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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COCA COLA BEVERAGE COMPANY MICRONESIA, INC., **Petitioner** **v.** **COMMONWEALTH UTILITIES CORPORATION,** **Respondent.**	**CIVIL ACTION NO. 24-0051** **ORDER DENYING RESPONDENT'S MOTION TO DISMISS**

I. INTRODUCTION

This matter came before the court for a hearing on June 27, 2024, regarding Respondent Commonwealth Utilities Corporation's Motion to Dismiss the Petition for Judicial Review from Coca Cola Beverage Company Micronesia, Inc. ("Coca Cola"). Michael Evangelista, Esq., appeared on behalf of the Commonwealth Utilities Corporation ("CUC"). Steven Pixley, Esq., on behalf of Coca Cola.

II. BACKGROUND

This administrative case relates to a long-standing billing dispute between CUC and customer Coca Cola spanning over a decade. Coca Cola received a bill from CUC on or about July 9, 2013, which was higher than previous CUC billings Coca Cola received. Coca Cola initiated a formal billing dispute on July 16, 2013 pursuant to NMIAC § 50-40-105. After years of waiting, CUC held a two-day hearing in October 2023, and CUC's hearing officer issued an adjudication order ("Administrative Order") a month later on November 20, 2023. The Administrative Order found that

CUC's billings were accurate and rejected Coca Cola's arguments they were not, as well as other defenses regarding CUC's delay in seeking adjustments to its billings. The CUC Board of Directors affirmed the Administrative Order in its January 25, 2024 meeting. CUC counsel informed Coca Cola of the Board's decision on January 29, 2024.

On February 26, 2024, Coca Cola filed a Petition for Judicial Review ("Petition") of the Administrative Order pursuant to 1 CMC § 9112 and NMIAC § 50-40-125. CUC filed a motion to dismiss pursuant to NMI R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. CUC does not dispute the timeliness of the filing of the Petition or that administrative remedies had been exhausted.

III. LEGAL STANDARD

a. Subject Matter Jurisdiction

NMI. R. Civ. P. 12(b)(1) allows a defendant to move for dismissal of the plaintiff's case on grounds that the court lacks jurisdiction over the subject matter.

b. Failure to State a Claim on which Relief May Be Granted

A motion to dismiss a complaint for "failure to state a claim upon which relief can be granted" pursuant to NMI R. Civ. P. 12(b)(6) tests the legal sufficiency of the claims within the complaint.

IV. LEGAL ANALYSIS

a. Exhaustion of Administrative Remedies

At the outset of the hearing, the court raised the issue of exhaustion of administrative remedies and the requirement in 4 CMC § 8158 of CUC's enabling statute. *See Cody v. N. Mariana Islands Ret. Fund*, 2011 MP 16 ¶ 10 (stating that "exhaustion [of remedies] and finality are jurisdictional" and that the court must address them *sua sponte* even if the parties do not raise the issues). Section 8158 directs the appeals of CUC agency decisions to the Commonwealth Public Utilities Corporation

("CPUC"), which hears the appeals pursuant to 4 CMC §§ 8448 and 8449. Under Section 8449, a final decision of the CPUC, including those relating to a complaint against CUC, would be subject to judicial review pursuant to 1 CMC § 9112 of the Administrative Procedure Act ("APA").

In this case, Coca Cola did not file an appeal to CPUC in accordance with Section 8158. In its supplemental brief, CUC agreed with Coca Cola that notwithstanding Section 8158, Coca Cola has exhausted its administrative remedies as it has appealed the decision to the CUC Board of Directors pursuant to NMIAC § 50-40-125, a CUC regulation.

The Supreme Court has acknowledged that Section 9112(d) of the APA provides for judicial review of final agency actions. *Rivera v. Guerrero*, 4 N.M.I. 79 (1993); and *Marianas Insurance Company, Ltd. v. Commonwealth Ports Authority*, 2007 MP 24 ¶ 15. A party challenging an agency decision must avail itself to the administrative appeal process and all administrative remedies provided by statute before seeking judicial review. *Marianas Insurance* at ¶ 12. As such, in *Rivera*, when the aggrieved party in a Commonwealth Ports Authority ("CPA") procurement solicitation failed to file a protest of the award to the board's appellate committee within the period specified in the regulation, it not only "bars. . . further administrative consideration but also judicial review." *Id*. The Court discussed the exhaustion of administrative remedies in a footnote stating in pertinent part:

> Parties seeking review under the APA must first exhaust all intra-agency appeals expressly mandated either by statute or by the agency's regulations. **Such exhaustion requirements create jurisdictional prerequisites to proceeding to court**. Where no statute or regulation mandates exhaustion, a court may proceed to review the agency's final decision under the APA and may not impose additional exhaustion requirement.

Id.at 84, n. 37; *see also Nansay Micronesia Corp. v. Govendo*, 3. N. Mar. I. 12, 19-20 (the court lacked jurisdiction to review a Coastal Resources Management Office decision because the aggrieved person did not timely file with the agency's board of appeals as required by statute).

In *Marianas Insurance*, the Court examined the exhaustion of remedies doctrine in the context of a statute of limitations period running while the petition for judicial review wended through the judicial process. Referencing the footnote in *Rivera*, the Court restated that exhaustion of administrative remedies is a requirement before proceeding to court. *See Marianas Insurance*, 2007 MP 14 ¶ 14. The Court proceeded to discuss the parameters of judicial review, noting that it involved "a broad spectrum of appellate review of agency actions" and included "any matter arising when an agency action is challenged in court." *Id*. ¶ 15. As to the exhaustion of administrative remedies, the Court recognized that that exhaustion doctrine "require[ed] challengers of agency actions and decisions to exhaust all administrative remedies before seeking judicial review." *Id*. ¶ 12. Its purpose is to "give[] an agency an opportunity to correct its own mistakes. . . before judicial review." *Id*. ¶ 13 (internal citations omitted). It also "promotes judicial efficiency" as "[c]laims are generally resolved much more quickly and economically in agency proceedings than in drawn-out judicial proceedings." *Id*. The Court recognized the important role that agencies play as a fact-finder. "When a claimant exercises the right to judicial review after exhausting the available administrative remedies, courts benefit from the existing administrative record." *Id*.

Viewed as jurisdictional, the Court recognized three general categories of exceptions to the exhaustion doctrine: (1) when undue prejudice may result if a party challenging an agency decision does not file suit before exhausting its administrative remedies such as prejudice caused by an unreasonable or indefinite timeframe that creates a conflict with a statute of limitations; (2) when an agency lacks authority or inability to provide adequate relief; and (3) when challenging the adequacy of the administrative procedure. *Id*. ¶ 21.

The Supreme Court revisited the exhaustion doctrine in *Cody*. The aggrieved person sought judicial review of the Northern Mariana Islands Retirement Fund's initial decision rather than wait

for a decision from the administrative hearing officer assigned to his matter. The Court reaffirmed its conclusion in *Marianas Insurance* that "exhaustion and final agency action are jurisdictional prerequisites to judicial review." *Cody* at ¶ 10. As such, even when parties fail to raise the issues, the court has the responsibility to review "exhaustion and finality *sua sponte*." *Id*.; *cf. Appleby v. Villagomez*, 2020 MP 3 ¶ 8 n. 5 (while parties may agree that a court has subject matter jurisdiction to hear a matter, the parties may not consent or waive subject matter jurisdiction); *see also* N. Mar. R. Civ. P. 12(h)(3) (an action must be dismissed if the court determines it lacks subject matter jurisdiction).[1]

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[1] In 2006, the United States Supreme Court in *Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006) observed that the word "jurisdiction" has "many, too many, meanings," finding fault with the Court for its own "profligate. . . use of the term" especially in cases relating to time limits as "mandatory and jurisdictional." *Id*. at 510. The Court in *Arbaugh* acknowledged that it has clarified that "time prescriptions [in statutes], however emphatic, are not properly typed 'jurisdictional,'" citing two opinions, among others, issued in 2004 in *Scarborough v. Principi*, 541 U.S. 401, 414 (2004) and *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). The Court opined that "[i]f the [Congress] clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh*, 546 U.S. at 515-516. Accordingly, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id*. at 516.

The statute at issue in *Arbaugh* involved Title VII of the Civil Rights Act which limited the reach of the employment discrimination provisions to employers having 15 or more employes. After a jury verdict had been reached in favor of the employee, the employer raised the fact that it did not meet the employee threshold. The United States Fifth Circuit Court of Appeals affirmed the dismissal for lack of jurisdiction. The Supreme Court reversed the decision holding that the number of employees is not a jurisdictional issue in the absence of Congress's clear intent to make the employee number requirement jurisdictional.

In *Santos-Zacaria v. Garland*, the United States Supreme Court examined 8 U.S.C. § 1252(d) that requires a noncitizen to exhaust certain administrative remedies prior to challenging an order of removal under the interpretative principle in *Arbaugh*. 598 U.S. 411 (2023). The Court reaffirmed the clear-statement principle stating that "[w]e treat a rule as jurisdictional only if Congress states that it is." *Id.* at 416. The Court emphasized that that it adopted the "clear-statement principle in *Arbaugh* "to leave the ball in Congress' court, ensuring that courts would impose harsh jurisdictional consequences only when Congress unmistakably has so instructed." *Id*. at 416-417.

As such, the exhaustion requirement in Section 1252(d)(1) was found to be "a quintessential claim-processing rule," and not jurisdictional. The Court explained that claim processing rules "govern how courts and litigants operate within those bounds" and "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Santos-Zacaria* at 416. In contrast, jurisdictional rules "sets the bounds of the court's adjudicatory authority." *Id*. Under such rules, the court cannot grant equitable exceptions. *Id*. Because of the harsh consequences of jurisdictional rules, the Supreme Court requires clear legislative intent on limiting court jurisdiction in administrative matters. *Id*. The Court observed that it has "routinely [treated] as nonjurisdictional the threshold requirement that claimants must complete, or exhaust, before filing a lawsuit" and has "yet to hold any statutory exhaustion requirement [as] jurisdictional when applying the clear-statement rule. . . adopted in *Arbaugh*." *Id.* at 417-418.

Examining the exceptions to the administrative exhaustion doctrine set forth in *Marianas Insurance* and comparing them to the facts in *Cody*, the Court found that exhaustion of administrative remedies is not required if doing so would cause "undue prejudice to a subsequent assertion of a court action" such as an "unreasonable or indefinite timeframe for administrative action." *Id.* ¶¶ 13-14. The Court held that when agency regulations do not specify reasonable time limits in its consideration of claims, the claimant/aggrieved party would not be required to exhaust administrative remedies and could proceed directly to court. *Id*. In *Cody*, the Court determined that the aggrieved party's interests "weigh heavily against requiring administrative exhaustion" because the Retirement Fund regulations did not provide any definite timeline in which a decision would be rendered. *Id*. ¶15. The Court cautioned that the holding in *Cody* is limited to the circumstances presented in the case and "is not intended to create a broad exception to the exhaustion doctrine." *Id*. ¶ 17.

In its supplemental brief, Coca Cola raised a similar argument to that raised by the aggrieved party in *Marianas Insurance*, noting the absence of any CPUC regulation or rules or time lines governing the filing of customer complaints. It also noted that there are only two current members of the CPUC which has a total of five members. With only two CPUC members and no regulations on

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The Commonwealth Supreme Court has recognized that Congress codified the exhaustion of remedies requirement in 5 U.S.C. § 704, on which the N.M.I. APA in 1 CMC § 9112(d) is based. *See Marianas Insurance*, at ¶ 14. In *Darby v. Cisneros*, cited in *Rivera*, *Marianas Insurance*, and *Cody*, the U.S. Supreme Court clarified that when Section 704 applies, exhaustion of administrative remedies is required in order to seek judicial review, but only when expressly required by a statute or an agency rule. 509 U.S. 137, 152-53. Discussing the final agency action prong of Section 704, the D.C. Circuit Court of Appeals recognized that although the language regarding final action in the Clean Water Act ("CWA") is similar to the APA's Section 704, finality is jurisdictional under the CWA but not the APA. *POET Biorefining LLC v. EPA*, 970 F.3d 392, 404 (D.C. Cir. 2020) (citing *Valero Energy Corp. v. EPA*, 927 F.3d 532, 536 (D.C. Cir. 2019)).

Under either the clear-statement principle of *Arbaugh* and reaffirmed in *Santos-Zacaria*, or the express exhaustion requirement principle in *Darby*, there is no clear language in the CPUC statute in 4 CMC §§ 8448 and 8449, limiting the court's jurisdiction when administrative remedies have not been exhausted, or mandating exhaustion of remedies before seeking judicial review.

its appeal procedures, Coca Cola argues that filing with CPUC will result in an indefinite timeframe for the final resolution of the billing dispute and for judicial review.

Indeed, the Administrative Code has no published regulations for CPUC, not even one noticing the general public on the procedures of its administrative appeals. CPUC action also requires a quorum of three members to conduct CPUC business. 4 CMC § 8407(b). With no quorum in place, a shroud of indefiniteness hovers over CPUC and its ability to process the appeal in accordance with 4 CMC § 8448 in a timely manner.

Considering that the facts in *Cody* are strikingly similar to the case at hand, there being no definite timeframe in which CPUC could reasonably be expected to render a decision, and the protracted administrative proceedings and long delay by CUC to conduct a hearing on Coca Cola's billing dispute present compelling circumstances to apply the undue prejudice prong of the *Marianas Insurance* exceptions to Coca Cola. Under such circumstances, Coca Cola would be unduly prejudiced if it were required to file an appeal of CUC's Administrative Order to CPUC. Accordingly, on such grounds the court has jurisdiction over Coca Cola's petition for judicial review.

As CUC does not dispute Coca Cola's position that it has exhausted administrative remedies, the court proceeds to address CUC's arguments for dismissal of Coca Cola's Petition.[2]

b. Motion to Dismiss

CUC brings attention to Coca Cola's s lack of adherence to several requirements of the rules governing administrative appeals. CUC points to non-conformance to the petition form as prescribed

[2] In its supplemental brief, CUC argues the appeal process in its regulations remains in effect notwithstanding the express language in 4 CMC § 8158 mandating any "person aggrieved by" CUC action, or inaction, to obtain CPUC review under Section 8448. CUC's reliance on the principles of statutory construction (i.e., implied repealers are disfavored) to support its argument is misplaced. The very statutory section which had authorized direct judicial review of CUC actions under the APA was specifically repealed by PL 15-40 which established the CPUC. The PL 15-40 amendments remained intact in PL 16-17, which contained comprehensive amendments to CUC's enabling statute. CUC should revise its regulations to reflect current applicable law that brings it under the ambit of CPUC oversight and review.

in Rule 2(c), the late filing of docketing statement and designation of record and the proof of service on the Office of the Attorney General ("OAG"), and the filing of a superfluous summons "proscribed by [NMI Rule Admin. App. 2(f)]." Lastly, CUC notes that Coca Cola did not designate parts of the administrative record deemed material to the questions on the appeal including the relevant proceedings to be transcribed pursuant to NMI Rule Admin. App. 4.

Because of Coca Cola's cumulative errors, CUC claims that the court lacks subject matter jurisdiction. Alternatively, CUC takes the position that Coca Cola does not raise in the Petition any specific errors made by the Hearing Officer in the Adjudication Order that warrant reversal.

Arguing against dismissal, Coca Cola's maintains that the court has jurisdiction because Coca Cola has exhausted administrative remedies which CUC has not challenged.

Second, Coca Cola maintains its petition does comply with Rule 2(c) because there are specific references in the petition to the incorporation rule which NMI R. Civ. P. 10(c) permits by which the contents of Adjudication Order which is the subject of this review were fully incorporated herein by reference in the petition.

1. Subject Matter Jurisdiction

Coca Cola's flaws in the petition, the late filing of the docketing statement and designation of record, and late service on the Office of the Attorney General do not deprive the court of subject matter jurisdiction.

The Rules of Procedure for Administrative Appeals authorize the court to grant a petitioner ten days within which to file an amended petition upon granting dismissal. *See* NMI R. P. Admin. App. 2(g)(1). Only if a non-diligent petition fails to take action within the ten-day period, or if a jurisdictional defect cannot be cured by amendment may a petition be dismissed outright with prejudice. The rules also provide discretion to the court to modify or suspend deadlines or any other

requirements in the interest of fairness and judicial economy. *See* NMI R. P. Admin. App. 7. Such considerations compel the court to accept the late filing of the docketing statement and the designation of record. The court notes that CUC will have the right and yet another opportunity to file a response to Coca Cola's arguments to be presented in its brief under Rule 5(b).

In sum, an imperfect petition or the delayed filing of the documents at issue in this case does not strip the court of subject matter jurisdiction.

i. Coca Cola's petition form compliance, or its deviation therefrom, does not render this court with a lack of subject matter jurisdiction.

Close scrutiny of Coca Cola's petition shows only two minor technical flaws: the omission of the case title and the administrative case number. The Petition in paragraphs 5 through 11 makes plainly clear that the matter for judicial review arises from a longstanding billing dispute between Coca Cola and CUC. Finally adjudicated by a CUC Hearing Officer last year, the administrative decision in favor of CUC was affirmed by the CUC Board of Directors. Coca Cola states in Paragraph 5 that it was "denied procedural due process" providing the grounds for its appeal to the Superior Court.

CUC has not made a good faith argument that it has been prejudiced somehow by the absence of an express statement in the Petition on the case title and number. The information is included in Exhibit A, the administrative order incorporated by reference into the Petition.

In sum, the Coca Cola has given sufficient notice to CUC of its intent to seek judicial review and the basis for judicial review. Coca Cola has more than adequately stated in paragraphs 5 through 11, the relevant facts and the type of proceeding and nature of the ruling by the agency required by Rule 2(c)(2) and (3). Admittedly terse but sufficiently noticed, the last sentence in Paragraph 5 states denial of procedural due process as the ground for the Petition.

ii. The late filing of the Docketing Statement does not render the court with a lack of subject matter jurisdiction.

A docketing statement based on the format provided in the Rules of Procedure for Administrative Appeal was supposed to have been filed with the Petition according to Rule 2(e) of NMI R. P. Admin. App. The docketing statement was filed late on March 28, 2024. Coca Cola has also filed the designation of the record on March 28, 2024, which is arguably untimely.

As stated, Rule 7 authorizes the court to modify or suspend the rules and order proceedings in the interest of fairness or judicial economy. CUC has not stated that it has been prejudiced by Coca Cola's late filings. Although filed after the motion to dismiss and without leave of court, in the interest of judicial economy, the court accepts the late filing. Accordingly, Coca Cola is deemed in compliance with NMI R. P. Admin. App. 2(e) and 4(a).

iii. Late service on the Office of the Attorney General does not render the court with a lack of subject matter jurisdiction.

Rule 2(f) requires service of the Petition and Docketing Statement on not only CUC but also the Office of the Attorney General ("OAG") within 20 days after filing the Petition. The OAG was served on April 2, 2024, more than 20 days after the deadline had passed. The court takes into consideration that the OAG had actual notice through Coca Cola counsel's email of February 28, 2024 of the petition filing which included former assistant attorney general Hunter Hunt. As such, pursuant to Rule 7, the late service will be deemed in compliance with Rule 2(f).

Based on the foregoing reasons, the court finds that it has subject matter jurisdiction over this case. Respondent's arguments for lack of subject matter jurisdiction are insufficient under NMI R. Civ. P. 12(b)(1).

2. Failure to State a Claim upon which Relief may be Granted

The court finds that Coca Cola's petition and docketing statement complies with the Rules of Procedure for Administrative Appeals and has therefore stated a claim upon which relief may be granted in satisfaction of NMI R. Civ. P. 12(b)(6). As such, CUC's alternate legal basis and rationale for dismissal is without merit.

V. CONCLUSION

The court has jurisdiction to hear Coca Cola's appeal even though it did not appeal CUC's Administrative Order to the CPUC. The circumstances of this case warrant the application of the undue prejudice exception to the exhaustion doctrine. The long delay by CUC to conduct a hearing and issue a decision on dispute and there being no definite timeframe specified by statute for CPUC to timely address the appeal, Coca Cola was not required to exhaust its administrative remedies before CPUC and could proceed directly to court for judicial review.

Further none of the form and filing flaws that CUC raises in its Motion warrants dismissal with prejudice. Admittedly, the filing of the initial documents to effectuate appeal of the administrative decision to and obtain jurisdiction of the Superior Court was less than perfect. Petitioner's counsel is advised to take notice of the requirements of the Rules of Procedure for Administrative Appeals which has been in effect since 2010. Late filings should be acknowledged, and leave of court should be sought prior to filing. As explained above, although late, the late filings and service on the OAG are deemed in compliance with Rule 2(f).

As the requisite initial documents have already been filed, the Court hereby **DENIES** CUC's Motion to Dismiss and further **ORDERS** the following:

1. CUC shall file a written notice/report on the status of the certification of record including all necessary transcripts and exhibits to be filed with the court within five days of this Order.

2. Pending the certification of record, the Court will set a briefing schedule with an opening brief from Coca Cola as the petitioner which shall comply with Rule 5(a)(1) through (5); followed by CUC's brief in opposition, pursuant to Rule 5(b); and Coca Cola's reply brief within 10 days after the receipt of the brief in opposition.

SO ORDERED this 9th day of August, 2024.

/s/
LILLIAN ADA TENORIO
Associate Judge