

Senate Committee on Commerce, Consumer Protection, and Health

Michael E. Champley
Former Commissioner, Hawaii Public Utilities Commission
Testimony on Governor's Message No. 703 - April 21, 2017 at 10:00 AM

Aloha Chair Baker and Members of the Committee:

The purpose of this testimony is to aid your evaluation of the nomination of Thomas Gorak to serve as a Commissioner of the Public Utilities Commission. It is based on over forty years of experience as a senior executive of a regulated electric and gas utility, as a regulator while serving on the Commission from 2011 through 2016, and as a consultant on clean energy matters. It also reflects my utmost respect for the Commission as a critically important institution.

I believe Mr. Gorak's conduct while serving as the Commission's Chief Counsel may raise questions that recommend against his confirmation. As you may be aware, Mr. Gorak previously served as Chief Counsel during my tenure on the Commission.

In my view, Mr. Gorak discharged his duties as Chief Counsel in a manner that was improper and contrary to the established protocols. It is well established that Chief Counsel must serve all Commissioners, not only by providing advice and counsel to each individual Commissioner, but also by ensuring that all three Commissioners are provided access to Commission staff and consultants.

Despite these established protocols, during a major and lengthy contested case proceeding Mr. Gorak chose to implement a Chief Counsel controlled ad-hoc team comprised of Commission staff and consultants. This ad-hoc team became a repository of knowledge and evidence concerning the key issues in the proceeding. As a sitting Commissioner, it was imperative that I have full access to the ad-hoc team. However, Mr. Gorak ensured that I was "walled off" from and had no access to the ad-hoc team for extended periods.

Importantly, access to this ad-hoc team was denied during the lengthy period when the draft order in this proceeding was prepared. The ad-hoc team approach implemented and controlled by Mr. Gorak therefore impaired my ability to properly contribute to decision-making in this contested case proceeding, and thus my ability to fulfill my duties and obligations as a Commissioner.

This testimony does not seek to challenge Mr. Gorak's resume, which speaks for itself. It does, however, raise serious questions concerning Mr. Gorak's judgment and suitability to serve as an independent and impartial Commissioner, should his nomination be confirmed.

Thank you for the opportunity to present this testimony.

Dean Nishina
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TO THE SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2017

FRIDAY, APRIL 21, 2017
10 a.m.

LATE

TESTIMONY ON GM 703

My name is Dean Nishina and I have been with the Division of Consumer Advocacy, Department of Commerce and Consumer Affairs, State of Hawaii, for over 25 years in various positions of increasing responsibility. I am offering the following testimony as an individual and not in my current capacity of executive director for the Division of Consumer Advocacy. I am offering my support of the Governor's Message No. 703, nominating Thomas Gorak as a commissioner for the Public Utilities Commission.

During my tenure with the Division of Consumer Advocacy, I have had the opportunity to observe many different individuals being hired as commission staff and individuals being named as commissioners. Based on that opportunity and my experience, I believe that Mr. Gorak is in very rare company as being one of the nominees with the most directly relevant experience to serve as a public utilities commissioner.

My first personal recollection of Mr. Gorak was that he was an attorney representing a client before the Commission in matters related to Kauai Island Utility Cooperative. My first real interaction with Mr. Gorak was in 2009 during a Kauai Island Utility Cooperative rate proceeding. As part of my due diligence in the proceeding, I conducted some research in order to determine Mr. Gorak's background. It was then that I first became aware of the extent of his experience in the field of utility regulation before various state and federal jurisdictions. Of course, after that, Mr. Gorak also was selected by Chair Hermina Morita to be chief counsel for the Public Utilities Commission and most recently has been serving as an interim commissioner.

I think the committee would be hard pressed to find other individuals who bring as much professional experience with the subject of regulation of public utilities and transportation industries as well as, perhaps most importantly, the regulation of Hawaii public utilities and transportation companies. Thus, I support the nomination of Mr. Gorak and urge the committee to give proper weight to Mr. Gorak's experience and abilities in its consideration of his nomination.

Thank you for the opportunity to testify.



