IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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In re Application of MAUI ELECTRIC COMPANY, LIMITED,
For Approval of the Amended and Restated Power Purchase
Agreement With Hawaiian Commercial & Sugar Company

SCWC-15-0000640

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000640; PUC DOCKET NO. 2015-0094)

DECEMBER 14, 2017

DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

I. Introduction

This case involves a narrow question of appellate jurisdiction, which has potentially broader implications. The narrow question is whether the Intermediate Court of Appeals (ICA) had jurisdiction to decide an appeal brought by Sierra Club. However, in order to decide that question, we must

determine whether Sierra Club had a constitutional right to intervene in proceedings before the Public Utilities Commission (PUC).

Those proceedings involved a request by Maui Electric Company, Ltd. (MECO) to amend the terms of a Power Purchase Agreement (PPA) under which MECO purchased power generated by Hawaiian Commercial & Sugar Company (HC&S) at its Puʻunēnē Plant. That agreement had been in place since 1990. The amendment (Amended PPA) sought to change the pricing structure and other terms relating to how power was made available by HC&S and purchased by MECO. However, absent approval of the Amended PPA, it appears the existing agreement could have continued indefinitely.

I respectfully dissent from the Majority's holding that Sierra Club had a right to intervene based on due process under the Hawaiʻi Constitution. I readily acknowledge that Sierra Club sought to raise important issues by participating in this proceeding, including ensuring that the PUC followed the direction, set forth in Hawaiʻi Revised Statutes (HRS) § 269-6(b) (Supp. 2013), to consider the need to reduce the State's reliance on fossil fuels in its decision making. However, as I set forth below, this court has recognized that there are alternative means available to enforce such statutory requirements. See County of Hawaiʻi v. Ala Loop Homeowners, 123 Hawaiʻi 391, 235 P.3d 1103 (2010).

Respectfully, the path taken by the Majority here--finding that Sierra Club's members had a property interest that entitled them to intervene--expands the limits of due process in ways that could have unintended consequences. Under our caselaw, the aesthetic and environmental interests of the two Sierra Club members whose affidavits supported the motion to intervene do not constitute "property" within the meaning of the due process clause. See Sandy Beach Def. Fund v. City Council of City and Cty. of Honolulu, 70 Haw. 361, 377, 773 P.2d 250, 261 (1989) ("we have not found that [aesthetic and environmental] interests rise to the level of 'property' within the meaning of the due process clause").

Accordingly, I would conclude that a hearing was not required by law, and MECO's application proceedings did not constitute a contested case. Therefore, I would hold that the ICA did not have jurisdiction to hear Sierra Club's appeal, and affirm the ICA's January 20, 2016 order dismissing the appeal.

II. Discussion

The issue before this court is whether the ICA had jurisdiction over Sierra Club's appeal.

At the time this appeal was filed, administrative appeals commenced in circuit court "except where a statute

provides for a direct appeal[1] to the intermediate appellate court[.]" HRS § 91-14(b) (Supp. 2014). HRS § 269-15.5 (2007) provided that the ICA had jurisdiction over PUC orders involving "a person aggrieved in a contested case proceeding":

> An appeal from an order of the public utilities commission under this chapter shall lie, subject to chapter 602, in the manner provided for civil appeals from the circuit courts. Only a person aggrieved in a contested case proceeding provided for in this chapter may appeal from the order, if the order is final, or if preliminary, is of the nature defined by section 91-14(a).
> . . .

(Emphasis added.)

This same standard appears in HRS § 91-14(a), and we have described the four jurisdictional requirements under HRS § 91-14(a) as follows:

> first, the proceeding that resulted in the unfavorable agency action must have been a "contested case" hearing—i.e., a hearing that was (1) "required by law" and (2) determined the "rights, duties, and privileges of specific parties"; second, the agency's action must represent "a final decision and order," or "a preliminary ruling" such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved "in" the contested case; and finally, the claimant's legal interests must have been injured—i.e., the claimant must have standing to appeal.

Kaleikini v. Thielen, 124 Hawaiʻi 1, 16-17, 237 P.3d 1067, 1082-83 (2010) (quoting Pub. Access Shoreline Hawaiʻi v. Hawaiʻi Cnty.

