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TO THE SENATE COMMITTEE ON WAYS AND MEANS

THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2017

MONDAY, FEBRUARY 27, 2017
9:40 A.M.

TESTIMONY OF DEAN NISHINA, EXECUTIVE DIRECTOR, DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, TO THE HONORABLE JILL N. TOKUDA, CHAIR, AND MEMBERS OF THE COMMITTEE

SENATE BILL NO. 382, SD1 - RELATING TO THE PUBLIC UTILITIES COMMISSION

DESCRIPTION:

This measure proposes to make various updates to the structure and operations of the Public Utilities Commission ("PUC'" or "Commission") to increase efficiency and effectiveness, including: permitting teleconference and videoconference abilities; updating the composition of the Commission; specifying training requirements; clarifying commissioners' ability to appoint and employ staff; permitting neighbor island members to receive per diem compensation and compensation for travel expenses; requiring the Commission to report to the legislature regarding certain staff duties; and requiring a management audit of the Commission.

POSITION:

The Division of Consumer Advocacy ("Consumer Advocate") offers comments on this bill.

COMMENTS:

The Consumer Advocate generally supports the idea of reasonable measures that might enable the Commission to become more collaborative and efficient. As will be discussed below, however, the Consumer Advocate defers to the Commission on whether aspects of this bill may adversely affect the Commission's operations and/or result in unintended consequences.

As offered in prior legislative sessions, the Consumer Advocate supports provisions in this legislation that would better enable neighbor island residents to serve on the Commission, such as the provisions allowing for teleconference or videoconference participation by commissioners to attend public hearings and requiring a per diem and travel compensation for neighbor island commissioners. The Consumer Advocate also generally supports provisions of this bill regarding the selection and training of commissioners.

The Consumer Advocate defers to the Commission about whether or not the provisions in this bill regarding the Commission's staff, structure, and guiding principles will help it be more collaborative and efficient. It is the Consumer Advocate's understanding that the Commission has only recently been able to fill many of its vacancies and that various organizational transitions are occurring; thus, an audit at this time may not be as helpful as after "the dust has settled." Therefore, the Consumer Advocate defers to the Commission about whether a management audit would be helpful at this time.

There are some provisions in this bill, however, that the Consumer Advocate worries may have unintended consequences. For example, while the guiding principles articulated in the first additional subchapter in section 2 of the bill are generally reasonable, writing them into statute may limit the Commission's options and/or create inconsistent objectives. A possible illustration is how the Commission will be challenged to fulfill the principle of encouraging competition even though there are other provisions that inhibit competition, such as section 271G-10, Hawaii Revised Statutes, which does not allow the Commission to grant a certificate of public convenience and necessity to another water carrier unless certain criteria are met.

Another example of possible unintended consequences is how increasing the size of the Commission may add more perspectives to the Commission's deliberations, but expanding the number of commissioners may also work against the bill's stated aim of increasing efficiency.

The Consumer Advocate supports provisions that would assist neighbor island residents and non-lawyers being commissioners, however, establishing a requirement that limits the number of attorneys that may serve on the commission or requiring that at least one commissioner be a resident of a county other than the city and county of Honolulu may inhibit the ability to select the most qualified individuals. Rather than establishing these types of requirements, these characteristics should be criteria that should be considered when determining that individual's qualification to serve as a commissioner.

In summary, the Consumer Advocate generally supports the intent to make the Commission more efficient and capable in order to serve the public interest but contends that further consideration may be necessary to ensure that the proposed legislation does not result in unintended and/or undesirable consequences.

Thank you for this opportunity to testify.

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LATE

SENATE COMMITTEE ON WAYS AND MEANS
The Honorable Senator Jill N. Tokuda, Chair
The Honorable Senator Donovan M. Dela Cruz, Vice Chair

S.B. No. 382, S.D. 1, Relating to the Public Utilities Commission

Hearing: Monday, February 27, 2017, 9:40 a.m.

