

CASE LOMBARDI & PETTIT
A LAW CORPORATION

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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F. OTAKE
CLERK

Attorneys for Plaintiff
THE ALLIANCE FOR SOLAR CHOICE, LLC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THE ALLIANCE FOR SOLAR CHOICE,
LLC,

Plaintiff,

vs.


DAVID Y. IGE, as Governor of the State of
Hawaii; STATE OF HAWAII PUBLIC
UTILITIES COMMISSION; JOHN DOES
1-20; JANE DOES 1-20; DOE
PARTNERSHIPS 1-20; DOE
CORPORATIONS 1-20; DOE ENTITIES
1-20; and DOE GOVERNMENTAL
UNITS 1-20,

Defendants.

CIVIL NO.: 15 - 1 - 2025 - 10 GWBC
(Declaratory Judgment)

COMPLAINT; SUMMONS

I do hereby certify that this is a full, true, and
correct copy of the original on file in this office.


Clerk, Circuit Court, First Circuit

COMPLAINT

Plaintiff THE ALLIANCE FOR SOLAR CHOICE, LLC (“TASC”), by and through its attorneys, Case Lombardi & Pettit, alleges and avers as follows:

JURISDICTION AND VENUE

1. Material events occurred within the jurisdiction of the Circuit Court of the First Circuit, State of Hawaii.

2. This Court has jurisdiction over this matter in accordance with Hawaii Revised Statutes (“HRS”) sections 91-7 (“[a]ny interested person may obtain a judicial declaration as to the validity of an agency rule”), 91-14(a) (“nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo . . . provided by law”), 603-21.5(3), and 632-1.

3. Venue is proper in accordance with HRS section 603-36(5).

PARTIES

4. TASC is a Delaware limited liability company that is registered to do business in the State of Hawaii.

5. Defendant DAVID Y. IGE is the Governor of the State of Hawaii.

6. Defendant STATE OF HAWAII PUBLIC UTILITIES COMMISSION is a State of Hawaii agency with the primary duty to protect the public interest by overseeing and regulating public utilities to ensure they provide reliable service at just and reasonable rates. Commissioners are appointed by the Governor of the State of Hawaii. Governor Ige and the Public Utilities Commission are collectively referred to as the “PUC.”

7. TASC has undertaken a diligent and good-faith effort to ascertain the true names, identities or capacities, whether corporate, associate, partnership, representative or otherwise, of John Does 1-20, Jane Does 1-20, Doe Corporations 1-20, Doe Partnerships 1-20, and

Doe Entities 1-20 (“the Doe Defendants”) and their involvement in this case. The names and identities of the Doe Defendants, however, are currently unknown to TASC. TASC thus sues the Doe Defendants by fictitious names. TASC will seek leave of court to amend the Complaint to set forth the true names and capacities of the fictitiously named Doe Defendants when they become known. TASC alleges that each of the Doe Defendants designated by a fictitious name has breached one or all of the duties or obligations alleged in this Complaint.

FACTS COMMON TO ALL COUNTS

8. TASC leads rooftop solar advocacy across the country and has been active in Hawaii solar policy since 2013. Founded by the nation’s leading rooftop solar companies, TASC represents the majority of the rooftop solar industry.

9. Member companies of TASC are the leading solar service providers in Hawaii, are responsible for more than 10,000 residential, school, government and commercial installations in the State, and collectively employ hundreds of Hawaii residents.

10. Today, most electric utilities operate as legislatively granted monopolies with the power to dictate prices and, without appropriate regulation, limit a customer’s ability to choose the source of supply of his or her electricity. Hawaii’s investor-owned electric utilities are subject to the jurisdiction of the PUC. Competitive choices in Hawaii, such as rooftop solar, have empowered residents to take control of their energy usage, utilize local and cleaner power sources, and lock in more stable and reasonable prices for electricity.

11. Net energy metering, or net metering, is a rate tariff called Rule 18 in the rate tariffs of the State’s investor-owned electric utilities. Under Hawaii law, net metering applies to eligible solar, wind, biomass or hydroelectric generation facilities, or a hybrid system of two or more of these technologies, with a capacity up to 100 kW.

