

Gary Zamber 8446
21 Waianuenue Ave., # 3
Hilo, HI 96720

Phone: (808) 969-3600
E-mail: gzamber@gmail.com
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PUNA PONO ALLIANCE, a	)	Civil No. 15-1-0034
Hawai`i non-profit association, <i>et al.</i>,	)	(Hilo) (Declaratory Judgment)
)	
Plaintiffs,	)	PLAINTIFFS' MEMORANDUM OPPOSING
	)	DEFENDANT COUNTY OF HAWAII'S
vs.	)	CROSS-MOTION FOR SUMMARY
	)	JUDGMENT filed on July 1, 2016;
PUNA GEOTHERMAL VENTURE,	)	DECLARATION OF GARY ZAMBER,
a Hawai`i Partnership, <i>et al.</i>,	)	EXHIBITS A-D; CERTIFICATE OF SERVICE
)	
Defendants.	)	<u>Hearing:</u> Thursday, July 21, 2016
	)	Time: 8:00 a.m.
	)	Judge: Hon. Greg K. Nakamura
	)	Trial date not set

**PLAINTIFFS' MEMORANDUM OPPOSING
DEFENDANT COUNTY OF HAWAII'S
CROSS-MOTION FOR SUMMARY JUDGMENT**

Three motions are being heard on July 21, 2016: (a) the Plaintiffs' May 25, 2016, motion for partial summary judgment declaring that enactment of Hawai`i County Code (HCC) § 14-114 was authorized by Hawai`i Revised Statutes (HRS) § 46-17; (b) the motion for summary judgment filed on June 30, 2016, by Defendant Puna Geothermal Venture (PGV), opposed by Plaintiffs' separately filed memorandum; and (c) the motion for summary judgment filed on July 1, 2016, by Defendant County of Hawai`i (COH or County), opposed by this memorandum. All of Plaintiffs' filings regarding these motions

and the Plaintiffs' filings with regard to motions previously filed by PGV and COH on March 3rd and 5th of 2015,¹ respectively, are incorporated herein by this reference.

I. Introduction

The County's supporting memorandum begins with a political statement asserting the conceptual value of geothermal energy: "geothermal energy production ... is critically important to the State of Hawai'i's intent to achieve 100 percent renewable energy Unfortunately, it is under attack by special interests."

The County's memorandum ends by arguing this case involves a political question arising from potential embarrassment of the County administration and its decision not to enforce the law against PGV, presumably based on its opinion as to PGV's vested rights.

Plaintiffs take exception to the implied characterization of this suit as an attack by special interests on a critically important source of renewable energy. Plaintiffs' suit asks the Court to declare that the County's night drilling ban is applicable to PGV. Whether PGV has vested rights, as the County administration has steadfastly asserted, is a legal issue that will be decided by this Court. The County's memorandum says (page):

the Hawai'i County Council ("Council") did not intend – as its legislative history confirms – that the Ordinance apply to the geothermal development activities PGV conducts pursuant to its Amended Geothermal Resource Permit issued in 2001. Seeking to override the Council's documented intent, Plaintiffs attempt to instigate judicial interference with legislative discretion to compel PGV's compliance with the Ordinance. Nonetheless, it is impossible for this Court to grant Plaintiffs their requested relief without disrespecting the Council's discretion.

Plaintiffs incorporate here by this reference the section of their memorandum in opposition to PGV's memorandum titled *The County's Legal Opinion is Just That*, that refutes the PGV's contention that "the Ordinance was not intended to apply to PGV". As shown by the evidence supplied with PGV's motion, and also relied upon by the County,

¹ On April 14, 2015, this Court considered separate motions filed by PGV and COH and decided Plaintiffs' first amended complaint stated a claim for declaratory relief as to the enforceability of County Code § 14-114. The Court further said the State should be a party. Plaintiffs filed a second amended complaint adding DLNR as a party.

Corporation Counsel advised Council members during their deliberation on Bill 292 (that became the night drilling ban) that the law could not apply to PGV's vested rights. The Planning Director also referred to opinions from the Corporation Counsel in her May 31, 2013, letter saying the law does not apply to PGV's operations under GRP-2.

During the Council's deliberations on Bill 292, Mr. Ikeda proposed an amendment to state in plain terms that PGV's vested rights would not be affected, and although that proposed amendment failed, Mr. Ikeda's comment on the matter is informative: "in other words, *whatever rights they have, they are able to keep*. And that's all we're trying to say". This Court has indicated it will decide the question of whether PGV's vested rights affect the applicability of the law to PGV's recent and future geothermal drilling as one of the issues presented in this case. It is not within the authority of County administrators to adjudicate that issue. Whatever rights PGV actually has they surely will be able to keep.

