

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
GRACE PACIFIC CORPORATION)
To Transfer a Motor Carrier)
Certificate or Permit.)
_____)

DOCKET NO. 05-0020

ORDER NO. 21898

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HAWAIIAN ELECTRIC LIGHT & POWER COMPANY
PUBLIC UTILITIES COMMISSION
STATE OF HAWAII

Filed June 29, 2005
At 8 o'clock A.M.

Karen Higashi.
Chief Clerk of the Commission

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

K. Higashi.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
GRACE PACIFIC CORPORATION)
To Transfer a Motor Carrier)
Certificate or Permit.)
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Docket No. 05-0020

Order No. 21898

ORDER

By this Order, the commission, among other things, (1) denies the OPERATING ENGINEERS LOCAL UNION NO. 3's ("Local 3") Motion to Intervene in this proceeding;¹ (2) permits Local 3 to participate in this proceeding, pursuant to Hawaii Administrative Rules ("HAR") § 6-61-56, subject to the limitations set forth in Section III.D. of this Order; and (3) directs Grace and Local 3 to submit to the commission legal briefs that address questions of law relating to whether this instant proceeding should be stayed pending the disposition of Local 3's Complaint with the National Labor Relations Board ("NLRB") within twenty (20) days of the date of this Order.

I.

Background

By an application filed on January 31, 2005 ("Application"), GRACE PACIFIC CORPORATION ("Applicant" or

¹Local 3's Motion to Intervene in Proceeding, filed on April 28, 2005 ("Motion to Intervene").

"Grace"), requests approval from the commission for a transfer of its certificate of public convenience and necessity number 222-C ("Certificate No. 222-C") to Ace Trucking, Inc. ("Ace").² Grace's request is made pursuant to Hawaii Revised Statutes ("HRS") § 271-18.

Grace served copies of the Application on the Hawaii Transportation Association, which consists of carriers that may be affected by Applicant's transfer, and on the Division of Consumer Advocacy, Department of Commerce and Consumer Affairs ("Consumer Advocate"). On February 3, 2005, the Consumer Advocate informed the commission that it will not be participating in this docket.

On April 28, 2005, Local 3 filed its Motion to Intervene in accordance with Order No. 21757, filed on April 20, 2005.³

On May 6, 2005, Grace filed its memorandum in opposition to Local 3's Motion to Intervene ("Memorandum in Opposition").

On May 13, 2005, Local 3 filed a request for leave to file a reply in support of its Motion to Intervene ("Request for

²Certificate No. 222-C allows Grace to operate in the dump truck classification on the island of Oahu.

³Commission Order No. 21757 approved Local 3's request, filed on April 4, 2005, for an enlargement of time to file a motion to intervene, pursuant to HAR § 6-61-23.

Leave") and attached to the Request for Leave its Reply referenced as Exhibit A ("Reply").⁴

On May 16, 2005, Grace filed a memorandum in opposition to Local 3's Request for Leave ("Opposition to Request for Leave").

II.

Request for Leave

Order No. 21757, filed on April 20, 2005, stated that replies should be refrained unless the commission requests or grants leave to do so.

On May 13, 2005, Local 3 filed its Request for Leave, and argues that it should be allowed to reply to Grace's Memorandum in Opposition since it is "rife with mischaracterizations and omissions of relevant facts", and Local 3 would like an opportunity to rebut Grace's arguments and to fully inform the commission about the impact of the proposed transaction. On May 16, 2005, Grace filed its Opposition to

⁴In its Reply, Local 3 argues, among other things, that Grace's Memorandum in Opposition was untimely, and thus, should not be considered by the commission. We disagree with Local 3 and concur with Grace's position in its Opposition to Request for Leave that its Memorandum in Opposition was timely filed in accordance with HAR § 6-61-41. HAR § 6-61-41 allows for an opposing party to file a memorandum in opposition "not later than five days after being served the motion[.]" The record indicates that Local 3 served its Motion to Intervene by U.S. mail on April 29, 2005. Thus, in accordance with HAR §§ 6-61-21(e) and 6-61-22 (computation of time), Grace had until May 9, 2005 to file its Memorandum in Opposition. Grace's Memorandum in Opposition was, therefore, timely as it was filed with the commission on May 6, 2005, and will be considered in disposing Local 3's Motion to Intervene.

Request for Leave to which it argues that Local 3's request for leave is a "blatant circumvention" of the commission's order.

Upon review, we believe Local 3's Request for Leave to be in compliance with Order No. 21757 and its reasons for filing its Reply to be reasonable. Accordingly, we find good cause to grant Local 3 leave to file its Reply. Its Reply will be considered in support of its Motion to Intervene.

III.

Motion to Intervene

A.

Standard of Review

It is well established that intervention as a party in a commission proceeding "is not a matter of right but is a matter resting within the sound discretion of the commission."⁵ HAR § 6-61-55 sets forth the requirements to intervene in this proceeding. In particular, HAR § 6-61-55(d) states that "[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." Accordingly, based on our discussion below, we will determine whether Local 3 satisfies these requirements.

