

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

-----In the Matter of-----)
)
PUBLIC UTILITIES COMMISSION) DOCKET NO. 2013-0168
)
Opening a Proceeding to Review)
the Progress of Castle & Cooke)
Resorts, LLC's Proposed Lanai)
Wind Project.)
_____)

ORDER NO. 31355

INITIATING PROCEEDING

PUBLIC UTILITIES
COMMISSION

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INITIATING PROCEEDING

By this Order, the commission initiates a proceeding to review the progress of the potential 200 megawatt ("MW") wind project CASTLE AND COOKE RESORTS, LLC ("Castle & Cooke") proposed to develop on the island of Lanai.

I.

Background

A.

Docket Nos. 2007-0331, HECO's First Competitive Bidding Process and 2009-0327, HECO's Petition for Declaratory Order

On May 19, 2008, in Docket No. 2007-0331, HAWAIIAN ELECTRIC COMPANY, INC.'s ("HECO") first competitive bidding process, HECO submitted its Proposed Final RFP for Non-Firm Renewable Energy Projects, Island of Oahu ("Final 2008 Oahu

RFP") to the commission.¹ The Final 2008 Oahu RFP solicited proposals for renewable energy contracts between 5 MW and 100 MW ("conforming bids"), but contained a clause that allowed bidders to submit alternate proposals ("non-conforming bids") for HECO's consideration.² The commission approved the issuance of the Final 2008 Oahu RFP by letter dated June 18, 2008 in Docket No. 2007-0331. In September 2008, HECO received a non-conforming bid from Castle & Cooke for a 400 MW wind project to be sited on the island of Lanai.³ HECO also received non-conforming bids from First Wind Hawaii, LLC ("First Wind") for construction of a 50 MW wind farm as well as a 350 MW wind farm on Molokai, with the projects to be known as "Ikaika Wind Power."⁴

On December 31, 2008, HECO, Castle & Cooke, and First Wind executed an agreement seeking to bifurcate the Castle & Cooke and First Wind wind farm proposals from the Final Oahu RFP

¹See Letter from HECO to the commission transmitting the Proposed Final RFP, dated May 19, 2008, filed in Docket No. 2007-0331.

²See Proposed Final RFP, dated May 19, 2008, filed in Docket No. 2007-0331, para. 2.7 at 11.

³See Letter Request for Confirmation that Supplementation is Acceptable, filed May 23, 2011, in Docket No. 2009-0327 ("Assignment Request"), at 1.

⁴Id.

("HECO Wind Bifurcation Agreement").⁵ Under the HECO Wind Bifurcation Agreement, the three stipulating parties agreed that HECO would seek commission approval for Castle & Cooke and First Wind to transfer their September 2008 project proposals, as submitted in response to the Final 2008 Oahu RFP, into a separate negotiation and evaluation process for the Lanai/Molokai wind projects.

On November 16, 2009, in Docket No. 2009-0327, HECO filed a petition with the commission seeking a Declaratory Order that HECO's bifurcation of Castle & Cooke's and First Wind's non-conforming proposals from the Final 2008 Oahu RFP was proper. On November 18, 2010, the commission issued its Decision and Order in Docket No. 2009-0327 ("Waiver D&O"), declaring that the proposed large wind farm projects, as described in HECO's petition filed on November 16, 2009, were not properly submitted through the Competitive Bidding Framework. However, the commission found that, in light of the public interest and to achieve a stated governmental objective, HECO was entitled to a waiver from the Competitive Bidding Framework, provided that: (1) fully executed term sheets for each of the Lanai/Molokai Wind Farm projects were filed within

⁵A copy of the HECO Wind Bifurcation Agreement was submitted to the commission by letter filed March 16, 2009 in Docket No. 2007-0331. The HECO Wind Bifurcation Agreement was filed under confidential seal, pursuant to Protective Order No. 23875, filed on December 6, 2007 in the same docket.

four months from the date of the Waiver D&O, unless otherwise ordered by the commission, and (2) documentation supporting the fairness of the price negotiated between HECO and the independent power producers was included in any application for approval of a power purchase agreement ("PPA").⁶

With respect to the commission's first condition for waiver of the Competitive Bidding Framework, the term sheet required agreement on all material terms, including: (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.⁷ On March 21, 2011, a fully executed term sheet between HECO and Castle & Cooke was timely filed in Docket No. 2009-0327; however, no term sheet was executed between HECO and First Wind due to First Wind's inability to secure a suitable site for its proposed project.⁸

⁶See Waiver D&O, filed November 18, 2010, in Docket No. 2009-0327, at 26.

