

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

HERMINA M. MORITA

Complainant,

vs.

HAWAII SUPERFERRY, INC.

Respondent.

DOCKET NO. 2007-0324

ORDER NO. 23696

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

2007 OCT -5 A 8:37

RECEIVED

Filed October 4, 2007

At 11 o'clock A.M.

Morley K. Kane

for Chief Clerk of the Commission

ATTEST: A True Copy

for KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

Morley K. Kane

OF THE STATE OF HAWAII

Respondent.

Order No. 23696

ORDER

after the date of service of this order.

I.

Formal Complaint

to Hawaii Revised Statutes ("HRS") § 271G-1 et seq.; failed to

comply with HRS § 343-1, et seq., and the Harbors Operating Agreement dated September 7, 2005.¹

The Complaint seeks: (1) an order requiring the Superferry to answer the Complaint within ten (10) days; (2) an order finding that Superferry is in willful violation of D&O No. 21524, HRS § 343-1, et seq., and/or the Harbors Operating Agreement, and suspending or placing the CPCN on inactive status until compliance is achieved; (3) an Order that the Superferry's CPCN is suspended or placed on inactive for willful violation of D&O No. 21524, HRS § 343-1, et seq., and/or the Harbors Operating Agreement, until an Environmental Assessment is completed, and if necessary, an Environmental Impact Statement is accepted; (4) an order that the operation of the Superferry is not in the public's interest until an Environmental Assessment is completed, and if necessary, an Environmental Impact Statement is accepted; (5) other relief as appropriate.²

II.

Discussion

Rule 6-61-67 of the Hawaii Administrative Rules ("HAR") states:

- (a) Any person may file a formal complaint against any public utility, water carrier, motor carrier, or other person subject to commission jurisdiction.

¹See Complaint at 19.

²See Complaint at 20-21.

(b) Formal complaints shall:

- (1) Be in writing;
- (2) Comply with sections 6-61-15 to 6-61-21;
- (3) State the full name and address of each complainant and of each respondent;
- (4) Set forth fully and clearly the specific act complained of in ordinary and concise language; and
- (5) Advise the respondent and the commission completely of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief desired.

(c) A complaint that alleges a violation of law shall clearly specify the particular parts of the law which are alleged to have been violated and the facts which the complainant relies upon to establish the violation.

(d) If two or more sections or subsections of the law or two or more requirements established pursuant to law are alleged to be violated, the facts claimed to constitute violation of one section, subsection, or requirement shall be stated separately from those claimed to constitute a violation of another section, subsection, or requirement whenever that can be done without undue repetition.

(e) If the formal complaint substantially complies with this subchapter, the commission shall serve a copy upon each respondent, together with an order requiring that the complaint be answered within twenty days after the date of service. Two copies of the formal complaint shall also be served on the consumer advocate. In emergency cases, the commission may require the filing of an answer within a shorter time.

(f) If the formal complaint is not in substantial compliance with this subchapter, the commission shall return the complaint to the complainant with an explanation of the reasons why the formal complaint does not comply with this chapter.

HAR § 6-61-67. With the exception of the fact that the Complainant attempted to file the Complaint in Docket No. 04-0180

and therefore the Complaint contains the wrong caption,³ and the fact that the Complaint was not notarized, the Complaint appears to substantially comply with HAR Title 6, Chapter 61, Subchapter 5 of the commission's Rules of Practice and Procedure, as required by HAR § 6-61-67(e).

Under HAR § 6-61-67(e), if the formal complaint substantially complies with Subchapter 5, "the commission shall serve a copy upon each respondent, together with an order requiring that the complaint be answered within twenty days after the date of service In emergency cases, the commission may require the filing of an answer within a shorter time." In her Complaint, Complainant requests that the commission order Superferry to provide an answer to the Complaint in ten (10) days, rather than twenty (20) days. However, in this case, Complainant has not provided any allegations or evidence to suggest that an emergency exists. Significantly, Complainant states that Superferry has indefinitely suspended its service to and from Nawiliwili Harbor, Kauai.⁴ Therefore, the commission will direct Superferry to file its answer to the Complaint in the

³Complainant attempted to file the Complaint in Docket No. 04-0180, entitled In the Matter of the Application of Hawaii Superferry, Inc. For a Certificate of Public Convenience and Necessity to Engage in Operations as a Water Carrier. Complainant, however, is not a party to that docket. It would, moreover, be improper to file a wholly new complaint in Docket No. 04-0140. As such, the commission filed the Complaint in this new docket, and utilizes an appropriate caption.

⁴See Complaint at 14.

ordinary course, which is within twenty (20) days after the date of service of this Order.⁵

III.

Order

THE COMMISSION ORDERS:

Superferry shall file an answer to the attached Complaint with the commission within twenty (20) days after the date of service of this order.

DONE at Honolulu, Hawaii OCT - 4 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

APPROVED AS TO FORM:

Jodi K. Yi
Jodi K. Yi
Commission Counsel

Leslie H. Kondo
By
Leslie H. Kondo, Commissioner

2007-0324.sl

⁵Complainant referenced Young Brothers, Ltd. in her Complaint, however, not as a Respondent. Therefore, it is not a party to this docket unless and until it files for, and is granted, intervenor status. Accordingly, it will not be served with a copy of the Complaint.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 23696 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

CATHERINE P. AWAKUNI (2 copies of Order and 2 copies
EXECUTIVE DIRECTOR of Complaint)
DIVISION OF CONSUMER ADVOCACY
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P. O. Box 541
Honolulu, HI 96809

HAWAII SUPERFERRY, INC. (1 copy of Order and Complaint)
500 Ala Moana Boulevard
Honolulu, HI 96813

HERMINA M. MORITA (1 copy of Order)
c/o HAROLD BRONSTEIN
P.O. Box 3064
Lihue, HI 96766



for Karen Higashi

DATED: OCT - 4 2007

HAROLD BRONSTEIN
P. O. Box 3064
Lihue, Hawaii 96766
Telephone: 245-1997

Attorney for Complainant
Hermina M. Morita

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

2007-0324

In the Matter of the) DOCKET NO. 04-0180
Application of)
) VERIFIED COMPLAINT; EXHIBITS
HAWAII SUPERFERRY, INC.) "A"-"G"
)
For a Certificate of Public)
Convenience and Necessity to)
Engage in Operations as a)
Water Carrier.)

VERIFIED COMPLAINT

Hermina M. Morita for and as her Complaint against Respondent,
Hawaii Superferry, Inc., upon information and belief, hereby
states:

1. This Complaint is brought pursuant to HRS 271G-1, et. seq., HRS 269.1, et. seq., and HAR 6-61-67.

2. At all times material hereto, the Complainant, Hermina M. Morita was and is a resident of the County of Kauai, State of Hawaii, and a member of the Hawaii State House of Representatives,

PUBLIC UTILITIES
COMMISSION

2007 SEP 27 P 12:33

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DEPT. OF COMMERCE AND
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STATE OF HAWAII

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District 14, whose business mailing address is The State Capitol Building, Room 314, Honolulu, Hawaii 96813.

3. Respondent, Hawaii Superferry, Inc. is a for profit Hawaii corporation whose mailing address is 500 Ala Moana Boulevard, Honolulu, Hawaii 96813.

4. The Director of Commerce and Consumer Affairs, Division of Consumer Advocacy, whose mailing address is 335 Merchant Street, Suite 326, Honolulu, Hawaii 96813 is an ex officio party to any proceeding before the Commission.

5. Young Brothers, Ltd., whose mailing address is 1331 Nimitz Highway, Honolulu, Hawaii 96817 was granted status to participate in Hawaii Superferry, Inc.'s application proceedings for a Certificate of Public Convenience and Necessity as a water carrier of passengers and property.

6. On or about July 22, 2004, Hawaii Superferry, Inc. filed with the Public Utilities Commission (PUC) an application for a Certificate of Public Convenience and Necessity (CPCN) requesting authorization to operate as a water carrier of passengers and property between the Islands of Oahu and Kauai, Maui and Hawaii.

7. Pursuant to the PUC's Decision and Order No. 21524, filed December 30, 2004, the Hawaii Public Utilities Commission conditionally granted the Hawaii Superferry a Certificate of Public

Convenience and Necessity (CPCN) to operate as a water carrier of passengers and property between the islands of Oahu and Kauai, Maui and Hawaii. (Exhibit "A"; PUC Docket No. 59).

8. In its Reply Statement of Position, filed with the PUC on December 8, 2004, Hawaii Superferry had stated:

D. Environmental review process.

1. Hawaii EIS Law (HRS Chapter 343)

. . . .

Applicant has requested that DOT issue a declaration of exemption for the harbor use because this action falls within several defined categories of actions that are exempt from the Hawaii EIS Law under Hawaii Administrative Rules ("HAR") §11-200-8.

. . . .

The question of whether the proposed harbor use would fall within the scope of the environmental review process prescribed in Hawaii EIS Law was discussed with high-level representatives of the DOT, the Attorney General and the State of Hawaii Office of Environmental Quality Control ("OEQC") during meetings held in November 2004. The indication conveyed to Applicant was that the harbor use is encompassed by one or more of the exemptions described above and in the DOT's Comprehensive Exemption List.

Applicant has requested confirmation from DOT that the harbor use falls within an exemption. A declaration of exemption or other confirmation will not be issued until the harbor alterations are definitively identified, such as in the LOI.

Applicant will inform the Commission as to the DOT's determination regarding the exemption.

(Exhibit "B", at pages 3-4; PUC Docket No. 51).

9. In its Decision and Order No. 21524, the PUC recognized that "issues were raised by some at the public hearings about the impact of the proposed ferry system on the environment", and further recognized that the testimony of some at the public hearings suggested that an "environmental assessment be done on the proposed ferry services' effect on the surrounding environment". (Exhibit "A", at page 24).

10. Although the PUC believed the environmental issues raised by the public were "important issues that should be addressed", the PUC's Decision and Order deferred the review of the environmental issues. Specifically, with respect to the environmental issues, Decision and Order No. 21524 states:

... they need not be addressed in this particular decision and order, since the determination of whether the proposed ferry service and its effect on the harbors and surrounding areas require an environmental assessment is currently being reviewed and addressed by the DOT.

(Exhibit "A", at page 25; Emphasis added).

11. Decision and Order No. 21524, further states:

We find it necessary, however, to condition our authorization in this docket upon Applicant's showing, to the satisfaction of the commission, that Applicant has complied with all applicable federal and state laws, rules and regulations, including, without limitation, matters relating to

the Environmental Impact Statement Law ("EIS"), under Chapter 343, HRS, to the extent applicable to ensure that all such requirements are appropriately addressed.

(Exhibit "A", at page 25; Emphasis added).

12. In its Summary of Findings and Conclusions, the Commission further stated:

Accordingly, we conclude that Applicant's request for operating authority, a CPCN, as set forth in the Application, should be granted, subject to the conditions discussed herein, and more specifically, in the ordering paragraphs below.

(Exhibit "A", at page 27; Footnote omitted; emphasis added).

13. The Commission's Orders state the following:

Orders

THE COMMISSION ORDERS:

1. Applicant is granted a CPCN to operate as a common carrier by water of passengers and property, between the islands of Oahu and Kauai, Maui and Hawaii, subject to the following conditions:

. . . .

(f) Applicant shall provide evidence that it is in full compliance with all applicable EIS, NOAA, and the U.S. Coast Guard laws, rules, regulations and requirements, and any and all other applicable federal and state laws, rules and regulations and requirements that are necessary to operate its proposed ferry service within the State;

(Exhibit "A", pages 27-29; Emphasis added).

