

Electronically Filed
Supreme Court
SCPW-20-0000568
16-SEP-2020
02:28 PM

SCPW-_____

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN THE MATTER OF THE	)	ORIGINAL PROCEEDING:
APPLICATION OF HAWAII ELECTRIC)	
LIGHT COMPANY, INC. [DKT. NO.	)	PETITION FOR EXTRAORDINARY WRIT
2017-0122]	)	AND/OR FOR WRIT OF MANDAMUS
_____)	
)	
HU HONUA BIOENERGY, LLC,)	
)	
Petitioner,)	
)	
vs.)	
)	
JAMES P. GRIFFIN, CHAIRPERSON,)	
STATE OF HAWAII PUBLIC UTILITIES)	
COMMISSION; JENNIFER M. POTTER,)	
COMMISSIONER, STATE OF HAWAII)	
PUBLIC UTILITIES COMMISSION;)	
LEODOLOFF R. ASUNCION,)	
COMMISSIONER, STATE OF HAWAII)	
PUBLIC UTILITIES COMMISSION;)	
)	
Respondents.)	
_____)	

**PETITION FOR EXTRAORDINARY WRIT
AND/OR FOR WRIT OF MANDAMUS**

DECLARATION OF BRUCE D. VOSS

EXHIBITS 1-7

CERTIFICATE OF SERVICE

Of Counsel:

BAYS LUNG ROSE & HOLMA

BRUCE D. VOSS 6532-0

Attorney at Law

A Law Corporation

JOHN D. FERRY III 9143-0

Topa Financial Center

700 Bishop Street, Suite 900

Honolulu, Hawaii 96813

Telephone: (808) 523-9000

Facsimile: (808) 533-4184

Email: bvoss@legalthawaii.com

jferry@legalthawaii.com

YAMAMOTO CALIBOSO

A Limited Liability Law Company

DEAN T. YAMAMOTO 5387-0

WIL K. YAMAMOTO 7817-0

BRADLEY S. DIXON 10192-0

YAMAMOTO CALIBOSO

A Limited Liability Law Company

1100 Alakea Street, Suite 3100

Honolulu, Hawaii 96813

Telephone: (808) 540-4500

Facsimile: (808) 540-4530

Email: dyamamoto@ychawaii.com

wyamamoto@ychawaii.com

bdixon@ychawaii.com

Attorneys for Petitioner

HU HONUA BIOENERGY, LLC

**PETITION FOR EXTRAORDINARY WRIT
AND/OR FOR WRIT OF MANDAMUS**

Petitioner HU HONUA BIOENERGY, LLC (“Hu Honua”), a Delaware limited liability company doing business in the State of Hawaii, by and through its attorneys, Bays Lung Rose & Holma, hereby petitions this Honorable Court for an Order granting an Extraordinary Writ and/or a Writ of Mandamus, directing Respondents James P. Griffin, Chairperson, State of Hawaii Public Utilities Commission, Jennifer M. Potter, Commissioner, State of Hawaii Public Utilities Commission, and Leodoloff R. Asuncion, Commissioner, State of Hawaii Public Utilities Commission (hereafter, “PUC”) to:

1. Vacate Order No. 37205, issued July 9, 2020, and Order No. 37306, issued September 9, 2020,¹ in PUC Docket No. 2017-0122; and
2. Promptly schedule and conduct an evidentiary hearing on the request for approval of the Amended & Restated Power Purchase Agreement (“A&R PPA”) for the Hu Honua bioenergy project, and make findings sufficient to determine whether the PUC satisfied its obligations under Hawaii Revised Statutes (“HRS”) § 269-6(b), as ordered by the Hawaii Supreme Court in In re Hawaii Electric Light Company, Inc., 145 Hawai`i 1, 445 P.3d 673 (2019).

This Petition is made pursuant to HRS § 602-5(a)(3); Rule 21 of the Hawaii Rules of Appellate Procedure (“HRAP”); the Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 5 and Article XI, Section 9 of the Hawaii Constitution; and is supported by the Statement of Reasons herein.

¹ PUC Order No. 37205 is attached hereto as Exhibit 2; PUC Order No. 37306 is attached hereto as Exhibit 7.

I. INTRODUCTION

On May 10, 2019, this Court directed the PUC and its Commissioners to hold an evidentiary due process hearing on remand and to “give explicit consideration to the reduction in GHG emissions in determining whether to approve the [A&R] PPA, and make the findings necessary for this [C]ourt to determine whether the PUC satisfied its obligations under HRS § 269-6(b).”² The PUC and its Commissioners refused to comply with this Court’s mandate. Instead, after prolonging and delaying the proceeding for some 14 months,³ on July 9, 2020 the PUC issued an Order revoking the Hu Honua project’s waiver from the PUC’s Competitive Bidding Framework, effectively killing the project. Without any notice or opportunity for Hu Honua to be meaningfully heard, the PUC’s action destroyed a project that is 99 percent complete; has cost nearly \$500 million to build; and would generate more than 200 jobs on Hawaii Island at full operation. During a global pandemic and severe statewide economic recession, the PUC’s action is inexplicable – and unconscionable.

By this Petition, Hu Honua asks the Court to command the PUC Commissioners to do what this Court ordered in 2019: promptly consider the project’s GHG emissions reduction and conduct an evidentiary hearing to determine whether to approve the A&R PPA for the Hu Honua project, in accordance with the requirements of due process and HRS § 269-6(b). Failure to provide immediate relief would cause irreparable harm to Hu Honua’s constitutional due process rights; catastrophic financial damage to Hu Honua; and a devastating loss of income to the Hu Honua workforce and their families during this pandemic.

² In Re HELCO, 145 Hawaii 1, 24-25, 445 P.3d 673, 696-697 (emphasis in original).

³ By comparison, when the application for approval of the A&R PPA for this project was submitted on May 9, 2017, the PUC took less than three (3) months to review and issue its decision approving the project on July 28, 2017.

Hu Honua acknowledges that this Petition seeks extraordinary relief not ordinarily granted by this Court. But this is an extraordinary situation, in extraordinary times. There is no prejudice to the PUC and its Commissioners to have to do what they were ordered to do. By contrast, any further delay will deny Hu Honua “adequate relief”. It would be the most hollow of victories for this Court to rule on an appeal a year or more from now that the PUC improperly failed to follow this Court’s remand instructions and its own rules and procedures, and, most importantly, violated Hu Honua’s constitutional rights. By then, the Hu Honua project and all of its potential benefits to Hawaii Island – e.g., renewable firm energy generation, economic stimulation within the community, employment creation (through direct jobs at the Hu Honua facility and indirect forestry, harvesting and planting, and transport hauling jobs), promotion of long-term local agriculture industry, increases in energy security, and the ability to expedite the retirement fossil-fuel plants – will be long gone. And the message to the investment community will be unambiguous – investment in reliance on Hawaii’s administrative and regulatory orders should be avoided. The resulting negative impact on Hawaii’s economy is inevitable.

II. STATEMENT OF FACTS

A. Hu Honua’s Project

The Hu Honua project (“Project”) is a state-of-the-art bioenergy facility that would provide renewable, firm, dispatchable energy; support Hawaii’s clean energy goals; and revitalize East Hawaii Island’s agricultural sector. Under the A&R PPA previously approved by the PUC, Hu Honua has built a biomass power plant that will produce up to 21.5-megawatts of committed capacity and 30 megawatts of available capacity for Hawaii Electric Light Co., Inc.’s (“HELCO”) electrical grid.⁴

⁴ See Exhibit 3, p. 6 (citing Order No. 34597, pp. 5-6, in PUC Docket No. 2017-0122)

Unlike other alternative energy sources such as solar and wind, which rely on favorable weather conditions (even with 4-hour duration battery energy storage systems), the Hu Honua Project would provide firm dispatchable electricity 24 hours a day, seven days a week, all year-round. By providing that resource adequacy and system security to the HELCO power grid, the Hu Honua Project would enable HELCO to deactivate and retire its existing fossil fuel-fired generators on Hawaii Island.⁵ Hu Honua would also significantly reduce GHG emissions as Hu Honua committed in the underlying proceeding to plant and grow more trees than it harvests from commercially managed forests, and has also committed that the Project will be carbon negative as soon as practicable.⁶ To further reduce carbon emissions, Hu Honua would also plant more than 1.25 million trees through the National Forest Foundation during the first five years of the Project.⁷

B. The PUC Twice Approves Waivers From the PUC’s Competitive Bidding Framework For the Project

In PUC Docket No. 2012-0212, the PUC conducted a detailed review of the Hu Honua Project’s benefits, and approved Hu Honua’s original Power Purchase Agreement (“Original PPA”) with HELCO.⁸ The Original PPA for the Project was negotiated pursuant to a waiver granted by the PUC in 2008 under Part II.A.3.d of the PUC’s Competitive Bidding Framework.⁹ Part II.A.3.d of the PUC’s Framework provides:

the Commission may waive this Framework or any part thereof upon a showing that the waiver will likely result in a lower cost supply of electricity to the utility's

⁵ See Exhibit 3, p. 43-45

⁶ See Exhibit 3, p. 65

⁷ Id.

⁸ See Exhibit 3, p. 4 (citing PUC Order No. 31758, dated December 20, 2013, in PUC Docket No. 2012-0212)

⁹ See Exhibit 3, p. 5 (citing Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008 pp. 7-9).

general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.

(emphasis added). The PUC granted the waiver to provide an expeditious means to increase the amount of firm renewable energy on HELCO's system.¹⁰ Hu Honua spent over one hundred fifty million dollars towards completion of the Project following the approval of the Original PPA.

On May 9, 2017, HELCO filed an A&R PPA between Hu Honua and HELCO with the PUC, which subsequently transferred it into PUC Docket No. 2017-0122. The A&R PPA amended the Original PPA in two primary ways: (a) it provided a time extension of two contract milestones for the completion of the biomass facility and (b) it reduced the contract's pricing of Hu Honua's energy and committed Hu Honua to a longer contract term. In Order No. 34726 (the "2017 D&O"), the PUC approved the A&R PPA, finding that "many of the commission's findings and conclusions in the Underlying Decision and Order remain relevant and applicable." The PUC's 2017 D&O again granted the Project a waiver from the Competitive Bidding Framework, finding that the:

opportunity to increase the amount of renewable energy on HELCO's system, without increasing the amount of as-available, intermittent renewable energy resources on HELCO's system[,] continues to be in the public interest. . . Moreover, the Project provides the most viable opportunity to add firm, dispatchable, renewable generation in the near term, and requiring the Project to enter the next round of competitive bidding would very likely forego the opportunity to utilize the federal ITC benefits.¹¹

¹⁰ Id. (citing Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008, pp. 6-9)

¹¹ See Exhibit 3, p. 8 (citing the PUC's 2017 D&O No. 34726, p. 30)

C. Hu Honua Spends Hundreds of Millions of Dollars to Complete the Project, as Ordered by the PUC

The A&R PPA set a Commercial Operation Date for the Project, 18 months after PUC Approval as defined in the A&R PPA. The PUC’s 2017 D&O directed Hu Honua to meet that deadline:

[T]he commission expects Hu Honua and HELCO to make all reasonable attempts to complete the project according to this schedule and does not expect future requests to extend the Commercial Operation Date deadline.¹²

In August 2017, Life of the Land (“LOL”) appealed the PUC’s 2017 D&O to the Hawaii Supreme Court. During the appeal, LOL moved to stay the 2017 D&O, which the Supreme Court denied.¹³ Given the denial of the stay, under Hawaii law the 2017 D&O was still effective¹⁴ and Hu Honua was still obligated to comply with the PUC’s directive to “make all reasonable attempts to complete the project” in a timely manner. Hu Honua did just that.

Since the PUC’s July 28, 2017 approval of the A&R PPA and renewed approval of the waiver from the PUC’s Competitive Bidding Framework, Hu Honua has incurred \$314,454,846.00 in Project development and construction costs and accrued interest.¹⁵ In total, Hu Honua has incurred \$474,027,138.00 in Project costs, which represents a Project completion percentage of approximately 99 percent.¹⁶

¹² 2017 D&O at 61 (emphasis added);

¹³ See In re HELCO, SCOT-17-0000630, Order Denying Motion for Stay, issued on April 16, 2018.

¹⁴ See HRS § 269-15.5.

¹⁵ See Exhibit 3, Affidavit of Jon Miyata, ¶ 4.

¹⁶ Id.

D. The Hawaii Supreme Court Orders the PUC to Hold An Evidentiary Hearing on Hu Honua’s A&R PPA, With Findings to Determine Whether the PUC Satisfied Its Obligations Under HRS § 269-6(b)

On May 10, 2019, the Hawaii Supreme Court issued its opinion in In re Hawai`i Elec. Light Co., 145 Hawai`i 1, 445 P. 3d 673 (2019). The Court found that the PUC’s proceeding was a contested case hearing because it was required by constitutional due process; that LOL had standing to appeal; and that the PUC’s 2017 D&O did not satisfy HRS § 269-6(b) because the PUC failed to make sufficient findings regarding GHG emissions. The Court remanded “for further proceedings,” stating:

[o]n remand, the PUC shall give explicit consideration to the reduction of GHG emissions in determining whether to approve the [A&R] PPA, and make the findings necessary for this court to determine whether the PUC satisfied its obligations under HRS § 269-6(b).¹⁷

The Court explained that “procedural due process necessitated a contested case hearing” because the PUC’s 2017 D&O “adversely affected LOL’s constitutionally protected right”. The Court held the PUC must hold an evidentiary hearing on the A&R PPA, to comply with constitutional requirements:

In order to comply with statutory and constitutional requirements, the [Commission’s] post-remand hearing must afford LOL an opportunity to meaningfully address the impacts of approving the [A&R] PPA on LOL’s members' right to a clean and healthful environment, as defined by HRS Chapter 269. The hearing must also include express consideration of GHG emissions that would result from approving the [A&R] PPA, whether the cost of energy under the [A&R] PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the [A&R] PPA are prudent and in the public interest, in light of its potential hidden and long-term consequences.¹⁸

¹⁷ In re HELCO, 145 Hawai`i at 25, 445 P.3d at 697 (emphasis in original).

¹⁸ Id. at 26, 445 P.3d at 698 (emphasis added).

E. The PUC Delays Scheduling an Evidentiary Hearing to Consider the A&R PPA, Then Revokes the Project’s Waiver from the Competitive Bidding Framework, Killing the Project

On remand, in June 2019 the PUC issued an Order re-opening the docket for the Hu Honua A&R PPA, with a procedural schedule including the evidentiary hearing required by the Hawaii Supreme Court.¹⁹ The PUC directed the parties in the docket to provide updates and additional briefing regarding HELCO’s system and their GHG analyses. By March 6, 2020, the parties filed supplemental briefing as directed by the PUC;²⁰ GHG emissions analyses for the Project and briefing in response thereto;²¹ written prehearing testimonies of witnesses;²² and information request responses.²³ All that remained was for the PUC to set an evidentiary hearing date, related pre-hearing motions, witness list, and exhibit filing deadlines, and post-hearing briefing deadlines.

The PUC then began to drag its feet. On March 17, 2020, in response to an inquiry from Hu Honua, the PUC’s counsel stated he was working on an order to address the remaining schedule but that it would take one to two months to issue—an unusually long time for a simple procedural order. On May 8, 2020, Hu Honua filed a letter with the PUC asking the PUC to hold a scheduling conference so that the evidentiary hearing and associated procedural deadlines could be set.²⁴ Two weeks later, the PUC responded by letter, stating that it needed

¹⁹ See Exhibit 3, p. 11 (citing Order No. 36382, Order Reopening Docket, filed on June 20, 2019, p. 1).

²⁰ The parties filed the supplemental briefing directed by the PUC on September 17, 2019.

²¹ GHG analyses were filed by HELCO and Hu Honua on October 21, 2019.

²² Prehearing testimonies were filed on January 28, 2020.

²³ Information Requests and Supplemental Information Request were filed and responded to between October 28, 2019 and March 6, 2020.

²⁴ See Exhibit 3, p. 14 (citing letter From: W. Yamamoto To: PUC Re: Docket No. 2017-0122: Scheduling Conference Request, filed May 8, 2020, p 1).

time to reflect on recent events, including the Covid-19 pandemic and its effects on the State.²⁵ Three more weeks passed. By letter to the PUC dated June 10, 2020, Hu Honua reiterated its request that the PUC set the evidentiary hearing; Hu Honua noted the PUC’s March 13, 2020 statement,²⁶ in which the PUC said that in light of the effects of COVID-19 on the State, the PUC would prioritize requests that (1) achieve the State’s clean energy and climate goals and (2) support economic recovery from the COVID-19 emergency.²⁷ Hu Honua explained how its Project met those priorities.²⁸ The PUC did not respond. On the morning of July 9, 2020, Hu Honua sent the PUC another letter, explaining how the ongoing delays were negatively impacting the Project and jeopardizing more than 50 existing jobs.²⁹ Later that morning, Hu Honua received the Order from the PUC, effectively killing the Project.

In Order No. 37205 (“Order Revoking Waiver”), the PUC revoked the Hu Honua Project’s waiver from the PUC’s Competitive Bidding Framework – even though there are no rules or procedure exist in the PUC’s own framework to rescind such a waiver. In an awkward attempt to sidestep its lack of authority for the action, the PUC characterized its revocation as a denial of HELCO’s request for a waiver.³⁰ However, no request for a waiver was pending before the PUC during the re-opened docket, as no renewed request for a waiver was necessary or had

²⁵ Id. (citing letter From: PUC To: W. Yamamoto Re: Docket No. 2017-0122, filed May 22, 2020, at 1).

²⁶ See Statement from Hawaii Public Utilities Commission on the COVID-19 Emergency, available at the Commission’s website at https://puc.hawaii.gov/wp-content/uploads/2020/03/Statement-from-Hawaii-Public-Utilities-Commission-on-COVID_3-24-2020.pdf.

²⁷ See Exhibit 3, p. 15 (citing Hu Honua’s June 10, 2020 Letter, pp 1-2).

²⁸ Id., pp. 2-4.

²⁹ Id. at 1.

³⁰ See Exhibit 2, Order Revoking Waiver, pp. 26-43.

been made.³¹ In fact, what the PUC did was revoke a waiver that it had initially approved in 2008 and then approved again in the 2017 D&O. Having revoked the waiver, the PUC then dismissed the request for approval of the Project’s A&R PPA, and refused to “address the remaining issues in this proceeding” – including the Hawaii Supreme Court’s mandate for an evidentiary hearing and explicit consideration of GHG emissions – claiming all other issues were now “moot”.³²

F. The PUC Rejects Hu Honua’s Request to Reconsider the Order Revoking Waiver

On July 20, 2020, Hu Honua timely filed a Motion for Reconsideration with the PUC, contending that the Order Revoking Waiver disregarded the Hawaii Supreme Court’s mandate to conduct an evidentiary hearing on the A&R PPA; violated Hu Honua’s constitutional due process rights; and blatantly misstated the facts and evidence in the PUC record, among other arguments.³³ On August 23, 2020, Hu Honua filed responses to other parties’ oppositions to the Motion, detailing how the PUC’s Order Revoking Waiver violated procedural due process by relying on “new information” outside the PUC docket without giving Hu Honua any notice or opportunity to respond to that information.³⁴

On September 9, 2020, the PUC denied Hu Honua’s Motion for Reconsideration, saying Hu Honua’s facts and contentions were “unconvincing”.³⁵ The PUC stated it was not “reasonable” for Hu Honua to rely on the PUC’s directive in the PUC’s 2017 D&O to “make all reasonable attempts to complete the Project,” and to spend the more than \$300 million since

³¹ Id.

³² Id., p. 2

³³ See Exhibits 3 and 4.

³⁴ See Exhibit 5, pp 20-23.

³⁵ See Exhibit 7, PUC Order No. 37306, filed September 9, 2020 (“Order Denying Reconsideration”).

2017 necessary to complete the Project.³⁶ The PUC contended that only LOL, and not Hu Honua, was entitled to constitutional due process and an evidentiary hearing.³⁷ The PUC was dismissive of its own prior references to the COVID-19 Pandemic, saying those statements were “merely to illustrate the sensitivity of customer bill impacts during this time.”

G. The PUC Action Killing the Project Will Cause Devastating Employment and Financial Consequences

The PUC’s cavalier disregard for Hu Honua and its employees is stunning – particularly as the COVID-19 Pandemic has driven Hawaii Island’s unemployment rate up to 12.8 percent.³⁸ In this pre-operation phase, Hu Honua currently has more than 60 employees and contractors on payroll; Hu Honua has continued to pay all of those employees and contractors through the many PUC delays. During operations at full capacity, Hu Honua would create approximately 188 jobs on Hawaii Island and 227 jobs statewide, including 38 plant operation jobs; 66 forestry jobs; 12 trucking jobs; and 111 additional indirect jobs.³⁹ The projected annual payroll would be approximately \$11.2 million. All of those jobs and income – for the next 30 years, will be lost unless the PUC’s Order Revoking Waiver is promptly reversed. Hu Honua will also lose its \$474 million investment, along with more than \$100 million in federal investment tax credits.⁴⁰ In addition, the State could lose at least \$70 million in federal New Market Tax Credits for community and economic development.⁴¹ At a time when Hawaii

³⁶ See *id.*, pp. 23-28.

³⁷ See *id.*, pp. 28-36.

³⁸ See Hawaii Department of Labor, August 22, 2020 press release:

<http://labor.hawaii.gov/blog/news/hawaiis-unemployment-rate-at-13-1-in-july>

³⁹ See Exhibit 4, pp. 17-18 (citing Hu Honua IR response 401, filed January 28, 2020)

⁴⁰ See Exhibit 3, Affidavit of Eli Katz ¶ 9-13.

⁴¹ See Exhibit 3, Affidavit of Jon Miyata, ¶ 5-9.

desperately needs capital investment to create jobs, the PUC’s action sends a chilling message to investors that this State’s word cannot be trusted.

III. STATEMENT OF JURISDICTION

The PUC Commissioners have abdicated and violated their official duties. Accordingly, Hu Honua requests the Supreme Court accept jurisdiction pursuant to HRS § 602-5(a)(3), which provides that “the supreme court shall have jurisdiction and powers as follows: [...] [t]o exercise original jurisdiction [...] if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices...”

IV. STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

This Petition presents the following issues: (1) Whether the PUC and its Commissioners ignored and violated the Hawaii Supreme Court’s instructions on remand and Hu Honua’s constitutional due process rights, including Hu Honua’s right to an evidentiary hearing, when the PUC summarily revoked the Project waiver from competitive bidding and killed the Project; (2) Whether the PUC Commissioners’ duty to hold a pre-revocation evidentiary hearing is enforceable through a writ of mandamus; and (3) Whether under these extraordinary circumstances, a writ of mandamus compelling the PUC Commissioners to promptly hold an evidentiary hearing is the only adequate relief available.

This Petition seeks the following relief, directing the PUC Commissioners to:

1. Vacate PUC Order No. 37205, issued July 9, 2020, and PUC Order No. 37306, issued September 9, 2020; and
2. Promptly schedule and conduct an evidentiary hearing on the request for approval of the A&R PPA for the Hu Honua bioenergy project, and make findings sufficient to

determine whether the PUC satisfied its obligations under HRS § 269-6(b), as ordered by the Hawaii Supreme Court in In re Hawaii Electric Light Company, Inc., 145 Hawai`i 1, 445 P.3d 673 (2019).

V. STATEMENT OF REASONS FOR ISSUING THE WRIT

“A writ of mandamus and/or prohibition is an extraordinary remedy”, but is necessary here, where Hu Honua has “a clear and indisputable right to the relief requested,” and there are no “other means to redress adequately the alleged wrong or to obtain the requested action.” See Kema v. Gaddis, 91 Hawai`i 200, 204, 982 P.2d 334, 338 (1999) (citing Straub Clinic & Hospital v. Kochi, 81 Hawai`i 410, 414, 917 P.2d 1284, 1288 (1996)).

More specifically, and as explained in further detail below, a writ of mandamus is appropriate and necessary because Hu Honua had a “clear and certain” right to a pre-revocation evidentiary hearing; the PUC’s duty to notice and hold such an evidentiary hearing was “ministerial” and “plainly prescribed”; and no other remedy or means of review will provide Hu Honua with the immediate relief that it urgently needs. See In re Disciplinary Bd. of the Haw. Supreme Court, 91 Hawai`i 363, 368, 984 P.2d 688, 693 (1999) (citing Azurin v. Von Raab, 803 F.2d 993 (9th Cir. 1986), cert. denied, 483 U.S. 1021 (1987)). The PUC Commissioners had no discretion to ignore the mandate from this Court, and certainly not in a manner that trampled on Hu Honua’s constitutional rights.

A. Following Remand, the PUC Ignored and Violated the Supreme Court’s Instructions and Hu Honua’s Rights, Including Hu Honua’s Right to a Pre-Revocation Evidentiary Hearing

1. The PUC Subverted the Supreme Court’s Explicit Instructions on Remand

a) The Scope of Remand

Although the Project’s most recent waiver from the PUC Competitive Bidding Framework was approved as part of the 2017 D&O from which LOL noticed its appeal, LOL did not challenge the waiver, and the Court left the A&R PPA’s waiver undisturbed. See In re HELCO, 145 Hawai`i at 10, 26, 445 P.3d at 682, 698. This Court was clear with its instructions on how to conduct further proceedings in the PUC Docket:

[o]n remand, the PUC shall give explicit consideration to the reduction of GHG emissions in determining whether to approve the [A&R] PPA, and make the findings necessary for this court to determine whether the PUC satisfied its obligations under HRS § 269-6(b).⁴²

Additionally, the Court directed the PUC to hold a hearing on the issue, and allow LOL to participate meaningfully in that hearing:

In order to comply with statutory and constitutional requirements, the [Commission’s] post-remand hearing must afford LOL an opportunity to meaningfully address the impacts of approving the [A&R] PPA on LOL’s members’ right to a clean and healthful environment, as defined by HRS Chapter 269. The hearing must also include express consideration of GHG emissions that would result from approving the [A&R] PPA, whether the cost of energy under the [A&R] PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the [A&R] PPA are prudent and in the public interest, in light of its potential hidden and long-term consequences.⁴³

⁴² In re HELCO, 145 Hawai`i at 25, 445 P.3d at 697 (emphasis in original).

⁴³ Id. at 26, 445 P.3d at 698 (emphasis added).

b) The PUC Did Not Comply with the Court’s Instructions on Remand

In its Order Denying Reconsideration, the PUC acknowledged its “‘duty...to comply strictly with the mandate of the [Court] according to its true intent and meaning, as determined by the directions given by the [Court].” See Exhibit 7, p. 13 (quoting State v. Lincoln, 72 Haw. 480, 485, 825 P.2d 64, 68 (1992)) (bracketing and ellipses added). But the PUC omitted the rest of the rule, which states that “when acting under an appellate court’s mandate, an inferior court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; ... or intermeddle with it, further than to settle so much as has been remanded.” See Lincoln, 72 Haw. at 486, 825 P.2d at 68; see also Chun v. Board of Trustees of Employees’ Retirement System of State of Hawai’i, 106 Hawai’i 416, 439, 106 P.3d 339, 362 (2005) (quoting Lincoln, 72 Haw. at 486-86, 825 P.2d at 68).

The PUC’s omission was deliberate, and telling: the PUC does not and cannot deny it failed to comply with this Court’s explicit directions on remand. See Exhibit 7, pp. 13-16. The PUC did not hold an evidentiary hearing to allow for meaningful discussion, development of, or consideration of the impacts, if any, that GHG emissions would have on an asserted right to a clean and healthful environment; additionally, the PUC made no express findings regarding those potential impacts. See generally Exhibit 2. And the PUC went far beyond its duty “to settle [only] so much as [the Court] remanded.” Chun, 106 Hawai’i at 439, 106 P.3d at 362 (bracketing added).

The PUC’s attempts to excuse its failure to comply with the Court’s explicit directions lack merit. See Exhibit 7, pp. 14-16. First, the PUC cannot point to anything in the Court’s In re HELCO opinion explicitly directing the PUC to “‘re-do”’ the *entire* proceeding or to revoke the Hu Honua Project’s waiver from competitive bidding. See Exhibit 7, pp. 13-14;

see also Exhibit 2, p. 26. No support exists or is cited for that proposition.⁴⁴ If the Court intended the PUC to take such action on remand, the Court could and would have included such direction along with the explicit directions that it did provide (which the PUC admits it failed to follow).

While the PUC appears to argue that “subsequently changed circumstances” somehow absolved the PUC of its “duty ... to comply strictly” with the Court’s mandate, see e.g., Exhibit 7, pp. 13-15, the PUC points to no such circumstances. See id., pp. 13-16. None exists. The PUC’s observation that the “application of the constitutional right to a clean and healthful environment in Hawaii to [PUC] proceedings has only recently been recognized and is still being developed” is not a change in factual circumstances that could justify the PUC’s decision to “vary” from or “intermeddle with” the Court’s mandate. See Exhibit 7, p. 14; see also Lincoln, 72 Haw. at 486, 825 P.2d at 68 (“We therefore conclude that the trial court stepped beyond the bounds of the mandate when it granted the motion to dismiss the indictment in a situation where it had before it the same factual case as did we when we ordered a new trial.”) (emphasis added).

Under the PUC’s analysis, any agency or lower court seeking to avoid compliance with the appellate court’s instructions could easily concoct a need to “re-do” the entire proceeding, and thereby achieve its goal. The PUC’s position is that its “duty...to comply strictly with the mandate of the [Court] according to its true intent and meaning, as determined

⁴⁴ “When a reviewing court remands a matter with specific instructions, the trial court is powerless to undertake any proceedings beyond those specified therein.” Standard Mgmt., Inc. v. Kekona, 99 Hawai`i 125, 137, 53 P.3d 264, 276 (App. 2001) (quotations omitted). The ICA further explained that “[r]emand for a specific act does not reopen the entire case; the lower tribunal only has the authority to carry out the appellate court’s mandate.” Id. (quotations omitted; emphasis added).

by the directions given by the [Court]” is really no duty at all. See Exhibit 7, p. 13 (quoting State v. Lincoln, 72 Haw. at 485, 825 P.2d at 68). That is a dangerous, and ultimately untenable, position for this Court to tolerate.

- c) By Subverting the Supreme Court’s Explicit Instructions on Remand, the PUC Ensured that the Proceedings Once Again Failed to Comply with Statutory and Constitutional Due Process Requirements

The PUC’s decision to step “beyond the bounds” of the Court’s mandate requires immediate correction. See Lincoln, 72 Haw. at 486, 825 P.2d at 68. The PUC’s failure and refusal to follow the Court’s prior mandate was not merely academic. Its decision inflicted serious financial and constitutional injuries upon Hu Honua. As detailed below, the PUC’s summary revocation of the Project’s waiver violated Hu Honua’s statutory and constitutional due process rights.

2. The PUC’s Procedural Shortcut Violated Hu Honua’s Statutory and Constitutional Right to a Pre-Revocation Hearing

- a) The Court’s Prior Determination that the PUC Violated LOL’s Due Process Rights Applies with Equal Force to the PUC’s Violation of Hu Honua’s Due Process Rights

History is repeating itself at the PUC. The Court already determined that the PUC erred by failing to recognize that the docket was a “contested case” pursuant to HRS § 91-1, and therefore warranted additional protections and procedure, which the PUC failed to provide LOL. See e.g. In re HELCO, 145 Hawai‘i at 19, 445 P.3d at 691. The same analysis applies here: the Docket *also* implicated Hu Honua’s “legal rights, duties or privileges,” see HRS § 91-1, which, “by law,” warranted protections and procedure – including an evidentiary hearing – that the PUC refused to provide Hu Honua following remand.

In In re HELCO, the Court noted that it “engages in a two-step inquiry when evaluating claims of a due process right to a hearing: ‘(1) is the particular interest which [the] claimant seeks to protect by a hearing ‘property’ within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is ‘property,’ what specific procedures are required to protect it.” 145 Hawai`i at 16, 445 P.3d at 688 (quoting Sandy Beach Def. Fund v. City Council of Honolulu, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989)).

b) Hu Honua’s Protected Property Interests Were Undoubtedly at Stake in the Docket

As to step one of the due process inquiry, the PUC refused to acknowledge that Hu Honua had any rights – or property interests – deserving any statutory or constitutional protection. See e.g., Exhibit 7, Docket No. 37306, pp. 28-37, 53-54. The PUC’s contentions lack any support in this Court’s relevant constitutional jurisprudence, and if credited, would undermine the entire regulatory structure that the PUC is charged with administering and applying pursuant to HRS Chapter 269.

For purposes of the due process analysis, a “property interest does not need to be ‘tangible’ to be protected by the due process clause. Rather, a protected property interest exists in a benefit – tangible or otherwise – to which a party has ‘a legitimate claim of entitlement.’” In re MECO, 141 Hawai`i 249, 260, 408 P.3d 1, 12 (2017) (quoting Sandy Beach Def. Fund, 70 Haw. at 377; 773 P.2d at 260). Accordingly, “property interests...may take many forms,” and the Court has “thus recognized protected property interests in a range of intangible entitlements...” In re MECO, 141 Hawai`i at 260, 408 P.3d at 12 (citations omitted; ellipses added). Such entitlements ““are created and their dimensions are defined by existing rules of understanding that stem from an independent source such as state law – rules or understanding that secure certain benefits and that support claims of entitlement to such benefits.”” Id. (quoting

In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawai'i 228, 241, 287 P.3d 129, 142 (2012)).

i. Hu Honua Had a Significant and Protected Property Interest in the Waiver Summarily Revoked by the PUC

The PUC refused to recognize that Hu Honua had – for due process purposes – any protected property interest in the waiver from the PUC’s Competitive Bidding Framework that the PUC twice granted. See Exhibit 7, Order No. 37306, pp. 31-32. Contrary to the PUC’s conclusory arguments, the waiver – like a permit, variance, or license – was a benefit to which Hu Honua had a legitimate claim of entitlement, triggering protection under the due process clause. See County of Kauai v. Pacific Standard Life Insurance Co., 65 Haw. 318, 327-28, 653 P.2d 766, 774 (1982) (government’s approval of “a variance or exemption” from a moratorium ordinance constituted a “final discretionary action” and “official assurance” upon which “[t]here was no question that the developers had a right to rely.”) (citing Life of the Land, Inc. v. City Council of City & County of Honolulu, 61 Haw. 390, 606 P.2d 866 (1980)); Brown v. Thompson, 91 Hawaii 1, 11, 979 P.2d 586, 596 (1999), as amended (July 13, 1999) (holding that an issued permit is considered a “property interest” for due process purposes); Kernan v. Tanaka, 75 Haw. 1, 22, 856 P.2d 1207, 1218 (1993) (“[a]lthough driving is a ‘privilege’ rather than a constitutional ‘right,’ once conferred, a license becomes a constitutionally protected property interest.”) (citing Bell v. Burson, 402 U.S. 535, 539 (1971)); Hoku Lele, LLC v. City & County of Honolulu, 143 Hawai'i 233, 426 P.3d 457, 2018 WL 4520946 at *5 (Haw. Ct. App. 2018) (Mem. Op.) (in the case of building permits erroneously and invalidly issued, the permit holder has a protectible property interest in the invalid permit and is entitled to procedural due process before the permit may be revoked).

The PUC waiver was “created,” and its “dimensions [were] defined by existing rules of understanding that stem from an independent source such as state law – rules or understanding that secure certain benefits and that support claims of entitlement to such benefits.” In re MECO, 141 Hawai`i at 260, 408 P.3d at 12. Specifically, the PUC’s authority to grant the waiver arises from the Creative Bidding Framework that the PUC adopted in 2006. See Exhibit 3, p. 8 (quoting 2017 D&O, p. 30), n. 16 (citing Order No. 23121, establishing Competitive Bidding Framework). The Competitive Bidding Framework, as amended and adopted in 2006, remains in force and it is regularly relied upon by the PUC and parties in proceedings before it. See Exhibit 3, p. 30. The section of the Competitive Bidding Framework which authorizes the PUC to grant waivers from the competitive bidding process does not provide any specific authority or grounds for the PUC to revoke those waivers. See Exhibit 3, pp. 25-26, 30 (citing Order No. 23121, Exhibit A). Similarly, the PUC’s grant of the waiver in 2017 contained no express reservations, conditions or qualifications. See Exhibit 3, p. 30 (citing 2017 D&O, pp. 27-31, 62). To the contrary, the PUC urged Hu Honua to use “all reasonable attempts to complete the [P]roject.” See Exhibit 3, p. 31 (quoting 2017 D&O, p. 61).

In reliance on the waiver and the PUC’s directions, Hu Honua continued with its reasonable good faith efforts to complete the Project and bring it online, incurring an additional \$314,454,846.00 in Project development and construction costs and accrued interest since 2017.⁴⁵ In total, since first obtaining a waiver in 2008, Hu Honua has incurred \$474,027,138.00 in Project costs, which represents a Project completion percentage of approximately 99 percent.⁴⁶ Under these facts, the PUC’s argument that the waiver “cannot reasonably be construed to form a

⁴⁵ See Exhibit 3, Affidavit of Jon Miyata, ¶ 4.

⁴⁶ Id.

‘legitimate claim of entitlement’ or support ‘reasonable reliance’ to proceed with the Project” is disingenuous. See Exhibit 7, p. 31. Given the PUC’s own instructions and the enormous amount of time, money, and effort Hu Honua spent to comply with the PUC’s instructions, Hu Honua at the very least has a protected property interest in the waiver which merits protection under the due process clause.

ii. Hu Honua Had a Significant and Protected Property Interest in a Clean and Healthful Environment

Hu Honua also has an interest in a “clean and healthful environment” which requires due process protection:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

In re HELCO, 145 Hawai`i at 16, 445 P.3d at 688 (quoting Article XI, Section 9 of the Hawai`i Constitution, and determining that LOL had a constitutionally protected property interest in a clean and healthful environment); In re MECO, 141 Hawai`i at 265, 408 P.3d at 17; In re Gas Co., LLC, 147 Hawai`i 186, 192, 465 P.3d 633, 639 (2020) (“In MECO, we held that there is a ‘protectable property interest’ in the ‘right to a clean and healthful environment guaranteed by article XI, section 9 and defined by HRS Chapter 269,’ which governs the PUC.”).