The Office of the Auditor has **no position** regarding S.B. No. 382, S.D. 1, which directs us to perform a management audit to evaluate the efficiency and effectiveness of the Public Utilities Commission (PUC). However, **we have concerns about the scope of tasks the bill requires us to conduct.**

Specifically, Section 7 of the bill states the management audit shall include but not be limited to:

(1) Appropriateness and applicability of current utility legislation;
(2) Adequacy of coverage of current PUC policies, rules, and procedures, including the commission's current strategic plan;
(3) Management of the PUC in terms of providing technical and analytical staff support in case management and enforcement of the PUC rules; and
(4) The effectiveness of the PUC in dealing with telecommunications, energy, and other utility issues.

Some of these tasks appear to be beyond our area of expertise and outside the scope of a performance audit. For example, it is not typically within the scope of a performance audit to assess the appropriateness and applicability of utility legislation. Likewise, the requirement that we assess the effectiveness of the PUC in dealing with telecommunications, energy, and other utility issues appears overly broad.

During the planning phase of our audit work, generally, we attempt to gain a broad understanding of an agency's programs and activities; based on our planning work, we next identify specific programs or activities that we believe are appropriate and meaningful to audit. For an audit to be completed within roughly six months, the scope of the audit must be relatively focused. We are concerned that we may not be able to produce this report before the 2018 session, given the broad scope of some requested tasks.

Thank you for considering our testimony related to the audit requested in S.B. No. 382, S.D. 1.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Twenty-Ninth Legislature, State of Hawaii
The Senate
Committee on Ways and Means

LATE

Testimony by
Hawaii Government Employees Association

February 27, 2017

S.B. 382, S.D. 1 – RELATING TO THE PUBLIC UTILITIES COMMISSION

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO supports the purpose and intent of S.B. 382, S.D. 1 which makes various updates to the structure and operations of the Public Utilities Commission in order to increase efficiency and effectiveness, as well as requires a management audit of the commission.

The role of the Public Utilities Commission is increasing in complexity and morphing beyond a traditional regulatory function, therefore it is necessary for the operations to also evolve. Many of the components of S.B. 382 are necessary changes to ensure that the PUC is operated effectively and efficiently, including allowing tele- and videoconferencing abilities, updating the composition of the Commission, specifying training requirements for commissioners, and clarifying the commissioners' ability to appoint their staff. However, the required management audit to evaluate the PUC is arguably the most critical component of this measure, as it will provide critical information to create a better performing commission.

Thank you for the opportunity to testify in support of S.B. 382, S.D. 1.

Respectfully submitted,

Randy Perreira
Executive Director

TESTIMONY OF RANDY IWASE
CHAIR, PUBLIC UTILITIES COMMISSION
STATE OF HAWAII
TO THE
SENATE COMMITTEE ON
WAYS AND MEANS

February 27, 2017
9:40 a.m.

MEASURE: S.B. No. 382, S.D. 1
TITLE: RELATING TO THE PUBLIC UTILITIES COMMISSION

Chair Tokuda and Members of the Committee:

DESCRIPTION:

This measure makes numerous significant changes to the structure and operations the Public Utilities Commission ("Commission" or "PUC").

This measure also requires the State Auditor ("Auditor") to conduct a management audit to evaluate the efficiency and effectiveness of the Commission.

This measure also requires that the chairperson of the PUC ("chair" or "chairperson"), in conjunction with other commissioners, shall work with the Department of Commerce and Consumer Affairs ("DCCA") and the Department of Human Resource Development ("DHRD") to develop clearly defined duties and responsibilities for Commission staff and that a report detailing these duties and responsibilities be submitted to the legislature no later than 20 days prior to the regular session of 2018.

POSITION:

The purported purpose of this bill is to increase the efficiency and effectiveness of the Public Utilities Commission.

However, contrary to the stated intent, the major changes proposed by this bill would lead to inefficiency and ineffectiveness in the Commission's ability to perform its duties in a timely manner. Moreover, some of the provisions proposed in this bill could raise legal issues that could hamper or prevent executing on those provisions.

Accordingly, and for the reasons set forth below, the commission **STRONGLY OPPOSES** the passage of SB 382, SD1.

COMMENTS:

The proposed amendments would NOT achieve the goal of a "more efficient and effective commission."

The amendments proposed would lead to confusion of operation and there by seriously affect the ability of the Commission to perform its duties in an efficient, effective, and timely manner.

For example, the proposal *requires* a docket review and decision making process "that engages all commissioners in a collegial, *face-to-face manner*, where commissioners shall have the opportunity to review, discuss and offer input *to* ***any order or decision requiring a consensus of commissioners***" (emphasis added).

- Statutorily mandating "face-to-face" meetings is an incredibly inefficient way to process all dockets that are before the Commission. According to the Commission's annual report for Fiscal Year 2016, the Commission issued a total of 783 decisions and orders in FY 2016.

- Each of these orders requires a consensus of commissioners. However, in a great majority of instances, no face-to-face meetings are necessary. Instead, the more efficient way to proceed – and the process that the Commission generally utilizes now – is for Commission staff to prepare a draft memo and/or order concerning a filing, and to circulate such drafts to the commissioners for review and approval. Commissioners then review, make comments if there are any, and sign off. The process is efficient, transparent, and timely.

- Many orders are procedural in nature, and are thus standard or routine, and are virtually always unanimously approved. It would be an incredible waste of time to require the commissioners to meet "face-to-face" to discuss each of these orders.

- Similarly, there are many filings that are unopposed by the Consumer Advocate and others. These filings can be easily explained and understood by a commissioner simply by reviewing the filing, and any accompanying staff memos and/or draft orders. Again, these dockets are generally not the subject of disagreement other than a few comments.

- I understand that prior to my chairmanship, there were some face-to-face meetings to reach decisions in detailed and/or complex investigative or contested case

proceedings. In my interview with various staff members upon becoming chair I was told these meetings were not productive and were often confusing. Staff was left with a feeling of "Where's Waldo". I was informed that staff often left these meetings with no clear indication of what each commissioner's position was, whether the commissioners agreed on the ultimate outcome, or what the structure of the particular order was to be. Staff often had to guess at what a particular commissioner or commissioners wanted. Many times, commissioners changed their minds once they read what was drafted in response to these meetings. This confusing process, which often resulted in more than one re-draft, left staff demoralized.

- To address this inefficient and confusing decision making process I instituted the "American Flag" process which was designed to address these shortcomings. It has been very successful. Under this process, appropriate staff personnel analyze the docket, and draft memos and/or meet with legal staff to discuss these issues. A draft order is prepared and transmitted to each commissioner, along with any staff memos. If a commissioner or commissioners disagree with all or a portion of the draft order, they are required to put their comments and/or proposed changes in writing on the draft order. In this way, issues are more focused and the positions of the commissioners are made clear. If necessary, once this is accomplished, a meeting of the commissioners can be held. This process is far superior to the previous method of doing things.

In short, the above amendment would result in the Commission meeting "face-to-face" for hundreds of dockets, many of which do not require such meetings. There should not be a statutory requirement of having meetings for meetings sake, particularly if the requirement hampers and slows down non-controversial or routine decisions. Second, the amendment seeks to eliminate a decision making process which works and mandates a return to a process which left staff confused and directionless. Decisions on such purely operational matters should be left to management.

Another example is the inexplicable reversal of the provisions of Act 108, SLH 2013 which vested authority in the Commission chair to determine the "employment, appointment, applicable salary schedules, promotion, transfer, demotion, discharge, and job descriptions" of Commission employees. Parenthetically, such powers had already been well established under the existing State job description of the powers and duties of the chair of the Public Utilities Commission.

