

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION



IN THE MATTER OF:) GPA Docket 20-01
)
The Application of the Guam Power)
Authority to Approve the Consent Decree) **ALJ REPORT**
with the United States Environmental)
Protection Agency (EPA).)
_____)

INTRODUCTION

1. This matter comes before the Guam Public Utilities Commission ["PUC"] upon the Guam Power Authority ["GPA"] Petition for PUC Approval of the Consent Decree with the United States Environmental Protection Agency ["EPA"].¹

BACKGROUND

2. Attached to GPA's Petition is a Consent Decree, which GPA proposes to enter into with the United States Environmental Protection Agency [USEPA] and the U.S. Department of Justice [DOJ].
3. The need for GPA to enter into a Consent Decree with USEPA and DOJ arises out of certain alleged violations by GPA of the EPA National Emission Standards for Hazardous Air Pollutants (NESHAP).²
4. USEPA alleges that Cabras Units No. 1 & 2 have violated the MATS NESHAP standards for oil-fired electric steam generating units since April 2015; it further alleges that GPA has been in violation of the RICE NESHAP standards for stationary reciprocating internal combustion engines at Cabras Units No. 3 & 4 from May 2013 to September 2015, and Piti Units No. 8 & 9 since May 2013.³
5. The "MATS" NESHAP are the Mercury and Air Toxics Standard and apply to oil-fired electric steam generating units such as Cabras Units 1 & 2. The MATS are a set of air pollution limits for toxic air pollutants such as mercury, arsenic and

¹ GPA Petition to Approve the Consent Decree with the United States Environmental Protection Agency (EPA), GPA Docket 20-01, filed November 12, 2019.

² Id. at p. 1.

³ Id. at p. 1.

metals. The RICE NESHAP imposes limitations upon emissions of toxic air pollutants including carbon monoxide.⁴

6. The purpose of the Consent Decree is to resolve all outstanding issues concerning alleged violations by GPA of the NESHAP standards. To resolve EPA's alleged violations, the Consent Decree/Settlement would require the following:
 - (a) GPA's payment of a civil penalty of \$400,000;
 - (b) Construction and operation of a new 180-MW power plant burning ultra-low sulfur diesel (ULSD), and also capable of burning liquified natural gas;
 - (c) GPA's fuel delivery system will be converted from residual fuel oil to ULSD, which will include refurbishing the main fuel storage tanks and constructing a new ULSD pipeline;
 - (d) Piti units 8 and 9 will be repowered with ULSD by December 31, 2021;
 - (e) Cabras units 1 and 2 will be repowered with low-sulfur residual fuel oil, then permanently shut down by October 31, 2022;
 - (f) Cabras units 3 and 4 and Tanguisson units 1 and 2 will be permanently shut down within 30 days of the settlement;
 - (g) GPA will build 100 MW of solar power (in addition to the 25 MW of solar already installed); and
 - (h) GPA will install and operate a new energy storage system.⁵
7. Attached hereto as Exhibit "1" is the Summary of Proposed Settlement Agreement prepared by GPA in October 2019.
8. Attached hereto as Exhibit "2" is the Guam Power Authority Presentation to the Guam Public Utilities Commission, dated October 2019. This presentation was given to some of the PUC Commissioners in October 2019, by Matt Morrison, an environmental litigation specialist from the Pillsbury Law Firm. Mr. Morrison has been a part of the GPA Legal Team which negotiated the Consent Decree proposal. The Presentation explains the background of the Consent Decree and its key Settlement terms, and recommends approval of the Consent Decree.⁶
9. In Resolution No. 2019-014, the Guam Consolidated Commission on Utilities granted GPA's request for approval of the Consent Decree with the USEPA and

⁴ Guam Power Authority Presentation to the Guam Public Utilities Commission, October 2019, at pgs. 3 – 5.

⁵ GPA Summary of Proposed Settlement Agreement between Guam Power Authority and the U.S. Environmental Protection Agency to Resolve Clean Air Act Violations alleged at the Cabras and Piti Units, prepared for the Consolidated Commission on Utilities, October 2019.

⁶ Exhibit "2" attached hereto.