When the PUC granted the waiver for the Project in 2017, it found, among other things, that “the opportunity to increase the amount of renewable energy on HELCO's system, without increasing the amount of as-available, intermittent renewable energy resources on HELCO's system, continues to be in the public interest,” and that “the Project provides the most viable opportunity to add firm, dispatchable, renewable generation in the near term.” See

Exhibit 3, p. 8 (quoting 2017 D&O, p. 30). Those findings were in accordance with the PUC’s general powers and duties under HRS § 269-6.

Hu Honua had substantial evidence to present at an evidentiary hearing that its Project would promote a “clean and healthful environment” and would enhance natural resources. At full capacity, the Hu Honua Project would result in approximately 299,796 fewer barrels of oil being imported into Hawaii each year.⁴⁷ The Project would allow HELCO to deactivate or retire one or more of its fossil fuel-burning generators on Hawaii Island.⁴⁸ Hu Honua has committed to planting and growing more trees than it harvests, and would plant an additional 1.25 million trees in its first five years of operation. Hu Honua’s analysis shows a net reduction of GHG emissions would result from the Project, even when including biogenic CO₂ emissions.⁴⁹ By the PUC’s summary and improper revocation of the Project waiver and refusal to hold an evidentiary hearing, Hu Honua was denied the opportunity to present and have that evidence considered by the PUC in a meaningful manner.

In short, much like the appellants in In re HELCO, In re MECO, and In re GASCO, Hu Honua had – and still has – a protectible property interest in the right to a clean and healthful environment, as defined by HRS Chapter 269. Hu Honua’s interest warrants additional protection under the due process clause, which the PUC failed to provide.

c) By Law, Hu Honua Was Entitled to, and the PUC Was Required to Hold, a Pre-Revocation Hearing

Turning to the second step of the due process inquiry, the PUC clearly failed to provide adequate procedures to protect Hu Honua’s property interests. See In re HELCO, 145

⁴⁷ See Exhibit 3, p. 52 (citing Pre-Hearing Testimony of Dr. Bruce Plasch, filed January 28, 2020).

⁴⁸ Id., pp. 43-44.

⁴⁹ Id., pp. 60-61.

Hawai`i at 16, 445 P.3d at 688 (noting that second step of inquiry requires examination of “what specific procedures are required to protect” the property interest at issue) (quotation and citation omitted). The following considerations demonstrate that Hu Honua was entitled to the evidentiary hearing that it did not receive:

(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Id., 145 Hawai`i at 17, 445 P.3d at 689 (citing Sandy Beach Def. Fund, 70 Haw. at 378, 773 P.2d at 261).

i. Hu Honua Had a Significant and Protected Private Interests in the Waiver and in a Clean and Healthful Environment

Hu Honua’s private interests in the waiver from the PUC’s Competitive Bidding Framework and in a clean and healthful environment were and remain significant and worthy of protection. In good faith and reasonable reliance on the waiver, Hu Honua expended more than \$474 million on the Project. The Project is nearly complete. Without the waiver, Hu Honua cannot proceed with the Project; the Order Revoking Waiver caused Hu Honua to suffer a loss of nearly a half-billion dollars.

The PUC’s decision to kill the Project also has a severe negative impact on Hu Honua’s interest in a clean and healthful environment. Upon completion, the Project would have helped protect and promote a clean and healthy environment by “increas[ing] the amount of renewable energy on HELCO’s system, without increasing the amount of as-available, intermittent renewable energy resources on HELCO’s system,” and by providing the “most

viable opportunity to add firm, dispatchable, renewable generation in the near term.” See Exhibit 3, p. 8 (quoting 2017 D&O, p. 30).

ii. The Order Revoking Waiver Poses an Unacceptable Risk of Erroneous Deprivation

Based on this Court’s instructions to the PUC, and the PUC’s pre-hearing notices, Hu Honua was prepared to argue at an evidentiary hearing that the claimed impacts of the Project’s GHG emissions were not significant enough to outweigh the many benefits to the environment that the Project would provide.

Instead of holding an evidentiary hearing on GHG emissions, the PUC behind closed doors cobbled together some so-called “evidence” outside the Hu Honua docket; never gave Hu Honua an opportunity to respond to that “evidence”; issued an order revoking the Project’s waiver from competitive bidding; and declared all other issues “moot”. As a result, as of now the Project is dead, and nearly a half-billion dollars and hundreds of jobs are lost, along with the opportunity to provide firm, dispatchable, and renewable energy for Hawaii Island.

iii. The Government’s Interest in Avoiding the Evidentiary Hearing

Holding an evidentiary hearing would not impose any undue burden on the PUC. See In re HELCO, 145 Hawai`i at 17-18, 445 P.3d at 689-90 (noting that the “the burden of affording LOL a contested case hearing is slight because the PUC is already statutorily required to consider the long-term effects of its decisions.”) (citation omitted). Indeed, the Court already ordered the PUC to hold such a hearing regarding the potential impact of GHG emissions, see id., 145 Hawai`i at 26, 445 P.3d at 698, which the PUC refused to do. Assuming, arguendo, a revocation of a waiver could be permissible, which Hu Honua does not concede, Hu Honua should be afforded the same opportunity to be heard, and provided “an opportunity to

meaningfully address” any and all concerns that the PUC believes may justify revoking the Project waiver and killing the Project, including but not limited to the potential impact of GHG emissions on the environment. See id.

B. The PUC’s Duty to Hold the Pre-Revocation Evidentiary Hearing Is Enforceable through a Writ of Mandamus

As set forth above, the PUC did not have discretion to ignore the Court’s instructions on remand, and it did not have discretion to issue the Order Revoking Waiver without first providing Hu Honua a meaningful opportunity to be heard. See §§V.A.-B., supra, see also HRS § 91-9; HAR §§16-601-28 through -51. While the PUC retains some discretion in how to conduct and resolve the issues raised at hearing, HRS Chapter 91 and HAR § 16-601, subchapter 3 mandate procedures which, if not formally waived or modified by the parties’ agreement, must be followed. See id.⁵⁰

Accordingly, an order compelling the PUC to comply with its ministerial duty to notice and hold the required evidentiary hearing immediately and in accordance with HRS Chapter 91 and HAR § 16-601, subchapter 3, is within this Court’s power under HRS § 602-5(a)(3). See e.g., Salling v. Moon, 76 Hawai’i 273, 274 n. 3, 874 P.2d 1098, 1099 n.3 (1994) (“A duty is ministerial where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion and judgment.”); Hanabusa v. Lingle, 119 Hawai’i 341, 350, 198 P.3d 604, 613 (2008) (nomination and appointment of candidates to university board of regents within “reasonable time” was governor’s nondiscretionary and ministerial duty; writ granted) (collecting cases); see also Tierney v. Dist. Court of the First Circuit, No. 29904, 2009 Haw. LEXIS 150, at *2 (July 8,

⁵⁰ There was no such formal waiver or modification here. See HAR §16-601-35.

2009) (acceptance and filing of petition for temporary restraining order was “ministerial duty” of the district court; writ granted); Murauskas v. Dist. Court of the First Circuit, No. 29099, 2008 Haw. LEXIS 94, at *2 (Apr. 24, 2008) (acceptance and filing of notice of appeal was ministerial act; writ granted); Gignac v. Circuit Court of the First Circuit, No. 30742, 2010 Haw. LEXIS 267, at *2 (Nov. 8, 2010) (“the filing of documents is a ministerial duty of the circuit court;” writ granted).

C. Under the Circumstances, a Writ of Mandamus Compelling the PUC to Hold the Requested Pre-Revocation Evidentiary Hearing Is the Only Adequate Relief Available to Hu Honua

Hu Honua acknowledges that it is requesting extraordinary relief, but under the circumstances here, nothing other than the immediate relief that the Court can provide through a writ of mandamus will suffice. Cf. Kema, 91 Hawai`i at 204, 982 P.2d at 338; In re Disciplinary Bd. of the Haw. Supreme Court, 91 Hawai`i at 368, 984 P.2d at 693. Hu Honua will also pursue a direct appeal to this Court pursuant to HRS § 269-15.51. However, even if that appeal is eventually resolved in Hu Honua’s favor, there is little chance that it would be timely enough to cure the harm which the Order Revoking Waiver and the Order Denying Reconsideration have already caused or imminently threaten to cause: the death of the Project, the loss of nearly \$500 million expended to complete it, the loss of jobs, and the loss of the environmental and economic benefits the Project will provide.⁵¹ Moreover, given the history of the PUC’s treatment of the Court’s instructions on remand following a direct appeal, there is no guarantee that the PUC

⁵¹ A review of recent opinions regarding appeals from PUC orders indicates that the timeline for resolution is approximately a year and a half to two years. See e.g. In re HELCO, 145 Hawai`i 1, 445 P.3d 673 (issued May 10, 2019, after appeal from PUC order dated July 28, 2017); In re GASCO, 147 Hawai`i 186, 465 P.3d 633 (issued June 9, 2020, after appeal from PUC order dated December 21, 2018); In re MECO, 141 Hawai`i 249, 408 P.3d 1 (issued December 14, 2017, after appeal from PUC order dated September 14, 2015). Pursuant to that timeline, Hu Honua would not receive a decision on appeal until early 2022.

would follow the Court’s instructions on remand at all, much less follow them expeditiously. Simply put, the interests at stake here—including the interests of Hu Honua’s employees—are too great, and too time-sensitive, to wait and see.⁵²

The most efficient way forward is through the relief requested in this Petition. It would allow the Project to continue, and Hu Honua to continue paying its employees and contractors, while the parties participated in the evidentiary hearing that the PUC was obligated to hold in the first instance. The requested relief would return the parties immediately to the status quo that existed following the Court’s remand, but before the PUC violated Hu Honua’s rights to due process, with clear direction and understanding of the issues to address at the hearing.

There are additional benefits that granting the relief requested would provide that, at this point in time, a direct appeal cannot provide. An order compelling the PUC to hold the evidentiary hearing now would allow the PUC to fulfill its statutory duties under HRS Chapter 269. Furthermore, if, after the full evidentiary hearing, any of the parties or participants chose to appeal from the PUC’s order, the parties and the appellate court would have a full and complete record, something which the parties and the Court currently lack due to the PUC’s derogation of its duties under HRS Chapter 269.

⁵² Likewise, restarting the competitive bidding process could and would not provide any opportunity to save the Project. From start to finish, the competitive bidding process for projects of this magnitude takes approximately five years, to go through the RFP, competitive bidding, and the multi-step PUC approval processes. See Exhibit 5, pp. 27-28. Continuing with the Project in a state of suspended animation for five years, without any assurance of PUC approval, is not financially feasible.

VI. CONCLUSION

Based on the foregoing arguments and authorities, Petitioner Hu Honua Bioenergy, LLC respectfully requests that this Court grant this Petition and immediately issue an Extraordinary Writ and/or Writ of Mandamus ordering Respondents to:

1. Vacate PUC Order No. 37205, issued July 9, 2020, and PUC Order No. 37306, issued September 9, 2020; and
2. Promptly schedule and conduct an evidentiary hearing on the request for approval of the Amended & Restated Power Purchase Agreement for the Hu Honua bioenergy project, and make findings sufficient to determine whether the PUC satisfied its obligations under HRS § 269-6(b), as ordered by the Hawaii Supreme Court in In re Hawaii Electric Light Company, Inc., 145 Hawai'i 1, 445 P.3d 673 (2019).

DATED: Honolulu, Hawaii, September 16, 2020.

/s/ Bruce D. Voss

BRUCE D. VOSS
JOHN D. FERRY III
DEAN T. YAMAMOTO
WIL K. YAMAMOTO
BRADLEY S. DIXON

Attorneys for Petitioner
HU HONUA BIOENERGY, LLC

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN THE MATTER OF THE)	
APPLICATION OF HAWAII ELECTRIC	)	DECLARATION OF BRUCE D. VOSS;
LIGHT COMPANY, INC. [DKT. NO.	)	EXHIBITS 1-7
2017-0122])	
_____)	
)	
HU HONUA BIOENERGY, LLC,)	
)	
Petitioner,)	
)	
vs.)	
)	
JAMES P. GRIFFIN, CHAIRPERSON,)	
STATE OF HAWAII PUBLIC UTILITIES)	
COMMISSION; JENNIFER M. POTTER,)	
COMMISSIONER, STATE OF HAWAII)	
PUBLIC UTILITIES COMMISSION;)	
LEODOLOFF R. ASUNCION,)	
COMMISSIONER, STATE OF HAWAII)	
PUBLIC UTILITIES COMMISSION,)	
)	
Respondents.)	
_____)	

DECLARATION OF BRUCE D. VOSS

I, BRUCE D. VOSS, declare as follows:

1. I am a partner at the law firm Bays Lung Rose & Holma, attorneys for Hu Honua Bioenergy, LLC (“Hu Honua”), in State of Hawaii Public Utilities Commission (“PUC”) Docket No. 2017-0122 and related matters. I make this Declaration based upon my personal knowledge.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Hawaii Supreme Court’s opinion in In re Hawaii Electric Light Company, Inc., 145 Hawai`i 1, 445 P.3d 673 (2019), issued May 10, 2019.

3. Attached hereto as Exhibit 2 is a true and correct copy of PUC Order No. 37205, filed July 9, 2020, in PUC Docket No. 2017-0122.

4. Attached hereto as Exhibit 3 is a true and correct copy of Hu Honua's Motion for Reconsideration of Order No. 37205; Affidavit of Jon Miyata; Affidavit of Eli Katz; and Exhibit 1, filed with the PUC on July 20, 2020, in PUC Docket No. 2017-0122.

5. Attached hereto as Exhibit 4 is a true and correct copy of Hu Honua's Supplemental Memorandum In Support of Hu Honua's Motion for Reconsideration of Order No. 37205; Affidavit of Jonathan Jacobs; and Affidavit of Bruce Plasch; filed with the PUC on July 20, 2020, in PUC Docket No. 2017-0122.

6. Attached hereto as Exhibit 5 is a true and correct copy of Hu Honua's Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua's Motion for Reconsideration of Order No. 37205, filed July 20, 2020; Affidavit of Warren Lee; Affidavit of Jonathan Jacobs; Affidavit of Jon Miyata; and Exhibits 1-2; filed with the PUC on August 23, 2020, in PUC Docket No. 2017-0122.

7. Attached hereto as Exhibit 6 is a true and correct copy of Hu Honua's Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua's Motion for Reconsideration of Order No. 37205, filed July 20, 2020; and Affidavit of Jonathan Jacobs; filed with the PUC on August 23, 2020, in PUC Docket No. 2017-0122.

8. Attached here as Exhibit 7 is a true and correct copy of PUC Order No. 37306, filed September 9, 2020, in PUC Docket No. 2017-0122.

I, BRUCE D. VOSS, declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 16, 2020.

/s/ Bruce D. Voss
BRUCE D. VOSS



Positive

As of: September 11, 2020 10:35 PM Z

In re Hawai'i Elec. Light Co.

Supreme Court of Hawai'i

May 10, 2019, Decided; May 10, 2019, Electronically Filed

SCOT-17-0000630

Reporter

145 Haw. 1 *; 445 P.3d 673 **; 2019 Haw. LEXIS 110 ***; 86 ERC (BNA) 5864; 2019 WL 2065921

In the Matter of the Application of HAWAII ELECTRIC LIGHT COMPANY, INC. For Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity.

because [Haw. Rev. Stat. § 269-6\(b\) \(Supp. 2016\)](#) required such consideration in the PUC's decisionmaking; [3]-The PUC denied the advocacy group due process because it gave the group no meaningful opportunity to be heard as to the agreement's impact on the group's property interest, under Haw. Rev. Stat. ch. 269 and [Haw. Const. art. XI, § 9](#), in a clean environment.

Prior History: [***1] APPEAL FROM THE PUBLIC UTILITIES COMMISSION. Docket No. 2017-0122.

Outcome

Decision vacated.

Core Terms

contested, fuel, emissions, energy, clean, environmental, fossil, biomass, quotation, climate, collateral, reduction, prudent, Electric, intervene, biofuels, long-term, renewable, claimant, aggrieved, expertise, Island, site, deprivation, decree, hidden, plants, externalities, prerequisite, capricious

LexisNexis® Headnotes

Energy & Utilities Law > Regulators > Public Utility Commissions > Consumer Advocates

[HNI](#) **Public Utility Commissions, Consumer Advocates**

Case Summary

Overview

HOLDINGS: [1]-The Hawai'i Supreme Court had jurisdiction of appellant advocacy group's appeal of appellee PUC's decision because it did not collaterally attack a prior decision, and [Haw. Rev. Stat. § 91-14\(a\) \(2012 & Supp. 2018\)](#) requirements of a contested case hearing, finality, and compliance with agency rules were met, since due process required a hearing, the group followed applicable rules, and it had standing; [2]-The PUC erred by not explicitly considering greenhouse gas emissions reduction in approving an agreement

Pursuant to [Haw. Rev. Stat. § 269-51 \(Supp. 2018\)](#) and *Haw. Admin. R. 16-601-62 (2019)*, the Consumer Advocate represents the consumer and may participate as an ex officio party in Public Utilities Commission proceedings.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

EXHIBIT 1

BRUCE VOSS

Administrative Law > Judicial
Review > Reviewability > Jurisdiction & Venue

[HN2](#) **Standards of Review, De Novo Standard of Review**

The existence of jurisdiction is a question of law that an appellate court reviews de novo under the right/wrong standard.

Administrative Law > Judicial Review > Standards of Review

Energy & Utilities Law > ... > Public Utility
Commissions > Hearings & Orders > Judicial Review

[HN3](#) **Judicial Review, Standards of Review**

In a direct appeal from a decision of the Public Utilities Commission, the standard of review, as set forth in [Haw. Rev. Stat. § 91-14 \(2012 & Supp. 2018\)](#), is as follows: Upon review of the record, a court may affirm the decision of the agency or remand the case with instructions for further proceedings, or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are (1) in violation of constitutional or statutory provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (6) arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion. [Haw. Rev. Stat. § 91-14\(g\) \(2012 & Supp. 2018\)](#).

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

Energy & Utilities Law > ... > Public Utility
Commissions > Hearings & Orders > Judicial Review

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

[HN4](#) **Standards of Review, Clearly Erroneous Standard of Review**

When reviewing a decision of the Public Utilities Commission, conclusions of law are reviewed de novo, pursuant to [Haw. Rev. Stat. § 91-14\(g\)\(1\), \(2\) and \(4\) \(2012 & Supp. 2018\)](#), questions regarding procedural defects are reviewable under

[Haw. Rev. Stat. § 91-14\(g\)\(3\) \(2012 & Supp. 2018\)](#), findings of fact are reviewable under the clearly erroneous standard, pursuant to [Haw. Rev. Stat. § 91-14\(g\)\(5\) \(2012 & Supp. 2018\)](#), and an agency's exercise of discretion is reviewed under the arbitrary and capricious standard, pursuant to [Haw. Rev. Stat. § 91-14\(g\)\(6\) \(2012 & Supp. 2018\)](#). Mixed questions of law and fact are reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case.

Administrative Law > Judicial
Review > Reviewability > Factual Determinations

[HN5](#) **Reviewability, Factual Determinations**

A court reviewing the decision of an agency should ensure that the agency made its findings reasonably clear. The parties and the court should not be left to guess the precise finding of the agency. An agency's findings should be sufficient to allow the reviewing court to track the steps by which the agency reached its decision.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > Judicial
Review > Reviewability > Questions of Law

[HN6](#) **Standards of Review, De Novo Standard of Review**

Questions of constitutional law are reviewed de novo, under the right/wrong standard.

Civil Procedure > Judgments > Relief From
Judgments > Independent Actions

[HN7](#) **Relief From Judgments, Independent Actions**

A collateral attack, as opposed to a direct attack, is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying such judgment or decree. The collateral attack doctrine is implicated when an independent suit seeks to impeach a judgment entered in a prior suit. Appellate courts in Hawai'i typically only apply the collateral attack doctrine in situations in which a second lawsuit has been initiated challenging a judgment or order obtained from a prior, final proceeding. A party asserting that an action constitutes an impermissible

In re Hawai'i Elec. Light Co.

collateral attack on a judgment must establish that (1) a party in the present action seeks to avoid, defeat, evade, or deny the force and effect of a prior final judgment, order, or decree in some manner other than a direct post-judgment motion, writ, or appeal, (2) the present action has an independent purpose and contemplates some relief or result other than the prior adjudication, (3) there was a final judgment on the merits in the prior adjudication, and (4) the party against whom the collateral attack doctrine is raised was a party or is in privity with a party in the prior action.

Civil Procedure > Appeals

Civil Procedure > Judgments > Relief From Judgments > Independent Actions

[HN8](#) [↓] **Civil Procedure, Appeals**

The first element of the collateral attack doctrine requires a showing that a party in a present action seeks to avoid, defeat, evade, or deny the force and effect of a prior final judgment, order, or decree in some manner other than a direct post-judgment motion, writ, or appeal. If an appeal is taken from a judgment, the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment.

Business & Corporate Compliance > ... > Climate Change > Environmental Law > Climate Change

Energy & Utilities Law > ... > Public Utility Commissions > Authorities & Powers > Environmental Oversight

[HN9](#) [↓] **Environmental & Natural Resources, Climate Change**

[Haw. Rev. Stat. § 269-6\(b\)](#)'s (Supp. 2016) requirement to reduce reliance on fossil fuels and to consider greenhouse gas emissions applies to the fulfillment of all of the Public Utilities Commission's duties.

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

[HN10](#) [↓] **Hearings & Orders, Judicial Review**

Decisions of the Public Utilities Commission are appealable to the Hawai'i Supreme Court pursuant to [Haw. Rev. Stat. § 269-](#)

[15.51 \(Supp. 2018\)](#).

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Administrative Law > Judicial Review > Reviewability > Standing

[HN11](#) [↓] **Reviewability, Reviewable Agency Action**

Judicial review over an agency appeal is authorized by [Haw. Rev. Stat. § 91-14\(a\) \(2012 & Supp. 2018\)](#) when the following requirements have been met: First, the proceeding that resulted in an unfavorable agency action must have been a contested case hearing, second, the agency's action must represent a final decision or order, or a preliminary ruling such that deferral of review would deprive the claimant of adequate relief, third, the claimant must have followed the applicable agency rules and, therefore, have been involved in the contested case, and finally, the claimant's legal interests must have been injured — i.e., the claimant must have standing to appeal. Accordingly, there are three jurisdictional requirements for judicial review over an agency appeal: (1) a contested case hearing, (2) finality, and (3) compliance with agency rules.

Administrative Law > Agency Adjudication > Formal Adjudicatory Procedure > Hearings

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

[HN12](#) [↓] **Formal Adjudicatory Procedure, Hearings**

For purposes of judicial review of an administrative agency decision, a contested case hearing is one that is (1) required by law and (2) determines the rights, duties, and privileges of specific parties.

Administrative Law > Agency Adjudication > Formal Adjudicatory Procedure > Hearings

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

[HN13](#) [↓] **Formal Adjudicatory Procedure, Hearings**

For judicial review purposes, in order for an administrative agency hearing to be required by law, it may be required by (1) agency rule, (2) statute, or (3) constitutional due process.

Energy & Utilities Law > Regulators > Public Utility
Commissions > Ratemaking Procedures

[HN14](#) **Public Utility Commissions, Ratemaking Procedures**

[Haw. Rev. Stat. § 269-16\(b\) \(Supp. 2018\)](#) requires the Public Utilities Commission (Commission) to conduct a contested case hearing whenever a utility seeks an increase in rates, but specifically exempts rate adjustments established pursuant to an automatic rate adjustment clause previously approved by the Commission. Haw. Admin. R. 6-60-6 (1981) similarly provides that automatic rate adjustment clauses that apply to fuel and purchased energy - or fuel adjustment clauses - do not require a hearing. Thus, not only are automatic rate adjustment clauses exempted from [Haw. Rev. Stat. § 269-16\(b\)](#)'s (Supp. 2018) hearing requirement, they are also defined by the relevant agency rule as provisions that allow for rate changes without a prior hearing.

Energy & Utilities Law > Regulators > Public Utility
Commissions > Ratemaking Procedures

[HN15](#) **Public Utility Commissions, Ratemaking Procedures**

Pursuant to [Haw. Rev. Stat. § 269-27.2\(d\) \(Supp. 2016\)](#), the Public Utilities Commission may only allow a public utility to impose an interim increase in rates to recover payments made to nonfossil fuel producers for firm capacity and related revenue taxes after an evidentiary hearing.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of Protection

[HN16](#) **Procedural Due Process, Scope of Protection**

The Hawai'i Supreme Court engages in a two-step inquiry when evaluating claims of a due process right to a hearing: (1) is the particular interest which the claimant seeks to protect by a hearing "property" within the meaning of the due process clauses of the federal and state constitutions, and, (2) if the interest is "property," what specific procedures are required to protect it.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of Protection

[HN17](#) **Procedural Due Process, Scope of Protection**

For procedural due process purposes, a protected property interest exists in a benefit — tangible or otherwise — to which a party has a legitimate claim of entitlement. Legitimate claims of entitlement that constitute property interests are not created by the due process clause itself. Instead, they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law — rules or understanding that secure certain benefits and that support claims of entitlement to those benefits.

Business & Corporate Compliance > ... > Climate
Change > Environmental Law > Climate Change

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of Protection

Energy & Utilities Law > ... > Public Utility
Commissions > Authorities & Powers > Environmental
Oversight

[HN18](#) **Environmental & Natural Resources, Climate Change**

Haw. Rev. Stat. ch. 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under [Haw. Const. art. XI, § 9](#) by providing that express consideration be given to reduction of greenhouse gas emissions in the decision-making of the Public Utilities Commission. An assertion of a right to a clean and healthful environment, as defined by Haw. Rev. Stat. ch. 269, therefore establishes a protectable property interest under [Haw. Const. art. XI, § 9](#) and Haw. Rev. Stat. ch. 269.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of Protection

[HN19](#) **Procedural Due Process, Scope of Protection**

When determining the procedures required to comply with constitutional due process, the Hawai'i Supreme Court considers the following three factors: (1) the private interest which will be affected, (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards, and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

In re Hawai'i Elec. Light Co.

Administrative Law > Agency Adjudication > Formal
Adjudicatory Procedure > Hearings

[HN20](#) [↓] **Formal Adjudicatory Procedure, Hearings**

A contested case hearing is one that is (1) required by law and (2) determines the rights, duties, and privileges of specific parties.

Administrative Law > Agency Adjudication > Formal
Adjudicatory Procedure > Hearings

[HN21](#) [↓] **Formal Adjudicatory Procedure, Hearings**

[Haw. Rev. Stat. § 91-1 \(Supp. 2018\)](#) does not contain a requirement that a contested case hearing be a trial-type evidentiary hearing or that the hearing exhibit a particular level of adversarial quality. Rather, there are only two requirements for a hearing to be regarded as a contested case hearing: (1) that the hearing be required by law and (2) that the hearing determine the rights, duties, or privileges of specific parties.

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency Action

[HN22](#) [↓] **Reviewability, Reviewable Agency Action**

Judicial review over an agency appeal under [Haw. Rev. Stat. § 91-14 \(2012 & Supp. 2018\)](#) is only available where the claimant followed the applicable agency rules and, therefore, was involved in a contested case.

Business & Corporate
Compliance > ... > Regulators > Public Utility
Commissions > Hearings & Orders

[HN23](#) [↓] **Public Utility Commissions, Hearings & Orders**

Former Haw. Admin. R. 6-61-74 provided the substantive requirements for applications and petitions to the Public Utilities Commission (PUC) generally, and former Haw. Admin. R. 6-61-55 described the substance of an application to intervene as a party in a PUC proceeding. Neither of these Rules, which remain effective in Haw. Admin. R. tit. 16, ch. 601, requires a party to request a contested case hearing. Moreover, no other rule that governs the rules of practice and procedure before the PUC imposes such a requirement.

Administrative Law > Judicial
Review > Reviewability > Reviewable Agency Action

[HN24](#) [↓] **Reviewability, Reviewable Agency Action**

The Hawai'i Supreme Court's case law does not require a party to request a contested case hearing before an administrative agency to gain access to the courts, where the relevant agency has not promulgated a rule requiring such a request and the party has participated in a contested case proceeding.

Administrative Law > Judicial
Review > Reviewability > Standing

[HN25](#) [↓] **Reviewability, Standing**

In the context of administrative appeals brought pursuant to [Haw. Rev. Stat. § 91-14\(a\) \(2012 & Supp. 2018\)](#), the concept of standing is comprised of two components. First, one must be a person aggrieved, inter alia, by a final decision and order in a contested case. Second, the aggrieved person must have participated in the contested case from which the decision affecting him or her resulted.

Administrative Law > Judicial
Review > Reviewability > Standing

[HN26](#) [↓] **Reviewability, Standing**

To be a person aggrieved with standing to appeal an administrative decision, one must be specially, personally, and adversely affected by the final decision and order at issue. An unfavorable final decision and order is not enough to satisfy this prong of the analysis - there must be a special injury or damage to one's personal or property rights, as distinguished from the role of being only a champion of causes.

Administrative Law > Judicial
Review > Reviewability > Standing

Environmental Law > Administrative Proceedings &
Litigation > Judicial Review

[HN27](#) [↓] **Reviewability, Standing**

The right to a clean and healthful environment, as defined by Haw. Rev. Stat. ch. 269, has been recognized as a legally protected interest adequate to confer standing to appeal an administrative decision.

PUC's duties.

Constitutional Law > ... > Case or
Controversy > Standing > Particular Parties

[HN28](#) [📄] **Standing, Particular Parties**

An organization may sue on behalf of its members even though it has not been injured itself when (1) its members would otherwise have standing to sue in their own right, (2) the interests the organization seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief itself requested requires the participation of individual members in the lawsuit.

Administrative Law > Judicial
Review > Reviewability > Standing

Energy & Utilities Law > ... > Public Utility
Commissions > Hearings & Orders > Judicial Review

[HN29](#) [📄] **Reviewability, Standing**

Although an aggrieved person must have participated in a contested case before an administrative agency in order to invoke judicial intervention regarding the agency's decision, standing to appeal from an administrative decision is not conditioned upon formal intervention in the agency proceeding. Where appellants have been aggrieved by an action of the Public Utilities Commission (PUC), and where they were involved as participants during the contested case, the appellants may challenge the order of the PUC in the Hawai'i Supreme Court.

Business & Corporate Compliance > ... > Climate
Change > Environmental Law > Climate Change

Energy & Utilities Law > ... > Public Utility
Commissions > Authorities & Powers > Environmental
Oversight

[HN30](#) [📄] **Environmental & Natural Resources, Climate Change**

Pursuant to [Haw. Rev. Stat. § 269-6\(b\) \(Supp. 2016\)](#), the Public Utilities Commission (PUC) must explicitly consider the effect of Hawai'i's reliance on fossil fuels on, inter alia, greenhouse gas (GHG) emissions. This has been characterized as a requirement to reduce reliance on fossil fuels and to consider GHG emissions, which applies to the fulfillment of all of the

Business & Corporate Compliance > ... > Climate
Change > Environmental Law > Climate Change

Energy & Utilities Law > ... > Public Utility
Commissions > Authorities & Powers > Environmental
Oversight

[HN31](#) [📄] **Environmental & Natural Resources, Climate Change**

The legislature has amended [Haw. Rev. Stat. § 269-6\(b\) \(Supp. 2016\)](#) to make it mandatory for the Public Utilities Commission (Commission) when exercising its duties to recognize the need to reduce reliance on fossil fuels and to explicitly consider the levels and effect of greenhouse gas (GHG) emissions. A primary purpose of the amendment was to require the Commission to consider the hidden and long-term costs of reliance on fossil fuels, which subjects Hawai'i and its residents to increased air pollution and potentially harmful climate change due to the release of harmful GHGs. [Haw. Rev. Stat. § 269-6\(b\)'s \(Supp. 2016\)](#) requirement to reduce reliance on fossil fuels and to consider GHG emissions applies to the fulfillment of all of the Commission's duties. Accordingly, [Haw. Rev. Stat. § 269-6\(b\) \(Supp. 2016\)](#) requires that express consideration be given to reduction of GHG emissions in the decision-making of the Commission.

Administrative Law > Judicial
Review > Reviewability > Factual Determinations

Business & Corporate Compliance > ... > Climate
Change > Environmental Law > Climate Change

Energy & Utilities Law > ... > Public Utility
Commissions > Authorities & Powers > Environmental
Oversight

[HN32](#) [📄] **Reviewability, Factual Determinations**

In determining whether the Public Utilities Commission has satisfied its duty to give express consideration to the reduction of greenhouse gas emissions in its decision-making pursuant to [Haw. Rev. Stat. § 269-6\(b\) \(Supp. 2016\)](#), the Hawai'i Supreme Court should ensure that the agency has made its findings reasonably clear. Parties and the Court should not be left to guess the precise finding of the agency. An agency's findings should be sufficient to allow a reviewing court to track the steps by which the agency reached its decision.

Administrative Law > Judicial Review > Remand & Remittitur

Energy & Utilities Law > ... > Public Utility Commissions > Hearings & Orders > Judicial Review

[HN33](#) [↓] **Judicial Review, Remand & Remittitur**

A remand of an agency decision pursuant to [Haw. Rev. Stat. § 91-14\(g\) \(2012 & Supp. 2018\)](#) is appropriate if an agency's findings are incomplete and provide no basis for review. Where the Public Utility Commission's (PUC) failure to make sufficient findings leaves the Hawai'i Supreme Court unable to determine the validity of its conclusions, it is appropriate to remand the case to the PUC for further proceedings, pursuant to [Haw. Rev. Stat. § 91-14\(g\) \(2012 & Supp. 2018\)](#), in order for the PUC to make findings necessary for judicial review.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Environmental Law > Public Enforcement > Environmental Justice

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

[HN34](#) [↓] **Procedural Due Process, Scope of Protection**

The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest. The right to a clean and healthful environment, as defined by laws relating to environmental quality, is a property interest protected by due process because it is a substantive right guaranteed by [Haw. Const. art. XI, § 9](#). Procedural due process includes the right to submit evidence and argument on the impact of a utility's agreement on an asserted property interest. The Public Utilities Commission has the authority to set limitations in conducting proceedings so long as the procedures sufficiently afford an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of the agreement's impact on the asserted property interest.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

[HN35](#) [↓] **Reviewability, Jurisdiction & Venue**

Under [Haw. Rev. Stat. § 91-14\(b\) \(2012 & Supp. 2018\)](#), appeals from decisions of administrative agencies are timely where the appellant files its notice of appeal within 30 days after service of a certified copy of the final decision and order of the agency.

Administrative Law > Agency Adjudication > Formal Adjudicatory Procedure

Business & Corporate Compliance > ... > Regulators > Public Utility Commissions > Hearings & Orders

Civil Procedure > Parties > Intervention > Permissive Intervention

[HN36](#) [↓] Former Haw. Admin. R. 6-61-55 set forth nine factors for the Public Utilities Commission (PUC or Commission) to consider in determining whether to grant a motion to intervene as a party in a PUC proceeding. The Rule further provided that the PUC would not grant intervention except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented. Pursuant to former Haw. Admin. R. 6-61-55(a), intervention as a party in a proceeding before the PUC was not a matter of right, but was a matter resting within the sound discretion of the Commission, as long as that discretion was not exercised arbitrarily or capriciously.

Counsel: Lance D. Collins, for appellant.

Clyde J. Wadsworth, (Kaliko'onalani D. Fernandes with him on the brief), for appellee PUC.

Margery S. Bronster, (Rex Y. Fujichaku and Kelly A. Higa with her on the brief), for appellee [Hu Honua](#) Bioenergy, LLC.

Joseph A. Stewart, (David M. Louie and Aaron R. Mun with him on the brief), for appellees HECO and HELCO.

Judges: RECKTENWALD, C.J., NAKAYAMA, McKENNA, POLLACK, AND WILSON, JJ.

Opinion by: Mark E. Recktenwald

Opinion

[*5] [**677] OPINION OF THE COURT BY RECKTENWALD, C.J.

This case arises from the Public Utilities Commission's approval of an amended power purchase agreement (Amended PPA) between Hawai'i Electric Light Company, Inc. (HELCO) and Hu Honua Bioenergy, LLC. Pursuant to the Amended PPA, Hu Honua would construct and operate a biomass-fueled energy production facility, and HELCO would purchase energy from the facility.

Life of the Land (LOL), an environmental nonprofit organization, sought to intervene as a party in the PUC's proceeding in order to address the environmental impacts of the proposed biomass facility. The PUC denied LOL full party status, but granted LOL limited participation in the proceeding. The PUC ultimately [***2] approved the Amended PPA without holding a hearing. LOL directly appealed the PUC's order granting it limited participation in the proceeding, as well as the Decision and Order approving the Amended PPA (2017 D&O), to this court.

LOL argues that the PUC: (1) failed to explicitly consider greenhouse gas (GHG) emissions in determining whether to approve the Amended PPA, as required by state law; (2) denied LOL due process to protect its interest in a clean and healthful environment by restricting its participation in the proceeding; and (3) abused its discretion and violated due process by denying LOL full party status in the proceeding. In addition to disputing these allegations, the PUC, HELCO, and Hu Honua contest this court's jurisdiction over the matter.

As a threshold matter, we hold that this court has jurisdiction to consider LOL's appeal. We further hold that the PUC erred by failing to explicitly consider the reduction of GHG emissions in approving the Amended PPA, as required by statute, and that the PUC denied LOL due process with respect

to the opportunity to be heard regarding the impacts that the Amended PPA would have on LOL's right to a clean and healthful environment. [***3] Finally, we need not resolve whether the PUC abused its discretion or deprived LOL of due process by denying it full party status in the proceeding.

