BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

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| 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. | ) | |

PROTECTIVE ORDER NO. 21190

STIPULATION FOR PROTECTIVE ORDER

EXHIBIT A

AND

CERTIFICATE OF SERVICE

Filed July 29, 2004

At 2:00 o'clock P.M.

Karen Higashi

Chief Clerk of the Commission

623586

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

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**STIPULATION FOR PROTECTIVE ORDER**

WHEREAS, on July 22, 2004, HAWAII SUPERFERRY, INC. ("Hawaii Superferry" or "Applicant"), filed an application for a Certificate of Public Convenience and Necessity to engage in operations as a water carrier ("Application");

WHEREAS, Hawaii Superferry maintains that disclosure of certain confidential information could competitively disadvantage Applicant in doing business in this State;

WHEREAS, Applicant anticipates that during the course of this proceeding, information considered to be confidential or proprietary (collectively referred to as "confidential information") by a party may be requested or filed;

WHEREAS, the Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs ("Consumer Advocate") is, ex officio, a party to this

proceeding pursuant to the Rules of Practice and Procedure before the Public Utilities Commission (the "Commission");

WHEREAS, Applicant is willing to disclose certain confidential information only to the Consumer Advocate and the Commission, so long as the information is protected from further disclosure;

WHEREAS, in order to assess the merits of the approvals sought by the Applicant, as well as to determine its involvement in this proceeding, the Consumer Advocate must have access to the information alleged to be confidential;

WHEREAS, Applicant and the Consumer Advocate desire to establish a set of procedures and provisions pertaining to the use and disclosure of information considered to be confidential and any information which a party may in the future contend to be confidential;

WHEREAS, the parties understand that during the course of the evidentiary hearing in this matter, if any, if it becomes necessary to address any information provided pursuant to this protective order during the course of the hearing, that portion of the proceeding will be heard in camera;

NOW, THEREFORE IT IS HEREBY STIPULATED AND AGREED, in accordance with Section 6-61-50 of the Rules of Practice and Procedure before the Public Utilities Commission, that the Commission issue a protective order covering the confidential information identified in the course of the proceeding in connection with the Application, as follows:

## TERMS OF THE ORDER

1. This protective order governs the classification, acquisition, and use of confidential information produced by any party in this docket.

2. All parties or participants to all or any portion of this docket, including persons who are granted intervention or participation after the effective date of this protective order, shall be subject to this protective order and shall be entitled to either all or specific portions of confidential information of a party or participant under the provisions of this protective order to the extent allowed by the Commission.

## APPLICATION OF THE UNIFORM INFORMATION PRACTICES ACT

3. To the extent that any of the documents covered by this protective order consist of "government records," as defined in Hawaii Revised Statutes ("HRS") §92F-3, the provisions of HRS Ch. 92F (Uniform Information Practices Act or "UIPA") shall apply to the disclosure of information contained in such documents. In the event any provision of this protective order conflicts with any provision of the UIPA, the UIPA shall control.

## CLASSIFICATION

4. Any party may designate as confidential any information it believes, in good faith, contains trade secrets or other confidential research, development, commercial, financial, vendor, or bid information including but not limited to, business plans, financial statements, and market analyses. Such information shall be protected against disclosure to a non-qualified person pursuant to the terms of this protective order, unless such

information is declassified, or permission to disclose the information to such non-qualified person is granted by the party claiming confidentiality, as provided in paragraph 13 below.

5. If a party designates information as confidential pursuant to paragraph 4 above or 6 below, it shall produce the confidential information in accordance with the procedures described in paragraphs 11 through 14 below, and concurrently provide certain information in writing to the Commission and the Consumer Advocate. If a party seeks to designate information as confidential, it must: (1) identify, in reasonable detail, the information's source, character, and location, (2) state clearly the basis for the claim of confidentiality, and (3) describe, with particularity, the cognizable harm to the producing party from any misuse or unpermitted disclosure of the information. If the Commission or any party to this docket challenges the claim of confidentiality of the information, the party claiming confidentiality shall bear the burden of proof in supporting its claim of confidentiality, and the Commission will determine whether the information is confidential and whether it should be disclosed under a protective order. Any challenge to the confidentiality of any information shall be made in accordance with paragraph 24 below.

6. Confidential information provided to the Commission or the Consumer Advocate, orally or in any other form, shall be protected as fully as confidential information provided in written form. A party shall notify the Commission and the Consumer Advocate when information provided orally or in other than written form

includes confidential information. At the time of such notification, a party shall, in the manner provided in paragraph 5 above, specify the subject-matter of such confidential information, the basis for the claim of confidentiality, and the cognizable harm to the producing party from any misuse or unpermitted disclosure of the information.

## FORMS OF CONFIDENTIAL INFORMATION

7. All information claimed to be confidential information shall be subject to the terms of this protective order, and shall be treated by all qualified persons (as defined by this protective order) as constituting confidential information. Unless a different treatment is warranted, any notes, summaries, abstracts, or analyses that are prepared by counsel, experts, or other qualified persons, and that reflect the underlying confidential information, shall also be subject to the terms of this protective order.

## DESIGNATION

8. Any party claiming that information is confidential shall place upon all applicable material the following legend:

**CONFIDENTIAL**
**SUBJECT TO PROTECTIVE ORDER**

Whenever only a portion of a document, transcript, or other material is deemed to contain confidential information, the party shall, to the extent reasonably practicable, limit the claim of confidentiality to only such portion. However, if such limitation is not reasonably practicable, the entire document, transcript, or other material may be designated as confidential information.

9. With respect to any confidential information that is not under the control of the party claiming confidentiality, other persons shall, to the extent requested by that party, cooperate to ensure that all copies of such confidential information bear the legend required in paragraph 8 above.

10. Any party may request the Commission to designate as confidential information any document or other information previously produced but not designated as confidential, provided that the party, in the manner provided in paragraph 5 above, specifies the subject-matter of such confidential information, the basis for the claim of confidentiality, and the cognizable harm to the producing party from any misuse or unpermitted disclosure of the information. In addition, the party claiming confidentiality shall substitute the previously-produced but not designated as confidential material with the identical material under designation as required in Paragraph 8 above.

## DISCLOSURE

11. Except as provided in paragraph 13 below, confidential information shall not be made available or disclosed to any person who is not a "qualified person" as defined in paragraph 12 below.

12. "Qualified person," as used in this protective order, means any one of the following:

a. The author(s), addressee(s), or originator(s) of the confidential information (provided that such person shall be a Qualified Person by virtue of this subparagraph only with respect to the confidential

information of which such person was the author, addressee, or originator);

b. The Commission and its staff;

c. The Consumer Advocate, its staff, its counsel (including employees directly employed by such counsel), and any consultants retained by the Consumer Advocate for this proceeding;

d. Applicant, its officers and employees, its counsel (including employees directly employed by such counsel), and any consultants retained by Applicant for this proceeding;

e. Any other party or participant to this proceeding, its staff, its counsel (including employees directly employed by such counsel), and any consultants retained by it for this proceeding, to the extent allowed by the Commission, provided however, no party's or participant's employee or consultant who is engaged in developing, planning, marketing or selling the party's/participant's products or services, or determining the costs of the party's/participant's products or services or designing prices of the party's/participant's products or services charged customers shall be deemed to be a qualified person;

f. Any other person approved by the party asserting the claim of confidentiality; and

g. Any other person designated as a qualified person by order of the Commission.

13. When a qualified person wishes to disclose confidential information to a non-qualified person, the qualified person must request permission from the party claiming confidentiality. The request shall identify the non-qualified person to whom disclosure is desired; disclose any past, present, or anticipated affiliation between the qualified person and the non-qualified person; specify the exact information to be disclosed; and state the reasons for disclosure. If permission is granted by the party claiming confidentiality, disclosure of the confidential information shall be made to such non-qualified person in the same manner as provided for qualified persons in paragraph 14 below.

## PROCEDURE FOR OBTAINING ACCESS

14. Prior to disclosing confidential information to a qualified person other than the Commission and its staff, the qualified person shall read a copy of this protective order, complete a copy of the agreement attached as Exhibit A to this protective order, and sign the completed copy of the agreement. A copy of the executed agreement shall be delivered to the party claiming confidentiality and the Commission.

## USE OF CONFIDENTIAL INFORMATION

15. Any confidential information obtained under this protective order shall be used solely in connection with this proceeding and any related administrative and judicial proceedings (at which time the information will continue to be treated as confidential),

and shall not be used for any other purpose, including business, governmental or commercial purposes, except as provided in paragraphs 16 and 17, and except as may be directed by (a) an order of court, (b) an order of the Commission, or (c) the UIPA (in the case of any "agency" as defined in HRS §92F-3), including any ruling of the Office of Information Practices.

16. Any confidential information obtained under this protective order may be used by the Commission and its staff in any proceeding pending before the Commission involving the producing party, or where the intended use of such confidential information is for the purpose of assisting the Commission in fulfilling its statutory duties and responsibilities with respect to the producing party. The confidential information shall continue to be treated as confidential until the protection conferred by this protective order (or any other applicable protective order) is terminated by the producing party, or until further order of the Commission.

17. Any confidential information obtained under this protective order may be used by the Consumer Advocate, its staff, its consultant and its counsel in any proceeding pending before the Commission involving the producing party, or where the intended use of such confidential information is for the purpose of assisting the Consumer Advocate in fulfilling its statutory duties and responsibilities with respect to the producing party. The confidential information shall continue to be treated as confidential until the protection conferred by this protective order (or any other applicable protective order) is terminated by the producing party, or until further order of the Commission.

18. Unless otherwise ordered by the Commission, if a party desires to file written testimony, exhibits or pleadings which contain or reflect the confidential information, the page(s) or portions of the page(s) containing or reflecting such information shall be treated as confidential, and that part of any hearing at which such information is discussed shall be held in camera, or under other conditions imposed by the Commission to prevent unnecessary public disclosure of such information. A copy of any confidential page, with any such information deleted, shall be filed to be included in the public record, and each such page shall contain the following designation in the upper left hand corner:

**Confidential Information**
**Deleted Pursuant To**
**Protective Order No. _____.**

**RETENTION OF CONFIDENTIAL INFORMATION**

19. Confidential information shall be retained in a locked cabinet dedicated to the storage of confidential information, or otherwise secured to ensure that access to and disclosure of the confidential information is limited to a qualified person.

20. Confidential information that is given to or filed with the Commission or its staff shall be separately bound and placed in a sealed envelope or other appropriate sealed container on which shall appear the following legend:

**THIS ENVELOPE IS SEALED PURSUANT TO PROTECTIVE ORDER NO. _____ AND CONTAINS DOCUMENTS WITH CONFIDENTIAL INFORMATION. IT IS NOT TO BE OPENED OR THE CONTENTS OF THIS**

**ENVELOPE DISPLAYED OR REVEALED EXCEPT TO QUALIFIED PERSONS AUTHORIZED TO INSPECT THE ENCLOSED DOCUMENTS.**

21. Confidential information shall not be reproduced or duplicated, except to make working copies and copies to be filed with the Commission under seal. If a document contains information so sensitive that it should not be copied by anyone, it shall bear the following legend: "Copying Prohibited."

22. If a court or other administrative agency requests, subpoenas, or orders production of confidential information that a party or person has obtained under this protective order, that party or person, prior to disclosure, shall promptly notify the party claiming confidentiality of the request, subpoena, or order.

## DURATION OF CONFIDENTIALITY

23. The confidentiality of the information produced pursuant to this protective order shall be preserved until all interested parties, by written stipulation, terminate the protection conferred by this protective order, or until further order of the Commission.