14. On or about January 24, 2005, Hawaii Superferry entered into a letter agreement with the U.S. Department of Transportation, Maritime Administration (MARAD) with respect to Hawaii Superferry's application dated June 4, 2004. The Hawaii Superferry's June 4, 2004 application requested a loan guarantee for the construction and mortgage financing of two (2) 105 meter, high speed roll on-roll off passenger and vehicle ferries. (PUC Docket No. 62; Exhibit "B" to Status Report, dated April 29, 2005).

15. The January 24, 2005 letter agreement between the Hawaii Superferry and MARAD, at Paragraph X(iii) states:

X. Determined that the Closing shall be preconditioned on MARAD's finding that

. . . .

(iii) the State has given all the governmental and environmental clearances (including a confirmation that there is no need for an environmental assessment of the port facilities) necessary to commence and complete the shoreside improvements, the leasing of equipment, the construction of the temporary passenger terminal facilities, and the operation of the ferries by HSF, and the periods of all applicable State and Federal statutes of limitation have run on the right of plaintiffs to block the project; (Emphasis added).

(PUC Docket No. 62; Exhibit "B" to Status Report, dated April 29, 2005).

16. The January 24, 2005 letter agreement between the Hawaii Superferry and MARAD, at paragraph XI states in part:

XI. Noted that a review under the National Environmental Policy Act of 1970 (NEPA) may be required pursuant to 40 C.F.R. Part 1500 and that MARAD will promptly make a decision as to the necessity for such review. If MARAD determines that a NEPA review is necessary, MARAD will promptly initiate such review (including an Environmental Assessment and Environmental Impact Statement, as appropriate) of the environmental impacts of this project. Any required NEPA review must be concluded prior to the occurrence of any Closing. Unless MARAD is satisfied that compliance with the requirements of NEPA is complete, MARAD is under no obligation to close on the Letter Commitment and may, in its sole discretion, cancel the Letter Commitment. Required that HSF pay for any NEPA review determined by MARAD to be necessary. (Emphasis added).

(PUC Docket No. 62; Exhibit "B" to Status Report, dated April 29, 2005).

17. In December 2004, prior to the execution of the January 24, 2005 letter agreement, the Hawaii Superferry's June 4, 2004 application to the U.S. Department of Transportation had been reviewed by MARAD's Office of Environmental Activities.

18. In the December 2004 environmental review, it was determined by MARAD, that the proposed action was considered a

"Major Federal Action" pursuant to 40 CFR 1508.18(a).

Specifically, MARAD stated:

The proposed action was reviewed by this office in December 2004 and it was determined that the action was considered a "Major Federal Action" pursuant to 40 CFR 1508.18(a) because 78.5% of the project would be funded Title XI loan guarantees totaling \$143.6 million. The proposed action is considered "Major" as it is partly funded, assisted, and approved by MARAD. (Emphasis added).

(Exhibit "C", at page 2).

19. On February 23, 2005, the Department of Transportation, State of Hawaii erroneously determined that the expenditure of \$40,000,000.00 in State funds for harbor improvements for the Hawaii Superferry, and the Hawaii Superferry's proposed operation at Honolulu Harbor, Kahului Harbor, Nawiliwili Harbor, and Kawaihae Harbor met the conditions that "permit exemption from environmental review at such location(s) based on the method of operation planned".

20. On or about March 28, 2005, based upon the State of Hawaii, Department of Transportation's February 23, 2005 erroneous determination that the "proposed action is exempt from further review", it appears that MARAD determined that notwithstanding its initial determination that the proposed action by Hawaii Superferry, Inc. was a "Major Federal Action", the proposed action

would be categorically excluded from the requirements of the National Environmental Protection Act. (Exhibit "C", at page 2).

21. MARAD's Record of Categorical Exclusion Determination, dated March 28, 2005, in discussing MARAD's December, 2004 environmental review, states in part:

Based on the information available at that time, there appeared to have been very little, if any, NEPA or state environmental work performed related to the proposed ferry service that would be adequate for MARAD's responsibilities under NEPA.

However, since that time, the State of Hawaii Department of Transportation completed a review of the proposed action pursuant to Chapter 343, Hawaii Revised Statutes, and Chapter 11-200, Hawaii Administrative Rules, and determined that the proposed action is exempt from further review.

Determination:

Based on our review of information conveyed to us and in our possession (or attached) concerning the proposed action as stated above, the NEPA Program Manager, has determined that the proposed action is categorically excluded from further NEPA review.

Recommendation:

MAR-820 recommends that the loan guarantee contract contains the requirement that Hawaiian High Speed Ferry (HSF) Corporation

comply with all applicable environmental laws and regulations.

(Exhibit "C", at pages 2-3).

22. During the 2005 legislative session, the Hawaii State Legislature appropriated forty million dollars (\$40,000,000.00) in reimbursable general obligation bonds for the design and construction of harbor improvements to be used by the Hawaii Superferry. The Legislature appropriated the use of the forty million dollars over two fiscal years. The first twenty million dollars (\$20,000,000.00) could be obligated during the fiscal year 2005-2006, and the second twenty million dollars could be obligated during the fiscal year 2006-2007. The Governor signed the appropriation into law as Act 178, 2005 Session Laws.

23. In its Status Report to the PUC dated April 29, 2005, Hawaii Superferry stated:

While the legislative appropriation of funds for harbor equipment is not financing extended to Applicant, the approval by the Hawaii State Legislature of the \$40,000,000 reimbursable general obligation bonds for harbors equipment is essential to Applicant's progress. (Emphasis added).

(PUC Docket No. 62; Status Report dated April 29, 2005, at page 3).

24. On or about September 7, 2005, the State of Hawaii, Department of Transportation, and Hawaii Superferry, Inc. entered into a Harbors Operating Agreement. (PUC Docket No. 67, Status Report, dated December 27, 2005).

25. The Harbors Operating Agreement, at page 21, paragraph IV.J.6. Compliance with Environmental Laws, states:

6. Compliance with Environmental Laws.
In the event a governmental authority or a court of law determines that an environmental assessment or environmental impact statement is required regarding HSF's operations, HSF will comply with all applicable environmental laws, statutes, rules, regulations, ordinances, orders, directives, and guidelines, including, the National Environmental Policy Act ("NEPA") and HRS Chapter 343 ("HEPA"). No part of this Agreement shall be construed as (a) an agreement or acknowledgment by HSF or the STATE that an environmental review under NEPA or HEPA is required or (b) a waiver of HSF's right to challenge or appeal any finding of a governmental authority or a court of law that an environmental assessment or environmental impact statement is required regarding HSF's operations. (Emphasis added).

(Exhibit "D", at pages 3-4).

26. By letter dated May 29, 2007, Hawaii Superferry requested that the Public Utilities Commission issue written confirmation pursuant to Decision and Order No. 21524 filed December 30, 2004 that "all requirements and conditions stated in D&O 21524 have been met to the satisfaction of the Commission and that HSF may commence operations as a water carrier." (PUC Docket No. 95).

27. In response to Hawaii Superferry's May 29, 2007 request, by letter dated June 12, 2007, Paul M. Nakayama, Research Assistant for the PUC wrote:

This is to confirm that, based on the representations made, and the information provided by the Superferry, the Commission understands that

the Superferry has satisfied the requirements set forth by the Commission in Decision and Order No. 21524 and Order No. 22934.

(Exhibit "E"; PUC Docket No. 96).

28. On August 23, 2007, the Hawaii Supreme Court in Sierra Club, et al. v. the Department of Transportation of the State of Hawaii, et al., Case No. 27407 issued an Order holding that the Hawaii Department of Transportation's determination that the improvements to the Kahului Harbor are exempt from the requirements of Chapter 343, Hawaii Revised Statutes was erroneous as a matter of law and mandated the preparation of an Environmental Assessment pursuant to HRS 343-1, et. seq. (Exhibit "F").

29. On August 27, 2007, in response to the PUC's request "to address the Order filed August 23, 2007 in Hawaii Supreme Court Appeal No. 27407," Hawaii Superferry replied:

HSF is in compliance with all applicable laws, rules, and regulations, and the August 23, 2007 Order does not change that status. (Emphasis added).

(Exhibit "G"; PUC Docket No. 100).

30. On August 31, 2007, the Hawaii Supreme Court in the Sierra Club, et al. v. the Department of Transportation of the State of Hawaii, et al., Case No. 27407 issued its full Opinion on this matter, and concluded as follows:

Contrary to the expressly stated purpose and intent of HEPA, the public was prevented from participating in an environmental review process for the Superferry project by DOT's grant of an exemption to the requirements of HRS chapter 343. The exemption was erroneously granted as DOT considered only the physical improvements to Kahului harbor in isolation and did not consider the secondary impacts on the environment that may result from the use of the Hawaii Superferry in conjunction with the harbor improvements. "All parties involved and society as a whole" would have benefitted had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the Hawai'i Environmental Protection Act.

(Slip Opinion, at pages 102-103; Emphasis added).

31. A Temporary Restraining Order is currently in effect against the Hawaii Superferry for the use of Kahului Harbor.

32. On Sunday, August 26, 2007 and Monday, August 27, 2007, the Hawaii Superferry operated from Honolulu Harbor to Nawiliwili Harbor, Kauai in willful violation of HRS 343-1, et. seq., the Harbors Operating Agreement, and the PUC's Decision and Order No. 21524, condition 1(f) which provides that:

Applicant shall provide evidence that it is in full compliance with all applicable EIS, NOAA, and the U.S. Coast Guard laws, rules, regulations and requirements, and any and all other applicable

federal and state laws, rules and regulations and requirements that are necessary to operate its proposed ferry service with the State;

(Exhibit "A", at page 29).

33. Effective August 28, 2007, the Hawaii Superferry temporarily suspended its operations to Kauai. Hawaii Superferry subsequently announced its intention to resume operations to Kauai on September 26, 2007. On September 21, 2007, Hawaii Superferry announced that it would indefinitely suspend service to and from Nawiliwili Harbor, Kauai.

34. On September 3, 2007, the State of Hawaii, Department of Transportation pursuant to the Hawaii Supreme Court's decision in Sierra Club, supra, acknowledged that the agency will prepare a statewide environmental assessment. The Environmental Assessment should not only assess the effect of the \$40,000,000.00 in State funds expended for harbor improvements at the four (4) harbors, but the secondary and cumulative effects of the proposed action, including the effects of the operation of the Hawaii Superferry.

35. HRS 343-1, et. seq., Environmental Impact Statements commonly referred to as the "Hawaii Environmental Protection Act" (HEPA) contains the following definitions:

§ 343-2. Definitions.

As used in this chapter unless the context otherwise requires:

...

"Action" means any program or project to be initiated by any agency or applicant.

"Agency" means any department, office, board, or commission of the state or county government which is a part of the executive branch of that government.

"Applicant" means any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.

"Approval" means a discretionary consent required from an agency prior to actual implementation of an action.

36. HRS 343-5(a)(1) provides that an Environmental Assessment shall be required for actions that are not exempt, and which propose the use of state lands or state funds.

37. When an agency proposes an action that uses state lands or state funds that is not exempt pursuant to HRS 343-6, HRS 343-5(b) provides that "the agency initially receiving and agreeing to process the request for approval "shall prepare an environmental assessment for such action at the earliest practicable time to determine whether an environmental impact statement shall be required". (Emphasis added).

38. When an applicant proposes an action that uses state lands or state funds and requires agency approval, HRS 343-5(c) provides that the agency "shall prepare an environmental assessment

for such action at the earliest practicable time to determine whether an environmental impact statement shall be required".

(Emphasis added).

39. For an agency action, HRS 343-5(b) makes the acceptance of a final Environmental Impact Statement a "condition precedent to the implementation of the proposed action". Specifically, HRS 343-5(b) states in part:

Acceptance of a required final statement shall be a condition precedent to implementation of the proposed action. (Emphasis added).

