



Via Hand Delivery

February 18, 2020

Mr. Daniel E. Orodener
Executive Officer
State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
235 South Beretania Street, Room 406
Honolulu, Hawaii 96813

**Re: LUC Docket No. A87-610, In re Petition of Tom Gentry and Gentry Pacific, Ltd.
(Successor Petitioner – Kamehameha Schools) – Findings of Fact, Conclusions of
Law, and Decision and Order Granting with Modification Motion for Modification
and Time Extension (“Order”), Filed February 11, 2020**

Dear Mr. Orodener:

On behalf of Waiawa Solar Power, LLC (“WSP”), whose solar project is the subject of the above-referenced Order that was issued by the Commission on February 11, 2020, we are writing to inform you that we have objections to the Order as currently drafted.

I. Administrative Rules from October 2019 Should Apply to the Order

Specifically, the Order appears to apply administrative rules that were enacted in October 2019 and not the rules in place on July 24, 2019, the date that the Trustees of the Estate of Bernice Pauahi Bishop, dba Kamehameha Schools filed its Motion for Modification and Time Extension. The administrative rules in effect from 2013 to October 2019 should be applied in the instant docket. Most notably, the language pertaining to Orders granting, denying or disposing of motions, including motions to amend, found in HAR § 15-15-70(m) differs from the 2013 version and the 2019 version. The 2013 administrative rules require that all of the commissioners who were present at the time of decision making and voted to affirmatively vote on the decision must sign the Order¹. In contrast, the 2019 version only requires the Chair to sign orders governing motions, including motions to amend decision and orders relating to district boundary

¹ Orders granting, denying, or otherwise disposing of motions relating to amendments of decisions and orders in district boundary amendment proceedings and to special permits shall be signed by the commissioners who have heard or examined the evidence relating to the motion and who have voted affirmatively on the decision.

HAR 15-15-70 (m) (2013).

MAILING ADDRESS
Post Office Box 131 / Honolulu, HI 96810

STREET ADDRESS
First Hawaiian Center / 999 Bishop Street, Suite 1400 / Honolulu, HI 96813
T 808.539.0400 / F 808.533.4945 / E atty@awlaw.com / www.ashfordwrison.com

amendments. As such, the Order dated February 11, 2010 is defective and should be cancelled and then re-issued using the proper procedure pursuant to the October 2019 rules.

II. Condition 8 (Timeframe of Interim Use) Does Not Reflect Commission's Intent

In addition to the defective form of the Order, the Order fails to include relevant findings of fact that are essential to support the Conditions and that the Conditions, as drafted, do not fully reflect the Commission's intent. Specifically, Condition 8 relating to the Timeframe of Interim Use fails to fully capture the Commission's intent. This condition currently states as follows:

8. Timeframe of Interim Use. The interim use of the approximately 200-acre portion of the Petition Area as shown on Petitioner's Revised Master Plan and Schedule for Development filed on October 7, 2019, for the proposed solar farm, including all permitting, construction, operation, and decommissioning activities associated with the solar farm, shall not exceed November 26, 2049. If WSP or its successor can demonstrate before November 26, 2049, that it has secured a PUC-approved PPA for extension of the operation of the solar farm and a lease extension with Petitioner, the interim use of the approximately 200-acre site for the proposed solar farm shall be extended to December 31, 2059.

WSP objects to the current language of Condition 8 as it fails to reflect three salient points raised during the Commission's deliberations: (1) it is not the intention of the Commission that WSP needs to appear before the Commission and merely notice shall suffice; (2) the possibility of a third party, other than Hawaiian Electric Company ("HECO"), to purchase power directly from WSP; and (3) the extension shall be automatic once such notice is provided. These positions are supported by the following excerpts from the transcripts:

COMMISSIONER WONG: So just like a judicial notice or something saying "We got that extension," or how would we be notified?
COMMISSIONER GIOVANNI: So I think as long as they have those two documents, that any claim made against them, I mean, by virtue of this order, it would demonstrate that they could operate until 2059. I don't think they have to come back before this body again.

See, January 9, 2020, Transcript ("TR") p. 256, lines 12-20.

COMMISSIONER WONG: Wait. Just one more.
So it's automatic extension -- going back to my



previous question. Automatic extension so that there could be a third party again instead of Hawaiian Electric; correct?

COMMISSIONER GIOVANNI: (Nodding head.)

COMMISSIONER WONG: Okay. Thank you.

See, January 8, 2020, Tr. p. 257, lines 18-24.

Based on the deliberations and clarifications sought by Commissioner Wong, it is clear that the Commission intended that submission of documents would suffice to trigger the automatic extension to December 31, 2059, that a third-party power purchaser may be sufficient for an extension, and that a hearing would not be required as an extension. In short, the extension should be automatic without the need for a hearing. As such, WSP respectfully requests that (i) the findings of fact include these excerpts from the transcripts reflecting the Commission's intention; and (ii) Condition 8 be amended as follows:

The interim use of the approximately 200-acre portion of the petition area for the proposed solar farm, including all permitting, construction, operation and decommissioning activities associated with the solar farm shall not exceed November 26, 2049. The period shall be automatically extended until December 31, 2059 if WSP or its successor can demonstrate before November 26, 2049 by filing with the LUC a written notification that it has secured a PUC-approved power purchase agreement for extension of the solar farm, if required, or entered into an extended offtake agreement with a third party and a lease extension with Kamehameha Schools has been entered into for the extended term.

III. Conclusion

In conclusion, we respectfully request that the Order dated February 11, 2020 be amended to adequately reflect the record with respect to Condition 8 and that the commissioners who were present and voted on the motion at the January 9, 2020 sign the new order.

Very truly yours,

ASHFORD & WRISTON
A Limited Liability Law Partnership LLP



Naomi U. Kuwaye
NUK:lyk



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cc: Jennifer A. Lim, Esq./Puananiona P. Thoene, Esq., Kamehameha Schools
Ms. Mary Alice Evans, Director, State of Hawaii, Office of Planning
Ms. Kathy K. Sokugawa, Director, City and County of Honolulu Department of Planning
and Permitting
Paul S. Aoki, Esq./Duane Pang, Esq., Department of the Corporation Counsel
Claire E. Connors, Esq./Dawn Takeuchi-Apuna, Esq., Department of the Attorney
General