It is a long standing management practice for any organization – public and private – to vest operational authority in the head of that organization. To now require, as this bill does, a

majority vote of three commissioners to, for example, hire an office secretary, clerk, attorney, or analyst, would create major adverse issues. The head of any organization is ultimately responsible for its action. Sound management principles as well as common sense, suggest that the head of that organization should be given the discretion and authority to hire staff and to supervise such matters as salary and demotion.

Another example of a mandate that will create confusion and inefficiencies is the requirement that each commissioner shall be provided the services of a staff attorney or researcher upon request and that "[a]ttorney/client privilege shall exist between the requesting commissioner and staff attorney until and if the work product is shared with other commissioners."

First, commissioners presently can request and obtain such services. Second, this proposal contradicts a purported goal of this bill – consensus and collaboration. To impose an attorney/client privilege will place staff attorneys in an extremely awkward position – they will have to constantly decide what they can and cannot discuss with other commissioners or staff and may be put in the position of having to refuse to answer other commissioners' questions. As presently operated, our staff is encouraged to collaborate with other staff and commissioners for assistance and direction. This proposal would create unwanted and unnecessary silos and discourage or prohibit collaboration.

This bill intrudes into the jurisdiction of the executive branch to manage and administer the operation of the agency.

Operational management of a department or agency is vested with the executive branch.

In addition to the above examples, below are some other examples of proposed mandates that interfere with such management and the efficient and effective operations of the Commission.

One example is the mandate that any commissioner may call for a meeting with other commissioners and "within 24 hours of the request the executive officer shall calendar such a meeting." No commissioners shall refuse such a meeting request without reasonable justification such as illness. The topic could be any topic before the Commission or "likely to come before the commission."

First, commissioners are presently free to discuss matters with any other commissioner. Second, a commissioner could tie up valuable time of other commissioners and staff simply because that commissioner wants to discuss a topic. Third, a meeting on a topic that may "likely come before the commission" may be highly inappropriate, particularly if such a future

matter may involve a contested case hearing and the commissioner seeks to provide off the record information to the other two commissioners.

Another example is the bill's mandate that the "executive officer shall not be involved in the development of policy or in any decision making for the commission."

This provision targeting the executive officer is unnecessary. First, the commissioners, not the executive officer, develop and establish Commission policy. Second, we are a small Commission. In analyzing and drafting proposals the input from staff is important. In fact, the pursuit of information, including input from knowledgeable individuals is crucial in analyzing the facts and issues in a docket. Does this bill suggest that receiving the thoughts and insights of staff personnel constitute "development of policy"? Again, commissioners are the decision makers. Finally, without any rationale, this bill mandates that the Commission and staff are prohibited from seeking input from the executive officer where the executive officer has significant experiences or expertise in a subject area. It simply does not make for sound research and analysis for the Commission to ignore that experience and expertise.

There are legal issues raised by certain provisions of this bill which may VOID such provisions.

First, this bill seeks to amend the holdover provision applicable to commissioners. Presently, a commissioner may be a holdover until the "member's successor is appointed and *qualified*" (emphasis added). This bill would delete the word "qualified" and allow a holdover to remain in office until confirmed by the Senate. In short, the bill seeks to equate the holdover status of commissioners to that of members of only two state boards – the Board of Regents and Board of Education. The legal issue raised is whether, by statute, the Legislature can override the provision of Article V, Section 6 of the State Constitution. That provision vests constitutional authority in the governor to make an interim appointment thereby filling a vacancy. Upon such appointment, the holdover period ends and the interim appointee assumes office.

It is true that members of the Board of Regents and Board of Education, by statute, may hold over until a successor is confirmed. But, there is a critical difference between these two boards and all other state boards and commissions. The State Constitution granted more power to the legislature over these two boards than it has over appointments to all other boards and commissions. Article X, Sections 2 & 6 of the State Constitution govern the Board of Education and Board of Regents. Both these provisions include the phrase "as provided by law" which is not present in Art. V, Sec. 6. Art. V, Sec. 6 is the controlling constitutional provision governing interim appointments (except for the Board of Regents and Board of

Education) and it is highly questionable, at best, if a statute can override this constitutional provision absent the language in Art. X, Sec. 2 & 6.