12. Net metering allows solar customers, including residents, businesses, schools and other public agencies, to receive full retail credit for the excess energy they deliver to the grid. This excess clean energy is exported to the grid for the utility to sell to the customers' neighbors. With net metering, consumers take control of their energy use through private investment and provide other ratepayers with clean energy and cost savings.

13. Forty-four states currently have net metering policies, including states with relatively high solar penetration, such as California. South Carolina recently became the latest state to adopt a net metering policy.

14. As detailed in this Complaint, the PUC recently purported to end net metering. By denying new solar consumers the benefits of net metering, Hawaii has joined states like Alabama, Tennessee, Texas, South Dakota, and Idaho that do not require their utilities to provide net metering policies.

15. Hawaii shares little in common on renewable energy policy with the few states that do not have net metering.

16. For example, Hawaii's legislature recently adopted a 100% renewable portfolio standard.

17. As another example, Hawaii's legislature established a state tax credit for renewable energy, including rooftop solar.

18. Until recent events, Hawaii's net metering program had been remarkably successful. For example, the capacity of all net-metered customers' onsite solar systems was sufficient to serve over 30% of the highest recorded peak electricity demanded on the Islands of Oahu, Maui, and Hawaii in 2014.

19. On October 12, 2015, the PUC issued a Decision and Order Resolving Phase 1 Issues, Order No. 33258, Docket No. 2014-0192 ("Decision"), which ends net metering in

Hawaii, imposes new tariffs for Hawaii consumers, and increases the monthly minimum bill just for solar consumers.

20. This action seeks a Declaration that the PUC exceeded its statutory authority, violated state law, and violated Constitutional due process by, among other things, failing to hold a hearing, failing to develop a proper evidentiary record, failing to give parties the opportunity to rebut arguments, and unreasonably discriminating against classes of Hawaii consumers.

21. On August 21, 2014, the PUC initiated Docket No. 2014-0192 via Order No. 32269, “Instituting a Proceeding to Investigate Distributed Energy Resource Policies” (“Proceedings”). By the PUC’s admission in the Decision, the purpose of the docket was “to investigate the technical, economic, and policy issues associated with DER [distributed energy resource] as they pertain to the electric operations of each of the HECO Companies [Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited] and KIUC [Kauai Island Utility Cooperative].” The PUC sought “to resolve issues that have been identified and discussed in several previous commission orders related to the future of Hawaii’s electric utilities in general and DER in particular, as well as the ‘Commission’s Inclinations on the Future of Hawaii’s Electric Utilities; Aligning the Utility Business Model with Customer Interests and Public Policy Goals’” Decision at 5-6.

22. On September 10, 2014, TASC filed a motion to intervene in the Proceedings.

23. In a March 31, 2015, ruling, the PUC granted TASC intervenor status and stated it would reconsider any Intervenor’s participation in the docket if, at any time during the course of the proceeding, the PUC determined that any Intervenor was attempting to unreasonably broaden the pertinent issues established by the PUC in the docket, was unduly delaying the proceeding, or was failing to meaningfully participate and assist the PUC in the development of the record in this docket.

24. In that same ruling, the PUC also set an expedited procedural schedule in which it stated it expected parties to participate in bi-weekly technical conferences to facilitate discussion and collaboration among the parties. The PUC's aim was to enable parties to stipulate to a proposed resolution of Phase 1 issues within an expedited timeframe to be completed on June 29, 2015.

25. Over the 90 days between March 31, 2015 and June 29, 2015, TASC made a good-faith effort to reach agreement with the other parties through the PUC's settlement-like process. A stipulation was reached on a very narrow subsection of issues in the Proceedings. Despite TASC's best efforts, a stipulation could not be reached on a number of issues vital to the property and financial interests of TASC, its members, and their customers.