SENATE COMMITTEE ON COMMERCE AND CONSUMER AFFAIRS

Friday, April 21, 2017 10AM Room 16

In SUPPORT GM703 Nomination of Thomas Gorak to the Public Utilities Commission

Aloha Chairwoman Baker, and members of the CPH Committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i strongly supports the nomination of Thomas Gorak to the Public Utilities Commission. Mr. Gorak is the best person to shepherd Hawai'i during this important phase of our transition to a 100% clean energy utility by 2045.

Mr. Gorak is extremely well-qualified to serve in this position, which requires technical expertise and a commitment to public service. Broadly, Mr. Gorak has over 37 years of utility regulatory experience and has served as the primary counsel for the PUC since 2016. He was the chief counsel for Docket No. 2015-0022 regarding the NextEra merger acquisition, meaning that he oversaw one of the most comprehensive and contentious energy proceedings in Hawai'i's utility history. Additionally, Mr. Gorak has presided over several closed and ongoing dockets regarding progressive energy policy including distributed energy resources, community based renewable energy, and the power supply improvement plan. He has extensive experience working with current and former PUC commissioners, as well as other state regulators and officials involved in energy policy matters.

In the view of the Sierra Club, Mr. Gorak has made every effort to be transparent and above board with the public about his activities as chief counsel and commissioner. From all appearances, Mr. Gorak has maintained exceptional transparency regarding his activities as a private attorney, PUC's chief counsel, commissioner of the PUC. Additionally, Mr. Gorak has extensive and valuable experience with other state energy regulators and has provided counsel for federal energy proceedings. His experience in these matters provide a unique perspective as Hawai'i transitions away from fossil fuels towards a future powered by 100% renewable energy.

Hawai'i is the first state to set a 100% renewable energy generation goal and will require a wide range of expertise and stakeholder input to achieve this goal. Mr. Gorak's proven experience in utility regulatory policy will be a major asset in this effort. There are few individuals who are as uniquely qualified to serve Hawai'i's energy sector as Mr. Gorak, nor are there many individuals who have already been involved in these efforts to such an extent. The Sierra Club fully supports this nomination.

We urge this Committee and the Senate as a whole to confirm Mr. Kaye to the Environmental Council. Thank you very much for this opportunity to provide testimony on this important nomination.

Mahalo,

Marti Townsend
Director

**SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION,
AND HEALTH**

April 21, 2017, 10:00 A.M. Room 016 (Testimony is 3 pages long)

TESTIMONY IN OPPOSITION TO GM 703

Aloha Chair Baker, Vice Chair Nishihara, and other Committee members:

My name is Ryan Hurley and as a resident, ratepayer and environmentalist I **oppose** GM 703 submitting for consideration and confirmation to the Public Utilities Commission, Gubernatorial Nominee, THOMAS GORAK, for a term to expire 06-30-2022.

Having previously served as commission counsel as well as continuing to follow and be involved with a number of energy and utility related issues, I have come to the conclusion that Mr. Gorak should not be confirmed as a Commissioner to the Hawaii State Public Utilities Commission ("Commission"). I cannot ignore the direction the Commission has gone in relation to including environmental and other externalities into its decision making process. Because of this philosophical shift that appears to have occurred at the Commission while Mr. Gorak was chief counsel and interim commissioner, I oppose his nomination to the Commission.

I am most concerned with the Commission's "flip-flopping" in relation to the application of Hawaii Revised Statute 343, relating to environmental impact statements ("HRS 343"). Under Mr. Gorak's counsel, the Commission has completely reversed its position regarding the need to incorporate a project's possible externalities into the decision making process. This "flip-flopping" can best be illustrated by examining two decision and orders filed almost 1 year apart, both during Mr. Gorak's tenure as chief counsel.

Order No. 31759, rejecting the Aina Koa Pono fuel supply contract (Docket No. 2012-0185) was filed by the Commission's most senior attorney on December 23, 2013, just three months after Mr. Gorak took over as chief counsel. In denying the fuel supply contract, the Commission, opined the importance of evaluating environmental externalities when considering a project, stating:

[A]n environmental assessment of the Project's impacts on the surrounding Kau area is not available for the commission's review or consideration.