DOJ.⁷ The CCU found that “the proposed settlement will provide a fair and reasonable resolution of the violations alleged by EPA, environmental benefits, and needed enhancements to Guam’s energy security and reliability.”⁸

10. The CCU further determined that “the settlement will improve air quality by requiring that GPA retire some older units upon competition of the new power plant and convert all remaining units to ULSD, which will reduce emissions of pollutants such as sulfur dioxide...”⁹ Finally, the CCU resolved that “it is in the best interest of the ratepayers of Guam to proceed with the proposed Consent Decree with EPA and DOJ.”¹⁰
11. On October 31, 2019, the PUC approved GPA’s award of an Energy Conversion Agreement to Korean Electric Power Company (KEPCO) to build, own, operate and transfer a 198MW fossil fuel plant.¹¹ At its meeting on the New Power Plant proposal, the PUC heard a presentation by Attorney Morrison which indicated that approval of the New Power Plant was necessary for the adoption of the Consent Decree. The ALJ also suggested that if the PUC did not approve the New Power Plant, there would not be a Consent Decree Settlement and the result would be the filing of litigation by the USEPA.
12. In approving the ECA with KEPCO, the PUC approved the essential element of the Consent Decree: the construction and operation of a new 180MW power plant burning ultra-low sulfur diesel (ULSD) by October 31, 2022.¹²
13. In its Order, the PUC also found that: “if a Consent Decree and Compliance Plan is not implemented soon, GPA will face significant penalties from USEPA. For non-compliance with USEPA regulations, GPA currently faces \$352,200,000 in penalties. The plan that GPA has proposed for the new 198MW combined cycle power plant will comply with USEPA regulations and appears to be satisfactory to USEPA.”¹³
14. On November 5, 2019, GPA and KEPCO executed the Energy Conversion Agreement.

⁷ CCU Resolution No. 2019-014, Relative to Approving the Consent Decree with the United States Environmental Protection Agency adopted October 29, 2019, at p.2.

⁸ Id., at p. 2.

⁹ Id.

¹⁰ Id., at p. 3.

¹¹ PUC Order, GPA Docket 19-13, dated October 31, 2019, at p. 19.

¹² GPA Petition to Approve the Consent Decree with the United States Environmental Protection Agency (EPA), GPA Docket 20-01, filed November 12, 2019, at p. 1.

¹³ PUC Order, GPA Docket 19-13, dated October 31, 2019, at p. 14.

ANALYSIS

15. Approval of the Consent Decree is in the best interest of GPA and the ratepayers of Guam for a number of reasons. Such approval of the Consent Decree will resolve the violations alleged by USEPA, avoid further protracted litigation, and bring finality to the proceeding.
16. Prior to finalization of the Consent Decree, USEPA and DOJ will file a Civil Complaint against GPA. Assuming that GPA executes the Consent Decree, GPA will not be required to file an Answer to the Civil Complaint. However, If GPA does not enter into the Consent Decree/ settlement concerning the violations, the Department of Justice and the USEPA will proceed with the litigation against GPA.
17. If GPA does not agree to the \$400,000 penalty and the other provisions of the Consent Decree, it faces the risk of a far higher penalty award against it. According to Attorney Morrison, the total maximum amount that DOJ could seek is an excess of \$600 million, which is beyond GPA's means.¹⁴
18. Litigation will impose substantial risks on GPA. A review of the draft Complaint prepared by USEPA and DOJ suggest a distinct possibility that GPA could be found by the District Court to have violated the MAT NESHAP and the RICE NESHAP. In the Complaint prepared by the Department of Justice, there are specific allegations that performance tests conducted by GPA prove that there were NESHAP violations. Violations include excessive omissions of CO, filterable particulate matter, and HAP metals. The evidence of violations offered are tests conducted by GPA of the emissions levels.¹⁵ It would not be prudent for GPA to risk a litigation outcome that could result in a far more excessive penalty.
19. GPA's Attorney Morrison estimates that a "best case scenario" in litigation would be a penalty award against GPA in excess of \$750,000.¹⁶
20. In a case involving the Virgin Islands, the United States recovered \$1.3 million for RICE NESHAP Violations regarding two units. That settlement did not include claims for MATS Violations. In the Virgin Islands case there were only two units

¹⁴ Guam Power Authority Presentation to the Guam Public Utilities Commission, October 2019, at p. 17.

¹⁵ Draft Complaint of the United States versus GPA, submitted to the ALJ Fred Horecky by GPA Counsel Graham Botha on October 14, 2019.