[1] Effective August 1, 2016, 2016 Haw. Sess. Laws Act 48 requires appeals from PUC decisions in contested case hearings to be filed "directly to the supreme court." HRS § 269-15.51(a) (Supp. 2016).

Planning Comm'n, 79 Hawaiʻi 425, 431, 903 P.2d 1246, 1252 (1995)) (internal brackets omitted; emphasis in Kaleikini).

Thus, as an initial matter, we must determine whether a hearing on MECO's application was a contested case, i.e., a hearing that was "required by law" and determines the "rights, duties, or privileges of specific parties." HRS § 91-1(5) (2012); see also Hawaiʻi Administrative Rules § 6-61-2 (providing the PUC Rules of Practice and Procedure and defining "contested case" as having "the same meaning as in section 91-1(5), HRS").

The parties do not dispute that the PUC's approval of the Amended PPA decided the legal rights, duties, or privileges of MECO and HC&S. As such, the threshold question is whether MECO's application to the PUC required a hearing by law, which may be required by "(1) agency rule, (2) statute, or (3) constitutional due process." Kaniakapupu v. Land Use Comm'n, 111 Hawaiʻi 124, 132, 139 P.3d 712, 720 (2006).

Sierra Club argues that a hearing was required by statute and by due process. I agree with the Majority that neither HRS § 269-27.2 nor HRS § 269-16 require a hearing on MECO's application.[2] However, contrary to the Majority, I would conclude that a hearing was not required by due process, since

[2] Sierra Club cites to two statutes--HRS §§ 269-16(b) and 269-27.2(d)--as requiring hearings for Public Utilities Commission (PUC) approval of rate increases. As the Majority concludes, these statutes do not apply to MECO's application because the Amended PPA would not result in an increase in rates to consumers. Thus, there was no statutory requirement to hold a hearing.

our caselaw requires a clearer showing of a protected property interest than Sierra Club has made here. See, e.g., Sandy Beach, 70 Haw. at 377 & n.10, 773 P.2d at 260, 261 & n.10 (requiring plaintiffs to show a "legitimate claim of entitlement," and finding that their "aesthetic and environmental interests" did not suffice where plaintiffs did not own property contiguous to the proposed development); Town v. Land Use Comm'n, 55 Haw. 538, 548, 524 P.2d 84, 91 (1974) ("The appellant has a property interest in the amending of a district boundary when his property adjoins the property that is being redistricted.") (citations omitted); In re ʻĪao Ground Water Management Area High-Level Source Water Use Permit Applications, 128 Hawaiʻi 228, 242, 287 P.3d 129, 143 (2012) [hereinafter ʻĪao] (finding a property interest in amended instream flow standards where farmers "own or reside on land" in the affected area and "rely upon that water to exercise traditional and customary rights" supported by statutory authority).

The subject matter of MECO's application to the PUC was approval of the Amended PPA. The dispositive issue, then, is whether Sierra Club's interest in the Amended PPA constitutes an "economic"[3] or "property" interest such that a contested case was

[3] Sierra Club's argument that it has an economic interest is unpersuasive. Sierra Club cites to Barasch v. Pennsylvania Public Utility Commission for support that utility customers have a property interest in "substantial increases in their bills unrelated to their current consumption of power." 546 A.2d 1296, 1305 (Pa. Commw. Ct. 1998).

Insofar as the Amended PPA would not increase consumer rates, (continued...)

required by constitutional due process. See Bush v. Hawaiian Homes Comm'n, 76 Hawaiʻi 128, 136, 870 P.2d 1272, 1280 (1994); Pele Defense Fund v. Puna Geothermal Venture, 77 Hawaiʻi 64, 68, 881 P.2d 1210, 1214 (1994). I conclude that it does not.

Sierra Club argues that due process requires a hearing based on the property interests of its affected members. Specifically, Sierra Club points to affidavits from two of its members, which state that the coal burning at the Puʻunēnē Plant emits dangerous air pollutants and impacts the aesthetic enjoyment of their homes.

In response, the PUC argues that Sierra Club does not have a property interest that was impacted by the Amended PPA. The PUC contends that Sierra Club's "aesthetic and environmental interests" do not rise to the level of property within the meaning of the due process clause, since Sierra Club's members do not live adjacent to the Puʻunēnē Plant and only refer to "vague concerns" about coal-burning. The PUC also argues that Sierra Club has no property interest in the extension of an existing power purchase agreement, which does not propose construction of a new power plant, and which will "likely decrease" the use of coal.

