

BEFORE THE PUBLIC UTILITIES COMMISSION

OF STATE OF HAWAII

In the Petition of) DOCKET NO: 2009-0327
)
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.)
_____)

**FRIENDS OF LĀNA‘I’S MOTION FOR RECONSIDERATION
OF THE ORDER GRANTING A WAIVER FROM COMPETITIVE BIDDING**

**MEMORANDUM IN SUPPORT OF MOTION
AND
CERTIFICATE OF SERVICE**

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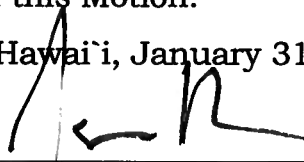
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**FRIENDS OF LĀNAʻI'S MOTION FOR RECONSIDERATION
OF THE ORDER GRANTING A WAIVER FROM COMPETITIVE BIDDING**

Friends of Lānaʻi (FOL), a public interest, not for profit entity registered with the State of Hawaiʻi, by and through its undersigned attorney, hereby respectfully moves the Hawaii Public Utilities Commission (the Commission), pursuant to HAR §§6-61-41 and 6-61-137, to reconsider its July 14, 2011 Order that, through the submission of its term sheet, Castle and Cooke (C&C) has complied with the conditional waiver from competitive bidding granted to Hawaiian Electric (HECO) and C&C by the Commission's November 11, 2010 Order in Docket No. 2009-0327. FOL requests a hearing on this Motion, pursuant to Rule 6-6-41 of this Commission. This Motion is based upon the

attached Memorandum in Support of Motion and such evidence as may be adduced during any hearing on this Motion.

DATED: Wailuku, Maui, Hawai'i, January 31, 2013.



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BEFORE THE PUBLIC UTILITIES COMMISSION

OF STATE OF HAWAII

In the Petition of)	DOCKET NO: 2009-0327
)	
HAWAIIAN ELECTRIC COMPANY, INC.)	MEMORANDUM IN SUPPORT OF MOTION
)	
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.)	
_____)	

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Friends of Lānaʻi (FOL), hereby respectfully moves the Commission to reconsider its July 14, 2011 Order that Castle and Cooke (C&C) has complied, through the submission of a term sheet, with the conditional waiver from competitive bidding granted to Hawaiian Electric (HECO) and C&C in the Commission's November 11, 2010 Order in Docket No. 2009-0327. Pursuant to HAR § 6-61-137,¹ FOL submits that due to the availability of new evidence

¹ Hawaii Administrative Rules (HAR) § 6-61-137 (motion for reconsideration or rehearing), provides that "[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 be filed within ten days after the decision or order is

and changed circumstances the Commission's Order is now erroneous, and respectfully requests that the Commission vacate that Order.

II. PERTINENT FACTUAL BACKGROUND

On December 8, 2006, the Commission adopted a Framework for Competitive Bidding, through Order No. 23121 in Docket 03-0372 "to govern competitive bidding as a [required] mechanism for acquiring new energy generation in Hawaii."²

On November 16, 2009, HECO filed a Petition in Docket 2009-0327 seeking a Declaratory Order from the Commission that the decision to bifurcate consideration of two non-conforming bids (hereinafter "Big Wind"), received in Docket 2007-0331 from C&C and First Wind Hawaii (FWH), was proper.

HECO then requested a waiver from the competitive bidding requirement in the Framework, citing reasons including the following: (1) HECO signed the Hawaii Clean Energy Initiative ("HCEI") Agreement on October 20, 2008, in which it committed to integrate (with the assistance of the State to accelerate the commitment) up to 400 MW of wind power into the O`ahu electrical system that is produced by one or more wind power plants located on Lāna`i and/or Moloka`i and transmitted to O`ahu via undersea cable systems;³ (2) the Big Wind Project is a time-sensitive project in which all essential components (the two industrial wind power plants located on Lāna`i and Moloka`i, the undersea cable and the infrastructure improvements necessary on O`ahu) must "proceed in parallel in a planned and coordinated fashion" in order for the project to succeed; and (3) HECO had garnered "unprecedented" amounts of State and Federal support for the project.⁴

In granting the waiver, the Commission itself noted that it would essentially be "futile" to require competitive bidding because it would likely result in the same two non-conforming bids (C&C and FWH):

served upon the party, setting forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful or erroneous."

² See, e.g. Order Opening Docket 2011-0039, filed 2/24/2011, at 2.

³ See p. 4 of the "Order Denying HECO's Request and Directing HECO to Submit a Draft RFP Pursuant to Framework" entered in this Docket on July 14, 2011.

⁴ See pp. 11-12 of the "Decision and Order" entered in this Docket on November 18, 2010.

The commission recognizes the substantial effort and expenditures necessary to issue additional RFP's, as well as the substantial delay that such a process would entail. Clearly, HECO was motivated by these considerations when it sought to bifurcate the Big Wind Project. As HECO admits, "**issuing a separate RFP would have incurred additional costs for reinitiating the RFP formulation steps required by the Framework and most likely would have resulted with the same two non-conforming bids."**"⁵ (Emphasis added)

The Commission found that HECO had not met its burden in satisfying the Commission's own tests for obtaining a waiver from competitive bidding, however the Commission ignored these tests and granted the waiver anyway, stating as follows:

Clearly, **the Big Wind Project provides HECO a significant opportunity to achieve the government objectives set out in the renewable portfolio standards.** The attainment of large-scale renewable energy generation such as the Big Wind Project has the potential to tremendously reduce the state's dependence on fossil fuel electricity generation and fulfill a substantial portion of Hawaii's renewable energy portfolio requirements.

The commission also finds that a waiver of the competitive bidding Framework is otherwise in the public interest because of the coordinated effort that such an undertaking requires. As the project currently stands, **HECO must work in cooperation with two developers on two separate islands as well as the State of Hawaii regarding the development and implementation of the undersea cable.** HECO must also coordinate the construction of substantial infrastructure to manage the connection of the undersea cable to the Oahu grid, as well as install necessary technology to ensure the stable implementation of this new sustainable resource. **Requiring the Big Wind bids to be competitively bid under a new RFP at this juncture would add considerable delay to the process and may perhaps endanger the viability of the project.**⁶ (Emphasis added)

⁵ Id. at p. 20.