In making this finding, the commission rejects as unpersuasive and without merit the Companies' assertion that it is more appropriate to address externalities that

*relate to the AKP Project in other forums and processes. Here, it is clear that AKP's ability to obtain Project financing is dependent upon the commission approving the contract. Without such approval, AKP will be unable to proceed with the Project. Thus, the Project and the contract, for purposes of considering the externalities in evaluating the contract, are intertwined.*¹

A year later, on December 31, 2014 the Commission issued Decision and Order No. 32600, approving Hawaiian Electric's Application for a Waiver from the Competitive Bidding Framework and PPA for the Na Pua Makani Wind Farm (Docket No. 2014-0423). In this decision, filed by Chief Counsel Gorak, the Commission does a philosophical U-turn and denounces the need to incorporate environmental externalities into its decision making process. The commission concludes that:

*Although the EIS is a condition precedent to implementing the Project pursuant to HRS § 343-5(d), nothing in HRS Chapter 343 precludes a non-accepting agency such as the commission from approving a project prior to completion of an EIS. The commission concludes that it is not necessary to await the outcome of the EIS before approving the PPA at issue here. The EIS proceedings are designed to address different matters, in particular, to address the objectives of the State's environmental policy as set forth in HRS §§ 344-3 and 344-4.*²

The Consumer Advocate's Statement of Position, filed in the same docket, does a good job discussing the dangers this type of reasoning can bring about.

*The Consumer Advocate contends that a Commission decision to withhold final approval of the PPA until the EIS is completed is reasonable since an unconditional approval of the Commission prior to the completion of the EIS would not fully consider all community objections and concerns. Furthermore, final approval of the PPA prior to the completion of the EIS may lead to distrust over the EIS process, because approval would appear to be presumptuous of the outcome of the EIS.*³

¹ See Decision and Order No. 31759, filed on December 23, 2013 in Docket No. 2012-0185 at pages 82-83

² See Decision and Order No. 32600, filed on December 29, 2014 in Docket No. 2013-0423 at page 80.

³ See Consumer Advocate's SOP filed on June 20, 2014, in Docket No. 2013-0423 at page 21.

Hawaii's commitment to being 100% renewable energy powered by 2045 means that conflicts between utility scale energy projects and our unique and environmentally sensitive communities will only continue to grow in number. If these conflicts are to be prevented, decision makers must be open-minded and ensure that they have all the relevant information they need before making a final decision.

Given the critical role the Commission will play in Hawaii's transition to a 100% renewable energy state, I cannot in good faith support Mr. Gorak's nomination. I strongly encourage this committee to oppose this nominee and ask Governor Ige to submit a candidate who better understands the uniqueness of Hawaii's cultures, communities, and environment and be willing to stand up for all up Hawaii's ratepayers and citizens as we transition to being a 100% clean energy state.

Thank you for this opportunity to testify.

Testimony of Hermina Morita
Senate Committee on Commerce, Consumer Protection & Health
GM 703 – Nomination of Thomas Gorak to the Hawaii Public Utilities Commission
Friday, April 21, 2017, 10:00 a.m.

Aloha Chair Baker, Vice-Chair Nishihara and Member of the Committee:

During my tenure as PUC Chair, I recruited and hired Thomas Gorak as Chief Counsel. I found him to be an important team member in pushing forward an aggressive agenda for the PUC where I valued his counsel and friendship.

After my departure from the PUC, I believe Mr. Gorak shirked his duties as the PUC's Chief Counsel by aiding the Governor's agenda to improperly throw out Commissioner Michael Champley and subsequently allowing the Governor to name Mr. Gorak as Commissioner Champley's replacement. I feel this was contrary to his duties and responsibility as the PUC Chief Counsel and not in accordance with the Hawaii Rules of Professional Conduct.

Rule 1.13(h) of the Hawaii Rules of Professional Conduct states:

If a government lawyer knows that an officer, employee or other person associated with the government is engaged in action, intends to act or refuses to act in a matter related to the lawyer's representation that is a violation of a legal obligation to the government or the public, or a violation of law which reasonably might be imputed to the government, the lawyer shall proceed as is reasonably necessary in the best interest of the government or the public.

