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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Investigation of)
)
HAWAIIAN ELECTRIC COMPANY, INC.)
HAWAII ELECTRIC LIGHT COMPANY, INC.)
MAUI ELECTRIC COMPANY, LIMITED)
)
Related to the Major Power Outages of)
October 15-16, 2006.)
_____)

Docket No. 2006-0431

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COMMISSION

MEMORANDUM IN OPPOSITION
TO MOTION TO INTERVENE OF
LIFE OF THE LAND

AND

CERTIFICATE OF SERVICE

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**MEMORANDUM IN OPPOSITION TO THE MOTION TO INTERVENE OF
LIFE OF THE LAND**

This Memorandum is respectfully submitted by Hawaiian Electric Company, Inc. (“HECO”), Hawaii Electric Light Company, Inc. (“HELCO”) and Maui Electric Company, Limited (“MECO”), collectively referred to herein as the “Hawaiian Electric Companies,” in opposition to the Motion to Intervene of Life of the Land (“LOL”), dated November 8, 2006 (“LOL’s Motion”).¹

The Hawaiian Electric Companies oppose LOL’s Motion on the grounds that (1) there is no statutory or other mandatory right which entitles LOL to intervene or otherwise participate in this docket, and LOL has not otherwise demonstrated a cognizable right to participate in this proceeding; (2) any general interest that LOL may have with respect to the earthquake outage

¹ This Memorandum is timely filed pursuant to Title 6, Chapter 61 of Hawaii Administrative Rules (“HAR”) §§ 6-61-22 (computation of time) & -41(c) (opposition to a motion). The prescribed period for opposing a motion is five (5) days, excluding intervening Saturdays, Sundays and holidays. LOL filed and served its motion *via* hand-delivery on Wednesday, November 8, 2006. Thus, excluding the intervening State Veteran’s Day holiday on Friday, November 9, and Saturday, and Sunday, the prescribed response period ends on Thursday, November 16, 2006. Title 6, Chapter 61 is hereinafter referred to as the “Commission’s Rules of Practice and Procedure” or the “Commission’s Rules.”

investigation is the same as the general public and/or can be adequately represented by the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy (“Consumer Advocate”) and LOL’s participation would delay the proceeding; (3) LOL has had and continues to have ample opportunity by other means (other than LOL’s participation in an earthquake outage investigation) to protect its interests ; (4) LOL’s allegations are not reasonably pertinent to and will unduly broaden the issues; (5) LOL has not shown that its participation would assist in the development of a sound record in this proceeding.

I. DISCUSSION

A. LOL Does Not Have a Statutory Right or Other Right to Participate in this Docket

LOL contends that it has a statutory right to participate based on the Hawaii State Constitution (Article XI, Section 9: Environmental Rights).² LOL would have the Commission believe that it has a constitutionally protected right to be granted intervention. Contrary to LOL’s claim, the Hawaii State Constitution provision and the descriptions of LOL’s “right” to participate do not grant LOL the status of a party to a Commission proceeding.³ The right to which LOL refers is not a right to intervene, it is a right to a “clean and healthful environment” which all of us as citizens of the State enjoy, and which we all may enforce “subject to reasonable limitations and regulation as provided by law.”⁴ Compare Hawaii Revised Statutes (“HRS”) § 269-51 (granting the Consumer Advocate the right to participate in Commission

² Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. HRS Const. Art. XI, § 9 (2006). LOL’s Motion at 4. LOL’s Motion is not paginated; page references herein are counted with the cover sheet as page 1.

³ Indeed, LOL has asserted in other dockets that it has a statutory right to participate in such dockets. LOL’s motions to intervene in those dockets were denied. See e.g. Order No. 18035 (filed September 20, 2000) in In Re Hawaiian Electric Company, Inc., Docket No. 00-0322 and Order No. 18746 (filed August 16, 2001) in In Re Hawaiian Electric Company, Inc., Docket No. 01-0228. Clearly if there was a statutory or constitutional right, LOL’s motions in those dockets would not have been denied.

