

DIVISION OF CONSUMER ADVOCACY
Department of Commerce and
Consumer Affairs
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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.)
)
For Approval Of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity.)

DOCKET NO. 2012-0212

DIVISION OF CONSUMER ADVOCACY'S
COMMENTS PURSUANT TO ORDER NO. 33516

I. INTRODUCTION

The Hu Honua biomass Power Purchase Agreement For Renewable Dispatchable Firm Energy and Capacity, dated May 3, 2012, ("PPA") was approved by Public Utilities Commission on December 20, 2013, pursuant to Decision and Order No. 31758. Since then, the project's completion was indefinitely delayed as a result of the following: 1) project developer Hu Honua Bioenergy, LLC's ("Hu Honua") inability to properly manage the design and construction phase of the development; 2) the failure of Hu Honua to obtain timely project financing; 3) litigation and mechanic's liens filed against Hu Honua by various design professionals, contractors, and subcontractors due to Hu Honua's non-payment of monies owed under various contracts and subcontracts; and 4) Hu Honua's breach of a Stipulated Judgment entered against Hu Honua by

Hawaiian Dredging Construction, Inc. (“Hawaiian Dredging”) in the amount of \$30 million that resulted in Hawaiian Dredging exercising its rights pursuant to the Stipulated Judgment to execute on its judgment, which included taking control over the project property. The Division of Consumer Advocacy (“Consumer Advocate”) knows of no facts or evidence that indicates that Hawaii Electric Light Company, Inc. (“Hawaii Electric Light”) caused or contributed to Hu Honua’s development, construction, and financing problems. Hu Honua has represented that the project is approximately 50% complete. Hu Honua estimates that it would need until August 30, 2017, a delay of over 1 ½ years, to be commercially operational, if this project is allowed to move forward.¹

Hawaii Electric Light asserts that Hu Honua’s failure to meet two significant contractual milestones: (1) the boiler hydro test date of July 22, 2015, and (2) commercial operations deadline of January 22, 2016;² constitute “Events of Default,” pursuant to the PPA, specifically sub-section 8.1.

II. WAS IT REASONABLE FOR HAWAII ELECTRIC LIGHT TO TERMINATE THE CONTRACT?

The PPA entered into by Hu Honua and Hawaii Electric Light provides the contractual obligations of both parties and any resulting Events of Default legally entitles either party to rely upon the default and termination provisions of the PPA.

¹ Hawaii Electric Light letter, dated February 16, 2016, at footnote 2.

² See PPA, Attachment B. The “Pass boiler hydro test” and “Commercial Operation Date Deadline” is 18 and 24 months, respectively, after the PUC Approval Date.

In this instance, Hu Honua's failure to meet the project completion milestones is defined as an event of default. When one party fails to perform consistent with the PPA, that party must be held to bear the consequences of its actions based upon the terms of the contract. In this instance, Hu Honua is the party that failed to meet its obligations under the PPA; therefore, it is reasonable for Hawaii Electric Light has to exercise its rights under the contract. If Hawaii Electric Light does not exercise its right to terminate the contract, then not only can it not seek alternatives to this project, Hawaii Electric Light may be deemed to have waived such rights and would face serious repercussions from regulators for granting unilateral extensions, especially if the project ultimately fails.

Until the PPA is terminated, Hawaii Electric Light is not in a position to seek potential alternatives to this project. If Hawaii Electric Light pursued any such alternatives while the PPA was still valid and binding, Hu Honua may allege that Hawaii Electric Light acted in bad faith in an attempt to subvert Hu Honua's ability to perform under the existing PPA. Neither the Commission nor the Consumer Advocate should require or suggest that Hawaii Electric Light seek alternatives to the Hu Honua project until such time that the Hu Honua PPA is deemed terminated and no longer binding on the parties.

Renewable project developers, such as Hu Honua, should not assume that the passage of Act 97, Session Laws of Hawaii 2015, setting the Renewable Energy Portfolio Standards ("RPS") at 100% by the year 2045, suggests that utility regulators will allow for extensions of the PPA in order to allow a troubled project to be completed well after the agreed upon and approved deadlines. Both parties to the PPA must fulfill

their respective contractual obligations in good faith and in a timely manner, if Hawaii is to reach the 100% RPS goal.

