Framework;
- The Commission could establish basic guidelines to govern competitive bidding;
- Sponsoring utilities should be allowed to design and implement individual solicitations;
- The Commission can specify characteristics of a successful competitive bidding process;
- A wide range of supply-side options should be allowed to participate in the competitive bidding processes;
- All relevant costs need to be considered in evaluating resource proposals;
- Steps must be taken to prevent and prohibit "self-dealing" and an unfair competitive advantage when a utility, or its affiliate elects to submit its own proposal in response to an identified need for generation;
- Reasonable costs incurred from selected projects should be recovered through rates; and
- The Commission must be assertive in overseeing the competitive bidding process.

The critical difference between the remaining Parties to the Docket pertains to whether:

- The host utility should be allowed to respond to its own solicitation.

After much discussion, the Consumer Advocate and the Electric Utility Companies reached agreement on a Competitive Bidding Framework (hereinafter referred to as the "Parties' Proposed Framework"). The Parties' Proposed Framework

sets forth the objectives of using a competitive bidding process for the acquisition of a future generation resource or block of resources, and the guidelines under which such process would occur. The Parties' Proposed Framework was submitted on May 22, 2006 along with a Stipulation.

HREA indicated its inability to agree to the Parties' Proposed Framework.¹ As a result, HREA submitted its own proposed competitive bidding framework for the Commission's consideration (hereinafter referred to as "HREA Proposed Framework").

The balance of this Brief provides a discussion on the merits of the Parties' Proposed Framework in conjunction with each of the issues to be addressed in the proceeding and the Consumer Advocate's concerns with HREA's Proposed Framework.

II. PROCEDURAL HISTORY.

As stated above, Commission Order No. 20583 opened this proceeding and provided that the Electric Utility Companies and the Consumer Advocate shall be parties to this docket.

On November 6, 2003, the Department of Business and Economic Development and Tourism ("DBEDT") and the COUNTY OF KAUAI filed their Motions to Participate Without Intervention.

On November 7, 2003, JOHNSON CONTROLS, INC. and PACIFIC MACHINERY, INC. filed their Motions to Intervene.

¹ See HREA's May 22, 2006 filing with the Commission.

On November 10, 2003, the COUNTY OF MAUI, THE GAS COMPANY and HESS MICROGEN, LLC. filed their Motions to Intervene.

On March 3, 2004, the Commission issued Order No. 20834, allowing DBEDT, the COUNTY OF KAUAI, the COUNTY OF MAUI, THE GAS COMPANY, JOHNSON CONTROLS, INC., HAWAII RENEWABLE ENERGY ALLIANCE ("HREA"), PACIFIC MACHINERY, INC., and HESS MICROGEN, LLC, to participate, either as Intervenors or Participants.

On March 14, 2004, THE GAS COMPANY filed its Notice of Withdrawal as a participant to this docket.

On June 30, 2004, Pacific Machinery, Inc. filed its Notice of Withdrawal as a participant to this docket.

On September 9, 2004, DBEDT filed its Notice of Withdrawal as a participant to this docket.

On September 22, 2004, the Commission issued Order No. 21357, approving Pacific Machinery, Inc.'s and DBEDT's requests to withdraw from this docket.

On March 14, 2005, the Consumer Advocate and the parties filed their respective Statements of Position with the Commission.

On April 4, 2005, the Consumer Advocate submitted information requests ("IRs") to HECO Companies and did not provide IRs to any other parties.

On April 4, 2005, HECO served their IRs upon the Consumer Advocate.

On April 4, 2005, the HREA submitted IRs to the Consumer Advocate, HECO Companies, COUNTY OF MAUI, COUNTY OF KAUAI, KIUC, HESS MICROGEN, LLC., and did not provide IRs to any other parties.

On April 4, 2005, KIUC filed notice that KIUC would not be submitting IRs on the parties' respective Statement of Positions filed March 14, 2005.

On April 28, 2005, the Consumer Advocate filed its responses to IRs from HECO.

On May 13, 2005, the Commission issued its IRs to the parties in this docket.

On June 9, 2005, the Consumer Advocate, HECO Companies, COUNTY of KAUAI, HREA, and KIUC filed their responses to IRs from the Commission.

On June 9, 2005, the COUNTY OF MAUI filed its Notice of Withdrawal as a participant to this docket.