40. If based upon an Environmental Assessment, there is a finding of significant impact for an Applicant's proposed action, HRS 343-5(c) requires the preparation of a draft and final Environmental Impact Statement. HRS 343-5(c), states in part:

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action. (Emphasis added).

41. Until the environmental assessment is completed, the operation of the Hawaii Superferry as a water carrier of passengers and property, including the use of the harbor improvements at any of the four (4) harbors by the Hawaii Superferry is precluded by HRS 343-5(b), as the "acceptance of the requested final statement shall be a condition precedent to implementation of the proposed

action". The preparation of the Environmental Assessment is a mandatory condition precedent to the lawful operation of the Hawaii Superferry as a water carrier, including the use of the harbors and the harbor improvements.

42. Until the environmental assessment and review process mandated by the Hawaii Supreme Court is completed, the operation of the Hawaii Superferry as a water carrier of passengers and property, including the use by Hawaii Superferry of the harbor improvements at any of the four (4) harbors is a willful violation of the Commission's Decision and Order No. 21524, and HRS 271G-1, et. seq., as well as HRS 343-1, et seq., and the Harbors Operating Agreement.

43. The declared policy of HRS 271G-1 states in part that:

. . . the transportation of persons and of property for commercial purposes, by water within the State or between points within the State, constitutes a business affected with the public interest.

44. Until such time that the Environmental Assessment is completed, and a determination is made whether or not an Environmental Impact Statement is required, it does not serve the public's interest to allow the Hawaii Superferry to operate as a water carrier pursuant to HRS 271G-1, et. seq..

45. Hawaii Superferry's application pursuant to HRS 271G-10, filed with the PUC on July 22, 2004 constituted an "action" within the meaning of HRS 343-2 and Hawaii Superferry, Inc. was the "Applicant" within the meaning of HRS 343-2.

46. Hawaii Superferry has not complied with the applicable laws and/or the PUC's conditional Decision and Order No. 21524, and/or the Harbors Operating Agreement, as the Hawaii Superferry, Inc. intends to operate prior to the preparation of the Environmental Assessment, and if necessary, the preparation of an Environmental Impact Statement.

47. HRS 343-1, et seq., is clear in its mandatory requirements. The legislative intent is not in question. The plain and unambiguous language of HRS 343 prohibits the proposed action, i.e. the use of the harbor improvements, and the operation of the Hawaii Superferry, until the Environmental Assessment is completed, or if required, the final Environmental Impact Statement is accepted by the appropriate authority in accordance with HRS 343-5(b) and (c).

48. Pursuant to the September 7, 2005 Harbors Operating Agreement between Hawaii Superferry and the State of Hawaii, Department of Transportation, the Hawaii Superferry agreed if "a court of law determines that an environmental assessment or

environmental impact statement is required regarding HSF's operations, HSF will comply with all applicable environmental laws," including "HRS Chapter 343". Specifically, the Harbors Operating Agreement states as follows:

6. Compliance with Environmental Laws. In the event a governmental authority or a court of law determines that an environmental assessment or environmental impact statement is required regarding HSF's operations, HSF will comply with all applicable environmental laws, statutes, rules, regulations, ordinances, orders, directives, and guidelines, including, the National Environmental Policy Act ("NEPA") and HRS Chapter 343 ("HEPA"). (Emphasis added).

(Exhibit "D" at pages 3-4; PUC Docket No. 67, Status Report dated December 27, 2005).

49. The Hawaii Superferry has willfully failed to comply with the PUC's Decision and Order No. 21524, conditionally granting to it a CPCN and authorizing it to operate as a water carrier of passengers and property pursuant to HRS 271G-10, and has willfully failed to comply with HRS 343-1, et. seq., and the Harbors Operating Agreement dated September 7, 2005.

Wherefore, the Complainant, Hermina M. Morita, respectfully requests that the Public Utilities Commission grant the following relief:

A. Enter an Order pursuant to HAR 6-61-67(e) requiring the Respondent to Answer the Verified Complaint within ten (10) days from receipt thereof;

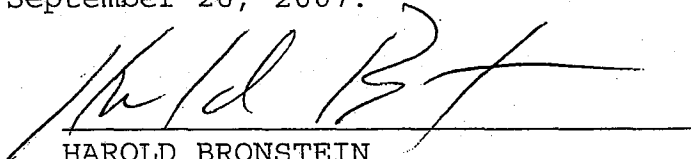
B. Enter an Order declaring that Hawaii Superferry, Inc. is in willful violation of 1) the PUC's Decision and Order No. 21524, 2) HRS 343-1, et seq., and/or 3) the Harbors Operating Agreement dated September 7, 2005, and the Hawaii Superferry's Certificate of Public Convenience and Necessity shall be suspended and/or held in inactive status until compliance therewith;

C. Enter an Order that until an Environmental Assessment as mandated by the Hawaii Supreme Court in Sierra Club, et. al. v. The Department of Transportation of the State of Hawaii, et al., Case No. 27407 is completed, and if necessary, a final Environmental Impact Statement is accepted, the Hawaii Superferry's Certificate of Public Convenience and Necessity shall be suspended and/or held in inactive status for willful violation of 1) the PUC's Decision and Order No. 21524, 2) HRS 343-1, et seq., and/or 3) the Harbors Operating Agreement dated September 7, 2005;

D. Enter an Order that until an Environmental Assessment as mandated by the Hawaii Supreme Court in Sierra Club, et. al. v. The Department of Transportation of the State of Hawaii, et al., Case No. 27407 is completed, and if necessary, a final Environmental Impact Statement is accepted, the operation of the Hawaii Superferry as a water carrier of passengers and property between the Islands of Oahu and Kauai, Maui and Hawaii is not in the public's interest, and the Hawaii Superferry's Certificate of Public Convenience and Necessity shall be suspended and/or held in inactive status until the environmental assessment is completed, and if necessary a final Environmental Impact Statement is accepted;

E. Such other and further relief the Public Utilities Commission deems appropriate under the circumstances.

DATED: Lihue, Hawaii, September 26, 2007.

A handwritten signature in black ink, appearing to read 'Harold Bronstein', written over a horizontal line.

HAROLD BRONSTEIN
Attorney for Complainant
Hermina M. Morita

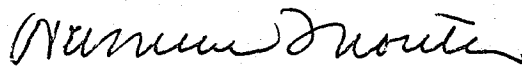
BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the) DOCKET NO. 04-0180
Application of)
) VERIFICATION
HAWAII SUPERFERRY, INC.)
)
For a Certificate of Public)
Convenience and Necessity to)
Engage in Operations as a)
Water Carrier.)
_____)

VERIFICATION

I, Hermina Morita, hereby declare under penalty of law that
upon information and belief the foregoing is true and correct.

DATED: Lihue, Hawaii, September 26, 2007.



HERMINA MORITA

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

HAWAII SUPERFERRY, INC.)

DOCKET NO. 04-0180

For a Certificate of Public)
Convenience and Necessity to)
Engage in Operations as a)
Water Carrier.)

DECISION AND ORDER NO. 21524

Filed December 30, 2004

At 1 o'clock P.M.

Prolee K. Kame
Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

2005 JAN -3 A 9:04

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ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

EXHIBIT "A"

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

HAWAII SUPERFERRY, INC.)

For a Certificate of Public)
Convenience and Necessity to)
Engage in Operations as a)
Water Carrier.)

Docket No. 04-0180

Decision and Order No. 21524

DECISION AND ORDER

I.

Procedural History

On July 22, 2004, HAWAII SUPERFERRY, INC. ("Hawaii Superferry" or "Applicant") filed an application for a certificate of public convenience and necessity ("CPCN") to operate as a water carrier of passengers and property between the islands of Oahu and Kauai, Maui and Hawaii, pursuant to Hawaii Revised Statutes ("HRS") § 271G-10 and Hawaii Administrative Rules ("HAR") § 6-61-81 ("Application").¹

Pursuant to HAR § 6-61-82, copies of the Application were served that same day on the DIVISION OF CONSUMER ADVOCACY,

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer

¹On August 3, 2004, Applicant filed Exhibit 17 to the Application pursuant to Protective Order No. 21190. Protective Order No. 21190 was filed on July 29, 2004, to govern the treatment of confidential documents filed in this docket. On September 9, 2004, Applicant filed a revised page 1 of Exhibit 17.

Advocate"),² Mayor Jeremy Harris, City and County of Honolulu, Mayor Harry Kim, County of Hawaii, Mayor Brian Baptiste, County of Kauai, Mayor Alan Arakawa, County of Maui, and Director Rodney Haraga, Department of Transportation.

On July 23, 2004, Applicant and the Consumer Advocate (collectively, referred to as "Parties") submitted a proposed stipulated procedural order ("Proposed Procedural Order") for commission approval. On August 3, 2004, the commission issued Order No. 21194 approving the Parties' Proposed Procedural Order, subject to certain modifications stated in the aforesaid order and "further modifications, particularly in the event that persons are granted intervenor or participant status in this docket."

Order No. 21194 also set forth the Parties' stipulated issues to be addressed in this matter, as follows: (1) whether Applicant's proposed service is or will be required by the present or future public convenience and necessity; (2) whether Applicant's proposed service is consistent with the public interest and transportation policy of the State of Hawaii ("State") as set forth in the declaration of policy in HRS § 271G-2; and (3) whether Applicant is fit, willing and able to properly perform the proposed service and to conform to the provisions of Chapter 271G, HRS, and the requirements, rules and regulations of the commission.

²Pursuant to HAR § 6-61-62, the Consumer Advocate is an ex officio party to any proceeding before the commission.

On August 16, 2004, the Consumer Advocate submitted information requests ("IRs") to Applicant. Applicant provided responses to these IRs on September 8, 2004 ("September 8, 2004 Responses").³ Applicant provided a supplemental response to the Consumer Advocate's IR-6 on September 14, 2004.

On August 19, 2004, YOUNG BROTHERS, LIMITED ("YB") filed a timely motion to participate ("Motion to Participate"), pursuant to HAR §§ 6-61-56 and 6-61-57.

On August 27, 2004, Applicant filed a memorandum in opposition to the Motion to Participate. On September 2, 2004, YB filed a reply memorandum in support of its Motion to Participate.

The Consumer Advocate issued supplemental IRs to Applicant on September 27, 2004. Applicant provided responses to these supplemental IRs on October 11, 2004.

³Pursuant to Order No. 21194, Hawaii Superferry's responses to the Consumer Advocate's IRs were due September 7, 2004. By letter dated September 7, 2004, Hawaii Superferry requested an extension of time to file its responses, to September 8, 2004, to allow additional time to complete making copies of exhibits to the responses. The commission granted Hawaii Superferry's request for this extension of time. Additionally, on September 10, 2004, Applicant provided copies of Exhibit 10 to the September 8, 2004 responses that had been enhanced for easier reading.

On October 1, 2004, the commission issued Order No. 21391 granting YB the right to participate in the instant docket, subject to certain limitations.⁴ Order No. 21391 also provided for public hearings to be held on the instant matter on all affected islands: Oahu, Kauai, Maui and Hawaii.⁵

On October 29, 2004, the Consumer Advocate and YB each submitted their respective Statements of Position.

On November 30, 2004, the commission issued IRs to Applicant. Applicant filed responses to the commission IRs on December 10, 2004 ("Applicant's Response to Commission IRs").

By letter dated November 30, 2004, Applicant requested an extension of time, to December 8, 2004, in which to file its Reply Statement of Position.⁶ The commission granted this request and on December 8, 2004, Applicant filed its Reply Statement of Position.

On December 12, 2004, Applicant filed a supplemental response to the September 8, 2004 Responses.