⁴ See HRS Const. Art. XI, § 9 (2006).

proceedings).⁵ Moreover, LOL's position is certainly contradicted by the Supreme Court of Hawai'i. In fact, the Supreme Court of Hawai'i states quite the opposite and grants considerable latitude to the Commission to reject a request to intervene, stating: "Intervention as a party in a proceeding before the PUC is not a matter of right, but is a matter resting within the sound discretion of the commission. This is generally true in proceedings before administrative agencies." In re Application of Hawaiian Electric Co., 56 Haw 260, 262, 535 P.2d 1102, 1104 (1975); see, In re Maui Electric Co., Docket No. 7000, Decision and Order No. 11668 (June 5, 1992) at 8; In re Hawaii Electric Light Co., Docket No. 6432, Order No. 10399 (November 24, 1989) at 5-6.

The Commission exercises its discretion by determining whether or not a movant should be admitted as a party (or as a participant) in a proceeding. The Commission is guided, in part, by Section 6-61-55 of the Commission's Rules which specifies that "[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." In re Hawaii Electric Light Co., Docket No. 7259, Order No. 12893 (December 2, 1993). In addition, when exercising its discretion the Commission needs to insure "the just, speedy and inexpensive determination of every proceeding," which is the purpose of Section 6-61-1 of the Commission's Rules. However, the "just, speedy and inexpensive determination" of a proceeding cannot be accomplished if the Commission admits every movant as a party.

As discussed above, LOL simply does not have a statutory right to intervene in this docket. Accordingly, LOL's Motion is governed by Section 6-61-55 of the Commission's Rules regarding intervention and the decision regarding whether to allow such intervention rests solely

⁵ Cf. HRS § 269-51: "As consumer advocate, the director of commerce and consumer affairs shall have full rights to participate as a party in interest in all proceedings before the public utilities commission."

within the “sound discretion of the Commission.” Section 6-61-55 of the Commission’s Rules requires that a motion make reference to the nature of the movant’s statutory or other right to participate in the hearing. In paragraph 2, page 4 of its motion, LOL has, in effect, provided none. It is axiomatic that an applicant for intervention cannot subsume the authority of the Commission and bootstrap itself into a right to intervene, as LOL seeks to do, by referring to authority in its own Petition and Charter of Incorporation and LOL Board Actions as support for its right to participate.⁶

Despite its interest in the environment, an interest which the Consumer Advocate and the Hawaiian Electric Companies also share, LOL has no cognizable right, constitutional or otherwise, to be granted intervention in this earthquake outage investigation. Based on the standards set forth above, LOL’s Motion should be denied.

B. Any General Interests That LOL May Have With Respect To This Investigation Are The Same As The General Public And/Or Can Be Adequately Represented By The Consumer Advocate And LOL’s Participation Would Delay The Proceeding

In order to be granted intervention, LOL must meet, among other sections, Section 6-61-55(b)(5) and Section 6-61-55(b)(8) of the Commission’s Rules. Section 6-61-55(b)(5) of the Commission’s Rules requires LOL to establish “the extent to which the applicant’s interest will not be represented by the existing parties” and Section 6-61-55(b)(8) of the Commission’s Rules requires LOL to establish “the extent to which applicant’s interest in the proceedings differs from that of the general public.”

LOL states that its interests differ from those of the general public because the “Consumer Advocate is bound by law to represent the interests of the general public, that is, the

⁶ The rule referenced by LOL is well known to the Commission and simply permits an officer of a corporation, among others, to represent the corporation in a proceeding before the Commission, that is, after and only if the corporation is a party. It is not a statutory or other right to intervention.

consumers of utility services. Life of the Land is concerned with environmental impacts.”⁷

However, LOL has not demonstrated how its “environmental impacts” are unique and would not be represented by other parties. Indeed, the Consumer Advocate, which is a party to this proceeding, is required to “represent, protect and advance the interests of all consumers.”⁸ The scope of the Consumer Advocate’s representation includes environmental impacts. LOL simply fails to show how its interests are different from those represented by the Consumer Advocate.

