

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

4U2C, INC., dba
HAWAII NATURE EXPLORERS

For a Motor Carrier Certificate
Or Permit.

DOCKET NO. 04-0168

ORDER NO. 21854

Filed June 3, 2005
At 2 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

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CONSUMER AFFAIRS
STATE OF HAWAII

Docket No. 04-0168
Order No. 21854

By this Order, the commission approves and adopts, in toto, the hearings officer's March 15, 2005, Findings of Fact, Conclusions of Law, and Recommended Decision and Order of Hearings Officer ("Recommended Decision") to deny Jack's Tours, Inc. ("Jack's") motion to intervene in the above-entitled matter¹ ("Motion to Intervene").

History

¹On July 8, 2004, 4U2C, INC., dba HAWAII NATURE EXPLORERS ("Applicant"), filed an application for a certificate of public convenience and necessity to transport passengers by motor vehicle in the 8-to-25 passenger classification, limited to utilizing motor vehicles with a maximum manufacturer's seating capacity of fifteen (15) passengers, on the island of Hawaii, excluding Waipio Valley.

served upon Applicant on March 15, 2005, via first class mail. That same day, the Recommended Decision was also served upon Jack's via first class mail.

Jack's filed timely written exceptions to the Recommended Decision on March 30, 2005 ("Exceptions"),² in which, among other things, it requested to present oral argument on its Exceptions before the commission. On April 6, 2005, Applicant filed a timely brief opposing the Exceptions.³

The commission granted Jack's request for oral argument and by Order No. 21779, filed on April 27, 2005, in the instant docket, notified Jack's and Applicant that oral argument on the Exceptions would be held on May 24, 2005 at 1:00 p.m. in the commission's hearing room ("Oral Argument").

II.

Oral Argument

Oral Argument on the Exceptions was held at the above-noted place, date and time. Jack's was represented by attorney Wray Kondo. Applicant was represented by attorney Arthur Fong.

Jack's primary assertion in its oral argument is that: (1) Applicant has failed to rebut Jack's *prima facie* evidence submitted pursuant to HAR § 6-61-55; (2) Applicant failed to submit evidence in its application relating to the public convenience and necessity of Applicant's proposed motor carrier

²See Hawaii Administrative Rules ("HAR") § 6-61-130.

³See HAR § 6-61-131.

service; and (3) Applicant failed to show that granting Jack's Motion to Intervene would result in undue delay.

Jack's additionally asserts that Applicant's proposed motor carrier service is identical to that currently offered by Jack's, and is therefore not necessary, and that Applicant's application emphasizes tour guide services, not motor carrier services.

Applicant countered that Jack's tariff does not reflect the types of services Applicant proposed to offer, i.e., nature-focused tours catering to Japanese-speaking visitors, consequently, Applicant's proposed motor carrier service is not duplicative of Jack's current motor carrier service and, thus, unnecessary, as Jack's asserts. Moreover, Applicant's owner has fifteen (15) years of extensive transportation experience to support Applicant's request for commission approval.

III.

Discussion

Intervention as a party in a proceeding before the commission is not a matter of right, but rather a matter resting within the sound discretion of the commission. In re Application of Hawaiian Elec. Co., Ltd., 56 Haw. 260, 264 (1975).

Upon a review of the entire record, including Jack's Exceptions and oral arguments by Jack's and Applicant, the commission is not persuaded that the Recommended Decision is incorrect and should be reversed. Rather, we agree with, and adopt the hearings officer's finding that Jack's participation as

a party is not necessary to the resolution of the instant matter. The commission is also not convinced that Jack's "participation as a party will not unreasonably broaden the issues or delay the proceeding."⁴ Recommended Decision at 7.

Accordingly, pursuant to Hawaii Revised Statutes § 269-6, we conclude that the Recommended Decision, attached hereto as Exhibit A, should be approved and adopted, *in toto*, consistent with HAR §§ 6-61-132 and 6-61-133, and, as a result, Jack's Motion to Intervene should be denied.