The Consumer Advocate recommends that the Commission support Hawaii Electric Light's determination that Hu Honua is in default of the PPA. To do otherwise would set a bad precedent that would allow material breaches of a developer's contractual obligations without repercussions.

III. CONSUMER ADVOCATE'S RECOMMENDATIONS.

It is important to note that the Commission previously addressed concerns regarding extensions of critical milestone dates in another docket. Honua Power, LLC ("Honua") negotiated a PPA for a 6.6 MW biomass gasification power plant in Docket No. 2010-0010 ("Honua PPA"). Subsequent to the Commission's approval of the project,³ Hawaiian Electric Company, Inc. ("Hawaiian Electric") filed a Second Amendment to the Honua PPA requesting to extend deadlines for critical milestones which included, among other things the following: (1) Honua's Irrevocable Standby Letter of Credit as defined in the Honua PPA required for the Interconnection Cost; (2) the in-service date; and (3) the reporting milestone date related to the production of documentation supporting that Honua has obtained all governmental permits required for commercial operation. Upon approving the Second Amendment in Decision and Order No. 31044, filed on February 27, 2013 ("Decision and Order No. 31044"), the Commission set forth a condition that Honua, through Hawaiian Electric, must provide the Commission and Consumer Advocate with evidence of its financial closing by April 1, 2013. Also, the Commission urged Hawaiian Electric, "in future

³ See Decision and Order, filed on January 19, 2011, in Docket No. 2010-0010.

instances where liquidated damages are foregone and / or significant delays for the in-service date are experienced, to seek other advantages for its ratepayer by, for example requiring a reduction in energy pricing.”⁴ The Commission in its Decision and Order No. 31044 also noted the following:

Pursuant to the PPC [Honua Power Purchase Contract], as amended by the First Amendment, Honua Power's failure to meet the in-service date would have constituted an "Event of Default" had the Contracting Parties not amended the PPC. Among other things, HECO would have had the right to terminate the PPC as a result of Honua Power's failure to meet its milestones. Generally speaking, termination for failure to meet significant milestones is an important PPA provision, since it allows HECO to move to other developers with projects that are shovel ready. Electric utility ratepayers, who have large monthly bills, need cost competitive renewable solutions immediately.

...

HECO should take greater care to ensure that its PPAs with developers are on track and should provide more timely notification to the commission and Consumer Advocate in the future. Developers similarly should not delay the schedules to which they agreed in good faith and then expect to obtain extensions without consequences resulting from their failure to timely act.⁵ [footnote omitted]

The Commission granted two extensions to Honua to meet the condition in Decision and Order No. 31044. In the first extension (See Order No. 31136 Extending Approval of Second Amendment to Power Purchase Agreement, filed on April 1, 2013 (“Order No. 31136”), Honua made concessions to Hawaiian Electric in exchange for the delay in project availability in which approximately \$656,694 of estimated interconnection costs were shifted from Hawaiian Electric to Honua and Hawaiian Electric no longer bore the fiscal responsibility for cost overruns in the cost of interconnection. In granting the second extension (See Order No. 31409 Extending

⁴ Decision and Order No. 31044, at 10.

⁵ Decision and Order No. 31044, at 10-12.

Approval of Second Amendment to Power Purchase Agreement, filed on August 14, 2013 ("Order No. 31409"), the Commission revealed its concerns regarding extensions and stated the following:

The commission has accommodated Honua Power's multiple requests to extend the deadline to file evidence of its financial closing, and has been rewarded with Honua Power's suggestion that the commission itself bears responsibility for the developer's difficulty in achieving satisfactory project financing. The commission reminds Honua Power that the onus for negotiating successful project financing remains squarely upon the developer, and that the docket was reopened in response to Honua Power's request to extend their project deadlines.

....

