

Honolulu, Hawaii

APR 28 2017

RE: GOV. MSG. NO. 703

Honorable Ronald D. Kouchi  
President of the Senate  
Twenty-Ninth State Legislature  
Regular Session of 2017  
State of Hawaii

Sir:

Your Committee on Commerce, Consumer Protection, and Health, to which was referred Governor's Message No. 703, submitting for study and consideration the nomination of:

PUBLIC UTILITIES COMMISSION

G.M. No. 703 THOMAS GORAK,  
for a term to expire 06-30-2022,

begs leave to report as follows:

Your Committee has reviewed the personal history, resume, and statement submitted by the nominee, Thomas Gorak, in consideration of his nomination for appointment to the Public Utilities Commission.

Your Committee received testimony in support of the nomination for the appointment of Thomas Gorak from the Department of Business, Economic Development, and Tourism; Distributed Energy Resource Council of Hawaii; Hawai'i Energy; Hawaii PV Coalition; International Brotherhood of Electrical Workers, Local Union 1260, AFL-CIO; Ulupono Initiative; Earthjustice; Sierra Club of Hawai'i; nineteen individuals and two form letters signed by a total of thirty-two individuals. Your Committee received testimony in opposition to the nomination for the appointment of Thomas Gorak from three individuals.

Your Committee acknowledges the testimony received in support of Mr. Gorak to be a Commissioner on the Public Utilities Commission. Specifically, your Committee notes that Mr. Gorak has



a resume that attests to his knowledge and experience working on energy matters and regulatory issues.

Your Committee further appreciates the importance of the Public Utilities Commission and the unique functions that distinguish the Commission from many other state boards and commissions -- specifically, the Commission's far-reaching impact on almost all businesses and individuals throughout the State through the regulation of public utilities, including the approval of rates, tariffs, charges, and fees; limited membership of three individuals who are exempt from chapters 76 and 89, Hawaii Revised Statutes; six-year term of service; and salaried commissioners who are members of the state Employees' Retirement System.

The Senate must also remain cognizant of its vital role as a check and balance of the Governor's exercise of executive power in relation to the powerful Public Utilities Commission. Accordingly, your Committee must carefully consider not only the qualifications and character of any Governor's nominee, but also the constitutional advise and consent process for gubernatorial appointments, and whether the Executive Branch properly exercised its powers in this process.

Your Committee further finds that it must weigh and balance the Senate's advise and consent role, the role of the public in participating in the screening of gubernatorial appointments, and the role of the Governor in the exercise of executive powers in the nomination and appointment of high-level public officers.

Your Committee additionally finds that the practices of Governors and the Senate from Statehood to the present have consistently complied with the constitutional mandate that gubernatorial appointments comply sequentially with a "nominat[ion] and, by and with the advice and consent of the senate", that is then followed by the appointment of the nominee by the Governor. The few exceptions that have occurred in the past, in which a governor avoided this sequential nomination process by appointing a public officer after a session of the Legislature and during the interim, were vigorously objected to by the Senate. Your Committee notes that the sequence of nomination, Senate confirmation, and gubernatorial appointment was properly followed for Mr. Gorak's predecessor; further, that Commissioner was eligible to remain in office as a legitimate holdover who had been approved and qualified by both the executive and legislative branches of government. The sheer timing and circumstances under



which Mr. Gorak was appointed as an interim Commissioner, soon before an important decision before the Public Utilities Commission, cast doubt over Mr. Gorak's ability or willingness to make decisions without improper influence from the Governor.

Your Committee notes that a gubernatorial nomination to public office made during a session of the Legislature provides the Senate the opportunity to perform the Senate's constitutional advise and consent responsibility. Furthermore, the Senate's practice of holding public hearings on all gubernatorial nominees gives the public an opportunity to participate in the screening of each nominee. The nomination process during the legislative session, including the public performance of the Senate's advise and consent responsibilities and public participation, helps to assure the public that each nominee is qualified and endowed with high integrity and unblemished character.

Your Committee recognizes and appreciates the testimony submitted by Hermina Morita, a former chair of the Public Utilities Commission, and is further aware of Ms. Morita's complaint filed in the Circuit Court of the First Circuit and includes a *quo warranto* claim that names Thomas Gorak as one of the defendants in the case. The case is currently pending with the Intermediate Court of Appeals. The lawsuit raises constitutional questions that may impact the Senate's role in gubernatorial nominations of individuals to boards and commissions. Additionally, your Committee is aware of the opinion issued by the Attorney General of Hawaii on the specific issues raised by the Senate President as to the constitutionality of the Governor's interim appointment of Mr. Gorak, and the Attorney General's response that this interim appointment was proper. However, your Committee strongly disagrees and believes that the Senate must vigorously defend the long-standing practice and process and refuse to allow the Senate's advise and consent responsibilities, public participation in the screening of gubernatorial nominees, and the checks and balances of gubernatorial appointment powers to be negated, diminished, or altered in any way by the acts of a governor making interim appointments. Such interim appointments could potentially circumvent, albeit for a temporary period, the Senate advise and consent process.

Although your Committee believes that interim appointments are necessary to fill vacancies, such interim appointments should not be used to remove a member of the Public Utilities Commission

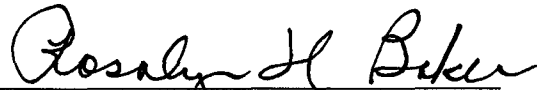


who had previously satisfied all of the constitutional requirements of nomination, Senate advise and consent, and appointment.

The totality of the information received on Mr. Gorak's nomination has made a profound impression and influence on the Chair of your Committee to conclude that the adverse information outweighs the balance of testimony received in favor of the nominee. Thus, based on all the information received, your Committee cannot in good conscience recommend to advise and consent to the nomination of Mr. Gorak, an appointment that, if made, would not expire until June 30, 2022. Accordingly, your Committee does not recommend supporting the nomination for the appointment of Mr. Gorak to the Public Utilities Commission.

As affirmed by the record of votes of the members of your Committee on Commerce, Consumer Protection, and Health that is attached to this report, your Committee, after full consideration of the background, experience, and qualifications of the nominee, recommends that the Senate not advise and consent to the nomination.

Respectfully submitted on  
behalf of the members of the  
Committee on Commerce, Consumer  
Protection, and Health,



ROSALYN H. BAKER, Chair



