

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of))
MAUI ELECTRIC COMPANY, LIMITED)) Docket No. 2009-0168
For Approval of Biodiesel Supply))
Contract and to Include Biodiesel))
Supply Contract Costs in MECO's))
Energy Cost Adjustment Clause.))

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 biodiesel. 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

MAUI ELECTRIC COMPANY, LIMITED ("MECO") 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. MECO is engaged in the production, purchase, transmission, distribution, and sale of

electricity in the County of Maui, which consists of the islands of Maui, Molokai, and Lanai.¹

On July 24, 2009, MECO filed an application ("Application") for approval of a biodiesel supply contract between MECO and Sime Darby Biodiesel Sdn. Bhd. dated June 26, 2009 ("Supply Contract").² The Supply Contract will provide approximately 1,000,000 gallons of biodiesel for use in MECO's Biodiesel Demonstration Project at its Ma'alaea Generating Station in Ma'alaea, Maui, Hawaii. MECO also requests approval to include the costs of the Supply Contract (including without limitation, the costs associated with the biodiesel fuel, transportation, storage, and related taxes) in its Energy Cost Adjustment Clause to the extent that the costs are not recovered in MECO's base rates.³

On July 29, 2009, LOL timely filed a motion to intervene. On August 5, 2009, MECO filed a Memorandum in

¹MECO, a wholly-owned subsidiary of Hawaiian Electric Industries, Inc., was initially organized under the laws of the Territory of Hawaii on or about April 28, 1921.

²MECO 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. MECO and the Consumer Advocate are hereafter collectively referred to as the "Parties."

³On August 13, 2009, the Consumer Advocate filed its Preliminary Statement of Position indicating that it has questions and concerns regarding MECO'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 MECO's Application.

Opposition to LOL's Motion to Intervene ("Opposition to LOL's Motion to Intervene").⁴

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

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 MECO'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."⁵

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

⁴The Consumer Advocate did not file a response to LOL's Motion to Intervene.

⁵See LOL's Motion for Leave to Reply, at 1.

LOL fails to address the substantive arguments raised in MECO's Opposition to LOL's Motion to Intervene.⁶

Upon review, 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 MECO 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 will retain the discretion to give statements in the Reply the appropriate weight.

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."⁷ 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;

⁶See MECO's Opposition to LOL's Reply, at 1.

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

- (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). 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."

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 whose members are concerned with many issues including, among other things, those related to the "environment, climate, justice, equity, and life cycle impacts."⁸ Its organizational goal is to "meet the State's energy needs through conservation and low-cost, non-polluting resources."⁹

LOL asserts that its interests differ from those of the general public and other parties to this proceeding and that it has no other means to protect its interests.¹⁰ LOL contends that while the Consumer Advocate is statutorily required to protect the interest of all consumers, LOL specifically represents "environmental, social, and holistic interests."¹¹ LOL argues that although consumer and environmental issues may overlap, they are sufficiently distinct to justify separate representation.¹²

Regarding MECO's Application, 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

⁸See LOL's Motion to Intervene, at 3.

⁹Id.

¹⁰Id. at 4.

¹¹Id.

¹²Id.

2007-0346.”¹³ 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.”¹⁴ Although LOL acknowledges that, “under specific conditions[,] some biofuels may be part of the solution[.]” for reducing greenhouse gas emissions, LOL states that “[i]n the end, it is the details of this particular application, that will determine whether [the] proposal is wise or foolish.”¹⁵

Having sponsored “dozens of expert witnesses in PUC Evidentiary Hearings on biofuels[,]”¹⁶ LOL claims that it will present “a proactive case, supported by expert witnesses and exhibits, which will provide to the Commission alternate scenarios.”¹⁷ In requesting intervention, LOL specifically states that it is not seeking to “muddy the waters,” but that it is merely attempting to bring clarity to the issues in this proceeding.¹⁸

¹³Id. at 3.

¹⁴Id. at 3-4.

¹⁵Id. at 5.

¹⁶Id. at 4.

¹⁷Id.

¹⁸Id.

b.

MECO's Opposition

In its Opposition to LOL's Motion to Intervene, MECO states that it intends to use the biodiesel to conduct testing, for approximately 122 days, to determine the long term effects of using biodiesel at its Ma'alaea Power plant.¹⁹ According to MECO, the issues involved in this docket are "limited in scope to a one-time purchase of biodiesel to gather more operating information and experience with the use of biofuels in MECO's system."²⁰ In this context, MECO requests denial of LOL's motion.

