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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

PUBLIC UTILITIES
COMMISSION

2007 FEB 13 P 3:03

FILED

**MOTION FOR AN EXEMPTION
FROM THE FRAMEWORK FOR COMPETITIVE BIDDING
DATED DECEMBER 8, 2006 AND FROM THE OTHER ADDITIONAL REGULATORY
REQUIREMENTS ESTABLISHED UNDER SAID FRAMEWORK PURSUANT TO THE
COMMISSION'S DECISION AND ORDER NO. 23121**

MEMORANDUM IN SUPPORT

DECLARATION OF RANDALL J. HEE, P.E.

and

CERTIFICATE OF SERVICE

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COOPERATIVE

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COMMISSION'S DECISION AND ORDER NO. 23121**

COMES NOW, KAUAI ISLAND UTILITY COOPERATIVE ("KIUC"), by and through its attorneys Morihara Lau & Fong LLP, hereby moves the Honorable Hawaii Public Utilities Commission (the "Commission") for an exemption from (1) the requirements set forth in the Framework for Competitive Bidding, dated December 8, 2006 ("CB Framework"), adopted by the Commission in Decision and Order No. 23121, filed on December 8, 2006 ("Decision and Order No. 23121"); and (2) the additional regulatory requirements established under the CB Framework pursuant to Decision and Order No. 23121, as deemed applicable to KIUC.¹

¹ In the alternative and as discussed further in the attached memorandum in support, if the Commission denies KIUC's request for an exemption, or if the Commission is unable to render a decision on this Motion prior to March 8, 2007, KIUC also requests an extension of time to comply with the CB Framework and/or the additional regulatory requirements established in Decision and Order No. 23121, as deemed applicable to KIUC, until one hundred and eighty (180) days following the issuance of a final determination on this Motion.

This Motion is made pursuant to Part II.A.5 of the CB Framework and Hawaii Administrative Rules § 6-61-41. No hearing on this Motion is requested.

DATED: Honolulu, Hawaii, February 13, 2007.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Kent D. Morihara", with a long horizontal flourish extending to the right.

KENT D. MORIHARA

Morihara Lau & Fong LLP
Attorney for KAUAI ISLAND UTILITY
COOPERATIVE

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MEMORANDUM IN SUPPORT

I.

Introduction and Background of CB Framework

On June 30, 2006, the Commission issued Decision and Order No. 22588 in this proceeding, which attached its proposed framework to govern competitive bidding as a mechanism for acquiring or building new generation in the State of Hawaii, and provided the parties² the opportunity to submit comments on the proposed framework, no later than July 31, 2006.³

On September 11, 2006, the HECO Companies, the Consumer Advocate, and HREA filed their respective comments on the Commission's proposed framework.

² Besides Kauai Island Utility Cooperative ("KIUC"), the other remaining parties in Docket No. 03-0372 were Hawaiian Electric Company, Inc. ("HECO"), Hawaii Electric Light Company, Inc. ("HELCO"), Maui Electric Company, Limited ("MECO") (collectively, HECO, HELCO and MECO hereinafter referred to as the "HECO Companies"), Hawaii Renewable Energy Alliance ("HREA"), and the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate").

³ The Commission granted several requests for extensions of time such that the deadline to file the parties' comments was extended to September 11, 2006. See Commission's letter, dated August 3, 2006; Stipulated Procedural Order No. 22795, filed on August 23, 2006; and Order No. 22804, filed on August 30, 2006.

KIUC notified the Commission that it was not submitting any comments to the proposed framework.

On December 8, 2006, the Commission issued Decision and Order No. 23121 ("Decision and Order No. 23121"), which adopted the final framework (hereafter, the final framework referred to as the "CB Framework"). In Decision and Order No. 23121, the Commission stated that it reviewed the parties' comments and adopted into the CB Framework as reasonable many of the recommendations noted by the HECO Companies and the Consumer Advocate. In particular, the Commission clarified as follows:

The revisions to the Framework and the [C]ommission's comments in this Decision and Order provide further clarity and consistency to the Framework and effectively respond to the recommendations, without changing the Framework's underlying principle that competitive bidding (unless exempted or waived by the [C]ommission for a specific project) is established as the required mechanism for acquiring a future generation resource or block of generation resources, whether or not such resource has been identified in an electric utility's Integrated Resource Plan ("IRP").⁴

Decision and Order No. 23121 also established other additional regulatory requirements related to the specific requirements set forth in the CB Framework. In particular, Ordering Paragraph Number 2 (Part IX, subpart 2) of Decision and Order No. 23121 states as follows:

2. Within ninety days from the issuance of the attached [CB] Framework [i.e., by March 8, 2007], the HECO Utilities and KIUC shall file in this docket their proposed tariffs containing procedures for interconnection and transmission upgrades for the [C]ommission's review and approval, as mandated by Part III.B.6 and Part IV.I.4 of the attached Framework. The other parties in this docket may file comments on the

⁴ Decision and Order No. 23121, at 3.

electric utilities' proposed tariffs. Any such comments shall be filed within thirty days from the filing date of the proposed tariffs.⁵