## APPEAL TO THE COMMISSION

24. If any interested person disagrees with the designation of information as confidential, the party claiming confidentiality and the person so disagreeing shall first make a good faith attempt to resolve the dispute on an informal basis. If the dispute cannot be resolved, the person contesting the confidentiality of the information shall file a motion to compel disclosure or any other appropriate motion with the Commission. The

party claiming confidentiality shall bear the burden of proof in supporting its claim, and the Commission will determine whether the information shall continue to be designated as confidential under this protective order. Pending a disposition of the motion, the information in question shall be treated as confidential information and shall not be disclosed except as permitted in this protective order.

## NONWAIVER OF OBJECTIONS AND RIGHTS

25. The parties retain the right to contest any assertion or finding of confidentiality or of non-confidentiality.

26. The parties retain the right to question, challenge, and object to the admissibility of confidential information on the grounds of relevancy or materiality.

## MODIFICATION OF THE PROTECTIVE ORDER

27. The Commission may modify this protective order on the motion of any party, or on its own motion, upon reasonable notice to the parties and an opportunity for hearing.

## DISPOSAL OF CONFIDENTIAL INFORMATION

28. Except as provided in paragraphs 29 and 30 below, within 90 days after the conclusion of this proceeding, persons in possession of confidential information shall, at the option of the party producing the confidential information, return or destroy all such materials and all copies, notes, tapes, papers, or other medium containing, summarizing, excerpting, or otherwise embodying any confidential information. If the party producing the confidential information requests destruction, the person destroying the information

shall certify its destruction to the producing party, indicating the name of the person destroying the documents, the method of destruction, and the identity of the specific documents destroyed.

29. Counsel and the representatives of record for a party shall be entitled to retain memoranda, pleadings, exhibits of record, written testimony, and transcripts embodying information derived from or incorporating confidential information to the extent reasonably necessary to preserve files on this proceeding.

30. Confidential information produced in this proceeding shall remain in the possession of the Commission, the Consumer Advocate, and counsel for the Consumer Advocate for the duration required by applicable statute.

**SANCTIONS**

31. Any person violating this protective order shall be subject to sanctions imposed by the Commission.

DATED: Honolulu, Hawaii July 23, 2004.

Robert E. "Terry" White
Chief Operating Officer
Hawaii Superferry, Inc.

John Cole
Executive Director
Division of Consumer Advocacy
Department of Commerce and Consumer Affairs

APPROVED AND SO ORDERED THIS 29th day of July, 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

EXHIBIT A

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

PROTECTIVE AGREEMENT

1. I, _____, have been presented with a copy of Protective Order No. _____, issued by the Public Utilities Commission in Docket No. _____ on the _____ day of _____, 2004 ("Protective Order").

2. I am employed, retained or assisting in Docket No. _____ and have requested review of the confidential information covered by the Protective Order.

3. I understand the confidential information covered by the Protective Order is to be used solely to assist _____ as provided for in paragraph 15 of the Protective Order (and paragraph 17 in the case of rendering assistance to the Consumer Advocate), and that I am to make no other use of the confidential information, nor am I to disclose the confidential information to any other person unless otherwise permitted by the Protective Order.

4. I further understand that at the conclusion of my assistance to _____, I shall account for each copy, extract, note and summary of, or other document containing any part of such confidential information to _____, and I shall abide by the provisions in paragraph 28 of the Protective Order, unless otherwise permitted by paragraphs 29 and

30 of the Protective Order.

5. I hereby certify that I have read the above-mentioned Protective Order and agree to abide by its terms and conditions.

DATED at _____, _____ _____, _____.

_____
Signature

_____

_____

_____
Address

(____) _____
Telephone Number

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Protective Order No. 21190 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

JOHN COLE
Executive Director
Division of Consumer Advocacy
Department of Commerce and Consumer Affairs
335 Merchant Street, Room 326
Honolulu, HI 96813

JOHN GARIBALDI
Chief Financial Officer
Hawaii Superferry, Inc.
Pier 19, Ferry Terminal
Honolulu, Hawaii 96817

Karen Higashi

Karen Higashi

DATED: July 29, 2004