

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
HAWAIIAN ELECTRIC COMPANY, INC. )  
For Approval to Commit Funds in )  
Excess of \$2,500,000 (excluding )  
customer contributions) for the )  
Purchase and Installation of the )  
Capital Equipment, Item P0001577, )  
For the Kahe 3 Biofuel Co-firing )  
Demonstration Project, and for )  
Approval of the Biofuel Supply )  
Contract for the Kahe 3 Biofuel )  
Co-firing Demonstration Project )  
and to Include the Biofuel Supply )  
Contract Costs in Hawaiian )  
Electric's Energy Cost Adjustment )  
Clause. )

DOCKET NO. 2009-0155

ORDER DENYING INTERVENTION AND  
GRANTING PARTICIPATION STATUS TO LIFE OF THE LAND

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

PUBLIC UTILITIES  
COMMISSION

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FILED

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Docket No. 2009-0155

ORDER DENYING INTERVENTION AND  
GRANTING PARTICIPATION STATUS TO LIFE OF THE LAND

By this Order, the commission denies LIFE OF THE LAND's ("LOL") Motion to Intervene, filed on July 29, 2009 ("Motion to Intervene"); but allows LOL to participate on the issue of the environmental sustainability of palm oil-based biofuel. The commission instructs the parties and LOL to submit a stipulated procedural order for the commission's review and approval, consistent with the parameters set forth in this Order.

I.

Background

HAWAIIAN ELECTRIC COMPANY, INC. ("HECO") is a Hawaii corporation and a public utility as defined by Hawaii Revised Statutes ("HRS") § 269-1 and, thus, is regulated by the commission under Chapter 269, HRS. HECO is engaged in the production, purchase, transmission, distribution, and sale of electricity on the island of Oahu.<sup>1</sup>

On July 13, 2009, HECO filed an application ("Application")<sup>2</sup> for approval: (1) to commit funds in excess of \$2,500,000, excluding customer contributions, (currently estimated at \$5,200,000) for the purchase and installation of capital equipment, Item P0001577, for the Kahe 3 Biofuel Co-firing Demonstration Project ("Biofuel Co-Firing Project") in accordance with Paragraph 2.3(g)(2) of General Order No. 7<sup>3</sup>; (2) of a biofuel supply contract ("Supply Contract") that will provide approximately 1,575,000 net U.S. gallons of biofuel for use in HECO's Biofuel Co-Firing Project; and (3) for inclusion of

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<sup>1</sup>HECO, a wholly-owned subsidiary of Hawaiian Electric Industries, Inc., was initially organized under the laws of the Kingdom of Hawaii on or about October 13, 1891.

<sup>2</sup>HECO served copies of the Application on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), an ex officio party in all proceedings before the commission. See HRS § 269-51; Hawaii Administrative Rules ("HAR") § 6-61-62. HECO and the Consumer Advocate are hereafter collectively referred to as the "Parties."

<sup>3</sup>The commission, in Docket No. 03-0257, increased the monetary threshold governing the filing of capital expenditure applications by HECO, from \$500,000 to \$2.5 million, exclusive of customer contributions, effective July 1, 2004. See Decision and Order No. 21002, filed on May 27, 2004.

the costs of the Supply Contract (including without limitation, the costs associated with the biofuel, transportation, and related taxes) in its Energy Cost Adjustment Clause to the extent not recovered in HECO's base rates.<sup>4</sup>

On July 29, 2009, LOL timely filed its Motion to Intervene in this proceeding noting that it provides a "unique perspective." On August 5, 2009, HECO filed a Memorandum in Opposition to LOL's Motion to Intervene ("Opposition to LOL's Motion to Intervene").<sup>5</sup>

On August 7, 2009, LOL filed a Motion for Leave to Reply to HECO's Opposition to LOL's Motion to Intervene ("Motion for Leave to Reply"), and attached its Reply to HECO's Opposition to LOL's Motion to Intervene ("Reply"). On August 14, 2009, HECO filed a Memorandum in Opposition to LOL's Motion for Leave to Reply to HECO's Opposition to LOL's Motion to Intervene ("Opposition to LOL's Reply").