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[3](...continued)
Barasch is distinguishable. See id. The parentheses around the numbers in Exhibit 4 ("Typical Residential Bill Impact for HC&S Amendment") to MECO's application indicated that both the estimated rate and estimated typical residential bill would decrease, not increase. Furthermore, MECO sought recovery of its purchased energy charges through its Energy Cost Adjustment Clause, and not through an interim increase in consumer rates.

I conclude that Sierra Club has not established a constitutionally protected property interest in the Amended PPA. "'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Sandy Beach, 70 Haw. at 377, 773 P.2d at 260 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577, (1972)).

In Aquiar v. Hawaiʻi Housing Authority, this court held that the plaintiffs' interest in continuing to receive the statutory benefit of low-cost housing was a property interest. 55 Haw. 478, 496, 522 P.2d 1255, 1267 (1974). In Silver v. Castle Memorial Hospital, we found that a medical doctor's interest in his continued practice of medicine was a constitutionally protected property interest. 53 Haw. 475, 484, 497 P.2d 564, 571 (1972). The property interests in these cases involved housing benefits and employment opportunities to which the parties had a "legitimate claim of entitlement." See Sandy Beach, 70 Haw. at 377, 773 P.2d at 260.

In contrast, Sierra Club's claimed interests are primarily the environmental and aesthetic interests of its members. For instance, Sierra Club notes that its members have to close their windows and run air filters, and that the "pollution plume" impacts their members' "aesthetic enjoyment of their homes." Sierra Club argues that approval of the Amended

PPA "adversely impacts the use and enjoyment of their property." However, "we have not found that [aesthetic and environmental] interests rise to the level of 'property' within the meaning of the due process clause." Sandy Beach, 70 Haw. at 377, 773 P.2d at 261; see also Wille v. Bd. Of Land & Nat. Res., CAAP-12-0000496, at 5, 2013 WL 1729711, at *5 (Haw. App. Apr. 22, 2013) (mem.), cert. denied, 2013 WL 4779500 (Haw. Sept. 4, 2013) (quoting Sandy Beach and concluding that plaintiff's "recreational-health and aesthetic interests" did not rise to the level of a property interest entitled to due process protection because the plaintiff "has not cited any statutory basis supporting her entitlement").

Sierra Club relies on Town and ʻĪao for support that they have a protectable property interest. However, both cases are distinguishable.[4]

In Town, the Land Use Commission approved a petition to amend the district designation of certain property from agricultural to rural. 55 Haw. at 539, 524 P.2d at 85-86. We

[4] Sierra Club's reliance on American Tower Corp. v. City of San Diego, 763 F.3d 1035, 1050-51 (9th Cir. 2014) is also inapposite. In that case, the Ninth Circuit held that the automatic approval of cell tower permits implicated landowners' property interests. Id. In so holding, the court noted that the facility was "adjacent to multi-family residential property," and that even if it wasn't, "[d]ozens of antennas perched on hundreds of feet of towers alongside hundreds of square feet of equipment shelters" would constitute a "substantial or significant deprivation of other landowners' property interests." Id. at 1050. In contrast to that case, where the denial of the permit would have ended the use of the towers, the Amended PPA did not determine whether the Puʻunēnē Plant continued to operate, but rather the terms of electricity purchases between HC&S and MECO. See id. at 1041.

concluded that the appellant had a property interest in "the amending of a district boundary when his property adjoins the property that is being redistricted." Id. at 548, 524 P.2d at 91 (emphasis added). In contrast, here, Petitioner's two named members, Clare Apana and Christine Andrews, do not live adjacent to the Puʻunēnē Plant. Cf. Sandy Beach, 70 Haw. at 377 n.10, 773 P.2d at 261 n.10 (noting that "[t]he California Supreme Court has recognized that land use decisions which substantially affect the property rights of owners of adjacent parcels may constitute deprivations of property within the context of procedural due process," and observing that "[n]one of the Appellants in this case are owners of property contiguous to the development") (emphasis added). As Sierra Club conceded in oral argument, Apana and Andrews live multiple miles away from the facility. See Oral Argument at 5:25-5:42, In re Application of Maui Electric Co., Ltd., SCWC-15-0000640, available at http://oaoa.hawaii.gov/jud/oa/16/SCOA_063016_SCWC_15_640.mp3.