In addition, the Commission’s Order No. 22986 requires that “a motion to intervene or participate without intervention in this docket must comply with the commission’s rules set forth in HAR Chapter 6-61, Subchapter 4.” Section 6-61-55(b)(9) of the Commission’s Rules requires the movant to state its position in support of or in opposition to the relief sought. In response to this requirement, LOL states its position as follows:

This docket focuses on investigating the outages. We support that Life of the Land opposes relying on fossil fuel as a solution to any energy problem. We are in a time crunch. We must make the transition to renewable resources now.”⁹

However, LOL fails to recognize that representation of its position has already been explicitly delegated, by law, to the Consumer Advocate:

The Consumer Advocate shall consider the long-term benefits of renewable resources in the consumer advocate’s role as consumer advocate.¹⁰

There is no divergence of interests here. LOL’s position, to the extent it may be relevant, is statutorily represented by the Consumer Advocate. The idea that the Consumer Advocate can only look after consumers’ non-environmental interests, while only LOL can look after their environmental interests, is simply incorrect.

⁷ LOL’s Motion at 4.

⁸ HRS § 269-51 (emphasis added).

⁹ Motion at 6, para. 10.

¹⁰ HRS § 269-54(c) (General Powers; duties) (emphasis added).

Moreover, the quote provided on page 4 of LOL's Motion does not support its position. In fact, the very quote cited on page 4 of LOL's Motion (*In re Hawaiian Elec. Co.* 56 Haw. 260 (1975)) leaves out a crucial qualifier. The quote is: "The practical effect of denying the appellant's standing would be to silence the voice of all those who would speak in the public interest, a duty that normally resides with the PUC staff."¹¹ The Court continues, holding

that where the appellants have been 'aggrieved' by the action of the PUC, and where they were involved as 'participants' during the agency hearings, and where the PUC staff (the agency through which they participated at the hearings) has failed to appeal the decision of the PUC, the appellants may challenge the order of the PUC in this court.¹²

As demonstrated above, LOL's quote does not stand for the proposition that LOL ought to be granted intervention because to deny it would be to deny the voice of the people. Quite to the contrary, LOL's quote stands for the proposition that the Consumer Advocate is first and foremost, the "voice of all those who would speak in the public interest" and only if it abdicates that role, would one have standing to speak. The Supreme Court of Hawai'i accords to the Consumer Advocate a preeminent role.

Accordingly, there is no need for redundant representation in a docket that is focused on power outages caused by the earthquake on October 15, 2006. As the Commission stated in Docket No. 99-0207: "If...it is concluded that [the participant's] efforts duplicate those of the Consumer Advocate's, the commission will reconsider [that participant's] further participation in this docket."¹³ Duplication of effort can only slow down the Commission's investigation needlessly at a time when Hawaii's ratepayers, the Hawaiian Electric Companies, the Consumer

¹¹ *In re Hawaiian Elec. Co.*, 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975) (internal citations omitted) (emphasis added). The Court notes that at that time the Director of Regulatory Agencies was mandated by law to protect the interests of consumers and in that capacity acted through the technical staff and other personnel of the commission, aided by a specially designated deputy attorney general.

¹² *Id.* (emphasis added). The case involved an application for a rate increase. The Court noted that individual ratepayer members of LOL would be compelled to pay a higher utility rate.

¹³ *In re Haw. Elec. Co.*, Docket No. 99-0207, Order No. 17532 (Feb. 10, 2000) at 5-6 (n.6 omitted).

Advocate and the Commission are seeking to better understand the “nuts and bolts” of the earthquake’s impact on and restoration of our island power grids. LOL’s Motion should be denied.