26. On June 1, 2015, TASC filed an Initial Statement of Position in the Proceedings.

27. On June 29, 2015, TASC filed a Final Statement of Position in the Proceedings.

28. The record of the Proceedings consisted almost entirely of parties' statements of position.

29. Because no material resolution of the issues set out for discussion in the PUC's August 21, 2014 Order had resulted from the above referenced discussions, and because the various Parties had now filed with the PUC disparate positions on the issues containing contradictory and conflicting evidence, some of which TASC had no opportunity to respond to, TASC on July 2, 2015 filed a Motion to Initiate Formal Evidentiary Hearings, which the PUC denied in the Decision.

30. The Decision ends the current Net Energy Metering (NEM) program, but grandfathers the existing current NEM customers and those with applications pending as of October 12, 2015.

31. The Decision was signed and effective October 12, 2015, but the PUC did not release it to the public until October 13, 2015.

32. The Decision purports to create three options for Hawaii consumers who want to invest in rooftop solar and other distributed energy resources:

- a. “Self-Supply” systems for customers who primarily intend to consume all of the energy produced by their systems onsite at their homes or businesses and will refrain from exporting excess energy to the grid;
- b. “Grid-Supply” systems for customers to export excess energy to the grid as needed, whereby customers receive energy credits on their monthly bills, but at a rate that is significantly lower than the full retail rate that applied under NEM; and
- c. “Time-of-Use” tariff in which prices for customers’ purchases of electricity vary over three time periods during the course of the day, with a phase-in mandatory tariff that purports to incentivize customers to shift energy demands to the middle of the day.

33. The “Time-of-Use” tariff is not yet established. The Decision ordered the utility to file more information necessary for the PUC to take action before that tariff will be established.

34. The PUC failed to conduct a cost-benefit analysis of the impacts of rooftop solar on the grid on the record of the Proceedings and has yet to complete an adequate cost-benefit study outside of the record of the Proceedings.

35. Although the PUC invited and received hundreds of public comments in addition to the positions of the Parties, it failed to hold a public hearing in accordance with HRS section 91-3 before issuing the Decision.

36. Both Article I, Section 4 of the Hawaii State Constitution and the First Amendment to the United States Constitution prohibit the abridging of the freedom of speech.

37. Hawaiian Electric, as well as TASC, frequently interacted with the media about their respective positions on the future of rooftop solar in Hawaii.

38. The PUC singled out TASC because it sought “resolution of issues in this docket outside of the collaborative process,” by speaking to the media on issues of important public policy. Further, the PUC indicated it “will closely scrutinize the behavior of TASC and its counsel in Phase 2 of this docket” and would remove TASC if it continues to “jeopardize the collaborative process” by interacting with the media.

39. The PUC’s actions have and will continue to chill TASC’s freedom of speech.

40. The PUC failed to develop a sufficient evidentiary record to support the Decision.

41. The Decision injures TASC, its members, and its members’ current and prospective customers. As a result of the Decision, new customers of TASC members will either receive no credit for excess electricity produced by their systems (Self-Supply) or receive significantly less credit than they did under NEM (Grid-Supply).

42. Further, the Decision creates substantial uncertainty about the rates at which customers will be credited for exported electricity in the future.

43. As a result of the Decision, TASC members will obtain fewer sales in Hawaii than they would have obtained under NEM.

44. As a result of the Decision, TASC members can continue to do business in Hawaii only by significantly increasing prices to customers, or by incurring significant additional costs, to offset the adverse economic effects of the Decision.

45. TASC members either sell solar energy systems to customers outright, or enter into long term leases or power purchase agreements with customers. To the extent that TASC members are able to continue to sell solar energy systems at reduced prices or by incurring additional costs while the Decision is in effect, they have no opportunity to recoup those lost revenues or increased costs, even if the Decision is later found to be unlawful.

46. Because TASC members cannot obtain monetary damages against the Defendants, TASC members have no remedy at law for the unlawful Decision, and are suffering and continue to suffer irreparable harm as a result.

COUNT I – DECLARATORY JUDGMENT
(MANDATORY RULEMAKING PROCEDURES)

47. TASC incorporates by reference all paragraphs in this Complaint.

48. There is an actual controversy between TASC and the PUC.

49. This Court has jurisdiction and authority to issue a declaratory judgment in accordance with HRS section 632-1.

50. The Decision constitutes a form of rulemaking without a public hearing and approval by the Governor.

51. HRS section 269-6 provides that “among the general powers of the commission is the authority to adopt rules pursuant to chapter 91 necessary for the purposes of this chapter.”

