

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)

JOHN R. EDNEY )

DOCKET NO. 04-0258

For a Motor Carrier Certificate )  
Or Permit. )  
\_\_\_\_\_)

ORDER NO. 21856

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

Karen Higashi  
Chief Clerk of the Commission

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

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KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

K. Higashi

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Docket No. 04-0258
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ORDER

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 matter<sup>1</sup> ("Motion to Intervene").

I.

History

On March 15, 2005, the duly appointed hearings officer issued his Recommended Decision setting forth, among other things, the procedural history of the proceedings, his findings of fact, conclusions of law, and recommended decision for the commission to review and consider. The Recommended Decision was served upon Applicant on March 15, 2005, via first class mail.

<sup>1</sup>On August 13, 2004, JOHN R. EDNEY ("Applicant"), filed an application for a certificate of public convenience and necessity to transport passengers by motor vehicle in the 1-to-7 and 8-to-25 passenger classifications, on the island of Hawaii, excluding Waipio Valley.

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"),<sup>2</sup> in which, among other things, it requested to present oral argument on its Exceptions before the commission. On April 1, 2005, Applicant filed a timely brief opposing the Exceptions.<sup>3</sup>

The commission granted Jack's request for oral argument and by Order No. 21781, 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 himself and attorney William Milks.

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 service; and (3) Applicant failed to show that granting

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<sup>2</sup>See Hawaii Administrative Rules ("HAR") § 6-61-130.

<sup>3</sup>See HAR § 6-61-131.

Jack's Motion to Intervene would result in undue delay. Additionally, Jack's argued that the commission must maintain a sound transportation policy and insist that Applicant meet the requirements for public need and necessity to protect the financial integrity of the transportation industry.

Applicant noted for the commission that the application process has gone on longer and cost more than originally anticipated because of Jack's Motion to Intervene.

### 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 the 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."<sup>4</sup> Recommended Decision at 7.

Accordingly, pursuant to Hawaii Revised Statutes § 269-6, we conclude that the Recommended Decision, attached

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<sup>4</sup>HAR § 6-61-55(d).

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.

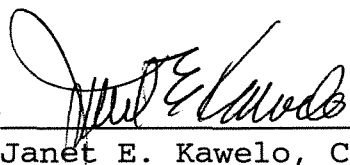
DONE at Honolulu, Hawaii \_\_\_\_\_.

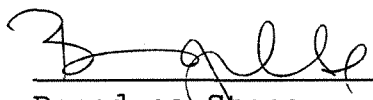
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By \_\_\_\_\_ (EXCUSED)  
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

By   
Janet E. Kawelo, Commissioner

  
Benedyne Stone  
Commission Counsel

04-0258.eh

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)	)	
JOHN R. EDNEY	)	DOCKET NO. 04-0258
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	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW, AND
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Permit.	)	AND ORDER OF
<hr/>	)	HEARINGS OFFICER

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

I.

Introduction

On August 13, 2004, JOHN R. EDNEY ("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 1-to-7 and 8-to-25 passenger classification. On September 27, 2004, Jack's Tours, Inc. ("Jack's Tours"), filed a timely motion to intervene and hearing on the motion pursuant to Hawaii Administrative Rules ("HAR") §§ 6-61-55 and 6-61-57. On October 12, 2004, Applicant filed a response to Jack's Tours' motion to intervene. On October 15, 2004, Jack's Tours filed a Motion to Strike Applicant's response to Jack's Tours Motion to Intervene, filed September 27, 2004 ("Motion to Strike"). Applicant did not file a response to Jack's Tours' Motion to Strike.

Exhibit A

By Notice of Hearing, filed on October 20, 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 Kinooole Street, Hilo, Hawaii. John R. Edney represented himself 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 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.

4. Jack's Tours asserts, among other things that: (1) the proposed services by the Applicant are already being provided by Jack's Tours and will cause Jack's Tours economic harm; (2) the proposed services by the Applicant are not and will not be required by the present or future necessity under the provisions of Chapter 271, HRS; (3) Jack's Tours 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; (4) there is sufficient capacity to meet the current and future public need and the authorization of additional motor carriers would only serve to place the industry at further risk of harm and economic failure during these difficult times; (5) granting of Applicant's 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; (6) Applicant is not fit or able to provide the service proposed as required by Chapter 271, HRS; (7) there are no other means available whereby the interest of Jack's Tours may be protected; (8) Applicant has limited experience in operating a charter service in Hawaii;



( )

(9) most of Applicant's experience stems from this role as the President and COO of Russell Transportation in Los Angeles, California from 1983-1990, but does not provide any further details about the nature of the business of Russell Transportation; (10) Applicant does not intend to participate in a tariff bureau and fails to attach as an exhibit to the application its rules and regulations governing its service and no detailed tariff proposal; (11) Applicant has not provided the commission with competent financial information upon which the commission can make a determination as to financial fitness to conduct the proposed operation; (12) the financial information submitted indicates that Applicant is not financially fit to operate as a motor carrier; (13) there are no other means available whereby the interest of Jack's Tours may be protected and Jack's Tours' interest differs from that of the general public; (14) Jack's Tours participation can assist in the development of a sound record through the introduction of pertinent evidence; (15) Jack's tours participation will not broaden the issues or unduly delay the proceeding; (16) Jack's Tours' interests in the proceeding differs from the general public because if Applicant is granted a CPCN, Applicant will be in direct competition with Jack's Tours and will likely result in a reduction in the number of passengers now being carried by Jack's Tours and the consequent loss of revenue.

### 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. Accordingly, this hearings officer recommends that Jack's Tours' Motion to Strike Applicant's Response to Jack's Tours' Motion to Intervene should be granted.

4. 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.

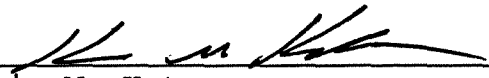
##### Recommended Decision and Order

1. Based on the foregoing, this hearings officer recommends that the commission grant Jack's Tours' Motion to

Strike Applicant's Response to Jack's Tours' Motion to Intervene  
in this proceeding.

2. 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.

  
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Kevin M. Katsura  
Hearings Officer  
Public Utilities Commission

john edney F&F.ac

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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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. 21856 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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\_\_\_\_\_  
Karen Higashi

DATED: JUN - 3 2005