

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION



IN THE MATTER OF:) GPA Docket 20-16
)
The Application of the Guam Power)
Authority Requesting to Retire Piti 8 & 9) **ORDER**
Units and to Procure 60MW of Renewable)
Energy.)
_____)

INTRODUCTION

This matter comes before the Guam Public Utilities Commission [“PUC”] upon the Petition of the Guam Power Authority [“GPA”] to review and approve GPA’s request to retire Piti 8 & 9 units, and to procure 60MW of renewable energy.¹ GPA indicates that when the new 198MW power plant and 120MW Solar PV Energy are commissioned, the Piti 8 & 9 units will be operating as peak load or back-up units, instead of baseload units, with a capacity factor of less than 15%.² In addition, the inclusion of 50% renewables in the GPA island wide power system by 2035 will “decrease Piti Production to Practically Nothing.”³

GPA further contends that it will be more cost effective for the Authority to rely upon the Aggreko 40 1MW plants then upon the Piti plants. GPA estimates that the 15-year nominal savings from retiring the Piti plants and relying upon the Aggreko plants will be \$1,122,559.00.⁴ GPA also suggests that reliance upon the Aggreko plants will avoid the cost of \$18.325M in converting the Piti plants from use of RFO to ULSD.⁵ Not only does GPA believe that reliance upon the Aggreko plants will be cheaper than continued reliance upon the Piti plants: GPA submits that the nature of the Aggreko 40 1MW units are movable and provide more operational flexibility and reliability for integration with Renewables.⁶

¹ GPA Petition to Retire Piti 8 & 9 Units and to Procure 60MW of Renewable Energy, GPA Docket 20-16, filed July 10, 2020.

² GPA Work Session, Presentation to the Consolidated Commission on Utilities, June 18, 2020, GPA Resolution No. 2020-14.

³ Id., at Energy Supply Paradigm Shift Conclusions.

⁴ Id.

⁵ Piti (MEC) 8 & 9 ULSD Conversion, June 23, 2020, at Revised ULSD Conversion Cost.

⁶ Id., at Energy Supply Paradigm Shift Conclusions.

GPA requests that the PUC authorize it to proceed with the retirement of the Piti 8 & 9 units “upon commissioning of the new 198MW Ukudu power plant, and the procurement of an additional 60MW of renewable resource.”⁷

BACKGROUND

1. District Court of Guam, GPA-USEPA Consent Decree

In GPA Docket 20-01, on November 12, 2019, the Guam Power Authority petitioned the PUC for approval of the Consent Decree with the United States Environmental Agency [“USEPA”].⁸ The Consent Decree arose out of certain alleged violations by GPA of the EPA National Emission Standards for Hazardous Air Pollutants (NESHAP).⁹ The PUC found that “Approval of the Consent Decree is in the best interest of GPA and the ratepayers of Guam...”.¹⁰ Based upon its determinations, the PUC approved the Consent Decree between GPA and USEPA, and authorized GPA to enter into the Consent Decree.¹¹

On April 20, 2020, the Honorable Frances M. Tydingco-Gatewood, Chief Judge of the District Court of Guam, executed a Consent Decree in the case of United States of America, Plaintiff, v. Guam Power Authority and Marianas Energy Company, L.L.C., Defendants, Case No. 1:20-cv-0007.¹² The Consent Decree was voluntarily entered into by the Guam Power Authority and the United States, represented by the Department of Justice.

The Consent Decree addresses a number of specific matters concerning the Piti 8 & 9 plants.¹³ GPA is required to, and agreed to, construct a new pipeline to convey ULSD from the Navy Tie-in Apra Harbor, through either tank #1934 or #1935, to the Piti Units 8 & 9.¹⁴ GPA agreed to submit permits and approvals relative to the fuel switch to USLD for Piti Units 8 & 9, and to install oxidation catalysts by March 1, 2020. By July 1, 2020, GPA agreed to enter into a binding contract for the

⁷ GPA Petition, *supra*, at. p. 2.

⁸ PUC Order, GPA Docket 20-01 dated December 5, 2019.

⁹ *Id.*, at p. 1.

¹⁰ *Id.*, at p. 4.

¹¹ *Id.*, at p. 6.

¹² United States of America, Plaintiff v. Guam Power Authority and Marianas Energy Company, L.L.C., Defendants, Consent Decree, Case No. 1:20-cv-0007. A copy of the Consent Decree is a part of the record in this Docket.

¹³ *Id.*, at p. 10.