⁴In particular, Order No. 21391 provided that YB's participation was limited to receiving copies of all correspondence, filings and briefs not designated confidential under Protective Order No. 21190 and that YB would be allowed to submit a written Statement of Position on the issues established in Order No. 21194, to be due on October 29, 2004.

⁵The public hearings were held in Honolulu on November 10, 2004, Lihue, Kauai on November 16, 2004, Kahului, Maui on November 17, 2004 and Waikoloa, Hawaii on November 18, 2004.

⁶Pursuant to Order No. 21194, Applicant's Reply Statement of Position was scheduled to be filed on or before November 30, 2004.

II.

Description of Applicant

Applicant is a Hawaii corporation incorporated on September 22, 2002 as HSF, Ltd., which changed its name to Hawaii Superferry, Inc, on February 2, 2004. Applicant's principal place of business is at Pier 19, Ferry Terminal, Honolulu, Hawaii. The officers and directors of Hawaii Superferry are:

<u>Name</u>	<u>Office</u>
Timothy W. Dick	Chairman of the Board of Directors/President
John L. Garibaldi	Chief Executive Officer/Director
Robert E. "Terry" White	Executive Vice President-Operations/Chief Operating Officer
John C. Dean	Director
Dr. Daniel I. Okimoto	Director
Brian Nishida	Director

III.

Background

A.

Description of Proposed Service

Applicant proposes to develop and operate a high-speed, roll-on/roll-off ferry service, using two vessels, capable of carrying up to 866 passengers and 282 cars, or 26 trucks/buses and 65 cars per trip, between the port of Honolulu, Oahu and the ports of Nawiliwili Harbor on Kauai, Kahului on Maui and Kawaihae on the island of Hawaii, subject to the availability of adequate

port facilities.⁷ When both vessels are in service, Applicant anticipates making daily round trips between Oahu and Maui, Kauai and Hawaii.⁸ Applicant expects its ferry service to cost about fifty (50) per cent of the price of flying,⁹ and is viewed as an alternative to the airlines and inter-island barge service for residents, visitors and businesses.

Applicant proposes to operate year-round, except for ten (10) days during the year for scheduled maintenance, drydocking, overhaul of the vessels and unscheduled interruptions due to weather and other unforeseen events.¹⁰

B.

Description of Vessels

Applicant proposes to use two (2) 105-meter, "semi-SWATH" aluminum catamaran vessels in its service, now being constructed by Austal USA LLC, in Mobile, Alabama.¹¹ Applicant initially expected delivery and commencement of service of the first vessel in late 2006, with the second vessel delivered in mid-2008. However, due to time constraints related to use of the harbor facilities, the first vessel is expected to commence

⁷Application at 4.

⁸Application at 2.

⁹Id.

¹⁰Application at 6.

¹¹Id.

service in January 2007.¹² The time frame for delivery and commencement of service of the second vessel remains unchanged.

Applicant states that the vessel design and diesel-powered water jet propulsion system engines to be used on the vessels are proven technologies that have been in operation for years on a variety of ocean-going vessels.¹³ The vessels will be powered by four (4) marine diesel engines, driving its own water jet propulsion system and is expected to travel at speeds on the ocean of 35 knots.¹⁴

C.

Use of State Harbor Facilities

The Applicant has received a Letter of Intent ("LOI") from the Department of Transportation, Harbors Division, State of Hawaii ("DOT") dated December 9, 2004, and filed with the commission on December 12, 2004, which "outlines the general terms, arrangements and conditions under which the DOT intends to enter into the formal agreement" for "the use of harbor facilities at Honolulu Harbor, Kahului Harbor, Nawiliwili Harbor, and Kawaihae Harbor."¹⁵ The DOT represents to Applicant that the harbor facilities at Honolulu, Kauai and Maui will be ready for

¹²Applicant's Reply Statement of Position, n.1.

¹³Applicant's Reply Statement of Position at 3.

¹⁴Application at 6-7.

¹⁵Applicant's Supplemental Response to Division of Consumer Advocacy's Information Request CA/HSF-IR-1, filed December 12, 2004, at 2-3. Applicant filed the LOI as confidential information pursuant to Protective Order No. 21190.

the commencement of Hawaii Superferry's operations by the anticipated commencement date of January 2007.¹⁶ The harbor facility at Kawaihae, Hawaii, however, may be delayed beyond the January 2007 date. To prepare for that possibility, Applicant and the DOT continue to explore options for the Kawaihae site.¹⁷

IV.

Consumer Advocate's Statement of Position

A.

Whether there is Sufficient Demand for Applicant's Proposed Ferry Service

The Consumer Advocate determined that, while it had concerns over the results of a market study by Market Scope, Inc., which was commissioned by Applicant (the "Market Study"),¹⁸ and which results were designated confidential pursuant to Protective Order No. 21190, overall, there appeared to be a sufficient demand for Applicant's proposed ferry service to conclude that the proposed ferry service is required by the present or future public convenience and necessity.¹⁹ The Consumer Advocate believes that the enticement of lower fares combined with reliable service could persuade sufficient numbers of passengers to use the new ferry service, enough to allow

¹⁶Applicant's Reply Statement of Position at 4.

¹⁷Applicant's Reply Statement of Position at 4-5.

¹⁸Applicant's Reply Statement of Position at 6.

¹⁹In reaching this determination, the Consumer Advocate also conducted its own analysis of Applicant's proposed service. See, Consumer Advocate's Statement of Position at 12.

Applicant to generate revenues to meet its financial obligations. The Consumer Advocate speculates that the proposed ferry service would have the added economic benefit of placing competitive pressure on more traditional carriers, such as airlines, to lower rates on existing airfares and cargo rates.²⁰

B.

Whether Applicant's Proposed
Ferry Service Serves the Public Interest

The Consumer Advocate believes that the proposed ferry service is consistent with the declaration of policy as set forth in chapter HRS § 271G-2. In particular, HRS § 271G-2 reads, in relevant part, that the transportation of persons and property by water within the State "constitutes a business affected with the public interest."

The Consumer Advocate further states that the proposed ferry service would provide more options and opportunities for inter-island travel at an anticipated lower cost than present air fares.²¹ It would also encourage the use of alternative transportation systems and promote statewide economic growth. The Consumer Advocate, therefore, concludes that Applicant's proposed ferry service is also in the public interest.

²⁰Consumer Advocate's Statement of Position at 12.

²¹Applicant also foresees possible use by the military for certain transportation needs. Application at 20.

C.

Whether Applicant is Financially Fit,

Willing and Able to Perform the Proposed Service

In reviewing Applicant's fitness, the Consumer Advocate considered the following: (1) whether Applicant is able to obtain adequate financing to commence the new ferry service and will it be able to generate sufficient funds to sustain operations; (2) whether Applicant has the managerial skills and technical knowledge to successfully operate the proposed ferry service; and (3) whether Applicant will be able to secure the necessary government approvals for its use of the harbor facilities at its anticipated ports.

i.

Financial Fitness

Applicant has issued \$3.3 million worth of equity in the form of Series A convertible preferred stock and has a commitment for the purchase of \$55 million additional equity in the form of Series B convertible preferred stock.²²

Applicant is in the process of securing additional financing through a loan guaranty from the Maritime Administration of the United States Department of Transportation ("MarAd"). To qualify for the MarAd loan, Applicant must prove that its proposed ferry service is economically sound. Applicant must demonstrate no more than a 2:1 debt to equity ratio, and

²²Applicant's Reply Statement of Position at 3.

must show positive working capital and demonstrate a certain minimum worth.²³

Applicant has yet to consummate any of the above financial guarantees. Thus, the Consumer Advocate advises that it will withhold its full recommendation until such time that Applicant consummates the above-noted loans, and further recommends that Applicant submit documentation confirming that it has secured the appropriate financing for its proposed ferry service.²⁴

ii.

Managerial Fitness

Based upon Applicant's representations in its Application, the Consumer Advocate finds that Applicant has the appropriate managerial experience to successfully operate the proposed ferry system. In particular, the management team of Hawaii Superferry has extensive professional experience in the transportation industry (including the airline industry and maritime operations) and corporate management.

iii.

Technical Skills to Operate a Ferry System

Applicant has entered into a contract with HMS-Hawaii, Inc., a subsidiary of Hornblower Marine Services, Inc. ("HMS"), to provide marine management and crew services. HMS currently

²³Application at 13.

²⁴Consumer Advocate's Statement of Position at 16.

manages ferry systems throughout the United States and the Bahamas. HMS also provides marine management for ferry operations chartered by the United States Marines in Okinawa, Japan.²⁵ Based upon representations made by Applicant, the Consumer Advocate has determined that HMS has sufficient technical expertise to support Applicant in its ferry operations.

iv.

Whether Applicant has the Necessary
Facilities to Provide the Proposed Ferry Service

Applicant requires harbor infrastructure not presently in place at the ports where it plans to dock its ferries. The Consumer Advocate notes that other State government agencies, primarily the DOT, are responsible for the development of such infrastructure as is necessary to accommodate the ferries and its employees and passengers at the respective ports. The Consumer Advocate, thus, will rely on the representations made by Applicant that Applicant is working closely with the DOT as it pertains to procuring the necessary harbor infrastructure.²⁶

Moreover, the Consumer Advocate recommends that Applicant provide (1) progress reports on the construction of its vessels to assess Applicant's ability to commence operations in early 2007 and (2) a copy of its certification from the

²⁵Application at 11.

²⁶Consumer Advocate's Statement of Position at 19.

United States Coast Guard for Applicant's vessels attesting to the vessels seaworthiness.²⁷

D.

Whether Applicant's Proposed Rules,
Regulations and Rates are Reasonable

The Consumer Advocate reviewed Applicant's proposed Tariff No. 1 to determine (1) whether Applicant's proposed rates are reasonable and (2) whether the rules and regulations are just and reasonable in their protection of the consumer.

The Consumer Advocate notes that there is no historical data on which to make a determination as to the reasonableness of the proposed rates, since Applicant has not commenced service. Nonetheless, Applicant will have to abide by HRS § 271G-17(b) and provide notice to the commission and the Consumer Advocate regarding any proposed rate change, giving the Consumer Advocate and the commission an opportunity to review any proposed rate changes.²⁸ Thus, the Consumer Advocate concludes that it does not oppose Applicant's proposed rates. Additionally, the Consumer Advocate recommends that Applicant post its tariff on Applicant's website as an accommodation to those passengers purchasing tickets from the website.²⁹

²⁷Consumer Advocate's Statement of Position at 18-19.

²⁸HRS § 271G-17(b) provides, in relevant part, that any rate change shall not be made until forty-five (45) days after a water carrier files a notice of rate change with the commission.

²⁹Consumer Advocate's Statement of Position at 20-21.

Upon reviewing Applicant's proposed rules and regulations, the Consumer Advocate asserts that it is satisfied that Hawaii Superferry's customers will be protected with regard to trip cancellations and complaints and dispute resolution. Applicant appears to have set up reasonable notification procedures for unscheduled cancellations and for the refund of customer fees. To monitor the number of unscheduled cancellations, the Consumer Advocate recommends that Applicant be required to submit quarterly reports on the number of cancellations and the reasons for each cancellation.³⁰

The Consumer Advocate also recommends that Applicant's proposed tariff include information on resolving customer complaints, including Applicant's and the commission's mailing address, telephone numbers and in the case of the commission, its facsimile number.³¹

V.

YB's Statement of Position

In its Statement of Position ("YB Statement of Position"), YB states that although it does not oppose Applicant's Application for ferry service, it has various concerns, such as ensuring that the requirements of Chapter 271G, HRS, will be applied fairly and impartially to all water

³⁰Consumer Advocate's Statement of Position at 22.