On June 20, 2005, the Commission issued Order No. 21880, approving THE GAS COMPANY's request to withdraw from the docket.

On July 8, 2005, the Commission issued Order No. 21908, approving the COUNTY OF MAUI's request to withdraw from the docket.

On August 9, 2005, the COUNTY OF KAUAI filed its Final Statement of Position.

On August 11, 2005, the Consumer Advocate, HECO Companies, KIUC, HESS MICROGEN, LLC. and HREA filed their respective Final Statements of Position.

On September 19, 2005, HESS MICROGEN, LLC filed its Notice of Withdrawal as a participant to this docket.

On October 18, 2005, the Consumer Advocate served its IRs on the HECO Companies on their Final Statement of Position.

On October 18, 2005, the HECO Companies served its IRs on the Consumer Advocate, KIUC, and HREA on their respective Final Statements of Position.

On October 18, 2005 HREA served its IRs on the Consumer Advocate and the HECO Companies on their Final Statements of Position.

On October 18, 2005 the Consumer Advocate received IRs from HREA and HECO on its Final Statement of Position.

On November 2, 2005, the Commission issued Order No. 22090, approving HESS MICROGEN, LLC's request to withdraw from the docket and dismissed Johnson Control, Inc. as a party.

On November 22, 2005, the Consumer Advocate served its responses to HECO's and HREA's IRs on the Consumer Advocates' Final Statement of Position.

On November 22, 2005, the HECO Companies served its responses and objections to the Consumer Advocate's and HREA's IRs on the HECO Companies' Final Statement of Position.

On November 22, 2005, KIUC served its responses to the Consumer Advocate's and the HECO Companies' IRs on KIUC's Final Statement of Position.

On November 22, 2005, HREA served its responses to HECO Companies' IRs on HREA's Final Statement of Position.

On December 5, 2005, the COUNTY OF KAUAI filed its Notice of Withdrawal as a participant to this docket.

On December 7, 2005, the Commission issued Order No. 22167 approving the COUNTY OF KAUAI's request to withdraw from the docket.

On December 12 through 16, 2006, the Commission conducted the evidentiary hearings in the docket.

On December 30, 2005, the Commission issued its Post-Hearing questions.

On January 27, 2006, the Commission issued Order No. 22249 amending the Regulatory Schedule to allow the Parties to submit a Joint Submission on March 31,

2006, Parties' Opening Briefs on April 17, 2006, Parties' Reply Briefs on May 1, 2006, and Parties' Oral Argument on May 2, 2006.

Between March 2006 and May 2006, the parties made several requests to modify the Regulatory Schedule.

On May 10, 2006, the Commission issued Order No. 22459 granting Parties' Request to Modify the Regulatory Schedule to allow Parties to file the Parties' Proposed Competitive Bidding Framework on May 22, 2006, Parties' Opening Briefs on June 6, 2006, Parties' Reply Briefs on June 13, 2005, and Oral Argument on June 19, 2006.

On May 22, 2006, the Consumer Advocate and the Electric Utility Companies filed their Stipulation Regarding Proposed Competitive Bidding Framework.

On May 22, 2006, HREA filed its Proposed Competitive Bidding Framework for Wholesale Generation (PLAN B) of Hawaii Renewable Energy Alliance.

II. DISCUSSION OF EACH OF THE ISSUES TO BE ADDRESSED TO BE ADDRESSED IN THE DOCKET.

A. ISSUE 1: WHAT ARE THE BENEFITS AND IMPACTS OF A COMPETITIVE BIDDING SYSTEM?

As noted by the Stipulation entered into between the Consumer Advocate and the Electric Utility Companies, the benefits and impacts of competitive bidding are to identify the generation resource, or block of generation resources that can best meet the need for additional generation as identified in each utility's IRP. This could be in terms of, for example, price, environmental impact, statutory requirements such as the RPS, reliability, or a combination of factors that may include these and other factors.

Section I.A.3.a. of the Parties' Proposed Framework describes the anticipated benefits and impacts of the competitive bidding system. The competitive bidding system is expected to facilitate an electric utility's acquisition of supply-side resources in a cost-effective, systematic manner and to offer a means by which to acquire new generating resources that are overall lower in cost and/or better performing than the utility could otherwise achieve. The competitive bidding system should not, however, negatively impact the reliability or unduly encumber the operation and/or maintenance of Hawaii's unique electric systems. Rather, the competitive bidding system should promote the electric utility system reliability by facilitating the timely acquisition of needed generation resources and allowing the utility to adjust to changes in circumstances, facilitate the achievement of renewable portfolio standards, state energy policy, and other important IRP objectives. Finally the competitive bidding system should be fair and equitable to bidders, without being unduly burdensome on Hawaii's electric utilities and public utility regulators. The above observations are more specifically described in Section III.A. of the Parties' Proposed Framework.