⁵See, *In re Application of Hawaiian Electric Company, Ltd.*, 56 Haw. 260, 262 (1975). See also, *In re Paradise Merger Sub, Inc. et al.*, Docket No. 04-0140, Order No. 21226 (August 6, 2004).

B.

Local 3's Position and Assertions

In support of its Motion to Intervene, Local 3 alleges, among other things:

1. It is the collective bargaining representative of approximately 190 employees who are employed by Grace under the Paving Agreement for Hawaii (2002-2007) (hereinafter referred to as "CBA"). Of these 190 employees, 45 employees in Grace's paving/hauling division are classified, pursuant to the CBA, as equipment operators, plant operators, quarry workers, mechanics and truck drivers.⁶
2. Grace is in the business of asphalt paving, which includes the hauling and delivery of aggregate materials.⁷
3. HRS § 271-18(d) specifically requires the PUC to consider the "employees of any transferring motor carrier."⁸
4. Because Grace does not intend to operate its wholly-owned subsidiary, Ace, as a "union entity," the employees of the transferring motor carrier covered by the CBA "will lose their jobs,

⁶Motion to Intervene at 4.

⁷*Id.*

⁸*Id.* at 7.

if not immediately after Ace begins to provide hauling services to Grace."⁹

5. The grant of Grace's Application to transfer its dump truck authority under Certificate No. 222-C to Ace will facilitate Grace's violations of federal labor laws.¹⁰
6. In light of its complaint filed with the NLRB against Grace, this proceeding should be stayed pending the NLRB's resolution of the matter.¹¹
7. Its participation in this matter is intended to streamline rather than delay the proceeding.¹²

C.

Grace's Position and Assertions

In opposition to Local 3's Motion to Intervene, Grace asserts, among other things:

1. Local 3's Motion to Intervene relies "on deliberate distortions and outright falsifications in an attempt to use" this proceeding "as a means to unlawfully organize a new company and as a union grievance process on

⁹Id. at 7-8

¹⁰Id. at 6.

¹¹Id. at 6; and Reply at 5.

¹²Id. at 9.

labor issues that are more appropriate for the [NLRB]."¹³

2. Contrary to Local 3's position, Grace has never intended that any of its current employees covered by the CBA would be displaced due to the transfer of its Certificate No. 222-C to Ace.¹⁴
3. The proposed transfer of its Certificate No. 222-C to Ace is intended to provide Grace with an additional source of support for its existing operations, to develop additional business, and to create more jobs and revenues.¹⁵
4. Local 3's statements and representations in its Motion to Intervene are misleading and speculative, and are intended to beguile the commission into believing that the transfer of its Certificate No. 222-C to Ace will have a detrimental effect on its current employees covered by the CBA.¹⁶
5. Grace's existing employees covered by the CBA "are unaffected by the proposed transfer."¹⁷

¹³Memorandum in Opposition at 2.

¹⁴*Id.*

¹⁵*Id.* at 2-4.

¹⁶*Id.* at 2-12.

¹⁷*Id.* at 5-7.

6. Local 3 attempts to expand rather than simplify the issues in this proceeding.¹⁸

D.

Discussion

HRS § 271-18 provides, in relevant part:

(b) No motor carrier shall sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its property necessary or useful in the performance of transportation services for the public or any certificate of public convenience and necessity or permits, or any part thereof, with any other carrier, without having secured from the public utilities commission an order authorizing it so to do.

* * *

(d) Whenever a transaction is proposed under subsection (b) or (c) of this section, the motor carrier or motor carriers, or person or persons, seeking approval thereof shall present an application to the commission . . . and the commission may thereupon act upon the application with or without first holding a public hearing; provided that if requested, it shall afford reasonable opportunity for interested parties to be heard.¹⁹ . . . In passing upon any transaction under subsection (b) or (c), the commission shall give weight, among other considerations, to the effect of the proposed

¹⁸ *Id.*

¹⁹ In light of Local 3's request for a public hearing in its Motion to Intervene and the numerous written letters from Grace's employees (Exhibit A to Local 3's Reply Memorandum, filed on April 13, 2005), requesting that the commission defer granting of the Application until such time as the labor relations issues have been resolved, the commission will also schedule a public hearing consistent with HRS § 271-18(d). The date, time and location will be established by notice of public hearing to be issued by the commission subsequent to our determination of questions of law, noted below in Section IV.

transaction upon (1) adequate transportation service to the public, (2) other motor carriers, and (3) the employees of any transferring motor carrier.

HRS § 271-18(b) and (d) (footnote and emphases added).

Upon review, the commission recognizes that the position and allegations raised by Local 3 are reasonably pertinent to the issue as to the effect of Grace's proposed transaction upon its existing employees. However, the commission is not convinced that Local 3's participation as a party or intervenor in this proceeding would not unreasonably broaden the remaining issues already presented in this proceeding.²⁰ Accordingly, consistent with HAR § 6-61-55, we conclude that Local 3's Motion to Intervene should be denied.