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<sup>4</sup>On August 3, 2009, the Consumer Advocate filed its Preliminary Statement of Position informing the commission that it has questions and concerns regarding HECO's requested relief and, thus, is unable to presently state its position on the merits of the Application. The Consumer Advocate states that it intends to issue information requests ("IRs") shortly to aid in its review of HECO's Application.

<sup>5</sup>The Consumer Advocate did not file a response to LOL's Motion to Intervene.

II.

Discussion

A.

LOL's Motion for Leave to Reply

In its Motion for Leave to Reply, LOL requests commission approval to submit a reply memorandum to HECO's Opposition to LOL's Motion to Intervene, and attaches its Reply "so as not to delay the proceeding should leave to reply be allowed."<sup>6</sup>

HECO, in its opposition, contends that LOL's Motion for Leave should be denied since LOL fails to show good cause as to why it should be allowed to file a reply to HECO's Opposition to LOL's Motion to Intervene. Among other things, HECO argues that LOL fails to point to a single inaccuracy in HECO's Opposition to LOL's Motion to Intervene.

Here, the commission finds good cause to allow LOL to submit its Reply. It appears that LOL submitted its Reply in response to certain allegations made by HECO in its Opposition to LOL's Motion to Intervene. To allow LOL an opportunity to address those assertions, the commission will grant LOL's Motion for Leave to Reply; but retains the discretion to give statements in the Reply the appropriate weight.

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<sup>6</sup>See LOL's Motion for Leave to Reply at 1.

B.

Intervention and Participation

Intervention in commission proceedings "is not a matter of right but a matter resting within the sound discretion of the commission."<sup>7</sup> HAR § 6-61-55 sets forth the requirements for intervention in commission proceedings. 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;

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<sup>7</sup>See In re Application of Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975).

- (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). HAR § 6-61-55(d) further 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."

In addition, HAR § 6-61-56 sets forth the requirements for participation without intervention in commission proceedings. Similar to the requirements for intervention in HAR § 6-61-55, HAR § 6-61-56 provides in relevant part:

- (b) A person who has a limited interest in a proceeding may make an application to participate without intervention 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.
- (c) The motion shall provide:
  - (1) A clear and concise statement of the direct and substantial interest of the applicant;
  - (2) The applicant's position regarding the matter in controversy;
  - (3) The extent to which the participation will not broaden the issues or delay the proceeding;
  - (4) The extent to which the applicant's interest will not be represented by existing parties;

- (5) A statement of the expertise, knowledge or experience the applicant possesses with regard to the matter in controversy;
- (6) Whether the applicant can aid the commission by submitting an affirmative case; and
- (7) A statement of the relief desired.

HAR § 6-61-56(b) and (c). Moreover, regarding the extent to which a participant may be involved in a proceeding, HAR § 6-61-56(a) provides:

The commission may permit participation without intervention. A person or entity in whose behalf an appearance is entered in this manner is not a party to the proceeding and may participate in the proceeding only to the degree ordered by the commission. The extent to which a participant may be involved in the proceeding shall be determined in the order granting participation or in the prehearing order.

HAR § 6-61-56(a).

1.

LOL's Motion to Intervene

a.

LOL's Motion

LOL states that it is a non-profit Hawaii organization with members concerned with many issues including, among other things, those related to the environment, climate, justice, equity, and life cycle impacts. Its organizational goal is to "meet the State's energy needs through conservation and low-cost,

non-polluting resources.”<sup>8</sup> LOL contends that it has sponsored dozens of expert witnesses in other proceedings in support of an alternative energy proposal, including numerous biofuel and palm oil witnesses. It states that this docket will directly and significantly affect positions LOL has taken in other dockets, including those on biofuels and feed-in tariffs.

