

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
NOEL C. MADAMBA, dba)
NOEL C. MADAMBA CONTRACTING)
For a Motor Carrier Certificate or)
Permit.)
_____)

DOCKET NO. 2008-0058

ORDER DENYING
EDWIN DELUZ TRUCKING & GRAVEL, LLC'S MOTION TO INTERVENE

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DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

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FILED

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ORDER DENYING
EDWIN DELUZ TRUCKING & GRAVEL, LLC'S MOTION TO INTERVENE

I.

A.

By application filed on March 31, 2008, Applicant requested a certificate of public convenience and necessity ("CPCN") to operate as a common carrier by motor vehicle in the dump truck classification on the island of Hawaii ("Application").

B.

Motion to Intervene

On May 12, 2008, Edwin Deluz Trucking & Gravel, LLC ("Movant") filed a motion to intervene in this proceeding ("Motion to Intervene"). According to Movant, it is a "duly certified common carrier by motor vehicle in the category of property" and holds CPCN No. 5093-C.

In its motion, Movant argues that intervention should be granted because: 1) "[t]he services proposed by Applicant are not and will not be required by present or future public convenience and necessity"; 2) "all services proposed to be rendered by Applicant are already provided by [Movant] and that any customer of Applicant is a potential customer of [Movant]; 3) "[t]he services proposed by Applicant will cause [Movant] economic harm by potentially servicing the same routes and customers [Movant] currently services"; 4) "[Movant] and other currently licensed motor carriers on the island of Hawaii have more than sufficient vehicle capacity to service the present and future public need. [Movant's] fleet is in fact underutilized at this time. Since approximately June 2007, [Movant] has observed a general downturn in the economy and has been forced to layoff employees and currently utilizes only 20 of its 26 available trucks due to the decrease in business"; 5) "Applicant is not fit or able to provide the service proposed"; 6) "[t]here are no other means available whereby the interests of [Movant] may be protected"; 7) "[Movant's] participation will facilitate the development of a sound record through the introduction of

pertinent evidence"; 8) "[Movant's] participation will not broaden the issues or unduly delay this proceeding"; and 9) "[Movant's] interest in the proceeding differs from that of the general public because, if the application filed herein is granted, Applicant will be in direct competition with [Movant] and its entry into the market will result in a potential diminution [of] [Movant's] current customer base and loss in revenue."¹

In its Motion to Intervene, Movant requested a hearing should the commission be inclined to deny its Motion. By Notice of Hearing filed on July 9, 2008, the commission notified Movant and Applicant that a hearing on the Motion to Intervene was scheduled for August 4, 2008, at 9:30 a.m., in the commission's hearing room.

No written response to the Motion to Intervene was filed by Applicant.

C.

Hearing on the Motion to Intervene

On August 4, 2008, the commission² heard oral argument on the Motion to Intervene. John P. Dobrovich, Jr., Esq. appeared on behalf of Movant. Also present was Kevin Balog, Operations Manager and a member of Movant. Applicant appeared pro se by telephone.

¹Motion to Intervene, at 2-5.

²Chairman Carlito P. Caliboso presided over the hearing. He was joined by Commissioner Leslie H. Kondo. Commissioner John E. Cole was excused.

A transcript of the hearing was filed with the commission on September 8, 2008.

III.

Discussion

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." See In re Application of Hawaiian Elec. Co., Ltd., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975); see also In re Paradise Merger Sub, Inc., et al., Docket No. 04-0140, Order No. 21226 (August 6, 2004).

HAR § 6-61-55 sets forth the requirements for intervention. It states, in relevant part:

- (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.

HAR § 6-61-55(a) and (b). Section 6-61-55(d), however, 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."

After reviewing the entire record, the commission finds that Movant's allegations are not reasonably pertinent to the resolution of the Application and that intervention by Movant would unreasonably broaden the issues already presented. While it is apparent that Movant may have a financial interest in preventing unwanted competition, Movant's claim that its sizeable business operations will be harmed over time by small motor carrier operators like Applicant, is purely speculative. Movant, moreover, has other means by which to protect its market share. Movant, for example, could offer better service than its competitors or more competitive pricing. See In re Robert's Tours & Transp., Inc., 104 Hawai'i 98, 109, 85 P.3d 623, 634 (Haw. 2004) (affirming the commission's decision to grant a motor carrier authority to operate where "it would encourage competition and constrain otherwise monopolistic operations"). Movant's participation as an intervenor is only likely to delay the proceeding and will not assist the commission in developing a

sound record. Based on the foregoing, the commission concludes that the Motion to Intervene should be denied.

IV.

Order

THE COMMISSION ORDERS:

Edwin Deluz Trucking & Gravel, LLC's Motion to Intervene, filed on May 12, 2008, is denied.

DONE at Honolulu, Hawaii OCT - 7 2008.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By [EXCUSED]
John E. Cole, Commissioner

By Leslie H. Kondo
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

Stacey Kawasaki Djou
Stacey Kawasaki Djou
Commission Counsel

2008-0058.cp

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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