¹⁴ *Id.*

performance of all work necessary to accomplish the fuel switch to ULSD and to install oxidation catalysts at Piti Units 8 & 9.¹⁵ By December 31, 2021, GPA agreed to complete the installation of oxidation catalysts at Piti Units 8 & 9, and to only use ULSD as a fuel to power Piti Units 8 & 9. Furthermore, GPA agrees to pay penalties for “failure to complete installation of oxidation catalysts at Piti Units 8 & 9...”.¹⁶ If it uses other than ULSD at Piti Units 8 & 9 after December 31, 2021, it agrees to penalties ranging from \$1,000.00 per day up to \$5,000.00 per day.¹⁷

The Consent Decree further provides that **its terms “may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.”**¹⁸ (emphasis added). Any disputes must be resolved by a “Dispute Resolution” process.

2. GPA Actions subsequent to Signing of Consent Decree and Guam Consolidated Commission on Utilities GPA Resolution No. 2020-14

The Consent Decree of the District Court requiring GPA to convert Piti Units 8 & 9 to ULSD is still in full effect. To date it has not been altered or amended. However, since the Consent Decree was entered into on April 20, 2020, GPA has since determined that it wishes to retire the Piti 8 & 9 units, rather than converting them to ULSD as it agreed to do in the Consent Decree.

At the “Work Session” for the Guam Consolidated Commission on June 18, 2020, GPA presented its plan to CCU for the retirement of the Piti 8 & 9 plants. At the CCU Meeting on June 23, 2020, GPA presented a written justification for the retirement of the Piti 8 & 9 plants. Such justification also included comments by Marianas Energy Corporation (“MEC”). MEC opposed the retirement of the Piti 8 & 9 plants, arguing, *inter alia*, that reliance upon the Aggreko plant rather than the Piti plants would actually be more expensive; that the Piti plants would retain a higher capacity reserve in case of unforeseen delays in the capacity expansion of renewables, at a very attractive thermal efficiency; and, that given all the uncertainties concerning when the new Ukudu plant and the renewables would be

¹⁵ Id., at p. 11.

¹⁶ Id., at p. 18.

¹⁷ Id.

¹⁸ Id., at p. 29.

in operation, any decision on retirement of Piti 8 & 9 should be postponed until these uncertainties were resolved.¹⁹

At its meeting on June 23, 2020, the Guam Consolidated Commission on Utilities adopted and approved GPA Resolution No. 2020-14.²⁰ Specifically, the CCU requested, subject to the review and approval of the Public Utilities Commission, the following relief: “1. **GPA is approved to plan for the retirement of Piti #8 & #9** Slow Speed Diesel Units after the New Power Plant at Ukudu has commenced commercial operation. 2. GPA is authorized to request USEPA to modify the consent decree to address retirement of Piti 8 & 9 upon completion of the new 198-MW Ukudu power plant, in lieu of conversion of units to ULSD by December 31, 2021. 3. GPA is approved to execute a Renewable Acquisition for 60-MW of Solar-PV + Energy-shifting ESS.” (emphasis added).

The CCU did not expressly approve the retirement of the Piti plants. What it did do was to authorize GPA “**to plan for the retirement of Piti #8 & #9.**”

In the meantime, GPA has requested that USEPA modify the Consent Decree to allow Piti 8 & 9 to be retired upon commissioning of the new 198MW Ukudu plant, in lieu of conversion of the units to ULSD, by December 31, 2021.²¹ In its Petition, GPA requests that PUC approve the retirement of the plants upon the commissioning of the 198 MW plant.

MEC submitted additional materials to the PUC on September 16, 2020.²² Therein MEC submits that GPA’s cost comparison between the 80 MW plants and the Aggreko 40 MW units is not an “apples to apples” comparison. GPA intends to also rely upon 40MW of the Diesel units, but has not included the costs of such units in its analysis. What should also be compared is the Piti units versus Aggreko at 40MW each, at 103,000MW of energy production. If Piti units and Aggreko/diesels are compared at 80MW, MEC states that annual savings of using the Piti plants would be \$4,092,326 per year, or \$45,418,500 for 15 years.²³ Finally,

¹⁹ Piti (MEC) 8 & 9, ULSD Conversion and MEC Comments, dated June 23, 2020, and (SUPPLEMENTAL), Consent Decree Requirement, dated June 23, 2020, attached hereto collectively as Exhibit “1”.