IV.

Orders

THE COMMISSION ORDERS:

1. The hearings officer's Recommended Decision, attached hereto as Exhibit A, is approved and adopted *in toto* and made a part of this Order.

2. Jack's Motion to Intervene is denied.

⁴HAR § 6-61-55(d).

DONE at Honolulu, Hawaii JUN - 3 2005.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By Janet E. Kawelo
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

Benedyne Stone
Benedyne Stone
Commission Counsel

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of))	
4U2C, INC.)	DOCKET NO. 04-0168
dba HAWAI'I NATURE EXPLORERS)	
)	FINDINGS OF FACT
)	CONCLUSIONS OF LAW, AND
For A Motor Carrier Certificate or)	RECOMMENDED DECISION
Permit.)	AND ORDER OF
<hr/>)	HEARINGS OFFICER

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED DECISION AND ORDER OF HEARINGS OFFICER

I.

Introduction

On July 8, 2004, 4U2C, INC. DBA HAWAI'I NATURE EXPLORERS ("Applicant") filed an application for a Certificate of Public Convenience and Necessity ("CPCN") to transport passengers by motor vehicle on the island of Hawaii in the 8-to-25 passenger classification, limited to utilizing motor vehicles with a maximum manufacturer's seating capacity of 15 passengers. On August 4, 2004, Jack's Tours, Inc. ("Jack's Tours"), filed a timely motion to intervene and requested a hearing on the motion pursuant to Hawaii Administrative Rules ("HAR") §§ 6-61-55 and 6-61-57. On August 23, 2004, Applicant filed a response to Jack's Tours' motion to intervene. On September 3, 2004, Jack's Tours filed a reply to Applicant's response to Jack's Tours' Motion to intervene.

By Notice of Hearing, filed on October 1, 2004, Applicant and Jack's Tours were given notice that a hearing on Jack's motion to intervene was scheduled to be heard by a duly appointed hearings officer on November 23, 2004, at 9:00 a.m. pursuant to Chapters 269 and 271, Hawaii Revised Statutes ("HRS") and Chapter 6-61, Hawaii Administrative Rules ("HAR").

A hearing on Jack's Tours' motion to intervene was held at 9:00 a.m. on November 23, 2004 at the Public Utilities Commission's Hawaii District Office, 688 Kinoole Street, Hilo, Hawaii. Kumiko Hasegawa, Applicant's President, represented Applicant at the hearing. Wray Kondo, an Attorney, represented Jack's Tours at the hearing. Hearings Officer Kevin M. Katsura presided over the hearing.

Based upon a review of the record and the testimony presented at the hearing, the issue is whether Jack's Tours should be allowed to intervene into this proceeding, pursuant to the requirements set forth in HAR § 6-61-55.

Having considered the testimony and other evidence presented at the hearing, and the entire record in this matter this hearings officer hereby renders the following findings of fact, conclusions of law, and recommended decision and order.

II.

Findings of Fact

1. Jack's Tours filed a timely motion to intervene in this docket.

2. Applicant filed an untimely response to Jack's Tours' motion to intervene into this docket.

3. Jack's Tours filed an unauthorized reply to Applicant's response to Jack's Tours' motion to intervene into this docket.

4. Jack's Tours is a certificated common carrier by motor vehicle in the 1-to-7, 8-to-25, and over-25 passenger classifications on the island of Hawaii, excluding Waipio Valley.