52. HRS Section 91-1(4) provides in part: “(4) ‘Rule’ means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency” HRS section 91-3(a) requires the PUC, before the adoption of any rule authorized by law, to:

Give at least thirty days’ notice for a public hearing. The notice shall include:

(A) A statement of the topic of the proposed rule adoption, amendment, or repeal or a general description of the subjects involved; and

(B) A statement that a copy of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed will be mailed to any interested person who requests a copy, pays the required fees for the copy and the postage, if any, together with a description of where and how the requests may be made;

(C) A statement of when, where, and during what times the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed may be reviewed in person; and

(D) The date, time, and place where the public hearing will be held and where interested persons may be heard on the proposed rule adoption, amendment, or repeal.

53. HRS section 91-3(c) states “[t]he adoption, amendment, or repeal of any rule by any state agency shall be subject to the approval of the governor.”

54. Hawaii Administrative Rules (“HAR”) sections 6-61-149 through 155 provide rulemaking procedures for the PUC that were not followed in the Proceedings.

55. The PUC ended NEM by stating that the cap on NEM systems has been met.

56. Under HRS section 102(a), the PUC only has authority to modify the NEM cap “by rule or order.” “Every electric utility shall develop a standard contract or tariff providing for net energy metering and shall make this contract available to eligible customer-generators, upon request, on a first-come-first-served basis until the time that the total rated generating capacity produced by eligible customer-generators equals .5 per cent of the electric utility’s system peak demand; provided that the public utilities commission may modify, by rule or order, the total rated generating capacity produced by eligible customer-generators.”

57. An “order” is the result of a contested case hearing, and a “rule” is the result of a rulemaking.

58. If the Proceeding is considered a rulemaking, the PUC violated the rulemaking procedures by failing to hold a public hearing, failing to provide proper notice of a hearing and failing to obtain approval from the governor in establishing new tariffs, closing the NEM program, and increasing the minimum bill solely for grid-supply and self-supply customers.

59. TASC is entitled to a Declaratory Ruling that the PUC’s violation of HRS section 91-3 and HAR sections 6-61-149 through 155 requires that the Decision be reversed, modified, and/or remanded to the PUC for further proceedings, including but not limited to a hearing.

COUNT II – DECLARATORY JUDGMENT (LACK OF STATUTORY AUTHORITY)

60. TASC incorporates by reference all paragraphs in this Complaint.

61. In accordance with HRS section 632-1, this Court can resolve “[c]ontroversies involving the interpretation of . . . statutes”

62. HRS section 269-7 gives the PUC investigative powers regarding public utilities.

63. HRS section 269-7 does not authorize the PUC to open an investigative docket and make substantive decisions such as setting rates and establishing new tariffs, including but not limited to taking actions to end the NEM program, create three new tariffs or charges for Hawaii energy consumers, and increase consumers’ rates.

64. TASC is entitled to a ruling that the PUC did not have the authority to issue the Decision under its investigative powers.

COUNT III – DECLARATORY JUDGMENT (MANDATORY HEARING)

65. TASC incorporates by reference all paragraphs in this Complaint.

66. HRS section 269-16(b) mandates that “[a] contested case hearing shall be held in connection with any increase in rates, and the hearing shall be preceded by a public hearing as prescribed in section 269-12(c), at which the consumers or patrons of the public utility may present testimony to the commission concerning the increase.” That section also states that “the commission, upon notice to the public utility, may . . . [a]fter a hearing, by order: Regulate, fix, and change all such rates, fares, charges, classifications, schedules, rules, and practices so that the same shall be just and reasonable”

67. The Decision increases the minimum bill for Hawaii consumers who submit and finalize an application to install rooftop solar after October 12, 2015.