²⁰ Guam Consolidated Commission on Utilities, GPA Resolution No. 2020-14, “Relative to Authorizing the Guam Power Authority to Retire Piti 8 & 9 Slow-Speed Diesel Units and to Procure 60-MW Installed Capacity from Renewable Energy,” adopted and approved on June 23, 2020.

²¹ GPA Petition to Retire Piti 8 & 9 Units and to Procure 60MW of Renewable Energy, GPA Docket 20-16, filed July 10, 2020, at p. 1.

²² Letter from Rino Manzano, MEC Plant Manager, to PUC ALJ Fred Horecky dated September 16, 2020

²³ Id.

MEC has submitted the Report of BWSC, who has been involved since the beginning in the supply of the Piti Generators and the development of the plants. In the opinion of BWSC, it concludes that the Piti fuel conversion is the overall most beneficial solution to the community and the people of Guam.²⁴

The ALJ filed his Report herein dated September 18, 2020.²⁵ The PUC adopts the recommendations of the ALJ Report.

DETERMINATIONS

1. The Report of Concentric Energy Advisors: PUC should not approve GPA's request to retire the Piti plants at the present time.

In order to thoroughly analyze the issues herein, the ALJ requested that PUC Consultant Concentric Energy Advisors provide an analysis of whether GPA should be authorized to retire the Piti 8 & 9 plants. On September 10, 2020, CEA submitted its final Report on "the Financial Convenience of Retirement of Piti 8 & 9 or Conversion to ULSD." CEA, through its principal Ruben Moreno, issued written questions to GPA and MEC, and also conducted oral conferences with both parties. The Report is on file herein, and copies thereof have been provided to the Commissioners.

The Report is a thorough analysis of issues regarding the alternatives of conversion or retirement of the Piti plant. CEA concludes as follows: "in sum, retirement of Piti plants 8 & 9 is financially more convenient than conversion to ULSD as long as the retirement takes place after the Ukudu plant becomes operational to ensure that reliability of the system is not affected."²⁶ CEA recommends that the PUC "should approve GPA's request **to proceed with the plan for the retirement of the Piti 8 & 9 units** upon commissioning of the new 198MW Ukudu power plant."²⁷

However, CEA does not suggest that PUC should presently approve the actual retirement of the plant, but conditions such approval for retirement upon provision by GPA of "evidence to the following three elements: 1) Evidence that the USEPA has agreed with the retirement of the plant instead of the conversion without negative impact to the Consent Decree; 2) the total cost to the ratepayer on an

²⁴ Report of BWSC dated June 26, 2020, Re: MEC ULSD Conversion Project 6-5—2020.

²⁵ ALJ Report, GPA Docket 20-15, dated September 10, 2020.

²⁶ Opinion of Concentric Energy Advisors, Opinion on the Financial Convenience of Retirement of Piti 8 & 9 or Conversion to ULSD, dated September 10, 2020. At p. 2.

²⁷ Id., at p. 2.

expected basis will be lower with the retirement of Piti 8 & 9; and 3) The expected resiliency of the island's electric system will not deteriorate."²⁸

Given that under the Consent Decree Order of the District Court of Guam GPA is still required to convert the Piti Plants to ULSD, it would be premature for the PUC to now approve GPA's request to retire the Piti Plants unless and until the Consent Decree is modified to allow for retirement. GPA cannot undertake any action contrary to the consent Decree until it obtains the approval of USEPA and possibly the District Court. GPA cannot proceed with a plan to retire the Piti units or retire the units until it obtains approval under the Consent Decree process and complies with the elements specified by CEA.

It is not appropriate for the PUC to approve retirement of the Piti plants at the present time. The main reason is that the Consent Decree of the District Court of Guam requires that GPA convert Piti 8 & 9 plants to ULSD. The PUC approved the Consent Decree, and authorized GPA to enter into such Decree. PUC should not approve any alternative to the handling of the Piti plants which is not specifically referenced and authorized in the Consent Decree of the District Court of Guam.

2. CCU's request for approval to execute a Renewable Acquisition for 60-MW of Solar-PV+Energy-shifting ESS is not properly before the PUC.

GPA's Petition includes three separate requests for authorization by the PUC to procure 60MW of renewable energy. However, other than the bare requests for approval, there is no information provided concerning the proposed procurement for 60MW of renewable energy, including details of the project, proposed location, cost, or any other information concerning the nature and scope of the proposed procurement. The regular and ordinary procedure for GPA to request for a procurement is the filing of a petition with the PUC that specifically indicating the location, nature, scope, and cost of the project, and the justification for the procurement. Proposed procurement documents, including a draft contract, are ordinarily submitted. In this case GPA has not submitted any of the standard information provided. PUC does not yet have sufficient information to evaluate the proposed 60MW renewable energy/ESS proposal.

