

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

ORDER NO. 24084

DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

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At 11:30 o'clock A .M.

Karen Higashi  
Chief Clerk of the Commission

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

Karen Higashi

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OF THE STATE OF HAWAII

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Docket No. 03-0372

Order No. 24084

ORDER

By this Order,<sup>1</sup> the commission instructs the HECO Companies to file a redacted version of their updated status report, dated February 22, 2008, that publicly discloses the information that is not subject to confidential protection, while retaining under seal the information the HECO Companies believe should be subject to confidential protection pursuant to Protective Order No. 22562, filed on June 26, 2006. For the information the HECO Companies continue to designate as confidential, the electric utilities, in their transmittal

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<sup>1</sup>The Parties are HAWAIIAN ELECTRIC COMPANY, INC. ("HECO"), HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), MAUI ELECTRIC COMPANY, LIMITED ("MECO"), KAUAI ISLAND UTILITY COOPERATIVE ("KIUC"), HAWAII RENEWABLE ENERGY ALLIANCE ("HREA"), 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 § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

HECO, HELCO, and MECO are collectively referred to as the "HECO Companies," while HECO and HELCO are collectively referred to as the "HECO/HELCO Companies."

letter, shall abide by the applicable requirements set forth in Paragraph 5 of Protective Order No. 22562.

The same requirements shall also apply to the confidential Exhibit A filed by the HECO Companies on February 29, 2008.

I.

Background

On June 26, 2006, the commission issued Protective Order No. 22562, which approved the Stipulation for Protective Order submitted by the Parties.

On December 8, 2006, the commission issued Decision and Order No. 23121, in which it adopted a Framework for Competitive Bidding as a mechanism for acquiring or building new energy generation in the State ("CB Framework").<sup>2</sup>

On January 17, 2008, the commission issued Order No. 23974, which addressed written requests filed on December 31, 2007, by the HECO Companies and the HECO/HELCO Companies, respectively.<sup>3</sup> By Order No. 23974, the commission: (1) denied the HECO Companies' request to further update their list of non-fossil fuel purchase offers that are exempt from the CB Framework (the "Updated List"), to include three additional

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<sup>2</sup>Decision and Order No. 23121, filed on December 8, 2006, with the Framework for Competitive Bidding, dated December 8, 2006, attached.

<sup>3</sup>Order No. 23974, filed on January 17, 2008.

non-fossil purchase offers;<sup>4</sup> (2) denied the HECO/HELCO Companies' request for an extension of time to conclude their negotiations of a power purchase agreement with a Big Island non-fossil fuel developer; and (3) instructed the HECO Companies to submit to the commission, by February 22, 2008, with copies served on the Consumer Advocate, an updated status report on the non-fossil fuel power purchase offers described in their Updated List.

On February 13, 2008, the commission denied HREA's Motion for Clarification and Partial Reconsideration of Order No. 23794.<sup>5</sup> On February 22, 2008, the HECO Companies filed under confidential seal their updated status report on the non-fossil fuel power purchase offers described in their Updated List ("Updated Status Report"), in response to Order No. 23974.

On February 29, 2008, the HECO Companies filed their Motion for Reconsideration of Order No. 23974.<sup>6</sup> The supporting

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<sup>4</sup>The commission also noted that the denial of the HECO/HELCO Companies' underlying request rendered moot their corresponding request for a one-year extension of time, from December 31, 2007 to December 31, 2008, to allow the HECO Companies to continue their negotiations with a firm capacity biomass developer under Part II.A.3.e(iii) of the CB Framework.

In Order No. 23974, the commission referred to: (1) the HECO Companies' underlying and corresponding requests collectively as "Request No. 1;" and (2) the HECO/HELCO Companies' request as "Request No. 2."

<sup>5</sup>Order No. 24035, filed on February 13, 2008.

<sup>6</sup>Motion for Reconsideration of Order No. 23974; Memorandum in Support of Motion; Exhibits A - B; Declaration of Daniel Ching; and Certificate of Service, filed on February 29, 2008. By letter dated February 1, 2008, the commission approved the HECO Companies' request for an enlargement of time, from January 29, 2008 to February 29, 2008, to file their motion. See Commission letter, dated February 1, 2008.

documents submitted by the HECO Companies in support of their motion include Exhibit A, filed under confidential seal.