In addition, Ordering Paragraph Number 3 (Part IX, subpart 3) of Decision and Order No. 23121 also states as follows:

3. Within one hundred and eighty (180) days from the issuance of the attached Framework, or prior to the commencement of any competitive bidding process under this Framework, as mandated by Part III.A.4 of the attached Framework, whichever comes first, the HECO Utilities and KIUC shall file in this docket their proposed Codes of Conduct for the [C]ommission's review and approval. The other parties in this docket may file comments on the electric utilities' proposed Codes of Conduct. Any such comments shall be filed within thirty days from the filing date of the proposed Codes of Conduct.⁶

However, the CB Framework also provides a mechanism for an electric utility such as KIUC to seek an exemption from the requirements set forth in the CB Framework. In particular, Part II.A.5 of the CB Framework states the following:

5. Exemption – ownership structure of an electric utility. Upon a showing that an entity has an ownership structure in which there is no substantial difference in economic interests between its owners and its customers, such that the electric utility has no disincentive to pursue new generation projects through competitive bidding, the Commission will exempt such entity from the [CB] Framework.

Through this Motion, pursuant to the above and for the reasons discussed further below, KIUC requests Commission approval for an exemption from (1) the CB Framework in its entirety, (2) the related additional regulatory requirements noted above. In the alternative, if the Commission denies KIUC's request for an exemption, or if the Commission is unable to render a decision on this Motion prior to KIUC's first regulatory requirement deadline of March 8, 2007, KIUC also requests an extension of

⁵ Id. at 46.

⁶ Id.

time to comply with the requirements set forth in the CB Framework and the related requirements set forth above, until one hundred and eighty (180) days following the issuance of a final determination on this Motion.

II.

Standard of Review

As noted above, Part II.A.5 of the Final CB Framework provides:

Exemption – ownership structure of an electric utility. Upon a showing that an entity has an ownership structure in which there is no substantial difference in economic interests between its owners and its customers, such that the electric utility has no disincentive to pursue new generation projects through competitive bidding, the Commission will exempt such entity from the [CB] Framework.

In Decision and Order No. 22588, the Commission clarified the exemption standard or criteria set forth in Part II.A.5 of the CB Framework, in relevant part, as follows:

Part II.A.5 of the [CB] Framework authorizes exemption from the Framework for organizations that have an ownership structure in which there is no substantial difference in economic interests between its owners and its customers, such that the electric utility has no disincentive to pursue new generation projects through competitive bidding. This language intends to draw a distinction between an investor-owned utility and a cooperatively-owned entity. In the former case, the utility's financial interest will tend to favor, all else being equal, a rate-base solution rather than a purchase solution. That tendency creates a potential conflict between shareholder interest and ratepayer interest.

In the later case, where most of the owners are also the customers, this conflict is smaller or absent. While a cooperative-like entity, to the extent it is treated as a "public utility" under Hawaii law, might still be subject to commission regulation, such regulation need not include this Framework. Under the commission's rationale, there is no reason to assume that an organization will make decisions that favor owners over customers. Nonetheless, the commission will

reexamine the exemption granted, should such a conflict arise in the future.⁷

III.

Discussion

A. As a Not-For-Profit Cooperative, KIUC Has An Ownership Structure In Which There Is No Substantial Difference In Economic Interests Between Its Members/Owners And Its Customers, Such That KIUC Has No Disincentive To Pursue New Generation Projects Through Competitive Bidding.

KIUC contends that the existing record in this proceeding and the record in other proceedings before the Commission clearly demonstrate that, as a not-for-profit cooperative entity, KIUC has an ownership structure in which there is no substantial difference in economic interests between its owners (aka, members) and its customers, such that KIUC has no disincentive to pursue new generation projects through competitive bidding.⁸ As acknowledged in this proceeding, KIUC is different than other electric utilities in Hawaii due to its cooperative ownership structure. Under this structure, all electric customers on the island of Kauai are members/owners of KIUC unless a customer elects not to become a member/owner. At this juncture, substantially all of Kauai's approximately 34,670 current electric customers are members of KIUC. Under this relationship, any money left over all expenses have been paid/met each year (i.e., the margin between income and expenses) is designated as the members' patronage capital. These net margins are distributed annually to all members in the form of cash or credits to the member's patronage capital account, or

⁷ Decision and Order No. 22588, at 17-18.

⁸ KIUC also requests that the Commission take official notice of facts of all Commission records and facts pertaining to KIUC's not-for-profit cooperative structure including, without limitation, information/documents submitted in Docket Nos. 02-0060 and 03-0371, pursuant to Hawaii Administrative Rules § 6-61-48.

any combination thereof, in proportion to the value or quantity of the services purchased by the member from KIUC during the applicable fiscal year.