In his role as PUC Chief Counsel, Mr. Gorak should have been well aware of the laws specific to the PUC. If he were to claim plausible deniability one would have to question either his ethics or competency in that role. I sincerely believe Mr. Gorak exhibited a huge character flaw when he allowed himself to become a political pawn, throwing the need to maintain the integrity and independence of the PUC to the wayside at a time when the credibility of the PUC was being severely tested. The removal of Commissioner Michael Champley, the holdover Commissioner and the de jure officer was contrary to State law and two previous Attorney General Opinions which have been in effect for almost 40 years.

To protect the Senate's authority and duty to advice and consent, on July 15, 2016, I filed a Complaint and Quo Warranto Petition in the First Circuit Court to challenge Governor Ige's action to name Mr. Gorak as a PUC Commissioner. The Senate filed an amicus brief supporting my position. The lower court ruled against the complaint and petition, which is now on appeal. I have for the Committee's perusal and the Committee's record a copy of my opening brief before the Intermediate Court of Appeals which was filed on February 22, 2017 laying out the timeline and legal reasoning on why the lower court erred in its decision. The defendant's (the State and Gorak) reply brief will not be due until May 2, 2017, as they requested an extension.

This is an unresolved controversy over the interpretation of the Constitution and statutes of the State of Hawaii that can only be fully resolved by the Courts. It is impossible to extricate the questionable actions which have led to Mr. Gorak being named a Commissioner by Governor

Ige to the Governors Message No. 703 before you today. Therefore, I ask the Senate not to consider this particular nominee until this controversy is settled by the Courts. The resolution of this lawsuit is extremely important to not only clear this controversy but to preserve the Senate's authority and duty to advise and consent.

Although there are other state and federal courts which have ruled favorably to what my complaint and petition are arguing, in Hawaii this will be a case of first impression, that would set a precedence on the issue of holdover positions, preserving the Senate's duty in advice and consent and what constitutes a vacancy and interim appointment when the Senate is not in session.

The Governor's actions, specifically the timing of naming of Mr. Gorak as a PUC Commissioner and removing Commissioner Champley just before the NextEra/HECCO merger decision has had a negative impact on Hawaii's business climate. This sequence of events did not go unnoticed by bond rating agencies, causing a real impact on the cost of capital for the Hawaiian Electric Companies, resulting in costs that are passed on to its customers in the form of higher rates. Given Mr. Gorak's past background and experience in financing, he should have been well aware of the importance of a stable and predictable regulatory climate in these matters. But, nonetheless, it appears his ambition and complicity has already caused a negative and cost impact trickling down to electricity customers.

For example, on July 21, 2016, Hawaii's regulatory climate was downgraded from Average/1 (1 indicates a stronger rating) to Average/2 (2 indicates a mid-range rating) with the following statement:

... recent events have caused RRA to re-think its view on the tenor of regulation in the state. After 18 months of deliberations, on July 15, 2016, the PUC rejected NextEra Energy's proposed acquisition of Hawaiian Electric Industries, or HE, the parent company of the three largest utilities operating in the state. While the merger was rejected without prejudice, leaving the door open for the companies to re-file the application, NextEra decided to walk away from the transaction. Gov. David Ige, a Democrat, had opposed the deal, and became heavily involved in the regulatory process through public statements and his decision to appoint a new commissioner to the PUC just before the Commission rendered its decision on the application. It is unclear whether this new commissioner's authority to participate in PUC decisions will be challenged going forward, which could potentially delay some matters that are pending before the PUC, or at the very least muddy the waters. Now that the merger he opposed has been abandoned, Gov. Ige continues to insert himself into the process as evidenced by public statements indicating that he has been fielding offers from several investor groups that are interested in acquiring HE. In addition, the PUC has made several material modifications to the aforementioned ARFs (alternative regulation frameworks) since they were implemented several years ago, and it is unclear whether they are going to remain in place. Also, in 2014, the Commission rejected a joint integrated resource plan filed by the HE utilities that had included expanded reliance on renewable resources, as mandated by the state's aggressive renewable portfolio standards, finding that the filing did not

conform to parameters laid out by the PUC in 2011, and indicating that it would instead conduct a review subject to “additional careful and detailed scrutiny.” That process is ongoing. Due to the factors discussed above, in July 2016 we lowered our rating of Hawaii regulation to Average/2 from Average/1.