⁶ Id. at pp. 22-23.

In so concluding, the Commission essentially found that there was a pre-determined Big Wind Project, with a pre-determined developer of an industrial wind power plant on Lānaʻi, a pre-determined developer of an industrial wind power plant on Molokaʻi, a required undersea transmission cable between Lānaʻi and Molokaʻi and Oʻahu, and required HECO infrastructure improvements on Oʻahu, development of which all needed to be simultaneously coordinated.

The Commission’s waiver from the competitive bidding requirement in the Framework was, however, conditional:

HECO's request for a waiver from the competitive bidding process for the Big Wind Project Developers that are the subject of this proceeding, i.e., Castle and Cooke, Resorts, LLC, for Lanai, and Hawaii Holding, LLC, dba First Wind Hawaii, for Molokai, are approved; provided that: (A) **fully executed term sheets for each of the projects**, as described in Section II.C, above, are filed within four months from the date of this Decision and Order⁷ (Emphasis added)

The Commission described the required contents of the “term sheet”, as follows:

... the term sheet required agreement on all material terms, which includes: (1) **information on the scope of the project (i.e., technology, capacity, location)**; (2) the manner in which the energy will be delivered (i.e., as-available, scheduled); (3) **the term of the agreement, projected in-service date, and key milestones, including, but not limited to proof of concept and any phases of the project**; (4) performance standards; and (5) pricing.⁸ (Emphasis added)

On March 15, 2011, anticipating FWH would fail to meet the conditions set, namely an inability to demonstrate site control, FOL submitted a request with the Commission that the waiver granted HECO with respect to the two non-conforming bidders be withdrawn and the competitive bidding process contemplated by the Framework be reinstated.

⁷ Id. at p. 26.

⁸ See “Order Denying HECO's Request and Directing HECO to Submit a Draft RFP Pursuant to Framework” entered in this Docket on July 14, 2011, at p. 6.

By the deadline (March 21, 2011) C&C submitted a term sheet for an industrial wind power plant on Lānaʻi; however FWH was not able to submit a term sheet for an industrial wind power plant on Molokaʻi because it could not establish Site Control for an industrial wind power plant on Molokaʻi.

On April 29, 2011, FOL filed a formal motion to intervene in Docket 2009-0327, asserting that the waiver granted to HECO was a nullity due to the failure of the named parties (C&C and FWH) to comply with the conditions under which it was granted. On May 13, 2011, the Commission denied FOL's Motion to Intervene.

On July 14, 2011, the Commission found, by Order, that C&C:
... has complied with the original waiver and may proceed with its negotiations with HECO for a 200 megawatt ("MW") wind farm on Lanai.⁹

The Commission also found, however, that:

The waiver no longer applies for the Molokai portion of the Big Wind project, because HECO did not submit a term sheet for a project with First Wind Hawaii, LLC ("FWH") on that island.¹⁰

The Commission further explained that:

... no term sheet was executed between HECO and FWH **due to FWH's inability to secure a suitable site for its proposed project.**¹¹ (Emphasis added)

Then, in a surprising turn of events, the Commission significantly redefined the Project. The Commission was obviously forced to recognize that there was no longer a predetermined developer for an industrial wind power plant on Molokaʻi. So the Commission jettisoned the concept that the Big Wind Project is comprised of two industrial wind facilities, one on Lānaʻi and one on Molokaʻi, with an undersea cable joining these two islands to Oʻahu and HECO infrastructure on Oʻahu. At least as to 200MW of the total of

⁹ Id. at p. 2.

¹⁰ Id.

¹¹ Id. at p. 6.

400MW that was the subject of the non-conforming bids in Docket 2007-0331 and the requested waiver in this Docket, the Commission ordered HECO to:

... submit a draft RFP for the commission's consideration for a competitive bidding process for 200 MW or more of renewable energy to be delivered to or on the island of Oahu.¹²

The Commission redefined the Project as follows:

The renewable energy projects submitted in this future RFP may be sited on any island that can be reasonably reached via an inter-island cable or sited on the island of Oahu itself.¹³
(Emphasis added)

Thus, the Project (1) is no longer limited to industrial-scale wind facilities, (2) can be for any form of renewable energy, (3) located on any island reasonably reached by a cable to O`ahu or (4) located on O`ahu itself. The Commission's rationale for this increased scope is expressed as follows:

It should be noted that by requiring a new RFP, the commission **does not intend to favor particular energy resources or geographical locations over another.** Instead, **the commission seeks to encourage a greater number of renewable developers to enter into the process.**¹⁴(Emphasis added)

Once the docket to receive bids for the 200 MW lost by FWH through its inability to demonstrate site control on Moloka`i was opened (Docket 2012-0225) HECO stated that a cable from O`ahu to the Proposed "Lana`i Wind Farm" would be required in the RFP because:

... Hawaiian Electric has signed a term sheet with Castle & Cooke Resorts, LLC ("Proposed Lana`i Wind Farm Developer") that will require an inter-island transmission cable to deliver the electric energy from the Proposed Lana`i Wind Farm to the Hawaiian Electric System.¹⁵

HECO stated that RFP Cable Bidders:

... will be required to include either (1) a Lana`i cable bid or Lana`i cable option, or (2) a statement of reasons as to why it is not

¹² Id. at p.3.

¹³ Id. at p.3.

¹⁴ Id. at p.16.

