

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

-----In the Matter of-----)
)
PUBLIC UTILITIES COMMISSION) DOCKET NO. 2008-0274
)
Instituting a Proceeding To)
Investigate Implementing a)
Decoupling Mechanism for Hawaiian)
Electric Company, Inc., Hawaii)
Electric Light Company, Inc.,)
and Maui Electric Company,)
Limited.)
_____)

ORDER DENYING MOTION FOR RECONSIDERATION

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

PUBLIC UTILITIES
COMMISSION

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ORDER DENYING MOTION FOR RECONSIDERATION

By this Order, the commission denies the Motion for Reconsideration of Order Denying Motion for Enlargement of Time to File Motion to Intervene, filed by TAWHIRI POWER LLC ("TPL") on December 15, 2008 ("Reconsideration Motion").

I.

Background

On October 24, 2008, the commission opened this docket to examine implementing a decoupling mechanism for HAWAIIAN ELECTRIC COMPANY, INC., HAWAII ELECTRIC LIGHT COMPANY, INC., and MAUI ELECTRIC COMPANY, LIMITED (collectively, "HECO Companies") that would modify the traditional model of rate-making for the HECO Companies by separating their revenues and profits from electricity sales.¹ In the Opening Order, the commission named

¹See Order Initiating Investigation, filed on October 24, 2008, in Docket No. 2008-0274 ("Opening Order").

the HECO Companies and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62, as parties to the proceeding. The commission also explained in the Opening Order that motions to intervene or participate must be filed within twenty days of the date of the Opening Order, pursuant to HAR § 6-61-57(3)(B), or by November 13, 2008.

Motions to intervene in this proceeding were timely filed by LIFE OF THE LAND ("LOL"), HAWAII RENEWABLE ENERGY ALLIANCE ("HREA"), HAIKU DESIGN AND ANALYSIS ("HDA"), HAWAII HOLDINGS, LLC, DOING BUSINESS AS FIRST WIND HAWAII ("First Wind"), the STATE OF HAWAII, DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM ("DBEDT"), HAWAII SOLAR ENERGY ASSOCIATION ("HSEA"), and BLUE PLANET FOUNDATION ("Blue Planet").

On November 17, 2008, TPL filed a Motion for Enlargement of Time to File Motion to Intervene ("Enlargement Motion") and a Motion to Intervene. In the Enlargement Motion, TPL asserted:

It is [TPL's] position that its Motion to Intervene is timely because public notice of the docket did not occur until October 29, 2008 when the Commission included an entry on the Order in its Daily Activity Report. Thus, [TPL] should have twenty (20) days from when the public notice was available instead of twenty (20) days from when the Order Initiating the Investigation was issued. Since public notice was not made available through the Commission's Daily Activity Report until October 29, 2008, [TPL]

should have until November 18, 2008 to file its Motion to Intervene.²

By order issued on December 3, 2008, the commission, among other things, allowed intervention in this proceeding to: LOL, HREA, HDA, First Wind, DBEDT, HSEA, and Blue Planet. The commission also denied the Enlargement Motion. In its review of the Enlargement Motion, the commission applied HAR § 6-61-23, which provides:

(a) When by this chapter or by notice or by order of the commission, any act is required or allowed to be done at or within a specified time, the commission for good cause shown may at any time, in its discretion:

- (1) With or without motion or notice, order the period enlarged, if written request is made before the expiration of the period originally prescribed or as extended by a previous order; or
- (2) Upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect[.] [Emphasis added.]

²Enlargement Motion at 3 (footnote omitted). On November 26, 2008, the HECO Companies filed a Memorandum in Opposition to TPL's Enlargement Motion and its Motion to Intervene. The commission's rules allow opposition memoranda to be filed in response to motions, but do not permit the filing of reply memoranda in support of motions. See HAR § 6-61-41. On December 2, 2008, TPL filed a Motion for Leave to File a Reply to HECO's opposition filed on November 26, 2008 ("TPL's Motion for Leave"), and on December 3, 2008, TPL filed its Reply Memorandum to HECO's opposition ("TPL's Reply"). TPL's Motion for Leave was filed while the commission's December 3, 2008 order ruling on intervention and the Enlargement Motion ("Intervention Order") was already being processed for filing; and TPL's Reply was filed after the Intervention Order was issued. For these reasons, TPL's Motion for Leave and TPL's Reply were not considered by the commission in the Intervention Order. To clarify the record, however, the commission denies TPL's Motion for Leave.

In denying the Enlargement Motion, the commission explained:

As set forth above, pursuant to HAR § 6-61-57(3)(B), the deadline to file motions to intervene or participate in this proceeding was twenty days after the filing date of the Opening Order, which was November 13, 2008. Because the Enlargement Motion was filed after this deadline, on November 17, 2008, the commission applies the "excusable neglect" standard in HAR § 6-61-23(a)(2), cited above, to its review of the Enlargement Motion. The excusable neglect standard is a strict standard requiring a showing that the failure to timely file with the commission was due to circumstances beyond TPL's control. Lack of legal sophistication and ignorance of the law do not constitute excusable neglect. Pogia v. Ramos, 10 Haw. App. 411, 416, 876 P.2d 1342 (Haw. Ct. App. 1994).

