

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

--- In the Matter of ---

PUBLIC UTILITIES COMMISSION

Instituting a Proceeding to
Investigate Competitive Bidding
for New Generating Capacity in
Hawaii.

DOCKET NO. 03-0372

PUBLIC UTILITIES
COMMISSION

2004 JAN 30 P 2:33

FILED

**MOTION TO STRIKE
OR, IN THE ALTERNATIVE, RESPONSE
AND CERTIFICATE OF SERVICE OF
JOHNSON CONTROLS, INC., AND PACIFIC MACHINERY, INC.**

Thomas C. Gorak

**Gorak & Bay, L.L.C.
76-6326 Kaheiau Street
Kailua-Kona, HI 96740-3218
808-331-2027**

Attorney for:

JOHNSON CONTROLS, INC.

PACIFIC MACHINERY, INC.

January 30, 2004

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII**

--- In the Matter of ---

PUBLIC UTILITIES COMMISSION

Instituting a Proceeding to
Investigate Competitive Bidding
for New Generating Capacity in
Hawaii.

DOCKET NO. 03-0372

**MOTION TO STRIKE
OR, IN THE ALTERNATIVE, RESPONSE
AND CERTIFICATE OF SERVICE OF
JOHNSON CONTROLS, INC., AND PACIFIC MACHINERY, INC.**

Pursuant to Subchapter 4 of the Rules of Practice and Procedure of the Public Utilities Commission of the State of Hawaii (“Commission” or “PUC”), Chapter 61, Title 6, of the Hawaii Administrative Rules (“Commission’s Rules of Practice and Procedure”), Johnson Controls, Inc. (“JCI”), and Pacific Machinery, Inc. (“PMI”) (hereinafter jointly referred to as the “Hawaii Energy Services Companies” or “HESCOs”), hereby file their motion to strike the “Memorandum In Response To Motions To Intervene,” (“Memorandum”) filed by the Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited (collectively referred to as the “Regulated Companies”), dated January 23, 2004, and received on January 26, 2004, by undersigned counsel. In the alternative, the Hawaii Energy Services Companies hereby file their response to the Memorandum of the Regulated Companies. This pleading is accompanied by a certificate of service.

This docket was instituted by Commission Order No. 20583, dated October 21, 2003, as an investigation of competitive bidding for new generating capacity in Hawaii. In support of this pleading, the Hawaii Energy Services Companies state as follows:

I. MOTION TO STRIKE

The purpose of this investigation is to evaluate competitive bidding as a mechanism for acquiring or building new generating capacity in Hawaii. Order No. 20583, p. 1. On November 7, 2003, the Hawaii Energy Services Companies filed their “Motion To Intervene And Certificate Of Service Of Johnson Controls, Inc., And Pacific Machinery, Inc.” (“November 7, 2003 Motion”) in the above-captioned docket, seeking, among other things, intervention on a joint and several basis. To date, the Commission has not acted upon the November 7, 2003 Motion.

Section 6-61-41(c) of the Hawaii Administrative Rules states:

An opposing party may serve and file counter affidavits and a written statement of reasons in opposition to the motion and of the authorities relied upon *not later than five days after being served the motion*, or, if the hearing on the motion will occur less than five days after the motion is served, at least forty-eight hours before the time set for hearing, unless otherwise ordered by the chairperson. (Emphasis added).

Notwithstanding the clear language of the Rule, some *seventy-seven days later*, the Regulated Companies filed their Memorandum. The Memorandum provides absolutely no reason for this lengthy delay in responding to the November 7, 2003 Motion, nor, to counsel’s knowledge, have the Regulated Companies sought leave from the Commission or the Chairperson of the Commission to file at this time. Obviously, the Memorandum was filed well beyond the time limitation specified in this Rule.