The GPA-PUC Contract Review Protocol establishes the obligation that GPA file a petition, which includes certain information, for any procurement:

²⁸ Id.

“With regard to any contract or obligation [procurement], which requires PUC approval under this Order, GPA shall initiate the regulatory review process through a petition, which shall be supported with the following:

- a) A resolution from the Consolidated Commission on Utilities [CCU], which confirms that after careful review of the documentation described in subparagraph (b) below and upon finding that the proposed procurement is reasonable, prudent and necessary, CCU has authorized GPA to proceed with the procurement, subject to regulatory review and approval.
- b) The documentation on which CCU based its approval under subparagraph (a) above, which shall include, at a minimum, a report from management or an independent third party, which contains the following:
 - i. A description of the project, including timeframes, time constraints and deadlines, and a justification of its need.
 - ii. An analysis from a technical and cost benefit perspective, of all reasonable alternatives for the procurement.
 - iii. A detailed review of the selected alternative, which establishes the basis of selection and that it is economically cost effective over its life.
 - iv. Cost estimates and supported milestones for the selected alternative.
 - v. The projected source of funding for the project with appropriate justification and documentation.
 - vi. A supporting finding that the procurement is necessary within the context of other utility priorities.”²⁹

GPA should file an appropriate petition so that PUC can properly assess its request to procure 60MW of renewable energy.

²⁹ Contract Review Protocol for Guam Power Authority, Administrative Docket, dated February 15, 2008, at paragraph 7.

3. PUC authorization for GPA to request USEPA to modify the Consent Decree to address retirement of Piti 8 & 9 is not necessary.

The CCU has requested in Resolution 2020-14 that PUC authorize GPA to request USEPA to modify the Consent Decree to address retirement of Piti 8 & 9. The PUC is not a party to the Consent Decree proceeding in the District Court of Guam. As previously indicated, the Consent Decree itself provides remedies for GPA if it wishes to modify the provisions which require GPA to convert Piti units 8 & 9 to ULSD. Under Sections XII, Dispute Resolution, and XIX Modification of the Consent Decree, GPA has stated remedies which enable it to seek modification of the Consent Decree.

PUC approval is not required under the Consent Decree for modification to occur. A “material change” to the Consent Decree requires Court approval. It is possible that a modification of the conversion of the Piti units 8 & 9 to retirement, rather than conversion, will require the approval of the Court. GPA is clearly empowered to seek such modifications as it desires through the Consent Decree modification process. If the Consent Decree is materially modified, PUC approval would be required in accordance with GPA Docket 20-01.

4. PUC Approval for the Retirement of Piti Units 8 & 9 at present would be premature and contrary to the Consent Decree.

Approval by the PUC of retirement of Piti units 8 & 9 would place it in direct contradiction to the requirements of the Consent Decree that GPA convert the Piti plants to ULSD. Approval of plant retirement at this juncture would surely be an uncomfortable position for PUC to be in, particularly since it approved the Consent Decree, authorized GPA to sign the Decree, and in effect recognized the GPA is obligated to adhere to the requirements of the Consent Decree. The District Court of Guam has retained jurisdiction for resolving all disputes arising under the Decree, entering orders modifying the Decree, and effectuating or enforcing compliance with the terms of the Decree.³⁰

The District Court has jurisdiction over the issue of whether the conversion of the Piti 8 & 9 plants to ULSD should be modified. An order by the PUC that the Piti plants may be retired would be premature until the District Court first rules on whether the Consent Decree will be modified to allow for retirement. A premature

³⁰ United States of America, Plaintiff v. Guam Power Authority and Marianas Energy Company, L.L.C., Defendants, Consent Decree, Case No. 1:20-cv-0007, at pgs.23-25 and 29.