Upon review, the commission does not find "excusable neglect" to justify granting the Enlargement Motion. The commission's rule on the deadline for intervention is clearly set forth in HAR § 6-61-57(3)(B), and was also addressed in the Opening Order. More importantly, TPL's position in the Enlargement Motion that the deadline for intervention was November 18, 2008 is belied by the fact that TPL timely filed a motion to intervene in the feed-in tariffs docket, Docket No. 2008-0273, by the November 13, 2008 deadline. The Opening Order in this docket and the order opening the feed-in tariffs docket were filed on the same day, October 24, 2008, such that under HAR § 6-61-57(3)(B), the deadline for intervention motions in both dockets was the same -- November 13, 2008. Moreover, notice of the opening of the feed-in tariffs docket appeared right above notice of the Opening Order in this docket in the October 29, 2008 Daily Activity Report. In sum, there appears to be no excusable reason why TPL did not timely file a motion to intervene in this docket, and the Enlargement Motion should be denied.³

³Intervention Order at 8-10 (footnotes omitted).

On December 15, TPL timely filed its Reconsideration Motion.

II.

Reconsideration Motion

HAR chapter 6-61, subchapter 14, governs motions for reconsideration filed with the commission. HAR § 6-61-137 states:

§6-61-137 Motion for reconsideration or rehearing. A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

HAR § 6-61-137 (emphasis added).

In the Reconsideration Motion, TPL continues to maintain its position that the deadline for it to file its intervention motion in this docket was twenty days after it received notice of the Opening Order, which fell on November 17, 2008. Thus, TPL believes its motion to intervene was timely filed. Alternatively, TPL asserts that if the commission construes its intervention motion as late, and applies the "excusable neglect" standard to TPL's Enlargement Motion, then TPL meets that standard because its failure to file by the November 13, 2008 deadline was due to circumstances beyond its control in that TPL had no control over when it would receive

notice of the Opening Order in the Daily Activity Report.⁴ TPL also asserts that its due process rights would be violated because it did not have sufficient notice of the Opening Order. In addition, TPL's counsel represents in a Declaration attached to the Reconsideration Motion that: "I did attempt to file [TPL's] Motion to Intervene in Docket No. 2008-0274 on November 13, 2008, but was prevented to do so by the Commission because it was approximately 4:33 p.m. Thus, [TPL] decided to fine tune its Motion to Intervene and file by the twenty (20) day deadline of November 17, 2008."⁵

The commission is not persuaded by TPL's arguments. The commission's rule on the timing of an intervention motion is very clear. HAR § 6-61-57(3) states, in relevant part:

A motion to intervene or participate shall be served on all parties and the consumer advocate and filed, in the proceedings other than those specified in paragraphs (1) or (2), no later than:

- (A) Twenty days after an application is filed;
- (B) Twenty days after the commission orders an investigation[.]
[Emphasis added.]

Thus, the rule specifies that motions to intervene are due twenty days after the commission opens an investigation, not twenty days after a party receives notice of the commission

⁴Reconsideration Motion at 6.

⁵See Declaration of Counsel attached to Reconsideration Motion, at ¶ 3.

opening an investigation.⁶ It appears that TPL seeks to re-write the commission's rules on the deadlines for intervention in commission dockets. TPL's interpretation of the rules would lead to varying and different deadlines depending on when parties claimed they received notice of the commission's opening of an investigative docket. TPL points to no support for its position, and in fact, there is none.

Moreover, TPL's position is simply not credible. In the commission's view, the entirety of the record indicates that TPL knew the intervention deadline, but was simply late in filing its motion. As explained in the Intervention Order, TPL timely filed a motion to intervene in the feed-in tariffs docket on November 13, 2008. The Opening Order in this docket and the order opening the feed-in tariffs docket were filed on the same day, October 24, 2008, such that under HAR § 6-61-57(3)(B), the deadline for intervention motions in both dockets was the same -- November 13, 2008. As now acknowledged by TPL in the Reconsideration Motion, it also tried to file a motion to intervene in this docket on November 13, 2008, but was not allowed to do so because TPL attempted to file the motion after the commission's office closed.⁷ TPL's position that, after it was unable to file its motion on November 13th, it decided to

⁶TPL's counsel, who practices regularly before the commission, should have been very familiar with the commission's deadlines to intervene under HAR § 6-61-57.

⁷HAR § 6-61-3(b) ("The office of the commission shall be open from 7:45 a.m. to 4:30 p.m. daily except Saturdays, Sundays, and legal holidays, unless otherwise provided by statute or executive order.").

take two extra days to "fine tune" its motion to file by TPL's claimed deadline of November 17th, is challenged by the fact that TPL timely filed its motion in the feed-in tariffs docket, and counsel actually rushed to file a motion in this docket by the November 13th deadline, but was turned away at the door because the office had already closed.⁸

In sum, the reason for TPL's failure to timely file a motion to intervene in this docket appears to have been due to circumstances within TPL's control. Given the high standard for "excusable neglect," discussed thoroughly in the Intervention Order, TPL's conduct does not meet this standard. Thus, TPL has failed to show that the commission's denial of TPL's Enlargement Motion was unreasonable, unlawful, or erroneous; its Reconsideration Motion should be denied.

III.

Order


THE COMMISSION ORDERS:

The Reconsideration Motion is denied.

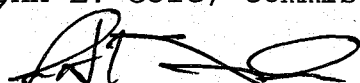
⁸Even accepting TPL's representations about its decision to wait to file its Motion to Intervene and Enlargement Motion by its own deadline of November 17, 2008, the commission questions the soundness of that decision. As set forth above, the commission's deadline to intervene in this docket should have been abundantly clear to TPL, and there is no support for TPL's claimed deadline of November 17, 2008. If anything, the prudent course for TPL would have been to file its Enlargement Motion prior to the November 13, 2008 deadline under HAR § 6-61-57(3)(B).

DONE at Honolulu, Hawaii JAN - 9 2009.

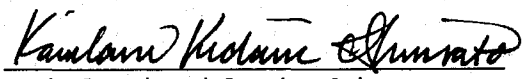
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner


By
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


Kaiulani Kidani Shinsato
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2008-0274.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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