⁷Id.

⁸See Letter from HECO to the commission, dated and filed on March 21, 2011, in Docket No. 2009-0327, at 1; Letter from HECO

According to HECO, on March 25, 2011, the utility notified Castle & Cooke that it had the option to develop a larger wind farm on Lanai, since a term sheet was not executed with First Wind by the March 18, 2011 deadline.⁹ The Castle & Cooke term sheet included an option for it to assign a portion of its larger project development opportunity to a project developer on Molokai, subject to the commission's acceptance of this option, as well as the development of acceptable terms and conditions for a Molokai wind farm including pricing and community benefits.¹⁰ By letter, dated April 7, 2011, Castle & Cooke informed HECO that it selected the "Second Option," which provided that Castle & Cooke would develop a 200 MW wind farm on Lanai and arranged for the development of a wind farm on

to the commission, dated and filed on May 21, 2011, in Docket No. 2009-0327, at 1.

⁹See id.

¹⁰Id. Under the Castle & Cooke term sheet, if Castle & Cooke elects the "Second Option" (as defined in the Castle & Cooke term sheet), the developer of the Molokai wind farm shall propose comparable community benefits for Molokai and reach agreement on the community benefits and supplementation of the Castle & Cooke term sheet to include similar terms and conditions for a power purchase agreement for the Molokai wind farm project within specified time frames provided in the Castle & Cooke term sheet. Id.

Molokai, such that the capacity of the Lanai and Molokai Wind Farms total 400 MW.¹¹

On May 23, 2011, in Docket No. 2009-0327, HECO filed its Assignment Request Letter, seeking confirmation from the commission that it is acceptable for HECO to submit a supplemented term sheet for a power purchase agreement with Castle & Cooke. Specifically, HECO requested commission confirmation that it is acceptable to supplement the existing term sheet with Castle & Cooke to reflect an assignment of a portion of the development rights associated with the Molokai portion of the Big Wind Project to a new party, namely Molokai Renewables, LLC. By Order Denying HECO's Request and Directing HECO to Submit a Draft RFP Pursuant to Framework, filed on July 14, 2011, in Docket No. 2009-0327, the commission denied HECO's request ("Order Denying Assignment Request").

With respect to the non-conforming bids HECO received during its Final 2008 Oahu RFP, as a result of HECO's actions and the commission's decisions on the non-conforming bids, just one project remained - a potential 200 MW wind project to be

¹¹Id. at 1-2. The April 7 letter includes (1) a copy of the executed letter of intent between Castle & Cooke and Molokai Renewables LLC (an affiliate of Pattern Energy Group LP) relating to the transfer of Castle & Cooke's rights to develop 200 MW of wind energy on Molokai and (2) a copy of the executed letter of intent between Molokai Renewables LLC and Molokai Properties Limited, evidencing site control on Molokai by Molokai Renewables for the project.

developed by Castle & Cooke on Lanai ("Castle & Cooke's Lanai Wind Project"). First Wind, who proposed to develop the second 200 MW of renewable energy originally carved out by HECO, Castle & Cooke, and First Wind under the Bifurcation Agreement as a potential wind project to be developed on Molokai, failed to meet the requirements set forth by the commission under the Waiver D&O.¹² By the commission's Order Denying the Assignment Request, HECO and Castle & Cooke's attempt to assign the development rights for the 200 MW project that First Wind intended to develop was rejected. Instead of approving the Assignment Request, the commission instructed HECO to solicit proposals for an additional 200 MW or more of renewable energy, which became the basis for the instant proceeding.

B.

Docket No. 2012-0157, Indirect Sale of Lanai Public Utilities

By Decision and Order No. 30998, filed on February 8, 2013, the commission, subject to certain conditions: (1) approved, pursuant to HRS § 269-7(a), and to the extent

¹²The commission is aware that a wind project on Molokai is less likely to be developed since Molokai Properties Inc. (commonly known as "Molokai Ranch") in February issued a statement indicating that it did not ". . . renew the agreement for the proposed wind farm project on Molokai Ranch lands at this time." See Catherine Cluett, Updated: Molokai Ranch Says No to Wind Project, The Molokai Dispatch, February 7, 2013; Catherine Cluett, Big Wind: Not as Big, The Molokai Dispatch, May 31, 2013.