¹⁵ See HECO's "Responses to Comments Submitted on Draft RFP" dated September 28, 2012, at p. 1.

commercially reasonable for the Bidder to include a Lanaʻi cable Bid or Lanaʻi cable option.¹⁶

Less than a year after receiving the benefit of the Commission-granted waiver from competitive bidding, C&C sold its Lānaʻi holdings, including the site targeted for Big Wind, to Lānaʻi Island Holdings (LIH), a disinterested third party on June 27, 2012:¹⁷ C&C, as Seller, and LIH, as Buyer, entered into a Sale Agreement dated May 2, 2012, As Amended, and a Purchase and Sale Agreement dated June 27, 2012, whereby C&C sold and transferred to LIH its interests in property on Lānaʻi, reserving on undisclosed (to the public) terms certain rights to develop an industrial wind power plant on Lānaʻi.

III. SITE CONTROL IS ESSENTIAL TO IMPLEMENTATION OF AN INTERISLAND RENEWABLE ENERGY PROJECT

“Site control” is the fundamental requirement that must be demonstrated by all developers who wish to apply for and receive approvals or permits to construct major projects in the State of Hawaii and the United States. In most cases, a developer must provide proof of ownership of the property upon which the development is proposed to be constructed in a filing open for public review and comment. It makes no sense to issue government approvals permitting the construction of large-scale permanent structures or improvements on a particular parcel of land unless the developer first proves that it has ownership and/or control of that land over a term sufficient to satisfy particular RFP solicitation goals.

The requirements for “site control” benefit most stakeholders, since government entities only plan and implement projects that actually have the capability of going forward, and affected, neighboring communities are only required to devote their time, energy and limited resources to reviewing and supporting, or opposing, those projects that could actually be constructed.

¹⁶ Id. at pp. 2-3.

¹⁷ See Letter filed 7/28/12 in Docket No. 2012-0157, confirming that the sale of Lānaʻi to LIH, LLC closed at 12:01 a.m., June 27, 2012.

A. Property Rights/Entitlements as an Aspect of “Site Control”

“Site control” is a term of art and a critical requirement in Hawaii public utilities law. HECO and this Commission (by virtue of approving HECO’s RFP) have, for example, defined the meaning of “site control” and “location” in Docket No. 2007-0331. This Docket first defines “site” as follows:

Site: The parcel of real property on which the Facility will be constructed and located, including any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of the Facility.¹⁸

To be eligible to bid on an RFP, for example, it is a “threshold requirement” that the bidder demonstrate “site control,” defined as follows:

The Bidder must demonstrate that it has control or a right to acquire control over a site for its project. To meet this threshold requirement, **bidders must either provide documentation indicating that they own the site on which the project will be located, have an option agreement on the site, or at a minimum have negotiated a letter of intent for the site.** HECO understands that site approval documents at this preliminary stage may be conditional upon receipt of a PPA from HECO. **Proposals with no demonstration of site control will be rejected.**¹⁹ (Emphasis added).

The RFP in Docket 2007-0331 included the following information on the types of documentation that would suffice to prove “site control:”

“8.2 Evidence of right to use site.

- Does the project have a right to use the site (e.g., by virtue of ownership or land rights obtained from the owner)?
- Does the project need any entitlements to use the site?
- Include any relevant documentation, e.g. letter of intent to negotiate a lease or purchase of site, or evidence of actual lease or purchase of site.
- If the project does not have site control, provide a timeline when it is anticipated that the project will receive entitlements to use the site,

¹⁸ HECO RFP, filed Docket 2007-0331, at Exhibit A, p. 99.

¹⁹ Id., Exhibit A, p. 26.

obtain a lease to, or purchase the site. For reference, use the execution date of the power purchase agreement as the starting point.”²⁰

The RFP in Docket No. 2007-0331 continues:

“Seller shall obtain all easements, rights of way, licenses and leases (collectively, "Land Rights") on the site of Seller's Facility and any other affected property, which are required to construct, maintain and operate the Company-owned Interconnection Facilities. Seller shall use its best efforts to obtain perpetual easements. Such Land Rights shall contain terms and conditions which are acceptable to Company and shall be provided in advance to Company for its review. For so long as Seller has the right under this Contract to sell energy to Company, Seller shall pay for any rents and other payments due under such Land Rights that are associated with Company-owned Interconnection Facilities.”²¹ (Emphasis added)

B. Duration of Property Rights as an Aspect of Site Control

A developer of a proposed wind power plant must show ownership or control of the site for a minimum period to insure the economic viability of the project. C&C acknowledged that HECO’s draft RFP in Docket 2007-0331 “shall be for a duration of at least 20 years,”²² and itself pointed out in comments to the draft PPA that, “developers must commit to a fixed amount of energy at a fixed flat or structured price over 20 years.”²³ This twenty-year requirement is proposed as well in HECO’s draft RFP pending before the Commission in Docket 2011-0225.²⁴

IV. C&C PREVIOUSLY PROVIDED SIGNIFICANT DETAILS FOR THE “SITE” FOR THE PROPOSED LĀNA’I ISLAND INDUSTRIAL WIND POWER PLANT PROJECT

C&C described the “Site” for its proposed industrial wind power plant located on Lāna’i as follows:

The site of the Proposed Lāna’i Wind Farm is located on the northwest portion of the island of Lana’i, County of Maui, State of

²⁰ Id. at p. 73.

²¹ Id. at p. 180.

²² C&C Comments to HECO’s Draft RFP, Docket 2007-0331, Exhibit A, p. 16.

²³ Id. at p. 25.

²⁴ See Draft RFP, 9/28/12, at Chapter 1, p. 1: “the total amount of electric energy being solicited is approximately 600 to 800 gigawatthours [] annually, over a term of 20 years.”

Hawaii. Electric energy generated by the Lanaʻi Wind Farm to the Undersea Cable System at the Lanaʻi Point of Interconnection (“Lanaʻi POI”) at a nominal operating voltage of 138 kV or as specified by Hawaiian Electric.

It is expected that the Lanaʻi POI would be at a 138 kV AC transmission line dead end structure inside a Lanaʻi POI AC Switchyard. The AC Switchyard would be either part of or adjacent to (1) an AC/DC Converter Station (if such a station is located on Lanaʻi), or (2) a stand-alone AC switchyard forming the terminal for an undersea AC cable (if there is an AC spur connecting Lanaʻi).