First, MECO argues that LOL's allegations are not reasonably pertinent to and would unreasonably broaden the issues in this proceeding.²¹ MECO states 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."²² MECO argues 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."²³

Second, MECO contends that LOL has no statutory or other mandatory right to intervene in this proceeding and that

¹⁹See MECO's Opposition to LOL's Motion to Intervene at 1-2.

²⁰Id. at 2.

²¹Id. at 4.

²²Id.

²³Id. at 5.

LOL fails to state a reasonable basis for its property, financial, and other interests in this proceeding. MECO 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.²⁴ Specifically, among other things, MECO 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."²⁵

Third, MECO 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.²⁶ MECO argues that LOL's efforts, here, will duplicate the efforts of the Consumer Advocate, which is bound by law to represent the interests of the general public and protect and advance the interests of all consumers, including LOL and its members.²⁷

Fourth, MECO 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. According to MECO, LOL has had ample opportunity to protect any interest that it may have in other dockets including

²⁴Id. at 7-8.

²⁵Id. at 8.

²⁶Id. at 8-9.

²⁷Id.

HECO's integrated resource planning dockets; Docket No. 05-0145 (the Campbell Industrial Park Generation Station and Transmission Additions Project); Docket No. 03-0371 (Distributed Generation); and Docket No. 2007-0346 (Imperium Biodiesel Supply Contract).²⁸

Fifth, MECO states that LOL fails to demonstrate how its participation in this proceeding would assist in the development of a sound record.²⁹ MECO 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.³⁰

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 biodiesel 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.³¹ In the commission's view, LOL fails to

²⁸Id. at 10.

²⁹Id. at 11.

³⁰Id.

³¹See In re Application of Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975).

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; particularly as this docket involves a one-time purchase of biofuel for the limited purpose of gathering information.

Moreover, LOL's assertion that the Consumer Advocate cannot represent its interests and 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[.]"³² Contrary to LOL's assertions, the Consumer Advocate is not limited to solely 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."³³

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

³²See HRS § 269-51.

³³See 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 biodiesel.

In its Application, MECO states that the Supply Contract requires that the biodiesel supplied to MECO 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 2007.³⁴ Thus, the environmental sustainability of palm oil-based biodiesel may be an issue in this proceeding. Given LOL's environmental interests and its contribution in Docket No. 2007-0346,³⁵ 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.

³⁴See Application at 20.

³⁵The commission notes that while it made a determination regarding the biodiesel supply contract in Docket No. 2007-0346, it 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 biodiesel. 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.

LOL's participation in this proceeding, however, 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 MECO's statement that its project schedule for its Biodiesel Demonstration Project "assumed a decision and order from the Commission approving this Application by January 21, 2010[,]"³⁶ the commission is prepared to proceed as expediently as

³⁶See Application at 21-22.

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 MECO requests a commission decision on its Application by January 21, 2010, the stipulated schedule of proceedings shall include the following:

1. Any evidentiary hearing on MECO'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.

III.

Orders

THE COMMISSION ORDERS:

1. LOL's Motion for Leave to Reply is granted.
2. LOL's Motion to Intervene is denied.

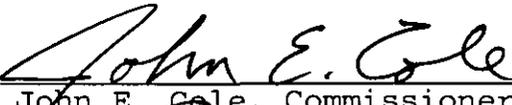
3. LOL shall be allowed to participate without intervention in this proceeding. LOL's participation in this proceeding shall, unless otherwise ordered by the commission, be limited to the issue of the environmental sustainability of palm oil-based biodiesel. With respect to this issue, LOL shall be allowed 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.

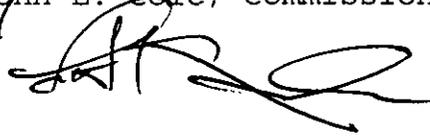
4. The Parties and LOL shall submit a stipulated procedural order for the commission's review and approval, consistent with the parameters set forth in Section II.C of this Order within fifteen days of the date of this Order. If the Parties and LOL are unable to agree, they shall submit separate proposed procedural orders for the commission's consideration within the same time period.

DONE at Honolulu, Hawaii SEP 16 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:


Bonita Y.M. Cheng
Commission Counsel

2009-0168.sl

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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