In ʻĪao, we concluded that the plaintiffs had a property interest in the Commission on Water Resource Management's order amending the Interim Instream Flow Standards for two streams. 128 Hawaiʻi at 240-42, 287 P.3d at 141-43. We noted that "[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support

claims of entitlement to those benefits." Id. at 241, 287 P.3d at 142 (quoting Int'l Bhd. of Painters & Allied Trades, Drywall Tapers, Finishers & Allied Workers Local Union 1944, AFL CIO v. Befitel, 104 Hawaiʻi 275, 283, 88 P.3d 647, 655 (2004) (quoting Roth, 408 U.S. at 577)). In ʻĪao, we considered provisions of the water code, including HRS §§ 174C-101(c) and (d),[5] which codify Native Hawaiian water rights. We determined that the plaintiffs' interests had a statutory basis in the water code, and distinguished the "aesthetic and environmental interests" holding from Sandy Beach in two ways:

> First, the affected parties before the court today own or reside on land in the area of Nā Wai ʻEhā, and rely upon that water to exercise traditional and customary rights, including kalo farming. Second, as cited above, there is statutory authority found throughout the water code to support their entitlement to water for kalo farming.

Id. at 242, 287 P.3d at 143 (emphasis added).

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[5] HRS §§ 174C-101(c) and (d) (1993) provide:

> (c) Traditional and customary rights of ahupuaʻa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, oʻopu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.
>
> (d) The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.

(Emphases added.)

Unlike the organization members in ʻĪao, Sierra Club's members do not live on or adjacent to the HC&S facility, do not rely on the impacted land to exercise traditional or customary Native Hawaiian rights, and do not identify any statutory authority for an entitlement besides a reference to HRS § 269-6, which only sets forth the "General powers and duties of the PUC." See id. at 241-43, 298 P.3d at 142-44; cf. Alejado v. City & Cty. of Honolulu, 89 Hawaiʻi 221, 228-30, 971 P.2d 310, 317-19 (App. 1998) (finding a constitutionally protected property interest in "city-provided legal representation" founded in HRS § 52D-8, because there was a "written rule or statute on which to base property interest claims").

In ʻĪao, this court followed Hawaiʻi and United States Supreme Court precedent and looked to statutes to determine if the plaintiffs' interests were supported by state law. 128 Hawaiʻi at 241-42, 287 P.3d at 142-43. We concluded that, based on the text of HRS §§ 174C-101(c)-(d) and § 174C-63[6], provisions in the water code, there was statutory authority "throughout the water code to support" the plaintiffs' claims of entitlement to water for kalo farming. Id. at 241-42, 287 P.3d at 142-43.

[6] HRS § 174C-63 provides:

> Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application. Such permit shall be subject to sections 174C-26 and 174C-27 and 174C-58 to 174C-62.

Unlike the statutes in ʻĪao which described Native Hawaiians' entitlement to water and directly supported the plaintiffs' property interests, HRS § 269-6 does not reference property interests, but rather specifies the powers, duties, and procedural obligations of the PUC. See HRS §§ 174C-101(c)-(d), 269-6. Specifically, under HRS § 269-6(b), the PUC is required to "consider the need to reduce the State's reliance on fossil fuels" and must explicitly consider "the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions."[7] HRS § 269-6 describes procedural requirements of PUC decision-making, but does not provide Sierra Club's members or others with a protected property interest. Similarly, neither HRS § 269-27.2, which describes rates, payments, and the PUC's duties and powers with respect to electricity generated from nonfossil fuels, nor Part V of Chapter 269, which codifies the State's renewable portfolio standards, provide Sierra Club's members or others with a protected property interest.