Based on the above, the Consumer Advocate and Electric Utility Companies agree that competitive bidding will be established as the preferred mechanism for acquiring a future generation resource or block of generation resources.² A competitive bidding process should not, however, be an immutable requirement because there will be circumstances in which competitive bidding may not be reasonable or practical. Thus, conditions and possible exceptions to a competitive bidding process are

² See Section I.A.3. of the Parties' Proposed Framework.

described in Sections I.A.3.a. through I.A.3.e. of the Parties' Proposed Framework to make clear the possible exceptions under which a competitive bid process would not be appropriate.³

B. ISSUE 2: HOW CAN A FAIR COMPETITIVE BIDDING SYSTEM BE DEVELOPED THAT ENSURES THAT COMPETITIVE BENEFITS RESULT FROM THE SYSTEM AND RATEPAYERS ARE NOT PLACED AT UNDUE RISK?

1. How can a fair competitive bidding system be developed that ensures that competitive benefits result from the system and ratepayers are not placed at undue risk?

a. Fairness and Transparency in the Competitive Bidding Process.

The Parties' Proposed Framework has a number of provisions that are intended to ensure a fair system, while not placing the system and ratepayers at risk. As described in Section II.B. of the Parties' Proposed Framework, the Commission will have a key role of determining whether each competitive bidding process conducted pursuant to the Parties' Proposed Framework is fair in its design and implementation, and whether projects selected through the competitive bidding processes are consistent with the utility's approved IRP, unless otherwise justified. As noted in Section IV. of the

³ The Consumer Advocate has offered examples of the circumstances under which the Commission reasonably might conclude that competitive bidding might be contrary to the public interest. See, e.g., Initial SOP at 34-40; HECO/CA-IR-33. The Consumer Advocate has stated, for example, that an urgent need may necessitate procurement timelines that would render competitive bidding infeasible. It is conceivable, for example, that HECO's burgeoning need for reserve capacity may require attention (at least as may pertain to capacity requirements during the upcoming summer months) that could not be timely addressed through competitive bidding. It also is possible – depending on the utility and the specific circumstances of its resource requirements – that competitive bidding might be rendered impractical for reason of emergency timing, size, lack of developer interest, utility expansion or repowering, and other factors. See Response to HREA-CA-IR-7.

Parties' Proposed Framework, the Commission will serve as an arbiter of last resort, after the utility, independent observer (when used), and bidders have attempted to resolve any dispute or pending issue.

Thus, the determination to use a competitive bidding process will generally be made in the IRP process as noted in Sections I.A.2. and I.C.3. of the Parties' Proposed Framework.⁴ Any exceptions to using a competitive bidding process for the acquisition of a generation resource or block of resources will be presented to the Commission in the IRP proceeding.⁵ Should a party or parties disagree with the recommendation for exception, the party or parties would be able to express their concerns to the Commission for resolution. The Commission will be responsible for deciding whether to proceed with competitive bidding versus other forms of resource acquisition based on the merits of the documentation presented to support the recommendation for, or against an exception. This in and of itself will help to ensure some fairness in the process since the decision to not use a competitive bidding process will be left to the Commission.

Once a determination is made to use a competitive bidding process, Sections III.B.2. and 3. of the Parties' Proposed Framework state that the Request for Proposal ("RFP") should identify any unique system requirements and provide information regarding the requirements of the utility, important resource attributes, and criteria used for the evaluation. Furthermore, the RFP document should describe the

⁴ Note, the term "generally" is used in the Parties' Proposed Framework to allow a competitive bidding process to be used outside of the IRP proceeding, when justified, as noted in Section I.C.4. of the Parties' Proposed Framework.