The Proposed Lanaʻi Wind Farm Developer will be responsible for paying for all new facilities required to deliver electric energy to the Lanaʻi POI. The facilities are expected to include one or more 34.5 kV/138 kV substations (“Collection Substations”) and 138 kV circuits connecting the Collection Substation(s) to the Lanaʻi POI.

The expected on-Lanaʻi infrastructure improvements would include improvements to Kaunapali Harbor and to highways and roads on Lanaʻi. It is expected that substantial improvements to Kaunapali Harbor will be required to off load equipment for the project components that would be located on Lanaʻi (including equipment for the Proposed Lanaʻi Wind Farm and Lanaʻi-sited equipment for the Undersea Cable System in the event an AC/DC converter station is located on Lanaʻi). It also is expected that the County portion of State Highway 440 between Kaunapali Harbor and Lanaʻi City will require widening, or the hillside on Castle & Cooke property will need to be cut back, to allow the transportation of materials and wind turbine components out of the harbor. Existing agriculture roads would have to be upgraded in order to divert construction traffic around the west side of Lanaʻi City and out to the project areas.²⁵

Thus, according to C&C’s own prior proffers, the “Site” included not only the acreage required for the industrial wind turbines themselves on the northwest portion of Lanaʻi, but also any easements, rights of way, surface use

²⁵ See HECO’s “Responses to Comments Submitted on Draft RFP” dated September 28, 2012, on pp. 3-4 and the report prepared by Navigant Consulting, Inc., dated April 19, 2011, for the Department of Business, Economic Development, and Tourism (“DBEDT”) and the Department of Accounting and General Services entitled “Status and Perspective on the Big Wind/Cable Project”, which is available on the DBEDT website at: energy.hawaii.gov/wpcontent/upload/2011/10/Navigant-2011.pdf. See also the Environmental Assessment/Environmental Impact Statement Preparation Notice for the Proposed Lanaʻi Wind Farm Project, dated September 19, 2008, which can be located on the Hawaii OEQC website at: oeqc.doh.hawaii.gov/.

agreements and other interests or rights in real estate for all components of the Project reasonably necessary for the construction, operation and maintenance of the Project, including, in this instance: (1) improvements to Kaunalapau Harbor; (2) widening of highways and roads on private property it owned on Lānaʻi; and (3) improvements to existing agriculture roads, on private property it owned on Lānaʻi, to and from the proposed sites for the wind turbines.

All of the above was taken for granted at the time the proffers were made, because C&C “owned” 98% of the island of Lānaʻi. Once C&C sold its Lānaʻi holdings, including the site targeted for Big Wind, to LIH on June 27, 2012,²⁶ reserving undisclosed rights to develop an industrial wind power plant on Lānaʻi, on undisclosed (to the public) terms, the previously granted waiver became moot. Put another way, had the Commission known for a certainty that C&C would sell off its Lānaʻi holdings, including the land targeted for Big Wind, less than a year after receiving a waiver from competitive bidding garnered through indisputable “site control,” the Commission would have had no more basis for granting the waiver option than it did for FWH.

The precise rights reserved by C&C to develop an industrial wind power plant on Lānaʻi appear in un-redacted versions of the two sales agreements noted in Section II, documents which are on file with the Commission pursuant to a protective offer in Docket 2012-0157 (regarding the proposed sale of three PUC-regulated utilities to LIH) and hence not available for review and comment by interested members of the public, including FOL.

The Commission and C&C, to date, have rebuffed all of FOL’s efforts (as well as the efforts of others) to require the disclosure of these terms as government records that must be made available to interested members of the public pursuant to HRS Chapter 92F. The Commission and C&C have failed to protect the public interest, to date, by refusing to open up this government process to allow scrutiny and public participation by FOL, and others, to assess whether or not C&C continues to have sufficient “site control” or even

²⁶ See FN 17, *supra*.

an identifiable location, applying the criteria of the Commission and HECO, to construct an industrial wind power plant on Lānaʻi and/or to continue to be entitled to a waiver from competitive bidding.

C&C must, as a result of the sale of its Lānaʻi lands, still be able to demonstrate “Site Control” over all of these components of the Lānaʻi proposed project – for at least a twenty-year period of time, in order to enjoy continued benefits from the Commission-granted waiver.

V. STANDARD OF REVIEW ON MOTION TO RECONSIDER

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.

The reopening of administrative proceedings is always warranted when new information becomes available that would have changed the outcome of the initial proceedings. *In Re Hawaii Elec. Div. of Citizens Util. Co.*, 60 Haw. 166, 590 P.2d 524 (1978); See *Administrative Law Treatise*, Kenneth Culp Davis, §18.09. As this Commission has opined: " [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).²⁷

Courts have developed three alternative grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence, and (3) the need to correct clear error or prevent manifest injustice. *Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E. D. Cal. 1986) aff'd in part, rev'd in part on other grounds, 828 F.2d 514 (9th

²⁷ Order Denying HECO's Motion for Reconsideration, Docket 2009-0327, filed 8/24/11 at 3.

Cir. 1987); *In Re Greco*, 113 B.R. 658, 664 (B. Haw. 1990); *Moore's Federal Practice*, §59.30.

Evidentiary hearings in a court of law may be reopened for the purpose of submitting new evidence if (1) the evidence was previously undiscovered even though due diligence was exercised by the moving parties; (2) the evidence is admissible and relevant, and (3) the evidence is of such a material and controlling nature as will probably change the outcome of the proceeding and not be cumulative or used to impeach or contradict witnesses who testified at the hearing. *Orso v. City and County of Honolulu*, 56 Haw. 241, 534 P.2d 489 (1975); *Deponte v. Ulupalakua Ranch*, 49 Haw. 672, 427 P.2d 94 (1967).