The situation presented here is the same as that presented to the Commission in a proceeding involving Molokai Outdoors Activities, LLC:

Motions to intervene were filed on: (1) November 15, 2001, by Molokai Independent Drivers, Inc., dba Molokai Off-Road Tours & Taxi (MIDI); (2) November 16, 2001, by Lanai Transportation Company, Inc.; (3) November 19, 2001, by Lanai City Service, Inc. (Lanai City); and (4) November 19, 2001, by Neil F. Rabaca, dba Rabaca's Limousine Service (Rabaca) (collectively, motions to intervene).

By letter filed on December 5, 2001, Applicant responded to the motions to intervene and amended its application by withdrawing its request for an extension of authority in the over-25 passenger classification on the island of Lanai. In accordance with Hawaii Administrative Rules (HAR) § 6-61-41, Applicant's response to the motions to intervene was untimely. We, thus, will not consider the letter for purposes of opposing the motions to intervene. We will, however, treat it as a request to amend Applicant's application.

In the Matter of the Application of Molokai Outdoor Activities LLC dba Molokai Outdoors For Extension of Motor Carrier Certificate, Docket No. 01-0391; Order No. 19388, dated May 31, 2002, p. 2 (footnotes omitted). Of course, the Memorandum submitted by the Regulated Companies here in no way amends an application as this docket concerns a Commission investigation.

Because the Regulated Companies failed to file their Memorandum within the time limits specified by the rules of the Commission, because they failed to provide any reason for their untimely filing, and because they failed to request permission to file at this time, the Memorandum either should not be received into the record in this docket, or it should be stricken from the record in this docket.

II. RESPONSE

Assuming *arguendo* that the HESCOs' motion to strike is not granted, the HESCOs provide the following response to the two issues raised by the Regulated Companies in their memorandum.

First, the Regulated Companies state that the HESCOs should only be permitted to participate in this proceeding "on a joint basis." (Memorandum, p. 2.) Apparently, the Regulated Companies object to allowing the two companies that comprise the HESCOs to intervene on a joint and several basis.

In their three sentence "discussion" of this issue, the Regulated Companies provide no compelling reason nor any precedent in support of their position. The only reason offered to support their request is that "JCI and PMI have filed one motion to intervene and the motion lists one counsel for both movants." (Memorandum, p. 2.) This statement not only ignores the plain language of the "one motion to intervene," it provides no legal support for the proposition that the intervention should not be granted on a joint and several basis.

The "one motion to intervene" states that the intervention request is being made on behalf of both JCI and PMI on a "joint and several basis." (November 7, 2003 Motion, p. 6.) This is an accepted method for intervening in agency and other proceedings. Three separate pleadings (that is, one for JCI, one for PMI, and one for both) are not required and, indeed, would simply be redundant.

There are many reasons why potential parties intervene on a joint and several basis in agency and other proceedings. For example, parties may join together because they have certain issues in common in a given proceeding. By joining together, these parties are able to present one set of comments, testimony, briefs, etc., to the Commission and the other parties, thereby avoiding

duplicative filings. However, as the Commission well knows, public utility matters may continue for periods of months or even years. If one party has to drop out of the group -- for example, because that party is no longer involved in the business being addressed in a particular docket, or for economic or other reasons -- there is no reason why the other party cannot continue even if there is no longer a group, assuming that the party has intervened in its own right. This is the purpose of a "joint and several" intervention.

The Regulated Companies do not address such issues, nor do they provide any legal support for the proposition that JCI and PMI should only be permitted to intervene on a joint basis. Of course, precedent to the contrary of the Regulated Companies' position is easily found.

In the order instituting this docket, the Commission itself stated:

Any individual, entity, *or* organization desiring to intervene as a party or to participate without intervention in this proceeding shall file a motion to intervene or participate without intervention not later than twenty (20) days of the filing of this order. Motions to intervene or participate without intervention must comply with all applicable rules of HAR Chapter 6-61, Rules of Practice and Procedures Before the Public Utilities Commission.

Order No. 20583, p. 5 (emphasis added).