5. Jack's Tours asserts that: (1) the services proposed by the Applicant are not and will not be required by the present or future necessity under the provisions of Chapter 271, HRS; (2) there is sufficient capacity by the current authorized operators to provide the proposed service; (3) none of Applicant's letters in support of her application are relevant to her ability or need to operate as a motor carrier; (4) granting Applicant a CPCN will not be consistent with the public interest and transportation policy of the State of Hawaii and will not foster sound economic conditions in transportation among the several carriers as set forth in the declaration of policy in Section 271-1, HRS; (5) granting Applicant a CPCN would have a direct and negative impact on Jack's Tours' business, and result in direct economic injury to Jack's Tours; (6) since Jack's Tours has been servicing Applicant's transportation needs, Jack's Tours will suffer economic injury through the loss of this business; (7) Applicant is not fit or able to provide the service proposed as required by Chapter 271, HRS; (8) there are no other means

available whereby the interest of Jack's Tours may be protected; (9) Jack's Tours participation can assist in the development of a sound record through the introduction of pertinent evidence; (10) Jack's tours participation will not broaden the issues or unduly delay the proceeding; and (11) Jack's Tours' interests in the proceeding differs from the general public because if Applicant is granted a CPCN it will likely result in a loss in revenue to Jack's Tours.

III.

Conclusions of Law

Based on the foregoing findings of fact, this hearings officer makes the following conclusions of law. Any findings of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

1. HRS § 271-12(c) requires that the commission issue a certificate to any qualified applicant, "authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing, and able to properly perform the service proposed and to conform to this chapter and the requirements, rules and regulations of the commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise the application shall be denied."

2. HAR § 6-61-57 provides, a motion to intervene, to be timely, shall be filed and served in all applications requesting issuance of a certificate of public convenience and necessity, the motion to intervene shall be filed not later than twenty days after a notice of the pending application has been published in a newspaper of general circulation within the State or within the county or counties affected by the application. This hearings officer finds that Jack's Tours filed a timely motion to intervene in this docket.

3. HAR § 6-61-41 (c) provides, in relevant part, "[a]n 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 [...]." This hearings officer finds Applicant's response to Jack's Tours' Motion to Intervene was untimely filed and it should not be considered in the decision to allow Jack's Tours to intervene into this proceeding.

4. HAR § 6-61-41 does not authorize Jack's Tours to file a reply to any response to Jack's Tours' motion to intervene. This hearings officer finds that Jack's Tours filed an unauthorized reply to Applicant's response to Jack's Tours' motion to intervene into this docket and it should not be considered in the decision to allow Jack's Tours to intervene into this proceeding.

5. HAR § 6-61-55 provides, (a) A person may make an application to intervene and become a party by filing a timely

written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant; (b) The motion shall make reference to: (1) The nature of the applicant's statutory or other right to participate in the hearing; (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter; (3) The effect of the pending order as to the applicant's interest; (4) The other means available whereby the applicant's interest may be protected; (5) The extent to which the applicant's interest will not be represented by existing parties; (6) The extent to which the applicant's participation can assist in the development of a sound record; (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding; (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and (9) Whether the applicant's position is in support of or in opposition to the relief sought; (c) The motion shall be filed and served by the applicant in accordance with section 6-61-21 and 6-61-57; (d) Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.

This hearings officer finds that Jack's Tours' assertions do not warrant a grant of intervention by the commission. This hearings officer does not believe that its participation as a party is necessary to the resolution of the



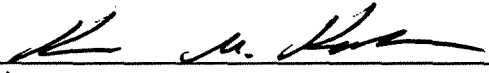
instant application. This hearings officer finds that the commission is capable of assuring that Applicant is in compliance with HRS § 271-12. Moreover, Jack's Tours has not convinced this hearings officer that its participation as a party will not unreasonably broaden the issues or delay the proceeding. Thus, this hearings officer concludes that Jack's Tours' motion to intervene should be denied.

IV.

Recommended Decision and Order

Based on the foregoing, this hearings officer recommends that the commission deny Jack's Tours' motion to intervene into this proceeding.

DONE at Honolulu, Hawaii MAR 15 2005.



Kevin M. Katsura
Hearings Officer
Public Utilities Commission

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Findings of Fact, Conclusions of Law, and Recommended Decision and Order of Hearings Officer upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
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WATANABE ING KAWASHIMA & KOMEIJI
First Hawaiian Center
999 Bishop Street, Floor 23
Honolulu, HI 96813



Karen Higashi

DATED: MAR 15 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 21854 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: JUN - 3 2005