¹⁶ Guam Power Authority Presentation to the Guam Public Utilities Commission, October 2019, at p. 17.

alleged to be in violation, fewer than the number of units alleged to be in violation by GPA.¹⁷

21. The Consent Decree/settlement, with various improvements to the GPA power system, will improve Guam's air quality and significantly reduce present harmful omissions and greenhouse gases. Operation of the new power plant will substantially reduce almost all levels of pollutants, including nitrogen oxides, sulfur dioxide, and particulate matter.¹⁸ The new power plant, utilizing ULSD, should reduce greenhouse gases by 36%.¹⁹
22. When the New Power Plant is in operation, GPA's annual fuel consumption will be reduced by about 35 million gallons annually.²⁰ Furthermore, the new plant will use tertiary-treated wastewater for cooling, substantially reducing demand on the aquafer.²¹
23. The proposed resolution in the Consent Decree will also increase Guam's energy security by allowing for the expansion of GPA's renewable energy portfolio with the construction of the new 198MW power plant and provide increased reliability with the retirement of the Cabras 1 and 2 units. The new power plant will complement the additional proposed solar power, providing the necessary support for the intermittent production of renewable energy during the day with the capacity to serve peak loads at night.²²
24. A potential downside and risk to the Consent Decree is that it imposes very strict deadlines on GPA, and imposes serious financial penalties upon GPA for violating the deadlines in the Consent Decree. Thus, there is certainly a risk that GPA will be unable to meet deadlines agreed to, and that financial penalties could be imposed upon GPA.
25. However, GPA has little option but to agree to the deadlines as set forth in the Consent Decree. All such Decrees ordinarily impose compliance deadlines upon the party alleged to be in violation of law. GPA has sought to mitigate the risk that the

¹⁷ Id.

¹⁸ GPA PRESENTATION ON NEW COMBINED CYCLE POWER PLANT, GPA Docket 19-13, dated October 1, 2019, at p. 24.

¹⁹ Attachment 9 to ALJ Report, GPA Docket 19-13, GPA PRESENTATION ON NEW COMBINED CYCLE POWER PLANT, dated October 3, 2019, at p. 25.

²⁰ Id., at 32.

²¹ Id.

²² CCU Resolution No. 2019-014, Relative to Approving the Consent Decree with the United States Environmental Protection Agency adopted October 29, 2019, at p.2.

New Power Plant will not be constructed on time by imposing the same penalties for delay upon KEPCO as are imposed upon GPA in the Consent Decree.

26. A positive aspect of the Consent Decree is that some of GPA's substantive agreements as to plant and system improvements had already been determined by GPA to be advantageous and desirable for undertaking. These include the New Power Plant, the 100MW of solar plant, closure of the Cabras 3 & 4 and Tanguisson plants, and the conversion of PITI 8 & 9 to ULSD.
27. The GPA Legal Team did an outstanding job in negotiating the Consent Decree. It successfully negotiated an agreement to pay a lesser penalty in recognition of GPA's inability to pay, and agreements concerning construction of plants and conversion of other plants that GPA had previously determined to undertake on its own.

RECOMMENDATION

28. The Administrative Law Judge recommends that the PUC approve the Consent Decree proposed between GPA and USEPA/DOJ, and authorize GPA to enter into the same.
29. A Proposed Order is submitted herewith for the consideration of the Commissioners.

Dated this 2nd day of December, 2019.

Frederick J. Horecky
Chief Administrative Law Judge

Summary of Proposed Settlement Agreement

**Between Guam Power Authority
And the U.S. Environmental Protection Agency**

**To Resolve Clean Air Act Violations
Alleged at the Cabras and Piti Units**



October 2019

I. Background

The Guam Power Authority (GPA) and the U.S. Environmental Protection Agency (EPA) have reached an agreement in principle to resolve alleged violations of the Clean Air Act at GPA's Cabras and Piti electricity generating stations. The details of that agreement are embodied in a draft consent decree, which GPA is submitting to the Guam Consolidated Commission on Utilities (CCU) and the Guam Public Utilities Commission (PUC) for review and approval.