⁵ See footnote 1 of the Parties' Proposed Framework.

bidding guidelines, the bidding requirements to guide bidders in preparing and submitting their proposals, the general bid evaluation and selection criteria, and the risk factors important to the utility. To ensure fairness in the process, Section III.B.4. of the Parties' Proposed Framework, states that the Commission will be able to review the draft RFP and supporting documentation prepared by the utility, attend the technical conferences held to discuss the draft RFP with interested parties (which may include potential bidders), review comments on the draft RFP, and review the final proposed RFP prior to issuance. Should the Commission determine that the utility did not adequately address a concern raised by an interested party (which may include potential bidders), the Commission can, of course, require the utility to modify the final proposed RFP prior to issuance.

Furthermore, whenever a utility or its affiliate seeks to advance their own project proposal in competition with those offered by bidders in response to a need that is addressed in the utility's IRP Plan, Section II.C. of the Parties' Proposed Framework states that an independent observer will be retained. The independent observer will be responsible for monitoring the competitive bidding process and report on the progress and results to the Commission. In addition, as noted in section II.C.3 of the Parties' Proposed Framework, the independent observer will be selected from a list of qualified candidates that is approved by the Commission. Finally, the Commission will be allowed to review and resolve, positions that differ from those of the independent observer as noted in Section II.C.4 of the Parties' Proposed Framework.

All of the provisions that are identified in the specific sections describing either when the process will be used, a party's role in the process, or how the process will be

carried out to ensure fairness and transparency in the competitive bidding process are summarized in Section II.H. of the Parties' Proposed Framework.

b. Minimizing risk to ratepayers from a competitive bidding process.

Section I.A.3.a. of the Parties' Proposed Framework sets forth the conditions under which a competitive bidding process might not be appropriate as the preferred mechanism for acquiring a future generation resource or block of resources. In addition, Section I.E. of the Parties' Proposed Framework sets forth the provisions that are intended to minimize risk to ratepayers as a result of a competitive bidding process. Finally, Section V. of the Parties' Proposed Framework describes the requirements for a utility when the identified need is for firm capacity due to system reliability concerns. All of the above are intended to minimize the impact and risk to ratepayers from use of a competitive bidding process.

2. What are the specific competitive bidding guidelines and requirements for prospective bidders, including the evaluation system to be used and the process for evaluation and selection?

Section III. of the Parties' Proposed Framework describes the specific bidding guidelines and requirements for prospective bidders. Subsection A describes the general requirements for the competitive bidding process. Subsection B describes the design of the competitive bidding solicitation process. Subsection C describes the requirements for the forms of contracts that may be negotiated between the utility and third-party developer of the proposed project that will be acquired through the

competitive bidding process. Subsection D describes the process for the issuance or the RFP and development of the proposals. Subsection E describes the evaluation and selection criteria for responses to the RFP solicitation. Subsection F describes the requirements for the evaluation of the bids that are received. Subsection G describes the contract negotiation process. Finally, Subsection H summarizes the fairness and transparency requirements.

3. How can a fair competitive bidding system encourage broad participation from a range of prospective bidders?

In order to encourage broad participation from a range of prospective bidders, Section B.3. of the Parties' Proposed Framework requires each electric utility to take steps to provide notice of its RFPs, and to encourage participation from a full range of prospective bidders. PURPA qualifying facilities, independent power producers, the host utility and its affiliates, and other utilities should not be unduly restricted from participation in any supply-side RFP. Furthermore, because the competitive bidding process may vary by resource type, the electric utility may establish a separate procurement process (such as a "set aside" or separate RFP process) to acquire as-available and/or firm capacity from renewable generating facilities. Finally, the RFP processes should be flexible, and should not include unreasonable restrictions on sizes and types of projects considered, taking into account the appropriate sizes and types identified in the IRP process.

In addition to the above, the Commission's ability to fulfill its role in the process and render timely decisions on matters of dispute, together with the provisions that are intended to ensure fairness and transparency in the process will help to assure potential

bidders that the process is fair and open. This should help to promote greater interest by prospective bidders.

C. WHAT REVISIONS SHOULD BE MADE TO THE INTEGRATED RESOURCE PLANNING PROCESS?

As noted in Section I.C. of the Parties' Proposed Framework, no changes are required to the IRP Framework since the competitive bidding process is intended to complement the Commission's IRP Framework and serve as a means of acquiring a future generation resource or block of resources that is included in the IRP Plan.