Moreover, the Commission has, in the past, treated a joint motion for intervention as a joint and several motion for intervention. In a proceeding involving the Western Motor Tariff Bureau, Inc., the Commission ruled as follows with respect to a joint request for intervention:

On October 10, 2002, PC Services, Inc. and Polynesian Cultural Center (PCC) timely filed a joint motion to intervene. Among other things, PCC asserted that the information and data it was able to submit in this proceeding "will supplement [the] evidence pertaining to individual consumers and will be critical to developing a comprehensive and complete record."

By Order No. 19741, filed on October 29, 2002, the commission denied intervention to PC Services, Inc., and granted intervention to PCC: “Upon review, it appears that WMTB's proposed increase in rates will directly impact Polynesian Cultural Center's operations. Thus, its allegations appear reasonably pertinent to the underlying issue in this proceeding. Accordingly, the commission will grant Polynesian Cultural Center's motion to intervene.”

Thereafter, by Amended Prehearing Order No. 19736, filed on November 7, 2002, and Order No. 19782, filed on November 19, 2002, the commission incorporated PCC's status as a party intervenor.

In the Matter of the Application of Western Motor Tariff Bureau, Inc., To Increase Rates and Charges on Behalf of Motor Carriers Participating in WMTB's Passenger Carrier Tariff No. 8-C, Island of Oahu, Docket No. 02-0362; Order No. 19860, dated December 6, 2002, pp. 1-2. Thus, for practical purposes, the Commission treated the joint motion as a motion filed on a joint and several basis, and granted only the individual application of PCC, rather than the individual application of PC Services, Inc., or the joint application. (PCC subsequently filed a motion to withdraw which the Commission granted.)

Rule 20 of the Hawaii Rules of Civil Procedure recognizes the principle of joint and several participation in cases, stating, in pertinent part:

Permissive joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Likewise, joint and several intervention is granted routinely in administrative proceedings. For example, the Federal Energy Regulatory Commission (“FERC”) routinely approves interventions on a joint and several basis. *See, e.g., Gulf South Pipeline Company, LP*, 99 F.E.R.C. ¶ 61,020 (2002); *Crossroads Pipeline Company*, 96 F.E.R.C. ¶ 61,256 (2001); *Columbia Gas Transmission*

Corporation, 95 F.E.R.C. ¶ 61,171 (2001); *Southern Natural Gas Company*; 83 F.E.R.C. ¶ 62,168 (1998); *El Paso Electric Company, et al.*, 68 F.E.R.C. ¶ 61,182 (1994); *Southern Natural Gas Company*, 58 F.E.R.C. ¶ 62,237 (1992); *Pennzoil Exploration and Production Company and Pennzoil Gas Marketing Company v. Southern Natural Gas Company*, 57 F.E.R.C. ¶ 61,346 (1991).

Thus, there is no merit to the Regulated Companies's assertion that intervention of JCI and PMI should be granted only on a joint basis.

Likewise, there is no merit in the claim that JCI and PMI should be granted intervention only on a joint basis because they are represented by one counsel. In fact, the Hawaiian Electric Company, Inc., the Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited, are also represented by one counsel for purposes of the Memorandum. The Regulated Companies simply fail to discuss why the fact that JCI and PMI are represented by one counsel makes any difference whatsoever.

Finally, the Regulated Companies have made no allegations that any type of harm would inure to them as a result of granting the November 7, 2003 Motion on a joint and several basis. There are, on the other hand, compelling reasons for granting such intervention as discussed above.

For these reasons, the Regulated Companies request that JCI and PMI should be treated only on a joint basis should be denied, and JCI and PMI should be granted intervention for the reasons set forth in the November 7, 2003 Motion on a joint and several basis.