Contrary to the tenor of the County's political hyperbole, Plaintiffs' request for declaratory relief is not disrespectful. Also, contrary to assertions that geothermal energy production is critically important, documented history of the past few years shows how that optimism is misdirected. Hawai'i Electric Light Company's geothermal request for proposals (RFP) is documented on its website. In its RFP for an additional 25 megawatts of geothermal electricity, *HELCO advised bidders to include costs of the County's night drilling ban* ("Each Best and Final Offer shall be based on the following assumptions: ... Combined Bid Price shall factor in the impacts of Hawai'i County Bill 292 (night-time drilling)"). See Exhibit A of the attached Declaration of Gary Zamber.² On February 24, 2015, HELCO selected the bid of Ormat, the parent company of PGV, and undertook negotiations to execute a power purchase agreement based on the new geothermal facility, but on February 10, 2016, HELCO announced that Ormat abandoned contract

² *Celotex Corp. v. Catrett*, 477 U.S. 317, 319, 324, 106 S.Ct. 2548, 2551, 2553 (1986), held that a non-moving party *opposing* summary judgment need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgment".

negotiations. *See* Zamber Exhibit B. A March 6, 2016, news report said production at PGV, that “contracts with Hawaii Electric Light Co. to provide up to 38 megawatts of renewable energy, averaged only 24.7 megawatts during the state’s last fiscal year, according to a report to the Legislature.” *See* Zamber Exhibit C.

Economics is not a strong suit in the geothermal industry. Ross Beaty, the founder and Chairman of Alterra Power, has commented on his investment in geothermal energy (*see* Zamber Exhibit D) :

... in 2008 I started a renewable energy company focused on geothermal power production.... After a couple of years and investment of about \$150 million ... I became quite disillusioned about the ability of geothermal power to be anything other than a bit player in the world energy equation. Reality triumphed over my idealism.... Theoretically, geothermal energy is everywhere.... But in reality, commercial geothermal electricity production is an extremely tough and risky business....” .

With the foregoing information, Plaintiffs are responding to the County’s political statements asserting the conceptual value of geothermal energy and the assertion that this case involves a nonjusticiable political question. Due to the emergence of less expensive renewable energy sources, geothermal is financially burdensome. The night drilling ban is a cost factor in developing geothermal energy, but not a deciding one in view of the commercial reality that geothermal as an extremely tough and risky business. PGV has been unable to produce 38 megawatts under its HELCO contract. While experiencing less than full production at PGV, Ormat decided to abandon its successful bid to HELCO to develop a new geothermal site.

For many years geothermal has had strong political support from County and State officials – probably because they genuinely want to believe it is an energy panacea.

II. Legal Issues

The County’s first substantive legal argument is that Plaintiffs have no private right of action to enforce the ordinance. Plaintiffs incorporate here by this reference the section of their memorandum in opposition to PGV’s memorandum titled *Plaintiffs Have*

the Right to Enforce the Law that begins by citing Plaintiffs right to enforce the night drilling ban through legal proceedings such as this declaratory action that is derived from the Hawai`i State Constitution, Article XI, § 9.

A. Private Right of Action

The private right of action inquiry focuses on the question of whether a private party can sue to enforce a statute. The County does not address the constitutional right to enforce laws that relate to environmental quality, including control of pollution, through appropriate legal proceedings. Instead, the County (and PGV) argue that the ordinance does not provide for an express or implied private right of action, citing *Alakai Na Keiki, Inc. v. Matayoshi*, 127 Hawai`i 263, 277 P. 3d 988 (2012), and *County ofHawai`i v. Ala Loop Homeowners*, 123 Hawai`i 391, 235 P. 3d 1103 (2010). COH also quotes *Whitey’s Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc.*, 110 Hawai`i 302, 313, 132 P. 3d 1213, 1224 (2006), that three factors help determine whether a statute provides a private right of action – and “legislative intent appears to be the determinative factor.

Those three factors, according to the cited authority and referred to as the “Rees/ Reliable test” are (1) whether plaintiffs are in a class for whose benefit the statute was enacted (the County’s night drilling ban created a right in favor of people residing within one mile of a drilling site to be free of the burdens of drilling at night); (2) whether legislative intent, explicit or implicit, has reference to creating or denying such a remedy and (here the County re-asserts its erroneous contention that Bill 292 was not intended to apply to PGV’s activities under GRP-2) and (3) whether an implied remedy is consistent with the underlying purpose of the legislative scheme (the County argues the law is silent as to its purpose, and further refers to its preemption argument).