III. COMMENTS ON HREA'S PROPOSED FRAMEWORK.

A. DIFFERENCES REGARDING PARTICIPATION BY THE ELECTRIC UTILITY.

One of the key differences between the remaining Parties to the Docket pertains to HREA's recommendation that electric utilities would not be allowed to participate in the competitive bidding process. (See Section II.B. paragraphs 2 and 7, pages 4 and 5 of HREA's May 22, 2006 filing.)

In support of this recommendation, HREA states that it "does not believe there can be 'level playing field,' if the utility is allowed to submit self-build project proposals in competition with third parties."⁶ HREA does, however, "support competition among third-parties and utility affiliates."⁷ Therefore, HREA recommends that the electric utility "bid out all new generation," and only prepare "backstop" proposals to invoke in the

⁶ See Section II.B., paragraph 2, page 4 of HREA's May 22, 2006 filing.

⁷ Id.

case that a RFP fails or a selected third part [sic] or affiliate fails.⁸ The backstop proposals would be included as exhibits in RFPs, “thereby indicating or illustrating the requested utility need.”⁹

The Consumer Advocate notes that HREA advances an approach to competitive bidding that is fundamentally different from that of the Parties’ Proposed Framework. It appears that HREA’s underlying rationale for this approach is that Hawaii’s electric utilities are, at one level, no more than relatively small “developers” of power generation facilities in an international market. Because the electric utility’s participation in the competitive bidding processes for generation facilities to be located within their own service territories does introduce a range of self-dealing concerns, some may view the exclusion of “one, small developer” from the large field of developers as a small price - if any – to pay to avoid self-dealing concerns.

Although HREA’s proposal is exactly the approach taken by many states in restructuring proceedings that required the electric utilities to exit the generation business to facilitate the introduction of retail competition, the approach is not appropriate for Hawaii’s electric industry.¹⁰ There are a number of more pragmatic

⁸ See Section II.B., paragraph 7, page 5 of HREA’s May 22, 2006 filing.

⁹ See Section II.B., paragraph 4, page 5 of HREA’s May 22, 2006 filing.

¹⁰ The Commission opened Docket No. 96-0493 on December 30, 1996 to examine the issues related to the introduction of competition in the electric utility industry including the potential impacts of competition, the feasibility of various options, and the appropriate extent to which competition should be encouraged for the overall benefit of all consumers. The Commission’s foremost concern, however, was to ensure the long-term efficiency and reliability of the State’s energy systems and the availability of safe, affordable, and equitable electricity services to Hawaii’s consumers. (See Decision and Order No. 20584, at page 1.) In Decision and Order No. 20584 filed on October 21, 2003, at page 9, the Commission recognized that since 1996, approximately 24 states and the District of Columbia have either enacted enabling legislation or issued regulatory orders implementing retail access. Since that time, however, several states

considerations that cause the Consumer Advocate to support and recommend the approach set forth in the Parties' Proposed Framework for the state of Hawaii.

The most important consideration focuses on the fact that Hawaii is not interconnected to a broader transmission grid that offers both a method of delivery of "primary" and "back-up" supplies from competitive suppliers located out-of-state. In the absence of a robust interstate transmission grid, Hawaii's electric utilities are, in fact, the "last line of defense" vis-à-vis system reliability requirements. In short, each electric utility has an obligation to serve and it must be positioned to address at all times. A utility cannot allow a reliability shortage to develop and persist simply because its efforts to conduct a fair, competitive RFP fail to produce a viable project (Consumer Advocate's Final SOP at 31-32).

Although HREA's proposed approach recognizes this obligation, its solution is problematic. HREA suggests that, where appropriate, a backstop proposal would help to "clarify the RFP requirements and provides assurance to potential bidders that they are not in direct competition with a utility self-build proposal." (See Section II.B. paragraph 4, page 5 of HREA's May 22, 2006 filing.) HREA also proposes to incorporate the "utility self-build back stop proposal as the parallel and contingency plans in the event of a failure of a RFP or the failure of a third party, and then takes the process a step farther to provide options in case the utility backstop proposal also fails." (See Section II.B. paragraph 5, page 5 of HREA's May 22, 2006 filing.) The thorny

discovered that competition did not materialize as anticipated and many states were reassessing the environment and the future of electric restructuring. Although some states chose to reinforce their efforts to develop a competitive retail market, others have opted to return to previous regulatory frameworks.

question becomes: What if the backstop proposal presented by a utility appears considerably better than any proposals received from third-party suppliers?