As a member-owned, not-for-profit cooperative, KIUC is not driven by the same factors as an investor-owned utility (“IOU”). Unlike an IOU, KIUC does not have to satisfy the needs of any shareholders nor deal with the natural tension or conflict that exists between shareholders and ratepayers. As stated by the Commission in Decision and Order No. 22588, because essentially all of the owners/members are also KIUC’s customers, “this conflict is smaller or absent.”⁹ Instead of making decisions that favor owners (i.e., shareholders) over customers (i.e., ratepayers), KIUC, as a cooperative, seeks to meet the needs of its owners/members who are also its customers. For example, while an IOU must be concerned with obtaining cost recovery (e.g., rate base) from ratepayers and obtaining a profit (i.e., rate of return) for its shareholders, a not-for-profit cooperative like KIUC does not have to face the same cost recovery issues because its ratepayers/customers and members/owners are essentially one and the same. For these reasons, KIUC requests an exemption from (1) the CB Framework in its entirety; and (2) the related additional regulatory requirements, as noted above and established in Decision and Order No. 23121.

B. Sufficient Protections Are Already In Place For KIUC That Obviate The Need For Commission Involvement Or Oversight Of The Competitive Bidding Process Via The CB Framework.

In addition to the points raised above, KIUC also asserts that, as a not-for-profit electric cooperative, sufficient protections are already in place for KIUC that obviate the need for Commission involvement or oversight of the competitive bidding process via

⁹ Decision and Order No. 22588, at 17-18.

the CB Framework. As previously stated by KIUC in this proceeding without any dispute by the other parties, a number of factors are inherent in KIUC's not-for-profit electric cooperative structure that provide certain added protections that essentially create a fail-safe measure to ensure that bids are competitive and that the competitive bidding process undertaken by KIUC will allow KIUC to continue supplying its members' electrical energy needs with generation that best meets KIUC's and its members'/customers' objectives. For example, as an electric cooperative borrowing money from the Rural Utilities Service ("RUS") in connection with its purchase of Kauai's electric utility in 2002 and its subsequent purchase of the existing 26.4 megawatt Kauai Power Partners' independent power producer facility in 2003, KIUC is required by RUS to use competitive procurement to the greatest extent practical. Except under certain circumstances, KIUC must use competitive procurement for obtaining all goods and services when a RUS loan or loan guarantee is involved. Second, due to its not-for-profit cooperative structure, KIUC has access to low-cost funding through its lenders (e.g., RUS) that can assist in keeping bids as low as possible or, in the alternative, to allow KIUC to buy its own generation addition under a time and material contract at a lower price than any of the bidders. Finally, as officials elected by the members/customers, KIUC's Board of Directors has a fiduciary responsibility to ensure that a democratic process to govern decisions and policymaking occurs including, without limitation, financial decisions that ensures that equity and efficiency considerations, encouragement of competitive efficiency options and new technologies, lower costs through competition, more choices, reliable supplies, and a level playing field on which all generation options could compete. In light of the above, KIUC believes that Commission involvement or oversight is not necessary.

For the foregoing reasons, KIUC contends that it has sufficiently met the exemption criteria or standard set forth in Part II. above. Moreover, its request for an exemption from the requirements set forth in the CB Framework in its entirety and the other related additional regulatory requirements established in Decision and Order No. 23121 is reasonable and is in the public interest, and should, therefore, be approved.

IV.

Conclusion

For the reasons set forth above, KIUC hereby respectfully requests that the Commission issues a decision and order:

1. Approving, pursuant to Part II.A.5 of the CB Framework, an exemption for KIUC from (a) the requirements set forth in the CB Framework, and (b) the related additional regulatory requirements established in Decision and Order No. 23121; and
2. Granting such other relief as may be just and reasonable under the circumstances.

DATED: Honolulu, Hawaii, February 13, 2007.

Respectfully Submitted,



KENT D. MORIHARA

Morihara Lau & Fong LLP
Attorney for KAUAI ISLAND UTILITY
COOPERATIVE

DECLARATION OF RANDALL J. HEE, P.E.

I, RANDALL J. HEE, P.E., declare as follows

1. I am Acting President and Chief Executive Officer ("CEO") for Movant Kauai Island Utility Cooperative ("KIUC").
2. KIUC is a Hawaii not-for-profit member-owned electric cooperative, whose principal place of business is 4463 Pahe'e Street, Lihue, Kauai, HI 96766-2032. KIUC is an operating public utility engaged in the production, transmission, distribution, purchase and sale of electric energy on the island of Kauai, State of Hawaii.
3. As Acting President and CEO and to the best of my knowledge, information and belief, I am familiar with KIUC's cooperative structure and present operations on the island of Kauai.
4. I am offering this Declaration in support of KIUC's Motion for an Exemption from the Framework for Competitive Bidding Dated December 8, 2006 and From the Other Additional Regulatory Requirements Established Under Said Framework Pursuant to the Commission's Decision and Order No. 23121 ("Motion") and its Memorandum in Support of said Motion, as follows.
5. I have reviewed KIUC's Motion and Memorandum in Support, and I hereby declare that the statements and representations made herein are true and accurate to the best of my knowledge, information and belief.
6. I declare under penalty of law that the foregoing is true and correct.

Executed on February 13, 2007



RANDALL J. HEE, P.E.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were duly served on the following parties, by having said copies delivered as set forth below:

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DATED: Honolulu, Hawaii, February 13, 2007



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