In short, it does not appear that the legislature

[7] Contrary to the Majority's statement, HRS § 269-6 does not require the PUC to consider "potential risks to health." Majority at 38. In addition, HRS § 269-6(b) does not mandate that the PUC's consideration of greenhouse gas emissions requires a PUC decision that results in a different level of emissions, and the Majority is incorrect in its assertion that "[t]he Commission's determinations of these matters would bear upon the level of emissions generated by the Puʻunene Plant, thus affecting Sierra Club's members' right to a clean and healthful environment as defined by Chapter 269." HRS § 269-6(b) only requires that the PUC explicitly consider greenhouse gas emissions along with three other factors in determining whether utility costs are reasonable.

created a due process property interest when it enacted and later amended Chapter 269. Unlike the statutes in ʻĪao, which explicitly implemented traditional and customary entitlements of Native Hawaiians to water, Chapter 269 discusses the powers, procedures, and operations of the Public Utilities Commission. See ʻĪao, 128 Hawaiʻi at 242, 287 P.3d at 143. Respectfully, the Majority's expansive interpretation of what constitutes a protected property interest in these circumstances may have unintended consequences in other contexts, such as statutes where the legislature has mandated consideration of specific factors by executive agencies when implementing a statute.

The Majority and Sierra Club both suggest that article XI, section 9 of the Hawaiʻi Constitution supports their analysis. We interpreted that provision in Ala Loop, where a group of homeowners sought declaratory relief "determining that [a charter school] must obtain a special permit from the Planning Commission and the [Land Use Commission] pursuant to HRS Section 205-6" in order to operate. 123 Hawaiʻi at 396, 235 P.3d at 1108. We determined that the provision recognized a substantive right, with the content of that right to be established by laws enacted by the legislature relating to environmental quality. Id. at 409, 235 P.3d at 1121. We concluded that "article XI, section 9 creates a private right of action to enforce chapter 205 in the circumstances of this case, and the legislature confirmed the existence of that right of action by enacting HRS

§ 607-25, which allows recovery of attorneys' fees in such actions." Id. at 408, 235 P.3d at 1120.

The Majority's argument that article XI, section 9 creates a protected property interest in a clean and healthful environment is unsupported by our precedent. Nothing in Ala Loop or the history of the 1978 constitutional convention suggests that by creating a private right of action to enforce environmental laws, the drafters also intended to create a protected property interest in a clean and healthful environment. Rather, the record to the constitutional conventions indicates that the drafters intended to create only a private right of action. See Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 690 ("Your Committee . . . has removed the standing to sue barriers, which often delay or frustrate resolutions on the merits of actions or proposals, and provides that individuals may directly sue public and private violators of statutes, ordinances, and administrative rules relating to environmental quality."). Similarly, Ala Loop held that article XI, section 9 "creat[ed] a private right of action to enforce chapter 205" but did not indicate that plaintiffs had a property interest. 123 Hawaiʻi at 408, 235 P.3d at 1120.

The Majority's discussion of ʻĪao is also unavailing. The Majority contends that the water rights at issue in ʻĪao were derived from article XII, section 7 of our constitution, which

guarantees native Hawaiian rights. Majority at 34. The Majority argues that just as the statutes at issue in ʻĪao specifically preserved the rights guaranteed by article XII, section 7, here, HRS Chapter 269 defines the contours of the article IX, section 9, guarantee to a clean and healthful environment. Majority at 32-34. However, this analogy is flawed. The statutes in ʻĪao, HRS §§ 174C-101 and 174C-63, specifically provide for the protection of native Hawaiians' property interest in appurtenant water of kuleana and taro lands, which in turn are expressly guaranteed by article XII, section 7. 128 Hawaiʻi at 241-42, 287 P.3d at 142-43 ("HRS § 174C-63 is yet another section of the water code that entitles native Hawaiian farmers to their water (emphasis added)); Haw. Const. art. XII, § 7 ("The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."). In contrast, HRS Chapter 269 describes no such property interests, and article XI, section 9 does not itself establish the content of the substantive right to a clean and healthy environment--rather, the drafters provided that its content would be defined by the legislature. See infra. The property interests of native Hawaiians described in article XII, section 7 were established long before they were reflected in the

Hawaiʻi Constitution, and, in contrast to article XI, section 9 do not depend on subsequent action by the legislature for their definition. See HRS § 7-1 (last revised in 1955, establishing native Hawaiians' right to water); HRS § 1-1 (1955) (declaring the common law of England to be the common law of Hawaiʻi, except as established by "Hawaiian usage"); In re Water Use Permit Applications, 94 Hawaiʻi 97, 135, 9 P.3d 409, 447 (2000) (acknowledging the "ultimate value of water to the ancient Hawaiians.").[8]