Accordingly, we vacate the 2017 D&O and remand this matter to the PUC for further proceedings.

I. BACKGROUND

A. PUC Proceedings

1. 2012 Docket

In 2012, HELCO submitted an application to the PUC seeking approval of a power purchase agreement (Original PPA) with Hu Honua. Pursuant to the Original PPA, Hu Honua agreed to refurbish an existing biomass power plant located on the Hāmākua Coast in Pepe'ekeo, Hawai'i, to allow it to utilize harvested timber and other "woody biomass" as a fuel source. HELCO agreed to purchase energy from the facility over the Original PPA's 20-year term.

LOL filed a Motion to Intervene as a party-intervenor in the PUC proceeding (2012 Docket), pursuant to Hawai'i Administrative Rules (HAR) § 6-61-55 (effective 1992-2018).¹ In its motion, LOL explained that it is a Hawai'i-based nonprofit organization comprised of members who live, work, and recreate in Hawai'i. LOL highlighted its environmental interests and explained that the externalities associated with the use of biofuels for energy production "[can] be very harmful to [its] interests." LOL also stated it "has [***4] developed great expertise in biofuels" and has demonstrated its expertise in several regulatory proceedings regarding biofuels.

More specifically, with regard to the proposed Hu Honua facility, LOL stated it had "several concerns, including the fuel source, [*6] [**678] the comparative cost, . . . [and whether] this proposed facility will cut into the utilities['] purchase of energy from existing and/or planned wind and solar farms." Finally, LOL stated it had "unique environmental interests different from the general public," and assured the PUC that its

administrative rules referenced in this opinion have been replaced by identical rules that remain in effect.

HAR § 6-61-55 (effective 1992-2018) has been replaced by HAR § 16-601-55 (effective Jan. 1, 2019). See *infra* note 22.

¹We note that HAR title 6, chapter 61 - Rules of Practice and Procedure Before the Public Utilities Commission (effective 1992-2018) - was repealed on January 1, 2019. It was replaced by *HAR title 16, chapter 601* (effective Jan. 1, 2019). All of the repealed

intent was "not to disrupt the process[,] but . . . to insure that [LOL's] members and our local environmental communities have a voice in this process."

The PUC found that the "concerns raised in [LOL's] Motion to Intervene provide[d] insufficient basis to justify full intervention[.]" However, it also found that "LOL's concerns regarding the proposed project's impact on existing renewable projects on the Big Island, and the supply and pricing analysis between the biomass resources delineated in the [Original] PPA [were] sufficient to justify LOL having limited participant status in [the 2012 Docket], pursuant to HAR § 6-61-56." Accordingly, the PUC [***5] denied LOL's motion, but granted it "limited participant status" sua sponte, allowing it to participate with respect to: (1) whether the energy price components properly reflect the cost of biomass fuel supply; and (2) whether HELCO's purchase power arrangements under the Original PPA are prudent and in the public interest.

The PUC ultimately approved the Original PPA, but HELCO subsequently terminated the agreement. HELCO and Hu Honua agreed to amend the Original PPA, giving rise to the Amended PPA at issue in the instant case.

2. 2017 Docket

In 2017, HELCO filed an application with the PUC, seeking approval of the Amended PPA. The PUC entered Order No. 34554, opening Docket No. 2017-0122 (2017 Docket) to address HELCO's request. The order also granted LOL "conditional participant status" in the proceeding and stated it would reevaluate LOL's status and establish the scope of LOL's participation following its final determination of the issues governing the 2017 Docket.

LOL filed exhibits in response to Order No. 34554, which included an overview of the "agricultural expertise" of Henry Curtis, LOL's Vice President of Consumer Issues. Curtis explained that he had "stayed with friends living [***6] in Hamakua, stayed at vacation sites in Hamakua, explored Hamakua, and made several trips to the Hu Honua site, driving around three sides of the site."² In support of his agricultural expertise, Curtis also cited to a chapter that he authored in "The Value of Hawai'i: Knowing the Past, Shaping the Future,"

² It appears Curtis was referring to the Big Island's Hāmākua Coast, of which Pepe'ekeo is a part.

³ Tawhiri Power, LLC (Tawhiri) and Hamakua Energy Partners (HEP) were granted participant status in the 2017 Docket only with regard to Issue 2.b. LOL, Tawhiri, and HEP all filed motions to intervene in the 2012 Docket, which were denied. They were instead granted limited participant status.

which cites runoff into the ocean as one of the primary adverse environmental impacts associated with the use of biofuels for energy production.

The PUC entered Order No. 34597, establishing a procedural schedule, statement of the issues, and scope of participation for participants. The PUC permitted LOL to participate in the proceeding, but limited the scope of its participation to the same two issues that it participated on in the 2012 Docket:

2.a.i. Whether the energy price components in the Amended and Restated PPA properly reflect the cost of biomass fuel supply.

2.b. Whether HELCO's purchase power arrangements under the Amended and Restated PPA are prudent and in the public interest.

Specifically, the PUC found that: Because the question of whether HELCO's purchase power arrangements under the Amended and Restated PPA are prudent and in the public interest continues to be an issue [***7] in this proceeding, as it was in Docket No. 2012-0212, the commission finds it appropriate to maintain LOL, Tawhiri, and HEP's participant status on this issue (Issue 2.b., above).³ Further, while [*7] [***679] not explicitly stated, the question of whether the energy price components properly reflect the cost of biomass fuel supply is a consideration when determining whether the purchased power costs to be paid by HELCO pursuant to the Amended and Restated PPA are reasonable (Issue 2.a., above). Accordingly, the commission finds it appropriate to maintain LOL's participant status on the specific sub-issue of whether the energy price components properly reflect the cost of biomass fuel supply (Issue 2.a.i., above). (Emphasis added).

a. Motion to Upgrade Status

LOL filed a Motion to Upgrade Status, requesting that the PUC allow it to intervene in the 2017 Docket as a party.⁴ In support of its Motion to Upgrade Status, LOL stressed the fact that the PUC had already "grant[ed] LOL participant status based on [its] interests in the pending matter." LOL also cited previous PUC proceedings in which it was admitted as a party, and stated that: (1) its Board of Directors "approved continuing to

⁴ Although LOL did not cite HAR § 6-61-55 as the relevant authority for its Motion to Upgrade Status, the motion nevertheless touches upon each of the nine requirements for motions for intervention under HAR § 6-61-55(b) (effective 1992 to 2018). *HAR § 16-601-55(b)* (effective Jan. 1, 2019) contains the same nine requirements. See infra, note 22.

In re Hawai'i Elec. Light Co.

intervene in [***8] energy dockets as a means of promoting sustainable policies"; (2) LOL's members "are very deeply concerned about climate change, biodiversity, and the spread of invasive species"; (3) the only way to protect LOL's interest is by accessing "classified documents dealing with externalities"; (4) there are no other means available to protect LOL's interests; (5) the Consumer Advocate does not represent LOL's interests because it lacks the expertise to understand externalities;⁵ (6) the agricultural expertise of LOL's vice president will assist in developing an evidentiary record; and (7) while the Consumer Advocate represents the interests of the general public, "LOL is concerned with a wider lens that encompasses externalities including social justice, environmental justice, climate justice, and [GHG] impacts." In addition, LOL specifically expressed concern regarding the externalities associated with "acquiring bioenergy crops" from a specific area of the Big Island that already serves as a source for another biofuel facility.

The PUC issued Order No. 34651, denying LOL's motion. The PUC cited HAR § 6-61-55, specifically noting subsection (d),⁶ and stated that "intervention is not a guaranteed right of a movant, but is a matter resting within the sound discretion of the commission, so long as that discretion is not exercised arbitrarily or capriciously." It also cited HAR § 6-61-56 (effective 1992-2018),⁷ which [*8] [**680] sets forth the requirements for participation without intervention. It stated: [***10]

As was the case in [the 2012 Docket], upon review of the record, the commission continues to find that the concerns raised in LOL's Motion, which are identical to or mirror the concerns raised by LOL in its Motion to Intervene in [the 2012 Docket], provide insufficient basis to justify full intervention in this proceeding. The commission finds that LOL has failed to demonstrate any additional interest or expertise sufficient to justify a change in its limited participant status granted on a conditional basis in Order No. 34554, and permanently established pursuant to Order

⁵ HNI[↑] Pursuant to [Hawai'i Revised Statutes \(HRS\) § 269-51](#) (Supp. 2018) and [HAR § 16-601-62](#) (effective Jan. 1, 2019), the Consumer Advocate represents the consumer and may participate as an ex officio party in Commission proceedings.

[HRS § 269-51](#) provides:

The executive director of the division of consumer advocacy shall be the consumer advocate in hearings before the public utilities commission. The consumer advocate [***9] shall represent, protect, and advance the interests of all consumers, including small businesses, of utility services.

The responsibility of the consumer advocate for advocating the interests of the consumer of utility services shall be separate and distinct from the responsibilities of the public utilities commission and those assistants employed by the commission. The consumer advocate shall have full rights to participate as a party in interest in all proceedings before the public utilities commission.

[HAR § 16-601-62](#) provides, in pertinent part:

(a) The consumer advocate is, ex officio, a party to any proceeding before the commission. . . .

(b) The consumer advocate shall further apprise the commission and the parties of record of any facts which relate to the protection or advancement of the consumer interest.

⁶ HAR § 6-61-55(d) (effective 1992-2018) provided that "Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." [HAR § 16-601-55\(d\)](#) (effective Jan. 1, 2019) contains identical language. See *infra* note 22.

⁷ HAR § 6-61-56 provided:

(a) The commission may permit participation without intervention. A person or entity in whose behalf an appearance is entered in this manner is not a party to the proceeding and may participate in the proceeding only to the degree ordered by the commission. The extent to which a participant may be involved in the proceeding shall be determined in the order granting participation or in the prehearing order.

(b) A person who has a limited interest in a proceeding may make an application to participate without intervention by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57.

(c) The motion shall provide: [***11]

(1) A clear and concise statement of the direct and substantial interest of the applicant;

(2) The applicant's position regarding the matter in controversy;

(3) The extent to which the participation will not broaden the issues or delay the proceeding;

(4) The extent to which the applicant's interest will not be represented by existing parties;

(5) A statement of the expertise, knowledge or experience the applicant possesses with regard to the matter in controversy;

(6) Whether the applicant can aid the commission by submitting an affirmative case; and

(7) A statement of the relief desired.

(Emphasis added). Other than the HAR section numbers it references, [HAR 16-601-56](#) (effective Jan. 1, 2019) is identical to HAR 6-61-56 (effective 1992-2018).

No. 34597.

b. Information Requests

LOL filed several Information Requests (IRs), seeking information from HELCO, Hu Honua, and the Consumer Advocate regarding GHG emissions and other potential adverse environmental impacts of the Hu Honua facility. In its response to LOL's IRs, HELCO acknowledged that GHGs would be emitted by equipment used to raze and transport trees, but stated that it had not quantified the amount of emissions. HELCO asserted that although carbon would be released into the atmosphere upon the combustion of trees in the facility, it would be recaptured upon the regrowth of the trees. In response to [***12] at least one of the IRs that LOL submitted to HELCO, HELCO objected and refused to respond, arguing that the information sought was "not relevant to and [was] outside the scope of LOL's authorized scope of limited participation[.]"

One of the IRs that LOL submitted to Hu Honua posed several questions regarding the quantity of wastewater that would be produced by the facility, the means by which it would be produced and managed, and the steps that would be taken to monitor and prevent ocean contamination. Hu Honua objected to this IR, as well as those focused on GHG emissions and climate change, stating that they were "not relevant or material to Issue Nos. 2.a.i or 2.b, which [were] the only issues for which the Commission authorized LOL's participation."

The Consumer Advocate responded to LOL that it had not completed an analysis of the impact the project would have on GHG emissions, and that any analysis should be comprehensive, including GHGs resulting from harvesting and transporting the feedstock. The Consumer Advocate further stated that it had not evaluated the need for a consultant to review GHGs and climate change in the instant proceeding.

c. Statements of Position

In its Statement [***13] of Position, LOL argued that Hu Honua's proposed facility was not in the public interest. LOL further argued that Hu Honua's proposal failed to fully address climate change and the environmental impacts of the proposed operations. LOL stated:

Hu Honua plans to chop down existing trees for seven years, and then to rely on a rotational system of growing new trees and then chopping them down. Omitting any [*9] [**681] discussion of the fossil fuels used in the mechanization of growing, chopping, chipping, and transport, Hu Honua alleges that this operation is carbon neutral.

LOL also argued that the pricing of Hu Honua's proposal was not in the public interest when compared to lower-priced solar-based electricity proposals previously approved by the PUC.

In its Reply Statement of Position, Hu Honua argued that its facility "will make a significant contribution to the State's [Renewable Portfolio Standards (RPS),]" noting that "HELCO estimates that Hu Honua will increase RPS levels by 11% over the life of the PPA, and avoid the emission of hundreds of thousands of tons of CO₂." Hu Honua asserted that "the estimated emissions due to transportation of fuel to the plant pale in comparison to the emissions [***14] reductions that will result from the displacement of fossil fuel[.]" Hu Honua further stated that "biomass plants, like wind and solar plants, are renewable and carbon neutral to a reasonable approximation, and are therefore deemed fully renewable by applicable state law."

d. 2017 Decision and Order

Without holding a hearing, the PUC entered the 2017 D&O approving the Amended PPA. The PUC noted that comments in support of the Project focused on issues including the fulfillment of the RPS targets and energy resource self-reliance, while comments in opposition focused on issues including potential adverse environmental impacts, an expected rise in GHG emissions, and general objections to biomass as a fuel resource.

The PUC then summarized each party's position, citing HELCO's claims that approval of the Amended PPA would be reasonable due to, inter alia, the project's contribution to the State's RPS goals, the fact that the contract price for the Amended PPA is de-linked from fossil fuel pricing, and the assertion that "renewable energy provided by the Project could potentially save approximately 15,700 barrels of fuel per year, which over the term of the [Amended] PPA amounts to approximately [***15] 329,000 barrels of fuel oil saved." The PUC also noted the following:

HELCO asserted that the totality of circumstances should be considered when reviewing whether the purchased power costs are reasonable, . . . including governmental policies and objectives, contributions towards RPS, reducing dependency on fossil fuels, decreased price volatility, de-linking energy costs from fossil fuel pricing, realization of tax incentives, and community benefits.

....

LOL asserted that "[t]he cost of biofuel includes both financial and non-financial components, which Hu Honua has failed to adequately address." LOL asserted that the "non-financial components" include impacts on

In re Hawai'i Elec. Light Co.

climate change and endangered species that were not explicitly quantified or monetized in HELCO's benefit/cost ratio.

....

LOL is not in favor of commission approval of the [Amended] PPA, but focused its rationale on concerns outside of the scope of its limited participation, namely climate change and comparative pricing with other forms of energy.

(Emphases added).

It appears the PUC adopted HELCO's analysis of the biomass facility's economic and customer bill impact under the Amended PPA, stating, "[p]er HELCO, . . . the [***16] Project provides significant renewable energy-related benefits, primarily through its firm capacity and contribution to the State's RPS goals. For the island of Hawaii, with the Project, the RPS goal levels increase by approximately 11% over the 30-year life of the Project." The PUC also made the following findings and conclusions:

[T]he commission finds that the Project will . . . add to the diversity of HELCO's existing portfolio of renewable energy resources.

....

Consistent with [*Hawai'i Revised Statutes (HRS)*] § 269-27.2(c)[(Supp. 2016)], the proposed pricing structure is delinked from fossil fuel pricing.

....

[*10] [**682] [I]t appears that the addition of the Project may primarily displace fossil fuel generation resources. Accordingly, the commission anticipates that, based on the representations made in HELCO's [Power Supply Improvement Plan], this Project will accelerate the retirement of fossil fuel plants[.]

(Emphases added).

The PUC addressed, inter alia, the following two issues: (2.a.i) whether the energy price components in the Amended PPA properly reflect the cost of biomass fuel supply; and (2.b) whether HELCO's purchase power arrangements under the Amended PPA are prudent and in the public interest. The PUC found the purchased [***17] power costs to be reasonable and that the arrangements under the Amended PPA were prudent and in the public interest. Accordingly, the PUC approved the Amended PPA, concluding that:

HELCO has met its burden of proof in support of its

request for the commission to approve the [Amended] PPA. The purchased power costs and arrangements set forth in the [Amended] PPA appear reasonable, prudent, in the public interest, and consistent with *HRS chapter 269* in general, and *HRS § 269-27.2(c)*, in particular. While the commission, in this instance, finds the pricing to be reasonable, the commission makes clear that its decision to approve the [Amended] PPA is not based solely on pricing, but includes other factors such as the State's need to limit its dependence on fossil fuels and mitigate against volatility in oil pricing.

(Emphases added).

B. Direct Appeal

LOL directly appealed the PUC's order denying LOL's Motion to Upgrade Status and the 2017 D&O to this court. See *HRS § 269-15.51* (Supp. 2018) and *HRS § 91-14* (2012 & Supp. 2018). LOL presents three points of error:⁸ (1) the PUC was required, under *HRS § 269-6(b)* (Supp. 2016), to explicitly consider GHG emissions in determining whether the costs of the Amended PPA were reasonable, but failed to do so; (2) the PUC denied [***18] LOL due process to protect its right to a clean and healthful environment, as defined by *HRS Chapter 269*, by restricting its participation in the PUC proceedings; and (3) the PUC erred in denying LOL's Motion to Upgrade Status from "participant" to "intervenor."

II. STANDARDS OF REVIEW

A. Jurisdiction

HN2[↑] "The existence of jurisdiction is a question of law that [the appellate court reviews] de novo under the right/wrong standard." *Captain Andy's Sailing, Inc., v. Dep't of Land & Nat. Res., 113 Hawai'i 184, 192, 150 P.3d 833, 841 (2006)* (internal quotation marks and citation omitted).

B. Direct Appeal

HN3[↑] Because this is a direct appeal from a decision of the PUC, the standard of review, as set forth in *HRS § 91-14*, is as follows:

Upon review of the record, the court may affirm the

are not challenged on appeal are binding on the appellate court." *Bremer v. Weeks, 104 Hawai'i 43, 63, 85 P.3d 150, 170 (2004)* (citations omitted).

⁸ LOL did not specifically challenge any findings of fact contained in the PUC's 2017 D&O in its Opening Brief. "Findings of fact . . . that

In re Hawai'i Elec. Light Co.

decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence [***19] on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g).

HN4[↑] Conclusions of law are reviewed de novo, pursuant to subsections (1), (2) and (4); [***11] [***683] questions regarding procedural defects are reviewable under subsection (3); findings of fact (FOF) are reviewable under the clearly erroneous standard, pursuant to subsection (5), and an agency's exercise of discretion is reviewed under the arbitrary and capricious standard, pursuant to subsection (6). Save Diamond Head Waters LLC, 121 Hawai'i [16.] 24, 211 P.3d [74.] 82 [(2009)]. Mixed questions of law and fact are "reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case." Id. at 25, 211 P.3d at 83 (quoting Del Monte Fresh Produce (Haw.), Inc. v. Int'l Longshore & Warehouse Union, 112 Hawai'i 489, 499, 146 P.3d 1066, 1076 (2006)).

HNS[↑] A court reviewing the decision of an agency should ensure that the "agency . . . make its findings reasonably clear. The parties and the court should not be left to guess . . . the precise finding of the agency." In re Water Use Permit Applications, 94 Hawai'i 97, 157, 9 P.3d 409, 469 (2000) ("Waiahole I") (quoting In re Kauai Elec. Div. of Citizens Utilities Co., 60 Haw. 166, 183, 590 P.2d 524, 537 (1978)). An agency's findings should be "sufficient to allow the reviewing court to track the steps by which the agency reached its decision." Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 230, 751 P.2d 1031, 1034 (1988)[; see] also In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 432, 83 P.3d 664, 695 (2004) (explaining that any presumption of validity, given to an agency's decision, "presupposes that the agency has grounded its decision in reasonably clear" findings [***20] of fact and conclusions of law).

Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kauai, 133 Hawai'i 141, 164, 324 P.3d 951, 974 (2014).

C. Constitutional Law

HN6[↑] "We review questions of constitutional law de novo, under the right/wrong standard." Jou v. Dai-Tokyo Royal State Ins. Co., 116 Hawai'i 159, 164-65, 172 P.3d 471, 476-77 (2007) (quoting Onaka v. Onaka, 112 Hawai'i 374, 378, 146 P.3d 89, 93 (2006)) (internal quotation marks omitted).

III. DISCUSSION**A. Jurisdiction**

This court must determine, as a threshold matter, whether it has jurisdiction over LOL's appeal. Pub. Access Shoreline Haw. by Rothstein v. Haw. Cty. Planning Comm'n by Fujimoto, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) (quoting Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994)). **Hu Honua** and HELCO argue that this court lacks jurisdiction because LOL's appeal of the PUC's 2017 D&O constitutes an improper collateral attack on the PUC's 2012 D&O. Additionally, **Hu Honua**, HELCO, and the PUC argue that this court lacks jurisdiction because LOL's appeal does not arise from a contested case and LOL failed to comply with the applicable agency rules by not requesting a contested case hearing.

As set forth below, LOL's appeal is not a collateral attack on the PUC's 2012 D&O. LOL has appealed the PUC's 2017 D&O to directly challenge its validity, rather than to indirectly impeach the validity of the PUC's 2012 D&O. Furthermore, the requirements for judicial review under HRS § 91-14(a) - a contested case hearing, finality, and compliance with agency rules - have been satisfied. The PUC's 2017 Docket was a contested case hearing because a hearing was required by constitutional [***21] due process in order to consider the impacts of approving the Amended PPA on LOL's right to a clean and healthful environment, as defined by HRS Chapter 269, and such a hearing would have determined the rights, duties, and privileges of HELCO. It is undisputed that the 2017 D&O is a final decision of the PUC. Finally, LOL followed the applicable agency rules, as it was involved in the contested case as a participant in the 2017 Docket and the PUC's administrative rules do not require a request for a contested case hearing as a prerequisite to judicial review. We therefore have jurisdiction to consider the merits of LOL's appeal.

1. Collateral Attack

[HN7](#)^[↑] "A collateral attack[, as opposed to a direct attack,] is an attempt to impeach a [*12] [**684] judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying such judgment or decree." *Kapiolani Estate v. Atcherly*, 14 Haw. 651, 661 (1903) (citations and internal quotation marks omitted). The ICA has observed that "the collateral attack doctrine is implicated when an independent suit seeks to impeach a judgment entered in a prior suit." *Smallwood v. City and Cty. of Honolulu*, 118 Hawai'i 139, 150, 185 P.3d 887, 898 (App. 2008). This court has similarly stated that "[a]ppellate courts in Hawai'i have typically only applied the collateral attack doctrine in situations [***22] in which a second lawsuit has been initiated challenging a judgment or order obtained from a prior, final proceeding." *In re Thomas H. Gentry Revocable Tr.*, 138 Hawai'i 158, 169 n.5, 378 P.3d 874, 885 n.5 (2016) (citation omitted).

The party asserting that an action constitutes an impermissible collateral attack on a judgment must establish that: (1) a party in the present action seeks to avoid, defeat, evade, or deny the force and effect of the prior final judgment, order, or decree in some manner other than a direct post-judgment motion, writ, or appeal; (2) the present action has an independent purpose and contemplates some other relief or result than the prior adjudication; (3) there was a final judgment on the merits in the prior adjudication; and (4) the party against whom the collateral attack doctrine is raised was a party or is in privity with a party in the prior action.

Smallwood, 118 Hawai'i at 150, 185 P.3d at 898.

As set forth below, LOL's appeal is a direct attack of the PUC's 2017 D&O, not a collateral attack on the PUC's 2012 D&O.

[HN8](#)^[↑] The first *Smallwood* element requires a showing that "a party in the present action seeks to avoid, defeat, evade, or deny the force and effect of the prior final judgment, order, or decree in some manner other than a direct post-judgment motion, writ, or appeal." *118 Hawai'i at 150, 185 P.3d at 898* (emphases added). [***23] "If an appeal is taken from a judgment, . . . the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment." *Kapiolani Estate*, 14 Haw. at 661. Rather than attacking the validity of the PUC's 2012 D&O, LOL's appeal was instituted for the express purpose of denying the force and effect the PUC's 2017 D&O. Thus, the first *Smallwood* element is not satisfied and LOL's appeal cannot be construed as a collateral attack. See *Kapiolani Estate*, 14 Haw.

at 661 ("A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying such judgment or decree.") (emphasis added).

Hu Honua and HELCO argue that, even if LOL's challenge appears to be a direct appeal of the PUC's 2017 D&O, it functions as a collateral attack on the PUC's 2012 D&O. *Hu Honua* and HELCO contend that the primary purpose of LOL's appeal is to force the PUC to consider the effect of the State's reliance on fossil fuels on GHG emissions and climate change. However, they argue, consideration of GHGs was not within the scope of the PUC's final statement of issues in the 2017 Docket. According to *Hu Honua* and HELCO, the 2017 Docket only [***24] involved increasing the term of the Original PPA and revisions to the contract price and milestone events, which do not directly relate to the effect of the State's reliance on fossil fuels on GHG emissions or climate change. *Hu Honua* and HELCO therefore contend that, to the extent the PUC was required to consider the effect of the State's reliance on fossil fuels on GHG emissions and climate change, "it did so only in the 2012 Docket." Because LOL failed to directly and timely challenge the 2012 D&O, *Hu Honua* and HELCO argue that LOL's appeal is an improper and untimely attempt to raise the PUC's failure to address GHGs in the 2012 D&O.

As discussed further *infra*, a majority of this court recently determined that [HN9](#)^[↑] "*HRS § 269-6(b)*'s requirement to reduce reliance on fossil fuels and to consider [GHG] emissions applies to the fulfillment of all of the [PUC's] duties." *In re Application of Maui Elec. Co. (MECO)*, 141 Hawai'i 249, 263, 408 P.3d 1, 15 (2017) (citing *HRS § 269-6(b)*). LOL was entitled to appeal the PUC's 2017 D&O due to the PUC's alleged failure to [*13] [**685] perform statutory and constitutional duties. *Hu Honua* and HELCO's argument that the collateral attack doctrine precludes this court from exercising appellate jurisdiction over LOL's appeal because the PUC's consideration of GHGs was outside the [***25] scope of the 2017 Docket is therefore without merit.

Accordingly, this court's appellate jurisdiction is not precluded by the collateral attack doctrine.

2. Contested Case

[HN10](#)^[↑] PUC decisions are appealable to this court pursuant to *HRS § 269-15.51*, which provides, in relevant part:

Any other law to the contrary notwithstanding, including chapter 91, any contested case under this chapter shall be appealed from a final decision and order or a preliminary ruling that is of the nature defined by *section 91-14(a)*

upon the record directly to the supreme court for final decision. Only a person aggrieved in a contested case proceeding provided for in this chapter may appeal from the final decision and order or preliminary ruling.

[HN11](#)^[↑] Judicial review over an agency appeal is authorized by [HRS § 91-14\(a\)](#)⁹ when the following requirements have been met:

[F]irst, the proceeding that resulted in the unfavorable agency action must have been a contested case hearing . . . ; second, the agency's action must represent a final decision or order, or a preliminary ruling such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved in the contested [\[***26\]](#) case; and finally, the claimant's legal interests must have been injured — i.e., the claimant must have standing to appeal.

[MECO, 141 Hawai'i at 258, 408 P.3d at 10](#) (quoting [Kilakila 'O Haleakala v. Bd. of Land & Nat. Res., 131 Hawai'i 193, 200, 317 P.3d 27, 34 \(2013\)](#)).

Accordingly, there are three jurisdictional requirements for judicial review over an agency appeal: (1) a contested case hearing, (2) finality, and (3) compliance with agency rules. [Id.](#) [Hu Honua](#), HELCO, and the PUC argue that this court lacks jurisdiction over LOL's appeal because the appeal does not arise from a contested case and LOL failed to comply with the applicable agency rules by not requesting a contested case hearing.¹⁰

⁹ [HRS § 91-14\(a\)](#) provides, in relevant part:

Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.

¹⁰ The parties do not dispute that the PUC's 2017 D&O was a final decision or order for the purpose of satisfying the requirements for judicial review of an agency appeal. Accordingly, that requirement is not addressed further.

¹¹ [HRS § 269-16\(b\)](#) provides, in relevant part:

No rate, fare, charge, classification, schedule, rule, or practice, other than one established pursuant to an automatic rate

a. The Proceeding Was a Contested Case Hearing

[HN12](#)^[↑] "A contested case hearing is one that is (1) required by law and (2) determines the rights, duties, and privileges of specific parties." [\[***27\]](#) [MECO, 141 Hawai'i at 258, 408 P.3d at 10](#) (internal quotation marks omitted) (citing [Kilakila, 131 Hawai'i at 200, 317 P.3d at 34](#)). As set forth below, the PUC's 2017 Docket was a contested case hearing because a hearing was required by law that would have determined the rights, duties, and privileges of HELCO.

i. "Required by Law"

[HN13](#)^[↑] "In order for an administrative agency hearing to be required by law, it may be required by (1) agency rule, (2) statute, or (3) constitutional due process." [Id.](#) (internal quotation marks omitted) (citing [Kilakila, 131 Hawai'i at 200, 317 P.3d at 34](#)). LOL contends that a contested case hearing was required under [HRS §§ 269-16](#) (Supp. 2018) and [269-27.2](#) (2007 & Supp. 2018), and constitutional due process. We hold that although a hearing was not required by statute, one was required pursuant to constitutional due process.

[\[*14\]](#) [\[**686\]](#) (A) [HRS § 269-16\(b\)](#)

[HN14](#)^[↑] [HRS § 269-16\(b\)](#) requires the PUC to conduct a contested case hearing whenever a utility seeks an increase in rates, but specifically exempts rate adjustments "established pursuant to an automatic rate adjustment clause previously approved by the commission[.]"¹¹ [HAR § 6-60-6](#) (effective June 19, 1981) similarly provides that automatic rate

adjustment clause previously approved by the commission, shall be established, abandoned, modified, or departed from by any public utility, except after thirty days' notice to the commission as prescribed in [section 269-12\(b\)](#), and prior approval by the commission for any increases in rates, fares, or charges. . . . 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. The commission, upon notice to the public utility, may:

....
(2) After a hearing, by order:

....
(G) Regulate its financial transactions[.]

(Emphases added).

In re Hawai'i Elec. Light Co.

adjustment clauses that apply to fuel and purchased energy--or fuel adjustment clauses--do not require a hearing.¹² Thus, not only are automatic rate adjustment clauses exempted [***28] from [HRS § 269-16\(b\)](#)'s hearing requirement, they are also defined by the relevant agency rule as provisions that allow for rate changes without a prior hearing.

The PUC approved the Amended PPA pursuant to, in part, *HAR § 6-60-6* (effective June 19, 1981). In so doing, it authorized HELCO to include energy power purchase costs in its Energy Cost Adjustment Clause (ECAC) and to include non-energy purchased power costs in its Purchased Power Adjustment Clause (PPAC). According to the 2017 D&O, HELCO's ECAC and PPAC are "fuel adjustment clauses" under *HAR § 6-60-6*.¹³ The PUC specifically noted that *HAR § 6-60-6* "generally governs the propriety of fuel adjustment clauses[.]" and stated in its Findings and Conclusions that:

[I]n the Underlying [2012] Decision and Order regarding the Original PPA, the commission found it "reasonable to authorize [***30] recovery of the purchased energy charges through [HELCO's] ECAC, and to recover the non-energy purchased power costs (including the related revenue taxes) through [HELCO's] PPAC, to the extent that such costs are not included in base rates." Because the energy and capacity payments in the [Amended PPA], as in the Original PPA, continue to not be included in another cost recovery mechanism, and given the above findings concerning pricing under the [Amended PPA], the commission authorizes the same recovery under the [Amended PPA].

In *MECO*, we considered whether a hearing was required under [HRS § 269-16\(b\)](#) before the PUC could approve Maui Electric's request to recover costs through its existing ECAC. *MECO*, [141 Hawai'i at 259-60](#), [**15*] [**687*] [408 P.3d at 11-12](#). In

making our determination that a hearing was not required by [HRS § 269-16\(b\)](#), we stated the following:

[T]he Commission authorized Maui Electric to recover charges for purchased energy under [***31] the Agreement through Maui Electric's existing energy cost adjustment clause. There is nothing in the record indicating that Maui Electric's energy cost adjustment clause was not previously approved by the Commission or that the Commission's decision revised the existing adjustment clause. Additionally, the record does not suggest that the use of the fuel adjustment clause in this case would cover anything other than increases or decreases in the unit cost of purchased energy determined by the last rate case proceeding for the utility. See *HAR § 6-60-6(3)*.

Id.

Similarly here, the PUC authorized HELCO to recover charges for purchased power through its existing ECAC and PPAC. The record indicates that these adjustment clauses were previously approved and were not revised by the PUC's 2017 D&O. Furthermore, the record does not suggest that the adjustment clauses would cover anything other than changes in the unit cost of purchased power determined by the last rate case proceeding.

Accordingly, because the rate adjustments implicated by the Amended PPA were established pursuant to automatic adjustment clauses previously approved by the PUC, the PUC was not required to hold a contested case hearing under [***32] [HRS § 269-16\(b\)](#) prior to approving the Amended PPA.

(B) [HRS § 269-27.2\(d\)](#)

included in the fuel adjustment clause unless the contracts or prices for the purchase of such fuel or energy have been previously approved or filed with the commission.

HAR § 6-60-6 (emphases added).

¹³ The Amended PPA defines "Energy Cost Adjustment Clause" as:

[HELCO]'s cost recovery mechanism for fuel and purchased energy costs approved by the PUC in conformance with [*HAR*] *§ 6-60-6* whereby the base electric energy rates charged to retail customers are adjusted to account for fluctuations in the costs of fuel and purchased energy or such successor provision that may be established from time to time.

"Purchased Power Adjustment Clause" is defined as "[t]he Purchased Power Adjustment Clause approved by the PUC in Decision and Order No. 30168 in Docket No. 2009-0164 on February 8, 2012."

12

The utility's rate schedules may include automatic rate adjustment clauses, only for those clauses previously approved by the commission. Upon effective date of this Chapter, any fuel adjustment clause submitted for [***29] commission approval shall comply with the following standards:

(1) "Fuel adjustment clause" means a provision of a rate schedule which provides for increases or decreases or both, without prior hearing, in rates reflecting increases or decreases or both in costs incurred by an electric or gas utility for fuel and purchased energy due to changes in the unit cost of fuel and purchased energy.

(2) No changes in fuel and purchased energy costs may be

In re Hawai'i Elec. Light Co.

[HN15](#)^[↑] Pursuant to [HRS § 269-27.2\(d\)](#), the PUC may only allow a public utility to impose an interim increase in rates to recover payments made to "nonfossil fuel producers for firm capacity and related revenue taxes" after an evidentiary hearing.¹⁴ As discussed above, in approving the Amended PPA, the PUC authorized HELCO to include energy power purchase costs and non-energy purchased power costs in its ECAC and PPAC, respectively, to the extent that such costs were not included in its base rates. However, HELCO's ECAC and PPAC are fuel adjustment clauses specifically exempt from hearing requirements and do not constitute an "interim increase in rates" for the purposes of [HRS § 269-27.2\(d\)](#).

In [MECO](#), we similarly considered whether a hearing was required under [HRS § 269-27.2\(d\)](#). [MECO, 141 Hawai'i at 259, 408 P.3d at 11](#). In determining that a hearing was not required by [HRS § 269-27.2\(d\)](#), we stated that:

Sierra Club [***33] has not argued that the [PUC]'s decision authorized Maui Electric to impose an interim increase in rates for the purpose of recovering payments for firm capacity, nor has Sierra Club argued that Maui Electric ever sought permission to do so. Indeed, the record indicates that one of the features of the Agreement was to eliminate the capacity payments that Maui Electric was paying to HC & S under the existing agreement. Accordingly, the requirement of a hearing provided for in [HRS § 269-27.2\(d\)](#) is not applicable to the Application in this case.

Id.

As in [MECO](#), LOL does not argue that the PUC authorized an interim increase in HELCO's base rates when it approved the Amended PPA, or that HELCO sought permission to impose such an increase. As such, the PUC was not required to hold a contested case hearing under [HRS § 269-27.2\(d\)](#) prior to approving the Amended PPA.

(C) Constitutional Due Process

LOL argues that a contested case hearing was required by constitutional due process prior to the PUC's approval of the Amended PPA. As set forth below, we agree.

[*16] [***688] [HN16](#)^[↑] This court engages in a two-step

¹⁴ [HRS § 269-27.2\(d\)](#) provides, in pertinent part:

Upon application of a public utility that supplies electricity to the public, and notification of its customers, the commission, after an evidentiary hearing, may allow payments made by the

inquiry when evaluating claims of a due process right to a hearing: "(1) is the particular interest which [the] claimant seeks to protect [***34] by a hearing 'property' within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is 'property,' what specific procedures are required to protect it." [Sandy Beach Def. Fund v. City Council of Honolulu, 70 Haw. 361, 376, 773 P.2d 250, 260 \(1989\)](#) (citing [Aguilar v. Haw. Hous. Auth., 55 Haw. 478, 495, 522 P.2d 1255, 1266 \(1974\)](#)).

Accordingly, to determine whether LOL was entitled to a contested case hearing pursuant to constitutional due process, we must first determine whether LOL possesses "an interest which qualifies as 'property' within the meaning of the constitution." Id. If LOL does possess such a property interest, we must then consider whether a contested case hearing was required to protect that interest. Id.

(1) Constitutionally Cognizable Property Interest

[HN17](#)^[↑] "[A] protected property interest exists in a benefit — tangible or otherwise — to which a party has a legitimate claim of entitlement." [MECO, 141 Hawai'i at 260, 408 P.3d at 12](#) (internal quotation marks omitted) (citing [Sandy Beach Def. Fund, 70 Haw. at 377, 773 P.2d at 260](#)). This court has explained that:

The legitimate claims of entitlement that constitute property interests are not created by the due process clause itself. Instead, "they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law — rules or understanding that secure certain benefits and that support claims of entitlement to [***35] those benefits."

Id. (quoting [In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawai'i 228, 241, 287 P.3d 129, 142 \(2012\)](#)).

LOL argues that it was entitled to due process to protect its constitutional right to a clean and healthful environment provided by [article XI, section 9 of the Hawai'i Constitution](#) and [HRS Chapter 269, Article XI, section 9](#) provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation,

public utility to nonfossil fuel producers for firm capacity and related revenue taxes to be recovered by the public utility through an interim increase in rates[.]

(Emphases added).

In re Hawai'i Elec. Light Co.

protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

In MECO, this court similarly considered whether the PUC violated Sierra Club's due process rights by approving a power purchase agreement between a utility company and a producer of electricity without holding a contested case hearing to consider the environmental impacts of approving the agreement. *Id.* at 260-65, 408 P.3d at 12-17. This court recognized that Sierra Club's interest in its right to a clean and healthful environment, as defined by laws relating to environmental quality, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai'i Constitution. *Id.* at 260-61, 408 P.3d at 12-13.

This court then determined that HN18 [↑] "HRS Chapter 269 is [***36] a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 by providing that express consideration be given to reduction of [GHG] emissions in the decision-making of the Commission." *Id.* at 264, 408 P.3d at 16. This court held that Sierra Club's assertion of a right to a clean and healthful environment, as defined by HRS Chapter 269, therefore established a protectable property interest under article XI, section 9 and HRS Chapter 269. *Id.*

Like the appellant in MECO, LOL seeks to protect its property interest in a clean and healthful environment, as defined by HRS Chapter 269. LOL stated in the 2017 Docket that:

Life of the Land is a non-profit Hawaii-based organization. Our members are very deeply concerned about climate change, biodiversity, and the spread of invasive species. Life of the Land believes that the efforts to protect our archipelago from the [*17] [**689] ravages of climate change, and the introduction of alien species has not been adequately protected and funded by legislative actions.

LOL asserts that "its members are located in Hawai'i and are directly concerned with preventing climate change impacts, biodiversity, and the spread of invasive species, all of which are affected by GHG emissions, as well [***37] as other environmental and public interest impacts of [the] PUC's decisionmaking on the [Amended PPA]." Consequently, pursuant to article XI, section 9 of the Hawai'i Constitution and HRS Chapter 269, as interpreted by this court in MECO, LOL has shown a constitutionally cognizable property interest in this case.

(2) A Contested Case Hearing was Required

Having determined that LOL has demonstrated a protected property interest in a clean and healthful environment as defined by HRS Chapter 269, "we next consider what procedures due process requires in the case." MECO, 141 Hawai'i at 265, 408 P.3d at 17, HN19 [] When determining the procedures required to comply with constitutional due process, we consider the following three factors: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." Sandy Beach Def. Fund, 70 Haw. at 378, 773 P.2d at 261 (citations omitted). Upon consideration of each of these factors, we conclude that a contested case hearing was required.

First, the private interest to be affected is LOL's right to a clean and healthful environment, which "includes the right that [***38] explicit consideration be given to reduction of [GHG] emissions in Commission decision-making, as provided for in HRS Chapter 269." MECO, 141 Hawai'i at 265, 408 P.3d at 17. The Amended PPA involves the construction and operation of a biomass combustion facility by Hu Honua, and reliance on the facility by HELCO for an extended term of thirty years. As in MECO, as part of the 2017 Docket, the PUC was asked to consider the reasonableness of the energy charges implicated by the Amended PPA, and to determine whether the arrangement was prudent and in the public interest. This "would necessarily include an evaluation of the hidden and long-term costs of the activities" of the Hu Honua facility. *Id.* at 266, 408 P.3d at 18. Because the PUC's determinations of these issues would require consideration of the level of GHG emissions generated by the Hu Honua facility, LOL's right to a clean and healthful environment, as defined by HRS Chapter 269, was directly affected by the PUC's approval of the Amended PPA under MECO.

Further, the PUC's 2017 D&O concluded that the Amended PPA was "consistent with HRS chapter 269" and was approved based in part on "the State's need to limit its dependence on fossil fuels and mitigate against volatility in oil pricing." The PUC's decision thus implicated LOL's constitutional [***39] right to a clean and healthful environment, as defined by HRS Chapter 269. Accordingly, the PUC's approval of the Amended PPA under the terms of the 2017 D&O adversely affected LOL's private interest.

Second, the risk of erroneous deprivation is high in this case, absent the protections provided by a contested case hearing. Consistent with public comments in opposition to the project, LOL posits that the PUC's approval of the Amended PPA could have adverse environmental impacts. Yet, the restricted scope

of the 2017 Docket prevented LOL from addressing these potential impacts. See *MECO, 141 Hawai'i at 266, 408 P.3d at 18* (risk of erroneous deprivation of Sierra Club's interest was high due to potential impact on air quality and absence of opportunities to be heard concerning electricity producer's performance under the agreement).

Finally, regarding the governmental interest, the burden of affording LOL a contested case hearing is slight because the PUC is already statutorily required to consider the long-term effects of its decisions. See *id.* (affording Sierra Club a hearing would not [*18] [**690] unduly burden the PUC in light of its statutory duty to consider the long-term effects of its decisions).

Accordingly, and consistent with this court's conclusion [***40] in *MECO*, a hearing conducted by the PUC was required by constitutional due process to protect LOL's right to a clean and healthful environment, as defined by *HRS Chapter 269. Id. at 269, 408 P.3d at 21.*

ii. "Rights, Duties, and Privileges"

HN20 [↑] A contested case hearing is one that is (1) required by law and (2) determines the rights, duties, and privileges of specific parties. *MECO, 141 Hawai'i at 258, 408 P.3d at 10* (citing *Kilakila, 131 Hawai'i at 200, 317 P.3d at 34*) (internal quotation marks omitted). Having determined that a contested case hearing was required by constitutional due process, the question becomes whether the 2017 Docket, in which the PUC approved the Amended PPA, constituted a contested case hearing. We conclude that the 2017 Docket was a contested case hearing because the hearing required by law would have determined HELCO's rights, duties, and privileges.

This court has explained that:

HN21 [↑] *HRS § 91-1* [Supp. 2018] does not contain the requirement that the hearing be a "trial-type evidentiary hearing" or that the hearing exhibit a particular level of "adversarial" quality. Rather, . . . there are only two requirements for a hearing to be regarded as a contested case hearing: (1) that the hearing be required by law and (2) that the hearing determine the rights, duties, or privileges of specific parties.

E & J Lounge Operating Co. v. Liquor Comm'n of City & Cty. of Honolulu, 118 Hawai'i 320, 333, 189 P.3d 432, 445 (2008).

In [***41] *Kilakila*, the Board of Land and Natural Resources (BLNR) approved an application submitted by the University of Hawai'i (UH) to permit construction of astronomy facilities near the summit of *Haleakala on Maui. 131 Hawai'i 193, 317*

P.3d 27. The circuit court dismissed an appeal of the BLNR's decision for lack of jurisdiction under *HRS § 91-14* because no formal contested case hearing had been held. The ICA affirmed. *Id. at 196, 317 P.3d at 30.* This court determined that, although no formal contested case hearing occurred, the BLNR proceedings that resulted in the granting of UH's application constituted a contested case hearing. *Id. at 200-02, 317 P.3d at 34-36.*

We first determined that UH's application "necessitated a hearing by law - i.e., by the administrative rules governing [Department of Land and Natural Resources] and BLNR." *Id. at 202, 317 P.3d at 36.* We then stated the following regarding the "rights, duties, and privileges" requirement of a contested case hearing:

In this case, no formal contested case hearing was actually held before the BLNR voted to grant the permit in this case, so the question becomes whether a formal hearing would have determined — or whether the proceedings that did take place determined — the "rights, duties, and privileges of specific parties." The inquiry here is "directed at the party whose [***42] application was under consideration." Thus, we focus on the rights, duties, and privileges of UH.

. . . . UH's proposed project involves construction of a substantial complex of astronomy facilities on conservation district land. . . . UH could not legally commence that construction without first submitting an application for a permit and having that application reviewed and approved by BLNR. Approval, including any conditions attached thereto, or denial of the application clearly implicates whether UH would or would not be able to engage in the requested use of building astronomy facilities at the telescope project site. Thus, a formal contested case hearing approving o[r] denying UH's application would have determined UH's rights, duties, or privileges with regard to the project. Even in the absence of a formal contested case hearing, we point out that the proceedings that otherwise took place, including the vote to grant the permit, in fact did determine UH's rights, duties, and privileges.

Id. (emphases added) (citations omitted).

Because approval of UH's permit was required before it could construct astronomy [*19] [**691] facilities at the project site, the proceedings that took place determined [***43] UH's rights, duties, and privileges. *Id.* We therefore concluded that, although no formal contested case hearing was conducted, the BLNR proceedings nevertheless constituted a contested case hearing within the meaning of *HRS § 91-14. Id.*

Similar to the BLNR proceedings at issue in Kilakila, no formal contested case hearing was held before the PUC approved the Amended PPA in the 2017 D&O. We must therefore address "whether a formal hearing would have determined - or whether the proceedings that did take place determined - the 'rights, duties, and privileges'" of HELCO. Kilakila, 131 Hawai'i at 202, 317 P.3d at 36 (noting that the inquiry is "directed at the party whose application was under consideration") (citation and quotation marks omitted).

Pursuant to HRS § 269-27.2(c), HELCO and Hu Honua's Amended PPA would be of no force and effect without approval by the PUC. Thus, had the PUC held a formal contested case hearing to determine whether the Amended PPA should be approved or rejected, that hearing would have determined the rights, duties, and privileges of HELCO. Even in the absence of a formal contested case hearing, the proceedings that took place in the 2017 Docket resulted in the PUC's approval of the Amended PPA, and therefore did in fact determine [***44] HELCO's rights, duties, and privileges. Accordingly, the PUC's proceedings in the 2017 Docket constituted a contested case hearing within the meaning of HRS § 91-14.

b. LOL Followed Agency Rules and Was Involved in the Contested Case

HN22 [↑] Judicial review over an agency appeal under HRS § 91-14 is only available where the claimant "followed the applicable agency rules and, therefore, [was] involved in the contested case." MECO, 141 Hawai'i at 258, 408 P.3d at 10

(quoting Kilakila, 131 Hawai'i at 200, 317 P.3d at 34). Hu Honua, HELCO, and the PUC argue that LOL was not entitled to a contested case hearing because it failed to request such a hearing. As set forth below, this argument is without merit, as LOL was not required to request a contested case hearing.

i. A Request for a Contested Case Hearing Was Not Required Pursuant to Administrative Rule

Hu Honua argues that LOL was required to request a contested case hearing pursuant to HAR §§ 6-61-74 (effective 1992-2018) and 6-61-55.¹⁵ However, the PUC's administrative rules do not contain such a requirement. HN23 [↑] HAR § 6-61-74 provided the substantive requirements for applications and petitions to the PUC generally, and HAR § 6-61-55 described the substance of an application to intervene as a party in a PUC proceeding. Neither of these rules, which remain effective in HAR title 16, chapter 601, requires a party to request [***45] a contested case hearing. Moreover, no other rule that governs the rules of practice and procedure before the PUC imposes such a requirement. Furthermore, it is undisputed that LOL was involved in the PUC's proceeding as a participant. Accordingly, judicial review over LOL's appeal is not precluded on this basis.

[*20] [***692] In contrast, HAR Chapter 13-1, governing the rules of practice and procedure before the Department of Land and Natural Resources, contains a requirement that a claimant "request a contested case and petition the board to hold a contested case hearing." HAR § 13-1-29(a) (effective Feb. 27, 2009).¹⁶ This court has recognized that "HAR § 13-1-29 is the

¹⁵ HAR § 6-61-74 provided:

All applications and petitions shall:

- (1) State clearly and concisely the authorization or relief sought;
- (2) Cite the appropriate statutory provision or other authority under which commission authorization or relief is sought; and
- (3) In addition to specific requirements for particular types of applications (see subchapters 7 to 10), state the following:

(A) The applicant's legal name and location of principal place of business, and, if a corporation, trust, association, or other organization, the state under whose laws the applicant was organized;

(B) The name, title, and address of the person to whom correspondence or communications in regard to the application are to be addressed. Notices, orders, and other documents shall be served upon the person named, and that service shall be deemed to be service upon the applicant; and

(C) If ex parte action or relief pending full hearing [***46] is sought, the necessity or emergency justifying the requested action.

See infra note 22. HAR § 16-601-74 (effective Jan. 1, 2019) provides identical requirements.

¹⁶ HAR § 13-1-29(a) provides:

On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold [***47] a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived.

In re Hawai'i Elec. Light Co.

applicable agency rule delineating the specific procedures for requesting a contested case hearing."¹⁷ Hui Kako'o Aina Ho'opulapula v. Bd. of Land & Nat. Res., 112 Hawai'i 28, 40, 143 P.3d 1230, 1242 (2006), abrogated on other grounds by Tax Found. of Hawai'i v. State, SCAP-16-462, 144 Haw. 175, 439 P.3d 127, 2019 Haw. LEXIS 65, 2019 WL 1292286 (Haw. Mar. 21, 2019). We noted that the appellants had made oral requests for a contested case hearing prior to the close of a BLNR meeting, but had failed to subsequently submit a written petition to the BLNR requesting a contested case hearing. Id. We thus determined that "inasmuch as the DLNR had properly promulgated specific procedures for a contested case hearing . . . and the Appellants failed to follow the requisite procedures, there was no contested case from which the Appellants could appeal, pursuant to HRS § 91-14(a)." Id. at 41, 143 P.3d at 1243.

In contrast, the PUC's administrative rules do not require claimants to request a contested case hearing. Thus, LOL did not fail to adhere to the applicable agency rules in seeking judicial review of its agency appeal without requesting a contested case hearing.

ii. A Request for a Contested Case Hearing Was Not Required by Hawai'i Case Law

The PUC argues that "[t]his court's case law on contested case hearings clearly indicates that a request for a contested case hearing is a necessary prerequisite to judicial review of the kind LOL seeks." The PUC cites MECO, 141 Hawai'i at 255, 408 P.3d at 7, Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 380, 363 P.3d 224, 228 (2015), Kilakila, 131 Hawai'i at 195, 204, 317 P.3d at 29, 38, Kaleikini v. Thielen, 124 Hawai'i 1, 4, 237 P.3d 1067, 1070 (2010), and Pele Defense Fund, 77 Hawai'i at 66, 881 P.2d at 1212, for the proposition that "at the very least, a party must have requested a contested case hearing before it can object to the denial of such a hearing." To the contrary, HN24¹⁸ this court's case law does not require a party to request a hearing to gain access

(Emphasis added).

¹⁷ HAR § 13-1-29 has been amended slightly since this court decided Hui Kako'o Aina Ho'opulapula. When the case was decided, HAR § 13-1-29(a) stated:

A hearing on a contested matter may be requested by the board on its own motion or upon the written petition of any government agency or any interested person who then properly qualifies to be admitted as a party. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the board meeting at which the matter is scheduled for disposition (if no public hearing is

to the courts, where the relevant agency has not promulgated a rule requiring such a request and the party has participated [***49] in a contested case proceeding.

A formal request for a contested case hearing is not a prerequisite for judicial review over an appeal under the cases cited by the PUC. In MECO, this court noted that, although the Sierra Club was not allowed to participate in the PUC's proceeding, it formally requested a contested case hearing. MECO, 141 Hawai'i at 255-57, 408 P.3d at 7-8. This court did not, however, hold that a [*21] [**693] formal request for a contested case hearing is a prerequisite for judicial review. Furthermore, MECO is distinguishable from the instant case because unlike the Sierra Club in MECO, LOL actively participated in the 2017 Docket. Mauna Kea Anaina Hou, Kilakila, and Kaleikini are also distinguishable because each of those cases concerned appeals of BLNR decisions, and as explained supra, agency rules of the BLNR, unlike those of the PUC, require that a formal request for a contested case hearing be submitted to attain judicial review over an agency appeal.

Pele Defense Fund, which involved an appeal of a Department of Health (DOH) decision, is similarly distinguishable because DOH rules provide that in order to obtain judicial review, an interested person seeking a contested case hearing must submit a complaint or application [***50] requesting such a hearing.¹⁸ 77 Hawai'i at 69, 881 P.2d at 1215 ("Appellees submitted 'Application[s] for Contested Case[s]' on forms provided by the DOH and in full compliance with the agency's rules."). Accordingly, the cases cited by the PUC do not establish that LOL was required to request a contested case hearing as a prerequisite to judicial review.

B. Standing

HN25¹⁹ In the context of administrative appeals brought pursuant to HRS § 91-14(a), this court has interpreted the

required). In either situation, the person or agency requesting the contested case hearing must file (or mail and postmark) a [***48] written petition with the board not later than ten days after the close of the public hearing or the board meeting, whichever is applicable. The time for making an oral or written request and submitting a written petition may be waived by the board.

(Emphasis added).

¹⁸ DOH rules also allow the DOH to hold a contested case hearing on its own motion. See Pele Defense Fund, 77 Hawai'i at 69 n.12, 881 P.2d 1215 n.12.

In re Hawai'i Elec. Light Co.

concept of standing to be comprised of two components.¹⁹ *Jordan v. Hamada*, 64 Haw. 451, 454-56, 643 P.2d 73, 75-76 (1982). "First, one must be a person aggrieved, inter alia, by a final decision and order in a contested case. Second, the aggrieved person must have participated in the contested case from which the decision affecting him resulted." *Id.* (citation and internal quotation marks omitted); see also *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 515, 654 P.2d 874, 880 (1982).

1. "Person Aggrieved"

[HN26](#)^[↑] To be a person aggrieved, "one must be specially, personally, and adversely affected" by the final decision and order at issue. *Life of the Land, Inc. v. Land Use Comm'n*, 61 Haw. 3, 7, 594 P.2d 1079, 1082 (1979) (quoting *East Diamond Head Ass'n v. Zoning Board of Appeals*, 52 Haw. 518, 523 n.5, 479 P.2d 796, 799 n.5 (1971)). An unfavorable final decision and order is not enough to satisfy this prong of the analysis - "[t]here must be a special injury or damage to one's personal or property rights[,] as distinguished from the role of being only a champion of causes." *Id.*

[HN27](#)^[↑] We have previously [\[***51\]](#) recognized the right to a clean and healthful environment, as defined by *HRS Chapter 269*, as a "legally protected interest" adequate to confer standing. *MECO, 141 Hawai'i at 270-71, 408 P.3d at 22-23*; see also *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 176-77, 177 n.10, 623 P.2d 431, 441, 441 n.10 (1981).

There is sufficient evidence in the record to demonstrate that the PUC's approval of the Amended PPA specially, personally, and adversely affected LOL's members. As set forth above, LOL is a Hawai'i-based nonprofit organization comprised of members who live, work, and recreate in Hawai'i. Such activity includes visiting and exploring the Big Island's Hamakua Coast, where the *Hu Honua* facility is located. LOL asserts

¹⁹ *HRS § 91-14(a)* provides, in pertinent part, "[a]ny person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review thereof under this chapter[.]" Pursuant to *HRS § 91-1*, the term "persons" includes individuals, associations, and public or private organizations.

²⁰ The PUC impliedly recognized this potential injury when it determined that, *inter alia*, "LOL's concerns regarding the proposed project's impact on existing renewable projects on the Big Island" were sufficient to satisfy the requirements of HAR § 6-61-56.

The grounds for participation without intervention in PUC proceedings, as set forth by HAR § 6-61-56(c) were:

- (1) . . . [T]he direct and substantial interest of the applicant;

that the *Hu Honua* facility's use of biofuels for energy production may cause adverse environmental impacts on the Big Island. In addition to submitting several IRs regarding the GHG emissions associated with the Amended PPA, LOL submitted an IR to *Hu Honua* regarding the potential for ocean contamination caused by the improper disposal of wastewater at the facility. It also expressed concern regarding the environmental impacts associated with "acquiring bioenergy crops" from an area of the Big Island that already serves as a source for [\[*22\]](#) [\[**694\]](#) another biofuel facility, and whether the *Hu Honua* facility will "cut into the utilities[*']*" [\[***52\]](#) purchase of energy from existing and/or planned wind and solar farms."²⁰ These impacts could affect the Big Island in general, and the Hamakua Coast in particular.

Thus, LOL has demonstrated an injury to its members, including their right to a clean and healthful environment as defined by *HRS Chapter 269*, due to the PUC's approval of the Amended PPA. LOL has therefore satisfied the first prong of the standing analysis. See *MECO, 141 Hawai'i at 270-71, 408 P.3d at 22-23*; see also *Sierra Club v. Hawai'i Tourism Authority ex rel. Bd. of Directors*, 100 Hawai'i 242, 271, 59 P.3d 877, 906 (2002) ([HN28](#)^[↑]) "An organization may sue on behalf of its members even though it has not been injured itself when: (1) its members would otherwise have standing to sue in their own right; (2) the interests the organization seeks [\[***53\]](#) to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief itself requested requires the participation of individual members in the lawsuit").

2. Participation

[HN29](#)^[↑] Although an aggrieved person must have participated in a contested case in order to invoke judicial intervention, we have not "conditioned standing to appeal from

- (2) The applicant's position regarding the matter in controversy;
- (3) The extent to which the participation will not broaden the issues or delay the proceeding;
- (4) The extent to which the applicant's interest will not be represented by existing parties;
- (5) A statement of the expertise, knowledge or experience the applicant possesses with regard to the matter in controversy;
- (6) Whether the applicant can aid the commission by submitting an affirmative case; and
- (7) . . . [T]he relief desired.

(Emphases added). *HAR § 16-601-56(c)* sets forth identical grounds for participation without intervention.

an administrative decision upon formal intervention in the agency proceeding." *Mahuiki*, 65 Haw. at 515, 654 P.2d at 880 (quoting *Jordan*, 62 Haw. at 449, 616 P.2d at 1371). Where "the appellants have been aggrieved by the action of the PUC, and where they were involved as participants during the [contested case,] the appellants may challenge the order of the PUC in this court." *Life of the Land, Inc. v. Land Use Comm'n*, 61 Haw. at 9, 594 P.2d at 1083 (internal quotation marks and ellipsis omitted) (quoting *In Re Application of Hawaiian Electric Co.*, 56 Haw. 260, 265, 535 P.2d 1102, 1106 (1975)). Because LOL was involved in the 2017 Docket as a participant, it has met the second prong of the analysis. LOL therefore has standing under *HRS § 91-14(a)* to appeal the PUC's 2017 D&O and the denial of its Motion to Upgrade Status.

C. Merits of LOL's Appeal

[HN30](#)^[↑] Pursuant to *HRS § 269-6(b)*, the PUC must explicitly consider the effect of the State's reliance on fossil fuels on, inter alia, GHG emissions. We have characterized this as a "requirement to reduce reliance on fossil fuels and to consider [GHG] **[***54]** emissions[, which] applies to the fulfillment of all of the [PUC's] duties." *MECO*, 141 Hawai'i at 263, 408 P.3d at 15. That the facility involved in the Amended PPA is a biofuel facility does not absolve the PUC of this duty. Thus, in approving the Amended PPA, the PUC was required to expressly consider the reduction of GHG emissions. *Id.* at 264, 408 P.3d at 16. Further, LOL was entitled to a meaningful opportunity to be heard on the issue of the Amended PPA's impact on its constitutional right to a **[**695]** clean and healthful environment, as defined by *HRS Chapter 269*.

The findings and conclusions in the PUC's 2017 D&O do not show that the PUC expressly considered the reduction of GHG emissions in reaching its decision. The PUC also denied LOL due process by preventing LOL from addressing the impacts of approving the Amended PPA on LOL's right to a **[*23]** clean and healthful environment, as defined by *HRS Chapter 269*.

1. The PUC Failed to Satisfy its Statutory Obligations

²¹ Relatedly, we note that the State has committed to furthering the goals of the Paris Climate Agreement. 2018 Haw. Sess. Laws. Act 15, § 1 at 46-47 ("The legislature notes that Hawai'i, as part of the United States Climate Alliance . . . committed to upholding the objectives of the 2015 Paris Agreement."). This commitment is advanced through *HRS Chapter 225P*, which provides, in part:

The purpose of [the] chapter is to address the effects of climate change to protect the State's economy, environment, health, and way of life. [The] chapter establishes the framework for the State

Under *HRS § 269-6(b)*

HRS § 269-6(b) provides:

The public utilities commission shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation in exercising its authority and duties under this chapter. In making determinations of the reasonableness of the costs of utility system capital **[***55]** improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and [GHG] emissions. The commission may determine that short-term costs or direct costs that are higher than alternatives relying more heavily on fossil fuels are reasonable, considering the impacts resulting from the use of fossil fuels.

(Emphases added).

In *MECO*, this court observed that "[i]n 2011, [HN31](#)^[↑] the legislature amended *HRS § 269-6(b)* to make it mandatory for the Commission when exercising its duties to recognize the 'need' to reduce reliance on fossil fuels and to 'explicitly consider' the levels and effect of [GHG] emissions[.]" *141 Hawai'i at 262, 408 P.3d at 14* (emphasis in original). This court determined that "a primary purpose of the [2011 amendment] was to require the Commission to consider the hidden and long-term costs of reliance on fossil fuels, which subjects the State and its residents to increased air pollution and potentially harmful climate change due to the release of harmful [GHGs]."²¹ *Id.* at 263, 408 P.3d at 15 (quoting H. Stand. Comm. Rep. No. 1004, in 2011 House Journal, at 1332) (internal quotation **[***56]** marks omitted). This court then concluded that "*HRS § 269-6(b)*'s requirement to reduce reliance on fossil fuels and to consider [GHG] emissions applies to the fulfillment of all of the Commission's duties." *Id.* (emphasis added). Accordingly, pursuant to *MECO*, *HRS § 269-6(b)* requires that "express consideration be given to reduction of [GHG] emissions in the decision-making of the Commission." *Id.* at 264, 408 P.3d at 16. Thus, it is clear that the PUC was required to expressly consider the reduction of

to:

- 1) Adapt to the inevitable impacts of global warming and climate change, including rising sea levels, temperatures, and other risk factors; and
- 2) Mitigate its greenhouse gas emissions by sequestering more atmospheric carbon and greenhouse gases than the State produces as quickly as practicable, but no later than 2045.

HRS § 225P-1 (Supp. 2018).

GHG emissions in deciding whether to approve the Amended PPA.

[HN32](#)^[↑] In determining whether the PUC satisfied this duty pursuant to [HRS § 269-6\(b\)](#), this court "should ensure that the agency . . . [made] its findings reasonably clear. The parties and the [***57] court should not be left to guess . . . the precise finding of the agency." [Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kauai, 133 Hawai'i 141, 164, 324 P.3d 951, 974 \(2014\)](#) (citation and quotation marks omitted). "An agency's findings should be sufficient to allow the reviewing court to track the steps by which the agency reached its decision." [Id.](#) (citation and quotation marks omitted); see also [In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 432, 83 P.3d 664, 695 \(2004\)](#) (explaining that any presumption of validity, given to an agency's decision, "presupposes that the agency has grounded its decision in reasonably clear" findings of fact and conclusions of law).

Because the 2017 D&O does not reflect that the PUC explicitly considered the reduction of GHG emissions in approving the Amended PPA, we conclude that the PUC [*24] [***696] failed to comply with [HRS § 269-6\(b\)](#). The only reference to GHG emissions in the 2017 D&O appears in the "Procedural Background" section. It reads, "[c]omments in opposition to the Project tended to focus on potential adverse environmental impacts, an expected rise in [GHG] emissions, . . . and general objections to biomass as a fuel resource." The 2017 D&O does not provide responses to those comments, nor is there any mention of GHG emissions in the PUC's "Statement of Issues" or "Discussion and Findings." Further, although the PUC restated [***58] HELCO's representations that the biomass facility could potentially save approximately 15,700 barrels of fuel per year and contribute to the State's RPS goals, it made no express findings or conclusions regarding the biomass facility's GHG emissions.

In its findings and conclusions, the PUC found that [Hu Honua](#)'s biomass facility may displace fossil fuel generation resources and accelerate the retirement of fossil fuel plants, and noted that its decision to approve the Amended PPA was based on "factors such as the State's need to limit its dependence on fossil fuels and mitigate against volatility in oil pricing." These findings and conclusions do not constitute "express consideration" of the reduction of GHG emissions, as provided for under [HRS § 269-6\(b\)](#). See [MECO, 141 Hawai'i at 264, 408 P.3d at 16](#).

In [MECO](#), Maui Electric requested that the PUC determine whether its proposed PPA was prudent and in the public interest, and consider the reasonableness of the associated energy charges. [Id. at 265-66, 408 P.3d at 17-18](#). This court

explained that when reviewing the PPA, the PUC was required under [HRS § 269-6\(b\)](#) to consider the hidden and long-term costs of energy produced under the Agreement, including the potential for increased air pollution due to GHG emissions. [Id. at 266, 408 P.3d at 18](#). This court further [***59] stated that the consideration of potential health risks is "axiomatic" in the PUC's analysis of the level of GHG emissions, "as contemplated by the legislature when it amended [HRS § 269-6\(b\)](#) in 2011[.]" [Id.](#)

Similarly, in the instant case, HELCO requested that the PUC determine whether the energy charges under the Amended PPA were reasonable and if its arrangement with [Hu Honua](#) were prudent and in the public interest. In its review of the Amended PPA, the PUC found that the "purchased power costs and arrangements set forth in the [Amended] PPA appear reasonable, prudent, in the public interest, and consistent with [HRS chapter 269](#) in general, and [HRS § 269-27.2\(c\)](#), in particular." The PUC did not, however, substantiate this finding by addressing the hidden and long-term environmental and public health costs of reliance on energy produced at the proposed facility, as required. These costs include "the potential for increased air pollution as a result of GHG emissions" directly attributed to energy generation at the facility, as well as GHG emissions produced at earlier stages in the production process, such as fuel production and transportation. See [MECO, 141 Hawai'i at 263, 408 P.3d at 15](#) ("a primary purpose of [amending [HRS § 269-6\(b\)](#)] was to require the [PUC] to consider the hidden [***60] and long-term costs of reliance on fossil fuels, which subjects the State and its residents to increased air pollution and potentially harmful climate change due to the release of harmful [GHGs].") (internal quotation marks and citation omitted).

Accordingly, the 2017 D&O was not supported by findings regarding GHG emissions of the [Hu Honua](#) facility "sufficient to allow the reviewing court to track the steps by which the [PUC] reached its decision." [Kauai Springs, Inc., 133 Hawai'i at 164, 324 P.3d at 974](#). Without such explicit findings, this court cannot determine whether the PUC adequately considered GHG emissions as required by [HRS § 269-6\(b\)](#).

[HN33](#)^[↑] "A remand pursuant to [HRS § 91-14\(g\)](#) is appropriate if an agency's findings are incomplete and provide no basis for review." [Int'l Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 328, 713 P.2d 943, 953 \(1986\)](#) (citing [In re Kauai Elec. Div. of Citizens Util. Co., 60 Haw. 166, 185-86, 590 P.2d 524, 538 \(1978\)](#)). [HRS § 91-14\(g\)](#) provides as follows:

[*25] [***697] Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or

In re Hawai'i Elec. Light Co.

modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions;

....

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly [***61] unwarranted exercise of discretion.

Where the PUC's failure to make sufficient findings leaves this court unable to determine the validity of its conclusions, it is appropriate to remand the case to the PUC for further proceedings, pursuant to [HRS § 91-14\(g\)](#), in order for the PUC to make findings necessary for judicial review. [Application of Hawaiian Tel. Co., 54 Haw. 663, 669, 513 P.2d 1376, 1379 \(1973\)](#); see also [In re Kauai Elec. Div. of Citizens Util. Co. 60 Haw. at 185, 590 P.2d at 537](#) (remanding the case to the PUC for further proceedings, pursuant to [HRS § 91-14\(g\)](#), because the PUC's order was "unsupported by findings of fact and conclusions").

Here, remand to the PUC for further proceedings is appropriate. On remand, the PUC shall give explicit consideration to the reduction of GHG emissions in determining whether to approve the Amended PPA, and make the findings necessary for this court to determine whether the PUC satisfied its obligations under [HRS § 269-6\(b\)](#).

2. The PUC's Failure to Provide LOL an Opportunity to Be Meaningfully Heard in the 2017 Docket Denied LOL Due Process

[HN34](#) [↑] "The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." [Sandy Beach Def. Fund. 70 Haw. at 378, 773 P.2d at 261](#) (citing [Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 \(1976\)](#)). As discussed supra, this court has recognized that the "right to a clean [***62] and healthful environment, as defined by laws relating to environmental quality," is a property interest protected by due process because it is a substantive right guaranteed by [article XI, section 9 of the Hawai'i Constitution. MECO, 141 Hawai'i at 253, 260-61, 408 P.3d at 5, 12-13](#). In [MECO](#), after concluding that Sierra Club's asserted property interest required a hearing by the PUC to comply with due process, this court observed that procedural due process includes "the right to submit evidence and argument on . . . the impact of the Agreement on the asserted property interest." [Id. at 269, 408 P.3d at 21](#) (citation omitted).

This court then stated that the PUC "has the authority to set limitations in conducting the proceedings so long as the procedures sufficiently afford an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of the Agreement's impact on the asserted property interest." [Id. at 270, 408 P.3d at 22](#).

As explained above, procedural due process necessitated a contested case hearing because the 2017 D&O, which approved the Amended PPA, adversely affected LOL's constitutionally protected right to a clean and healthful environment, as defined by [HRS Chapter 269](#). See [id. at 265, 408 P.3d at 17](#) (agency hearing required "when the challenged State action adversely affects the constitutionally protected rights of others") (quoting [Pele Def. Fund. 77 Hawai'i at 68, 881 P.2d at 1214](#)) (internal [***63] quotation marks omitted). Accordingly, LOL was entitled to an opportunity to be heard at a meaningful time and in a meaningful manner regarding the Amended PPA's impact on its right to a clean and healthful environment, as defined by [HRS Chapter 269](#). See [id. at 270, 408 P.3d at 22](#).

LOL was not afforded a sufficient opportunity to address the Amended PPA's impact on its constitutional right to a clean and healthful environment, as defined by [HRS Chapter 269](#), throughout the 2017 Docket. The PUC allowed LOL to participate in the 2017 Docket with respect to two sub-issues: (2.a.i) whether the energy price components in the Amended PPA properly reflect the cost of biomass fuel supply, and (2.b) whether HELCO's purchase power arrangements under [*26] [***698] the Amended PPA are prudent and in the public interest. LOL argued that the proposed biomass facility was not in the public interest and should be rejected. LOL further argued that "the issue of climate change is embedded in both issues the Commission assigned to LOL to consider[,] that [Hu Honua](#)'s proposal failed to fully address the environmental impact of its operations, and that [Hu Honua](#)'s claims of carbon-neutrality were unsupported.

However, HELCO refused to respond to LOL's IRs regarding environmental [***64] impacts of the project and production of an environmental site assessment because those topics were outside the scope of LOL's participation. [Hu Honua](#) similarly objected to LOL's IRs regarding loss of stored carbon from tree harvesting, environmental impacts of the project, and production of an environmental site assessment as outside the scope of LOL's restricted participation. LOL filed a Motion to Compel, seeking lease agreements and a forestry operations report from [Hu Honua](#), in order to address the cost of biomass fuel supply and GHG emissions from the facility's operations. However, the PUC denied LOL's motion, finding that "LOL's Motion to Compel, if granted, would cause an undue delay in this proceeding."

Thus, although the 2017 D&O acknowledged LOL's attempts to discuss the Amended PPA's impacts on LOL's right to a clean and healthful environment, as defined by [HRS Chapter 269](#), in addressing whether the Amended PPA is prudent and in the public interest, the PUC did not afford LOL an opportunity to be heard regarding this issue at a meaningful time and in a meaningful manner. Rather, the PUC prevented LOL from meaningfully addressing the impact that approving the Amended PPA would have on [***65] LOL's asserted property interest, based on its determination that LOL's environmental concerns were beyond the scope of the 2017 Docket. Accordingly, the PUC's procedures violated LOL's due process right to be meaningfully heard regarding the impacts that approving the Amended PPA would have on LOL's right to a clean and healthful environment, as defined by [HRS Chapter 269](#).

Due to the PUC's failure to allow LOL to present evidence and argument concerning its right to a clean and healthful environment, as defined by [HRS Chapter 269](#), this court must vacate the PUC's 2017 D&O and remand this case to the PUC for a hearing that complies with procedural due process. In order to comply with statutory and constitutional requirements, the PUC's post-remand hearing must afford LOL an opportunity to meaningfully address the impacts of approving the Amended PPA on LOL's members' right to a clean and healthful environment, as defined by [HRS Chapter 269](#). The hearing must also include express consideration of GHG emissions that would result from approving the Amended PPA, whether the cost of energy under the Amended PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the Amended PPA are prudent and in the [***66] public interest, in light of its potential hidden and long-term consequences. See [MECO, 141 Hawai'i at 269, 408 P.3d at 21](#).

3. The PUC's Denial of LOL's Motion to Upgrade Status

LOL asserts that the PUC's denial of its Motion to Upgrade Status in Order No. 34651 was clearly erroneous and constituted an abuse of discretion. LOL further argues that its "participant" status and the restriction of its participation to two issues in the 2017 Docket denied it a sufficient opportunity to protect its constitutional right to a clean and healthful environment, as defined by [HRS Chapter 269](#).

[Hu Honua](#), HELCO, and the PUC argue that it was within the PUC's discretion to find that LOL's motion failed to satisfy the factors under HAR § 6-61-55 for party-intervenor status. HELCO additionally argues that LOL is time-barred from challenging the PUC's denial because it did not do so within the thirty-day time period required by [HRS § 91-14\(b\)](#). We

conclude that LOL's appeal of Order No. 34651 is timely, but we need not determine whether the PUC abused its discretion or violated LOL's due process right in denying LOL's Motion to Upgrade Status.

[*27] [***699] a. Timeliness of LOL's Appeal of Order No. 34651 Denying LOL's Motion to Upgrade Status

LOL's appeal of Order No. 34651 is timely. [HN35](#) [↑] Under [HRS 91-14\(b\)](#), appeals [***67] are timely where the appellant files its notice of appeal "within thirty days after service of the certified copy of the final decision and order of the agency[.]" HELCO cites [Kilakila, 131 Hawai'i at 195, 317 P.3d at 29](#), for the proposition that "denied requests to intervene are final orders as defined in [HRS § 91-14](#)," and argues that Order No. 34651, which denied LOL's Motion to Upgrade Status to party-intervenor, was a "final decision and order" subject to the thirty-day time limit under [HRS § 91-14\(b\)](#). Because Order No. 34651 was issued on June 23, 2017 and LOL appealed that determination sixty-four days later on August 26, 2017, HELCO contends that LOL's appeal is untimely.

In [Kilakila](#), this court considered whether the BLNR's decision to approve a permit, without either granting or denying Kilakila's request for a contested case hearing, was a "final decision and order" within the meaning of [HRS § 91-14, 131 Hawai'i at 202-03, 317 P.3d at 36-37](#). We noted that in [Kaleikini, 124 Hawai'i at 26, 237 P.3d at 1092](#), the "DLNR's decision to deny Kaleikini's request for a contested case hearing constituted a final decision and order of the agency because it ended the litigation." *Id. at 203, 317 P.3d at 37* (internal quotations omitted). We then determined that the BLNR's vote to grant the permit effectively denied Kilakila's request for a contested case hearing, and was therefore [***68] a "final decision and order," as it provided the requisite finality to enable Kilakila to appeal. *Id.*

Here, Order No. 34651 Denying LOL's Motion to Upgrade Status was not required to be appealed within thirty days because it did not constitute a "final decision and order" of the PUC. The order denied LOL party status and confirmed LOL's limited participant status, but did not resolve all other outstanding issues in the 2017 Docket. Thus, unlike the agency decisions in [Kaleikini](#) and [Kilakila](#), which provided appellants the "requisite finality" by "end[ing] the litigation[.]" the PUC's Order No. 34651 merely maintained LOL's participation in the proceeding. See [Kilakila, 131 Hawai'i at 203, 317 P.3d at 37](#). Therefore, LOL's appeal would have been unripe until the PUC issued the 2017 D&O, which represents the "final decision and order" of the PUC. The PUC issued the 2017 D&O on July 28, 2017, which, along with Order No. 34651 Denying LOL's Motion to Upgrade Status, was appealed by LOL on August

26, 2017. As LOL filed its notice of appeal twenty-nine days after the PUC's 2017 D&O, its appeal is timely.

b. We Need Not Decide Whether the PUC Abused its Discretion or Violated Due Process by Denying LOL's Motion to Upgrade Status

[HN36](#)^[↑] HAR § 6-61-55 set forth [***69] nine factors for the PUC to consider in determining whether to grant a motion to intervene as a party in a PUC proceeding. The rule further provided that the PUC would not grant intervention "except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented."²² Pursuant [*28] [**700] to HAR § 6-61-55(a), "[i]ntervention as a party in a proceeding before the PUC is not a matter of right[,] but is a matter resting within the sound discretion of the commission[.]" as long as that discretion is not exercised arbitrarily or capriciously. *Application of Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975)* (citation omitted).

LOL argues that the limitation of its participation to Sub-issue Nos. 2.a.i and 2.b denied it a meaningful opportunity to address its constitutional right to a clean and healthful environment. However, as discussed above, the record does not establish that the PUC explicitly considered the reduction of GHG emissions at all in the 2017 Docket. It is therefore clear that the PUC misconstrued this aspect of its statutory duty, which was fundamental to LOL's potential [***71] role in the proceeding. As such, it appears the PUC's denial of LOL's Motion to Upgrade Status was premised on a flawed understanding of the relevant inquiry, and therefore we cannot

say whether such denial constituted an abuse of discretion.

LOL further argues that the PUC's denial of its Motion to Upgrade Status violated its due process rights by impeding its ability to obtain access to documents. However, the record does not establish that the PUC restricted LOL's access to documents due to its status as a limited participant. Order No. 34597, which established, inter alia, a final statement of the issues and LOL's scope of participation in the 2017 Docket, limited LOL's participation to Sub-issue Nos. 2.a.i and 2.b, but did not restrict the manner of its participation within those issues. Further, Protective Order No. 34555, which "govern[ed] the classification, acquisition, and use of trade secrets, and other confidential information" produced in the docket, provided that "[a]ll parties or participants to all or any portion of this docket . . . shall be entitled to all confidential information under the provisions of this Protective Order to the extent allowed by the commission." [***72] (Emphasis added). LOL does not allege or demonstrate that access to documents designated as "confidential" was given to parties, but denied to participants. Accordingly, it is not apparent from the record that LOL would have had greater access to documents had the PUC granted its Motion to Upgrade Status.

In sum, on remand, it is within the PUC's discretion to determine the extent of LOL's participation in the proceeding, pursuant to *HAR § 16-601-55*, provided that the PUC complies with its statutory and constitutional obligations to consider the reduction of GHG emissions and to allow LOL a meaningful opportunity to be heard regarding the Amended PPA's impact on its right to a clean and healthful environment, as defined by *HRS Chapter 269*.

²² HAR § 6-61-55 provided:

(a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.

(b) The motion shall make reference to:

- (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;

[***70] (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 or delay 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.

(c) The motion shall be filed and served by the applicant in accordance with sections 6-61-21 and 6-61-57.

(d) Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.

Other than the HAR section numbers it references, *HAR 16-601-55* (effective Jan. 1, 2019) is identical to HAR 6-61-55 (effective 1992-2018).

IV. CONCLUSION

As set forth above, [HRS § 269-6\(b\)](#) requires the PUC to expressly consider the reduction of GHG emissions in its decision-making. The PUC failed to do so in determining whether the costs associated with the Amended PPA were reasonable, and in approving the Amended PPA. The PUC also failed to afford LOL an opportunity to be heard at a meaningful time and in a meaningful manner regarding the Amended PPA's impact on LOL's property interest in a clean and healthful environment, as defined [***73] by [HRS Chapter 269](#).

The PUC's 2017 D&O is therefore vacated and this case is remanded to the PUC for proceedings consistent with this opinion.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

End of Document

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity.)
_____)

ORDER NO. 37205

DENYING HAWAII ELECTRIC LIGHT COMPANY, INC.'S REQUEST
FOR A WAIVER AND DISMISSING LETTER REQUEST FOR APPROVAL
OF AMENDED AND RESTATED POWER PURCHASE AGREEMENT

TABLE OF CONTENTS

I. BACKGROUND.....3

 A. Docket No. 2008-0143 (Waiver Docket) 3

 B. Docket No. 2012-0212 (Original PPA Docket 4

 C. Relevant Procedural History 8

II. DISCUSSION.....17

 A. HELCO Has Not Met Its Burden To
 Justify A Waiver From The Competitive
 Bidding Framework For The Hu Honua Project 17

 1. Applicants' Position..... 18

 2. Recent Developments 20

 3. The Competitive Bidding Framework 24

 4. Denying HELCO's Request For A Waiver 26

 B. Miscellaneous Matters 43

 C. Impact Of Greenhouse Gas
 Emissions Related To The Project 44

III. ORDERS.....54

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) Docket No. 2017-0122
)
For Approval of a Power Purchase) Order No. **37205**
Agreement for Renewable Dispatchable)
Firm Energy and Capacity.)
_____)

DENYING HAWAII ELECTRIC LIGHT COMPANY, INC.'S REQUEST
FOR A WAIVER AND DISMISSING LETTER REQUEST FOR APPROVAL
OF AMENDED AND RESTATED POWER PURCHASE AGREEMENT

By this Decision and Order,¹ the Public Utilities Commission ("Commission"), denies HELCO's request for a waiver from the Competitive Bidding Framework for the Amended and Restated Power Purchase Agreement dated May 5, 2017 ("Amended PPA")² between

¹The Parties to this docket are HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), HU HONUA BIOENERGY, LLC ("Hu Honua") (collectively, HELCO and Hu Honua are referred to as "Applicants"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Commission has also granted Participant status to LIFE OF THE LAND ("LOL"), TAWHIRI POWER, LLC ("Tawhiri"), and HAMAKUA ENERGY, LLC ("Hamakua"). See Order No. 34554, "Opening a Docket to Review and Adjudicate Hawaii Electric Light Company, Inc.'s Letter Request for Approval of Amended and Restated Power Purchase Agreement, Filed in Docket No. 2012-0212 on May 9, 2017," filed May 17, 2017 ("Order No. 34554").

²"Hawaii Electric Light Company, Inc.'s Amended and Restated Power Purchase Agreement dated May 5, 2017," filed May 9, 2017. HELCO submitted the Amended PPA as "Exhibit A" to a written letter

HELCO and Hu Honua to purchase energy and capacity from Hu Honua's biomass facility on Hawaii island (the "Hu Honua Project"). As discussed in this Order, HELCO has not demonstrated that a waiver from the competitive bidding framework is necessary or justified. HELCO's recent competitive solicitations have been successful in procuring multiple large-scale renewable energy projects cost-effectively, such that HELCO's requested waiver is not in the public interest. As a result, the Commission dismisses without prejudice HELCO's Letter Request, filed May 9, 2017, in Docket No. 2012-0212,³ for approval of the Amended PPA and does not address the remaining issues in this proceeding, as moot.

request to the Commission, filed May 9, 2017. The cover letter shall be referred to herein as "HELCO Letter Request," and the Amended PPA attached as Exhibit A shall be referred to as the "Amended PPA."

³Pursuant to Order No. 34556, "Transferring Request for Approval of Amended and Restated Power Purchase Agreement from Docket No. 2012-0212 to Docket No. 2017-0122," filed May 18, 2017, in Docket No. 2012-0212 ("Order No. 34556"), HELCO's Letter Request was transferred to this docket.

I.

BACKGROUND

A.

Docket No. 2008-0143 (Waiver Docket)

On July 16, 2008, HELCO and its parent company, Hawaiian Electric Company, Inc. ("HECO"), submitted an application seeking a waiver from the Commission's Competitive Bidding Framework⁴ for a proposed project to be built by Hu Honua.⁵ Specifically, Hu Honua proposed building a biomass energy project in Pepeekeo on Hawaii Island.⁶ In relevant part, HECO and HELCO argued in the Waiver Application that HELCO did not have any on-going or planned renewable energy requests for proposals ("RFP") at the time, and that "a waiver [would] be in the public interest as it would allow discussions to continue on the provision of ancillary services that could assist the utility grid's operations."⁷

⁴See In re Public Util. Comm'n, Docket No. 03-0372, Decision and Order No. 23121, filed December 8, 2006, Exhibit A ("Competitive Bidding Framework" or "Framework").

⁵See In re Haw. Elec. Co. Inc., Docket No. 2008-0143, "Application; Exhibits A & B; and Certificate of Service," filed July 16, 2008 ("Waiver Application").

⁶Waiver Application, Exhibit A at 1.

⁷Docket No. 2008-0143, Decision and Order, filed November 14, 2008 ("Waiver D&O") at 2 (citing Waiver Application at 3).

On November 14, 2008, the Commission issued its Waiver D&O granting HECO and HELCO's request for a waiver from the Competitive Bidding Framework for the Hu Honua Project, finding that "a waiver for the Hu Honua Project is in the public interest because 'it could provide an opportunity to increase the amount of renewable energy on HELCO's system, without increasing the amount of as-available, intermittent renewable energy resources on HELCO's system.'"⁸ However, the Commission cautioned that it was "not approving the Hu Honua Project per se[,]"" and that any subsequent power purchase agreement ("PPA") between HELCO and Hu Honua related to the Project would be reviewed separately by the Commission.⁹

B.

Docket No. 2012-0212 (Original PPA Docket)

On August 30, 2012, pursuant to the waiver granted in Docket No. 2008-0143, HELCO submitted an application seeking Commission approval of a PPA with Hu Honua for firm, dispatchable energy from the Hu Honua Project.¹⁰

⁸Waiver D&O at 7.

⁹Waiver D&O at 7.

¹⁰In re Haw. Elec. Light Co., Inc., Docket No. 2012-0212, "HELCO Application; Verification; Exhibits 1-11; and Certificate of Service," filed August 30, 2012 ("Original PPA Application").

On October 24, 2012, the Commission issued Order No. 30739 which, in relevant part, granted Participant status to Tawhiri, Hamakua, and LOL.¹¹ In denying Tawhiri's, Hamakua's, and LOL's requests for Intervenor status, the Commission found that the limited interests asserted by each of them in their motions to intervene did not support granting Intervenor status, but did support Participant status as to Issue No. 6 of the Commission's established statement of issues; i.e., whether the Original PPA between HELCO and Hu Honua was prudent and in the public interest.¹²

On December 30, 2013, the Commission approved the Original PPA for the Hu Honua Project.¹³

On January 28, 2016, the Commission issued Order No. 33516 in Docket No. 2012-0212, instructing HELCO to file a status report regarding the progress of the Hu Honua Project.¹⁴ The Commission observed "that the latest Commercial Operations

¹¹Docket No. 2012-0212, Order No. 30739, "Denying Motions to Intervene Filed by Tawhiri Power, LLC, Hamakua Energy Partners, L.P., Preserve Pepeekeo Health and Environment, and Life of the Land; Granting Participant Status to Tawhiri Power, LLC, Hamakua Energy Partners, L.P., and Life of the Land; and Other Initial Matters," filed October 24, 2012 ("Order No. 30739").

¹²See Order No. 30739 at 14-16 and 19-23.

¹³Docket No. 2012-0212, Decision and Order No. 31758, filed December 20, 2013 ("Original PPA D&O").

¹⁴Docket No. 2012-0212, Order No. 33516, "Instructing Hawaii Electric Light Company, Inc. to File a Status Report and Permitting Reply Comments," filed January 28, 2016 ("Order No. 33516").

Date ('COD') for the project was December, 2015, and that the project appears to have been significantly delayed with no apparent COD in the near-term future."¹⁵ Consequently, the Commission indicated its "concern[] with the continued efficacy of this project, particularly in light of the significant lapse in time between when the original application was filed and the now lapsed COD."¹⁶

On February 16, 2016, HELCO submitted a status report on the Hu Honua Project, pursuant to Order No. 33516.¹⁷ In its Status Report, HELCO clarified that: (1) Hu Honua had failed to meet two "Guaranteed Milestones" under the Original PPA;¹⁸ (2) Hu Honua's failure to meet the subject Guaranteed Milestones constituted a material breach and default under the Original PPA; (3) HELCO had declared an Event of Default under the terms of the Original PPA; and (4) "[b]ased on information provided by [Hu Honua], [Hu Honua]

¹⁵Order No. 33516 at 1.

¹⁶Order No. 33516 at 1-2.

¹⁷Letter From: J. Viola To: Commission Re: Docket No. 2012-0212 - Application of Hawaii Electric Light Company, Inc. For Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity - Status Report per Order No. 33516," filed February 16, 2016 ("HELCO Status Report").

¹⁸According to HELCO's Status Report, Hu Honua's failure to meet the Guaranteed Milestones were the result of litigation with its general contractor and loss of Project financing in 2014. See HELCO Status Report at 6-7 and 9.

has no ability to cure the Event of Default or achieve commercial operations in the near future.”¹⁹ As a result, HELCO informed the Commission that, “[a]bsent compelling changes in circumstances,” it intended to terminate the Original PPA with Hu Honua effective March 1, 2016.²⁰

On March 4, 2016, HELCO filed a letter notifying the Commission that it had terminated the Original PPA with Hu Honua.²¹ Hu Honua subsequently filed a request for Commission action on HELCO’s decision to terminate the Original PPA.²² In response, on June 9, 2016, the Commission issued information requests (“IRs”) to HELCO and Hu Honua.

On September 8, 2016, the Commission dismissed Hu Honua’s Request for Commission Action, finding that the PPA termination and underlying bases were governed by the express terms of the Original PPA and were not appropriate for resolution by the

¹⁹HELCO Status Report at 1.

²⁰HELCO Status Report at 2.

²¹Docket No. 2012-0212, Letter From: J. Viola To: Commission Re: Docket No. 2012-0212 - Application of Hawaii Electric Light Company, Inc., for Approval of a Power Purchase Agreement (“PPA”) with Hu Honua Bioenergy, LLC; Notice of Event of Default and Termination, filed March 4, 2016 (“HELCO Termination Letter”).

²²“Hu Honua Bioenergy, LLC’s Request for Commission Action; Affidavit of Harold Robinson; Exhibits ‘1’ and ‘2’; and Certificate of Service,” filed May 19, 2016 (“Hu Honua Request for Commission Action”).

Commission.²³ However, the Commission observed that HELCO had indicated that it was open to continuing negotiations with Hu Honua to see if they “[could] mutually agree upon a proposal that will enable the [P]roject to move forward for Commission review and approval.”²⁴

On May 9, 2017, HELCO submitted its Letter Request seeking Commission approval of the Amended PPA in Docket No. 2012-0212.²⁵ On May 18, 2017, the Commission issued Order No. 34556, which transferred HELCO’s Letter Request and Amended PPA from Docket No. 2012-0212 to Docket No. 2017-0122.

C.

Relevant Procedural History

On May 17, 2017, the Commission issued Order No. 34554, which opened Docket No. 2017-0122 for the purpose of receiving, reviewing, and adjudicating HELCO’s May 9, 2017 letter request for

²³Order No. 33901, “Dismissing Hu Honua Bioenergy, LLC’s Request for Commission Action,” filed September 8, 2016 (“Order No. 33901”).

²⁴Order No. 33901 at 9 (citation omitted).

²⁵On December 1, 2016, Hu Honua filed a federal civil action against HELCO. The Amended PPA is apparently a result of the Parties’ settlement discussions in the Hu Honua lawsuit. According to HELCO, on June 20, 2017, the Parties reached a settlement agreement in Hu Honua’s lawsuit against HELCO, which required the Parties to submit the Amended PPA to the Commission for review and approval. HELCO Letter Request at 4.

the Amended PPA (as noted above, the next day, May 18, 2017, the Commission issued Order No. 34556, which transferred HELCO's May 8, 2017 letter request from Docket No. 2012-0212 to this docket).

In so doing, the Commission noted that transferring HELCO's Letter Request out of Docket No. 2012-0212 into this new docket was "consistent with past [C]ommission rulings involving similar situations, whereby an applicant's new or modified request for relief was essentially beyond the scope of the original application."²⁶ In support, the Commission expressly identified a number of considerations, including, in relevant part:

Second, HELCO presumes that the waiver granted by the [C]ommission in Docket No. 2008-0143, is transferred to and now applies to the [Amended] PPA. If its presumption is incorrect, HELCO, in the alternative, requests that the [C]ommission grant a new waiver for the [Amended] PPA. [citation omitted].

HELCO's presumption ignores the conditions placed upon the waiver granted in Docket No. 2008-0143. Specifically, the [C]ommission conditioned the previous waiver on HELCO's (1) filing of a fully executed term sheet within four months of the date of the Decision and Order (i.e., November 14, 2008), and (2) demonstration of evidence that the price paid by HELCO to Hu Honua was fair and in the best interest of the ratepayer.

Because the timing and pricing structure of the [Amended] PPA makes compliance with these

²⁶Order No. 34554 at 5.

conditions impossible, the [C]ommission concludes that HELCO's presumption is incorrect.²⁷

Moreover, noting that "circumstances on the island of Hawaii have changed since the [C]ommission initially granted the waiver on November 14, 2008, in Docket No. 2008-0143[,]""²⁸ the Commission expressly "identifie[d] HELCO's alternative request for a new waiver as an issue for adjudication in this proceeding."²⁹

In addition, in Order No. 34554, the Commission, on its own motion, named Hu Honua as a party to this proceeding.³⁰ Order No. 34554 also granted Participant status to Tawhiri, Hamakua, and LOL³¹ (the Commission ruled that Tawhiri, Hamakua, and LOL's scope of participation included whether the Amended PPA was prudent and in the public interest; LOL was also granted permission to participant on the additional sub-issue of whether

²⁷Order No. 34554 at 6-7.

²⁸Order No. 34554 at 7. See also, id. at 7-9 (listing specific examples of changed circumstances on the island of Hawaii).

²⁹Order No. 34554 at 9. See also, id. at 10 (statement of issues to govern this proceeding on remand).

³⁰Order No. 34554 at 11.

³¹Order No. 34554 at 13.

the energy price components in the Amended PPA properly reflect the cost of biomass fuel supply).³²

On May 30, 2019, in response to Order No. 34554, HELCO submitted a "Memorandum in Support" of its request for a waiver from the Competitive Bidding Framework for the Hu Honua Project.³³ Briefly, HELCO asserted the following considerations in support of its waiver request under the Competitive Bidding Framework:

1. **Part II.A.3.b.(iv) of the Framework** - as competitive bidding under the current circumstances will impede achievement of the government objectives and policies set forth in HRS §§ 269-27.2 and 269-27.3 and the RPS law.
2. **Part II.A.3.b[.](iii) of the Framework** - as competitive bidding under the current circumstances could result in the less efficient procurement of more expensive biomass generation (due to the expiration of the [federal] Investment Tax Credit ("ITC"))[]).
3. **Part II.A.3.c.(iii) of the Framework** - as the Hu Honua project will help meet the government objectives and policies set forth in HRS §§ 269-27.2 and 269-27.3 and the RPS law.
4. **Part II.A.3.d of the Framework** - as a waiver for the Hu Honua project is in the public interest because the Hu Honua project

³²Order No. 34597, "Establishing a Procedural Schedule, Statement of Issues, and Scope of Participation for Participants," filed June 6, 2017.

³³"Hawaii Electric Light Company, Inc.'s Memorandum in Support of Request to Waive Framework for Competitive Bidding; Attachment A; and Certificate of Service," filed May 30, 2017 ("HELCO Waiver Memo").

currently presents the most expeditious means to increase the amount of renewable energy on [HELCO's] system without increasing the amount of as-available, intermittent renewable energy resources on [HELCO's] system. Further, the project will provide capacity and ancillary services necessary to support the reliability of a system with an existing high penetration of renewable intermittent resources.

***Note:** This is the basis under which the Commission originally granted the project a waiver from the Competitive Bidding Framework.

5. **Part II.A.3.d. of the Framework** - under current circumstances, a waiver is in the public interest as: (a) the project will likely result in an increase in the reliable supply of renewable firm dispatchable electricity to customers, (b) if completed on schedule by the end of 2018, the project will be able to take advantage of the federal ITC for renewable energy (in lieu of a Production Tax Credit), (c) the renewable generation from the Hu Honua project, if completed on schedule, will be available much sooner than if the project was put out for bid via a competitive solicitation, (d) the project is anticipated to provide community benefits including economic stimulation, employment creation (through direct jobs at the Hu Honua facility and indirect forestry, harvesting, and hauling jobs), promotion of long-term local agriculture industry, and increases in energy security, (e) the price remains delinked from the price of fossil fuel generated electricity; and (f) the addition of Hu Honua would enable the Company to expedite retirement of fossil-fuel plants.³⁴

On July 28, 2017, the Commission issued Decision and Order No. 34726, which approved the Amended PPA

³⁴HELCO Waiver Memo at 3-4.

("Amended PPA D&O"). In pertinent part, the Commission granted HELCO's request for a waiver from the Competitive Bidding Framework for the Hu Honua Project, finding that: (1) the opportunity to increase the amount of renewable energy on HELCO's system without increasing the amount of as-available intermittent renewable energy is in the public interest; and (2) the Hu Honua Project appears to provide "the most viable opportunity to add firm, dispatchable, renewable generation in the near term, and requiring the Project to enter the next round of competitive bidding would very likely forgo the opportunity to utilize the federal ITC benefits."³⁵

Additionally, in approving the Amended PPA, the Commission "note[d] that this proceeding to review the [Amended] PPA was triggered by Hu Honua missing major construction milestones established in the Original PPA[,]" and set forth its expectation that "Hu Honua and HELCO [will] make all reasonable attempts to complete the project according to this schedule and does not expect future requests to extend the Commercial Operations Date deadline."³⁶

³⁵Amended PPA D&O at 30 and 31.

³⁶Amended PPA D&O at 61.

Participant LOL filed an appeal of the Amended PPA D&O and, on May 10, 2019, following briefing and oral argument, the Hawaii Supreme Court vacated the Amended PPA D&O and remanded the matter to the Commission.³⁷ In particular, the Court held that the Commission had not “explicitly considered the reduction of GHG emissions in approving the Amended PPA, as required by statute, and that the [Commission] denied LOL due process with respect to the opportunity to be heard regarding the impacts that the Amended PPA would have on LOL’s right to a clean and healthful environment.”³⁸

On June 20, 2019, pursuant to the Supreme Court’s decision, the Commission issued Order No. 36382, which re-opened this docket for further proceedings to review the Amended PPA.³⁹ In so doing, the Commission established that all issues would be re-examined, in addition to a new, fourth issue, which would expressly consider the impact of greenhouse gas (“GHG”) emissions associated with the Amended PPA and the Hu Honua Project.⁴⁰

³⁷See In the Matter of Haw. Elec. Light Co., Inc., 145 Hawaii 1, 445 P.3d 673 (2019).

³⁸In re Haw. Elec. Light, 145 Hawaii at 5, 445 P.3d at 677.

³⁹Order No. 36382, “Reopening Docket,” June 20, 2019 (“Order No. 36382”).

⁴⁰See Order No. 36382 at 9 and 14. See also, Order No. 36539, “Adopting a Procedural Order,” filed September 5, 2019 (“Order No. 36539”), at 3-4.

The Commission also expanded the Participants' scope of participation such that they could comment on all issues established for the re-opened proceeding.⁴¹

Order No. 36382 also provided the Parties and Participants with an opportunity to submit supplemental briefing on the initial issues (i.e., issue nos. 1-3, including the waiver issue) "taking into consideration events that have occurred in Hawaii Island's energy market and developments on HELCO's system since the [C]ommission issued [the Amended PPA D&O]" ⁴²

Subsequently, the Commission issued Order No. 36539, which, in relevant part, established a procedural schedule which provided for an opportunity for Parties and Participants to submit: (1) IRs regarding each other's supplemental briefing; (2) pre-hearing testimony on all issues; and (3) IRs and Supplemental IRs ("SIR") regarding each other's pre-hearing testimony. Deadlines regarding an evidentiary hearing and related procedural events were deferred to be scheduled at a later date.⁴³

⁴¹Order No. 36382 at 13.

⁴²Order No. 36382 at 4.

⁴³Order No. 36539, "Adopting a Procedural Schedule," filed September 25, 2019 ("Order No. 36539"), at 5-7.

All of the above-described pre-hearing submissions have been completed.⁴⁴ At this juncture, prior to proceeding, the Commission finds it reasonable to evaluate the record and determine the most prudent and efficient means forward. In this regard, on May 8, 2020, Hu Honua submitted a letter to the Commission requesting a scheduling conference to discuss the evidentiary hearing and related procedural steps.⁴⁵ On May 22, 2020, the Commission filed its response, in which it acknowledged Hu Honua's May 8, 2020 letter, but explained that recent major developments warranted consideration and reflection as to how best to proceed.⁴⁶

Specifically, the Commission noted that Final Award Selection for the second phase of the Hawaiian Electric Companies'⁴⁷ (including HELCO) competitive RFP had been completed

⁴⁴Due to some discovery disputes, the deadlines for the above procedural steps were extended several times. See Order No. 36908, "Granting in Part and Denying in Part Life of the Land's Second Motion to Compel and Motion for Clarification and Enlargement of Time," filed December 20, 2019.

⁴⁵Letter From: W. Yamamoto To: Commission Re: Docket No. 2017-0122: Scheduling Conference Request, filed May 8, 2020.

⁴⁶Letter From: Commission To: W. Yamamoto Re: Docket No. 2017-0122 In re: Hawaii Electric Light Company, Inc. ('HELCO'), Application for Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity, filed May 22, 2020 ("Commission Response").

⁴⁷The "Hawaiian Electric Companies" refers to HELCO, HECO, and Maui Electric Company, Limited.

in Docket No. 2017-0352, resulting in “the largest renewable energy procurement ever undertaken in Hawaii,” which has the potential to “produce 460[MW] of solar energy and nearly 3[GW] hours of energy storage on [those islands].”⁴⁸ Additionally, the Commission noted the emergency situation currently facing Hawaii as a result of the State’s response to the COVID-19 virus, including the drastic impacts to Hawaii’s economy.⁴⁹

II.

DISCUSSION

A.

HELCO Has Not Met Its Burden To Justify A Waiver From The Competitive Bidding Framework For The Hu Honua Project

Based on review of the record, and taking the surrounding history and circumstances of this docket into account, the Commission finds and concludes that HELCO has not met its burden to support its request for a waiver for the Hu Honua Project. Accordingly, the Commission resolves Issue No. 1, i.e., “Whether HELCO has met its burden of proof in support of its request to waive Hu Honua’s Project from the [C]ommission’s Framework for Competitive Bidding,” in the negative and dismisses

⁴⁸Commission Response at 1.

⁴⁹Commission Response at 1-2.

the Amended PPA on this basis. The Commission's reasoning is discussed below.

1.

Applicants' Position

In its post-remand briefing, Applicants rely on the following principal arguments:

1. Requiring the Hu Honua Project to go through competitive bidding under the circumstances would impede the government objectives and policies set forth in HRS §§ 269-27.2 and 269-27.3 and the RPS law (HRS §§ 269-91, et. seq.).

2. Requiring the Hu Honua Project to go through competitive bidding under the current circumstances could result in less efficient procurement of more expensive biomass generation due to the expiration of the federal ITC, which Hu Honua anticipated receiving.

3. The Hu Honua Project will help meet the State's objectives and policies set forth in HRS §§ 269-27.2 and 269-27.3 and the RPS law.

4. Granting a waiver for the Hu Honua Project is in the public interest because the Project offers the most expeditious means to increase renewable energy on HELCO's system without increasing as-available, intermittent renewable energy, as well as provides capacity and ancillary services to support system

reliability in the face of high penetration of renewable intermittent resources.

5. Granting a waiver for the Hu Honua Project is in the public interest because: (a) the Project will likely increase the reliable supply of renewable firm dispatchable electricity to customers; (b) if completed on schedule, the Project will be able to take advantage of the federal ITC; (c) the renewable generation from the Project, if completed on schedule, will be available much sooner than if the Project were put out for competitive bid; (d) the Project is anticipated to provide community benefits such as economic stimulation, employment creation, promotion of long-term agricultural industry, and increases in energy security; (e) the Amended PPA pricing is de-linked from the price of fossil fuels; and (f) the addition of the Project will allow HELCO to expedite retirement of fossil fuel plants.⁵⁰

⁵⁰HELCO Waiver Memo at 3-4. See also, "Hawaii Electric Light Company, Inc.'s Supplemental Brief; Attachments 1-2; and Certificate of Service," filed September 17, 2019 ("HELCO Supplemental Brief"), at 2-3 (stating that HELCO's position on Issues Nos. 1-3, post-remand, "remain the same as previously filed on the record before in this docket[,] and that "as to Issue No. 1, [HELCO] refers to its [Waiver Memo], filed herein on May 30, 2017, and the record herein."); and Letter From: K. Katsura To: Commission Re: Docket No. 2017-0122, Hawaii Electric Light Company, Inc.; Amended and Restated PPA with Hu Honua Bioenergy, LLC; Hawaii Electric Light Company, Inc.'s Prehearing Testimonies and Exhibits, filed January 28, 2020 ("HELCO Prehearing Testimonies"), HELCO T-1 at 23-27.

Recent Developments

Upon reviewing the record and considering recent developments, the Commission is not persuaded that these considerations sufficiently justify a waiver from the Competitive Bidding Framework. In particular, the Commission takes note of the following recent developments.

On December 31, 2018, as a result of the RFP process in Docket No. 2017-0352, the Hawaiian Electric Companies submitted applications requesting Commission approval for seven PPAs for grid-scale, solar-plus-storage projects on the islands of Oahu, Maui, and Hawaii.⁵¹ These renewable dispatchable generation PPAs ("RDG-PPA") featured contractual provisions that represented significant improvements over previous renewable energy PPAs, including lower unit pricing, ranging between \$0.08/kWh to \$0.12/kWh,⁵² and commitment to provide a fixed amount of

Hu Honua asserts substantively the same arguments in support of a waiver. See "Hu Honua Bioenergy, LLC's Prehearing Testimonies; Attachment A; Exhibits 'Hu Honua-100' - 'Hu Honua-800'; and Certificate of Service," filed January 28, 2020 ("Hu Honua Prehearing Testimonies"), Hu Honua T-1 at 24-26 and Hu Honua T-4 at 6-7.

⁵¹See Docket Nos. 2018-0430, 2018-0431, 2018-0432, 2018-0433, 2018-0434, 2018-0435, and 2018-0436.

⁵²See <https://www.hawaiianelectric.com/new-solar-plus-storage-projects-set-low-price-benchmark-for-renewable-energy-in-hawaii>, last accessed July 7, 2020.

dispatchable energy to the utility at the utility's discretion (i.e., available capacity), thereby eliminating a number of undesirable contractual provisions, such as seniority curtailment, "evergreen" renewal, and risk-adjusted pricing.⁵³ In addition, the RDG-PPAs, with their firm dispatchability, provide increased system reliability and grid stability, as well as the operational flexibility to "allow [the utility] to 'best meet the needs of the Company's system'"⁵⁴

To date, the Commission has approved six of the RDG-PPAs, including two on Hawaii Island, both 30 MW renewable facilities paired with a battery energy storage system ("BESS") of 120 MW-hours ("MWh"), and which feature unit pricing of \$0.08/kWh and \$0.09/kWh, respectively.⁵⁵

⁵³See e.g., In re Hawaiian Elec. Co., Inc., Docket No. 2018-0434, Decision and Order No. 36232, filed March 25, 2019 ("D&O 36232"), at 58-62 (aside from the unit price, the provisions in the PPA in Docket No. 2018-0434 are substantively identical to the PPAs submitted in Docket Nos. 2018-0430, 2018-0431, 2018-0432, 2018-0433, 2018-0435, and 2018-0436).

⁵⁴D&O 36232 at 62.

⁵⁵See In re Haw. Elec. Light Co., Inc., Docket No. 2018-0430, Decision and Order No. 36233, filed March 25, 2019; In re Haw. Elec. Light Co., Inc., Docket No. 2018-0432, Decision and Order No. 36234, filed March 25, 2019; In re Haw. Elec. Co., Inc., Docket No. 2018-0431, Decision and Order No. 36236, filed March 25, 2019; In re Haw. Elec. Co., Inc., Docket No. 2018-0434, Decision and Order No. 36232, filed March 25, 2019; In re Haw. Elec. Co., Inc., Docket No. 2018-0435, Decision and Order No. 36231, filed March 25, 2019; and In re Maui Elec. Co., Ltd., Docket No. 2018-0436, Decision and Order No. 36235,

In addition, in Docket No. 2017-0352, the Hawaiian Electric Companies have recently completed their second round of competitively bid RFPs for RDG-PPAs, which have resulted in the selection of sixteen new solar-plus-storage or stand-alone storage projects for PPA negotiations, including three new projects on Hawaii Island (Keahole Battery Energy Storage, Puako Solar PV + Battery Storage, and Waikoloa Village Solar + Storage).⁵⁶

These RDG-PPA projects have transformed the renewable energy procurement market in Hawaii by demonstrating that competitive bidding can result in PPAs that provide firm, dispatchable renewable energy and ancillary grid services at increasingly lower prices.⁵⁷ Pertinently, the approved RDG-PPA

filed March 25, 2019. The sixth of the initial RDG PPAs, Docket No. 2018-0433, is currently pending before the Commission.

⁵⁶See <https://www.hawaiianelectric.com/hawaiian-electric-posts-new-renewable-energy-projects-details>; and <https://www.hawaiianelectric.com/clean-energy-hawaii/our-clean-energy-portfolio/renewable-project-status-board>, last accessed July 7, 2020.

⁵⁷In approving the first round of RDG-PPAs, the Commission observed that there appears to be a declining trend in the contract pricing for solar-plus-storage PPAs. See D&O 36232 at 53-54 n.155 (citing In re Kauai Island Util. Coop., Docket No. 2017-0443, Decision and Order No. 35538, filed June 20, 2018 (approving contract pricing of \$0.10850/kWh); In re Kauai Island Util. Coop., Docket No. 2017-0018, Decision and Order No. 34723, filed July 28, 2017 (approving contract pricing of \$0.1108/kWh); and In re Kauai Island Util. Coop., Docket No. 2015-0331, Decision and Order No. 33557, filed February 26, 2016 (approving contract pricing of \$0.145/kWh)).

projects for Hawaii Island, AES Waikoloa Solar, LLC (Docket No. 2018-0430) and Hale Kuawehi Solar LLC (Docket No. 2018-0432) are 30 MW in size, which is slightly larger than the 21.5 MW for the Hu Honua Project,⁵⁸ and, at \$0.08/kWh and \$0.09/kWh, respectively, are significantly less expensive than the Hu Honua Project's estimated pricing of \$0.221/kWh.⁵⁹

Furthermore, it appears that there is uncertainty as to whether the Hu Honua Project will receive the federal ITC. As a result of "unanticipated delays beyond 2018 which were outside of its control," Hu Honua failed to meet the safe harbor requirements for the federal ITC by placing the Project in service by the end of 2018.⁶⁰ As a result, "obtaining the ITC is no longer a guarantee

⁵⁸See HELCO Prehearing Testimonies, HELCO T-1 at 20.