applicable, HRS § 269-17.5, the indirect sale and transfer from Castle & Cooke, Inc. to Lanai Island Holdings, LLC, of all the membership interests of Castle & Cooke Resorts, Inc.'s wholly owned subsidiary, Manele Water Resources, LLC; (2) approved, pursuant to HRS § 269-7(a), and to the extent applicable, HRS § 269-17.5, the indirect sale and transfer from Castle & Cooke, Inc. to Lanai Island Holdings, LLC, of all the stock of Castle & Cooke Resorts, Inc.'s wholly owned subsidiary, Lanai Water Company, Inc.; and (3) approved, pursuant to HRS § 269-7(a), the indirect sale and transfer from Castle & Cooke, Inc. to Lanai Island Holdings, LLC, of all the stock of Castle & Cooke Resorts, Inc.'s wholly owned subsidiary, Lanai Transportation Company, Inc. The commission, consistent with the authority granted to it via chapter 269, HRS, reviewed only the indirect sale and transfer of the public utilities on Lanai, as described immediately above. However, a much larger sale and transfer occurred on Lanai, involving Lawrence J. Ellison's agreement to:

purchase the two resort hotels (the Four Seasons Resorts Lanai at Manele Bay, the Four Seasons Resorts Lanai, Lodge at Koele), two championship golf courses and club houses (The Experience at Koele and The Challenge at Manele), over 88,000 acres of land (including, without limitation, the Koele Project District (600 acres of residential development), the Manele Project District (800 acres of residential development), Lanai City properties (248 acres of various commercial and residential assets), Koele Stables, Lanai

Pines Sporting Clays, CCI's interest in La Ola Solar Farm that sells power to Maui Electric Company, Limited, administrative buildings and central support services assets, employee rental housing, parks and recreation facilities, Club Lanai site and the regulated utilities (Manele Water, Lanai Transportation, and Lanai Water) whose largest customers are the resorts and developments, and other assets. . . . This unique opportunity will be consummated through a purchase and sale of all of the membership interests of CC Resorts, which includes all of CC Resorts' subsidiary entities (including the CCR Regulated Subsidiaries), two other CCI unregulated subsidiaries, and over 88,000 acres of land (including approximately 86,000 acres of land from CCI) (the "Lanai Transaction") .¹³

A review of the redacted version of the Sale Agreement for the Lanai Transaction demonstrates that Castle & Cooke intends to retain for itself the right to develop the Castle & Cooke's Lanai Wind Project. Specifically, the exhibit to the Sale Agreement provides:

Seller shall retain at closing the right to develop the "Big Wind" project, which is a planned wind farm on approximately 7,000 acres of land on the northwest corner of the island capable of producing a contemplated 200 to 400 megawatts of renewable energy ("Wind Project"), as well as all rights and interests in existing studies and contracts directly related to the Wind Project¹⁴

¹³Castle & Cooke, Inc.'s, Castle & Cooke Resorts, LLC's, Manele Water Resources, LLC's, Lanai Transportation Company, Inc., and Lanai Water Company. Inc.'s Application; Exhibits A - J; Verifications; and Certificate of Service, filed on June 19, 2012, in Docket No. 2012-0157, at 2 - 3.

¹⁴Exhibit A, Sale Agreement, filed on July 31, 2012, in Docket No. 2012-0157, at 1 (Exhibit A is sealed, in part, under

II.

Discussion

A.

Purpose for Initiating this Proceeding

As a result of the commission's Waiver D&O and Order Denying the Assignment Request, HECO has the opportunity to negotiate a PPA with Castle & Cooke. No "development rights" have been extended to or vested in Castle & Cooke's Lanai Wind Project and the Waiver D&O should not be construed as such. The Waiver D&O only provides HECO and Castle & Cooke with an opportunity to negotiate a PPA without HECO's need to conduct a process in strict conformance with the commission's Competitive Bidding Framework. Therefore, if and when a PPA is filed with the commission for review and approval, the PPA will be evaluated solely on its merits at the time of submittal.

Whether Castle & Cooke's Lanai Wind Project is in the public interest and should be developed, will be determined as part of the comprehensive evaluation of potential as-available renewable energy projects and grid infrastructure development options. The commission intends to evaluate Castle & Cooke's Wind Project as a combined resources proposal (i.e., wind project and generation tie transmission cable), without regard

Protective Order No. 30455, filed on June 20, 2012, in Docket No. 2012-0157).

to a request for a certificate of public convenience and necessity ("CPCN"), as required by chapter 269, Part VIII, Interisland Transmission System. The commission will not assume that a CPCN must be granted pursuant to HRS § 269-132 when evaluating the combined resources proposal to determine if it is in the public interest.