68. The Decision also regulates, fixes, and/or changes rates, charges, and rules for Hawaii consumers.

69. TASC is entitled to a Declaratory Ruling that the PUC violated HRS section 269-16(b) by failing to hold a contested case hearing, preceded by a public hearing, before increasing rates for Hawaii consumers, and regulating, fixing, and/or changing rates, charges, and rules for Hawaii consumers. This violation requires that the Decision be reversed, modified, and/or remanded to the PUC for further proceedings, including but not limited to a hearing.

70. In addition, under HRS section 102(a), the PUC only has authority to modify the NEM cap “by rule or order”.

71. An “order” is the result of a contested case hearing, and a “rule” is the result of a rulemaking.

72. The Decision ends NEM by stating that the cap on NEM systems has been met. If that aspect of the decision is not a rule, TASC is also entitled to a Declaratory Ruling that the PUC violated HRS section 269-102(a) by failing to hold a contested case hearing before modifying the NEM cap. This violation requires that the Decision be reversed, modified, and/or remanded to the PUC for further proceedings, including but not limited to a hearing.

COUNT IV – DECLARATORY JUDGMENT (DISCRIMINATORY RATEMAKING)

73. TASC incorporates by reference all paragraphs in this Complaint.

74. The Decision imposes a minimum bill increase only for new grid supply and self-supply consumers but does not demonstrate that grid-supply and self-supply consumers have distinct demand or cost-related characteristics compared to other similarly situated consumers. This increase constitutes an unreasonably discriminatory rate for new grid supply and self-supply consumers.

75. Unreasonably discriminatory rates violate HRS section 269-16(b)(2)(B).

76. TASC is entitled to a Declaratory Ruling that the PUC violated HRS section 269-16(b) by engaging in unreasonably discriminatory ratemaking. This violation requires that

the Decision be reversed, modified, and/or remanded to the PUC for further proceedings, including but not limited to a hearing.

COUNT V – DECLARATORY JUDGMENT
(VIOLATION OF CONSTITUTIONAL DUE PROCESS)

77. TASC incorporates by reference all paragraphs in this Complaint.

78. Hearings are required by constitutional due process when property rights are at issue.

79. A “property interest” is a benefit to which the claimant is legitimately entitled. A property interest is not limited to the traditional right-privilege distinction, but also includes a benefit that one is entitled to receive by statute.

80. The Constitutional due process hearing requirement for property interests satisfies the “contested case” requirements in HRS sections 91-1(5).

81. The Decision deprives TASC and Hawaii consumers of property interests, including but not limited to investments in offices, employees, sales outreach, trucks, and Hawaii-specific PV systems.

82. The PUC did not provide sufficient notice that NEM could be eliminated in Phase 1 of this docket and failed to reasonably investigate or give the parties a chance to respond to the impacts of eliminating the NEM program on the solar industry or the adoption rate of rooftop solar.

83. The PUC failed to give parties an opportunity to rebut or respond to new assertions made by other parties in their final statements of position.

84. The PUC relied on evidence outside of the record, and took positions contrary to the parties in the proceeding without giving the parties an opportunity to respond.

85. The PUC violated HRS Chapters 91 and 269 and Constitutional due process by issuing the Decision without a hearing.

86. TASC is entitled to a Declaratory Ruling that the PUC violated HRS Chapters 91 and 269 and constitutional due process.

87. TASC is entitled to a Declaratory Ruling that the PUC's violation of HRS Chapters 91 and 269 and Constitutional due process invalidates the Decision and requires a remand to the PUC for a hearing.

COUNT VI – DECLARATORY JUDGMENT (HRS CHAPTER 91)

88. TASC incorporates by reference all paragraphs in this Complaint.

89. TASC was entitled to a hearing before the Decision was issued.

90. The contested case hearing requirement implicates HRS Chapter 91, including but not limited to, HRS Chapter 91-14(g), which requires agency decisions to be supported by substantial evidence.

91. The Decision is not supported by substantial evidence.

92. There is insufficient evidence in the PUC record to support closing the NEM program, establishing the existence and level of a transitional rate, and increasing regulating, fixing, and/or changing rates, charges, and rules for Hawaii consumers.