The Hawaii Supreme Court has acknowledged and applied this standard, with some modifications, in administrative proceedings. The purpose of a rehearing is to direct the administrative agency's attention to matters which have been overlooked or mistakenly conceived and to prevent injustice, if the additional evidence would lead to a different outcome in the case. *In Re Hawaii Elec. Div. of Citizens Util. Co.*, 60 Haw. 166, 590 P.2d 524 (1978); *Yamada v. Natural Disaster Claims Comm'n.*, 54 Haw. 621 (1973).

This Commission has emphasized in this Docket that it has reserved the right to reconsider every aspect of this Project and that it has not endorsed the inter-island renewable energy project, nor made a substantive determination of the project's viability.²⁸ This Commission has already agreed that reconsideration shall be available as new facts, such as these, unfold. In *Bocalbos v. Kapiolani Medical Center*, 93 Hawai'i 116, 997 P. 2d 42 (ICA 2000) the Appellate Court held that the administrative agency abused its discretion in denying the motion to reopen to receive new evidence.

FOL submits this Motion to Reconsider based on the recent sale of the island of Lānaʻi by C&C to LIH on June 27, 2012. The sale was not contemplated and had not occurred when the Commission granted HECO and C&C the conditional waiver from competitive bidding in its November 11, 2010

²⁸ See "Order Denying HECO's Request and Directing HECO to Submit a Draft RFP Pursuant to Framework" entered in this Docket on July 14, 2011 at p. 17.

Order, or when this Commission entered its July 14, 2011 Order that C&C had complied with the conditional waiver. The sale now renders so much of the negotiated term sheet regarding C&C's ownership and site control ineffective, and further renders the Commission's waiver unsustainable. All of the tests for reopening to receive new evidence and reconsideration are met in the circumstances presented here. The Commission must reconsider its Order granting HECO a waiver in this Docket to correct a clear error and to protect the public's interest.

VI. PROCEDURAL ISSUES

A. FOL Moves Again To Intervene, Should It Be Necessary To Do So, To Seek Reconsideration

Should HECO argue that FOL must be a party to seek reconsideration, FOL (1) notes that it already meets the statutory definition of a party set out in HRS § 91-1(3) in that it has sought to be recognized as a party as of right in this Docket and therefore does not need to file a further Motion to Intervene; (2) in the alternative, renews, restates and incorporates by reference the Motion to Intervene that it filed earlier in this Docket; (3) notes that seeking to intervene at this juncture based upon new evidence that only became available on June 27, 2012 cannot time bar a Motion to Intervene and that any Rule of this Commission that requires intervention within ten (10) days of the filing of the docket, on an absolute basis, violates Hawaii case law (intervention shall be freely granted), the intent of HRS Chapter 91 and the Hawaii and U.S. Constitutions; (4) seeks an enlargement of time to file this further Motion to Intervene, pursuant to HAR § 6-61-23(a)(2); and (5) notes that it is entitled to be recognized as a party as a matter of law and fact because the Rules of the Commission "shall be liberally construed to secure the just, speedy, and inexpensive determination of every proceeding" – not in a strict or literal fashion that deprives constitutional and statutory rights. See §6-61-1 of the Commission's Rules.

B. FOL's Motions To Reconsider And To Intervene, If Necessary, Are Timely, Based On New Evidence Not Available To FOL Or The Commission When HECO/C&C Secured A Waiver From Competitive Bidding In 2010.

The legal standard for a motion to reconsider²⁹, if filed with the Commission beyond the ten (10) day period following the filing of the Order in question, is set forth in HAR § 6-61-23(a)(2):

Enlargement. (a) When by this chapter or by notice or by order of the commission, any act is required or allowed to be done at or within a specified time, the commission for good cause shown may at any time, in its discretion:
(2) Upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect[.]

This Rule is substantially similar to Rule 6(b), likewise entitled “Enlargement,” in the Hawaii Rules of Civil Procedure (“HRCPP”) and therefore the cases construing the latter Rule are applicable in construing the Commission’s similar Rule.³⁰

Rules regarding the enlargement of time are not to be strictly applied. Instead, these Rules are to be applied liberally to grant the extensions requested, absent bad faith on the part of the movant or prejudice to the non-movant(s). The Hawaii Supreme Court has ruled, in *Struzik v. City and County of Honolulu*, 50 Haw. 241, 246, 437 P.2d 880, 884 (1968), that “The Rules of Civil Procedure are to be liberally construed to promote justice,” and the court may depart from the literal application of the rule where such action is necessary to prevent the miscarriage of justice. The Commission’s own Rules, in §6-61-1, similarly state that these Rules “shall be liberally construed to secure the just, speedy, and inexpensive determination of every proceeding.”

²⁹ This standard would also apply for an enlargement of time to file the Motion to Intervene, if necessary.

³⁰ Rule 6(b) HRCPP states: “When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion ... (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect ...”

Based upon these principles, the Hawaii Supreme Court held, in *Bagalay v. Lahaina Restoration Foundation*, 60 Haw. 125, 588 P.2d 416 (1978), that the trial court had abused its discretion in refusing to enlarge time. The Court reasoned:

Courts generally have given Rule 6(b) a liberal interpretation, consistent with the liberal interpretation standard in Rule 1, F.R.C.P., *Vandervelde v. Put and Call Brokers and Dealers Association*, 43 F.R.D. 14 (S.D.N.Y. 1967); and in order to work substantial justice, *Roscoe v. Roscoe*, 126 U.S.App.D.C. 317, 379 F.2d 94 (1967); *Yonofsky v. Wernick*, 362 F. Supp. 1005 (S.D.N.Y. 1973). Ordinarily, the discretion of the court should be exercised to permit an extension of time in the absence of a showing of bad faith on the part of the movant for substitution or undue prejudice to the other parties to the action. *United States v. Miller Brothers Construction Company*, 505 F.2d 1031 (10th Cir.1974); *Staggers v. Otto Gerdau Company, Inc.*, 359 F.2d 292 (2d Cir.1966); *Roscoe v. Roscoe, supra*. The burden is on the movant to demonstrate **good faith and to show **some reasonable basis for noncompliance with the rules**. *Yonofsky v. Wernick*, 362 F. Supp. 1005, 1012 (S.D.N.Y. 1973). (Emphasis added).**

In *Bagalay, supra*, the court was dealing with a dismissal based upon a claimed failure to make a timely substitution with respect to a party who had died. The court stated at 60 Haw. at 143, 588 P.2d at 427:

In the absence of a showing of undue prejudice to appellees in the two years and eight months time lapse between appellant's death and the motion for substitution, and in the light of the fact that counsel for appellant did not abandon the case but continued with pretrial proceedings while attempting to locate "heirs" in the Philippines, we find that the trial court abused its discretion in not permitting appellant to substitute appellant's administratrix in the case.