Given the Lanai Transaction and the resulting extent to which Castle & Cooke voluntarily relinquished its ability to control the assets it previously controlled, some uncertainty arises as to whether Castle & Cooke retains an equivalent ability to develop its Lanai Wind Project as it did when it submitted its non-conforming bid to HECO in 2008 and its term sheet in 2011. As a result, the commission initiates this proceeding to review the progress of Castle & Cooke's Lanai Wind Project.¹⁵

¹⁵HECO included numerous references to Castle & Cooke's Lanai Wind Project in its September 28, 2012 version of its 200 MW or more renewable energy request for proposals for delivery to or on the island of Oahu. By Order issued concurrently with this Order, the commission instructed HECO to remove such references to the Castle & Cooke Lanai Wind Project and concluded it would open the instant proceeding to review the progress of the proposed wind project.

B.

Commission Authority

Hawaii Revised Statutes ("HRS") § 269-7 states, in relevant part:

- (a) The public utilities commission and each commissioner shall have the power to examine the condition of each public utility, the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours, and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies, or corporations, its compliance with all applicable state and federal laws and with the provisions of its franchise, charter, and articles of association, if any, its classifications, rules, regulations, practices, and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations.

.

- (c) Any investigation may be made by the commission on its own motion, and shall be made when requested by the public utility to be investigated, or by any person upon a sworn written complaint to the commission, setting forth any prima facie cause of complaint. A majority of the commission shall constitute a quorum.

HRS § 269-7(a) and (c) (emphasis added). Similarly, in HRS § 269-6, the commission is vested with "general supervision . . . over all public utilities."¹⁶

C.

Named Parties

Since HECO and Castle & Cooke, as the contracting parties to any PPA that might be developed and filed, and the Consumer Advocate¹⁷ will all be impacted by the outcome of this proceeding, the commission will name them as parties to this docket. Their involvement and participation in this proceeding will assist the commission in developing a sound record for its investigation. Within twenty days of the filing of this Order, Castle & Cooke shall file a notice of appearance indicating its representative for service of future filings and orders.

¹⁶Commission investigatory authority is also set forth in HRS § 269-15 and Hawaii Administrative Rules ("HAR") § 6-61-71.

¹⁷The Consumer Advocate is statutorily mandated to represent, protect, and advance the interests of all consumers of utility service and is, ex officio, a party to any proceeding before the commission. See HRS § 269-51; HAR § 6-61-62.

D.

Procedural Matters

Any interested individual, entity, agency, or community or business organization may file a motion to intervene or participate without intervention in this docket. A motion to intervene or participate without intervention must be filed not later than twenty days from the date of this Order, pursuant to HAR § 6-61-57(3)(B). Motions to intervene or participate without intervention must comply with HAR Chapter 6-61, Rules of Practice and Procedure Before the Public Utilities Commission. Any intervenor or participant will not be allowed to broaden the issues or unduly delay the proceeding.

Within twenty days of the filing of this Order, Castle & Cooke will file a written statement with the commission indicating the status of its Lanai Wind Project. Such written statement shall include a summary of its ability to develop its Lanai Wind Project, given the uncertainty created as a result of the Lanai Transaction.

III.

Orders

THE COMMISSION ORDERS:

1. An investigative proceeding is initiated to review the progress of Castle & Cooke's Lanai Wind Project.

2. HECO, Castle & Cooke, and the Consumer Advocate are parties to this investigative docket. Castle & Cooke shall file a notice of appearance within twenty days of the filing of this Order indicating its representative for service of future filings and orders.

3. A motion to intervene or participate without intervention must be filed not later than twenty days from the date of this Order, pursuant to HAR § 6-61-57(3)(B). Motions to intervene or participate without intervention must comply with HAR Chapter 6-61, Rules of Practice and Procedure Before the Public Utilities Commission.

4. Castle & Cooke shall file a written statement not later than twenty days from the date of this Order, specifying in detail the status of its Lanai Wind Project and addressing the uncertainty created as a result of the Lanai Transaction.

DONE at Honolulu, Hawaii JUL 11 2013.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Hermina Morita
Hermina Morita, Chair

By Michael E. Champley
Michael E. Champley, Commissioner

By Lorraine H. Akiba
Lorraine H. Akiba, Commissioner

APPROVED AS TO FORM:

Catherine P. Awakuni

Catherine P. Awakuni
Commission Counsel

2013-0168.do

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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