The Parties' Proposed Framework allows a utility proposal to be tested directly against those of third-party suppliers (see proposed Parties' Proposed Framework Section V.A.1). Important in this calculus could be the facts that: (1) Hawaii's land, environmental and cultural resources are limited (and highly valued), and (2) the electric utilities have longstanding positions in their respective service territories.

In short, there may be times when a utility is able to respond to an identified resource need with a project that is considerably less costly and/or offers a better use of available land, environmental and cultural resources than can third-party developers. Under HREA's Proposed Framework, ratepayers would not be able to receive the benefits of such utility project.

Furthermore, HREA's Proposed Framework does not address the situation where the future generation resource or block of resources is needed to address a reliability concern that is not adequately addressed by the third-party developers who submit a bid in response to the RFP. In this situation, as the Parties' Proposed Framework provides, the utility should be allowed to submit its own self-build project to ensure that Hawaii's electric ratepayers are not at risk from the impacts of the competitive bidding process. HREA's proposal would leave customers exposed to such a risk.

HREA appears to infer that by allowing a utility's affiliate, as opposed to the utility, to participate in the competitive bidding process fairness can be attained. As discussed above, and in response to the Commission's post hearing questions (in

particular Commission question posed as Section III.A.3.f. of the Post Hearing Questions), however, concerns with self-dealing may also exist when an affiliate of the utility is allowed to participate.

To address concerns regarding utility participation, either by the utility or through its affiliate, in the competitive bidding process, the Parties' Proposed Framework requires retention of an independent observer whenever a utility or its affiliate elects to submit a proposal in response to an RFP (see Section II.C.). In addition, the Parties' Proposed Framework clearly states that "whenever the utility is responding to its own RFP, or is accepting bids submitted by its affiliates, the utility will take additional steps to avoid self-dealing in both fact and perception" (see Section III.H.8.). Finally, as stated in Section II.B. of the Parties' Proposed Framework, the primary role for the Commission shall be to ensure that each competitive bidding process conducted pursuant to this Framework is fair in its design and implementation, and to ensure that projects selected through competitive bidding processes are consistent with the utility's approved IRP Plan (unless otherwise justified). The Commission is also expected to serve as the arbitrator of last resort, after the utility, independent observer, and bidders have attempted to resolve any disputes or pending issues. (See Section IV. of the Parties' Proposed Framework.) All of the above are intended to provide the controls necessary to ensure that the process is fair and equitable to all bidders, especially when the utility or its affiliates participates in the bidding process.

Based on the above, the Consumer Advocate recommends that Hawaii's electric ratepayers be given the opportunity to enjoy the benefits of what may be relatively low cost/high value utility generation projects whenever feasible. Accordingly, the

Consumer Advocate recommends that the Commission adopt, in its entirety, the Parties' Proposed Framework which allows the utility to develop the best response (i.e., in terms of maximizing value to ratepayers) to each identified generation resource need. This may include allowing the utility to develop its own response to a generation need, especially if such need addresses a reliability concern, then "test" its proposal against projects that may be offered by third-party suppliers in a competitive bidding process. The Consumer Advocate continues to emphasize that the RFP design processes should incorporate every reasonable step to mitigate self-dealing concerns (see summary procedures presented in Section III.H. of the Parties' Proposed Framework).

B. DIFFERENCES REGARDING THE USE AND ROLE OF THE INDEPENDENT OBSERVER.

HREA recommends an alternate approach to the use of independent observers, such that each independent observer would be hired by and report to the Commission, not the utility. (See Section II.B., paragraph 8, page 6 of HREA's May 22, 2006 filing.) At first blush, there is a certain intrinsic appeal to HREA's recommendation. As implemented, the independent observer would become, in essence, an extension of the Commission "looking over the shoulder" of the utility as it proceeds through each competitive bidding process. In this sense, the approach recommended by HREA would seem quite likely to ensure that each utility implements each competitive bidding process in a fair, appropriate manner.