⁵⁹See HELCO Letter Request, Exhibit B at 14 (estimating an "all-in levelized cost of \$.221/kWh, assuming a dispatch of 200,000 MWh").

⁶⁰See Hu Honua Prehearing Testimonies, Hu Honua T-3 at 3-4. See also, HELCO Letter Request, Exhibit B at 25-26 (Confidential).

It appears that the Project delays arose from a Department of Health inspection which concluded that Hu Honua had violated state water pollution laws by discharging industrial wastewater into the Project's injection wells. See <https://www.civilbeat.org/2018/09/big-island-wood-burning-power-plant-raises-environmental-concerns/>; and <https://www.bizjournals.com/pacific/news/2018/11/30/hawaii-doh-investigation-finds-hu-honua-bioenergy.html>, last accessed July 7, 2020.

under applicable safe harbor provisions.”⁶¹ This affects one of Applicants’ core arguments for granting a waiver, which was that the delay associated with competitive bidding risked a loss of the federal ITC which helped make the Project cost effective.⁶²

3.

The Competitive Bidding Framework

Part II.A.3. of the Competitive Bidding Framework states, in relevant part, that “[c]ompetitive bidding, unless the Commission finds it to be unsuitable, is established as the required mechanism for acquiring a future generation resource or a bloc of generation resources”⁶³ Accordingly, the presumption under the Framework is that competitive bidding for new generation resource is desirable and waivers should be treated as an exception.⁶⁴

⁶¹Hu Honua Prehearing Testimonies, Hu Honua T-3 at 3.

⁶²According to Hu Honua, without the federal ITC, the Project “may never be profitable” Hu Honua response to CA/Hu Honua-IR-102.b.1., filed February 18, 2020.

⁶³Competitive Bidding Framework at 3. Concomitantly, the Framework provides a process by which an electric utility may submit an application for a waiver from competitive bidding for a project. See id. at 6-7 (Part II.A.4.).

⁶⁴See e.g., “Tawhiri Power LLC’s Prehearing Testimony; and Certificate of Service,” filed January 28, 2020 (“Tawhiri Prehearing Testimony”), Exhibit 1 at 3 (“The Framework was developed to protect the public interest, thus any request for a waiver must be examined with strict scrutiny with the burden

The Competitive Bidding Framework, Part II.A.3., goes on

to provide, in relevant part:

- b. Under certain circumstances, to be considered by the Commission in the context of an electric utility's request for waiver under Part II.A.4., below, competitive bidding may not be appropriate. These circumstances include: (i) when competitive bidding will unduly hinder the ability to add generation in a timely fashion; (ii) when the utility and its customers will benefit more if the generation resource is owned by the utility rather than by a third-party (for example, when reliability will be jeopardized by the utilization of a third-party resource); (iii) when more cost-effective or better performing generation resources are more likely to be acquired more efficiently through different procurement processes; or (iv) when competitive bidding will impede or create a disincentive for the achievement of IRP goals, [RPS] standards or other government objectives and policies, or conflict with requirements of other controlling laws, rules, or regulations.

- c. Other circumstances that could qualify for waiver include: (i) expansion or repowering of existing utility generating units; (ii) the acquisition of near-term power supplies for short-term needs; (iii) the acquisition of power from a non-fossil fuel facility (such as a waste-to energy facility) that is being installed to meet a governmental objective; and (iv) the acquisition of

being placed on the requestor. Request[s] for waiver must be the exception, not the status quo, in order to uphold the integrity of the competitive bidding process.”).

power supplies needed to respond to an emergency situation.

- d. Furthermore, the Commission may waive the Framework or any part thereof upon a showing that the waiver will likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.⁶⁵

4.

Denying HELCO's Request For A Waiver

As a preliminary matter, the Commission observes that this is the third time it has addressed the issue of whether to grant HELCO's request for a waiver from the Framework for the Hu Honua Project. Notwithstanding the Commission's prior decisions on this issue, the Commission retains discretion to consider this issue in light of the record and circumstances at the time the issue is before the Commission.

This is consistent with the prior history of this Project. Upon submission of the Amended PPA, the Commission corrected HELCO's presumption that the waiver granted in Docket No. 2008-0143 would be automatically transferred to apply to the Amended PPA and stated that this issue would be re-examined in

⁶⁵Competitive Bidding Framework at 4-5.

light of the changes in circumstances since the original granting of the waiver.⁶⁶ Likewise, when this docket was remanded back to the Commission, the Commission expressly stated that the entire statement of issues, including HELCO's waiver request, would be considered and instructed the Parties to submit supplemental briefing on this issue.⁶⁷

Thus, in taking up this issue, the Commission again considers all the relevant evidence and surrounding circumstances to inform its decision. In pertinent part, as discussed above, the initiation of Docket No. 2017-0352 and the resulting RDG-PPAs have produced real alternatives against which to evaluate the benefits and costs of the Hu Honua Project and diminish the persuasiveness of Applicants' waiver arguments. Many of the prior bases for supporting a waiver for the Project, including lack of other dispatchable, renewable energy projects, the delays associated with developing other renewable projects in comparison to Hu Honua, and the contributions to the State's renewable energy goals have been challenged by the competitively bid projects arising from Docket No. 2017-0352, which have been shown to provide similar benefits at significantly lower costs to customers.

⁶⁶See Order No. 34554 at 6-7.

⁶⁷See Order No. 36382 at 14.

The Hu Honua Project is expected to provide a net output of approximately 21.5 MW of committed capacity, as well as ancillary services, to HELCO on a 24-hour/7-day per week basis, with a normal dispatch range of 10.0 to 21.5 MW, with a minimum load of 7 MW for emergency system constraints.⁶⁸ In comparison, the AES Waikoloa Solar and Hale Kuawehi Solar projects consist of a PV system capable of producing 30 MW(ac) paired with a BESS capable of storing 120 MWh of energy and which is directly charged from the PV system.⁶⁹

As evidenced above, both of these RDG-PPA projects are capable of providing dispatchable renewable energy, and are also able to provide greater capacity to HELCO than the Hu Honua Project. In addition, the Hu Honua Project requires a minimum must-run requirement of 10 MW under normal conditions⁷⁰ (i.e., HELCO must dispatch the Project at 10 MW or greater capacity), which may result in curtailment of other renewable

⁶⁸Hu Honua Prehearing Testimonies, Hu Honua T-1 at 7.

⁶⁹See AES Waikoloa Application at 13; and Docket No. 2018-0432, "Hawaii Electric Light Company, Inc.'s Application; Exhibits 1-10; Verification; and Certificate of Service," filed December 31, 2018, at 14-15.

⁷⁰Amended PPA at 60 of 238 (Section 3.3(b)). As noted above, the Project may operate at a lower load of 7 MW in emergency situations.

resources on HELCO's system⁷¹ (the Commission further notes that this may also result in the un-economic dispatch of other generation units on HELCO's system).

As reflected above, the results of these initial rounds of RFPs for RDG-PPAs undermine Applicants' argument that the Hu Honua Project is uniquely positioned to expeditiously and efficiently address State renewable energy objectives and policies. As noted above, the first round of RDG-PPAs have resulted in approval of two renewable projects on Hawaii Island, which, collectively, are expected to contribute the same amount of renewable energy towards the Companies' RPS goals.⁷²

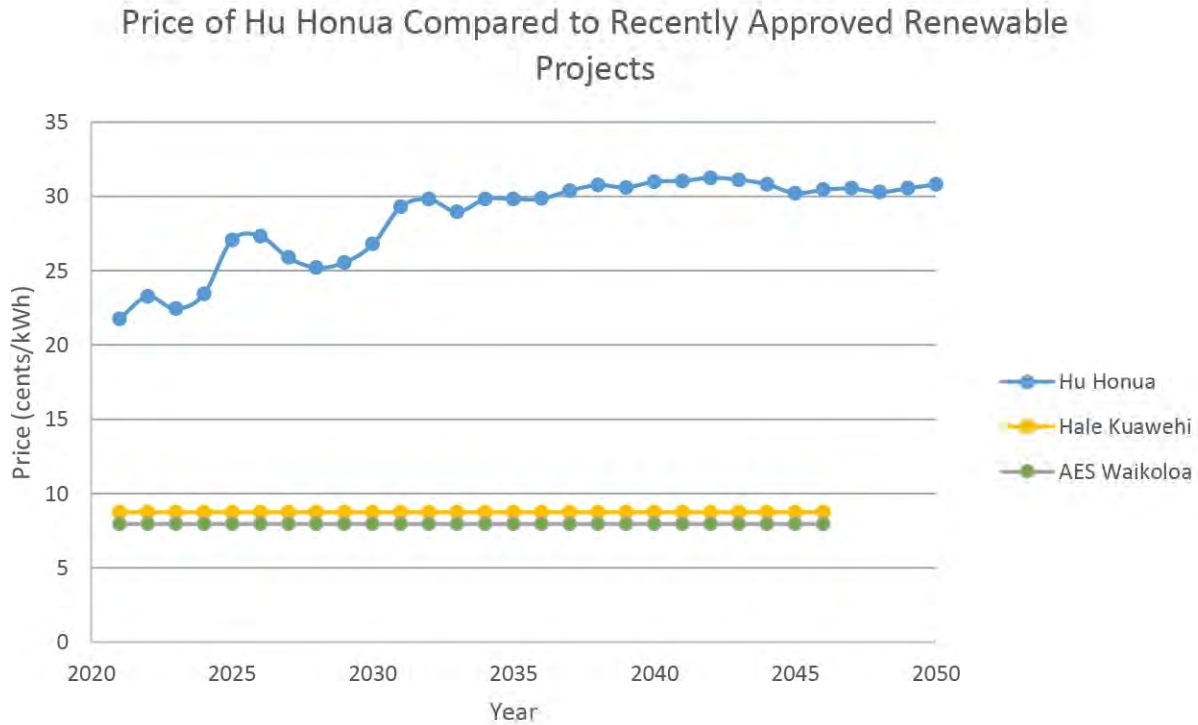
Additionally, these RDG-PPA projects are priced at significantly lower costs to customers. At \$0.08-0.09/kWh, the approved AES Waikoloa Solar and Hale Kuawehi projects are less than half of the Hu Honua Project's effective levelized price estimate of \$0.221/kWh.⁷³ The following chart illustrates the effective price of the Hu Honua Project over the term of the PPA,

⁷¹See "Tawhiri Power LLC's Supplemental Briefing on Issues Nos. 1-3; and Certificate of Service," filed September 17, 2019, at 7.

⁷²See <https://www.hawaiianelectric.com/clean-energy-hawaii/our-clean-energy-portfolio/renewable-project-status-board>, last accessed July 7, 2020.

⁷³See Tawhiri Prehearing Testimony, Exhibit 1 at 4. See also, Competitive Bidding Framework, Part II.A.3.a.

compared to the unit price of the AES Waikoloa and Hale Kuawehi projects.⁷⁴



These considerations are not insignificant, given the impact this could have on ratepayers. Notably, the RDG-PPA projects are estimated to result in decreases to customer bills

⁷⁴See Hu Honua Prehearing Testimonies, Hu Honua-501 at 8 and 12. Hu Honua argues that the effective price in the Amended PPA does not reflect the full range of benefits provided by the Hu Honua Project, and that the unit prices for AES Waikoloa and Hale Kuawehi understate the actual cost of those projects. However, as discussed herein, the Commission finds that these issues should be addressed in the context of a competitive bidding process, and that under the circumstances, granting a waiver of the competitive bidding framework for the Hu Honua Project would not be in the public interest.

throughout the length of their PPA terms,⁷⁵ whereas the Hu Honua Project is estimated to result in an increase in customer bills until near the end of the PPA term.⁷⁶

This is especially relevant now, in light of the economic challenges resulting from the government measures in response to the global COVID-19 pandemic.⁷⁷ As Hawaii's ratepayers struggle to recover financially, it is more important than ever to ensure that customer bills are supporting projects that offer the best value, particularly in situations like this where the projects are similar in size (the AES Waikoloa Solar and Hale Kuawehi projects

⁷⁵See e.g., AES Waikoloa Application, Exhibit 3, Attachment 4 at 1.

⁷⁶See HELCO Prehearing Testimonies, HELCO-305 at 1-2 (indicating that residential customers are estimated to see an increase in their bills until 2049 if the Project is approved). See also, CA Prehearing Testimony, CA-T-1 at 16; and Tawhiri Prehearing Testimony, Exhibit 1 at 7.

⁷⁷On March 5, 2020, Governor David Y. Ige issued his first Emergency Proclamation related to COVID-19, authorizing and invoking a variety of provisions related to the State's response to the COVID-19 emergency situation, available at: https://governor.hawaii.gov/wpcontent/uploads/2020/03/2003020-GOV-EmergencyProclamation_COVID19.pdf. The Governor has issued nine additional Proclamations since that time, providing details regarding the State's response to the COVID-19 Pandemic. See <https://governor.hawaii.gov/emergency-proclamations/>, last accessed July 7, 2020.

are 30 MW each and the Hu Honua Project is 21.5 MW) and offer similar benefits.⁷⁸

This undermines Applicants' contention that denial of HELCO's request for a waiver for the Hu Honua Project will result in the less efficient and more costly addition of renewable energy on to HELCO's system, as competitive bidding appears to have produced renewable energy projects that are projected to cost less than the Hu Honua Project.⁷⁹

Furthermore, due to the BESS component, the RDG-PPA projects are capable of providing grid supportive services. As stated by HELCO in Docket No. 2018-0430 (approving the AES Waikoloa Solar project), "[HELCO] anticipates that it will dispatch the battery energy storage system's stored energy to [HELCO's] grid to, among other things, help with ramping towards [HELCO's] periods of peak energy demand (rather than ramping up conventional generation), offset night-time fossil fuel generation, and assist in grid stabilization subject to discharge limits."⁸⁰

⁷⁸See Competitive Bidding Framework, Part II.A.3.a(i) and (ii).

⁷⁹See Tawhiri Prehearing Testimony, Exhibit 1 at 4-5. See also, Competitive Bidding Framework, Part II.A.3.b(iii).

⁸⁰Docket No. 2018-0430, "Hawaii Electric Light Company, Inc.'s Application; Exhibits 1-10; Verification; and Certificate of Service," filed December 31, 2018 ("AES Waikoloa Application"), at 15.

This demonstrates that competitive bidding is capable of timely producing grid-scale renewable energy projects that can supply similar levels of renewable energy to HELCO (as well as the other Hawaiian Electric Companies) in addition to providing grid services to support the integration of intermittent renewable resources,⁸¹ and rebuts Applicants' argument that a waiver for the Hu Honua Project is necessary to achieve similar benefits.⁸²

The RDG-PPAs also further the State's renewable energy policies and goals by helping HELCO to meet its RPS goals and increasing the amount of renewable energy on HELCO's system (by both providing direct renewable energy to HELCO's grid from the solar projects' PV panels, as well as utilizing the projects' BESS to provide grid services to facilitate greater integration of intermittent, renewable energy).⁸³ Concomitantly, the Commission is not persuaded that denying HELCO's request for a waiver for the Hu Honua Project will frustrate the State's renewable energy objectives and goals.

Moreover, Hu Honua has failed to achieve safe harbor of the federal ITC, which required the Project to be placed in service

⁸¹See Competitive Bidding Framework, Part II.A.3.a(iv).

⁸²See Competitive Bidding Framework, Part II.A.3.b(iii).

⁸³See Competitive Bidding Framework, Part II.A.a(v).

by the end of 2018.⁸⁴ While “Hu Honua is still hopeful of recovering ITC tax credits on the basis of its continuous construction and other circumstances[,]”⁸⁵ Hu Honua does not identify what these “other circumstances” are, and the fact that the Project has still not been fully completed⁸⁶ makes the prospect of obtaining the federal ITC seem increasingly unlikely. Accordingly, the Commission is not convinced that a waiver is justified by the need to claim the federal ITC, as Hu Honua’s ability to claim the federal ITC appears speculative at this point.⁸⁷

To the extent Applicants’ claim that granting a waiver for the Hu Honua Project will result in community benefits, such as job creation and economic stimulation, the Commission does not see

⁸⁴See Hu Honua Prehearing Testimonies, Hu Honua T-3 at 3-4. See also, HELCO Letter Request, Exhibit B at 25-26 (Confidential).

⁸⁵Hu Honua Prehearing Testimonies, Hu Honua T-3 at 4.

⁸⁶See Letter From: D. Yamamoto To: Commission Re: Docket No. 2017-0122; Hu Honua Bioenergy, LLC’s Response to the State of Hawaii Public Utilities Commission’s Letter Dated May 22, 2020, filed June 12, 2020, at 2 (indicating that, while “nearly complete,” the Project is not yet completed and ready for operation).

⁸⁷See Competitive Bidding Framework, Part II.A.3.a(i) and (ii) and compare with Part II.A.3.b(iii) (describing a situation where “more cost-effective or better performing generation resources are more likely to be acquired more efficiently through different procurement processes[]” outside of competitive bidding). As noted above, even assuming the Hu Honua Project were to receive the federal ITC, the Project’s costs are still expected to be higher than the RDG-PPAs from the Phase 1 RFPs.

how these are unique to the Hu Honua Project or how they justify a waiver from the Competitive Bidding Framework. Arguably, any renewable project selected for Hawaii Island would provide economic stimulation and job creation, in that a facility would need to be built, maintained, and operated. It is unclear how or whether requiring the Hu Honua Project to go through competitive bidding would eliminate these benefits, in that the winning bid, be it Hu Honua or another bidder for a renewable energy project, would still be required to build and operate a renewable facility on Hawaii Island.

To the extent Hu Honua contends that its Project conveys unique community economic benefits due to the specific operation of the Project and/or the related business of providing biomass to fuel the Project, the Commission is not persuaded that these circumstances are sufficient to distinguish the Project from any other competitively bid project to the level necessary to justify a waiver. In fact, such benefits are precisely the kind of factors that would be evaluated during a competitive bidding process.

The Commission also observes that the fact that the Amended PPA's pricing is de-linked from the price of fossil fuel, alone, does not compel a waiver from the competitive bidding framework. As demonstrated in Docket No. 2017-0352, an RFP for renewable, dispatchable projects is equally capable of producing

competitive bids with proposed pricing that is de-linked from the price of fossil fuels.

Lastly, it does not appear that granting a waiver to the Hu Honua Project will allow HELCO to expedite the retirement of fossil fuel plants. HELCO has previously informed Hu Honua that its planned retirement of its fossil fuel plants predated the Hu Honua Project and, as such, "it would be improper for the economic analysis to reflect the Hu Honua facility replacing one or more of the three [HELCO] steam units that were already slated for removal from service prior to the appearance of Hu Honua."⁸⁸ As a result, "the only resource the Hu Honua facility could displace or defer were grid-scale wind or PV and load shifting batteries [i.e., other renewable energy generation resources]

⁸⁸Letter From: D. Brown To: Commission Re: Docket No. 2017-0122 - Hawaii Electric Light Company, Inc.; Amended and Restated PPA with Hu Honua Bioenergy, LLC; Transmittal of Hawaii Electric Light Letter Dated June 20, 2017, filed June 20, 2017 ("HELCO-Hu Honua Letter"), at 2. See also, id. at 3 ("In addition, as explained in the previous section above, there were no existing steam units that could be displaced since it was already assumed that the existing steam units would be removed from service before Hu Honua entered the picture with negotiations in April 2016."); and HELCO response to Tawhiri-HELCO-SIR-6.a, filed January 6, 2020 ("There is no plan to immediately retire any specific generating plants once the Hu Honua plant begins providing energy and capacity to the system.").

. . . [the removal of which] simply increased plan costs because they were economical resources to have in the plan.”⁸⁹

This is also reflected in HELCO’s updated resource plans, in which the expected retirement of HELCO’s fossil fuel plants are unaffected by the addition of the Hu Honua Project.⁹⁰

While none of these considerations are, by themselves, dispositive, when taken as a whole, the Commission finds that they compel the conclusion that HELCO’s requested waiver for the Hu Honua Project is unnecessary under the circumstances, as it appears that competitive bidding has resulted in renewable

⁸⁹HELCO-Hu Honua Letter at 3.

Subsequently, in response to an IR from Hu Honua, HELCO stated that addition of the Hu Honua Project could result in the retirement of HELCO’s Puna, Hill 5, and Hill 6 steam units in 2019, rather than in 2020. HELCO response to HHB-HELCO-IR-9.a, filed July 6, 2017. However, this was apparently premised on Hu Honua beginning operation according to schedule. As the Hu Honua Project is still under construction, HELCO’s Puna, Hill 5, and Hill 6 steam units are still in operation and have not been prematurely retired.

⁹⁰See Letter From: J. Ignacio To: Commission Re: Docket No. 2017-0122 - Hawaii Electric Light Company, Inc. Amended and Restated PPA with Hu Honua Bioenergy, LLC; Project Economic and Bill Impact Analysis, filed May 24, 2017, Exhibit A at 3-4. See also, CA Prehearing Testimony, CA-T-2 at 11-12.

This resource plan remained unchanged by HELCO even after the docket was re-opened in 2019. See Letter From: B. Hiyane To: Commission Re: Docket No. 2017-0122 - For Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity; Hawaii Electric Light Company, Inc.’s Response to Order No. 36382 and Greenhouse Gas Analyses, filed October 21, 2019, Attachment 1, Exhibit 2, Attachment 1; and HELCO Prehearing Testimonies at HELCO-301.

projects that are expected to provide similar benefits on more favorable terms to HELCO's customers.⁹¹ Under these circumstances, the Commission is not convinced that granting a waiver for the Hu Honua Project is justified or in the public interest.

To be clear, this is not to say that the Hu Honua Project is irrelevant or that biomass resources do not have a place in Hawaii's renewable energy portfolio. The pertinent issue here is whether this particular Project should be exempted from competitive bidding against other renewable projects to determine the best value for HELCO and its customers. The Commission is aware that biomass resources offer different considerations than other renewable resources, such as solar and wind, but believes that these distinctions are better weighed and addressed in the context of the Competitive Bidding Framework.

Based on the above, the Commission makes the following findings and conclusions:

1. The competitive bidding process conducted in the RFP proceeding, Docket No. 2017-0352, in parallel with this proceeding has resulted in the approval, to date, of six renewable energy PPAs of comparable size to the Hu Honua Project, including two on Hawaii Island, which offer similar benefits in terms of

⁹¹See e.g., CA Prehearing Testimonies, CA-T-1 at 10.

renewable energy and grid services and which are priced significantly lower than the Hu Honua Project.

2. A second phase of the RFP process is currently underway and has yielded the HECO Companies' selection of an additional sixteen bids for renewable energy projects, including three on Hawaii Island.⁹²

3. Nothing in HRS §§ 269-27.2 or 269-91, et seq., distinguishes or prioritizes renewable energy produced from biomass resources, versus solar, wind, or other sources of renewable energy, and the underlying goals and policies of promoting and facilitating greater amounts of renewable energy appear to be equally served by the RDG-PPA projects as by the Hu Honua Project.

4. HRS § 269-27.3 provides the Commission with the authority to grant preferential rates to the purchase of renewable energy produced in conjunction with agricultural activities, but does not mandate any particular Commission action, nor does it

⁹²Two of these three bids are for solar-plus-storage projects, each of which is expected to provide 60 MW of renewable energy and is paired with up to 240 MWh of energy storage. The third bid is for a standalone energy storage project of 12 MW. See <https://www.hawaiianelectric.com/hawaiian-electric-selects-16-projects-in-largest-quest-for-renewable-energy-energy-storage-for-3-islands;> and [https://www.hawaiianelectric.com/clean-energy-hawaii/our-clean-energy-portfolio/renewable-project-status-board,](https://www.hawaiianelectric.com/clean-energy-hawaii/our-clean-energy-portfolio/renewable-project-status-board) last accessed July 7, 2020.

indicate that a request for a PPA with preferential rates under this statute cannot be made under the Competitive Bidding Framework or is otherwise exempted from the Framework.

5. Based on the above, the Commission concludes that requiring the Hu Honua Project to go through the competitive bidding process will not impede the government objectives and policies set forth in HRS §§ 269-27.2, 269-27.3, and 269-91, et seq., under the circumstances presented in this docket.

6. Hu Honua sought, but has not yet fulfilled, the safe harbor requirements for the federal ITC, which required the Hu Honua Project to be placed in service by the end of 2018. As a result, obtaining the federal ITC is no longer a guarantee under applicable safe harbor provisions.⁹³

7. Based on the above, the Commission concludes that requiring the Hu Honua Project to go through competitive bidding is not likely to result in more costly or less efficient procurement of biomass based on the expiration of the federal ITC, as it appears speculative, at best, that Hu Honua will receive the federal ITC, even if approved for a waiver, under the circumstances.

⁹³See Hu Honua Prehearing Testimonies, Hu Honua T-1 at 25.

8. While the estimated timeline for the first round of RDG-PPA projects to come online is slightly longer than for the Hu Honua Project,⁹⁴ taking the totality of the circumstances into consideration, including the significant difference in PPA pricing and the estimated bill impact to HELCO customers, the Commission finds that this slight difference in estimated project completion, alone, does not justify a waiver. Furthermore, the Commission notes that these are just estimated project completion dates, and that the Hu Honua Project itself has been subject to a number of substantial delays⁹⁵ that has placed it far behind its original estimated completion date.⁹⁶

9. While the Hu Honua Project may result in community benefits such as economic stimulation and employment creation, the Commission is not convinced that these are unique to the Hu Honua Project, as any approved project developer would be required to build, maintain, and operate a renewable facility on Hawaii Island and would also convey economic benefits to the community. Thus,

⁹⁴Hu Honua represents that its Project will be completed in 2020. The AES Waikoloa Solar project is expected to be completed in 2021 and the Hale Kuawehi Solar project is expected to be completed in 2022. See <https://www.hawaiianelectric.com/clean-energy-hawaii/our-clean-energy-portfolio/renewable-project-status-board>, last accessed July 7, 2020.

⁹⁵See pgs. 5-6, *supra*.

⁹⁶Under the Original PPA, the latest Commercial Operations Date for the Hu Honua Project was December 2015. See Order No. 33516 at 1.

a waiver is not necessary, as community benefits could be provided by a successful competitive bidder, whether it be Hu Honua or another renewable energy project, and the unique community benefits proposed by the Hu Honua Project are better evaluated in the context of the Competitive Bidding Framework.

10. The RDG-PPAs approved as part of the first round of RFPs arising from Docket No. 2017-0352 all contain pricing that is de-linked from the price of fossil fuels. Accordingly, while relevant, the Commission does not find that this supports a waiver for the Hu Honua Project under the circumstances, and that, to the extent the Project offers unique benefits in this area, they are better evaluated in the context of the Competitive Bidding Framework.

11. According to HELCO's updated resource plans, the addition of the Hu Honua Project in 2020 is not expected to accelerate the retirement or conversion of any of HELCO's existing fossil fuel plants. Consequently, approving a waiver for the Hu Honua Project does not appear to advance this consideration in any meaningful way.

12. Taking all of the above findings and conclusions into account, the Commission ultimately concludes that HELCO has not met its burden of proof in support of its request for a waiver from the Competitive Bidding Framework for the Hu Honua Project.

13. Based on the Commission's denial of HELCO's request for a waiver from the Competitive Bidding Framework for the Hu Honua Project, the Commission does not consider and dismisses the Amended PPA, since the request for a waiver is a threshold issue that is addressed before addressing the Amended PPA itself.⁹⁷ Concomitantly, the Commission finds that the remaining issues in this proceeding are moot.

B.

Miscellaneous Matters

The Commission observes that there are a number of pending motions submitted by LOL in this proceeding, including: a Motion to Compel, filed March 16, 2020;⁹⁸ a Motion for Leave to respond to HELCO's Memorandum in Opposition to LOL's Motion to Compel, filed March 27, 2020;⁹⁹ a Motion for Leave to respond to Hu Honua's Memorandum in Opposition to LOL's Motion to Compel,

⁹⁷See In re Hawaiian Elec. Co., Inc., Docket No. 2018-0400, Order No. 36502, "Dismissing Application Without Prejudice," filed September 6, 2019.

⁹⁸"Life of the Land's Motion to Compel; Memorandum in Support of Motion; Declaration; and Certificate of Service," filed March 16, 2020.

⁹⁹"Life of the Land's Motion for Leave re HELCO's Motion; Memorandum in Support of Motion for Leave; Declaration; and Certificate of Service," filed March 27, 2020.

filed March 27, 2020;¹⁰⁰ and a Motion to Strike, filed June 12, 2020.¹⁰¹

In light of the Commission's ruling above denying HELCO's waiver request, and the resulting dismissal of the Amended PPA, the Commission finds that these outstanding motions are moot.

C.

Impact Of Greenhouse Gas Emissions Related To The Project

In light of the Commission's ruling above, the Commission does not make any express findings or conclusions regarding Issue No. 4, regarding the estimated impacts of GHG emissions associated with the Hu Honua Project. As the Commission's decision today renders moot consideration of the Project itself based on the waiver issue, the separate issue of LOL's due process right to be heard on the Project's impact on LOL's property interest in a clean and healthful environment is no longer germane, in that the Project will not proceed as a result of this docket.

¹⁰⁰"Life of the Land's Motion for Leave re Hu Honua Motion; Memorandum in Support of Motion for Leave; Declaration; and Certificate of Service," filed March 27, 2020.

¹⁰¹"Life of the Land's Motion to Strike; Declaration of Henry Q. Curtis; and Certificate of Service," filed June 12, 2020.

That being said, the Commission is mindful of the legal guidance provided by the Hawaii Supreme Court, particularly as it pertains to the Commission's statutory obligation to explicitly consider the impact of GHG emissions associated with the Amended PPA.¹⁰² Accordingly, the Commission has reviewed the record on the issue of the Project's GHG emissions impact and offers the following discussion.

On October 21, 2019, pursuant to Order No. 36382,¹⁰³ HELCO and Hu Honua submitted analysis providing estimates of avoided GHG emissions associated with the Hu Honua Project.¹⁰⁴

¹⁰²See In re Haw. Elec. Light, 145 Hawaii at 5, 445 P.3d at 677.

¹⁰³In reopening the docket on remand following the Hawaii Supreme Court's decision, Order No. 36382, in relevant part, instructed Applicants to "analyze the GHG impacts of the Project and supplement the record" with the following analyses: (1) updated assumptions used for simulating HELCO's power system, including the RDG-PPAs approved as part of the first round of the RFP process; (2) estimated net "smokestack" GHG emission impacts (calculated as avoided emissions from fossil fuel plants less GHG emissions from the Hu Honua Project); and (3) estimated net lifecycle GHG emission impacts (calculated as avoided lifecycle emissions from fossil fuel plants less lifecycle emissions from the Hu Honua Project). Order No. 36382 at 10-12.

¹⁰⁴Letter From: B. Hiyaane To: Commission Re: Docket No. 2017-0122 - For Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity; Hawaii Electric Light Company, Inc.'s Response to Order No. 36382 and Greenhouse Gas Analyses, filed October 21, 2019 (the cover letter and summary are referred to herein as the "HELCO GHG Analysis" and the attached GHG analysis by Ramboll is referred to as the "Ramboll Report"); and Letter From: D. Yamamoto To: Commission Re: Docket No. 2017-0122: Hu Honua Bioenergy, LLC's Greenhouse Gas Emissions

HELCO submitted an estimated net "smokestack" GHG emissions impact analysis and an estimated lifecycle GHG emissions impact analysis, both prepared by Ramboll US Corporation ("Ramboll"). Hu Honua submitted similar analyses prepared by Environmental Resource Management ("ERM"); Hu Honua also submitted an additional net lifecycle GHG emissions analysis by JPB, LLC ("JPB").¹⁰⁵ The results of the Ramboll and ERM Analyses are summarized in the tables below:¹⁰⁶

Impact Analysis, filed October 21, 2019 (the cover letter and summary are referred to herein as the "Hu Honua GHG Analysis" and the attached GHG analysis prepared by ERM is referred to as the "ERM Report").

¹⁰⁵See Hu Honua response to CA/Hu Honua-IR-35, Exhibit 1, filed November 19, 2019 ("JPB Analysis"). It appears that JPB provided an estimate of the GHG emissions associated with building and operating a hypothetical fossil fuel unit, in order to provide a comparison for evaluating the lifecycle GHG emissions between the Hu Honua Project and a fossil fuel plant See ERM Report at 13; see also, CA Prehearing Testimonies, CA-T-3 at 4-5.

¹⁰⁶See HELCO GHG Analysis, Attachment 1 at 2-6.

Both Ramboll and ERM modeled scenarios that included and excluded the operation of Puna Geothermal Ventures ("PGV"), another independent power producer which has a PPA with HELCO to supply firm generation (geothermal). See HELCO GHG Analysis, Attachment 1 at 2. Due to the lower Puna eruption that occurred in 2018, PGV's operations were suspended due to lava flow damage to the facility. In late 2019, HELCO filed an application for approval of a renegotiated PPA. See In re Hawaii Elec. Light Co., Inc., Docket No. 2019-0333. Based on HELCO's GHG filings, if PGV is brought back online to HELCO's system, this would be expected to reduce the run time for the Hu Honua Project (thereby reducing the Project's GHG emissions).

Table 1

Net "Smokestack" GHG Emissions (metric tons of CO ₂ emissions)				
	Excluding Biogenic CO ₂ e		Including Biogenic CO ₂ e	
	With PGV	Without PGV	With PGV	Without PGV
Avoided ¹⁰⁷ Smokestack GHG emissions from HELCO systems (Ramboll)	1,768,111	2,144,291	2,073,771	2,571,272
Smokestack GHG emissions from Hu Honua Project (ERM)	0 ¹⁰⁸	0	6,996,000	7,760,000
"Net" Smokestack GHG Emissions	1,768,111	2,144,291	-4,992,229 ¹⁰⁹	-5,188,728

¹⁰⁷In reading these figures, the Commission clarifies that the positive numbers refer to the avoided (i.e., reduction) in GHG emissions that are expected to occur.

¹⁰⁸Because the Hu Honua Project intends to utilize biomass as its fuel source, its biogenic CO₂ emissions in the ERM modeled scenario are zero when biogenic CO₂e is excluded from the model.

¹⁰⁹Likewise, these "negative" figures are intended to reflect an increase in GHG emissions under these scenarios (i.e., a "negative avoided" impact equals an "increase"). See CA Prehearing Testimony, CA-T-3 at 16-17.

Table 2

Net Avoided "Lifecycle" GHG Emissions (metric tons of CO ₂ e)				
	Excluding Biogenic CO ₂ e		Including Biogenic CO ₂ e	
	With PGV	Without PGV	With PGV	Without PGV
Avoided Lifecycle GHG Emissions from HELCO system (Ramboll)	2,148,354	2,625,971	2,454,014	3,052,952
Lifecycle GHG emissions from Hu Honua Project (ERM)	280,000	294,000	n/a ¹¹⁰	n/a
Net Lifecycle GHG emissions	1,868,354	2,331,971	n/a	n/a

The Commission observes that a significant factor in analyzing the Project's estimated GHG emission impact is whether biogenic CO₂ emissions, i.e., biomass and biodiesel, are included. As reflected above, inclusion of biogenic emissions results in a net increase in smokestack GHG emission for the Project. While Hu Honua did not provide a net lifecycle GHG emissions impact analysis that included biogenic emissions, the fact that the

¹¹⁰ERM did not calculate estimated lifecycle GHG emissions for the Hu Honua Project for a scenario that include biogenic CO₂ emissions and neither HELCO nor Ramboll independently estimated the GHG emissions from the Hu Honua Project.

inclusion of biogenic emissions in the net smokestack analysis resulted in an increase in net GHG Project emissions infers that an increase in net lifecycle GHG emissions would have resulted had biogenic emissions been included.

Hu Honua asserts that excluding biogenic emissions from its GHG emission analysis is supported by Hu Honua's related efforts to cultivate biomass to supply the Project. "[T]he general premise [behind this policy] is that the amount of GHG emitted from using biomass as a fuel source equals the amount sequestered in the carbon cycle as biomass stocks are regrown, and therefore, achiev[es] carbon neutrality."¹¹¹

In this regard, Hu Honua is supported by the HAR governing the State Department of Health's GHG emission reduction plans, which consider biogenic CO₂ emissions to be zero, as well as the federal Environmental Protection Agency's 2018 policy statement on biogenic sources of GHG emissions as generally considered to be carbon neutral.¹¹²

¹¹¹CA Prehearing Testimonies, CA-T-3 at 15.

¹¹²See "Division of Consumer Advocacy's Supplemental Briefing on the Filed Greenhouse Gas Emissions Analyses," filed January 14, 2020 ("CA GHG Analyses Brief"), at 24 (citing HAR § 11-60.1-204 and "EPA's Treatment of Biogenic Carbon Dioxide (CO₂) Emissions from Stationary Sources that Use Forest Biomass for Energy Production," at 1, April 23, 2018, accessed at https://www.epa.gov/sites/production/files/2018-04/documents/biomass_policy_statement_2018_04_23.pdf).

That being said, the Commission shares the Consumer Advocate's concerns that such treatment "obscures the actual GHG emission intensity associated with burning biomass feedstock."¹¹³ As reflected above, both the analyses performed by Ramboll and ERM concluded that net GHG emissions will significantly increase as a result of the Project when biogenic emissions are included. In addition, the Consumer Advocate has referenced material that indicates that there is an ongoing policy discussion at the federal level as to whether sources of biogenic carbon emissions should continue to be considered carbon neutral.¹¹⁴ Accordingly, it may be prudent to keep the impact of biogenic CO₂ emissions in mind, as this issue continues to develop over time.