C. In Addition to Consumer Advocate Representation, LOL’s Participation in Other Proceedings Shows That It Has Ample Means, Other than Participation in an Earthquake Outage Investigation, to Protect its Interests

LOL apparently believes that simply because it has been allowed intervention or participation in other dockets (notably, at times, with HECO’s, HELCO’s or MECO’s support), it should be allowed into this one as well. Prior participation in and familiarity with other Commission dockets are not dispositive factors permitting intervention under the Commission’s Rules. Moreover, a closer examination of these dockets reveals that there is hardly anything more that participation in a power outage investigation could add to protecting LOL’s positions on renewable energy and the environment.

LOL has already protected its interest in renewable energy and the environment in numerous dockets. The following is a partial list:

- Docket No. 04-0113 (Demand Side and Load Management Programs);
- Docket No. 03-0371 (Distributed Generation (HECO did not oppose intervention));
- Docket No. 03-0417 (East Oahu Transmission Project (HECO did not oppose intervention));
- Docket No. 96-0493 (Generic Electricity Restructuring);
- Docket No. 99-0004 (MECO’s Integrated Resource Plan (“IRP”) 2000-2020);
- HECO’s IRP-2 and IRP-3 Advisory Group; and
- Docket No. 05-0145 (Campbell Industrial Park Generating Station and Transmission Additions Project) (HECO did not oppose intervention).

Nonetheless, LOL claims to need yet another forum in which to protect renewable energy policy and environmental concerns. The Hawaiian Electric Companies respectfully submit that this outage investigation is significantly different from other dockets in which LOL has participated. Accordingly, LOL's Motion should be denied.

D. LOL's Allegations Are Not Reasonably Pertinent To and Will Unduly Broaden the Issues Already Presented

LOL states that it is concerned with environmental impacts and renewable resources. Although there is no "project" *per se*, LOL alleges that its presence in the docket will enable the Commission "to get a more complete picture of the environmental, social and economic costs/benefits associated with this project and the alternatives."¹⁴

The Commission's Order identifies the following preliminary issues:

1. Aside from the earthquake, are there underlying causes that contributed or may have contributed to the Power Outages?
2. Were the activities and performances of the HECO Companies prior to and during the Power Outages reasonable and in the public interest? Specifically, were the power restoration processes and communication regarding the outages reasonable under the circumstances?
3. Could the island-wide Power Outages on Oahu and Maui have been avoided? What are the necessary steps to minimize and improve the response to such occurrences in the future?
4. What penalties, if any, should be imposed on the HECO Companies?¹⁵

LOL's allegations about the environment and renewable energy are ill-suited to helping the Commission focus on the preliminary issues that it has identified. The Hawaiian Electric Companies respectfully submit that LOL would take the Commission far afield from the

¹⁴ LOL's Motion at 6.

¹⁵ Order No. 22986 at 9. The Commission notes that these are preliminary and that the parties (and intervenors and participants) may restructure, eliminate, or recommend other issues for review.

efficient, focused resolution that is required under these extraordinary circumstances. Certainly, if any projects come from the Commission's investigation, such projects will at some future point (not in this docket) undergo appropriate environmental reviews and other approvals as required by law prior to implementation. It is critical that utility operations and response procedures are understood. If other procedures need to be put in place, the utilities need to proceed reasonably and expeditiously in case of another earthquake event. In short, the investigation needs to move forward as quickly as possible consistent with the Commission's directives towards resolution.

Notwithstanding this urgency, LOL is already anticipating that other issues may arise which bring their interests to bear. A reading of the "Possible Issues" contained in LOL's Motion, compared against LOL's stated interest in renewable energy and environmental concerns, reveals little, if anything, that would justify LOL's participation in this outage investigation.¹⁶ A summary analysis of the Hawaiian Electric Companies' objections to LOL's participation based upon LOL's list of "Possible Issues" is presented below.

(1) "Telecommunications:"

Communications may become an issue, but LOL's input will not be needed. Community opposition to new cell towers is covered by zoning laws, permitting, the Federal Communications Commission ("FCC") and other jurisdictional entities. The Telecommunications Act of 1996¹⁷ and the Commission's and FCC's orders and administrative rules will play heavily in any solution. LOL's renewable energy and environmental interests are not implicated.