³¹Consumer Advocate's Statement of Position at 22-23.

carriers. YB was present at each public hearing³² and expressed its concerns about issues such as the crowding of the harbor facilities with the addition of Applicant's proposed ferry service and its ability to load and unload its barges with the proposed ferry service and accompanying passengers and vehicular traffic.

VI.

Applicant's Reply to the Consumer Advocate and YB's Issues

In its Reply Statement of Position, Applicant asserts that it has responded to the Consumer Advocate's concerns. Applicant is prepared to provide all documentation regarding its financial commitments upon the receipt of its equity funding and loan guaranty. Applicant represents that it will provide semi-annual progress reports on the construction of the vessels, along with its certificate of inspection from the U.S. Coast Guard showing compliance with the International Code of Safety for High Speed Craft (2000). Applicant also intends to comply with the Consumer Advocate's recommendations by posting its tariff on its website and providing information on the number of cancellations and the reasons for the cancellations.³³

Finally, Applicant will revise its tariff consistent with the Consumer Advocate's recommendation that it include a customer complaint provision in its tariff for those customers

³²YB was present at the public hearing held on Oahu, but did not provide public or written testimony.

³³Applicant's Reply Statement of Position at 8-10.

with complaints. Specifically, Applicant will include in its tariff information to contact Applicant and the commission for any customer unable to resolve a dispute.³⁴

As with the issues raised by the Consumer Advocate, Applicant asserts that it has addressed the concerns raised by YB in its Statement of Position. For example, Applicant asserts that it will comply with all tariff requirements, including those with respect to any change in sailing schedule.³⁵ Applicant also clarifies several statements included in its Application that were incorrect or misleading (including matters related to total sailing time, total time to move a military battalion and the cost for ferry service).³⁶

Finally, regarding YB's concern over harbor space on the neighbor islands for berthing and cargo staging, Applicant assures the commission that it is working with the DOT on necessary improvements for the facilities.³⁷ Applicant represents that it will work to ensure the full use of existing facilities by all parties to maintain the flow of passengers, cargo and vehicles.³⁸

³⁴Applicant's Reply Statement of Position at 11.

³⁵Applicant's Reply Statement of Position at 12.

³⁶Applicant's Reply Statement of Position at 13.

³⁷Applicant's Reply Statement of Position at 14.

³⁸Id.

VII.

Discussion

HRS § 271G-10(c) provides that:

A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation covered by the application if it is found that the applicant is fit, willing, and able, properly to perform the service proposed and to conform to [chapter 271G, HRS] and the requirements, rules and regulations of the commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise the application shall be denied.

Thus, Applicant must satisfy the conditions set forth in HRS § 271G-10(c) before the commission can grant it the authority to operate as a common carrier by water.

A.

Applicant's Fitness, Willingness
and Ability to Perform the Proposed Ferry Service

Applicant's financial transactions have yet to be consummated. It is in the process of finalizing its loan guaranty with MarAd³⁹ and has a commitment for the purchase of \$55 million additional equity in the form of Series B convertible stock. Applicant's combination of funding arrangements appears

³⁹Applicant represents that a letter of commitment from MarAd remains pending, as MarAd is waiting for the results of Applicant's discussions with the DOT regarding use of the DOT's harbor facilities. Applicant expects to successfully conclude its discussions with the DOT regarding use of the harbor facilities, and shortly thereafter to receive the loan commitment from MarAd. See, Applicant's Response to Commission IRs, PUC-IR-6.

sufficient to provide adequate financing for start-up costs, maintenance of operations and the construction of both vessels.

Any finding of financial fitness, however, is contingent upon the receipt by the commission of all executed financial documents relating to the \$55 million equity funding and the MarAd loan guaranty, including any other loan commitments which Applicant may enter into with relevance to its proposed ferry service. Thus, the commission finds that Applicant should be required to submit documentation of the: (1) receipt of the commitment for the \$55 million equity funding; (2) MarAd loan guaranty; and (3) any other funding commitments regarding Applicant's proposed ferry service prior to commencing its operations.

Applicant's team of professionals from the airline and maritime industries along with the corporate management experience of its directors appears to provide Applicant with the ability to efficiently and safely manage its proposed ferry service. Likewise, technical support for Applicant will be carried out by HMS which has experience in ferry operations throughout the world. We, thus, find that Applicant has the appropriate managerial and technical support to operate its proposed ferry service.

Applicant's vessels are being constructed by Austal USA, an experienced shipbuilder. The vessels will be inspected and certified by the United States Coast Guard, in compliance with the requirements of the International Code of Safety for High Speed Craft (2000). Applicant states that it will maintain

the status of its certification and will provide copies of new or renewal certificates as they are received.⁴⁰

Applicant will be utilizing harbor facilities, under the jurisdiction of the DOT. Applicant will dock its ferries in DOT's harbor facilities and utilize DOT's terminal space and associated infrastructure for its related ferry services, including the handling of arriving and departing passengers and their vehicles, and associated ticketing and security services.

As noted above, Applicant has negotiated the general terms and conditions with the DOT for the use of its harbor facilities through an LOI.⁴¹ The DOT represents to Applicant that, except for the Kawaihae harbor, all harbors will be ready for Hawaii Superferry's commencement of operations in January 2007.⁴² With regard to readiness of the harbor facility sites, Applicant states that its negotiations with the DOT

⁴⁰See, Applicant's Reply Statement of Position at 10. Applicant also represents that it will obtain all necessary insurance coverage upon the delivery of each vessel. In addition, Applicant represents that it will obtain sufficient amounts for the protection of the public, and in such amounts as the commission may require. See, Application at 14.

⁴¹As discussed above, the LOI between the State and Applicant includes terms and conditions for the assignment of costs by the State to Applicant for certain temporary accommodations and initial and later improvements at the harbor facilities. The LOI was submitted to the commission pursuant to Protective Order No. 21190, as it contains confidential information. The commission will require that the Applicant provide the commission with all costs for accommodations and improvements at the harbor sites expended by Applicant and that Applicant include such costs in Applicant's financial statements provided to the commission for review. Additionally, Applicant shall apprise the commission of the construction timetable for any accommodations and improvements at the harbors in its quarterly reports to the commission, required herein.

⁴²Applicant's Reply Statement of Position at 4.

include a Facility Layout Study, dated November 22, 2004, ("Facility Layout Study") prepared for Applicant by outside consultants.⁴³ The Facility Layout Study presents layout proposals for the terminal facilities to be used by Applicant for its proposed ferry service.⁴⁴

In addition to the terms and conditions negotiated with the DOT in the LOI, Applicant states that it will need the following additional permits, licenses or approvals: (1) Certificates of Inspection from the U.S. Coast Guard; (2) a permit for wastewater disposal from the City and County of Honolulu ("City")⁴⁵; (3) licenses from the Federal Communications Commission for radio and electronic equipment; (4) National Oceanic and Atmospheric Administration ("NOAA") registration for emergency locator beacons; and (5) other approvals, as necessary.⁴⁶

The commission notes that concerns were voiced during the public hearings regarding potential conflicts with existing harbor uses, including the lack of harbor space, traffic concerns and the use of the waterways surrounding the harbors. However, because the use of the harbor facilities is under the

⁴³Applicant's Reply Statement of Position at 5. The Facilities Layout Study was submitted to the commission pursuant to Protective Order No. 21190.

⁴⁴See, Applicant's Reply Statement of Position at 5.

⁴⁵If Applicant discharges its wastewater into a facility owned by the DOT, Applicant will likely be covered under an existing Industrial Wastewater Discharge Permit, issued by the City to the DOT. Should Applicant discharge its wastewater into its own facility, Applicant will have to obtain all necessary discharge permits from the City.

⁴⁶See, Applicant's Response to Commission IRs, PUC-IR-3.

jurisdiction of the DOT, the commission expects Applicant to work closely with the DOT to address these concerns and obtain all necessary harbor approvals to conduct its proposed ferry service.

Based on Applicant's representations, and with the condition that Applicant submits to the commission all necessary approvals for use of the harbor and its related infrastructure, including a final LOI, and any and all leases, licenses, permits, and agreements for the use of such harbor facilities, the commission finds that Applicant is fit, willing and able to perform the proposed ferry service. The commission also finds that Applicant will be able to conform to all applicable laws, rules and regulations relevant to its proposed ferry operations.

B.

Applicant's Proposed Service is or Will be Required by the
Present or Future Public Convenience and Necessity

Presently, the record indicates that the options for inter-island travel and transportation are limited primarily to the airline industry, for passenger travel, and barge service for transportation of other goods and vehicles.⁴⁷ As with the limited options for travel, pricing options are limited as well.

Applicant contends that "Hawaii is a market that is ideal for fast ferries for passengers and vehicles."⁴⁸ Applicant submits that the Market Study "showed a high acceptance level of

⁴⁷Application at 2.

⁴⁸Applicant's Reply Statement of Position at 5.

the ferry service concept and the prices proposed by Applicant."⁴⁹ The Consumer Advocate's own analysis supports Applicant's contention of an unmet demand for alternative travel.⁵⁰ We agree with the Consumer Advocate that there appears to be a latent demand for Applicant's proposed ferry service sufficient to justify the grant of a CPCN to Applicant. Applicant's proposed fares for inter-island travel and transportation will be approximately half the current cost of an airline ticket, thus giving travelers an attractive option to air travel, for either leisure or business travel. Smaller groups, especially, such as schools and athletic teams, will now have affordable alternatives to the airlines for inter-island travel.

We, thus, find that Applicant's proposed ferry service is or will be required by the present or future public convenience and necessity.

C.

Applicant's Proposed Service is Consistent with the Public Interest and the State's Transportation Policy

HRS § 271G-2 sets forth the declaration of policy recognized by the legislature of the State with regard to transportation by water. Specifically, the legislature recognizes that the transportation of persons and property by water "constitutes a business affected with the public interest". HRS § 271G-2. In addition, the legislature has expressed its

⁴⁹Applicant's Reply Statement of Position at 6.

⁵⁰Consumer Advocate's Statement of Position at 11.

support for the Applicant to establish an inter-island fast ferry service and specifically requested the commission to "expeditiously process any required certification" for the Applicant.⁵¹

Applicant's proposed ferry service will provide more transportation options for persons and property at an expected lower cost than the existing modes of transportation. Applicant states that its proposed ferry service is expected to create new job growth in the form of approximately three hundred (300) full-time or part-time jobs to support the operation and maintenance of the ferries.⁵²

Ferry travel may also encourage more families and independent business persons to travel to the neighbor islands, with the resultant positive effect on the economy. Ferry travel would also allow individuals and groups (where air travel for a group may be cost prohibitive) an opportunity to make neighbor island trips. The legislature and governor of the State of Hawaii have both formally expressed their support for the proposed ferry service,⁵³ along with other government, community and business leaders.⁵⁴

⁵¹Haw. S. Con. Res. 149, 22nd Leg. 2004.

⁵²Application at 19.

⁵³Application, Exhibits 24 and 25.

⁵⁴Application, Exhibit 26.

Based on the above, the commission finds that the proposed ferry service is consistent with the public interest and the transportation policy set forth in HRS § 271G-2.⁵⁵

The commission recognizes that issues were raised by some at the public hearings about the impact of the proposed ferry system on the environment and suggesting that an environmental assessment be done on the proposed ferry services' effect on the surrounding environment. We believe that although these are important issues that should be addressed, they need not be addressed in this particular decision and order, since the determination of whether the proposed ferry service and its effect on the harbors and surrounding areas require an environmental assessment is currently being reviewed and

⁵⁵In addition to the transportation policy set forth in HRS § 271G-2, Applicant's proposed ferry service is also consistent with the objectives set forth in HRS § 226-17, which states, in relevant part, that transportation objectives for the State shall be directed toward developing:

- (1) An integrated multi-modal transportation system that services statewide needs and promotes the efficient, economical, safe, and convenient movement of people and goods.
- (2) A variety of carriers to offer increased opportunities and advantages to interisland movement of people and goods.
- (3) Increased capacities of airport and harbor systems and support facilities to effectively accommodate transshipment and storage needs.
- (4) Encouragement of the development transportation systems and programs which would assist statewide economic growth and diversification.

addressed by the DOT,⁵⁶ and the legislature has determined that this Application should be processed expeditiously.⁵⁷

We find it necessary, however, to condition our authorization in this docket upon Applicant's showing, to the satisfaction of the commission, that Applicant has complied with all applicable federal and state laws, rules and regulations, including, without limitation, matters relating to the Environmental Impact Statement Law ("EIS"), under Chapter 343, HRS, to the extent applicable to ensure that all such requirements are appropriately addressed.