There are, however, some pragmatic problems with HREA's suggested approach. First, HREA's approach would inject the Commission into the middle of each

RFP process. Before an RFP could proceed, the Commission would have to assess the tasks that to be performed by the independent auditor, engage in some sort of selection process, and formally hire the independent observer. Moreover, disputes between RFP participants (e.g., the host utility) and the independent observer would become more difficult to resolve if “the line” between the Commission and independent auditor is not definitive. If the independent observer is seen as “an arm of the Commission” in an advisory capacity, as opposed to an independent entity who will be responsible for making an independent recommendation to the Commission, it may be harder for the Commission to serve as the final arbiter in matters that could not be resolved by the utility, independent observer, and bidders.¹¹ Finally, having the independent observer hired by the Commission would appear to be inconsistent with the Commission’s existing ex parte rules and authority as set forth in Hawaii Administrative Rules §§ 6-61-28 to 6-61-29.

Accordingly, and in the same sense that those interested in a company’s financial statements typically rely (at least to some degree) on the opinion of a the third-party auditing firm hired by the company, the Consumer Advocate recommends that the task of identifying and hiring independent observers for RFP processes lie with the utilities (see Section II.C.3. of the Parties’ Proposed Framework). In addition, the recommended Framework would allow for possible input from stakeholders and for a utility’s decisions in this regard to be reviewed by the Commission, as part of its review

¹¹ This was one of the primary reasons for Legislative Auditor’s recommendation to separate the Division of Consumer Advocacy from the Public Utilities Commission and place each agency in separate departments of State government.

of each RFP design process (see, e.g., Sections II.B.2 and II.C.1. of the Parties' Proposed Framework).

C. DIFFERENCES REGARDING THE REQUIREMENT TO DETERMINE THE FINANCIAL IMPACTS OF NON-UTILITY BIDS ON A UTILITY'S FINANCIAL STATEMENT.

HREA recommends that an analysis be performed before the release of the RFP by the utility and, if potential balance sheet impacts are identified, the impacts would be reported to the Commission and a potential cost impacts would be included in the RFP. (See Section II.B. paragraph 9, page 6 of HREA's May 22 submission to the Commission.)

HREA's proposal is not workable for the following reasons. First, the potential financial impacts on the utility's balance sheet cannot be known in advance of knowing the identity of the resource provider. Second, even if it were possible to determine the potential impacts of third-party provider's financial statement on the utility's financial statement, requiring that a determination be made prior to the release of the RFP regarding all potential proposals and including the description of the impacts in the RFP would unreasonably delay the entire RFP process.

As a result, the Parties' Proposed Framework provides in Section III.E.8. that where a utility may have to restructure its balance sheet and increase the percentage of more costly equity capital in order to offset the impacts of purchasing power on its balance sheet, this rebalancing cost also should be taken into account in evaluating the total cost of specific proposals for a new IPP-owned generating units. To allow this

analysis to occur, there will be a requirement that bidders provide all information necessary to complete these evaluations.

D. POTENTIAL INCONSISTENCY IN THE STATED GOALS OF HREA'S PROPOSED FRAMEWORK AND THE RELATIONSHIP TO PURPA.

In Section II.A. of its May 22 submission, HREA states that one of its specific goals is to have the utility “acquire new wholesale generation that [is] lower cost and/or better performing than the utility could otherwise achieve.” (See Section II.A., goal No. 2, page 3 of HREA’s May 22 submission to the Commission.) Yet, HREA states that its Proposed Framework is not intended to supersede PURPA. (See Section II.B. paragraph 6, page 5 of HREA’s May 22 submission to the Commission.) Further, under HREA’s proposal, third-party generation would be eligible to participate in competitive bid solicitations and would continue to be able to “make proposals outside” of those solicitations (p.13). It appears to the Consumer Advocate that the foregoing observations can be harmonized only if the rates and terms and conditions determined in the competitive bidding also are used to define the avoided cost and other terms and conditions applicable to QFs. Otherwise, there would be no opportunity to “acquire new wholesale generation that are lower cost and/or better performing the utility could otherwise achieve.”

Similarly, in Section I. of its May 22 submission, HREA states that it “supports competitive bidding for new wholesale generation in Hawaii and believes there will be overall benefits to Hawaii’s utilities and their ratepayers and Hawaii’s economy. These include the potential to stabilize utility rates in the near term and reduce rates in the long term.” [Emphasis added.] Again, for this benefit to be achieved with respect to QFs,

the approach to setting QF contract rates will need to be revisited since Hawaii's avoided costs have been calculated based on the price of fossil fuel.

E. PROPOSAL TO USE COMPETITIVE BIDDING EARLIER IN THE IRP PROCESS TO SELECT PROJECTS FOR THE UTILITY'S 5-YEAR ACTION PLAN.