(2) "Distributed generation:"

¹⁶ LOL's Motion at 3-4.

¹⁷ Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

LOL has had ample opportunity to protect (promote) the interests of its members through its participation in the Commission's Distributed Generation proceeding, Docket No. 03-0371. If needed, the Commission can take administrative notice of that proceeding.

(3) "Operations:"

Load shedding, operator functions, and generation operation will be a discussion that is primarily technical in nature and will involve a thorough examination by the subject-matter experts who will prepare reports for the Commission's investigation. These issues do not implicate LOL's renewable energy and environmental interests.

(4) "Independent Power Producers:"

Independent Power Producers are governed by the terms of their contracts under State and Federal laws, including but not limited to Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) (*as modified by the Energy Policy Act of 2005* (Aug. 8, 2005)). The degree which HC&S could, if at all, re-energize the grid is not an issue that implicates LOL's renewable and environmental interests.

(5) "Externalities:"

LOL states: "We live in a world where all things are interconnected. The choices we make today affect our pocketbooks, o[u]r environment and our planet (climate change)." The Hawaiian Electric Companies do not disagree with this statement. However, this possible issue unduly broadens the issues already presented. Moreover, to the extent our choices affect our pocketbooks, the Consumer Advocate will represent the ratepayers. To the extent our choices affect our environment and our planet (climate change), renewable generation (non-fossil fuel) issues are a matter of broad State policy,

State and Federal laws, Consumer Advocate representation, and other Commission proceedings. As discussed above, LOL has already participated or is currently participating in a number of these proceedings.

(6) “Proposed Power Plant:”

LOL is an intervenor with full rights as a party in Docket No. 05-0145 regarding the Campbell Industrial Park Generating Station. Its interests are already protected and its participation in the earthquake outage investigation on this basis would be unnecessary and redundant. Furthermore, future generating plant construction projects, if any, will be subject to their own approval/review process and LOL can move to intervene in those proceedings at the appropriate time, as it did with the Campbell Industrial Park project.

(7) “Waikiki:”

LOL cites the East O’ahu Transmission Line project and the timing of the restoration of power to Waikiki. LOL’s possible issue does not implicate its interest in the environment or in renewable energy. LOL participated in the East O’ahu Transmission Line project, Docket No. 03-0417. The Commission can refer to the record in that docket, if necessary, for LOL’s environmental views on the project.

In summary, the purposes for going methodically through the list of LOL’s “Possible Issues” above is to show that even under circumstances where such issues arise, LOL’s interests, if any, are not implicated or are already protected through its participation in other dockets, already represented by the Consumer Advocate, or are simply and unreasonably overbroad. Accordingly, LOL’s Motion should be denied.

E. LOL Has Not Shown That Its Participation Would Assist In the Development of a Sound Record in This Proceeding

LOL has not shown that its participation would assist in the development of a sound record regarding the Commission's investigation into the October 15-16 outage. LOL's Motion only includes a generalized statement citing its past experiences in energy matters and does not cite to general or specific expertise in electric industry power outages or even earthquake effects on utility infrastructure. Instead, LOL cites its Statement of Position in the East Oahu Transmission Line docket (Docket No. 03-0417). A close examination of that statement of position does not support LOL's position. If anything, it appears more likely that LOL participation would sidetrack the proceeding away from the outage investigation as LOL would attempt to "enable the PUC to get a more complete picture of the environmental, social and economic cost/benefits associated with this project and alternatives." LOL's Motion at 6. It is clear that LOL's participation will not lead to the development of a sound record in this docket.

II. CONCLUSION

Based on the foregoing, the Hawaiian Electric Companies respectfully request that the Commission deny LOL's Motion.

DATED: Honolulu, Hawaii, November 16, 2006.



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MAUI ELECTRIC COMPANY, LIMITED

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing
MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE OF LIFE OF THE
LAND, together with this Certificate of Service, by hand delivery and/or mailing a copy by
United States mail, postage prepaid, to the following:

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(2 copies)

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DATED: Honolulu, Hawaii, November 16, 2006.



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