D.

Applicant's Proposed Rules, Regulations and Rates

We agree with the Consumer Advocate that there is no historical data to determine whether the proposed rates are just and reasonable. In light of this, and the nascent nature of Applicant's proposed service, we will not render any findings regarding the reasonableness of Applicant's proposed rates in this proceeding. The commission reserves its right, however, to review the reasonableness of Applicant's rates in its next rate case proceeding.

In addition, upon a review of Applicant's proposed rules and regulations, along with a consideration of the Consumer Advocate's recommendations that were not opposed by Applicant, (i.e., that Applicant be required to submit quarterly

⁵⁶Applicant's Reply Statement of Position at 19.

⁵⁷Haw. S. Con. Res. 149, 22nd. Leg. 2004.

reports to the commission and Consumer Advocate regarding the number of cancellations and that Applicant's proposed tariff include contact information for dispute resolution), the commission finds Applicant's proposed rules and regulations to be reasonable, subject to the terms and conditions noted below.

E.

Request for Waiver of HAR § 6-61-75(b)(1)

Applicant requests that the requirements of HAR § 6-61-75(b)(1), which requires that, in general, an applicant must submit an audited balance sheet along with a financial statement, be waived because Applicant has not yet begun day-to-day operations, and thus does not have an audited balance sheet.⁵⁸ Applicant proposes to submit its reviewed balance sheet in place of the audited balance sheet. Applicant represents that it has filed the same financial statements to satisfy MaRad requirements, which usually requires audited financial statements, for the same reason.

We find Applicant's request in this instance to be reasonable. Accordingly, for the purposes of this decision and order only, the commission will grant Applicant's request to waive the HAR § 6-61-75(b)(1) requirement of an audited balance sheet and will accept its unaudited financial statements. The commission reserves its right, however, to request that Applicant provide the commission with audited financial statements in the future.

⁵⁸ Application at 14.

VII.

Summary of Findings and Conclusions

Upon a review of the record, the commission finds that Applicant is fit, willing and able to properly perform the proposed service and to conform to Chapter 271G, HRS, and the requirements, rules and regulations of the commission. We also find that the proposed service is or will be required by the present or future public convenience and necessity and that such service is consistent with the public interest and the transportation policy of the State. Accordingly, we conclude that Applicant's request for operating authority, a CPCN, as set forth in the Application, should be granted, subject to the conditions discussed herein, and more specifically, in the ordering paragraphs below.⁵⁹

IX.

Orders

THE COMMISSION ORDERS:

1. Applicant is granted a CPCN to operate as a common carrier by water of passengers and property, between the islands

⁵⁹We find the Consumer Advocate's recommended conditions in its Statement of Position to be reasonable. Therefore, we conclude that such conditions should be adopted in their entirety and be incorporated as part of this decision and order.

of Oahu and Kauai, Maui and Hawaii, subject to the following conditions:

(a) Applicant shall submit to the commission and the Consumer Advocate documentation that it has secured the appropriate financing for the proposed ferry service;

(b) Unless ordered otherwise, Applicant shall submit quarterly status reports to the commission and the Consumer Advocate describing, among other things, the status of its progress in the construction and delivery of its vessels and in any improvements undertaken at the harbor facilities, the costs of such improvements, and the status of its progress in securing the appropriate financing,⁶⁰ described herein. The first quarterly status report is due within one hundred and twenty (120) days from the date of this decision and order, and each report filed thereafter shall subsequently be due within 120 days from the due date of the previous report;

(c) Applicant shall provide a copy of the certificate from the United States Coast Guard for each of its two (2) vessels;

(d) Applicant shall amend its tariff, as recommended by the Consumer Advocate, to include information on resolving customer complaints, including Applicant's and the commission's mailing address, telephone number, and the commission's facsimile number;

⁶⁰Any confidential information required to be reported to the commission may be submitted to the commission pursuant to Protective Order No. 21190.

(e) Applicant shall post its tariff on its website;

(f) Applicant shall provide evidence that it is in full compliance with all applicable EIS, NOAA, and the U.S. Coast Guard laws, rules, regulations and requirements, and any and all other applicable federal and state laws, rules and regulations and requirements that are necessary to operate its proposed ferry service within the State;

(g) Applicant shall provide evidence that it is in compliance with the City's permit process for wastewater disposal; and

(h) Applicant shall provide a copy of the final agreement between Applicant and the DOT, presently in the form of the LOI, and any and all leases, licenses, permits, and agreements for the use of harbor facilities from or with the DOT.

2. Applicant's request to waive the requirements of HAR § 6-61-75(b)(1) is granted. The commission will accept, for the purposes of this decision and order only, copies of Applicant's unaudited financial statements.

3. Applicant shall comply with all of the commission's requirements for common carriers by water, including, but not limited to, filing a lawful tariff, paying a fee of \$60 for water carrier gross revenues, and filing all appropriate insurance documents relating both to the vessels and to the harbor facilities, pursuant to the LOI and consistent with HRS § 271G-13.


4. Unless stated otherwise, the Consumer Advocate's recommended conditions in its Statement of Position are adopted in their entirety and incorporated as part of this decision and order.

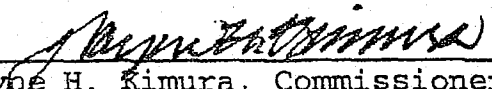
5. Unless ordered otherwise, Applicant shall comply with the foregoing requirements no later than ninety (90) days prior to commencement of service, or October 31, 2006, whichever comes first. Failure to abide by any portion of this decision and order within the specified time constitutes cause for this commission to void this decision and order.

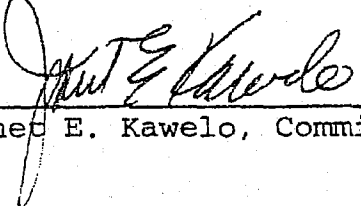
6. Applicant shall not commence operations under this decision and order until it has received written confirmation from the commission that all requirements and conditions stated herein have been met to the satisfaction of the commission.

DONE at Honolulu, Hawaii December 30, 2004.

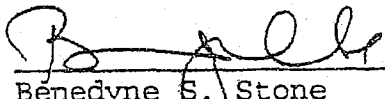
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Benedyne S. Stone
Commission Counsel

04-0180.s1

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21524 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

JOHN L. GARIBALDI,
CHIEF EXECUTIVE OFFICER
HAWAII SUPERFERRY, INC.
Pier 19, Ferry Terminal
Honolulu, HI 96817

THOMAS W. WILLIAMS, JR., ESQ.
AUDREY E. J. NG, ESQ.
PETER Y. KIKUTA, ESQ.
GOODSILL ANDERSON QUINN & STIFEL
Alii Place, Suite 1800
1099 Alakea Street
Honolulu, HI 96813

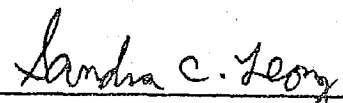
Attorneys for HAWAII SUPERFERRY, INC.

LISA M.K. SAKAMOTO
VICE PRESIDENT FINANCE and GOVERNMENT AFFAIRS
YOUNG BROTHERS, LIMITED
1331 North Nimitz Highway
Honolulu, HI 96817

CERTIFICATE OF SERVICE - Continued

J. DOUGLAS ING, ESQ.
WRAY H. KONDO, ESQ.
EMI L. M. KAIMULOA, ESQ.
WATANABE ING KAWASHIMA & KOMEIJI LLP
First Hawaiian Center
999 Bishop Street, 23rd Floor
Honolulu, HI 96813

Attorneys for YOUNG BROTHERS, LIMITED


for Karen Higashi

DATED: December 30, 2004

LYK/PN

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In The Matter Of the Application Of

HAWAII SUPERFERRY, INC.

For a Certificate of Public Convenience and
Necessity to engage in operations as a Water
Carrier

DOCKET NO. 04-0180

APPLICANT HAWAII SUPERFERRY, INC.'S

REPLY STATEMENT OF POSITION:

EXHIBITS 1-5:

AND

CERTIFICATE OF SERVICE

PUBLIC UTILITIES
COMMISSION

2004 DEC - 8 P 3:59

FILED

GOODSILL ANDERSON QUINN & STIFEL
A LIMITED LIABILITY LAW PARTNERSHIP LLP

THOMAS W. WILLIAMS, JR.
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Telephone: (808) 547-5600
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Attorneys for Applicant
HAWAII SUPERFERRY, INC.

EXHIBIT B
PAGE 1 OF 4 PAGES

with other users of the harbors, including canoe paddling groups at Kahului Harbor. While the use of harbor facilities falls within the purview of the DOT, Applicant offers the following comments.

Much of the concern surrounding Applicant's use of Kahului Harbor appears to have arisen out of confusion regarding DOT's proposal to create Pier 2C. As stated by John Garibaldi, CEO of Applicant, at the public hearing in Kahului, did not propose the creation of Pier 2C and would not even be able to use Pier 2C. The issue relating to Pier 2C (which was intended primarily for cruise ships, not for Applicant) appears to be on its way to being resolved. See article titled "A project that no one needs", Maui News, November 21, 2004, a copy of which is attached hereto as Exhibit 5.

D. Environmental review process.

1. Hawaii EIS Law (HRS Chapter 343)

The Commission received public testimony to the effect that Applicant should submit to the environmental review process prescribed in HRS Chapter 343 (the "Hawaii EIS Law"), primarily because of alterations to harbor facilities. While the determination of whether the harbor use requires submission to the environmental review process under the Hawaii EIS Law is within the purview of the DOT, Applicant provides the following comments.

Applicant has requested that DOT issue a declaration of exemption for the harbor use because this action falls within several defined categories of actions that are exempt from the Hawaii EIS Law under Hawaii Administrative Rules ("HAR") § 11-200-8.

The Hawaii EIS Law applies to persons who are required to obtain an agency "approval" prior to proceeding with either: "(1) Implementing actions which are either located in certain specified areas; or (2) Actions that require certain types of amendments to existing county general plans." HAR §11-200-6. The Hawaii EIS Law is triggered because the harbor use both "propose[s] the use of state or county lands or the use of state or county funds" and because it

proposes a "use within the shoreline area." HRS §343-5(a)(1) and (3). See also HAR §11-200-6(b)(1)(A) and (C); HAR §11-200-6(b)(2)(B).

Compliance with the Hawaii EIS Law is required for certain "actions" unless those actions are exempt. An "action" is broadly defined as "any program or project to be initiated by any agency or applicant." HRS § 343-2. Although the harbor use might ordinarily be an "action" subject to the Hawaii EIS Law, the contemplated use falls within several different exempt categories under the Hawaii Administrative Rules, as elaborated below.

Applicant's harbor use is exempt from the Hawaii EIS Law under one or more of the following exemptions:

(1) Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing;

(2) Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced;

...

(6) Construction or placement of minor structures accessory to existing facilities.

HAR §11-200-8. The proposed harbor use involves actions such as installation of security fencing/gates; installation of tents for security personnel and passengers; installation of pavement striping to delineate vehicle queuing areas, driveways and parking; installation of mooring or loading barges; installation of modular vehicle access ramps; installation or upgrade of mooring hardware and fender systems; installation of stairway towers; and installation of mooring bollards and hardware for barges.

The question of whether the proposed harbor use would fall within the scope of the environmental review process prescribed in the Hawaii EIS Law was discussed with high-level

representatives of the DOT, the Attorney General and the State of Hawaii Office of Environmental Quality Control ("OEQC") during meetings held in November 2004. The indication conveyed to Applicant was that the harbor use is encompassed by one or more of the exemptions described above and in the DOT's Comprehensive Exemption List.

Applicant has requested confirmation from DOT that the harbor use falls within an exemption. A declaration of exemption or other confirmation will not be issued until the harbor alterations are definitively identified, such as in the LOI. Applicant will inform the Commission as to the DOT's determination regarding the exemption.

2. National Environmental Policy Act (42 USCA §§ 4321 to 4370f)

The Commission also heard public testimony to the effect that Applicant should submit to the environmental review process prescribed by federal law. The National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4370f ("NEPA"), requires compliance by all agencies of the Federal Government. 40 CFR § 1507.1.

Applicant will receive a loan guaranty from the United States Department of Transportation Maritime Administration ("MarAd") under a federal ship financing program established by Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271-1280a, implemented by 46 CFR Part 298. Ship financing guarantees from MarAd are "categorically excluded" under NEPA. A "categorical exclusion" means "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency . . ." 40 CFR § 1508.4. Pursuant to its procedures, MarAd has concluded that ship financing guarantees fall under a categorical exclusion. See MAO 600-1, section 4.05, App. 1, 50 Fed. Reg. 30900 (July 30, 1985). An environmental review under NEPA is therefore not required.

EXHIBIT

B



U.S. Department
of Transportation
Maritime
Administration

400 Seventh Street, S.W.
Washington, D.C. 20590

March 31, 2005

James B. Ellis II, Esq.
Blank Rome LLP
600 New Hampshire Avenue, NW
Washington, DC 20037

Dear Mr. Ellis:

Please be advised that, pursuant to paragraph XI of the Letter Commitment dated January 21, 2005, the Maritime Administration (MARAD) has determined that the proposed Title XI loan guarantee for the financing of two passenger/vehicle ferries for Hawaii Superferry, Inc., is categorically excluded from further review under the National Environmental Policy Act. This action (copy enclosed) satisfies the requirements of paragraph XI.

Paragraph X (iii) of the Letter Commitment contains as a condition that "... the periods of all applicable State and Federal statutes of limitation have run on the rights of plaintiffs to block the project." MARAD has determined that this condition is inapposite and unnecessary and the condition is hereby eliminated.

Sincerely,

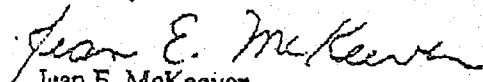

Juan E. McKeever
Associate Administrator for Shipbuilding



EXHIBIT C
PAGE 1 OF 3 PAGES

MARITIME ADMINISTRATION
RECORD OF CATEGORICAL EXCLUSION DETERMINATION

Proposed Action: HAWAII Super Ferry Inc., application for loan guarantee (ship financing guarantee) to acquire two passenger and vehicle ferries for use in an existing trade route in and around the Hawaiian Islands.

Number(s) of the Categorical Exclusion(s) Being Applied: MAO 600-1 (1) and (7).

Discussion : The proposed action fits within a class of actions that is listed in Appendix 1, of MAO 600-1, "MARITIME ADMINISTRATION ACTIONS WHICH ARE NOT NORMALLY MAJOR ACTIONS SIGNIFICANTLY AFFECTING THE ENVIRONMENT" (i.e., Categorical Exclusions)

Applicable categorical exclusions 1 and 7 state:

1. *Administrative procurements (e.g., general supplies), contracts for personal services, personnel actions, project amendments which do not significantly alter the environmental impact of an action; and operating or maintenance subsidies, ship financing guarantees, deferred tax programs, etc., not resulting in a change in the effect on the environment.*
7. *Project or program actions for which applicable environmental documentation has been prepared previously and environmental circumstances have not subsequently changed.*

The proposed action was reviewed by this office in December 2004 and it was determined that the action was considered a "Major Federal Action" pursuant to 40 CFR 1508.18(a) because 78.5% of the project would be funded Title XI loan guarantees totaling \$143.6 million. The proposed action is considered "Major" as it is partly funded, assisted, and approved by MARAD.

Based on the information available at that time, there appeared to have been very little, if any, NEPA or state environmental work performed related to the proposed ferry service that would be adequate for MARAD's responsibilities under NEPA.

However, since that time, the State of Hawaii Department of Transportation completed a review of the proposed action pursuant to Chapter 343, Hawaii Revised Statutes, and Chapter 11-200, Hawaii Administrative Rules, and determined that the proposed action is exempt from further review.

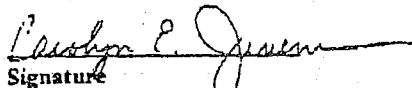
Determination:

Based on our review of information conveyed to us and in our possession (or attached) concerning the proposed action as stated above, the NEPA Program Manager, has determined that the proposed action is categorically excluded from further NEPA review.

C
EXHIBIT
PAGE 2 OF 3 PAGES

Recommendation:

MAR-820 recommends that the loan guarantee contract contains the requirement that Hawaiian High Speed Ferry (HSF) Corporation comply with all applicable environmental laws and regulations.


Signature

Agency Environmental Team Leader, Office of
Environmental Activities

3/28/05
Date

¹ May be incorporated in its entirety into other environmental review records.

COPY

**HARBORS OPERATING AGREEMENT
BETWEEN STATE OF HAWAII AND HAWAII SUPERFERRY, INC.**

This Harbors Operating Agreement ("Agreement") is entered this 7th day of September, 2005, by and between the STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION, having its principal office located at 869 Punchbowl Street, Honolulu, Hawaii 96813 (hereinafter the "STATE"), and HAWAII SUPERFERRY, INC., a Hawaii corporation, with its principal office located at Pier 19 Ferry Terminal Building, Honolulu Harbor, Honolulu, Hawaii 96817 (hereinafter "HSF"). The STATE and HSF are collectively referred to as the "PARTIES."

WHEREAS, HSF desires to introduce a commercial ocean-going interisland ferry service that will carry passengers, vehicles, passenger luggage, produce and other goods loaded on vehicles and will provide an alternative means of transportation between the islands in the State of Hawaii; and

WHEREAS, HSF is seeking financial support from the U.S. Department of Transportation, Maritime Administration (hereinafter "MarAd") and other investors to complete construction of the vessels intended for use in the establishment of the interisland ferry service in the State of Hawaii and to fund initial operations for such service; and

WHEREAS, MarAd issued a letter dated January 24, 2005 to HSF regarding certain approvals issued by MarAd with respect to a guarantee of obligations in connection with such financing pursuant to Title XI of the Merchant Marine Act, 1936, as amended; and

WHEREAS, the State of Hawaii Public Utilities Commission ("PUC") has entered Decision and Order No. 21524 in Docket No. 04-0180 approving HSF's application for a certificate of public convenience and necessity ("CPCN") to engage in operations as a water carrier in accordance with chapters 271G, Hawaii Revised Statutes ("HRS"), subject to the conditions stated in said Decision and Order; and

WHEREAS, the STATE owns, operates, maintains, and manages commercial harbors throughout the State of Hawaii and seeks to facilitate international, domestic, and intrastate maritime trade and activity between the islands and any U.S. or international port; and

WHEREAS, the STATE is willing to provide operational access and use of its commercial harbors to HSF to institute commercial ferry service in the State subject to and in accordance with the terms and conditions described herein; and

WHEREAS, the STATE has determined that the establishment of a commercial interisland ferry service in the State of Hawaii is in the interest of and a benefit to its citizens and businesses and the State is willing to enter into an agreement with HSF to

provide access to the STATE's commercial harbors and facilities to accommodate the start-up of HSF's interisland ferry service operations; and

WHEREAS, the STATE is willing to provide certain facilities and equipment at its commercial harbors to accommodate the operation of an interisland ferry service; and

WHEREAS, HSF is willing to provide interisland ferry service operations between the islands of Hawaii with high speed ferry vessels; and

WHEREAS, HSF and other users of the STATE's commercial harbors are subject to the STATE's administrative rules governing the use of commercial harbors, including Title 19, Subtitle 3, Chapters 41, 42, 43, and 44, of the Hawaii Administrative Rules ("HAR"); and

WHEREAS, while the PARTIES recognize that HSF's interisland ferry service operations provide the general public with an alternative transportation opportunity and that the STATE seeks to encourage such transportation opportunities, the PARTIES also recognize that space within the commercial harbors of the State is exceptionally limited and that the limitations on available space require the optimum use of commercial harbor areas in order to ensure that the transportation, loading, unloading, handling, and processing of passengers, cargo, commodities, and other items are accommodated to the greatest extent practicable;

NOW THEREFORE, in consideration of the foregoing stipulations, conditions, representations, covenants, requirements, and promises set forth herein and for other good and valuable consideration, it is hereby agreed by and between the PARTIES as follows:

I. DEFINITIONS: The following terms shall have the meanings set forth in this section.

A. "Americans with Disabilities Act" and "ADA" are defined in Section IX.E. herein.

B. "Applicable Laws" means all applicable federal, state, and county laws, statutes, ordinances, rules, regulations, directives, and orders, including, without limitation, those laws, statutes, ordinances, rules, regulations, directives, and orders applicable to the use of the STATE's commercial harbors and the establishment, operation and conduct of an interisland ferry service between the islands of the State of Hawaii, and including all applicable environmental and security requirements.

C. "Audited Financial Statements" are defined in Section VIII.F. herein.

D. "Austal" means Austal USA LLC, the builder of the two vessels for HSF intended for use in HSF's operations.

E. "Business days" means the STATE's business days, which excludes all STATE holidays and weekends.

then the State shall so notify HSF in writing of these circumstances within thirty (30) days after the STATE learns or discovers that the State Funding Authority is or has become insufficient to complete the planning, engineering, design, procurement, acquisition, construction, and installation of the State Equipment. If the events described in Section IV.J.3.a, b, or c(i) occur, the STATE shall attempt to value engineer or otherwise modify the scope of work to bring it within the State Funding Authority or otherwise allow the STATE's contractor the opportunity to complete and provide the State Equipment in a manner that meets the requirements of the RFP. The STATE will also consult with HSF as to any available alternatives to address the insufficiency of the State Funding Authority and offer HSF the opportunity to be responsible for or cover any such insufficiency or deficiency and supplement the State Funding Authority. If, despite these efforts, the State is still unable to have the STATE's contractor satisfactorily complete the planning, engineering, design, procurement, acquisition, construction, and installation of the State Equipment within the State Funding Authority, the STATE may thereafter elect not to award the RFP Contract or may terminate the RFP Contract. If this occurs, either of the PARTIES may terminate this Agreement, without liability to the other party.

4. Submission of HSF Operational Plans, HSF Equipment Plans, Vessel Plans, and Facility Layout Plans. HSF has provided to the STATE, for the STATE's review and approval, the HSF Operational Plans, the HSF Equipment Plans, Vessel Plans, and the Facility Layout Plans in accordance with the Harbor Milestone Schedule. HSF has provided to the STATE any information reasonably and expressly requested by the STATE in writing regarding the HSF Operational Plans, the HSF Equipment Plans, Vessel Plans, and the Facility Layout Plans (except for the portion dependent upon the State Equipment Plans) that is critical to the design, ordering, construction, or installation of the State Equipment. The PARTIES shall cooperate and work with each other and provide comments in a timely manner (assuming a reasonable amount of time is provided for a party to respond given the nature of the request) in the development of the HSF Operational Plans, the HSF Equipment Plans, the Vessel Plans and the Facility Layout Plans.

5. HSF financing. HSF has provided to the STATE documentation demonstrating and confirming to the reasonable satisfaction of the STATE that HSF has obtained sufficient funding and financing, or binding commitments for the same, to complete construction of HSF's vessels and to commence initial operations, including the Title XI loan guaranty from MarAd and that the Closing, as defined in the MarAd Commitment Letter, has been fully completed.

6. Compliance with Environmental Laws. In the event a governmental authority or a court of law determines that an environmental assessment or environmental impact statement is required regarding HSF's operations, HSF will comply with all applicable environmental laws, statutes, rules, regulations, ordinances, orders, directives, and guidelines, including; the National Environmental Policy Act ("NEPA") and HRS Chapter 343 ("HEPA"). No part of this Agreement shall be construed as (a) an agreement or acknowledgment by HSF or the STATE that an environmental review under NEPA or HEPA is required or (b) a waiver of HSF's right to

challenge or appeal any finding of a governmental authority or a court of law that an environmental assessment or environmental impact statement is required regarding HSF's operations.

7. Force Majeure. No Force Majeure Event has occurred, the effects of which subsist.

K. Availability Dates; Delays.

1. State Equipment Availability Date I. The STATE acknowledges that it is essential to HSF that the State Equipment be available to allow timely delivery of HSF's vessels and commencement of HSF's interisland ferry operations. Accordingly, the PARTIES agree that State Equipment Availability Date I shall occur no later than eighteen (18) months after the Funding Date. The STATE will periodically advise HSF of its progress in achieving State Equipment Availability Date I.

a. Extension of State Equipment Availability Date I.

(1) HSF actions. If, after the STATE enters into the RFP Contract, HSF fails to timely submit the HSF Operational Plans, the HSF Equipment Plans, and the Facility Layout Plans for the STATE's review at the times and completion stages indicated in the Harbor Milestone Schedule and such failure causes an unrecoverable delay in the performance of the RFP Contract, the STATE will be entitled to an extension of the State Equipment Availability Date I for the same number of days that HSF's failure to submit its plans at the required times and completion stages creates an unrecoverable delay in the completion of the State Equipment. HSF acknowledges that if any information reasonably requested by the STATE in writing that is critical to the design, ordering, construction, or installation of the State Equipment is not timely provided, furnished, or delivered by HSF to the STATE in response to the STATE's request, assuming HSF is given reasonable time to respond given the nature of the request, or if HSF furnishes materially incorrect information, then State Equipment Availability Date I may be delayed for the amount of time that such failure to provide the information or the submission of incorrect information causes an unrecoverable delay in the completion of the State Equipment. If after the STATE enters into the RFP Contract, HSF fails to timely respond to a reasonable request from the STATE for critical information, assuming HSF is given reasonable time to respond given the nature of the request, or HSF submits to the STATE materially incorrect information in response to such a request, the PARTIES shall attempt in good faith to recover any schedule delays, but HSF acknowledges that the STATE will be entitled to an extension of the State Equipment Availability Date I for the same number of days that such failure to provide information or the submission of incorrect information causes an unrecoverable delay in the completion of the State Equipment. If HSF fails to correct or address, to the STATE's reasonable satisfaction, any noncompliance with the conditions described in Sections IV.J.1 (Compliance with laws) and IV.J.6. (Compliance with Environmental Laws) and, to the extent such noncompliance is material, Sections IV.J.4 (Submission of HSF Operational Plans, HSF Equipment Plans, Vessel Plans, and Facility Layout Plans), and IV.J.5. (HSF Financing), the PARTIES shall attempt in good faith to recover any

96

LINDA LINGLE
GOVERNOR



STATE OF HAWAII
PUBLIC UTILITIES COMMISSION
DEPARTMENT OF BUDGET AND FINANCE
465 S. KING STREET, #103
HONOLULU, HAWAII 96813

Telephone: (808) 585-2020
Facsimile: (808) 585-2066

CARLITO P. CALIBOSO
CHAIRMAN

JOHN E. COLE
COMMISSIONER

e-mail: Hawaii.PUC@hawaii.gov

C.C.C.
JC
C
BKK
SKD/BS

SI/CL
LYK/AN

JL
BKK
NK

June 12, 2007

Audrey E.J. Ng, Esq.
Goodsill Anderson Quinn & Stifel
Alii Place, Suite 1800
1099 Alakea Street
Honolulu, Hawaii 96813

Re: Docket No. 04-0180
Application of Hawaii Superferry, Inc. ("Superferry")

Dear Ms. Ng:

This letter is in response to your May 29, 2007 letter to the Public Utilities Commission ("Commission"), wherein you requested confirmation from the Commission that all requirements set forth in Decision and Order No. 21524, filed on December 30, 2004, in the above-referenced docket ("Decision and Order No. 21524"), as modified by Order No. 22934, filed on October 11, 2006 ("Order No. 22934"), have been met ("May 29, 2007 Letter").

In the May 29, 2007 Letter, you also requested clarification regarding the condition set forth by the Commission in Order No. 22934 that the Superferry "file a copy of the certificate of inspection from the [United States Coast Guard ("USCG")] for its two vessels no later than forty-five (45) days prior to commencement of service, or June 1, 2007, whichever comes first." You asked that this condition be enforced only as to Superferry's first vessel (the "Alakai"), and for confirmation that inspection requirements for Superferry's second vessel need only be satisfied upon completion of the second vessel, and prior to its placement into service.

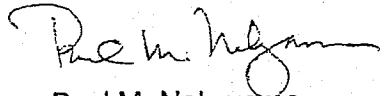
This is to confirm that, based on the representations made, and the information provided by the Superferry, the Commission understands that the Superferry has satisfied the requirements set forth by the Commission in Decision and Order No. 21524 and Order No. 22934. This confirmation is subject to written verification of the satisfactory completion of any additional inspections required by the USCG of the Alakai, to be completed upon (1) leaving the Austal Shipyard dock, (2) leaving the

Audrey E.J. Ng, Esq.
June 12, 2007
Page 2

Port of Mobile, and (3) arrival in Honolulu prior to carrying any passengers,¹ as well as the continued satisfaction by Superferry of any and all applicable laws, rules, and regulations. With regard to Commission requirements relevant to Superferry's as-yet-to-be-completed second vessel, this is to confirm that Superferry shall provide confirmation of all USCG approvals to the Commission prior to the second vessel being placed into service.

Should you have any questions regarding any of the above, please feel free to contact us.

Sincerely,



Paul M. Nakayama
Research Assistant

PMN:eh

c: Catherine P. Awakuni
P. Roy Catalani, Esq.
Wray H. Kondo, Esq.
Hawaii Superferry, Inc.

¹See May 29, 2007 Letter. In a telephone conversation with Ms. Ng, counsel for Superferry, on June 6, 2007, Commission staff was informed that deficiencies 1-8, as noted in Exhibit B of the May 29, 2007 Letter, were addressed to the satisfaction of the USCG prior to the Alakai leaving the Austal Shipyard dock. As noted above, the Alakai, therefore, will undergo two more inspections by the USCG, i.e., upon leaving the Port of Mobile, and upon arrival in Honolulu. Ms. Ng also assured Commission staff that as the Alakai's current USCG certificate of inspection expired on June 8, 2007, the Commission would receive an updated USCG certificate of inspection once issued by the USCG on or around the time the Alakai leaves the Port of Mobile for Honolulu.

NO. 27407

IN THE SUPREME COURT OF THE STATE OF HAWAII

THE SIERRA CLUB, a California non-profit corporation
registered to do business in the State of Hawai'i; MAUI
TOMORROW, INC., a Hawai'i non-profit corporation; and the
KAHULUI HARBOR COALITION, an unincorporated association,
Plaintiffs-Appellants

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF
HAWAII; RODNEY HARAGA, in his capacity as Director of
the DEPARTMENT OF TRANSPORTATION OF THE STATE OF
HAWAII; BARRY FUKUNAGA, in his capacity as Director
of Harbors of the DEPARTMENT OF TRANSPORTATION OF
THE STATE OF HAWAII and HAWAII SUPERFERRY,
Defendants-Appellees

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NO. 05-1-0114)

ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

Upon consideration of the appellate briefings, the
record, and oral argument,

IT IS HEREBY ORDERED that the July 12, 2005 judgment of
the circuit court of the second circuit in this case is reversed.
The Hawai'i Department of Transportation's determination that the
improvements to the Kahului Harbor, on the Island of Maui, are
exempt from the requirements of Hawai'i Revised Statutes (HRS)
chapter 343 (Supp. 2004) was erroneous as a matter of law, and we
therefore instruct the circuit court to enter summary judgment in
favor of Plaintiffs-Appellants the Sierra Club, Maui Tomorrow,

I do hereby certify that the foregoing is a full, true and correct
copy of the original on file in the Office of the Clerk of the
Supreme Court of the State of Hawaii.
Dated at: SEP 10 2007
Honolulu, Hawaii

EXHIBIT F
PAGE 1 OF 2 PAGES

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F.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

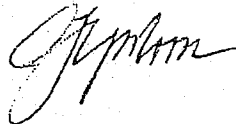
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Inc., and the Kahului Harbor Coalition on their claim as to the request for an environmental assessment. Flint v. MacKenzie, 53 Haw. 672, 673, 501 P.2d 357, 358 (1972).

IT IS FURTHER ORDERED that this case is remanded to the circuit court for such other and further disposition of any remaining claims as may be appropriate.

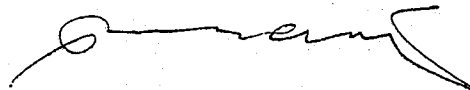
We retain concurrent jurisdiction to enter an opinion and judgment that will follow.

DATED: Honolulu, Hawai'i, August 23, 2007.



Steven H. Levinson

Anna C. Nakayama



Karen E. Duggan, Jr.

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MARSHALL M. GOODSILL
(1916-2004)
WILLIAM F. QUINN
(1919-2006)
RICHARD E. STIFEL
(1920-1993)

August 27, 2007

Stacey K. Djou, Esq.
Hawaii Public Utilities Commission
465 South King Street, Suite 103
Kekuanaoa Building
Honolulu, Hawaii 96813

Re: Hawaii Superferry, Inc.
Docket No. 04-0180

Dear Ms. Djou:

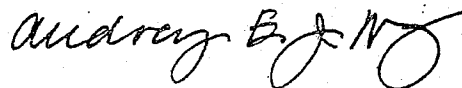
You requested an update by Hawaii Superferry, Inc. ("HSF") to its Status Report filed August 20, 2007 to address the Order filed August 23, 2007 in Hawaii Supreme Court Appeal No. 27407, a copy of which is enclosed. HSF is in compliance with all applicable laws, rules and regulations, and the August 23, 2007 Order does not change that status.

HSF was also provided with a courtesy copy of the Order Instituting Interim Remedies in Civil No. 06-1-0027(1) dated August 23, 2007, a copy of which is enclosed. HSF reported on the status of this lawsuit in its Status Report, although HSF is not a party to this lawsuit. HSF is informed that the State of Hawaii Department of Transportation has complied with or will comply with the Order Instituting Interim Remedies.

Please let me know if you have any questions or need any further information.

Sincerely,

GOODSILL ANDERSON QUINN & STIFEL
A LIMITED LIABILITY LAW PARTNERSHIP LLP



Audrey E. J. Ng

AEJN

cc: Division of Consumer Advocacy (2 copies)
P. Roy Catalani, Esq.
Wray H. Kondo, Esq.

EXHIBIT 9
PAGE 1 OF 1 PAGE

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