Furthermore, it appears that there are discrepancies in the assumptions used by Ramboll and ERM in calculating their respective GHG emission impacts. The Consumer Advocate observes that the "ERM utilized eGRID data from 2016, which does not reflect the most recent data available on HELCO's system . . . [which] has resulted in significantly higher GHG emissions and intensities associated with HELCO's fossil fuel-fired generators in comparison

¹¹³CA GHG Analyses Brief at 19.

¹¹⁴See CA GHG Analyses Brief at 24-26.

to the figures in the Ramboll GHG Analysis[,]" and do not appear to take into account the recent RDG-PPAs.¹¹⁵

In addition, it appears that ERM exclusively compared the Hu Honua Project's smokestack emissions to smokestack emissions from fossil fuel plants on HELCO's system, rather than a combination of fossil fuel and renewable generation sources.¹¹⁶ While ERM appears to have acknowledged this,¹¹⁷ it nonetheless continues its analysis "on a comparison between the Project and HELCO's existing fossil-fuel facilities at the same amount of projected dispatch in annual MWh for the 30 year term of the [Amended PPA][,]" on the basis that "choosing to prioritize the displacement of fossil fuel generation over displacing renewable generation would be consistent with meeting the State of Hawaii's 100% renewable energy goals."¹¹⁸ Accordingly, it appears that

¹¹⁵CA GHG Analyses Brief at 14.

¹¹⁶ERM Report at 2. See also, CA GG Analyses Brief at 15.

¹¹⁷ERM Report at 2 ("It is understood that HELCO intends to displace a significantly lesser amount of annual MWh of fossil-fuel generation over the 30 years [of the Amended PPA] compared to the Project's annual MWh because of HELCO's forecasted displacement of a combination of both renewable generation and fossil-fueled generation.") (emphasis in the original).

¹¹⁸ERM Report at 2. While Order No. 36382 did describe estimated net smokestack GHG emissions as "avoided emissions from fossil fueled plants" less "emissions from Hu Honua plant," Order No. 36382 at 11, this was not intended as license to ignore HELCO's resource planning. To the extent HELCO's long-term plans call for a diversified generation portfolio of fossil fuel and renewable energy resources, the net smokestack GHG emissions

rather than utilize the updated long-term resource plan provided by HELCO to model lifecycle GHG emissions, ERM instead substituted its own judgment as to how HELCO's generation facilities should be dispatched and used those assumptions to model the Project's net lifecycle GHG emissions.

As noted by the Consumer Advocate, this "resulted in significant differences between the GHG emissions and intensities calculated in the Ramboll GHG Analysis as compared to the ERM GHG Analysis."¹¹⁹ Pertinently, the Commission observes that this methodology increases the avoided stack GHG emissions from HELCO's systems which correspondingly increases the amount of "net" smokestack emissions resulting from the Hu Honua Project (net smokestack emissions = avoided emissions from HELCO fossil fueled plants - emissions from Hu Honua Project).

analysis should take this into account and utilize the estimated GHG emissions from those fossil fuel resources that HELCO anticipates using (as it appears Ramboll did in its analysis).

¹¹⁹CA GHG Analyses Brief at 15 and 16 (including Table 3); see also, CA Prehearing Testimonies, CA-T-3 at 5. In addition, compare HELCO GHG Analysis, Attachment 1 at 3 (Table 2.1) with Hu Honua GHG Analysis at 3 (Tables 2 and 3) (reflecting that ERM's analysis resulted in estimated GHG emissions from HELCO's facilities that are nearly double that of Ramboll's analysis).

Furthermore, as the Consumer Advocate observes, the Ramboll Report relies on the ERM Report to provide a comprehensive GHG emissions impact analysis for the Hu Honua Project: "ERM's results on the Net 'Smokestack' GHG Emissions impact on the Hu Honua Plant served as the basis for both ERM's and Ramboll's analyses of the Estimated Net 'Smokestack' and Lifecycle GHG Emissions Impact of adding Hu Honua to HELCO's system."¹²⁰ The interrelated nature of these reports heightens the risk that an error in the methodology, data, or assumptions may have corrupted the results of both Reports.¹²¹

As noted above, the Commission does not find it necessary to make findings on the issue of the Project's estimated GHG emissions impact in light of the denial of HELCO's waiver request, and refrains from doing so at this time. However, upon reviewing the record on this issue, the considerations discussed above indicate that there are still lingering concerns regarding the impact of the Project's GHG emissions.

Furthermore, due to Project's delays and the rapid progress of the Hawaiian Electric Companies' RFP process, the

¹²⁰CA GHG Analyses Brief at 17. See also, HELCO Prehearing Testimonies, HELCO T-4 at 4-5.

¹²¹On this issue, the Consumer Advocate has voiced several concerns with the development of assumptions and underlying calculations used in the ERM Report. See CA GHG Analyses Brief 18; and CA Prehearing Testimonies, CA-T-3 at 10-12.

assumptions underlying the Ramboll and ERM (and JPB) Reports are rapidly changing. As noted above, the second round of RFPs in Docket No. 2017-0352 has produced sixteen selected competitive bids for new renewable energy and energy storage projects, which are not included in any of the Reports' assumptions. As HELCO updates its long-term resource plans to incorporate such renewable projects, it is possible that the estimated GHG emissions impact of the Hu Honua Project will also change, as more renewable projects displace existing fossil fuel units.

III.

ORDERS

THE COMMISSION ORDERS:

1. HELCO's request for a waiver from the Competitive Bidding Framework for the Hu Honua Project is denied.
2. As a result of the Commission's denial of HELCO's waiver request, the Commission does not consider and dismisses without prejudice the Amended PPA between HELCO and Hu Honua, as set forth in HELCO's Letter Request.
3. In light of the Commission's rulings above, the Commission finds that the other issues in this proceeding, including the pending motions filed by LOL, are moot.

4. This docket is closed, unless ordered otherwise by the Commission.

DONE at Honolulu, Hawaii JULY 9, 2020.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By James P. Griffin
James P. Griffin, Chair

By Jennifer M. Potter
Jennifer M. Potter, Commissioner

By Leodoloff R. Asuncion, Jr.
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:

Mark Kaetsu
Mark Kaetsu
Commission Counsel

2017-0122.ljk

CERTIFICATE OF SERVICE

Pursuant to Order No. 37043, the foregoing order was served on the date it was uploaded to the Public Utilities Commission's Document Management System and served through the Document Management System's electronic Distribution List.

FILED

2020 Jul 09 AM 08:36

PUBLIC UTILITIES
COMMISSION

The foregoing document was electronically filed with the State of Hawaii Public Utilities Commission's Document Management System (DMS).

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
)	
HAWAII ELECTRIC LIGHT COMPANY, INC.	)	DOCKET NO. 2017-0122
)	
For Approval of a Power Purchase)	
Agreement for Renewable Dispatchable)	
Firm Energy and Capacity)	

**HU HONUA BIOENERGY, LLC'S MOTION FOR RECONSIDERATION
OF ORDER NO. 37205, ISSUED JULY 9, 2020**

MEMORANDUM IN SUPPORT OF MOTION

AFFIDAVIT OF JON MIYATA

AFFIDAVIT OF ELI KATZ

EXHIBIT 1

AND

CERTIFICATE OF SERVICE

DEAN T. YAMAMOTO
WIL K. YAMAMOTO
BRADLEY S. DIXON

YAMAMOTO CALIBOSO
A Limited Liability Law Company
1100 Alakea Street, Suite 3100
Honolulu, Hawaii 96813
Phone No. (808) 540-4500
Facsimile No. (808) 540-4530
Emails: dyamamoto@ychawaii.com
wyamamoto@ychawaii.com
bdixon@ychawaii.com

Counsel for HU HONUA BIOENERGY, LLC.

BRUCE D. VOSS
JOHN D. FERRY

BAYS LUNG ROSE & HOLMA
Topa Financial Center
700 Bishop Street, Ste. 900
Honolulu, Hawaii 96813
Phone No. (808) 523-9000
Facsimile No. (808) 533-4184
Emails: bvoss@legalthawaii.com
jferry@legalthawaii.com

Co-Counsel for HU HONUA BIOENERGY,
LLC.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
)	
HAWAII ELECTRIC LIGHT COMPANY, INC.	)	DOCKET NO. 2017-0122
)	
For Approval of a Power Purchase)	
Agreement for Renewable Dispatchable)	
Firm Energy and Capacity)	
_____)	

**HU HONUA BIOENERGY, LLC’S MOTION FOR RECONSIDERATION
OF ORDER NO. 37205, ISSUED JULY 9, 2020**

Hu Honua Bioenergy, LLC, a Hawaii limited liability company (“Hu Honua”), by and through its undersigned counsel, Yamamoto Caliboso, LLLC, hereby respectfully moves the Public Utilities Commission of the State of Hawaii (“Commission”), pursuant to Hawaii Administrative Rules (“HAR”) §§ 16-601-41 and 16-601-137¹, for reconsideration of Order No. 37205, issued July 9, 2020, and requests that the Commission vacate the order in its entirety.

Pursuant to HAR § 16-601-41, Hu Honua respectfully requests a hearing on the motion. Hu Honua understands that pursuant to HAR § 16-601-142,² such a hearing must be requested by the Commission or a Commissioner who concurred in the decision. Hu Honua submits that a hearing on this Motion is justified given (1) the negative impact on Hu Honua’s significant property interest (over \$400 million spent in reliance on prior

¹ Hu Honua’s Motion is timely filed. Pursuant to HAR 16-601-137, a motion for reconsideration “shall be filed within ten days after the decision or order is served upon the party.” Order No. 37205 was served by email on July 9, 2020. Ten days therefrom is Sunday, July 19, 2020. HAR § 16-601-22 provides that in the computation of time under Title 16, Chapter 601, where the last day of a period specified falls on a Saturday, Sunday, or holiday, the period runs until the next day that is not a Saturday, Sunday, or holiday. Accordingly, this motion is due on or before Monday, July 20, 2020, and is timely filed.

² HAR §16-601-142 states that “[o]ral argument shall not be allowed on a motion for reconsideration, rehearing, or stay, unless requested by the commission or a commissioner who concurred in the decision.”

Commission approvals), (2) the devastating effect of preventing the infusion of new money into the Hawaii Island economy and loss of hundreds of jobs and millions of dollars in tax revenue for the State for the next 30 years, (3) the negative impact on the State's Renewable Portfolio Standard (RPS) goals and prolonged use of high amounts of price-volatile imported oil by allowing fossil fuel plants to continue operating for up to 25 years (instead of being replaced sooner by Hu Honua), (4) the negative impact of eventually replacing firm fossil fuel plants with biofuels that are significantly more expensive than Hu Honua, (5) the negative impact of maintaining high levels of greenhouse gas ("GHG") emissions instead of significantly reducing GHG emissions with Hu Honua, (6) the negative impact on the State's goal of promoting renewable energy in conjunction with agricultural activities, and (7) the other impacts discussed in this Motion.

Given the above impacts, especially the hundreds of local jobs in the balance, Hu Honua respectfully requests that the Commission expedite its decision-making on this Motion for Reconsideration and render a decision within 2 to 3 weeks. By this Motion for Reconsideration, Hu Honua also requests that, after a hearing, the Commission vacate its Order No. 37205, issued July 9, 2020.

DATED: Honolulu, Hawaii, July 20, 2020.



DEAN T. YAMAMOTO
WIL K. YAMAMOTO
BRADLEY S. DIXON

YAMAMOTO CALIBOSO
A Limited Liability Law Company

Counsel for HU HONUA BIOENERGY,
LLC



BRUCE D. VOSS
JOHN D. FERRY

Bays Lung Rose & Holma

Co-Counsel for HU HONUA
BIOENERGY, LLC

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. BACKGROUND..... 4

III. LEGAL STANDARD. 17

IV. DISCUSSION. 17

 A. Hu Honua’s Waiver Was Not Disturbed by the Hawaii Supreme Court’s Decision to Remand the Case for the Commission’s Consideration of GHG Impacts. 17

 1. On remand the Hawaii Supreme Court instructed the Commission to consider GHG emissions only and to hold an evidentiary hearing that complies with procedural due process. 18

 2. The Commission’s revocation of Hu Honua’s waiver violates the scope of the Hawaii Supreme Court’s remand. 21

 3. A revocation of a previously granted waiver is not permitted under the Competitive Bidding Framework. 25

 4. The Commission’s statement that its revocation here is consistent with prior actions in this docket is wrong. 26

 B. The Commission is equitably estopped from revoking its waiver..... 28

 1. The Commission’s waiver was an official assurance upon which Hu Honua unquestionably had a right to rely. 29

 2. In good faith reliance on the Commission’s waiver, Hu Honua expended substantial sums of money and other resources. 30

 C. The Commission’s revocation of the A&R PPA’s waiver without notice and a hearing violated Hu Honua’s right to due process of law. 34

 1. The Commission’s grant of a waiver for the A&R PPA, and Hu Honua’s vested right to proceed with the Project, are “property interests or legal entitlements” protected by due process. 34

 2. Hu Honua was entitled to notice and a hearing to protect its property interest in the A&R PPA waiver..... 36

 a. Private interest. 37

 b. Risk of erroneous deprivation..... 37

 c. Governmental interest. 38

 D. The Waiver is Still Justified under Part II.A.3.d. of the Competitive Bidding Framework as the Hu Honua Project is an Expeditious Means to Increase the Amount of Firm Renewable Energy on HELCO’s system and is in the Public Interest..... 39

1.	A waiver is still justified as Hu Honua is still the most expedient opportunity to increase the amount of firm renewable energy on HELCO’s system and would also provide firm capacity and grid services necessary and essential to support intermittent renewable resources, such as solar and wind projects, all without foregoing federal ITC benefits.....	39
2.	HELCO has no current plan to retire any fossil-fired generators but might be able to do so if Hu Honua is operational.	43
E.	The Finding that Hu Honua’s Ability to Obtain the Federal ITC is “Speculative, at Best” is Unreasonable, Erroneous, and Misleading.	45
F.	New Markets Tax Credits (NMTC) that Benefit the State of Hawaii at Risk.....	48
G.	The Order Revoking Waiver Unreasonably and Erroneously Ignores Hu Honua’s Significant Contributions to Other State Objectives.....	51
1.	Fossil fuel price volatility.	51
2.	The Commission disregards the State’s public policy in favor of promoting Hawaii agricultural under HRS § 269-27.3.	52
3.	Retirement of Fossil Fuel Fired Plants and the State’s RPS Goals pursuant to HRS § 269-92.	53
H.	The Order Revoking Waiver Unreasonably and Erroneously Fails to Consider the Inherent Inefficiencies of Requiring Hu Honua to Participate in a Future RFP.....	54
I.	The Commission Unreasonably and Unlawfully Failed to Make Findings Regarding GHG in Contravention of its Explicit Duties Set Forth in HRS § 296-6(b) and as Directed by the Hawaii Supreme Court.....	57
1.	The Commission’s statement that Hu Honua failed to provide a net lifecycle GHG emissions impact analysis that considered biogenic emissions is patently erroneous and misleading, as demonstrated by the supplemental analysis submitted by Hu Honua in its prehearing testimonies.	60
2.	The Order Revoking Waiver Erroneously and Unreasonably Ignores the Fact That The End Result is the Same Regardless of Which Assumptions Are Used, i.e. Hu Honua’s Project Will Reduce GHG Emissions.	66
3.	Hu Honua Conducted its GHG Analysis in Accordance with the Commission’s Order Reopening Docket Which Provided Specific and Unambiguous Instructions With Respect to Calculating the Estimated Net Smokestack Emissions.	67
V.	CONCLUSION.....	68

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Aguiar v. Hawaii Housing Authority</u> , 55 Haw. 478, 522 P.2d 1255 (1974).....	36
<u>Allen v. City & County</u> , 58 Haw. 432, 571 P.2d 328 (1977)	34, 35
<u>Bell v. Burson</u> , 402 U.S. 535 (1971).....	35
<u>Brown v. Thompson</u> , 91 Hawaii 1, 979 P.2d 586 (1999), <i>as amended</i> (July 13, 1999)	36
<u>Cho Mark Oriental Food, Ltd. v. K&K Intern.</u> , 73 Haw. 509, 836 P.2d 1057, (1992)	68
<u>Chun v. Board of Trustees of Employees' Retirement System of State of Hawai'i</u> , 106 Hawaii 416, 106 P.3d 339 (2005)	22
<u>County of Kauai v. Pacific Standard Life Insurance Co.</u> , 65 Haw. 318, 653 P.2d 766 (1982)	29, 34, 36
<u>Filipo v. Chang</u> , 62 Haw. 626, 618 P.2d 295 (1980).....	28, 33
<u>Foster v. Civil Service Commission</u> , 255 Ill.App.3d 30, 194 Ill.Dec. 169, 627 N.E.2d 285, 290 (Ct.1993).22 <u>In re 'Āao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications</u> , 128 Hawai'i 228, 287 P.3d 129 (2012)	35
<u>In re Application of Maui Elec. Co., Ltd.</u> , 141 Haw. 249, 408 P.3d 1 (2017).....	34, 35, 58
<u>In re Hawaii Electric Light Company, Inc.</u> , 145 Hawaii 1, 445 P.3d 673 (2019)	2, 10, 11, 18, 19, 20, 21, 25, 37, 58, 59
<u>In re HELCO</u> , SCOT-17-0000630, Order Denying Motion for Stay, issued on April 16, 2018.....	9
<u>Kernan v. Tanaka</u> , 75 Haw. 1, 856 P.2d 1207 (1993) (citing <u>Bell</u> , 402 U.S. at 539).....	36
<u>Life of the Land, Inc. v. City Council of City & County of Honolulu</u> , 61 Haw. 390, 606 P.2d 866 (1980).	29, 33, 35

<u>Logan v. Zimmerman Brush Co.</u> , 455 U.S. 422 (1982)	36
<u>Pele Def. Fund v. Puna Geothermal Venture</u> , 77 Haw. 64, 881 P.2d 1210, 1214 (1994)	34
<u>Porter v. Queen's Med. Ctr.</u> , No. CAAP-16-0000602, 2020 WL 858804 (Haw. App. Feb. 21, 2020), <i>cert. granted sub nom.</i> No. SCWC-16-0000602, 2020 WL 2562016 (Haw. May 20, 2020).....	22
<u>Sandy Beach Def. Fund v. City Council of Honolulu</u> , 70 Haw. 361, 376, 773 P.2d 250, 260 (1989)	34, 36, 37, 46
<u>Sierra Club v. State of Hawaii Department of Transportation</u> , 115 Hawaii 299, 167 P.3d 292 (2007)	26
<u>Sierra Club v. Hawai'i Tourism Auth.</u> , 100 Hawaii 242, 59 P.3d 877 (2002).....	68
<u>Standard Mgmt., Inc. v. Kekona</u> , 99 Hawaii 125, 53 P.3d 264 (Haw. App. 2001). ..	22, 23
<u>Warren v. Department of Administration</u> , 590 So.2d 514 (Fla.Dist.Ct.App.1991).....	23
<u>Yamada v. Nat. Disaster Claims Comm'n</u> , 54 Haw. 621, 513 P.2d 1001 (1973).....	28

STATUTES

HRS § 91-14(g):	18
HRS § 269-6(b)	4, 11, 19, 57, 58
HRS § 269-15.5	9, 31
HRS § 269-27.3	8, 53
HRS § 269-92	54

RULES

<u>HAR § 16-601-41</u>	1
<u>HAR § 16-601-48</u>	38

HAR § 16-601-137 1, 17

HAR § 16-601-139 46

OTHER AUTHORITIES

2 Am. Jur. 2d Administrative Law § 550 22, 23

Callies, Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls, 2 U.HAWAII L. REV. 167, 174 (1979). 29

Docket No. 03-0372, Decision and Order No. 23121, filed December 11, 2006 8, 30

Docket No. 2007-0008, Letter From: K. Katsura To: Commission Re: Docket No. 2007-0008 – Renewable Portfolio Standards Law Examination, filed February 11, 2020 .. 41

Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008 4, 5

Docket No. 2011-0092, Order No. 31343, filed July 2, 2013 17

Docket No. 2012-0212, Decision and Order No. 31758, dated December 20, 2013..... 4

Docket No. 2017-0352, Order No. 35405, filed April 6, 2018 10

Docket No. 2017-0352, Order No. 35529, filed June 15, 2018..... 10

Docket No. 2017-0352, Order No. 36356, filed June 10, 2019..... 10

Docket No. 2019-0050, HECO’s Response to PUC-HECO-IR-10, filed July 3, 2019..... 4

Docket. No. 2020-0090, Hawaiian Electric Company, Inc., Hawai’i Electric Light Company, Inc., and Maui Electric Company, Limited's Application; Verification, filed June 9, 2020 52

Statement from Hawaii Public Utilities Commission on the COVID-19 Emergency, available at the Commission’s website at https://puc.hawaii.gov/wp-content/uploads/2020/03/Statement-from-Hawaii-Public-Utilities-Commission-on-COVID_3-24-2020.pdf..... 15

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
)	
HAWAII ELECTRIC LIGHT COMPANY, INC.	)	DOCKET NO. 2017-0122
)	
For Approval of a Power Purchase)	
Agreement for Renewable Dispatchable)	
Firm Energy and Capacity)	
<hr/>		

**MEMORANDUM IN SUPPORT OF HU HONUA
BIOENERGY LLC’S MOTION FOR RECONSIDERATION**

I. INTRODUCTION.

Hu Honua Bioenergy, LLC, a Hawaii limited liability company (“Hu Honua”), respectfully moves the Public Utilities Commission of the State of Hawaii (“Commission” or “PUC”), pursuant to Hawaii Administrative Rules (“HAR”) §§ 16-601-41 and 16-601-137, for reconsideration of Order No. 37205 (“Order Revoking Waiver”), issued July 9, 2020.

The Commission’s Order Revoking Waiver defies logic and the law. At a time when this State desperately needs jobs and investment to revive and diversify its economy, the Commission without notice or any due process killed a project that would generate hundreds of jobs and cost nearly \$500 million to build. The Commission’s action casts a dark cloud over all pending and future alternative energy projects in Hawaii, effectively telling investors that this State’s word cannot be trusted. The long-term consequences of the Order Revoking Waiver will be devastating, not just for alternative energy development but for the State’s economy as a whole.

Hu Honua seeks reconsideration of the Order Revoking Waiver on the following grounds:

(1) The Commission’s revocation of a waiver it previously approved was unlawful because it exceeded the Commission’s authority upon remand from the Hawaii Supreme Court. The Commission’s grant of a waiver in connection with the approval of the A&R PPA in 2017 was not considered or addressed by the Hawaii Supreme Court in In re Hawaii Electric Light Company, Inc. (“In re HELCO”)³ and was not within the scope of the Hawaii Supreme Court’s remand instructions;

(2) The Commission is equitably estopped from revoking its previously approved waiver under longstanding Hawaii law, based on the more than \$314 million in project costs Hu Honua has spent since the waiver was approved;

(3) The Commission’s revocation of the waiver without giving Hu Honua notice of the specific information and considerations that the Commission believes form the bases of such revocation and an opportunity to be heard unlawfully deprives Hu Honua of a significant property interest and violates Hu Honua’s constitutional due process rights;

(4) The Commission’s bases for concluding that the A&R PPA no longer qualifies for a waiver, including its discussion of the projects currently under development from the HECO Companies first and second Request for Proposals (“Phase 1 RFP” and “Phase 2 RFP”, respectively), are erroneous;

(5) The Commission erroneously ignores or disregards the unique contributions Hu Honua makes in achieving the state of Hawaii’s (“State”) public policy objectives, such as helping achieve the State’s RPS and agricultural goals, delinking energy pricing from volatile fossil fuel costs, and the unique and significant benefits the

³ 145 Hawaii 1, 445 P.3d 673 (2019).

Hu Honua Project would provide to the State such as economic stimulation and the creation of jobs in the forestry, harvesting, transportation, wood-making, and vegetation management industry sectors, as well as the diversification of Hawaii Island's renewable resources that are less vulnerable to weather-related reliability, volcanic activity, and price fluctuations inherent with importing and refining fossil fuel oil.

(6) The Commission unreasonably and erroneously mischaracterizes the estimated GHG impacts of the Project and ignores the significant reduction in GHG anticipated by HELCO's consultant Ramboll and Hu Honua's consultants ERM and JBP. In fact, ERM has demonstrated that Hu Honua not only significantly reduces GHG emissions, and achieves carbon neutrality, but is carbon negative when accounting for the planting and growing of trees,⁴ which Hu Honua has committed to do.⁵ The Commission unreasonably and erroneously ignores the carbon reduction benefits in connection with Hu Honua's commitment to plant/grow more trees than is harvested,⁶ setting a dangerous precedent that the Commission will not account for the carbon benefits associated with planting new trees or reforestation projects. The record reflects that Hu Honua has committed that the Project will be carbon negative as soon as practicable, or by 2045 at the latest,⁷ which is more than can be said for the solar + battery projects, which though help to reduce GHG, do not reach carbon neutrality or negative

⁴ See HU HONUA-601, filed January 28, 2020; Testimony of David Weaver, Hu Honua Testimony T-6, filed January 28, 2020, at 26-27.

⁵ See Response to CA/Hu Honua-IR-107(c), filed February 28, 2020 and CA/Hu Honua-SIR-27, filed March 9, 2020.

⁶ Order Revoking Waiver, at 49-50; Response to CA/Hu Honua-IR-107(c), filed February 28, 2020 and CA/Hu Honua-SIR-27, filed March 9, 2020.

⁷ See Response to CA/Hu Honua-IR-107(c), filed February 18, 2020 and CA/Hu Honua-SIR-27, filed March 9, 2020.

and all leave a carbon positive footprint.⁸

Hu Honua seeks reconsideration of the Commission's Order Revoking Waiver and asks that the Commission vacate its Order No. 37205, issued July 9, 2020, and comply with the Hawaii Supreme Court's remand instructions in *In re HELCO*, which consist of (1) explicitly considering the reduction of GHG emissions pursuant to HRS § 269-6(b) and (2) to hold "a hearing that complies with procedural due process."⁹

II. **BACKGROUND.**

The Hu Honua project ("Hu Honua" or "Project") is a state-of-the-art bioenergy facility that will provide renewable, firm, dispatchable energy, support Hawaii's clean energy goals, revitalize East Hawaii Island's agricultural sector, and bring many new jobs to Hawaii Island. In Docket No. 2012-0212, the Commission conducted a detailed review of the Hu Honua Project's benefits, and approved Hu Honua's original Power Purchase Agreement ("Original PPA") with Hawaii Electric Light Company, Inc. ("HELCO").¹⁰ The Original PPA for the Project was negotiated pursuant to a waiver granted by the Commission in 2008 under Part II.A.3.d of the Commission's Competitive Bidding Framework.¹¹ Part II.A.3.d provides that

the Commission may waive this Framework or any part thereof upon a showing that the waiver will likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the

⁸ While solar projects may help reduce greenhouse gas emissions, they are not as effective as Hu Honua because they cannot achieve carbon neutrality or be carbon negative. See e.g., Docket No. 2019-0050, HECO's Response to PUC-HECO-IR-10 at Attachment 1, at 9, filed July 3, 2019 (Ramboll Analysis of GHG impacts of AES' West Oahu Solar Project). Solar projects are not capable of acting as a carbon sink whereas Hu Honua has committed that the Project will be carbon negative as soon as practicable, or by 2045 at the latest by the planting/growing of trees. See Response to CA/Hu Honua-IR-107(c), filed February 18, 2020 and CA/Hu Honua-SIR-27, filed March 9, 2020.

⁹ 145 Hawaii at 25-28, 445 P.3d at 697-700.

¹⁰ Docket No. 2012-0212, Decision and Order No. 31758, dated December 20, 2013 ("Original PPA Approval Order").

¹¹ See Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008 at 7-9 (emphasis added).

public interest.

The Commission granted the requested waiver under this provision in order to provide an expeditious means to increase the amount of firm renewable energy (capable of replacing 24/7 firm fossil generation) on HELCO's system, an objective that remains important today.¹²

On May 9, 2017, HELCO filed with the Commission the Amended and Restated Power Purchase Agreement ("A&R PPA") between Hu Honua and HELCO in Docket No. 2012-0212, which was subsequently transferred into this docket, in order to provide HELCO customers with the same advantages as the Original PPA but at a lower cost and a commitment to a longer term. The A&R PPA amends the Original PPA in two primary ways: (a) it provides an extension of two contract milestones to allow Hu Honua to complete the biomass facility and (b) it reduces the contract's pricing and restructures the contract term.¹³ Because the Commission had already comprehensively reviewed and approved the Original PPA, the Commission, in approving the A&R PPA, limited its review to the following three issues:

1. Whether HELCO has met its burden of proof in support of its request to waive Hu Honua's Project from the commission's Framework for Competitive Bidding.
2. Whether HELCO has met its burden of proof in support of its request for the commission to approve the Amended and Restated PPA for the Hu Honua Project.
 - a. Whether the purchased power costs to be paid by HELCO pursuant to the Amended and Restated PPA are reasonable.

¹² See Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008 at 6-9.

¹³ The A&R PPA also makes other relatively minor and conforming amendments, as described in detail in Exhibits G and H to Hawaii Electric Light Company ("HELCO's") Request for Approval of Amended and Restated Power Purchase Agreement ("A&R PPA Approval Request"), filed May 9, 2017 in Docket No. 2012-0212 and later transferred to Docket No. 2017-0122 by Order No. 34554, filed on May 10, 2017.

- i. Whether the energy price components in the Amended and Restated PPA properly reflect the cost of biomass fuel supply.
 - b. Whether HELCO's purchase power arrangements under the Amended and Restated PPA are prudent and in the public interest.
 3. Whether Hu Honua has met its burden of proof in support of its request for preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities pursuant to Hawaii Revised Statutes § 269-27.3.¹⁴

In Order No. 34726 ("2017 D&O"), less than three months after requesting approval of the A&R PPA, the Commission approved the A&R PPA finding that:

Given the relatively minimal number of changes from the Original PPA, many of the commission's findings and conclusions in the Underlying Decision and Order remain relevant and applicable to its analysis of the A&R PPA. ...

The A&R PPA contemplates that Hu Honua will construct and operate a 21.5 MW biomass power plant located on a site in Pepeekeo, Hawaii, although Hu Honua expects to provide 30 MW of Available Capacity. Under the terms of the A&R PPA, the difference of 8.5 MW of Available Capacity would be provided to HELCO at no additional charge. ...

Pursuant to the A&R PPA, HELCO is required to accept and pay for capacity and energy generated by the Facility at a combined levelized rate of approximately \$221 per MWh during the term of the A&R PPA, based on estimated annual capacity and energy payments over the 30-year term of the A&R PPA. ...

As in the Underlying [Original PPA] Decision and Order, the commission continues to conclude that the levelized rate should not be the sole factor to be used in determining whether a project should be approved. Other factors can be used to determine whether a rate is just and reasonable to the utility's ratepayers, depending on the facts and circumstances associated with a proposed project. Here, as in the Underlying Docket, the commission finds that the Project will provide performance and operational features similar to HELCO's existing steam generators with dispatchable capacity, inertial and primary frequency response, regulation and load following capabilities, and will add to the diversity of HELCO's existing portfolio of renewable energy resources. Stated succinctly, the Project will

¹⁴ Docket No. 2017-0122, Order No. 34597, filed June 6, 2017, at 5-6.

provide firm, dispatchable, renewable energy, and will provide ancillary services. ...

The Project will provide economic benefits to HELCO's ratepayers. HELCO's payments to Hu Honua for capacity and energy costs are estimated to provide a Net Present Value cost savings of \$22,457,000 to HELCO ratepayers in 2017 dollars, per the Supplemental Analysis. The Supplemental Analysis also estimates that a typical residential customer that uses 500 kWh per month will have levelized savings of \$1.21/month on the customer's electric bill over the term of the A&R PPA. ...

As a firm, dispatchable biomass resource, the Project provides diversification of HELCO's generation portfolio in two ways: (1) the Project's fuel source is different than any other energy resource and is less vulnerable to weather- and climate-related reliability concerns, and (2) the Project adds another form of firm, dispatchable renewable energy with operational characteristics similar to HELCO'S existing fossil-fueled steam generators. ...

Based on the commission's review of the record, including confidential information, it appears that the addition of the Project may primarily displace fossil fuel generation resources. Accordingly, the commission anticipates that, based on the representations made in HELCO's PSIP, this Project will accelerate the retirement of fossil fuel plants, including Hill 5 and 6, and Puna Steam. ...

The Project is anticipated to provide community benefits, including economic stimulation and the creation of jobs, both at the Hu Honua facility and supporting jobs in industries such as forestry, harvesting, and hauling. ...

Based on the above findings, the commission finds that HELCO has met its burden of proof in support of its request for the commission to approve the A&R PPA. The purchased power costs and arrangements set forth in the A&R PPA appear reasonable, prudent, in the public interest, and consistent with HRS chapter 269 in general, and HRS § 269-27.2(c), in particular. While the commission, in this instance, finds the pricing to be reasonable, the commission makes clear that its decision to approve the A&R PPA is not based solely on pricing, but includes other factors such as the State's need to limit its dependence on fossil fuels and mitigate against volatility in oil pricing. ...

2017 D&O at 53-60. The Commission also noted that it was approving the A&R PPA pursuant to the "normal" criteria for PPAs and, therefore, did not address Hu Honua's

request for preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities pursuant to HRS § 269-27.3.¹⁵

The Commission's 2017 D&O also granted the Project a waiver from the Commission's Competitive Bidding Framework¹⁶ under Part II.A.3.d, finding that the

opportunity to increase the amount of renewable energy on HELCO's system, without increasing the amount of as-available, intermittent renewable energy resources on HELCO's system[,] continues to be in the public interest. ...

In support of that finding, the Commission noted that "[a]s of the end of the first quarter of 2017, approximately 45.5% of all energy on [HELCO's] system was generated from renewables with approximately 20.1% generated from intermittent renewable energy sources, including utility scale photovoltaic[], hydro, wind, and customer-sited rooftop solar." ...

The Commission further recognized that "HELCO's PSIP Update Report: December 2016 E3 plan ... shows that HELCO plans on adding more than 100 MW of intermittent renewable energy (30.4 MW of DG-PV and 72 MW of Wind) over the next 5 years, which will require sufficient firm dispatchable energy to ensure reliability of grid services." ...

Moreover, the Project provides the most viable opportunity to add firm, dispatchable, renewable generation in the near term, and requiring the Project to enter the next round of competitive bidding would very likely forego the opportunity to utilize the federal ITC benefits.

2017 D&O at 30.

Finally, the Commission stressed the importance of meeting the Commercial Operation Date deadline in the A&R PPA:

The commission notes that this proceeding to review the A&R PPA was triggered by Hu Honua missing major construction milestones established in the Original PPA. The A&R PPA sets the Commercial Operation Date deadline at 18 months after PUC Approval of Amendment Date, as that term is defined in the A&R PPA. Hu Honua has represented that the project is 50% complete and that meeting the Commercial Operation Date deadline

¹⁵ Docket No. 2017-0122, Decision and Order No. 34726, filed July 28, 2017, at 1-2.

¹⁶ See Docket No. 03-0372, "In re Public Utilities Commission Instituting a Proceeding to Investigate Competitive Bidding for New Generating Capacity in Hawaii," Decision and Order No. 23121, filed December 11, 2006, at Exhibit A ("Competitive Bidding Framework").

will allow the project to qualify for federal tax incentives. Given these factors, the commission expects Hu Honua and HELCO to make all reasonable attempts to complete the project according to this schedule and does not expect future requests to extend the Commercial Operation Date deadline.¹⁷

Accordingly, the Commission ordered Hu Honua and HELCO to “make all reasonable attempts to complete the project” no later than the Commercial Operation Date deadline, which Hu Honua is presently well-within. In response to this clear directive, Hu Honua proceeded to immediately ramp up construction and spend hundreds of millions of dollars to mobilize and execute full time construction across multiple trades in order to complete the remaining 50% of the project on a timely basis. The Project was approximately 99% complete when the Commission issued its Order Revoking Waiver.

In August 2017, Life of the Land (“LOL”) appealed the 2017 D&O to the Hawaii Supreme Court. During the appeal, LOL had moved to stay the 2017 D&O, which the Supreme Court denied.¹⁸ Given the denial of the stay, under Hawaii law, the 2017 D&O was still effective¹⁹ and Hu Honua was still obligated to comply with the Commission’s directive to “make all reasonable attempts to complete the project” in a timely manner. Hu Honua did just that.

Meanwhile, between 2017 and 2019, following the 2017 Commission approval and during pendency of the Hawaii Supreme Court appeal, the Commission orchestrated and accelerated new renewable projects to be solicited for Hawaii Island, ordering HELCO to

¹⁷ 2017 D&O at 61 (emphasis added); The Commercial Operation Date Deadline is 18-Months after PUC Approval of Amendment Date. See Attachment B to the A&R PPA, dated May 9, 2017. PUC Approval of Amendment Date is defined in Section 25.12(D) of PPA. The PUC Approval of Amendment Date shall be the date upon which the PUC Approval of Amendment Order becomes a non-appealable order within the meaning of the definition of a Non-appealable PUC Approval of Amendment Order in Section 25.12(B) of the PPA, which as of this writing has not yet occurred yet. Accordingly, Hu Honua is still well-within its Commercial Operation Date deadline under the A&R PPA.

¹⁸ See In re HELCO, SCOT-17-0000630, Order Denying Motion for Stay, issued on April 16, 2018.

¹⁹ See HRS § 269-15.5 (appeals from the Commission shall not stay the operation of the order appealed from unless stayed by the appellate court upon motion and a hearing).

expedite the request for proposals for new variable renewable energy projects on Hawai'i Island in two separate phases, Phase 1 RFP and Phase 2 RFP.