Neither FOL nor the Commission could have foreseen C&C's sale of the island of Lānaʻi in 2012, and FOL may therefore be excused from failing to file a Motion to Reconsider based on evidence that did not exist in 2010 or 2011. Therefore, FOL submits that "good cause" exists for the enlargement of time for the Motions because the "new evidence" that is the subject of these Motions did

not exist within the initial ten day periods for the filing of these Motions and only became available at least a year later. Under the circumstances that have evolved in this Docket, no reasonably prudent person or party could have foreseen that C&C would 1) negotiate a term sheet with HECO, based on its ownership of the land targeted for Big Wind on Lānaʻi in 2011; 2) secure a waiver from competitive bidding, based on the terms of the negotiated term sheet (including site control of land C&C owned on Lānaʻi) in 2011; and 3) then sell its lands to a third party in July 2012, thereby rendering the Commission's waiver granted on November 18, 2010 and the acceptance of the term sheet on July 14, 2011 invalid.

FOL respectfully requests an enlargement of time for the filing of its Motions here as well, pursuant to HAR § 6-61-23(a)(2). FOL has acted diligently to bring these matters before the Commission after first attempting to have the information in the sales agreements made public. FOL has acted in good faith, and there will be no prejudice to HECO or any other party to these proceedings. The Commission cannot apply these rules in a strict or literal manner if such a construction does not achieve a just result, as here. *Struzik, supra*. Through a liberal construction of these rules to promote justice, the Commission must exercise its discretion to grant the requested enlargements. *Bagalay, supra; Bocalbos; supra*.

VII. ARGUMENT

A. This Commission Is Fully Aware of Whether the Rights Reserved By C&C DO or DO NOT Satisfy This Commission's Own Criteria for Site Control

The Commission, the Consumer Advocate and C&C have access to the un-redacted versions of the two sales documents submitted in Docket 2012-0157 and are thereby fully aware of the precise and actual terms under which C&C has reserved the rights to develop an industrial wind power plant on Lānaʻi. The Commission has the power and duty, as a matter of its public trust responsibilities to citizens of the State of Hawaiʻi, including FOL and its members, to review the un-redacted versions of the two sales documents and

determine whether or not the tests for location and “site control” are satisfied any longer. The Commission cannot answer that it is prevented from responding to this Motion because the precise terms of any reservation of rights by C&C have been deemed confidential, or that FOL is simply attempting to cause the Commission to disclose the precise terms of any reservation by C&C after the Commission has already declined to do so.

Protective Order No. 30455, applicable to this information, in paragraph 16, contains two important qualifications to the “confidentiality” of any information covered by the protective order. First, the Commission may use any confidential information “for the purpose of assisting the Commission in fulfilling its statutory duties and responsibilities.” Using this information to respond to this Motion assists the Commission in fulfilling its statutory duties and responsibilities. Further, the Commission has a statutory duty and responsibility, because this is a project intended to help meet Hawaii’s “renewable portfolio standards”,³¹ to determine whether C&C truly has maintained “site control.” Second, the Commission has the power through “further order” to use any information previously deemed confidential in a public proceeding. The Commission could enter such a “further order” now.

Thus far, the Commission has allowed developers’ claims regarding “site control” to be filed with the Commission through protective orders, and has only made public pronouncements in this regard when a developer fails to demonstrate ownership or control for sufficient duration to meet the requirements of a utility’s RFP, as happened with FWH in Docket 2007-0331.

As noted, C&C sold its Lānaʻi holdings (including the Big Wind site) to LIH on June 27, 2012, and submitted an un-redacted sales agreement to the Commission in Docket 2012-0157 pursuant to protective order; included in that agreement are the undisclosed terms by which C&C reserved certain rights to develop an industrial wind power plant on Lānaʻi. Therefore, the

³¹ HRS §§ 269-91 et. seq.

Commission knows that C&C no longer owns any land on Lānaʻi, and knows whether or not sufficient control exists to warrant continuing the waiver:

* Do the un-redacted sales agreements prove that C&C has retained property rights to construct and operate an industrial wind power plant on Lānaʻi for a duration of at least twenty (20) years? If not, the Commission’s waiver, relying on a term sheet based on C&C’s complete ownership and total site control on Lānaʻi, is no longer applicable.

* Do the un-redacted sales agreements prove that C&C has retained property rights to a parcel of real property on which the industrial wind power plant will be constructed and located, including any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of an industrial wind power plant on Lānaʻi? If not, the Commission’s waiver, relying on a term sheet based on C&C’s complete ownership and total site control on Lānaʻi, is no longer applicable.

* Is there a period of time after which the “rights” will expire, or are there conditions precedent that C&C must meet before the rights arise? If so, the Commission’s waiver from the RFP requirements of Docket 2007-0331, due to a term sheet based on C&C’s complete ownership and total site control on Lānaʻi, must be vacated.

Because the Commission granted the waiver “in light of the public interest and to achieve a stated governmental objective³² [emphasis supplied]”³³ the Commission, in the public interest, has a statutory duty and responsibility to rescind the waiver if the site control retained by C&C no longer constitutes “site control” as set forth in the term sheet C&C and HECO submitted to the Commission in 2011.