LOL states that the “use of palm oil is very controversial and its use presents numerous complications, as we have shown in Dockets 2005-0145 and 2007-0346.”<sup>9</sup> According to LOL, new studies have been published since conclusion of those dockets and “[b]oth the US EPA and California have proposed Indirect Land Use Changes [] be analyzed within the biofuel context.”<sup>10</sup>

In addition, LOL asserts that there are no other means to protect its interests and that its interests differ from those of the general public and other parties to this proceeding. With respect to the Consumer Advocate, LOL contends that it is statutorily required to protect the interest of consumers, while “LOL represents environmental, social and holistic interests.”<sup>11</sup> While noting the overlap between consumer and environmental issues, LOL argues that the “minimal divergence” is sufficient to warrant separate representation.

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<sup>8</sup>See LOL’s Motion to Intervene at 3.

<sup>9</sup>Id. at 4.

<sup>10</sup>Id.

<sup>11</sup>Id.

LOL represents that it offers a unique perspective and that it "intend[s] to present a proactive case, supported by expert witnesses and exhibits, which will provide to the Commission alternative scenarios."<sup>12</sup> According to LOL, its participation will enable the commission to view and consider all pertinent available information needed to make a sound decision. Moreover LOL contends that its participation in this docket will not unduly broaden the issues or delay the proceedings. LOL specifically states it is not seeking to "muddy the waters", but that it is seeking to bring clarity to the issues and contends that its involvement in the proceeding "will be provided so as to strengthen the defensibility" of the commission's decision.<sup>13</sup>

LOL states that it supports policies that "support increasing Low Climate Impact Energy Systems [] and decrease our greenhouse gas emission footprint."<sup>14</sup> It contends that, under specific conditions, biofuels may be the solution; however, "[i]n the end, it is the details of this particular application, that will determine whether [the] proposal is wise or foolish."<sup>15</sup>

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<sup>12</sup>Id.

<sup>13</sup>Id. at 5.

<sup>14</sup>Id.

<sup>15</sup>Id.

b.

HECO's Opposition

On August 5, 2009, HECO timely filed its Opposition to LOL's Motion to Intervene. At the outset, HECO notes that its request is very narrow in scope. HECO states that the intended use for the biofuel is for HECO to conduct testing, during approximately thirty days, to determine the maximum biofuel/low sulfur fuel oil blend that can be used at Kahe 3 and other steam generation units on HECO's system. According to HECO, the issues involved in this docket are "limited in scope to a one-time purchase of biofuel to gather more operating information and experience with the use of biofuels in Hawaiian Electric's system."<sup>16</sup> In this context, HECO requests denial of LOL's motion.

HECO argues that LOL's allegations are not reasonably pertinent to and would unreasonably broaden the issues in this proceeding. According to HECO, LOL failed to state any factual basis or other specific interest in this proceeding that would entitle LOL to intervention. HECO states that it has ample reasons to be concerned with LOL's involvement in this proceeding. In particular, HECO asserts that it is "concerned that LOL will attempt to re-litigate issues that were extensively addressed in Docket No. 2007-0346 and Docket No. 05-0145 and/or unreasonably broaden issues or otherwise sidetrack the proceeding with irrelevant matters."<sup>17</sup> In addition, among other things, HECO

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<sup>16</sup>See HECO's Opposition to LOL's Motion to Intervene at 2.

<sup>17</sup>Id. at 4-5.

contends that its "previous experience with LOL in biofuel related dockets suggests that LOL's intervention was certainly not conducive to the just, speedy and inexpensive determination of those proceedings."<sup>18</sup>

HECO also states that LOL has no statutory or other mandatory right to intervene in this proceeding and that LOL fails to state a reasonable basis for its property, financial, and other interests in this proceeding. HECO contends that LOL: (1) does not discuss its particular interests in this docket; (2) provides generalizations of its interests without discussing how they will be impacted by this proceeding; and (3) fails to discuss what effect an order in this proceeding will have on LOL's interests. Specifically, among other things, HECO contends that "LOL fails to discuss the effect of how a one-time purchase of biofuel for the limited purpose of gathering information will impact any of LOL's interests."<sup>19</sup>

In addition, HECO contends that any interest that LOL may have with respect to this docket is the same as that of the general public which can be adequately represented by the Consumer Advocate. HECO argues that LOL failed to demonstrate how its impacts are unique with respect to this proceeding and how it would not be represented by the Consumer Advocate. Among other things, HECO contends that LOL ignores the fact that the Consumer Advocate is bound by law to represent the interests of the general public and protect and advance the interests of

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<sup>18</sup>Id. at 5.