EPA has alleged that GPA violated EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) at Units 1 through 4 of the Cabras facility, and at Units 8 and 9 of the Piti facility. The NESHAP contains standards set by EPA for air pollutants that may reasonably be expected to cause serious health effects or adverse environmental effects. These standards are established for certain industries and types of equipment. EPA alleges that GPA has been in violation of the NESHAP standards for oil-fired electric steam generating units at Cabras Units 1 and 2 since April of 2015, and at Cabras Units 3 and 4 from May of 2013 until they were damaged by an explosion in 2015. EPA also alleges that GPA has been in violation of the NESHAP standards for stationary reciprocating internal combustion engines at Piti Units 8 and 9 since May of 2013.

Key Settlement Terms

To resolve EPA's alleged violations, the settlement requires the following:

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- GPA's payment of a civil penalty of \$400,000;
 - Construction and operation of a new, 180-MW power plant burning ultra-low sulfur diesel (ULSD), and also capable of burning liquified natural gas;

- GPA's fuel delivery system will be converted from residual fuel oil to ULSD, which will include refurbishing the main fuel storage tanks and constructing a new ULSD pipeline;
- Piti units 8 and 9 will be repowered with ULSD by December 31, 2021;
- Cabras units 1 and 2 will be repowered with low-sulfur residual fuel oil, then permanently shut down by October 31, 2022;
- Cabras units 3 and 4 and Tanguisson units 1 and 2 will be permanently shut down within 30 days of the settlement;
- GPA will build 100 MW of solar power (in addition to the 25 MW of solar already installed); and
- GPA will install and operate a new energy storage system.

II. Approvals and Current Status

Several approvals from the CCU and PUC are required prior to implementation of this settlement. GPA has already begun the process of obtaining these approvals:

- On July 25, 2019, the PUC approved a contract between GPA and AYM International, Inc. for construction of a ULSD pipeline;
- On August 29, 2019, the PUC approved a contract between GPA and Tristar Agility for bulk storage fuel tanks inspection and refurbishment;

- Also on August 29, 2019, the PUC approved contracts between GPA and Mobil Oil Guam and Isla Petroleum and Energy Holdings LLC for the supply of diesel fuel oil to GPA;
- On September 3, 2019, the CCU approved an Energy Conversion Agreement (ECA) between GPA and Korea Electric Power Company (KEPCO) for the 198 MW power plant;
- GPA filed the power plant ECA with the PUC on September 5, 2019;
- The PUC is expected to vote on the ECA on October 31, 2019; and
- Upon PUC approval, GPA and KEPCO will sign the agreement.

In addition to CCU and PUC approval, the settlement must be authorized by the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice. Once the Department of Justice files the consent decree with the United States District Court for Guam, a public notice will be published in the Federal Register, after which the public will have 30 days in which to submit comments. After the close of the public comment period, the Department, in coordination with EPA, will respond to any comments submitted and request that the Court approve the settlement as an order of the court.

III. Conclusion and Recommendation

GPA recommends that the CCU approve this settlement because it will provide a fair and reasonable resolution of the violations alleged by EPA, numerous environmental benefits, and needed enhancements to Guam's energy security and reliability.

The United States has alleged that the six Cabras and Piti units at issue have been out of compliance with the applicable NESHAP for four to six years. If proven true, GPA could face tens of millions of dollars in civil penalties, in addition to the cost of undertaking substantial investments to reduce emissions, which GPA could be forced to achieve on a much more aggressive compliance schedule. The proposed consent decree negotiated with the United States requires GPA to pay a nominal civil penalty that takes into account GPA's limited resources and its preference to focus its expenditures on new, efficient power and cost-effective emission reduction measures.

The settlement will improve air quality by requiring that GPA retire some of its older units and switch to cleaner fuels, primarily through building a new ULSD power plant. This will reduce emissions of pollutants such as sulfur dioxide, which can combine with precipitation and moisture to form acid rain.

The proposed resolution of the United States' claims will also increase Guam's energy security by dramatically expanding GPA's renewable energy portfolio and by adding a new reliable power plant to replace the antiquated Cabras and Tanguisson units. GPA's plans for an additional 100 MW of utility solar, in addition to its existing solar production, will mean that nearly 70% of GPA's projected daytime energy production after 2021 will come from solar panels. The new power plant will compliment this renewable power, providing the necessary support for the intermittent production of renewable energy during the day and the capacity to serve peak loads at night.

We therefore recommend approval of the proposed consent decree.