Second, the Regulated Companies have correctly identified a typographical error in the HESCOs' November 7, 2003 Motion. The phrase "[o]ther ways in which the proposed CHP program could affect the property, financial, and other interests" should read "[o]ther ways in which

a competitive bidding program could affect the property, financial, and other interests” of the HESCOs. November 7, 2003 Motion pp. 7-8.

Undersigned counsel observes, however, that there was no need for a formal pleading concerning this “issue” in the first instance. Had the Regulated Companies’ counsel simply telephoned undersigned counsel sometime during the last several months, the error could have been easily identified and rectified. Given that this is simply a typographical error, the Regulated Companies’ other statements in the Memorandum concerning delays in other dockets should be given no weight whatsoever.

III. CONCLUSION

WHEREFORE, the Hawaii Energy Services Companies, Johnson Controls, Inc., and Pacific Machinery, Inc., respectfully request that the Commission grant their motion to strike the Memorandum of the Regulated Companies, or, in the alternative, that the Commission accept this response to the Memorandum of the Regulated Companies.

Respectfully submitted,

JOHNSON CONTROLS, INC.

PACIFIC MACHINERY, INC.

By their attorney:



Thomas C. Gorak
Hawaii Bar No. 0007673
Gorak & Bay, L.L.C.
76-6326 Kaheiau Street
Kailua-Kona, HI 96740-3218
808-331-2027

January 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this day I have served a copy of the foregoing “Motion To Strike, Or, In The Alternative, Response And Certificate Of Service Of Johnson Controls, Inc., And Pacific Machinery, Inc.,” by hand delivery or by depositing same in the United States Mail, first class postage prepaid, and addressed to the following:

Department of Commerce
and Consumer Affairs
Division of Consumer Advocacy
335 Merchant Street, Room 326
Honolulu, HI 96813

William A. Bonnet, Vice President
Hawaiian Electric Company, Inc.
P.O. Box 2750
Honolulu, HI 96840-0001

Warren H.W. Lee, President
Hawaii Electric Light Company, Inc.
P.O. Box 1027
Hilo, HI 96721-1027

Edward L. Reinhardt, President
Maui Electric Company, Limited
P.O. Box 398
Kahului, HI 96733-6898

Alton Miyamoto, President & CEO
Kauai Island Utility Co-Op
2970 Haleko Road
Suite 202
Lihue, HI 96766

Oshima Chun Fong & Chung LLP
Alan M. Oshima, Esq.
Kent D. Morihara, Esq.
841 Bishop Street
Suite 400
Honolulu, HI 96813

Steven P. Golden
Director, External Affairs & Planning
The Gas Company, LLC
841 Bishop Street
Suite 1700
Honolulu, HI 96813

George T. Aoki, Esq.
The Gas Company, LLC
841 Bishop Street
Suite 1700
Honolulu, HI 96813

Warren S. Bollmeier II
President
Hawaii Renewable Energy Alliance
46-040 Konane Place #3816
Kaneohe, HI 96744

Brian T. Moto, Esq.
Cindy Y. Young, Esq.
Department of Corporation Counsel,
County of Maui
200 South High Street
Wailuku, HI 96743

Lani D.H. Nakazawa, Esq.
Christine L. Nakea, Esq.
Office of the County Attorney
County of Kauai
4444 Rice Street
Suite 220
Lihue, HI 96766-1300

Deborah Day Emerson, Esq.
John W.K. Chang, Esq.
Department of the Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

Hess Microgen, LLC
c/o Sandra-Ann Y.H. Wong, Esq.
Attorney at Law, a Law Corporation
1050 Bishop Street, #514
Honolulu, HI 96813

Dated: Kailua-Kona, Hawaii, January 30, 2004.

A handwritten signature in black ink, reading "Thomas C. Gorak". The signature is written in a cursive style with a large, sweeping initial "T".

Thomas C. Gorak
Hawaii Bar No. 0007673

Gorak & Bay, L.L.C.
76-6326 Kaheiau Street
Kailua-Kona, HI 96740-3218
808-331-2027