Nonetheless, we find that Local 3's concerns relating to Grace's existing employees covered by the CBA to be genuine and compelling. We also believe that Local 3's expertise, knowledge or experience with labor issues may assist the commission in assessing the effect of Grace's proposed transaction on its existing employees consistent with the applicable requirement set forth under HRS § 271-18(d). For these reasons, we find it reasonable to permit Local 3 to participate without intervention in this proceeding, pursuant to HAR § 6-61-56, in which its participation is limited to the following: (1) an opportunity to address issues solely pertaining to the effects of the proposed transaction on

²⁰In particular, the commission's review will be limited in the instant Application to those issues specifically related to the requirements set forth under HRS § 271-18(d).

Grace's existing employees covered by the CBA through information requests (limited to two (2) sets of information requests) to Grace, a legal brief (as set forth under Section IV. below) and a final position statement addressing these issues for the commission's review and consideration; (2) an opportunity to be heard at a public hearing, as requested, to be scheduled subsequent to the issuance of this order consistent with HRS § 271-18(d); and (3) the ability to monitor this proceeding by receiving all pleadings, decisions, orders and other documents filed with the commission in this docket.

Further, we must admonish Local 3 that its participation in this docket will be limited to only the issues solely pertaining to the effects of the proposed transaction on Grace's existing employees covered by the CBA. The commission will preclude any efforts that will unreasonably broaden the remaining issues, and unduly delay the proceeding. The commission will reconsider Local 3's participation in this proceeding if, at any time during the proceeding, the commission determines that Local 3's efforts: (1) unreasonably broaden the pertinent issues in this docket; or (2) unduly delay the proceedings.

IV.

Request for Stay

In its Reply, Local 3 also requests that the Application should be stayed pending a full and final resolution

of its Complaint filed with the NLRB.²¹ We note that a Reply is not an appropriate mechanism to request for relief or an order by the commission, as requested by Local 3. Instead, Local's 3 request for stay should have been filed in a form of a motion that complies with the requirements set forth under HAR § 6-61-41.²²

Nonetheless, the commission recognizes that certain issues should be determined under the National Labor Relations Act. See, e.g., *Briggs v. Hotel Corporation of the Pacific*, 73 Haw. 276, 283, 831 P.2d 1335, 1341 (1992). Accordingly, we find it necessary to require Grace and Local 3 to provide legal briefs on this matter within twenty (20) days of the date of this Order to assist the commission in determining whether this instant proceeding should be stayed pending the disposition of Local 3's Complaint with NLRB.

V.

Orders

THE COMMISSION ORDERS:

1. Local 3's Request for Leave, filed on May 13, 2005, is granted.

²¹Pursuant to HAR § 6-61-48, we take official notice of all records pertaining to Local 3's Complaint filed with NLRB on April 12, 2005 in Case No. 37-CA-6847-1.

²²HAR § 6-61-41 states, in relevant part that all motions shall: (1) Be in writing; (2) State the grounds for the motion; (3) Set forth the relief or order sought; and (4) Be accompanied by a memorandum in support of the motion, if the motion involves a question of law.

2. Local 3's Motion to Intervene, filed on April 28, 2005, is denied. Instead, Local 3 is permitted to participate in this docket, pursuant to HAR § 6-61-56, subject to the limitations set forth in Section V. of this Order.


3. Within twenty (20) days from the date of this Order, Grace and Local 3 shall submit to the commission legal briefs that address questions of law relating to whether this instant proceeding should be stayed pending the disposition of Local 3's Complaint with NLRB. Consistent with HRS § 271-18(d), a public hearing will be scheduled, and the date, time and location will be established by notice of public hearing to be issued by the commission subsequent to our determination of these questions of law.


4. Grace and Local 3 are directed to meet informally to formulate the issues and a regulatory schedule including, without limitation, the deadlines for information requests, position statement and rebuttal position statement, and all procedural matters necessary to govern the proceedings to be set forth in a stipulated procedural order. The stipulated procedural order shall be filed with the commission within twenty (20) days of the date of this Order for the commission's review and approval. If unable to stipulate to such an order, Grace and Local 3 shall submit its own proposed procedural order for the commission's review and consideration within twenty (20) days of the date of this Order.

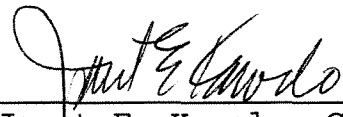
DONE at Honolulu, Hawaii

JUN 29 2005


PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Benedyne S. Stone
Commission Counsel
05-0020.rpr

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 21898 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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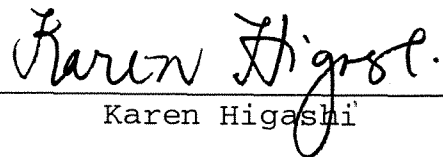
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Karen Higashi

DATED: JUN 29 2005