Second, this bill seeks to expand the Commission to five members and further provides that the Commission shall "[n]ot include more than two commissioners who have a solely legal background." First, and most obvious, is the bill may be deemed discriminatory by excluding from consideration for appointment an entire class of people – those with "a solely legal background" – simply because there are two commissioners with legal background. Second, and just as important, the term "a solely legal background" is vague and ambiguous. Left undefined, competent candidates who are not attorneys-at-law could be excluded from consideration.

This bill also unfairly targets the Commission's chief counsel and chief of policy and research by mandating that they file disclosures of financial interests. Presently 84-17(c) requires only chiefs at the department division level to file. The chief counsel and chief of policy are, at most, branch chief level positions, which is a level below department division chiefs. The bill and committee report provide no rational basis for targeting the Commission's branch chiefs as a matter of policy.

Additionally, sadly, the bill goes even further. It amends 84-17(d). This section provides that the financial disclosure statements "shall be public records". This is a serious requirement and the Legislature has wisely limited such a requirement to cover only those at the highest level of government. Namely, those who are the decision makers, e.g. the governor, department directors and deputy directors, and members of certain boards and commissions. Again, neither the bill, nor committee report provides strong policy reasons for such a drastic departure from public policy - i.e. to require public disclosure of financial statements of staff who are not decision makers. Yet this bill does just that by requiring public financial statements from the Commission's, "executive officer, chief counsel, chief of policy and research, and any individual employed as or in the role of a hearings officer[. . .]" These staffers DO NOT make the ultimate decisions – the commissioners do. The inclusion of such staffers in the public disclosure provision is unfair.

The implementation of this measure will necessitate expenditure of funds.

Various requirements in this measure will necessitate expenditures by the Commission in order to implement. Please see the table below for a summary of the estimated costs associated with these requirements. The Commission also notes that the PUC office renovation currently underway was designed to meet the Commission's current staffing authorization while remaining compliant with DAG's Office Space Standards. Providing

additional office space for two new Commissioners and four new clerical staff will either require the Commission to secure additional office space in a separate location or to halt construction and redesign the Commission's current office renovation, to which the Commission has already dedicated significant funding and estimates its final cost at roughly $10M.

Requirement	**Non-Recurring Cost**	**Recurring Cost**
Hearing attendance by teleconference or video conference. (p. 10, ln. 1 to p. 11, ln. 8).	**$30,000**	**$13,500/year**
Federal DoD per diem for neighbor island Commissioners. (p. 17, lns. 8-14)		($275 per day * 5 days per week * 52 weeks per year) **$71,500/year**
2 New Commissioners (p. 17 ln. 2)		2 Commissioners * ($117,132 salary + 58,566 fringe) **$351,396/year**
Training Expenses (p.19, lns. 3-17)	(NARUC training for 2 new Commissioners) **$7,000**	(Additional funds as necessary for staff training and new Commissioners appointments)
Travel expenses for neighbor island Commissioners (p. 20, lns. 5-12)		(Once per week * $200 per trip * 52 weeks per year) **$10,500/year** for each Neighbor Island Commissioner
Personal clerical staff for each of 4 Commissioners (p. 22, lns. 12-18)		4 staff * ($40,000 salary + $20,000 fringe) **$240,000/year**
Est. Total	**$37,000**	**$686,896/year or more**

For the foregoing reasons, the Commission respectfully requests that this bill be held.

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, February 25, 2017 12:17 PM
To: WAM Testimony
Cc: launahele@yahoo.com
Subject: *Submitted testimony for SB382 on Feb 27, 2017 09:40AM*

SB382
Submitted on: 2/25/2017
Testimony for WAM on Feb 27, 2017 09:40AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Benton	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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