<sup>19</sup>Id. at 8.

all consumers including LOL and its members. HECO asserts that LOL's efforts, here, will duplicate the efforts of the Consumer Advocate.

Furthermore, HECO states that LOL's participation in other commission proceedings demonstrates that it has ample means, aside from participation in this proceeding, to protect its interests. It argues that LOL has had ample opportunity to protect any interest that it may have in other dockets including HECO integrated resource planning dockets, and Docket Nos. 05-0145 (the Campbell Industrial Park Generation Station and Transmission Additions Project); 03-0371 (Distributed Generation); and 2007-0346 (Imperium Biodiesel Supply Contract).

Finally, HECO states that LOL failed to demonstrate how its participation in this proceeding would assist in the development of a sound record. HECO asserts that LOL's Motion to Intervene only provides a generalized statement of LOL's past experiences on energy matters and proposes to put on witnesses on issues that have arisen since the last biofuel evidentiary hearing, but fails to discuss what those issues are and how they are germane to this proceeding.

c.

#### Discussion

Upon review, the commission finds LOL's arguments for full intervention, as a party, unpersuasive in this case involving a one-time purchase of biofuels for testing and information-gathering purposes. Intervention in commission

proceedings is not a right but "a matter resting within the sound discretion of the commission" as articulated by the Hawaii Supreme Court.<sup>20</sup> In the commission's view, LOL fails to demonstrate that its property, financial, or other interests are adversely affected in this proceeding. Notably, LOL lacks a statutory or other mandatory right to intervene in this proceeding.

LOL's assertion, moreover, that LOL's interests differ from that of the general public, is not convincing. LOL's argument that separate representation is necessary since consumer and environmental issues are distinct and that this divergence is sufficient to justify intervention is not persuasive. As noted by LOL, its interests do "overlap" with those of consumers and the general public, whose interests the Consumer Advocate is statutorily required to "represent, protect, and advance[.]"<sup>21</sup> Contrary to LOL's assertions, the Consumer Advocate is not limited solely to advocating for consumer-type interests, as the Consumer Advocate is also statutorily required to "consider the long-term benefits of renewable resources in the consumer advocate's role as consumer advocate."<sup>22</sup>

Based on the foregoing, the commission concludes that LOL's Motion to Intervene should be denied.

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<sup>20</sup>See In re Application of Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975).

<sup>21</sup>See HRS § 269-51.

<sup>22</sup>See HRS § 269-54(c).

Grant of Participation Without Intervention

Although intervention by LOL is inappropriate in this case, the commission finds that LOL could still contribute as a participant in this proceeding. Even though LOL's interests appear to be protected, represented, and advanced by the Consumer Advocate, there is an opportunity in this proceeding for LOL to assist the commission in developing the record related to the environmental sustainability of the use of palm oil-based biofuel.

In its Application, HECO states that the Supply Contract requires that the biofuel supplied to HECO comply with the requirements of the Environmental Policy for the Hawaiian Electric Company's Procurement of Biodiesel from Palm Oil and Locally Grown Feedstocks, dated August 2007.<sup>23</sup> Thus, the environmental sustainability of palm oil-based biofuel may be an issue in this proceeding. Given LOL's environmental interests and its contribution in Docket No. 2007-0346,<sup>24</sup> a prior biofuel proceeding, the commission finds that LOL's limited involvement in this proceeding as a participant could assist the commission in its review and understanding of this issue.

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<sup>23</sup>See Application at 27.