## II.

### Information Designated as Confidential

Protective Order No. 22562 "governs the classification, acquisition, and use of confidential information produced by any party in this docket."<sup>7</sup> Paragraphs Nos. 4, 5, and 8 of Protective Order No. 22562, state:

4. Any party may designate as confidential any information it believes, in good faith, contains confidential information related to the HECO Companies' negotiations with independent power producers, trade secrets, or other confidential research, development, commercial, financial, vendor, or bid information. Such information shall be protected against disclosure to a non-qualified person pursuant to the terms of this protective order, unless such information is declassified, or permission to disclose the information to such non-qualified person is granted by the party claiming confidentiality, as provided in paragraph 13 below. In addition, a party may designate certain information as being confidential and reserve distribution to another specified party (not including the Consumer Advocate) by notifying the Commission, the Consumer Advocate, and the other parties in writing, setting forth in particularity the information to be kept confidential and not available to the other party. With respect to such confidential information, the party whom such information is being withheld shall be treated as a non-qualified person from whom such information shall be protected against disclosure in accordance with the terms of this protective order.

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<sup>7</sup>Protective Order No. 22562, Ordering Paragraph No. 1, at 3.

5. If a party designates information as confidential pursuant to paragraph 4 above or 6 below, it shall produce the confidential information in accordance with the procedures described in paragraphs 11 through 14 below, and concurrently provide certain confidential information in writing only to the Commission and the Consumer Advocate (provided the party producing the certain confidential information follows the notification procedures described in paragraph 4 above), and/or concurrently provide certain confidential information in writing to the Commission, the Consumer Advocate, and the other parties. If a party seeks to designate information as confidential, it must: (1) identify, in reasonable detail, the information's source, character, and location, (2) state clearly the basis for the claim of confidentiality, and (3) describe, with particularity, the cognizable harm to the producing party from any misuse or unpermitted disclosure of the information. If the Commission or any party to this docket challenges the claim of confidentiality of the information, the party claiming confidentiality shall bear the burden of proof in supporting its claim of confidentiality, and the Commission will determine whether the information is confidential and whether it should be disclosed under a protective order. Any challenge to the confidentiality of any information shall be made in accordance with paragraph 24 below.

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8. Any party claiming that information is confidential shall place upon all applicable material the following legend:

**CONFIDENTIAL  
SUBJECT TO PROTECTIVE ORDER**

Whenever only a portion of a document, transcript, or other material is deemed to contain confidential information, the party shall, to the extent reasonably practicable, limit the claim of confidentiality to only such portion. However, if such limitation is not reasonably practicable, the entire document, transcript, or other material may be designated as confidential information.

Protective Order No. 22562, Paragraphs Nos. 4, 5, and 8, at 3-6 and 8 (footnote and text therein omitted) (emphasis added).

The commission, in Order No. 24035, noted:

Partial Voluntary Disclosures

Requests No. 1 and No. 2 both included confidential attachments that disclosed to the commission and the Consumer Advocate only, and not to HREA or KIUC: (1) the identities and current status of negotiations with three non-fossil fuel producers, for Request No. 1; and (2) the identity and current status of negotiations with the Big Island non-fossil fuel developer, for Request No. 2.

Subsequently, by letter dated January 7, 2008, Puna Geothermal Venture ("PGV") informed the commission that it "is the developer referred to in the letter, and concurs with HELCO's and HECO's request[,]" i.e., Request No. 2. Thereafter, HREA, in its Motion for Clarification and Partial Reconsideration, discloses that, with respect to Request No. 1, two of the three non-fossil producers are its members, Site Constructors, Inc., and Na Makani Moa'e Ku, respectively. HREA also discloses, from its viewpoint, the status of negotiations for these two member entities.

As a result of the voluntary disclosures by PGV and HREA, respectively, the commission notes that, with respect to the HECO Companies' confidential attachments filed with the commission on December 31, 2007 (with copies served upon the Consumer Advocate), the identity of only one non-fossil producer remains under confidential seal.

Order No. 24035, Section II.B, Partial Voluntary Disclosures, at 7-8 (footnote and citation therein omitted).