PUC order could constitute an interference with the jurisdiction of the District Court. In *West v. Lamb*, 497 F.Supp.989 (D. Nevada 1980), the District Court held that a Consent Decree Order of the Court would bind non-parties to the action to observe the Court's Order because of the "Supremacy Clause" of the Constitution of the United States. A Consent Decree of a Federal Court would "prevail" over the "order of any administrative body" of the state.³¹ "Federal Preemption" bars any state or local action which is contrary to a Federal Order. *People v. Teledyne, Inc.*, 599 N.E.2d 472, (Ill. 1992). The District Court of Guam has previously invoked the Supremacy Clause concerning its Consent Decree over the Guam Solid Waste System and inconsistent local government actions.³²

The PUC is an administrative agency, a public corporation of the government of Guam. In the legal hierarchy of state and federal orders, PUC is constrained to follow lawful orders of Federal Courts. PUC faced this dilemma with regard to solid waste rates for the Guam Solid Waste Authority. PUC previously took the position that it should not address such rates for so long as GSWA was under the jurisdiction of a federal court receivership/consent decree proceeding. The above-referenced cases raise the concern that a ruling by the Guam Public Utilities Commission authorizing the retirement of the Piti plants would be contrary to the Consent Decree, could potentially usurp the jurisdiction of the District Court, and potentially violate the Supremacy Clause of the United States Constitution. PUC should await action by the District Court before it addresses these issues.

ORDERING PROVISIONS

After careful review and consideration of the record in this proceeding, the Petition of the Guam Power Authority ["GPA"] to review and approve GPA's request to retire Piti 8 & 9 units, and to procure 60MW of renewable energy, the Report of Concentric Energy Advisors, and the Administrative Law Judge Report, and after discussion at a duly noticed regular meeting held on September 24, 2020, for good cause shown and on motion duly made, seconded and carried by affirmative vote of the undersigned Commissioners, the Guam Public Utilities Commission hereby **ORDERS** that:

1. At the present time, the PUC denies GPA's Petition and will not take action on GPA's plan to retire the Piti plants or authorize retirement of to the plants. GPA should first seek modification of the Consent Decree, in accordance with the

³¹ Id., at pgs. 1006-1008.

³² U.S. v. Government of Guam, 2008WL732796.


provisions thereunder, to allow for the retirement of the Piti plants, including any necessary court approval of the proposed modification.

2. If the Consent Decree is modified to provide for retirement of the Piti 8 & 9 plants, GPA must obtain final approval from the PUC for retirement of the plants. In such case, GPA must provide evidence to the PUC of the following three elements (in compliance with the recommendation of the CEA Report): (a) Evidence that the USEPA and the District Court (if required) have agreed with the retirement of the plant instead of conversion without negative impact to the Consent Decree; (b) that the total cost to the ratepayers on an expected basis would be lower with the retirement of Piti 8 & 9; and (c) that the expected resiliency of the island's electric system will not deteriorate. In any application to PUC for approval of retirement, GPA should also establish that the proposed renewable assets will be fully available for use in the island wide power upon the commissioning of the new 198MW Ukudu power plant. Based upon the foregoing and any other relevant considerations, the PUC would determine whether retirement of the Piti 8 & 9 plants should be authorized.
3. GPA's request for approval to execute a Renewable Acquisition for 60-MW of Solar-PV+Energy-shifting ESS is not properly before the PUC. GPA should file an appropriate petition, which satisfies the requirements of the Contract Review Protocol, so that PUC can properly assess its request to procure 60MW of renewable energy.
4. GPA is ordered to pay the Commission's regulatory fees and expenses, including, without limitation, consulting and counsel fees and the fees and expenses of conducting the hearing proceedings. Assessment of PUC's regulatory fees and expenses is authorized pursuant to 12 GCA §§12103(b) and 12125(b), and Rule 40 of the Rules of Practice and Procedure before the Public Utilities Commission.

[SIGNATURES TO FOLLOW ON NEXT PAGE]

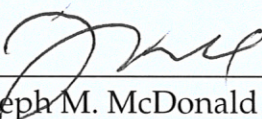
Order
Request to Retire Piti 8 & 9 units and
to Procure 60MW of renewable energy
GPA Docket 20-16
September 24, 2020

Dated this 24th day of September, 2020.

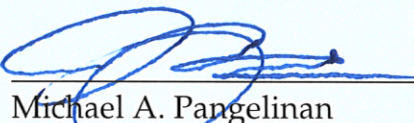


Jeffrey C. Johnson
Chairman

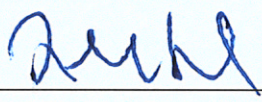
Rowena E. Perez-Camacho
Commissioner



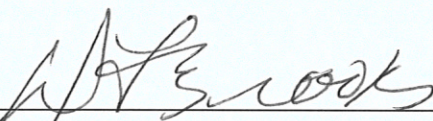
Joseph M. McDonald
Commissioner



Michael A. Pangelinan
Commissioner



Peter Montinola
Commissioner



Doris Flores Brooks
Commissioner

Pedro S.N. Guerrero
Commissioner