The County relies on legislative history in its argument. Exhibit D of the Zamber Declaration submitted with Plaintiffs’ memorandum opposing PGV’s summary judgment motion is a transcript of proceedings on Bill 292 at the County Council on October 3, 2102, where Mr. Yagong said, in relevant part:

If you live next to a plant – just think about where you live today, and to have a [sic] industry come in and drill 24 hours a day at the noise level that I witnessed, personally, myself at the Lanipuna Subdivision. It is totally unacceptable to say that it’s okay for it to happen at 2 o’clock in the morning or 4 o’clock in the morning or 5 o’clock in the morning.

When you’re talking about a residential area, although zoned “Agriculture,” where you have families that work and children that needs to go to school, it’s just not acceptable for us to allow that to happen.

Mr. Yagong referred to the necessity to protect community health and safety by banning unacceptable night drilling noise levels he had witnessed personally in terms of noise and sleep deprivation affecting families that work and their children that need to go to school. Supposing the three factor test asserted by the County and PGV applies, there is ample evidence of legislative intent to create a right in favor of people residing within one mile of a drilling site to be free of noise that unreasonably interferes with comfortable enjoyment of life – and an implied remedy is consistent with that purpose.

However, the dispositive authority on this issue is Plaintiffs’ constitutional right to enforce laws that relate to environmental quality, including control of noise pollution, through appropriate legal proceedings. *See* Hawai`i Constitution Article XI, § 9, and *County of Hawai`i v. Ala Loop Homeowners*, 123 Hawai`i 391, 235 P. 3d 1103 (2010), as further described *Plaintiffs Have the Right to Enforce the Law* (opposing PGV’s motion).

B. Equitable Estoppel and Vested Rights

The County’s equitable estoppel and vested rights arguments both rely on a belief that GRP-2 is the final discretionary permit required by PGV in order to conduct drilling operations – and the related belief that any necessary DLNR drilling permit is ministerial and not discretionary. Plaintiffs incorporate here by this reference the section of their memorandum in opposition to PGV’s memorandum titled *DLNR Exercises Judgment as to Drilling Permits* showing that DLNR makes an *informed analysis of an application and a reasoned decision for approval or disapproval*, hallmarks of a discretionary permit. Any drilling after the date of the night drilling ban is subject to the law, PGV’s claim of vested rights notwithstanding, because DLNR drilling permits are not ministerial.

C. Preemption

The County's preemption argument contends that HRS Chapter 182, *Reservation and Disposition of Government Mineral Rights*, and Hawai'i Administrative Rules (HAR) Title 13, Chapter 183 – DLNR's *Rules of Leasing and Drilling of Geothermal Resources* – “establish a comprehensive state regulatory scheme governing geothermal resource development including drilling.”³

Plaintiffs incorporate here by this reference the section of their memorandum in opposition to PGV's memorandum titled *Authority to Enact HCC § 14-114 is not Preempted*. Arguments that HRS Chapter 182 provides a comprehensive state statutory scheme of geothermal regulation sidestep how the actual statutory scheme for geothermal development regulation was set forth in several parts of HRS Chapter 205 – statutes that were repealed by Act 97 in 2012.

D. Political Questions

COH actually separates two related political arguments (1) the Council's intent not to apply the law to PGV's activities under GRP2 make its enforcement legally a political question and (2) the County has discretion regarding enforcement of the law. It cannot be disputed that the County chose not to enforce the law, and the reason given for that choice was the opinion that PGV's vested rights under GRP2 precluded any such enforcement.

Nothing in the unambiguous night drilling law suggests that the County Council intended to exempt PGV's vested rights from its application. An amendment proposing to incorporate such language into the law was defeated. The vested rights issues is not a political question, it is a legal question, to be decided judicially, not administratively. The County may be embarrassed by its decision not to enforce the law, but that it not a reason to avoid adjudication of the vested rights issue.

³ *Defendant State of Hawai'i Department of Land and Natural Resources' Substantive Joinder to Defendant Puna Geothermal Venture's Motion for Summary Judgment filed June 30, 2016* was filed on July 1, 2016, also arguing the County's night drilling ban is preempted by HRS Chapter 182 and related rules.

Where an adjudication would be possible “only by an initial policy determination by the court of a kind normally reserved for nonjudicial discretion” or in the absence of any appropriate judicial standards, those issues are of a peculiarly political nature and not suitable for judicial determination. *Office of Hawaiian Affairs v. State*, 96 Haw. 388, 401, 31 P.3d 901, 914 (2001).

In this cases the straightforward legal questions of preemption (resolved by HRS § 46-17), Plaintiffs’ right to sue (resolved by Article XI, § 9) and vested rights are of a kind commonly addressed by Courts according to appropriate judicial standards.

III. Conclusion

This Court should enter summary judgment in Plaintiffs’ favor declaring that the enactment of HCC Article 19 was a County legislative act authorized by HRS § 46-17 and, as such, is not preempted by State law. Further, the Court should enter summary judgment against all the Defendants on the issue of Plaintiffs’ right to enforce the night drilling ban and against PGV on its claim of vested rights and additional defenses.

DATED: Hilo, Hawai`I, July 12, 2016,

Gary Zamber
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PUNA PONO ALLIANCE, et al.,) Civil No. 15-1-0034
) (Hilo)
 Plaintiffs,) (Declaratory Judgment)
)
 vs.) DECLARATION OF GARY ZAMBER,
) EXHIBITS A-D
 PUNA GEOTHERMAL VENTURE, et al.,)
)
 Defendants.)
 _____)

DECLARATION OF GARY ZAMBER

1. I am the Plaintiffs’ attorney in this litigation; matters set forth herein are stated upon my personal knowledge and I am competent to so testify under oath.

2. Attached hereto as Exhibit A is a true and correct copy of pages from the October 27, 2014, *Geothermal RFP Addendum No. 1 (Best and Final Offer)*, part of a geothermal request for proposals (RFP) obtained from the website of the Hawai`i Electric Light Company (<http://bit.ly/29Df70g>) with emphasis added (underlining) to parts that refer to the night drilling ban created by Hawai`i County Bill 292.

3. Attached hereto as Exhibit B is a true and correct copy of a February 10, 2016, press release regarding the geothermal RFP obtained from the website of the Hawai`i Electric Light Company (<http://bit.ly/29Df70g>).

4. Attached hereto as Exhibit C is a true and correct copy of a March 6, 2016, news article obtained from the *Hawaii Tribune-Herald* website (<http://bit.ly/29rIRcM>).

5. Attached hereto as Exhibit D is a true and correct copy of a June 30, 2014, news article obtained from the website of *Business Vancouver* (<http://bit.ly/2a0n8ZR>).

I, Gary Zamber, do declare under penalty of law that the foregoing is true and correct.

DATED: Hilo, Hawai'i, July 12, 2016.

Gary Zamber
Attorney for Plaintiffs

Exhibit A

of Plaintiffs' Memorandum Opposing Defendant County of Hawai'i's
Cross-motion for Summary Judgment

(pages from HELCO's October 27, 2014, *Geothermal RFP Addendum No. 1*)

FILED

ADDENDUM NO. 1

Issued: October 27, 2014

TO

2014 OCT 28 P 3:57

PUBLIC UTILITIES
COMMISSION

**REQUEST FOR PROPOSALS
FOR
RENEWABLE GEOTHERMAL DISPATCHABLE ENERGY
AND FIRM CAPACITY RESOURCES
ISLAND OF HAWAI'I**

February 28, 2013

Docket No. 2012-0092

Hawaii Electric Light Company, Inc.



**Hawaiian Electric
Maui Electric
Hawai'i Electric Light**

ADDENDUM NO. 1

REQUEST FOR BEST AND FINAL OFFER

Hawai'i Electric Light hereby modifies the Geothermal Request For Proposals ("Geothermal RFP") via this addendum ("Addendum No. 1") to allow for submission of Best and Final Offers consistent with the requirements stated in this Addendum No. 1. Accordingly, Hawai'i Electric Light is requesting that Bidders revise their Bids and submit a Best and Final Offer consistent with the requirements stated in this Addendum No. 1.

This request to modify the Geothermal RFP is made pursuant to Section 5.6D of the Geothermal RFP and Section IV.B.10 of the Framework for Competitive Bidding ("Framework") and is consistent with Commission Order No. 32195 in Docket No. 2012-0092 (Instructing Hawaii Electric Light Company, Inc. to File its Request to Modify its Final Geothermal Request for Proposals).

Responsive Bids shall conform to the Geothermal RFP, as amended by this Addendum No. 1. The Geothermal RFP and this Addendum No. 1 shall be construed together and harmonized to the maximum extent practicable. If there are any conflicts between the Geothermal RFP and this Addendum No. 1, the terms of this Addendum No. 1 shall control.

The proposed schedule for Best and Final Offers is set forth in Section II below. Unless otherwise defined herein, capitalized terms shall have the meaning set forth in the Geothermal RFP.

I. BEST AND FINAL OFFER PROCESS

Chapter 5 (Bid Assessment and Evaluation Requirements) to the Geothermal RFP is hereby amended to include the following Best and Final Offer process.

A. ELIGIBILITY TO SUBMIT BEST AND FINAL OFFER

For purposes of this Best and Final Offer process, all current Bidders that have previously met the Eligibility Requirements with respect to their original Bids in response to the Geothermal RFP will be permitted to submit a Best and Final Offer in accordance with this Addendum No. 1. Such Bidders will be referred to as "eligible Bidders."

Each Best and Final Offer must comply with the following requirements:

- Best and Final Offer pricing must be at or below the required Threshold Price criteria (discussed in subsection 1. below);
- Best and Final Offer pricing may not be contingent in any respect;
- Best and Final Offer must meet or be better than the required Mandatory Performance Standards (discussed in subsection 2. below); and
- Best and Final Offer must meet all other required criteria of the Geothermal RFP as modified by this Addendum No. 1.

1. EVALUATION OF PRICE/SYSTEM IMPACTS CRITERIA

Bidders will be required to submit a single Best and Final Offer with a Combined Bid Price (i.e. Combined Capacity Charge³ + Energy Charge). Each Best and Final Offer shall be based on the following assumptions:

- Best and Final Offers shall describe a single scenario by providing pricing based on annual generation production of 169,000 MWh based on a 25 MW generating unit, Dispatchable between 7 MW and 25 MW.
- All Bidders must provide a Best and Final Offer based on a PPA term of 20 years.
- Combined Bid Price shall factor in the impacts of Hawai'i County Bill 292 (night-time drilling) and Hawai'i County Bill 129 (hydraulic fracturing). (emphasis added)

The lowest-priced Best and Final Offer which is equal to or less than the Threshold Price ("Low Bid") shall receive a total of 600 points with respect to the Price/System Impacts Criteria. All other Best and Final Offers which meet the Threshold Price shall receive proportionally lower total points with respect to the Price/System Impacts Criteria. Specifically, the points allocated to the higher-priced Best and Final Offers shall be equal to the Low Bid price multiplied by the maximum points available for Price/System Impacts Criteria (i.e. 600 points), divided by the higher proposal price. The following chart is provided for illustrative purposes:

Bidder	Combined Bid Price	Calculation	Points for Price/System Impacts Criteria
Bidder A (Low Bid)	10.00 ¢/kWh	Max Points	600
Bidder B	11.00 ¢/kWh	10.00*600/11.00	545
Bidder C	12.00 ¢/kWh	10.00*600/12.00	500

³ Combined Capacity Charge must include the Capacity Charge for the Facility Bid Price along with the capacity charge for the Seller-Owned Interconnection Facilities Costs and the Company-Owned Interconnection Facilities Costs. These charges shall be itemized in the revised Appendix B (Bidder's Response Package) attached hereto as Attachment A to this Addendum No. 1.

A Best and Final Offer that does not meet or exceed the requirements of the Mandatory Performance Standards as defined by Addendum No. 1 shall be deemed non-responsive and shall not be considered for selection to the Final Award Group.

1.6 GOVERNMENT APPROVALS AND LAND RIGHTS

Information requested in this section is unchanged from Appendix B (Bidder's Response Package) to the Geothermal RFP. An eligible Bidder may supplement, amend, or replace information and materials in this section of the original Bid, consistent with the requirements of Addendum No. 1 to the Geothermal RFP.

1.7 COMMUNITY OUTREACH AND COMMUNITY BENEFITS PLAN

Section 1.7 of the original Appendix B (Bidder's Response Package) is hereby amended as follows: as applicable, eligible Bidders shall supplement, amend, or replace information in this section of the original Bid, and revise their Community Outreach and Community Benefits Plan consistent with the requirements of Addendum No. 1.

1. Describe in detail, the plan for community outreach and communications with respect to the proposed geothermal facility in light of the impacts of Hawai'i County Code Article 19 relating to geothermal drilling (Ord. No. 12-151, sec. 1, 2012) and the impacts of recently enacted Hawai'i County Code Article 21 relating to hydraulic fracturing (Ord. No. 13-115, sec. 2, 2013). (emphasis added)
2. Describe in detail, the plan for community outreach and communications with respect to the proposed geothermal facility in light of the impacts of Hawai'i County Code Article 21 relating to hydraulic fracturing (Ord. No. 13-115, sec. 2, 2013).
3. If available, provide any evidence that the Bidder is taking steps to implement the above referenced community outreach and communication in light of these two recent Hawai'i County Code Articles.

2.0 TECHNICAL INFORMATION REQUIREMENTS

In responding to each of the technical information requirements in this section, the eligible Bidder shall meet the requirements of Addendum No. 1 and provide sufficient detail, relevant information, and supporting documentation in its Best and Final Offer submittal such that Hawai'i Electric Light can make an informed decision as to whether the proposed geothermal Project will be able to meet the Mandatory Performance Standards. Such information should include demonstration of the ability to meet such Mandatory Performance Standards at a similar facility with documentation of that ability. Submitting links to a Bidder's or manufacturer's website, without adequate supporting documentation, evidence, and discussion, will be considered non-responsive. Eligible Bidders should be aware that in general the technical information provided to Hawai'i Electric Light in the initially submitted Bid

5. Describe the emissions controls of the Facility, including the emissions requirements (types of emissions, level of emissions), approach to meeting requirements, and technology, equipment and configurations planned to execute the approach.