Finally, a conclusion that Sierra Club does not have a constitutional right to intervene in the proceedings before the PUC does not, as Sierra Club alleges, deprive the organization of any recourse. Rather, it appears that Ala Loop would give Sierra Club the ability to bring a separate declaratory judgment action alleging that the PUC has failed to comply with its statutory duties under HRS § 269-6.[9]

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[8] The Majority also mischaracterizes Life of the Land v. Land Use Comm'n of State of Hawaiʻi, 63 Haw. 166, 175-76, 623 P.2d 431, 440 (1981), by suggesting that it held that the rights provided in article XI, section 9 were property interests. Rather, the inquiry there was whether plaintiffs had standing. In its discussion of standing, the court noted that standing "may also be tempered, or even prescribed, by legislative and constitutional declarations of policy," citing article XI, section 9. Id. at 172, 623 P.2d at 438.

[9] The Majority argues that a post-decision civil action for declaratory judgment is not a replacement for participation in a hearing before the PUC. Majority at 42-43. This is a policy argument, and it is "improper for this court to usurp the legislature's role by making our own policy decision[s]." Konno v. Cty. of Hawai'i, 85 Haw. 61, 75, 937 P.2d 397, 411 (1997). The drafters provided that the legislature and administrative agencies, and not the courts, would provide the substantive content of article XI, section 9. See Stand. Comm. Rep. No. 77, in 1 Proceedings of the

(continued...)

My primary disagreement with the Majority is that it adopts an all or nothing approach to defining the substantive environmental rights secured by article XI, section 9 of our constitution, while the provision itself requires a more nuanced approach. Under the Majority's approach, either there is no right at all, or there is a right that must necessarily rise to the level of a property interest. Instead, the plain language and history of article XI, section 9 indicate that there is an intermediate position: through its enactment of laws relating to the environment, the legislature can provide a private right of action to enforce those laws without creating a property interest.

Article XI, section 9 of the Hawaiʻi constitution reflects a carefully crafted compromise that recognizes a prominent role for the legislature in shaping the contours of the substantive rights that can be enforced, and a robust role for the courts in enforcing them—-a role that we recognized for the first time in Ala Loop. 123 Hawaiʻi at 416-417, 235 P.3d at 1128-29. As noted by the committee report from the 1978 constitutional convention:

> Developing a body of case law defining the content of the right could involve confusion and inconsistencies. On the other hand, legislatures, county councils and

[9](...continued)
Constitutional Convention of Hawai'i of 1978, at 689-90. Indeed, they emphasized that "developing a body of case law defining the content of the right could involve confusion and inconveniences." Id. at 689.

> administrative agencies can adopt, modify or repeal environmental laws or regulation laws [sic] in light of the latest scientific evidence and federal requirements and opportunities. Thus, the right can be reshaped and redefined through statute, ordinance and administrative rule-making procedures and not inflexibly fixed.

Id. at 409 n.24, 235 P.3d 1121 n.24 (emphases added) (quoting Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawaiʻi 1978, at 689).

Respectfully, the Majority's all or nothing approach is inconsistent with the framers' vision of the respective roles of the judicial and legislative branches in giving meaning to the protections of article XI, section 9. The Majority is in effect developing an unpredictable "body of case law" that expands in unforeseeable ways the private right of action that was explicitly contemplated and authorized by article XI, section 9, by declaring that such a right is necessarily a property interest, and then imposing judicially developed standards concerning what process is due.[10]

In sum, the Majority's holding in this case is a departure from our previous caselaw, and an expansion of what constitutes a property interest under the due process clause. Respectfully, this will create uncertainty regarding what

[10] I agree with the Majority that when a property interest is at issue, it is the role of the courts to determine whether due process has been provided. Majority at 43 & n.33; see Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawaiʻi 376, 409, 363 P.3d 224, 257 (2015). However, the threshold question here is whether there is a property interest at stake.

constitutes a property interest, and may have unintended consequences.

III. Conclusion

For the foregoing reasons, I would conclude that the PUC was not required, by statute or by constitutional due process, to conduct a hearing on MECO's Amended PPA application. Therefore, a hearing was not required by law, and the PUC's approval of the Amended PPA did not constitute a contested case. As such, I would hold that the ICA did not have jurisdiction under HRS § 269-15.5 to hear Sierra Club's appeal, and affirm the ICA's January 20, 2016 order granting MECO's motion to dismiss for lack of appellate jurisdiction.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama