

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of) Docket No. 2020-0089
)
LAUNIUPOKO IRRIGATION CO., LTD) MOVANTS NA AIKANE O MAUI, INC.
) AND J. KE'EAUMOKU KAPU'S MOTION
For Temporary Rate Relief) TO INTERVENE OR, ALTERNATIVELY
) FOR PARTICIPANT STATUS, AND
) REQUEST FOR CONTESTED CASE;
) MEMORANDUM IN SUPPORT OF
) MOTION; DECLARATION OF J.
) KE'EAUMOKU KAPU; CERTIFICATE OF
) SERVICE

MOVANTS NA AIKANE O MAUI, INC. AND J. KE'EAUMOKU KAPU'S MOTION TO
INTERVENE OR, ALTERNATIVELY FOR PARTICIPANT STATUS, AND REQUEST FOR
CONTESTED CASE

DECLARATION OF J. KE'EAUMOKU KAPU

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MOVANTS NA AIKANE O MAUI, INC. AND J. KE'EAUMOKU KAPU'S MOTION TO INTERVENE OR, ALTERNATIVELY FOR PARTICIPANT STATUS, AND REQUEST FOR CONTESTED CASE

Movants NA AIKANE O MAUI, a non-profit organization, incorporated in the State of Hawai'i; ("Na Aikane") and J. Ke'eamoku Kapu (collectively, "Movants") by and through their undersigned counsel, hereby seeks to intervene in the above-captioned proceeding pursuant to Hawaii Revised Statutes ("HRS") § 269-16 and the Public Utilities Commission's ("Commission") Rules of Practice and Procedure, Hawaii Administrative Rules ("HAR") § 16-601-55 (2019). In the alternative, and should this Commission deny intervenor status, Applicants seek participant status pursuant to HAR §16-601-56.

Movants also requests that the Commission hold a contested case pursuant to HRS Chapter 91 on Movants' rights and interests, which would be affected by approval of the proposed Temporary Rate Relief for Applicant LAUNIUPOKO IRRIGATION CO., LTD.

Movants submit this motion for intervention, or in the alternative, participation, and a contested case to ensure that Movants rights and interests related to its ability to initiate, perpetuate, engage, and foster Native Hawaiian culture through ahupua'a caretaking, protocols, language, music, and other means, both in local Maui communities and abroad are protected. Movants further seek to ensure that any proposed Rate Relief or associated water system capital improvement projects ("CIP Projects") and/or water system expansion, properly account for and considers greenhouse gas emissions, environmental impacts, and that community voices are considered and engaged adequately in Commission procedures on the proposed Rate Relief and CIP Projects. Movants' officers, supporters and participants include residents of the Kauaula

valley who are descendants from the aboriginal people who inhabited the Hawaiian archipelago prior to 1778 and also conduct kānaka maoli traditional and customary practices in the areas likely affected by the requested Rate Relief and proposed CIP Projects.

For these reasons, and the information provided in the enclosed memorandum and affidavits, Movants respectfully request to be admitted as an intervenor or, if such status is denied, as a participant to the proceedings, and also request a contested case.

DATED: Honolulu, Hawai'i

October 26, 2020

/s/ Ryan D. Hurley
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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAI‘I

In the Matter of)	Docket No. 2020-0089
)	
LAUNIUPOKO IRRIGATION CO., LTD)	MEMORANDUM IN SUPPORT OF
)	MOTION
For Temporary Rate Relief)	
_____)	

MEMORANDUM IN SUPPORT OF MOTION

Movants NA AIKANE O MAUI (Na Aikane), a non-profit organization, incorporated in the State of Hawai‘i and J. Ke‘eumoku Kapu (collectively, "Movants"), by and through its undersigned counsel, respectfully seeks intervenor status, or if denied, be admitted as participants, in the above-captioned proceedings on Applicant LAUNIUPOKO IRRIGATION CO., LTD's ("LIC" or "Applicant")¹ request for Temporary Rate Relief, filed with the Public Utilities Commission of the State of Hawai‘i ("Commission") on June 5, 2020 (“application”). Na Aikane also requests that the Commission hold a contested case pursuant to Hawaii Revised Statutes ("HRS") Chapter 91 on the rights and interests of Movants as described further herein.²

I. Introduction

On June 5, 2020, LIC filed its Application for Temporary Rate Increase ("Rate Relief") pursuant to HRS §269-165. LIC seeks “temporary rate relief,” but its application describes

¹ Applicant LAUNIUPOKO IRRIGATION CO., LTD., is a Hawai‘i limited liability company, whose sole member is Makila Land Co., LLC (Makila). See Docket 02-023, Application For A Certificate Of Public Convenience And Necessity Pursuant To Section 269-7.5 To Provide Non-Potable Water Service For 7000 Acres At Launiupoko, Maui; And For Approval Of Rules, Regulations, And Rates filed on August 1, 2002 ("CPCN App.") at 3. Makila members are Maui Land Ventures, LLC; Olowalu, LLC; and West Maui Land Company, Inc. See Docket 02-023 Launiupoko Irrigation Co., LLC's responses to Consumer Advocate's Information Requests filed on February 25, 2003 at 1.

² In any case, the instant proceedings on the LIC Application constitute a contested case hearing on the rights and legal interests of Movants. HRS §91-1.

significant capital improvement expenditures and projects; increases in energy utilization; and efforts to comply with stream restoration mandates.

LIC's application describes water system expansion and proposed CIP Projects that include adding at least two (2) seven hundred (700) gallon per minute pumps and installing over two (2) miles of additional large diameter waterline.³ LIC asserts these proposed improvements are necessary because implementation of Interim Instream Flow Standards (IIFS) required by the Commission on Water Resources Management ("CWRM") in 2018 "significantly reduced the volume of water available for diversion for the Company's use as its non-potable water sources for its customers." See Application Exhibit E, Direct Testimony of Glenn Tremble at 3. LIC further notes, "Whereas diverted stream flow utilizes gravity for conveyance of the company's water storage reservoirs pumpage from groundwater wells requires power (diesel and/or electric to convey water to the Company's water storage reservoirs.... Not only does pumping water cost significantly more than utilizing gravity flow, the use of diesel fuel in the absence of any utility electric power further increases the cost of operations." *Id* at 4.

Na Aikane is a non-profit organization, incorporated in the State of Hawai'i and with its primary place of business in Lahaina on the island of Maui. Declaration of J. Ke'eumoku Kapu ("Kapu Decl.") ¶2. Na Aikane was incorporated to initiate, perpetuate, engage, and foster Native Hawaiian culture through ahupua'a caretaking, protocols, language, music, and other means, both in local Maui communities and abroad are protected. *Id.* ¶4. J. Ke'eumoku Kapu ("Ke'eumoku") is President of Movant Na Aikane o Maui, and also an individual movant who currently resides reside in Kauaula valley, Lahaina, Maui with their 'ohana. *Id.* ¶¶2-6. Movants include many residents of the Kauaula valley and kānaka maoli traditional and customary practitioner of areas likely affected by the proposed Rate Relief and proposed CIP Projects. *Id.* ¶¶5, 8.

³ The proposed CIP Projects have not been sufficiently identified and or described, such that the Commission can make fully informed decision on the Application. For instance, the waterline is proposed to use State or County lands, which triggers the HRS chapter 343 environmental review that is meant to inform decisions, including the Commission's decision on the Application.

LIC's current and planned water system encroaches on Movants' lands, may increase greenhouse gas emissions, and fail to restore sufficient stream water on which Movants depend for kalo farming. The considerable energy expenditures associated with LIC's system changes could significantly increase the amount of GHG emissions associated with the LIC water system. Kapu Dec. ¶¶29-30. Movants are also concerned that LIC and its associated companies continue to illegally use lands, both public and private, for its water system, fails to comply with regulations and reporting requirements necessary to ensure transparency about their operations, and not sufficiently restore surface waters to Kauaule stream as a consequence of their water system expansion. *Id.* ¶31 Movants have rights and interests that will be impacted by the proposed Application and associated CIP Projects. *Id.* ¶32. Movants seek to intervene to ensure the qualitative or quantitative GHG emission impacts of LIC's water system expansion and reconfiguration through the proposed CIP Projects are considered and the Commission provided necessary on-the-ground information about impacts of LIC's proposed CIP Projects and system expansion. *Id.* ¶33.

For these and other reasons further described *infra*, Movants seek to intervene or, in the alternative, to participate, in the Commission's proceedings to protect their constitutional rights to a clean and healthy environment, their native Hawaiian traditional and customary rights, and real property interests. Movants' intervention will also contribute important information on the impacts associated with LIC's planned capital improvement projects "which are anticipated to address the transmission of non-potable water in the longer term."⁴ Application at 8.

⁴ See Application EXHIBIT G for Upcoming Capital Improvement Projects (2020-23) totaling \$3.8 million (Collectively "CIP Projects"). The above discussed CIP projects relating to the two (2) additional pumps and waterline is already underway and will cost at least \$1.25 Million. *Id.*

The Commission currently has General Orders for regulating gas, electric and telephone utilities in the State of Hawai'i. All of three (3) of these General Orders call for Commission review prior to commencement of construction or commitment when a proposed capital expenditure reaches a certain threshold (\$500,000 for gas and telephone utilities and \$2.5 million, excluding customer contributions for electric utilities). No general order exists for water utilities in Hawai'i, thus water utilities, including the Applicant utility, can commit significant amounts of rate payer money on expansion/ capital improvement projects without any regulatory pre-approval. *See* General Order No. 7, Standards for Electric Service in Hawai'i, Paragraph 2.3(g)(2) and Decision and Order No. 21002, filed on May 27, 2004, in Docket No. 03-0257, effective July 1, 2004, (the General Order No. 7 capital expenditures threshold was increased from \$500,000 to

II. All nine Commission considerations weigh in favor of Movants' intervention

As required by Hawaii Administrative Rule ("HAR") § 16-601-55(b) this motion and memorandum discuss:

- (1) The nature of the applicant's statutory or other right to participate in the hearing;
- (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
- (3) The effect of the pending order as to the applicant's interest;
- (4) The other means available whereby the applicant's interest may be protected;
- (5) The extent to which the applicant's interest will not be represented by existing parties;
- (6) The extent to which the applicant's participation can assist in the development of a sound record;
- (7) The extent to which the applicant's participation will broaden the issues orderly the proceeding;
- (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
- (9) Whether the applicant's position is in support of or in opposition to the relief sought.

A. Movants statutory and constitutional rights to a hearing due to property interests in the Rate Relief and associated CIP Projects upon which the Application is premised.

The Commission is required to hold a hearing on the Application. HRS §269-16(b) provides in part: "A contested case hearing shall be held in connection with any increase in rates, and the hearing shall be preceded by a public hearing as prescribed in section 269-12(c), at which the consumers or patrons of the public utility may present testimony to the commission concerning the increase." Movants have constitutionally protected rights that entitle them to be parties to the Commission's hearing pursuant to articles I, §5; XI, §§1, 9; and XII §7 and the U.S. Constitution, amendments V and XIV.

The Commission is required to consider the qualitative or quantitative impacts of GHG emissions consequent to approval of the application. HRS §269-6(b). Movants have rights in the Commission's consideration of the harmful impacts of GHG emissions on the earth's climate,

\$2.5 million, excluding customer contributions for electric utilities); General Order No. 9, Standards for Gas Service in Hawai'i, Paragraph 2.3(f)(2); and General Order No. 8, Standards for Telephone Service in Hawai'i, Paragraph 2.3(d)(2).

and more specifically, the impacts of climate change on Hawai‘i and the ahupua‘a in Kauaula, pursuant to article XI, §9 of the Hawai‘i Constitution. Kapu Dec. ¶9. *See In re: Gas Co., LLC*, 147 Hawai‘i 186, 465 P.3d 633 (2020) (article XII, §7 constitutional rights considered in determining whether petitioners were persons aggrieved); *In re Hawaii Electric Light Company*, 145 Hawai‘i 1, 445 P.3d 673 (2019) (article XI §9 constitutional rights require due process and a Commission hearing).

Movants have constitutional rights under article XI, §§ 1 and 9 of the Hawai‘i State Constitution as beneficiaries of Hawaii’s public trust and based on their rights to a clean and healthful environment defined by provisions requiring consideration of greenhouse gas impacts under HRS §269-6(b).⁵ The Commission’s exercises of authority under these laws relating to environmental quality implicate Movants’ rights to a clean and healthy environment. Due process requires that the Commission hold a contested case prior to decision making on application because the latter will impact Movants’ rights.

Movants understand U.S. Geological Services researchers are predicting that climate change impacts will cause dry areas of Maui to become drier, with the greatest effects seen in the West Maui mountains (Mauna Kahālāwai). Kapu Dec. ¶10. Even after the Commission of Water Resources Management designated interim instream flow standards for Kauaula and Launiupoko streams in 2018, Movants seldom see enough water in Kauaula stream to reach the ocean. *Id.* ¶23. Reduced or absent streamflow harms our abilities to sustain our traditional and customary practices, including our domestic uses of water and kalo farming. *Id.* ¶25. Movants include many residents of Kauaula valley and their families. Kapu Dec. ¶¶5-6. Many of these residents, including Movants are kānaka maoli and conduct traditional and customary practices. *Id.* ¶8 These practices include the perpetuation of native Hawaiian culture and the ahupua'a system and include native Hawaiian traditional and customary kalo farmers on kuleana lands. *Id.* ¶7. These kalo farms are depend on the restoration of Kauaula surface waters. *Id.* ¶17. Article

⁵ Movants have interests in ensuring that GHG emissions consequent to the project, even and especially as the project is being constructed prior to any regulatory approval, are appropriately assessed and minimized. LIC’s initial Application and supporting documents contain no GHG analysis. *See Application inter alia.*

XII, § 7 of the Hawai‘i State Constitution protects the Movants’ traditional and customary rights. Kapu Dec. ¶8.

Anthropogenic climate change can decrease the ratio of more resilient native plant species to non-natives, including fast-growing grasses that choke out native plants that Movants use and celebrate as part of the indigenous heritage of Hawai‘i. Kapu Dec. ¶¶10-11. Climate change impacts include increased risks of wildfire, including for reasons related to the proliferation of fast-growing non-native grasses. Wildfire is a real danger in Kauaula valley where families living on kuleana lands, including Movants, have only one road access available to exit the area and no nearby fire services. *Id* ¶¶12-13. Climate change causes rising sea levels that threaten iwi kupuna with inundation. Many iwi kupuna were traditionally and customarily buried in sandy nearshore areas. Protection of iwi kupuna is part of Movants’ native Hawaiian traditional and customary practice. *Id* ¶¶14-15.

Climate change causes higher “king” tides and storm events that increase the amount of sediment that enters our nearshore reefs in Lahaina. Kapu Dec. ¶18. Reef ecosystems are necessary to sustaining fisheries and limu that Movants gather as part of their traditional and customary practices. *Id* ¶16.

Furthermore, Movants have constitutionally protected property rights consequent to their ownership of lands and rights likely to be affected by the requested Rate Relief Application and proposed CIP Projects under article I, § 5 of the Hawai‘i State Constitution as described *infra* Part III.B. Kapu Dec. ¶¶27, 29.

B. Movants’ property, financial, and other interests are extensively impacted by the requested Rate Relief and proposed CIP Projects.

In addition to the property interests described *supra* Part II.A, the requested Rate Relief and proposed CIP Projects directly impact the property rights of Ke‘eumoku. LIC is a partially owned subsidiary of West Maui Land Company, who has a hydropower plant on ‘āpana 3 of Land Commission Award No. 581 to Laahili, the ownership of which is currently subject to a legal dispute between petitioner Ke‘eumoku and Makila Land Company⁶ in *Makila Land Co. v. Kapu (Laahili)*, SCAP-19-0000457, pending before the Hawai‘i Supreme Court. Kapu Dec.

⁶ West Maui Land Company manages LIC and is the parent company of Makila Land Company. See *Supra* note 1.

¶¶24-26. Also, West Maui Land Company has a water pipeline that travels down to the hydropower plant, an access road, and an irrigation system on a kuleana parcel in Kauaula valley, ‘āpana 1 of Land Court Award No. 6507 to Apana, for which petitioner Ke‘eaumoku is the owner and heir, as determined by a jury of the Circuit Court of the Second Circuit and confirmed on appeal in *Heirs and Assigns of Apana*, 146 Hawai‘i 600, 463 P.3d 1257 (App. 2020) *cert. denied*, SCWC-17-0000803 (Haw. Sep. 25, 2020). The encroaching water system and associated access and structures, whether belonging to LIC, West Maui Land Company, or Makila Land Company, exist on petitioner Ke‘eaumoku’s land, no permission has been given and said entities have NOT sought to obtain permission to date. *Id.* ¶¶27-28.

Movants are and include persons with interests in lands through which LIC’s proposed water system improvements will pass and are also in lands adjacent and nearby those lands. Settled Hawai‘i case law recognizes nearby and adjacent landowners hold a “concrete interest” in proceedings on proposed developments so as to satisfy standing requirements, including requirements for mandatory intervenor status. *See County of Hawai‘i v. Ala Loop Homeowners*, 123 Hawai‘i 391, 419-20, 235 P.3d 1103, 1131 (2010) (recognizing adjoining landownership as a form of standing, but not a private right of action); *Mahuiki v. Planning Comm’n*, 65 Haw. 506, 654 P.2d 874 (1982) (affirming a decision to permit development nearby land in the special management area could only have an adverse impact on an adjacent landowner); *Town v. Land Use Comm’n*, 55 Haw. 538, 524 P.2d 84 (1974) (concluding adjacent and nearby property owners had a property interest in changing the land use entitlements and adjacent and nearby landowners have legal rights as a specific and interested party in a contested case proceeding to change land use designations or entitlements); *East Diamond Head Ass’n v. Zoning Bd. Appeals*, 52 Haw. 518, 479 P.2d 796 (1971) (adjoining property owner has standing to protect property from “threatening neighborhood change”); *Dalton v. City & County of Honolulu*, 51 Haw. 400, 462 P.2d 199 (1969) (property owners across the street from a proposed project have a concrete interest in scenic views, sense of space and density of population).

Additionally, LIC’s proposed water system improvements will use public lands in the right of ways of county roads Mill Street, Aholo Road and Kahaulaleia Road, which roads Movants utilize as residents of Kauaula valley. Kapu Dec. ¶36.

C. The Commission’s approval of the Rate Relief and associated CIP Projects would have many and varied impacts on Movants’ rights and interests.

HAR §16-601-55(b)(3) requires discussion of the “effect of the pending order as to the applicant’s interest[.]” Movants have interests in ensuring that determinations relating all Maui utility systems, including related to capital improvement projects consider all the necessary and required factors, including GHG emissions when making determinations. HRS §269-6(b).

Movants concerns have not been adequately addressed in LIC's Application and supporting documents. For instance, Movants are concerned that the requested Rate Relief and proposed CIP Projects could disturb historic and cultural sites as they have an interest in the appropriate and respectful treatment, protection and preservation of such sites. Kapu Dec. ¶37.

Movants have specific knowledge of the geographic locations and surrounding communities and that would be affected by the proposed Rate Relief and CIP Projects and would be able assist the Commission in its decisions relating to the Application. Kapu Dec. ¶¶5-6. Movants also have information about the impacts of LIC’s water system and efforts to comply with CWRM-mandated restoration on Kauaula stream. This is relevant because LIC has represented that its rate increase is necessary to comply with requirements to restore some water to Kauaula stream, which impacts on the area can inform the Commission’s decision on the requested Rate Relief and proposed CIP Projects. Application at 4-5; *see supra* Part II.A.

D. Other means by which Movants’ interests may be protected are insufficient.

Other means by which Movants’ interests may be protected are insufficient. HAR §16-601-55(b)(4). LIC represents that it owns the lands through which its water system improvements pass and therefore are not seeking certain permits through which processes Movants could potentially raise certain concerns. No other agency with regulatory oversight over greenhouse gas emissions or reliance on fossil fuels has a currently pending application concerning LIC’s water system expansion before it. HRS §269-6(b). In any case, merely deferring to other agencies’ permitting process would expose Movants’ rights and interests to the risks of bureaucratic momentum. This Commission’s decision-making matters because following decisionmakers may inadvertently rely on its actions. “Bureaucratic rationalization and bureaucratic momentum are real dangers, to be anticipated and avoided by [agencies].” *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) quoted by *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010). The accumulated review and approvals from successive agencies for a project may have a compound effect that prejudices Movants.

Movants cannot intervene in other proceedings on LIC's water system improvements and CIP projects because LIC has not sought the Commission's approval for these capital expenditures, even though it apparently seeks to recover these costs through the instant proceeding. LIC represents an application for general rate increase was to follow three (3) months after the filing of the present Application. *See* Application at 3. However, it appears that no such general rate application has yet to be filed. Furthermore, LIC states in its Application that it is "is now looking to complete certain capital improvement projects, which are anticipated to address the transmission of non-potable water in the longer term. These capital improvement projects are set forth in Exhibit G attached hereto and incorporated herein by reference. [LIC] anticipates that these capital expenditures will be addressed as part of the general rate application" Application at 8.

E. No existing parties can adequately represent Movants' interests.

This Commission may consider that no existing parties will represent Movants' interests. HAR §16-601-55(b)(5). LIC, the Commission staff, and the Consumer Advocate cannot adequately represent Movants' interests. *See Hoopai v. Civil Service Comm'n*, 106 Hawai'i 205, 217, 103 P.3d 365, 377 (2004) ("[Proposed intervenors] need only show that the Commission's representation of [its] interests may have been inadequate"). A "lack of adequate representation" also exists where a prospective intervenor would make a "more vigorous presentation" of a side of an argument than the government defendant because the regulation – the validity of which is being challenged – would benefit members of the prospective intervenor group. *New York Public Interest Res. Grp. v. Regents of Univ. of New York*, 516 F.2d 350, 352 (2d Cir. 1975). Movants have more on-the-ground information and would make a more vigorous presentation of their rights, interests, and positions than any existing party.

The Consumer Advocate's responsibilities are to members of the public insofar as they are consumers of a utility and do not extend to Movants' quality of life, environmental concerns and potential irreparable harm to protected traditional and customary rights. HRS §§ 269-51; - 54(b)(7) (the Consumer Advocate's authority is restricted to representing interests of *consumers of utility services* and not as adjacent neighbors or environmentalists). Additionally, the Consumer Advocate lacks the same organizational focus as Movants and does not have on-the-ground knowledge of the impact the requested Rate Relief and proposed CIP projects will have on rights and interest of Movants.

F. Movants' participation will assist the Commission's decision-making

This Commission may consider Movants' ability to assist in the development of a sound record by intervening or participating in these proceedings. HAR §16-601-55(b)(6). For example, the LIC Application for a temporary rate increase of over 100% the previous rates as well as a proposed CIP project(s) costing upwards of \$3.8 million that involves the installation of over two (2) miles of underground large diameter water pipe that will traverse both state and county lands as well as private lands, whose ownership rights are contested, contains no discussion of land rights or even possible environmental impacts as required by HRS § 343-5 as well as discussion of cultural considerations that would be pertinent to the LIC's Application. Movants' evidence and information will assist the Commission in determining the reasonableness of LIC's claimed costs and expenditures in relation to its application for rate relief. Additionally, Movants can provide information about LIC representations concerning the amounts of surface water restored to Kauaula stream over the past years and other conditions concerning surface water availability in Kauaula valley. Kapu Dec. ¶38.

G. Movants' intervention or participation will not broaden issues or delay proceedings

1. *Granting intervention or participation to Movants will not broaden issues.*

Movants' intervention or participation would not broaden issues or delay proceedings as is properly considered here under HAR §16-601-55(b)(7). Movants raise their constitutional rights and property interests because they are relevant to their standing and entitlement to due process protections afforded by participation in the Commission's hearing on LIC's rate increase and associated CIP projects. HRS §269-16(b). Movants' issues concern the Commission's qualitative or quantitative consideration of GHG emissions consequent to approval of the application and whether LIC's water system expansion will impact their constitutional rights and the safety and accommodation of the public. HRS §269-16(b)(16). Movants' interests align with the Commission's pre-existing duty to consider GHG emissions consequent to approval of the application, which issues the Commission is already required to consider as part of these proceedings, as well as the factual basis for LIC's rate relief application. HRS §269-6(b).

2. *Movants' intervention or participation will not unduly delay proceedings.*⁷

Inclusion of Movants would not unduly delay proceedings. The standard is not one under which any potential delay weighs against granting intervention. “Additional parties always take additional time which may result in delay, but this does not mean that intervention should be denied.” 7C Wright, Miller & Kane. *Federal Prac. & Procedure*, Civil 2d. 1913 at 381-82 (2d ed. 1986). Rather, judicial bodies may consider intervention improper only where it “will ‘unduly delay’ the adjudication.” *Id.*; see also *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 265 F.2d 364, 367 n.1 (D.C. Cir. 1959) (“Efficient and expeditious hearing should be achieved not by excluding parties who have a right to participate, but by controlling the proceedings so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence”). Movants’ interests are all pertinent to this proceeding and its intervention or participation would not inject collateral, new issues, wholly unrelated to the underlying litigation. See *Blackfeld Hawaii Corp. v. Travelodge Int’l, Inc.*, 3 Haw. App. 61, 641 P.2d 981 (1983); *Taylor Comm. Grp v. Southwestern Bell Tel. Co.*, 172 F.3d 385, 389 (5th Cir. 1999); *United States v. S. Florida Water Management Dist.*, 922 F.2d 704, 711-712 (11th Cir. 1991).

Additionally, Movants are represented by counsel and this arrangement would serve to increase the efficiency and timeliness of intervention or participation and thus not cause undue delay in the proceedings.

H. Movants’ interests are distinguishable from those of the general public

The Commission may properly consider Movants’ interests which are distinguishable from those of the general public. HAR §16-601-55(b)(8). As indicated *supra* Part II.A and B, Movants include those who are descended from the aboriginal peoples who inhabited the Hawaiian archipelago prior to 1778 and conduct kānaka maoli traditional and customary practices, of which the requested Rate Relief and proposed CIP Projects will likely have significant impacts, therefore have interests distinguishable from the general public.

⁷ LIC's Application stated “an application for general rate increase will be filed within three (3) months of the filing of this application.” However, on the date of filing of this Motion, October 26, 2020 no application has yet to be filed.

Movants rights and interests in a clean and healthy environment, as well traditional and customary practices, and property interests in lands subject to the application may be so directly and immediately affected by the requested Rate Relief and proposed CIP project that Movants hold interests clearly distinguishable from that of the general public. *Compare Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 903 P.2d 1246, 1250, 79 Hawai'i 425, 429 (1995) (*PASH II*) (concluding an unincorporated public interest membership organization had standing to contest a county permitting decision); *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 623 P.2d 431 (1981) (nonprofit group was neither an owner nor an adjoining landowner, but was held to have personal and special aesthetic and environmental interests); *Citizens for the Protection of the North Kohala Coastline v. County of Hawaii*, 91 Hawai'i 94, 101, 979 P.2d 1120, 1127 (1999) (community group alleging recreational and other interests demonstrated standing).

Potential harms to these interests constitute an injury in fact to the interests of Movants, which establishes standing to intervene. *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 321-22, 167 P.3d 292, 314-15 (2007) (showing of an injury in fact to recreational interests of its members would suffice to establish standing to intervene); *Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982) (an injury to a recreational interest is an injury in fact sufficient to constitute standing to assert the rights of the public for purposes of declaratory and injunctive relief) *as interpreted by Citizens v. County of Hawai'i*, 91 Hawai'i 94, 101, 979 P.2d 1120, 1127 (1999) (citizen group had standing to challenge agency's issuance of a permit for coastline resort construction where "injury to its members' quality of life is threatened").

Granting intervention to Movants accords with liberalized standing requirements for environmental and cultural practitioners. In cases where environmental and traditional and customary practitioners interests are at stake, Hawai'i courts "have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements." *Citizens for the Protection of the North Kohala Coastline*, 91 Hawai'i at 101, 979 P.2d at 1127 (citations omitted). "[O]ur basic position has been that standing requirements should not be barriers to justice." *Life of the Land*, 63 Haw. at 174, 623 P.2d at 441. Liberalized standing particularly makes sense in the context of intervention, which provides for nonparties to "represent their interests and arguably improves the court's decision making by allowing the presentation of different viewpoints and evidence." Juliet J. Karastelev, *On the Outside Seeking*

In: Must Intervenors Demonstrate Standing to Join a Lawsuit?, 52 Duke L. J. 455 (2002).

Including intervenors benefits judicial economy because their inclusion may spare parties from relitigation of the same issue. See Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 Mich. J. Race & L. 263, 279–80 (1999) (disposition of issues in a single lawsuit may be achieved through liberal intervention and may avoid subsequent lawsuits).

III. Movants currently take no position on the LIC's temporary rate increase.

Movants currently take no position on LIC's Application for Rate Relief and associated CIP Project. However, LIC's water system has been/ is being substantially expanded without approval or review by the Commission, or any other regulatory body. Based on the concerns listed *supra*, the current Application is not certain and specific enough to provide the Commission with the necessary information it needs to fulfil its constitutionally and statutorily required duties related to evaluating the Application. Kapu Decl. ¶31. Movants can provide the Commission with much needed information, specifically in relation to the impact the requested Rate Relief and proposed CIP Projects will likely have on their property interests, which include a protected property interest in clean/healthful environment as well as traditional and customary practices. For these reasons and at this time, Movants seek to intervene or participate in the instant proceedings in order to assist the Commission in achieving a decision that best complies with the rights of all interested communities and relevant laws. HAR §16-601-55(b)(9).

IV. Request for a Contested Case

Movants seek a contested case on LIC's application. A contested case is a "proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS § 91-1(5). Ongoing proceedings on the LIC Application will constitute a contested case on the constitutional rights and interests of Movants. See *In re Hawaii Electric Light Company*, 145 Hawai'i 1, 445 P.3d 673 (2019); *In re Application of Maui Elec.*, 141 Hawai'i 249, 408 P.3d 1 (2017). However, Movants expressly request a contested case to avoid later confusion as to whether Movants expected its legal rights and interests to also be adjudicated as part of the proceedings on the LIC Application.

V. Conclusion

Based on the foregoing, Movants respectfully request that this Commission grant their request for intervention, or in the alternative, participation, and for a contested case on LIC's Application for Temporary Rate Increase, filed June 5, 2020.

DATED: Honolulu, Hawai'i

October 26, 2020

/s/ Ryan D. Hurley
LAW OFFICE OF RYAN D. HURLEY
RYAN D. HURLEY
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
LAW OFFICE OF LANCE D. COLLINS
LANCE D. COLLINS
Attorneys for Movants NA AIKANE O MAUI,
INC. and J. KE'EAUMOKU KAPU

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of)	Docket No. 2020-0089
)	
LAUNIUPOKO IRRIGATION CO., INC.)	DECLARATION OF J. KE'EAUMOKU
)	KAPU
For Temporary Rate Relief.)	
)	
<hr/>		
		<u>DECLARATION OF J. KE'EAUMOKU KAPU</u>

I, J. KE'EAUMOKU KAPU, do declare under penalty of law that the following is true and correct.

1. I am a resident of the island and county of Maui.
2. I am the president of Movant NA AIKANE O MAUI, Inc., a Hawai'i nonprofit corporation with its primary place of business in Lahaina, Maui (Na Aikane) in the above-captioned proceedings.
3. I am also an individual movant in the above-captioned proceedings.
4. Na Aikane was incorporated to initiate, perpetuate, engage, and foster Maui's community and abroad regarding our Native Hawaiian culture through ahupua'a caretaking, protocols, langue, music, and other means.
5. Na Aikane and its officers, supporters, and program participants include many residents of Kauaula valley and their families.
6. Myself and my 'ohana currently reside in Kauaula valley, Lahaina, Maui.
7. Na Aikane's perpetuation of Native Hawaiian culture and our ahupua'a system depend on a clean and healthy environment and climate.
8. Na Aikane and its officers, supporters, and program participants, including myself, include descendants of the aboriginal peoples who inhabited the Hawaiian archipelago prior to 1778 and conduct kānaka maoli traditional and customary practices.
9. Na Aikane is concerned about the harmful impacts of greenhouse gas emissions on the earth's climate, and more specifically, the impacts of climate change on Hawai'i and our ahupua'a in Kauaula.
10. We understand U.S. Geological Services researchers are predicting that climate change impacts will cause dry areas of Maui to become drier, with the greatest effects seen in the

West Maui mountains (Mauna Kahālāwai).

11. Anthropogenic climate change can decrease the ratio of more resilient native plant species to non-natives, including fast-growing grasses that choke out native plants that we use and celebrate as part of our heritage.

12. Climate change impacts include increased risks of wildfire, including for reasons related to the proliferation of fast-growing non-native grasses.

13. Wildfire is a real danger in Kauaula valley where families living on kuleana lands, including my own, have only one road access available to exit the area and no nearby fire services.

14. Climate change causes rising sea levels that threaten our iwi kupuna with inundation. Many iwi kupuna were traditionally and customarily buried in sandy nearshore areas. I have worked with the Aha Moku o Maui Iwi Kupuna committee to develop protocols for protecting our iwi kupuna as their burials are disturbed by sea level rise.

15. Protection of iwi kupuna is a native Hawaiian traditional and customary practice. Na Aikane and its officers, supporters, and program participants, including myself conduct iwi kupuna protection practices.

16. On October 23, 2020, Applicant Launiupoko Irrigation Company (LIC) disturbed buried iwi kupuna as it was installing its water utility line.

17. I am unaware of and have not been able to find an archaeological assessments or inventory surveys for the LIC water improvements project.

18. Climate change has caused higher “king” tides and storm events that increase the amount of sediment that enters our nearshore reefs in Lahaina. Reef ecosystems are necessary to sustaining fisheries and limu that we gather as part of our traditional and customary practices.

19. Na Aikane and its officers, supporters, and program participants, including myself, are native Hawaiian traditional and customary kalo farmers on kuleana lands that depend on the restoration of Kauaula surface waters.

20. Kauaula and Launiupoko streams depend on water recharge of Mauna Kahālāwai.

21. Over the years, we have seen fewer and fewer days when Kauaula stream reaches the ocean, whereas it used to flow mauka to makai.

22. Mauka to makai stream flow is important in traditional ahupua‘a systems.

23. Even after the Commission of Water Resources Management designated interim

instream flow standards for Kauaula and Launiupoko streams in 2018, we seldom see enough water in Kauaula stream to reach the ocean.

24. Na Aikane and its officers, supporters, and program participants, including myself, have information about the impacts of LIC's water system on Kauaula stream. This is relevant because LIC has represented that its rate increase is necessary to comply with requirements to restore some water to Kauaula stream.

25. Reduced or absent streamflow harms our abilities to sustain our traditional and customary practices, including our domestic uses of water and kalo farming.

26. LIC, as a subsidiary or project managed by West Maui Land Company, has a hydropower plant that it is no longer operating, which therefore no longer reduces GHG emissions by replacing fossil fuels.

27. The LIC hydropower plant exists on 'āpana 3 of Land Commission Award No. 581 to Laahili, the ownership of which is currently subject to a legal dispute between myself and Makila Land Company in *Makila Land Co. v. Kapu (Laahili)*, SCAP-19-0000457, pending before the Hawai'i Supreme Court.

28. West Maui Land Company manages LIC and is the parent company of Makila Land Company.

29. West Maui Land Company has a water pipeline that travels down to the hydropower plant, an access road, and an irrigation system on a kuleana parcel in Kauaula valley, 'āpana 1 of Land Court Award No. 6507 to Apana, for which I am owner and heir, as determined by a jury of the Circuit Court of the Second Circuit and confirmed on appeal in *Makila Land Co. v. Heirs and Assigns of Apana*, 146 Hawai'i 600, 463 P.3d 1257 (App. 2020) *cert. denied*, SCWC-17-0000803 (Haw. Sep. 25, 2020).

30. The encroaching water system and associated access and structures, whether belonging to LIC, West Maui Land Company, or Makila Land Company, exist on my land, no permission has been given and said entities have sought to obtain permission to date.

31. LIC's water system expansion includes proposals to draw on groundwater sources through existing wells. Pumping water from wells may require considerable energy expenditures.

32. Na Aikane and its officers, supporters, and program participants, including myself, are concerned that LIC water system improvements and stream restoration allegedly

giving rise to LIC's current application for a rate increase will require more power/ energy entail increases in greenhouse gas emissions and further reliance on fossil fuel importation.

33. Na Aikane and its officers, supporters, and program participants, including myself, are concerned that LIC and its parent company will continue to illegally use lands, both public and private, for its water system, fail to comply with regulations and reporting requirements to ensure transparency about their operations, and not sufficiently restore surface waters to Kauaula stream as a consequence of their water system expansion.

34. Na Aikane and its officers, supporters, and program participants, including myself, seek to ensure the Commission's decisionmaking on LIC's temporary rate increase will comply with all laws, including those that protect our rights and interests.

35. Na Aikane and I seek intervention to ensure the qualitative or quantitative greenhouse gas emissions impacts of LIC's water system expansions and reconfigurations are considered and to provide necessary on-the-ground information about LIC's proposals to expand and reconfigure its water system.

36. Na Aikane and its officers, supporters, and program participants, including myself use county roads Mill Street, Aholo Road and Kahaulelia Road, which roads Movants utilize as residents of Kauaula valley, whose rights of ways are proposed to be used as part of the LIC water system line improvements.


37. Na Aikane and its officers, supporters, and program participants, including myself are concerned that LIC's water system expansion construction work will disturb further historic and cultural sites and without appropriate and respectful treatment, protection and preservation of such sites.

38. I, and others in Na Aikane, can provide information about LIC representations concerning the amounts of surface water restored to Kauaula stream over the past years and other conditions concerning surface water availability in Kauaula valley

DECLARANT FURTHER SAYETH NAUGHT

DATED: Lahaina, Hawai'i

October 25, 2020


J. KE'EAUMOKU KAPU
Declarant

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of)	Docket No. 2020-0089
)	
LAUNIUPOKO IRRIGATION CO., LTD)	CERTIFICATE OF SERVICE
)	
For Temporary Rate Relief)	
_____)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was duly served on the following parties, at the following email addresses pursuant to the Commission's Order No. 37043, entered March 13, 2020:

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DATED: Honolulu, Hawai'i

October 26, 2020

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