6. Provide any additional information needed to sufficiently describe the impacts of Hawai'i County Code Article 19 relating to geothermal drilling (Ord. No. 12-151, sec. 1, 2012) and the impacts of recently enacted Hawai'i County Code Article 21 relating to hydraulic fracturing (Ord. No. 13-115, sec. 2, 2013) on the engineering and technology of the proposed geothermal facility.

(emphasis added)

2.3 PROJECT MANAGEMENT / EXPERIENCE

Information requested in this section is unchanged from Appendix B (Bidder's Response Package) to the Geothermal RFP. An eligible Bidder may supplement, amend, or replace information and materials in this section of the original Bid, consistent with the requirements of Addendum No. 1 to the Geothermal RFP.

2.4 SITING

Information requested in this section is unchanged from Appendix B (Bidder's Response Package) to the Geothermal RFP. An eligible Bidder may supplement, amend, or replace information and materials in this section of the original Bid, consistent with the requirements of Addendum No. 1 to the Geothermal RFP. Notwithstanding anything to the contrary, the Bidder's site shall remain unchanged from the original Bid.

2.5 SUSTAINABLE ENERGY RESOURCE PLAN

Information requested in this section is unchanged from Appendix B (Bidder's Response Package) to the Geothermal RFP. An eligible Bidder may supplement, amend, or replace information and materials in this section of the original Bid, consistent with the requirements of Addendum No. 1 to the Geothermal RFP.

2.6 PROJECT SCHEDULE

Section 2.6 of Appendix B (Bidder's Response Package) to the Geothermal RFP is amended to include the following: please demonstrate how the Bidder's Project schedule addresses the impacts of (1) Hawai'i County Code Article 19 relating to geothermal drilling (Ord. No. 12-151, sec. 1, 2012), and (2) Hawai'i County Code Article 21 relating to hydraulic fracturing (Ord. No. 13-115, sec. 2, 2013). An eligible Bidder may supplement, amend, or replace information and materials in this section of the original Bid, consistent with the requirements of Addendum No. 1 to the Geothermal RFP.

(emphasis added)

Project Acquisition Options	Project Acquisition Price (\$)
Facility Purchase Price (fifth (5th) anniversary of COD)	
Facility Purchase Price (tenth (10th) anniversary of COD)	
Facility Purchase Price (fifteenth (15th) anniversary of COD)	

With the recent enactment of Hawai'i County Code Article 19 relating to geothermal drilling (Ord. No. 12-151, sec. 1, 2012) and Hawai'i County Code Article 21 relating to hydraulic fracturing (Ord. No. 13-115, sec. 2, 2013), the Bidder is asked to provide a definitive discussion of how these two new laws have been considered in the development of its Best and Final Offer.

(emphasis added)

4.0 REQUIREMENTS FOR NEW OR UPDATED INFORMATION

Except where the eligible Bidder is not permitted to update information, as directed in Addendum No. 1, the eligible Bidder may include additional new information. In an effort to ensure an appropriate understanding of the Best and Final Offer, each eligible Bidder shall use the matrix below to indicate where sections of its originally submitted Bid have been supplemented, amended, or replaced with the information and materials in its Best and Final Offer.

Does the Bidder's Best and Final Offer provide supplemental, amended, or replacement information or materials to those previously submitted by the Bidder in its original Bid? Bidder should circle "Yes" or "No" for each Section below.

<i>"Yes"</i> <i>(Evaluator should refer to Best and Final Offer)</i>	<i>"No"</i> <i>(Evaluator should refer to originally submitted Bid)</i>
---	--

Section List

Appendix B (Bidder's Response Package) to the Geothermal RFP

Section 1.0 Commercial Information Requirements		
Section 1.1 Bid Certification Form	Yes	No
Section 1.2 Bid Summary / Contact Information	Yes	No
Section 1.3 Executive Summary of the Bid	Yes	No
Section 1.4 Financial / Legal Information	Yes	No
Section 1.5 Redlined Version of the Model Geothermal Power Purchase Agreement	Yes	No
Section 1.6 Government Approvals and Land Rights	Yes	No
Section 1.7 Community Outreach and Community Benefits Plan	Yes	No
Section 2.0 Technical Information Requirements		
Section 2.1 Project Operational	Yes	No

Exhibit B

of Plaintiffs' Memorandum Opposing Defendant County of Hawai'i's
Cross-motion for Summary Judgment

(February 10, 2016, HELCO press release)



NEWS RELEASE

CONTACT: Jay Ignacio 808.969.0124 (Hawai'i Island)
Barbara Heckathorn 808.543.4470 (all others)

FOR IMMEDIATE RELEASE

Ormat withdraws from contract negotiations to provide 25 MW of additional geothermal energy on Hawai'i Island

HILO, Feb. 10, 2016 – Hawai'i Electric Light today announced that Ormat has withdrawn from contract negotiations to provide 25 MW of additional geothermal energy on Hawai'i Island. The negotiations were part of a Request for Proposal (RFP) process, a competitive bidding framework initiated to add lower cost, firm, renewable geothermal energy to the island's energy portfolio.

Following a rigorous review of bids submitted as part of a competitive bid process, Hawai'i Electric Light Company selected Ormat on February 24, 2015, based on their ability to meet price levels and performance standards, and began contract negotiations.

"Our primary goal for the RFP was to obtain geothermal energy that could significantly lower the overall cost to our customers while maintaining overall system reliability," said Jay Ignacio, Hawai'i Electric Light Company president. "We're disappointed that Ormat decided not to proceed to develop the project."

The company will continue its efforts to increase cost-effective renewable energy, and is including geothermal in its analysis of potential future resource options as part of the update to its Power Supply Improvement Plans.

Currently, more than 47 percent of electricity on Hawai'i Island is generated from renewable resources, including hydro, wind, distributed solar, and geothermal.

###

FOLLOW US FOR THE LATEST:



Exhibit C

of Plaintiffs' Memorandum Opposing Defendant County of Hawai'i's
Cross-motion for Summary Judgment

(March 6, 2016, news article from the *Hawaii Tribune-Herald*)

News

Sports

Photo Galleries

Commentary

Obituaries

Classifieds

Jobs

Homes

Autos

e-Edition

Report: PGV's power output down

Published March 6, 2016 - 1:30am

Tweet



By **TOM CALLIS** Hawaii Tribune-Herald

Is the state's only geothermal power plant losing steam?

Production at Puna Geothermal Venture, which contracts with Hawaii Electric Light Co. to provide up to 38 megawatts of renewable energy, averaged only 24.7 megawatts during the state's last fiscal year, according to a report to the Legislature.

The Department of Land and Natural Resources provides the document as part of an annual update on the distribution of geothermal royalties and the prospect of creating an interisland power cable. Regarding the latter, there has been no progress, the report says.

But noteworthy is the production level at PGV, which brought its sixth production well online near the end of that fiscal year, running from July 1, 2014, to June 30, 2015. The report says PGV completed maintenance and repairs on two wells during that time period, which likely affected energy output.

With the new well online, the plant on Kilauea's East Rift Zone outside Pahoehoe still remains below capacity.

Mike Kaleikini, senior director of Hawaii affairs for Ormat Technologies, which operates PGV, said the plant is now producing 30 megawatts.

"There's still more work to be done overall," he said, when asked how the plant will increase production, and whether more wells will be needed.

"We got some plans in the works," Kaleikini added, without providing specifics. "We don't have any firm plans."

He said PGV intends to host a community meeting later this month to discuss the status of the plant and future prospects.

Kaleikini said Ormat remains committed to the location.

"We've been here over 20 years," he said. "We are in it for the long haul."

A "resource assessment" also will be completed shortly that could shed light on the production issues, he said.

"It will give us a firm handle ... tell us exactly what's happening," Kaleikini said.

The last assessment occurred as part of the plant's 8-megawatt expansion, with help from the American Recovery and Reinvestment Act of 2009.

Ormat is facing a lawsuit in federal court alleging that it defrauded the federal government of \$13.8 million in stimulus funds for the expansion, which increased its capacity to 38 megawatts. The company denies the claim.

HELCO President Jay Ignacio said PGV doesn't get penalized for the low output, but that does result in lost revenue for the plant.

The utility has to rely more on fossil fuel generation when renewable energy production is lower, he said.

Ignacio said a meeting is also in the works with PGV officials to discuss ways for the plant to return to full capacity.

According to the DLNR report, PGV paid \$1.7 million in geothermal royalties last fiscal year. Of that, Hawaii County received \$535,708 and \$357,139 went to the Office of Hawaiian Affairs.

The remaining 50 percent went to the state.

On average, geothermal provides more than 20 percent of Hawaii Island's electricity, DLNR said.

Email Tom Callis at tcallis@hawaiitribune-herald.com.

RULES FOR POSTING COMMENTS

Comments posted below are from readers. In no way do they represent the view of Oahu Publishing Inc. or this newspaper. This is a public forum.