On August 3, 2016, Moody’s “downgraded HECO’s senior unsecured rating to Baa2 from Baa1. Parent holding company HEI’s short-term rating for commercial paper was also downgraded to P-3 from P-2 . . . ‘The ratings downgrade is prompted by our concern that HECO will continue to face significant challenges in transforming its generation base to 100% renewable sources in an unpredictable and highly political regulatory environment,’ said Toby Shea VP – Senior Credit Officer of Moody’s.”

On a positive note, Moody’s gave the rating a stable outlook given their “expectation that Hawaii’s strong existing regulatory provisions and legislative support will be sufficient to counterbalance HECO’s execution challenges as it transforms its generation base to all renewables in an unpredictable and political regulatory environment.”

Moody’s indicated that it could take a positive rating action “if the regulatory environment becomes more credit supportive and less political.” However, on the other hand, it could change the ratings downward should HECO encounter additional difficulties with regulators and interveners or supportive regulatory provisions are adversely changed or scaled back, amongst other issues.

S&P rates HECO as BBB-, only one notch above non-investment grade, which is a very precarious position for HECO to find itself when the regulatory climate is viewed as unpredictable and highly political.

For your information, the following link is to a chart of the bond rating scale used by Moody’s, S & P and Fitch: https://en.wikipedia.org/wiki/Bond_credit_rating_-_Credit_rating_tiers

I, working with many of you, have spent a good part of my public service career attempting modernize and rebuild the PUC to be better prepared in providing the leadership to handle the challenges of Hawaii’s clean energy transformation. A good part of this effort was focused on making the PUC less political and more purpose driven to accomplish the optimal industry structure. Regulatory expert Scott Hempling describes this as “motivations, behavior, and performance all align with the public interest, its microeconomic features (the product array, customers’ experience, sellers’ profitability); and its macroeconomic features (the industry’s overall performance, its contribution to the state and regional economies, its environmental effects). An effective regulator tests that vision against present facts, makes adjustments, and then designs and sequences the regulatory steps to produce it.”

Unfortunately, with the nomination of Mr. Gorak, one of the most important attributes of a Commissioner – independence – appears to be replaced by political complicity. With the Governor’s questionable naming of Mr. Gorak and his interference in regulatory proceedings, financial analysts view this as highly political moves which puts at risk the utility’s bond rating. It also should be noted that in the past year Mr. Gorak has sat as a Commissioner, the PUC has become more opaque and lost its leadership role in being recognized at the forefront of a clean energy transformation nationally. Where Hawaii’s efforts were once recognized on par

with the New York's Reforming the Energy Vision (REV) regulatory proceedings, it now does not even make it to the top 5 states list: <http://www.utilitydive.com/news/the-top-5-states-for-utility-grid-modernization-and-business-model-reform/439550/>

Another important attribute for the PUC is professional and experience diversity. Should Mr. Gorak's nomination be considered, the PUC will have three attorneys as Commissioners, all from Oahu. Diversity of disciplines, experience and views and enlightened leadership are critical in tackling the monumental task of Hawaii's clean energy transformation. Again, as regulatory expert Scott Hempling puts it, "Today's regulators do much more: They make markets, design programs, administer investment funds, incubate renewable energy industries, disseminate broadband, promote energy efficiency, protect critical infrastructure, and resolve stakeholder differences. They even act as political shields for governors and legislators paralyzed by the complexity of it all."

Simply put, Mr. Gorak's nomination comes with a lot of baggage. As I stated earlier, there is a controversy over the interpretation of the Constitution and statutes that have yet to be resolved by the Courts directly involving this nominee. As there is no way to untangle and extricate that controversy from today's proceedings, I ask the Senate not to consider this particular nominee until this controversy is settled by the Courts.