93. The PUC failed to conduct a cost-benefit analysis of the impacts of rooftop solar on the grid on the record of the Proceeding and has yet to complete an adequate cost-benefit study outside of the record of the Proceeding.

94. Under HRS section 269-145.5, the PUC is required to “[e]xpand . . . options for customers to manage their energy use” and “maximiz[e] interconnection of distributed generation [systems] to the State’s electric grids on a cost-effective basis at non-discriminatory terms”

95. The Decision, including but not limited to its proposed cap under the grid supply tariff, provides no substantial evidence that it will expand options for customers to manage their energy use or maximize the interconnection of distributed generation systems to the State's grids on a cost-effective basis at non-discriminatory terms.

96. Also under HRS section 269-145.5, the PUC must determine "fair compensation for electric grid services and other benefits provided to customers and for electric grid services and other benefits provided by distributed generation customers and other non-utility service providers"

97. The Decision provides no substantial evidence that it determines fair compensation for electric grid services and other benefits provided to customers and for electric grid services and other benefits provided to customers and for electric grid services and other benefits provided by distributed generation customers and other non-utility service providers.

98. TASC is entitled to a Declaratory Ruling that the PUC's violation of HRS Chapter 91's substantial evidence standard requires that the Decision be reversed, modified, and/or remanded to the PUC for further proceedings, including but not limited to a hearing.

COUNT VII – TEMPORARY INJUNCTIVE RELIEF

99. TASC incorporates by reference all paragraphs in this Complaint.

100. The Decision has caused and is causing irreparable harm to TASC member companies in the form loss of goodwill, violation of state and federal Constitutional due process, and the PUC exceeding its statutory authority.

101. Such harm is irreparable by monetary damages because the State of Hawaii is sovereignly immune from monetary damages.

102. Unless a Temporary Injunction is issued, the PUC's violation of HRS Chapters 91 and 269 and state and federal Constitutional due process will continue to cause irreparable harm

to TASC and Hawaii consumers and businesses for which there is no adequate remedy at law, including, without limitation, loss of business, loss of goodwill, and loss of competitive position in the marketplace. Money damages cannot adequately compensate TASC because they are unavailable against the State of Hawaii.

103. As a result, TASC requests that after trial or hearing, this Court permanently enjoin the PUC or anyone acting in concert with them from any further violations of HRS Chapters 91 and 269 and Constitutional due process.

104. It is essential that the Court act immediately and temporarily enjoin the PUC from continuing with the conduct described in this Complaint, because the Decision has caused and will continued to cause irreparable harm to TASC and Hawaii consumers and businesses. In order to preserve the status quo and rights of TASC during the pendency of this action, the PUC should be Ordered to appear and show cause why it should not be temporarily enjoined during the pendency of this action, from implementing the Decision.

105. Unless enjoined, the Decision will continue to cause irreparable harm. In contrast, the PUC will not be harmed from the issuance of an injunction, because it can still conduct normal PUC business.

CONCLUSION

WHEREFORE, TASC prays that this Court:

(a) Enter preliminary and permanent injunctions prohibiting the PUC from implementing the Decision;

(b) Enter a Declaratory Ruling that the PUC violated HRS Chapters 91 and 269 and Constitutional due process;

(c) Enter a Declaratory Ruling that the PUC's violation of HRS Chapters 91 and 269 and Constitutional due process invalidates the Decision and requires a remand to the PUC for a hearing.

(d) Enter a Declaratory Ruling that the Decision be reversed, modified, and/or remanded to the PUC for further proceedings;

(e) Grant such other and further relief, in law or equity, as this Court may deem just.

DATED: Honolulu, Hawaii, October 21, 2015.

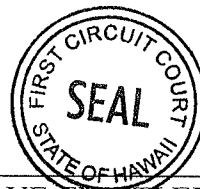
Mark G. Valencia

MARK G. VALENCIA
MICHAEL R. MARSH
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THE ALLIANCE FOR SOLAR CHOICE, LLC

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawaii, October 21, 2015.

F. OTAKE



CLERK OF THE ABOVE-ENTITLED COURT