<sup>24</sup>In addition, while the commission made a determination regarding the biodiesel supply contract in Docket No. 2007-0346, the commission did not address the environmental concerns raised by LOL about the use of palm oil based biodiesel in that proceeding. See In re Hawaiian Electric Company, Inc., Decision and Order filed August 5, 2009, in Docket No. 2007-0346 at 19 n.49.

Based on the foregoing, the commission concludes that LOL should be allowed to participate without intervention in this docket. However, LOL's participation in this proceeding shall, unless otherwise ordered by the commission, be limited to the issue of the environmental sustainability of palm oil-based biofuel. With respect to this issue, LOL shall be allowed to participate fully in this proceeding including, among other things, submitting direct testimony, issuing and responding to IRs, filing briefs and pleadings, and during any evidentiary hearing, calling witnesses and cross-examining opposing witnesses.

Nevertheless, LOL's participation in this proceeding is conditional. The commission will preclude any effort by LOL to unreasonably broaden the pertinent issues or unduly delay the proceeding. The commission will reconsider LOL's participation in this docket if, at any time during the course of this proceeding, the commission determines that LOL is unreasonably broadening the pertinent issues or unduly delaying the proceeding.

C.

Stipulated Procedural Order

Given HECO's statement that its project schedule for the Biofuel Co-Firing Project "assumed a decision and order from the Commission approving this Application by

January 29, 2010[,]"<sup>25</sup> the commission is prepared to proceed as expediently as possible to resolve the issues in this proceeding. Thus, the commission instructs the Parties and LOL (the Participant) to submit a stipulated procedural order setting forth the issues, procedures, and schedule to govern this proceeding. Since HECO requests a commission decision on its Application by January 29, 2010, the stipulated schedule of proceedings shall include the following:

1. Any evidentiary hearing on HECO's Application should be held on December 8, 2009;
2. Simultaneous post-hearing opening briefs should be filed within two weeks after the evidentiary hearing; and
3. Simultaneous post-hearing reply briefs should be filed one week after the submittal of post-hearing opening briefs.

The stipulated procedural order, consistent with the parameters set forth above, shall be filed within fifteen days of the date of this Order for the commission's review and approval. If the Parties and LOL are unable to stipulate, they shall submit separate proposed procedural orders for the commission's consideration within the same time period.

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<sup>25</sup>See Application at 29.

III.

Orders

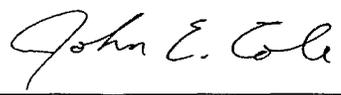
THE COMMISSION ORDERS:

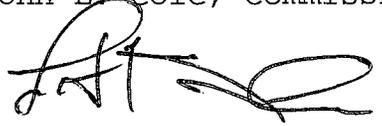
1. LOL's Motion for Leave to Reply is granted.
2. LOL's Motion to Intervene is denied.
3. LOL shall be allowed to participate without intervention in this proceeding. LOL's participation in this proceeding shall, unless otherwise ordered by the commission, be limited to the issue of the environmental sustainability of palm oil-based biofuel. With respect to this issue, LOL shall be allowed to participate fully in this proceeding including, among other things, submitting direct testimony, issuing and responding to IRs, filing briefs and pleadings, and during any evidentiary hearing, calling witnesses and cross-examining opposing witnesses.
4. The Parties and LOL shall submit a stipulated procedural order for the commission's review and approval, consistent with the parameters set forth in Section II.C of this Order within fifteen days of the date of this Order. If the Parties and LOL are unable to agree, they shall submit separate proposed procedural orders for the commission's consideration within the same time period.

DONE at Honolulu, Hawaii SEP 11 2009.

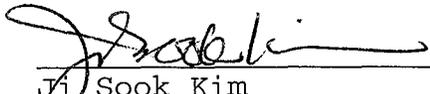
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By:   
Carlito P. Caliboso, Chairman

By:   
John E. Cole, Commissioner

By:   
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

  
Ji Sook Kim  
Commission Counsel

2009-0155.laa

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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