The Commission therefore has the power and duty, as a matter of its public trust responsibilities to citizens of the State of Hawaiʻi, including FOL and its members, to review the un-redacted versions of the two sales

³² Namely the legislatively-set renewable portfolio standards, HRS §§ 269-91 et. seq.

³³ Decision and Order, filed in Docket 2009-0327 on 11/18/10 at 1-2.

documents submitted in Docket 2012-0157 and determine whether or not the tests for location and “site control” underpinning C&C’s term sheet with HECO have been invalidated by the sale of Lānaʻi.

B. If C&C Now Does Not Satisfy The Tests For “Site Control” The Waiver Must Be Invalidated And Competitive Bidding Restored As To A Proposed Industrial Wind Power Plant On Lānaʻi

FOL requests that the Commission reconsider its order granting the waiver to HECO and C&C in Docket 2009-0327 and find that it is no longer valid, and further find that the Lānaʻi portion of the Big Wind proposal is subject to competitive bidding, since the fundamental justification for the Commission-granted waiver in Docket 2009-0327 no longer applies. It is likely that C&C can simply no longer demonstrate the site control upon which the waiver relied, a flaw which proved fatal to FWH’s attempts to avoid competitive bidding in Docket 2007-0331.

The Commission found that C&C was excused from competitive bidding and could proceed to negotiate with HECO for a PPA for Big Wind on Lānaʻi, on July 14, 2011, because the submitted “term sheet” included “information on the scope of the project (i.e. technology, capacity and **location** [emphasis supplied].” The Commission similarly determined that the Molokaʻi portion of Big Wind had to be rebid because FWH could not submit a term sheet establishing location or site control.

On July 14, 2011, in denying HECO’s assignment request, the Commission stated that it believed that “it would be inequitable **at this juncture** to forfeit C&C’s portion of the waiver based on FWH’s failure.”³⁴ Less than a year later, C&C sold all of its lands on the island of Lānaʻi, and although C&C has maintained through various press releases that it has “retained” the rights to develop a wind power plant on Lānaʻi,³⁵ the terms and conditions are unknown (to members of the public).

³⁴ Order Denying HECO’s Request and Directing HECO to Submit a Draft RFP Pursuant to Framework, filed 7/14/11, at 14.

³⁵ See Letter and press release, filed in Docket 2012-0157, 6/21/12, at p. 2.

HECO sought a reconsideration³⁶ of the Commission's Order requiring it to rebid the Moloka'i portion of Big Wind by asserting, "[T]he fact remains that we are now in the unique position of having all of the necessary parties (utility, wind farm developers and landowners) assembled together" (emphasis supplied) to pursue Big Wind.³⁷ After denying the assignment request, the Commission confirmed the waiver with respect to C&C because it was the "landowner" of the project area on Lāna'i, and, unlike FWH, site control was assumed. However, it is now indisputable that C&C is no longer the "landowner" of Lāna'i, rendering HECO's reasoning irrelevant and the term sheet on which the Commission granted HECO a waiver invalid. To maintain the waiver is clearly erroneous.

Since the fundamental reason that FWH's waiver was declared no longer valid - lack of site control - now applies to the Lāna'i portion of Big Wind as well, permitting C&C to rely on the Commission-approved waiver from competitive bidding, despite the obvious change in ownership and control of the proposed project site on Lāna'i, cannot shield the project from the rigorous review and competition bidders must undergo in Docket 2011-0225, and is no longer "equitable."

It is notable that, aside from relying on a "governmental purpose" to exempt FWH and C&C from competitive bidding in Docket 2009-0327, the Commission determined unequivocally that HECO failed to:

- Comply with the Competitive Bidding Framework when it determined to bifurcate the two non-conforming bids and in not creating a separate RFP for projects "larger than 100MW;"
- Provide sufficient support for its claim that all potential bidders received adequate notice of the alleged opportunity to submit non-conforming bids and failed to submit **evidence that the Big Wind Project could achieve a commercial operation date of 2013**, as stated in the RFP for conforming proposals;
- "Evaluate [] Big Wind proposals on a myriad of criteria," and that when HECO bifurcated Big Wind from other proposals it "**ceased its substantive evaluation of Big Wind altogether;**"

³⁶ HECO acknowledged that C&C, not a party to the Docket, drafted the Memorandum in Support of the Motion to Reconsider. HECO Memorandum in Support of Motion to Reconsider, filed 7/26/11, p. 2, FN2.

³⁷ Id., Attachment 1, p. 3.

- Evaluate the Big Wind Project on “price and non-price terms”;
- Select the Big Wind Projects for a shortlist;
- Require the Big Wind Projects to post a “bid deposit security”;
- Select the Big Wind Projects for a “Final Award” grouping;
- Include the Independent Observer appointed by the Commission in approving HECO’s decision to bifurcate the two non-conforming bids from the process.³⁸

Even more egregiously, HECO informed the Independent Observer **“some time before that there was consideration being given to special treatment³⁹ of the Big Wind proposals”** [Emphasis supplied].⁴⁰

Given the change in circumstances, FOL questions whether C&C now has sufficient site control on Lānaʻi to warrant continued exemption from the competitive bidding process required by the Framework, just as the Consumer Advocate questioned whether C&C “own[ed] the right to develop” a 200 MW wind power plant on Molokaʻi when C&C attempted to “assign” its rights to Molokai Renewables.⁴¹ Without current “site control” the July 14, 2011 Order accepting the C&C term sheet must be reconsidered and the requirement for competitive bidding be reinstated.

In sum, FWH, one of two non-conforming bidders subject to the Commission-granted waiver in Docket 2009-0327, failed to perform. And while C&C successfully met the initial deadline, it has subsequently relinquished ownership and control of the land proposed for its segment of the so-called Big Wind project. It is likely that there is virtually nothing left upon which the waiver can have effect, and there is no longer any basis to waive the requirement that the Lānaʻi portion of Big Wind is subject to the competitive bidding process. FOL respectfully submits that the public is best served by a Commission declaration that, in this instance, the waiver is invalid and require

³⁸ Decision and Order, Docket No. 2009-0327, filed 11/18/10, at 17-19.