The commission is mindful that the total amount of as-available renewable energy resources that the Oahu grid can accommodate utilizing existing generation technology but without significant curtailment may be declining. As a result, HECO cannot and should not hold a place in the queue in perpetuity for developers when there is the potential that such placeholder will limit other potentially viable projects. Accordingly, please note that this will be the final extension for any of Honua Power's project deadlines.⁶ [footnote omitted]

Further, the Commission specifically discussed the perceived negative impacts of such delays:

While the commission acknowledges that ratepayers are not affected in terms of pricing or overall revenue requirements as a result of the Second Amendment, the commission questions whether HECO's ratepayers will experience some negative effects as a result of the Second Amendment. Specifically, as a result of the Second Amendment, HECO's ratepayers must endure a significant delay by which it can receive renewable energy from Honua power, potentially at a less expensive rate than may be provided by HECO using traditional fossil fuel-fired generation.⁷

⁶ Decision and Order No. 31409, at 7-8.

⁷ Decision and Order No. 31044, at 10.

The Hu Honua PPA has a levelized price, including both energy and capacity payments, of approximately \$253 per MWH (25.3 cents per kWh).⁸ At the time this PPA was analyzed and approved, the price terms of the PPA would have provided Hawaii Electric Light's ratepayers a net benefit compared to the cost of energy from a comparably dispatched oil-fired unit. Given the recent steep decline in oil prices, the current PPA price is likely to result in a bill increase for Hawaii Electric Light customers. If Hu Honua's biomass project is to be salvaged, it must be at pricing terms that will result in a net benefit and bill decrease for Hawaii Electric Light customers.

Therefore, based upon the Commission's guidance as set forth in the Honua docket, the Consumer Advocate recommends that the Commission takes such action that includes, but is not limited, to the following:

1. On March 1, 2016, deem the PPA between Hu Honua and Hawaii Electric Light terminated;
2. After March 1, 2016, require Hawaii Electric Light to seek alternatives to the Hu Honua project, then set a deadline of June 1, 2016 by which Hawaii Electric Light will report to the Commission and the Consumer Advocate the alternatives it has determined to be feasible and reasonable; and
3. In the event that the Commission determines that the Hu Honua PPA should not be terminated, then the Commission should order that Hawaii Electric Light and Hu Honua enter into good faith negotiations to salvage this biomass project with an order to the parties that the price terms for a

⁸ Reply Statements of Positions filed by Hawaii Electric Light and the Consumer Advocate on May 7, 2013, in Docket No. 2012-0212.

new or amended PPA provide a net benefit and bill decrease to Hawaii Electric Light customers. Further, the Commission should issue an order to show cause to Hu Honua that requires Hu Honua to provide the following, if this project is to be allowed to move forward:

- a. Adequate proof of financing that has no contingencies other than the approval of a new or amended PPA;
- b. An executed contract with an experienced and capable EPC contractor;
- c. An executed contract with a licensed, experienced, and capable general contractor who will complete the biomass plant;
- d. A Critical Path Method schedule for the completion of the project;
- e. Adequate proof that Hu Honua is capable of operating the biomass facility;
- f. Pro formas that show that Hu Honua will be a going concern in both the short and long term; and
- g. Adequate proof, including, but not limited to, fuel supply contracts that show that Hu Honua will be able to obtain adequate fuel supply at reasonable costs in both the short and long term in order to successfully operate the plant at reasonable costs and to deliver the agreed upon energy to Hawaii Electric Light's system.

IV. CONCLUSION.

The Consumer Advocate is well aware of the millions of dollars that have already been incurred by numerous parties to this biomass plant development. The Commission is faced with a difficult decision on whether to support the termination of the PPA or to allow the Hu Honua developers to move forward with the project. The Consumer Advocate's recommendations above are intended to ensure that Hawaii Electric Light's customers receive a net benefit and bill decreases.

DATED: Honolulu, Hawaii, February 23, 2016.

Respectfully submitted,

By 
FOR JEFFREY T. ONO
Executive Director

DIVISION OF CONSUMER ADVOCACY