In submitting the Updated Status Report under confidential seal, the HECO Companies state, without further explanation, that "[t]he details concerning these projects are

confidential, and the attachment is being submitted pursuant to Protective Order No. 22562, dated June 26, 2006."<sup>8</sup>

Here, the commission notes that PGV has already disclosed that it is the Big Island non-fossil developer that is the subject of the HECO/HELCO Companies' Request No. 2. Moreover, as part of its voluntary disclosure, PGV also openly disclosed and described its negotiations with the HECO/HELCO Companies.<sup>9</sup> Furthermore, in UPC Hawaii Holdings, LLC vs. Maui Elec. Co., Ltd., Docket No. 2008-0021 ("Docket No. 2008-0021"), the complainants UPC Hawaii Holdings, LLC, and Kaheawa Wind Power II, LLC, in their complaint filed on February 6, 2008, disclose and describe in detail their negotiations with the respondents MECO and HECO for a proposed wind energy project at Kaheawa Pastures on the island of Maui.<sup>10</sup>

Most notably, the HECO Companies, in designating the entire Updated Status Report as confidential, do not "(1) identify, in reasonable detail, the information's source, character, and location, (2) state clearly the basis for the claim of confidentiality, and (3) describe, with particularity,

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<sup>8</sup>HECO Companies' Transmittal Letter, dated February 22, 2008, at 1.

<sup>9</sup>See PGV's letter, dated January 7, 2008, enclosing copies of the HECO/HELCO Companies' Request No. 2, including the HECO/HELCO Companies' confidential Exhibit A, Negotiations with Puna Geothermal Venture.

<sup>10</sup>On February 25, 2008, Shell WindEnergy Inc. filed a motion to intervene in Docket No. 2008-0021. According to the movant, it has been actively pursuing the development of a wind farm project at Ulupalakua Ranch on the island of Maui.

the cognizable harm to the producing party from any misuse or unpermitted disclosure of the information[,]" as required by Paragraph No. 5 of Protective Order 22562. The requirement that the producing party meet these specific factors is necessary for the commission to determine whether the information filed under seal by the HECO Companies constitutes confidential information that, if publicly disclosed, will cause cognizable harm to the producing party.

In addition, the HECO Companies chose not to file a redacted version of its Updated Status Report, which is permissible under Paragraph No. 8 of Protective Order No. 22562, to the extent reasonably practicable. In essence, in the commission's view, the entire Updated Status Report is not confidential, and it is reasonably practicable for the HECO Companies to produce a redacted version of this report.

For these reasons, the commission instructs the HECO Companies to file a redacted version of their Updated Status Report that publicly discloses the information that is not subject to confidential protection, while retaining under seal the information the HECO Companies believe should be subject to confidential protection pursuant to Protective Order No. 22562.<sup>11</sup> For the information the HECO Companies continue to designate as confidential, the electric utilities, in their transmittal

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<sup>11</sup>For example, in In re Hawaiian Elec. Co., Inc., Hawaii Elec. Light Co., Inc., and Maui Elec. Co., Ltd., Docket No. 02-0051, the HECO Companies file their status reports for Tariff Rule 14H under partial confidential seal, i.e., in redacted form.

letter, shall abide by the applicable requirements set forth in Paragraph 5 of Protective Order No. 22562.

Lastly, based on the commission's rationale discussed above, the commission likewise finds that: (1) the entire confidential Exhibit A filed by the HECO Companies on February 29, 2008 is not confidential; and (2) it is reasonably practicable for the HECO Companies to produce a redacted version of this report. Thus, the same requirements shall also apply to the confidential Exhibit A filed by the HECO Companies on February 29, 2008.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. By March 31, 2008, the HECO Companies shall file a redacted version of their Updated Status Report that publicly discloses the information that is not subject to confidential protection, while retaining under seal the information the HECO Companies believe should be subject to confidential protection pursuant to Protective Order No. 22562, filed on June 26, 2006. For the information the HECO Companies continue to designate as confidential, the electric utilities, in their transmittal letter, shall abide by the applicable requirements set forth in Paragraph 5 of Protective Order No. 22562, filed on June 26, 2006.

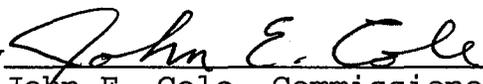
2. The same deadline date and requirements set forth in Ordering Paragraph No. 2, above, shall apply to the confidential Exhibit A filed by the HECO Companies on February 29, 2008.

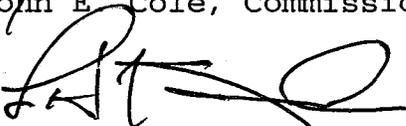
3. Separate filings shall be submitted by the HECO Companies in complying with Ordering Paragraphs No. 1 and No. 2 above, with copies served on the other parties.

DONE at Honolulu, Hawaii MAR 10 2008.

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

03-0372.cp

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 24084 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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Certificate of Service  
Page 2

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*Karen Higashi*  
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Karen Higashi

DATED: MAR 10 2008