³⁹ HECO confirmed that on “at least two occasions, the Governor [Lingle] held press conferences in her office specifically to discuss the Lanai project,” and further, that “in discussions with the Governor and her staff, it was made clear to HECO that the Company needed to find a way to try to accommodate them [Big Wind].” See HECO Response to PUC-IR-104, Docket 2009-0327, filed 6/14/2010.

⁴⁰ Decision and Order, Docket No. 2009-0327 at 17-19.

⁴¹ CA’s Response to Commission, filed 6/9/11 at 6.

the Lānaʻi portion of Big Wind be subject to competitive bidding, as contemplated by the Commission- adopted Framework.

On the other hand, the sense of urgency underlying HECO's request for a waiver from competitive bidding, which the Commission relied upon in granting the request, has vanished: there is now a sole bidder exempted from competitive bidding, with the result that C&C now has a significant competitive advantage over those bidding into Docket 2011-0225; the rush to achieve a "governmental interest" and desire to avoid a "delay" in negotiations has slowed considerably due to the Commission's own decision to require HECO to re-bid the Molokaʻi portion of Big Wind and the State's decision to squander two years in pursuing the HIREP: Wind PEIS. HECO's decision to incur substantial costs in "substantial technical studies related to the integration of Big Wind"⁴² was HECO's choice, not sanctioned by the Commission.

In addition, invalidating the C&C waiver and requiring competitive bidding would be consistent with the stated purposes of the Commission's July 14, 2011 Order:

1) there would be no pre-determined island upon which projects have to be constructed or to which cable spurs must be constructed ("the commission does not intend to favor particular ... geographical locations over another");

2) there would be no pre-determined type of renewable energy (a wind power plant on Lānaʻi) – bids could be for any type of renewable energy project ("the commission does not intend to favor particular energy resources ... over another") and

3) there would be no pre-determined bid (C&C) ("the commission seeks to encourage a greater number of renewable developers to enter into the process").⁴³

If, as is likely, the "Site Control" (ownership of 98% of the Island of Lānaʻi) alleged by C&C in the term sheet submitted on March 21, 2011 is no longer

⁴² Memorandum in Support of Petition, filed 11/16/09 in Docket 2009-0327, at p. 8.

⁴³ See p. 16 of the "Order Denying HECO's Request and Directing HECO to Submit a Draft RFP Pursuant to Framework" entered in this Docket on July 14, 2011.

adequate based upon the new evidence contained in the sales agreement dated July 27, 2012 (C&C no longer has “Site Control” to develop all components of the Lānaʻi Wind Power Plant Project for at least 20 years), then now is the time to include the Lānaʻi portion of the 200MW in the Commission’s broader definition of the Project and delete any pre-determined assumption that there will be a “wind farm” on the specific “Island of Lānaʻi” with a required “Lānaʻi cable option.” The Commission has not approved any RFP in Docket 2011-0225 yet and there is still time to require competitive bidding for all 400+MW.

VIII. THE RFP IN DOCKET 2011-0225 THAT REQUIRES AN UNDERSEA CABLE CONNECTION TO LĀNAʻI CANNOT BE APPROVED BY THE COMMISSION IF THE TERM SHEET UNDERPINNING THE WAIVER IN DOCKET 2009-0327 IS NO LONGER VALID

The draft RFP in Docket 2011-0225, which is being finalized and is due to be submitted to the Commission later this year, currently requires any bidder either to include within the bid (1) a proposal to construct an undersea electrical transmission cable capable of transmitting to O`ahu electricity generated from an industrial wind power plant located on Lānaʻi, or (2) a demonstration why it would not be economically feasible to do so.⁴⁴

The Commission cannot approve any final RFP that presumes, without an appropriate demonstration, subject to public review and comment, that there already exists “site control” for an industrial wind power plant located on the island of Lānaʻi, since C&C was exempted from competitive bidding on this basis.

Likewise, the Commission cannot approve any final RFP that presumes, without an appropriate demonstration, subject to public review and comment, that there is sufficient “site control” to support an undersea transmission cable to or from Lānaʻi. This is particularly true because this Commission currently has no jurisdiction over an undersea cable, as a “right of way” (ROW) or lease will not be granted for the cable until some future time, and as any undersea

⁴⁴ HECO Draft RFP, posted 9/28/12 at <http://www.heco.com/vcmcontent/GenerationBid/HECO/CompetitiveBid/Revised%20Draft%20RFP%20-%2009%2028%202012.pdf> at pp. 2-3.

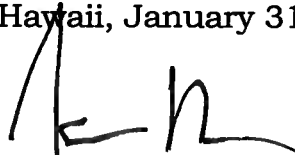
cable may be located and constructed beyond the three-mile seaward jurisdiction of the State of Hawai`i.

If C&C cannot specifically identify a location, and has no (or insufficient) “site control” at that location to satisfy this Commission’s own tests for an industrial wind power plant located on the island of Lāna`i (and this Commission above all others has put itself in the position to know whether or not this is true), potential bidders can no more be required to construct a cable to Lāna`i than to any other location or site in the state. FOL respectfully requests that the Commission delete any requirement from any final RFP that a Lāna`i connection must be bid and also delete any requirement from any final RFP for an alternative explanation why it is not economically reasonable.

IX. CONCLUSION

For all of the foregoing reasons, Friends of Lāna`i respectfully requests the Commission reconsider its Order granting HECO and C&C a waiver from competitive bidding in Docket No. 2009-0327. The term sheet upon which the waiver was based is no longer valid as C&C no longer owns Lāna`i and has lost the site control relied upon to secure the waiver.

DATED: Wailuku, Maui, Hawai, January 31, 2013.



Isaac Hall
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CERTIFICATE OF SERVICE

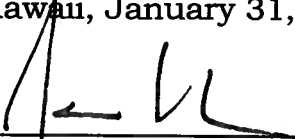
I hereby certify that a copy of the foregoing document(s) was duly served upon the party listed below by:

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