HREA's proposed use of competitive bidding to select projects for possible inclusion a utility's 5-year Action Plan (as part of the IRP process) (See Section II.B. paragraph 3, page 4 of HREA's May 22 submission to the Commission) is not inconsistent with the Parties' Proposed Framework. It does, however, present some pragmatic problems.

Section I.C. of the Parties' Proposed Framework states that the first determination to use competitive bidding to acquire generation identified in an IRP Plan should be made in conjunction with the next practical IRP process following Commission approval of this Framework. The Parties' Proposed Framework also allows for a competitive bidding process to be utilized by a utility outside of the IRP process, if circumstances justify such action. Thus, there is nothing to prevent the utilities from utilizing a competitive bidding process to acquire generation for the upcoming 5-year action plans in the IRP Plans that are currently under development by each of Hawaii's electric utilities.

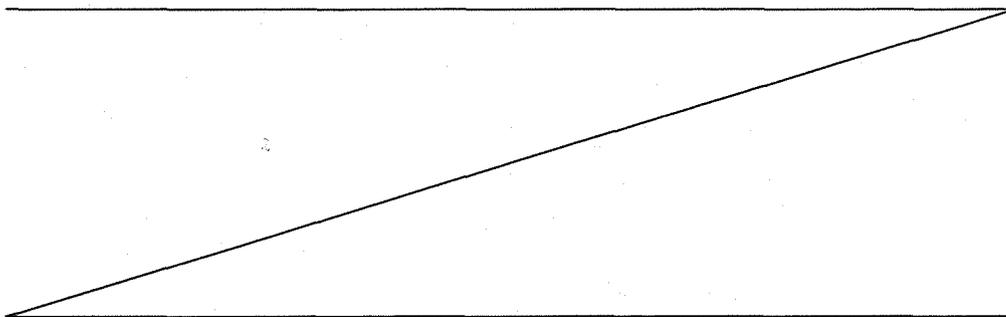
Nonetheless, HREA's suggestion regarding the use of competitive bidding as a market test of the IRP could be problematic in practice. If bidding is used as a test that is not expected to lead to real contracts, it is not likely to produce realistic bids or even a full-range of bids. Further, the information from any bids will likely become stale unless

the utility is ready to act promptly as part of the bid review process. So, any use of competitive bidding should be as part of a process designed to produce meaningful contracts promptly after the bids are submitted (if the bids are deemed attractive).

IV. SUMMARY RECOMMENDATION.

The Parties' Proposed Framework is in the public interest and responds to the issues identified by the Commission when it opened this docket. The Parties' Proposed Framework establishes an agreed set of resource procurement principles. These principles are designed to guide competitive bidding processes, with the expectation that these processes will ensure fairness and transparency while meeting customer needs at the lowest reasonable cost. The Consumer Advocate contends that the Parties' Proposed Framework fulfills these objectives.

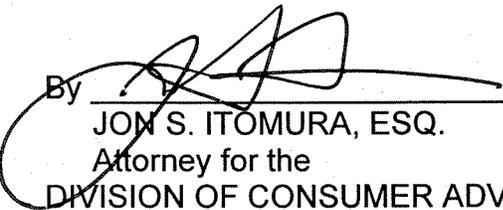
In this regard, the Parties' Proposed Framework provides flexibility to address specific circumstances that cannot be fully anticipated in advance as one cannot possible predict all of the facts that will need to be considered in each and every circumstance. Thus, the Parties' Proposed Framework is not designed to be prescriptive, though it does provide a meaningful structure for acquiring future resource needs.



For all of the above, the Consumer Advocate recommends that the Commission find that the Parties' Proposed Framework and Stipulation are in the public interest and thus, approves the Stipulation and Parties Proposed Framework.

DATED: Honolulu, Hawaii, June 6, 2006.

Respectfully submitted,

By 

JON S. ITOMURA, ESQ.

Attorney for the

DIVISION OF CONSUMER ADVOCACY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DIVISION OF CONSUMER ADVOCACY'S OPENING BRIEFS** was duly served upon the following parties, by personal service, hand delivery, and/or U.S. mail, postage prepaid, and properly addressed pursuant to HAR § 6-61-21(d).

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A handwritten signature in cursive script, reading "Desura L. Loo", is written over a horizontal line.