Exhibit D


of Plaintiffs' Memorandum Opposing Defendant County of Hawai'i's
Cross-motion for Summary Judgment

(June 30, 2014, news article obtained from *Business Vancouver*)

Drilling down to the economic realities of geothermal power

When someone who has just completed a series of mining asset sales totalling \$1.6 billion chooses to share some frank thoughts on geothermal power, you ...

June 30, 2014, 11 p.m.

 Uncategorized

By Peter Ladner

When someone who has just completed a series of mining asset sales totalling \$1.6 billion chooses to share some frank thoughts on geothermal power, you have to respect the source.

Geothermal bubbled up in the news in May as a lost opportunity for BC Hydro in the Joint Review Panel's thumbs-sideways assessment of the Site C dam project.

Lumina Copper founder Ross Beaty knows something about copper – enough to complete the company's sale to First Quantum Minerals earlier this month for \$470 million. Beaty is also passionate about renewable energy, which led him into a geothermal power investment in 2008, only to come out of the experience somewhat sobered.

“Geothermal energy is free, global and almost limitless – in fact, the heat in the first couple of kilometres below the earth's surface contains enough energy to supply the world for over 100,000 years!” he writes in an unpublished report.

“So in 2008 I started a renewable energy company focused on geothermal power production, thinking that my geology and resource-development background and my experience in the same rocks and countries that geothermal power was located in might offer an advantage. After a couple of years and investment of about \$150 million from my shareholders, I became quite disillusioned about the ability of geothermal power to be anything other than a bit player in the world energy equation. Reality triumphed over my idealism.

“Theoretically, geothermal energy is everywhere, generated from heat produced due to radioactive decay of minerals in the earth's interior. ...

“But in reality, commercial geothermal electricity production is an extremely tough and risky business. Drilling is very costly due to the wide-diameter, kilometres-deep drill holes required to access and explore geothermal systems that are high-pressure and high-temperature; rock formations containing high-temperature fluids are complex with variable chemistry, pore density and

permeability; reinjection is often difficult and costly; extraction of fluids often removes heat from the geothermal system more rapidly than it can be restored naturally; large volumes of cool water are often required to cool the geothermal fluid before it can be reused; highly flammable chemicals are often used in electrical production; and geothermal systems are often located far from electrical demand, requiring long and costly electrical transmission lines. ...

“So in 2011 I merged my geothermal power company with another company that produced large amounts of wind power and run-of-river hydro power to diversify away from purely geothermal power. The resulting company, Alterra Power, today produces nearly 600 megawatts (2,000 gigawatt hours of electricity a year), enough to power about 200,000 homes with electricity.”

By Beaty's calculations, geothermal power costs about \$5 million to create each megawatt of electricity, compared with hydro, wind and solar capital costs “in the range of \$3 million to \$5 million per megawatt” and coal/gas power plants at around \$1 million to \$2 million per megawatt.

Of course, lifetime free fuel, increasing prices on carbon and regulatory subsidies can justify the Geothermal Energy Association's conclusion that “when looking at the entire life cycle of the plant, geothermal power is one of the most affordable and enduring technologies.”

Beaty's experience casts serious doubt on the Joint Review Panel's estimate that geothermal could supply 700 megawatts of renewable power, or almost two-thirds of Site C's production. There still isn't an operating geothermal power plant anywhere in Canada.

Alterra CEO John Carson confirmed Beaty's skepticism in a recent Globe and Mail article, saying “no one has imminent plans for production-scale drilling” in B.C.

Which isn't to say that BC Hydro has properly investigated alternatives to Site C, only that geothermal's potential can easily be overestimated.

https://www.biv.com/article/2014/7/drilling-down-to-the-economic-realities-of-geother/#disqus_thread on this topic. [Join the discussion.](#) ()

Please enable JavaScript to view the [comments powered by Disqus.](http://disqus.com/?ref_noscript) ([http://disqus.com](http://disqus.com/?ref_noscript))

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was on this date duly served by deposit with the U.S. Postal Service, first class postage prepaid, addressed to:

Thomas L.H. Yeh, Esq.
85 W. Lanikaula Street
Hilo, HI 96720

Attorney for Defendant Puna Geothermal Venture

and

Laureen Martin, Esq.
Office of the Corporation Counsel
101 Aupuni Street, Unit 325
Hilo, HI 96720

Attorney for Defendant County of Hawai`i

and

Cindy Y. Young, Esq.
Deputy Attorney General
Department of the Attorney General
465 South King Street, Room 300
Honolulu, HI 96813

Attorney for Defendant State of Hawai`i

DATED: Hilo, Hawai`i, July 12, 2016.

Gary Zamber
Attorney for Plaintiff