With respect to the Phase 1 RFP, the Commission ordered the acceleration of the Phase 1 renewable projects and even incentivized HELCO with a significant money kickback (Performance Incentive Mechanism) if HELCO were able to solicit these projects, enter into PPA contracts, and submit to the Commission for approval by the end of 2018.²⁰ The expectation was that the Phase 1 RFP projects would be complementary, or in addition, to Hu Honua's 24/7 firm renewable energy designed to directly replace 24/7 firm fossil generation. Moreover, in considering the Phase 2 renewable energy projects, the Commission specifically instructed HELCO in 2019 to solicit more renewable energy than HELCO had originally proposed as a possible replacement for Hu Honua and/or PGV.²¹

In hindsight, it appears the Commission had been setting the stage for accelerating these new Phase 1 RFP and Phase 2 RFP renewable projects on Hawaii Island in order to possibly replace Hu Honua with these projects or use them as a basis to deny Hu Honua's A&R PPA should the Supreme Court remand the 2017 D&O. However, at no time during the Supreme Court appeal did the Commission recommend to Hu Honua that it should stop or hold off on construction despite knowing that Hu Honua was continuing to construct and was obligated to continue to construct pursuant to its 2017 D&O during the pendency of the appeal.

In May 2019, in In re HELCO, the Hawaii Supreme Court held, *inter alia*, that the

²⁰ See Docket No. 2017-0352, Order No. 35405, filed April 6, 2018, at 12 and Order No. 35529, filed June 15, 2018, at 11.

²¹ See Docket No. 2017-0352, Order No. 36356, filed June 10, 2019, at 11-12.

Commission erred when it failed to expressly consider the reduction of GHG emissions in its decision-making pursuant to HRS § 269-6(b) and that LOL should have been afforded an opportunity to be heard regarding the impact of the A&R PPA on LOL's interest in a clean and healthful environment, as defined by HRS Chapter 269.²² The Hawaii Supreme Court remanded the proceeding and ordered that the Commission "shall give explicit consideration to the reduction of GHG emissions in determining whether to approve the Amended PPA, and make the findings necessary for this court to determine whether the Commission satisfied its obligations under HRS § 269-6(b)."²³ The Hawaii Supreme Court also instructed the Commission to hold "a hearing that complies with procedural due process."²⁴

In Order No. 36382 ("Order Reopening Docket"), the Commission reopened this docket for further proceedings following remand from the Hawaii Supreme Court to review the A&R PPA as instructed by the Supreme Court.²⁵ The Commission incorporated into this matter's procedural schedule an evidentiary hearing that is

intended to explore, among other things, the greenhouse gas ("GHG") emissions that would result from approving the A&R PPA, whether the cost of energy under the A&R PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the A&R PPA are prudent and in the public interest, in light of its hidden and long-term consequences.²⁶

Accordingly, the Commission added Issue No. 4:

4. Whether the GHG emissions that would result from approval of the A&R PPA and subsequent addition of the Project to HELCO's system are greater than the GHG emissions that would result from the operations of HELCO's system without the addition of the Project, whether the cost of energy under the A&R PPA is reasonable in light

²² 145 Hawaii at 28, 445 P.3d at 700.

²³ 145 Hawaii at 25, 445 P.3d at 697 (emphasis in original).

²⁴ 145 Hawaii at 26, 445 P.3d at 698.

²⁵ Order No. 36382, Order Reopening Docket, filed on June 20, 2019, at 1.

²⁶ Order Reopening Docket, at 2.

of the potential for GHG emissions, and whether the terms of the A&R PPA are prudent and in the public interest, in light of its potential hidden and long-term consequences.²⁷

In its Order Reopening Docket, the Commission specifically instructed the Parties to provide additional updates regarding HELCO's system and gave instructions regarding how the Parties should conduct their GHG analyses. That order instructed the parties to:

1) Update and document the assumptions used for simulation of HELCO's power system (including, but not limited to, an update and documentation of assumptions for Table 1 on pp. 3-4 [of the Project Economic and Bill Impact Analysis, Attachment A, at 3-4] (HELCO's Resource Plan Comparison) with current information about the Hawaii Island system). This includes inclusion of the recently-approved solar plus storage projects on Hawaii Island,²⁸ and simulation of Resource Plan both with and without the Puna Geothermal Ventures power plant ("PGV plant"), to account for scenario where the PGV plant is ultimately unable to reach commercial operations. Updates should also include any new generation procured through the Phase 2 Renewable RFP in Docket No. 2017-0352, as applicable.

2) Estimate Net "Smokestack" GHG Emissions Impact from operation of the Hu Honua plant. (Net "Smokestack" Emissions = Avoided Emissions from Fossil Fueled Plants – Emissions from Hu Honua plant).²⁹ The commission expects that the Applicants will work together to estimate the CO2 emissions per MWh of the Hu Honua plant output. The Applicants should document all assumptions in developing these estimates.

3) Estimate Net Lifecycle GHG Emissions Impact from operation of the Hu Honua plant. (Net Lifecycle Emissions = Avoided Lifecycle Emissions from Fossil Fueled Plants – Lifecycle Emissions from Hu Honua plant). For this analysis, Applicants will have to estimate GHG emission for all "upstream" activities from delivering fossil fuels and biomass to the Hu Honua plant, and emissions from constructing the Hu Honua plant. The commission understands that this can become complicated analysis and suggests that the Applicants may want to identify values based on peer-reviewed literature that can serve as reasonable proxy in the absence of detailed Hawaii- and/or project-specific data. The commission encourages Hu

²⁷ *Id.* at 9.

²⁸ The Commission noted to see "Docket Nos. 2018-0430 and 2018-0432." Order Reopening Docket, at 11 n.13

²⁹ The Commission noted that "[i]n this context, 'smokestack' emissions refers to measurement of the CO2 emissions from combustion of the fuel at the Hu Honua plant and does not include emissions from other activities prior to producing electricity." Order Reopening Docket, at 11 n.14.

Honua to provide as much project-specific data as possible.³⁰ All input assumptions used for the analysis shall be documented and provided in the record.³¹

In addition, the Commission amended the scope of participation for the Participants in the docket to allow the Participants to address all the issues in the docket and asked for “supplemental briefing” on Issue Nos. 1 through 3 to address changes in Hawaii Island’s energy market since the 2017 D&O.³²

Thereafter, pursuant to the Commission’s adopted procedural orders, supplemental briefing on Issue Nos. 1 through 3,³³ GHG emissions analyses for the Project and briefing in response thereto,³⁴ written prehearing testimonies of witnesses,³⁵ and information requests and supplemental information requests with responses thereto were filed with the Commission.³⁶ The last scheduled procedural event established by the Commission – responses to SIRs from the Parties and Participants on the pre-hearing testimonies – occurred on March 6, 2020, with the remaining deadlines to be established by the Commission. The only remaining procedural events for this docket that had not been scheduled by the Commission were the evidentiary hearing and related deadlines.³⁷

After March 6, 2020, because the Commission had not yet scheduled the evidentiary hearing and related deadlines, on March 10, 2020, Hu Honua’s counsel spoke

³⁰ The Commission provided as an example, NREL’s U.S. Life Cycle Inventory Database, <https://www.nrel.gov/lci/>. Order Reopening Docket, at 11 n.15.

³¹ Order Reopening Docket, at 10-12.

³² Order Reopening Docket, at 12-14.

³³ Hamakua Energy, LLC, Tawhiri Power LLC, HELCO, and Hu Honua filed their supplemental briefs regarding Issue Nos. 1 through 3 on September 17, 2019.

³⁴ GHG analyses were filed by HELCO and Hu Honua on October 21, 2019.

³⁵ Prehearing testimonies were filed on January 28, 2020.

³⁶ Information Requests and Supplemental Information Request were filed and responded to between October 28, 2019 and March 6, 2020.

³⁷ See Order No. 36908, filed December 20, 2019, at 27-28, as clarified by Order No. 36957, filed January 17, 2020, at 3-4.

with Commission counsel to inform the Commission that Hu Honua, HELCO, and the Consumer Advocate were available on certain dates in May for the evidentiary hearing. In response, on March 17, 2020, Commission counsel indicated that he was working on an order that would address the remaining schedule and that it would take one to two months to issue, which seemed extraordinarily long to issue a schedule.³⁸

After waiting approximately two months, on May 8, 2020, Hu Honua filed a letter with the Commission requesting that the Commission hold a scheduling conference with the Parties so that the evidentiary hearing and associated procedural events could be established in this docket ("Hu Honua's May Letter").³⁹ Hu Honua's May Letter explained that the last procedural event in the docket had occurred over two months before on March 6, 2020, and that it would be helpful to discuss alternative dates for the evidentiary hearing so that Hu Honua could coordinate the availability of several witnesses located both locally and abroad.⁴⁰

By letter dated May 22, 2020 ("Commission's Response"), the Commission responded to Hu Honua's May Letter, acknowledging receipt of the letter and expressing its appreciation of the Parties' interest in establishing deadlines for the remaining procedural events in the docket.⁴¹ The Commission's Response noted two developments that would impact its decision-making with respect to establishing the remaining procedural events in the docket: (1) the Commission was informed of the results of the

³⁸ Letter From: W. Yamamoto To: Commission Re: Docket No. 2017-0122: Scheduling Conference Request, filed May 8, 2020, at 1.

³⁹ See Letter From: W. Yamamoto To: Commission Re: Docket No. 2017-0122: Scheduling Conference Request, filed May 8, 2020, at 1.

⁴⁰ Id.

⁴¹ See Letter From: Commission To: W. Yamamoto Re: Docket No. 2017-0122, In re: Hawaii Electric Light Co., Inc. ("HELCO"), Application for Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity, filed May 22, 2020, at 1.

Hawaiian Electric Companies' Phase 2 Request for Proposals on May 8, 2020 and (2) the COVID-19 pandemic and its effects upon the State.⁴² The Commission's Response noted that given these two developments, it would need time to reflect on these issues but that it would issue an order regarding this docket as soon as reasonably possible.⁴³

By letter dated June 10, 2020, Hu Honua replied to the Commission's Response ("Hu Honua's June Letter").⁴⁴ Hu Honua noted that it was mindful of the Commission's public statement, dated March 13, 2020,⁴⁵ in which the Commission stated that in light of the effects of COVID-19 on the State, the Commission would prioritize certain actions and requests, including those that: (1) achieve the State's clean energy and climate goals and (2) support economic recovery from the COVID-19 emergency.⁴⁶ Hu Honua's June Letter explained why the Hu Honua project is well-positioned to help the State meet both of these priorities expressed by the Commission.⁴⁷ Accordingly, Hu Honua requested the timely and efficient continuation of this docket and requested that the Commission establish a "reasonable procedural schedule for the remainder of this proceeding at the earliest."⁴⁸

By letter dated July 9, 2020, at 9:57 a.m., Hu Honua filed its final letter to the Commission ("Hu Honua's July Letter").⁴⁹ Hu Honua informed the Commission that the ongoing delays in the docket were substantially and negatively impacting the Project and

⁴² Id. at 1-2.

⁴³ Id. at 2.

⁴⁴ See Letter From: D. Yamamoto To: Commission Re: Docket No. 2017-0122: Hu Honua Bioenergy, LLC's Response to the State of Hawaii Public Utilities Commission's Letter Dated May 22, 2020, at 1.

⁴⁵ See Statement from Hawaii Public Utilities Commission on the COVID-19 Emergency, available at the Commission's website at https://puc.hawaii.gov/wp-content/uploads/2020/03/Statement-from-Hawaii-Public-Utilities-Commission-on-COVID_3-24-2020.pdf .

⁴⁶ Hu Honua's June Letter, at 1-2.

⁴⁷ Id. at 2-4.

⁴⁸ Id.

⁴⁹ See Letter From: D. Yamamoto To: Commission Re: Docket No. 2017-0122, filed July 9, 2020.

was jeopardizing in excess of fifty jobs on Hawaii Island.⁵⁰ Hu Honua also stated that the delays were placing the Project's financing and investments at risk and again asked for the efficient continuation of the proceeding and a reasonable procedural schedule.⁵¹

On the same morning of July 9, 2020, shortly after Hu Honua's July Letter was filed, Hu Honua received via email at 10:05 a.m. service of the Order Revoking Waiver, some four months after the last scheduled procedural event on March 6, 2020, despite the repeated requests by Hu Honua to establish the remaining procedural deadlines in the docket.⁵² In the Order Revoking Waiver, the Commission described its revocation as a denial of HELCO's request for a waiver from the Competitive Bidding Framework on the basis that HELCO had not met its burden to justify a waiver for the Project and dismissed the A&R PPA without prejudice and closed the docket.⁵³ However, there was no request for a waiver pending before the Commission during the re-opened docket as no renewed request for a waiver was necessary or had been made.⁵⁴ In fact, what the Commission did was revoke a waiver that it had previously approved in the 2017 D&O.

For the reasons stated herein, Hu Honua respectfully requests that the Commission reconsider its Order Revoking Waiver and comply with the Hawaii Supreme Court's mandate to explicitly consider the Project's GHG reduction and to hold an evidentiary hearing to take in evidence on the reduction of GHG in connection with the Project.

⁵⁰ *Id.* at 1.

⁵¹ *Id.* at 1-2.

⁵² See Letter From: W. Yamamoto To: Commission Re: Docket No. 2017-0122: Scheduling Conference Request, filed May 8, 2020; Letter From: D. Yamamoto To: Commission Re: Docket No. 2017-0122: Hu Honua Bioenergy, LLC's Response to the State of Hawaii Public Utilities Commission's Letter Dated May 22, 2020, filed June 10, 2020; Letter From: D. Yamamoto To: Commission Re: Docket No. 2017-0122: Hu Honua Bioenergy, LLC's Further Inquiry Regarding Procedural Schedule, filed July 9, 2020.

⁵³ Order Revoking Waiver, at 26-43.

⁵⁴ Order Revoking Waiver, at 26-43.

III. **LEGAL STANDARD.**

Motions for Reconsideration are governed by Hawaii Administrative Rule (“HAR”)

§ 16-601-137, which provides:

A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds on which the movant considers the decision or order *unreasonable, unlawful, or erroneous*.⁵⁵

When evaluating motions for reconsideration, “matters that may have been overlooked or mistakenly conceived can be considered.”⁵⁶

IV. **DISCUSSION.**

A. **Hu Honua’s Waiver Was Not Disturbed by the Hawaii Supreme Court’s Decision to Remand the Case for the Commission’s Consideration of GHG Impacts.**

The Commission’s Order Revoking Waiver mistakenly, unreasonably, unlawfully, and erroneously frames the Commission’s decision as a decision to deny HELCO’s request for a waiver from the Competitive Bidding Framework for the A&R PPA.⁵⁷ As explained herein, this is an inaccurate and misleading characterization as the Commission had already granted a waiver for the A&R PPA in its 2017 D&O, which was not at issue in In re HELCO and not impacted by that decision on remand. Accordingly, there was no renewed request for a waiver by HELCO pending before the Commission for the Commission to deny. The Commission’s Order Revoking Waiver was a unilateral revocation of Hu Honua’s waiver from the Competitive Bidding Framework *sua sponte* by

⁵⁵ HAR § 16-601-137 (emphasis added).

⁵⁶ See Docket No. 2011-0092, Order No. 31343, filed July 2, 2013, at 28.

⁵⁷ Order Revoking Waiver, at 1.

the Commission, and it ignores the Hawaii Supreme Court’s remand of the case for further proceedings, pursuant to HRS 91-14(g),⁵⁸ for the Commission to explicitly consider the GHG reduction of the Project and to make findings necessary for judicial review.⁵⁹ Therefore, and as explained in further detail below, the Commission’s decision to revoke Hu Honua’s waiver was unreasonable, unlawful, and erroneous.

1. On remand the Hawaii Supreme Court instructed the Commission to consider GHG emissions only and to hold an evidentiary hearing that complies with procedural due process.

The following is a brief summary of the issues raised by LOL in its appeal to the Hawaii Supreme Court. It is necessary to understand the reasons for the remand to understand the scope of the instant proceeding. During the Commission’s first review of the A&R PPA, the Commission granted LOL “conditional participant status” but denied LOL’s subsequent request to upgrade its status to a full party.⁶⁰ In so doing, the Commission allowed LOL to participate in the 2017 Docket with respect to two sub-issues: (2.a.i) whether the energy price components in the A&R PPA properly reflect the cost of biomass fuel supply, and (2.b) whether HELCO’s purchase power arrangements under

⁵⁸ HRS § 91-14(g) provides:

(g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Emphasis added).

⁵⁹ In re HELCO, 145 Hawaii at 24-25, 445 P.3d at 696-97.

⁶⁰ In re HELCO, 145 Hawaii at 7, 445 P.3d at 679.

the A&R PPA are prudent and in the public interest. However, as characterized by the Court, “the [Commission] prevented LOL from meaningfully addressing the impact that approving the [A&R] PPA would have on LOL’s asserted property interest, based on its determination that LOL’s environmental concerns were beyond the scope of the 2017 Docket.”⁶¹

LOL appealed both the Commission’s order denying its request to upgrade its status and the 2017 D&O, claiming, *inter alia*, (1) that the Commission was required under HRS § 269-6(b) to explicitly consider GHG emissions in determining whether the costs of the A&R PPA were reasonable and (2) LOL was denied due process in its efforts to protect its right to a clean and healthful environment, as defined by HRS Chapter 269, by the Commission’s restriction of its participation in the 2017 Docket.⁶²

After holding that it had jurisdiction over the matter, that the Commission’s proceeding was a “contested case hearing” because it was required by constitutional due process, and that LOL had standing to bring the appeal, the Court turned to the merits of LOL’s arguments.⁶³ The Court agreed with LOL that the 2017 D&O failed to satisfy HRS § 269-6(b) because the Commission failed to make sufficient findings regarding GHG emissions.⁶⁴ Therefore, the Court remanded the case “for further proceedings,” stating that

[o]n remand, the [Commission] shall give explicit consideration to the reduction of GHG emissions in determining whether to approve the [A&R] PPA, and make the findings necessary for this court to determine whether the [Commission] satisfied its obligations under HRS § 269-6(b).⁶⁵

⁶¹ In re HELCO, 145 Hawaii at 26, 445 P.3d at 698.

⁶² In re HELCO, 145 Hawaii at 10, 445 P.3d at 682.

⁶³ In re HELCO, 145 Hawaii at 11-22, 445 P.3d at 683-695.

⁶⁴ In re HELCO, 145 Hawaii at 24-25, 445 P.3d at 696-97.

⁶⁵ In re HELCO, 145 Hawaii at 25, 445 P.3d at 697 (emphasis in original).

The Court then addressed LOL's claim that it was denied procedural due process by the Commission's limiting of LOL's participation in the 2017 Docket. The Court explained that in this case,

procedural due process necessitated a contested case hearing because the 2017 D&O, which approved the [A&R] PPA, adversely affected LOL's constitutionally protected right to a clean and healthful environment, as defined by HRS Chapter 269...Accordingly, LOL was entitled to an opportunity to be heard at a meaningful time and in a meaningful manner regarding the [A&R] PPA's impact on its right to a clean and healthful environment, as defined by HRS Chapter 269.⁶⁶

The Court reviewed LOL's limited participation in the 2017 Docket, and ultimately concluded that "LOL was not afforded a sufficient opportunity to address the [A&R] PPA's impact on its constitutional right to a clean and healthful environment, as defined by HRS Chapter 269, throughout the 2017 Docket."⁶⁷ The Court instructed:

Due to the [Commission's] failure to allow LOL to present evidence and argument concerning its right to a clean and healthful environment, as defined by HRS Chapter 269, this court must vacate the [Commission's] 2017 D&O and remand this case to the [Commission] for a hearing that complies with procedural due process. In order to comply with statutory and constitutional requirements, the [Commission's] post-remand hearing must afford LOL an opportunity to meaningfully address the impacts of approving the [A&R] PPA on LOL's members' right to a clean and healthful environment, as defined by HRS Chapter 269. The hearing must also include express consideration of GHG emissions that would result from approving the [A&R] PPA, whether the cost of energy under the [A&R] PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the [A&R] PPA are prudent and in the public interest, in light of its potential hidden and long-term consequences.⁶⁸

Accordingly, In re HELCO vacated the 2017 D&O and remanded the matter to the Commission.⁶⁹ The Commission was instructed to explicitly consider GHG emissions in

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id. at 26, 445 P.3d at 698 (emphasis added).

⁶⁹ See id.

determining whether to approve the A&R PPA and to hold an evidentiary hearing to afford LOL an opportunity to meaningfully address the impacts of approving the A&R PPA on LOL's members' right to a clean and healthful environment, as defined by HRS Chapter 269.⁷⁰ However, In re HELCO left the Commission's decision regarding the Project's waiver from the Competitive Bidding Framework completely undisturbed and the Commission was not instructed by the Court to reconsider the issue.

2. The Commission's revocation of Hu Honua's waiver violates the scope of the Hawaii Supreme Court's remand.

The Order Revoking Waiver impermissibly revoked, *sua sponte*, Hu Honua's waiver from the Competitive Bidding Framework. While Hu Honua recognizes that the 2017 D&O was vacated by the Hawaii Supreme Court and remanded to the Commission "for proceedings consistent with" the opinion, the waiver of the Hu Honua Project from the Competitive Bidding Framework was not an issue on appeal in In re HELCO. Tellingly, the Hawaii Supreme Court did not instruct the Commission to re-consider the Commission's finding that a waiver for the Hu Honua Project from the Competitive Bidding Framework was justified.⁷¹ The Hawaii Supreme Court in In re HELCO remanded this case for ***two express and limited purposes***: (1) to require the Commission to give explicit consideration to the reduction of GHG emissions in determining whether to approve the A&R PPA; and (2) to allow LOL a meaningful opportunity to be heard regarding the A&R PPA's impact on its right to a clean and healthful environment, as defined by HRS Chapter 269.⁷² That is all.

It is well-established that "[a] court may limit the scope of the remand to an

⁷⁰ See *id.* at 23-26, 445 P.3d at 695-98.

⁷¹ See *id.*

⁷² In re HELCO, 145 Hawaii at 25-28, 445 P.3d at 697-700.

administrative agency, and when the scope of remand is limited, the entire case is not reopened, but rather the lower tribunal is only authorized to carry out the appellate court's mandate."⁷³ In Chun v. Board of Trustees of Employees' Retirement System of State of Hawai'i, the Hawaii Supreme Court observed

(1) that [i]t is the duty of the trial court, on remand, to comply strictly with the mandate of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court, and (2) that when acting under an appellate court's mandate, an inferior court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; ... or intermeddle with it, further than to settle so much as has been remanded."⁷⁴

As explained by the Hawaii Intermediate Court of Appeals ("ICA"), "[w]hen a reviewing court remands a matter with specific instructions, the trial court is powerless to undertake any proceedings beyond those specified therein."⁷⁵ The ICA further explained that "[r]emand for a specific act does not reopen the entire case; the lower tribunal only has the authority to carry out the appellate court's mandate."⁷⁶ These principles are **critical** to maintaining an orderly and efficient administrative and judicial review process. Accordingly, the Commission exceeded its authority when it revoked the waiver for the A&R PPA on remand as the issue was not within the scope of the Hawaii's Supreme

⁷³ 2 Am. Jur. 2d Administrative Law § 550; see also Porter v. Queen's Med. Ctr., No. CAAP-16-0000602, 2020 WL 858804, at *16 (Haw. App. Feb. 21, 2020) and *cert. granted sub nom.* No. SCWC-16-0000602, 2020 WL 2562016 (Haw. May 20, 2020) ("because the scope of remand was specifically limited to the issue of reopening Porter's claims under HRS § 386-89(c) in the September 17, 2013 D&O and December 3, 2013 Order, the LIRAB did not err by declining to re-address Porter's fraud allegations because doing so would have exceeded the scope of remand.").

⁷⁴ 106 Hawaii 416, 439, 106 P.3d 339, 362 (2005) (internal quotation marks, citations omitted, and emphasis added).

⁷⁵ Standard Mgmt., Inc. v. Kekona, 99 Hawaii 125, 137, 53 P.3d 264, 276 (Haw. App. 2001) (quoting Foster v. Civil Service Commission, 255 Ill.App.3d 30, 194 Ill.Dec. 169, 627 N.E.2d 285, 290 (Ct.1993)) (emphasis added).

⁷⁶ Id. (quoting Warren v. Department of Administration, 590 So.2d 514, 515 (Fla.Dist.Ct.App.1991)) (emphasis added).

Court's mandate on remand.⁷⁷

And the fact that the Court “vacated” the 2017 D&O is immaterial. Vacating the 2017 D&O is the mechanism that allows the Commission to address the specific issues identified in the Court’s remand instructions. Appellate courts routinely reverse judgments with instructions to the lower court to address specific issues on remand.⁷⁸

Hu Honua also notes that HELCO shared this understanding of the Supreme Court’s mandate to the Commission on remand. HELCO explained in its own memorandum in opposition to a motion to compel filed by LOL that it also understood that “although the Commission amended the scope of participation such that all participants are permitted to participate on all issues, the issue here on remand (and thus LOL’s

⁷⁷ See also HELCO TESTIMONY T-1 at 23, lines 14-17 (“[A]s far as the Company is aware, the 2017 waiver remains in effect as the A&R PPA has never been terminated. Further, in the new issues to be addressed by the Commission, the issue of whether the existing waiver granted in this docket is still in effect has not been specifically identified.”)

⁷⁸ See 2 Am. Jur. 2d Administrative Law § 550 (“A court may limit the scope of the remand to an administrative agency, and when the scope of remand is limited, the entire case is not reopened, but rather the lower tribunal is only authorized to carry out the appellate court's mandate”) (footnotes omitted); See also 5 Am. Jur. 2d Appellate Review § 687, which states:

[T]here are two types of remands: (1) a general remand, which does not provide specific directions and leaves all issues open to consideration in the new trial; and (2) a remand with directions, which requires the trial court to enter a judgment in conformity with the mandate. If an appellate court remands with specific instructions, those instructions must be followed exactly to ensure that the lower court's decision is in accord with that of the appellate court. Where the appellate court's mandate contains express instructions that direct the trial court to take a specified action, the trial court has no authority to deviate from those instructions. Where an appellate court remands with specific directions, the trial court is duty-bound to render a judgment that strictly conforms to that mandate; the court is without power to modify, alter, amend, or otherwise depart from those directions.

A "limited remand" prohibits relitigation of some issues on remand, or directs that only some expressly severed issues or causes may still be litigated. Where a case is remanded for a specific and limited purpose, issues not encompassed within the remand order may not be decided on remand. The entire case is not reopened, but rather the lower tribunal is only authorized to carry out the appellate court's mandate, and may not exceed the scope of the remand or open up the proceeding to legal issues beyond the remand. Remand with specific instructions to the trial court necessarily precludes the trial court from considering issues outside the scope of remand.

participation in the same) is limited to consideration of the GHG emissions that would result from approval of the [A&R PPA].”⁷⁹

While the parties and participants provided updates to the Commission regarding Issue Nos. 1 through 3,⁸⁰ per the Commission’s instructions,⁸¹ at no time did the Commission expressly indicate that these updates were for the purposes of considering the revocation of the waiver for the A&R PPA. Also, notwithstanding the Commission improperly considering revocation of the waiver, the Commission also did not notify the parties of the specific information under consideration occurring in unrelated proceedings and discussions outside of the Hu Honua docket (to which Hu Honua was not a party), such as comparative pricing or capabilities of variable renewable energy under consideration in the Phase 1 RFP and Phase 2 RFP (which cannot be compared against 24/7 firm renewable energy as they are fundamentally different products with different capabilities), for determining whether to revoke the waiver and, therefore, did not afford the parties an opportunity to consider, address, and be heard on such information under consideration.

The Commission’s Order Revoking Waiver oversteps the mandate from the Hawaii Supreme Court and revisits an issue that was not raised on appeal in In re HELCO. In so doing, the Commission also failed to follow the actual mandate of the Hawaii Supreme Court to “give explicit consideration to the reduction of GHG emissions in determining whether to approve the Amended PPA, and make the findings necessary for this court to

⁷⁹ See Hawaii’s Electric Light Company, Inc.’s Memorandum in Opposition to Life of the Land’s Motion to Compel, filed March 23, 2020, at 2-3.

⁸⁰ See e.g., Hu Honua Bioenergy, LLC’s Supplemental Briefing on Issue Nos. 1 to 3, filed September 19, 2019.

⁸¹ See Order Reopening Docket, at 14.

determine whether the [Commission] satisfied its obligations under HRS 269-6(b).⁸² The Commission acted outside of its authority and disregarded the instructions of the Hawaii Supreme Court. The Order Revoking Waiver cannot stand.

3. A revocation of a previously granted waiver is not permitted under the Competitive Bidding Framework.

The Commission asserts that “[n]otwithstanding the Commission’s prior decisions on this issue, the Commission retains discretion to consider this issue in light of the record and circumstances at the time the issue is before the Commission.”⁸³ The Commission cites no authority supporting this proposition; none exists.

The Competitive Bidding Framework does not provide a mechanism through which the Commission may revoke a granted waiver.⁸⁴ The Competitive Bidding Framework’s procedures for seeking a waiver are located at Section 2.A.4 and at no place does it provide that a revocation of a previously granted waiver is permissible. As the Commission knows, the Competitive Bidding Framework went through multiple drafts in 2006. The Commission had every opportunity to give itself authority to revoke previously granted waivers; it intentionally chose not to do so. Moreover, the Commission did not impose a deadline on the effectiveness of the waiver. The Commission’s revocation of the A&R PPA waiver violates the Commission’s own rules and procedures established to govern itself and its consideration of waiver requests.⁸⁵ If such authority were granted to the Commission, it would be virtually impossible to attract investors to projects as they

⁸² In re HELCO, 145 Hawaii at 25, 445 P.3d at 697.

⁸³ Order Revoking Waiver, at 26.

⁸⁴ See Order No. 23121, filed December 8, 2006, at Exhibit A.

⁸⁵ Cf. Sierra Club v. State of Hawaii Department of Transportation, 115 Hawaii 299, 335, 167 P.3d 292, 342 (2007) (“Superferry I”) (finding that State agency must follow the procedures the agency creates for itself).

would be subject to the discretion of the Commission to revoke a previously approved waiver from the Competitive Bidding Framework.

4. The Commission's statement that its revocation here is consistent with prior actions in this docket is wrong.

The Commission's Order Revoking Waiver states that its decision to revisit the waiver issue here

is consistent with the prior history of this Project. Upon submission of the Amended PPA, the Commission corrected HELCO's presumption that the waiver granted in Docket No. 2008-0143 would be automatically transferred to apply to the Amended PPA and stated that this issue would be re-examined in light of the changes in circumstances since the original granting of the waiver.⁸⁶

The Commission's reasoning here is erroneous and the prior history it cites describes an entirely different situation from the one here. The Commission's previous actions in this proceeding are not consistent with its extraordinary decision here to revoke, with no notice, an approved waiver for the same A&R PPA.

In the prior history situation, Hu Honua disputed the improper termination by HELCO of the Original PPA due to the alleged failure to achieve certain deadlines.⁸⁷ HELCO and Hu Honua worked collaboratively to come to an agreement on the terms of a new PPA, the A&R PPA, and then submitted the A&R PPA to the Commission for approval.⁸⁸ Given the new PPA, the Commission found that it would be impossible for Hu Honua to comply with the conditions that the Commission had placed on the Original PPA's 2008 waiver due to changes in project timing and the pricing structure between the

⁸⁶ Order Revoking Waiver, at 26-27 (citing Order No. 34554 at 6-7).

⁸⁷ See Hawaii Electric Light Company, Inc.'s Amended and Restated Power Purchase Agreement dated May 5, 2017, filed May 9, 2017, at Letter Request p.3.

⁸⁸ Id. at Letter Request p.4.

respective agreements.⁸⁹ Accordingly, the Commission concluded that HELCO's presumption that the waiver [for the Original PPA] would be "transferred to and now apply" to the A&R PPA was incorrect.⁹⁰ The Commission also found that HELCO's reliance on a waiver [of the Original PPA] granted 8-1/2 years before was incompatible with the significant changes to the island of Hawaii in the interim.⁹¹ Therefore, the Commission explicitly instructed the parties in 2017 [requesting approval of the A&R PPA] that it "identifies HELCO's alternative request for a new waiver as an issue for adjudication in this proceeding."⁹²

The circumstances here in the 2019 re-opened docket are markedly different. Most critically as discussed *supra*, the Commission had already granted a waiver from competitive bidding for the A&R PPA, which is still effective because that waiver was not at issue on appeal to the Hawaii Supreme Court. The waiver decision was not affected by the In re HELCO decision, and the Competitive Bidding Framework does not allow the Commission to *sua sponte* revoke a granted waiver. Neither HELCO nor Hu Honua sought the transfer of a waiver from a different PPA to the A&R PPA, nor did they renew a request for approval of a waiver. The Commission had already granted a waiver for the A&R PPA and the same A&R PPA was before the Commission on remand.

The Commission's Order Reopening Docket did not identify Issue No. 1 (waiver from the Competitive Bidding Framework) as "an issue for adjudication in this proceeding". On June 20, 2019, the Commission merely asked for supplemental briefing to provide the Commission updates on "changes in the Hawaii Island energy market"

⁸⁹ Order No. 34554, at 7.

⁹⁰ Id. at 6-7.

⁹¹ Id. at 7-9.

⁹² Id. at 9.

since the 2017 D&O. The 2017 D&O was filed on July 28, 2017 and the updates sought by the Commission were for a period of less than 23 months. The Commission's decision to revoke the waiver for the A&R PPA is neither analogous to nor consistent with the Commission's previous decision that a new waiver decision was necessary for a new PPA because it would have been impossible to meet the Commission's original waiver conditions. Further, only 23 months has passed here as compared with the 8.5 years that had passed between the Original PPA's waiver and the Commission consideration of the A&R PPA in 2017. Moreover, the 23 months that had passed (during the appeal) was due to the Commission's error in not explicitly considering GHG. The circumstances are simply not analogous. The Commission's proffered rationale for revisiting and then summarily revoking the waiver is disingenuous.

B. The Commission is equitably estopped from revoking its waiver.

The Commission is equitably estopped from revoking the A&R PPA's waiver as Hu Honua reasonably relied on the Commission's action in approving the waiver, which was not appealed, in expending significant sums following the 2017 D&O.⁹³ Hawaii courts have consistently applied the doctrine of equitable estoppel in analogous land development cases and explain the doctrine as follows:

[A] change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will

⁹³ “[T]he doctrine of equitable estoppel is fully applicable against the government if it is necessary to invoke it to prevent manifest injustice.” Yamada v. Nat. Disaster Claims Comm'n, 54 Haw. 621, 629, 513 P.2d 1001, 1006 (1973); Filipo v. Chang, 62 Haw. 626, 635, 618 P.2d 295, 300 (1980) (applying equitable estoppel against state government; noting that “[a] citizen has a right to expect the same standard of honesty, justice and fair dealing in his contact with the State or other political entity, which he is legally accorded in his dealings with other individuals.”).

be forthcoming in due course, and he may safely proceed with the project.⁹⁴

“Put another way, ‘[t]he critical questions become: (1) What reliance is ‘good faith’; (2) what sums are ‘substantial’; (3) what constitutes ‘assurance’ by officials; and (4) when does a developer have a right to rely on such assurances?’”⁹⁵ As explained in further detail below, all four “critical questions” must be answered in favor of finding an estoppel against revocation of the waiver.

1. The Commission’s waiver was an official assurance upon which Hu Honua unquestionably had a right to rely.⁹⁶

Developers like Hu Honua have the right to rely upon an agency’s “final discretionary action” as sufficiently “official assurance” that they may safely proceed with their projects.⁹⁷ In a closely analogous context, the Hawaii Supreme Court has held that the government’s approval of “a variance or exemption” from a moratorium ordinance constituted a “final discretionary action” and “official assurance” upon which “[t]here was no question that the developers had a right to rely.”⁹⁸

That holding is directly applicable here. There is no dispute that the Commission has the authority to approve waivers from the Competitive Bidding Framework.⁹⁹ The Commission’s decision to grant a waiver was in accordance with (a) the factors set forth in the Competitive Bidding Framework, (b) the public interest (and its statutory mandate),

⁹⁴ Life of the Land, Inc. v. City Council of City & County of Honolulu, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980).

⁹⁵ Id. (quoting Callies, Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls, 2 U.HAWAII L. REV. 167, 174 (1979)).

⁹⁶ The Hawaii Supreme Court has indicated that of the four “critical questions” underpinning the rule, the last two questions – regarding official assurance and the right of reliance – should be considered together first. See County of Kauai v. Pacific Standard Life Insurance Co., 65 Haw. 318, 327, 653 P.2d 766, 774 (1982) (“Nukolii”).

⁹⁷ See id. at 328, 653 P.2d at 774.

⁹⁸ Id. (discussing Life of the Land, 61 Haw. 390, 606 P.2d 866).

⁹⁹ Competitive Bidding Framework at Section II.A.3 and 4.

and (c) the Commission's prior "Waiver Order," which it filed nearly nine years earlier.¹⁰⁰

Hu Honua had every right to treat the Commission's waiver as a final discretionary act and official assurance that it could safely proceed with the Project without participating in a competitive bid. The Commission's findings and conclusions and resulting order granting the waiver are unconditional and without contingencies that would justify its revocation.¹⁰¹ Additionally, while the Competitive Bidding Framework provides the Commission with authority and factors to consider in *granting* a waiver, it provides the Commission with no such authority or factors to consider in *revoking* a waiver.¹⁰² Moreover, there was no intervening change in applicable law occurred that would have disturbed Hu Honua's understanding: in the more than 13 years since the Commission adopted the Competitive Bidding Framework, the Commission has never amended or supplemented the Competitive Bidding Framework to grant the Commission the authority to revoke.¹⁰³ Finally, and as noted supra, the propriety of the waiver was *not* an issue raised on appeal, and its effectiveness was *not* impacted by In re HELCO.

2. In good faith reliance on the Commission's waiver, Hu Honua expended substantial sums of money and other resources.

Hu Honua's decision to proceed with the Project, and its expenditure of substantial sums of money in doing so, were unquestionably in good faith. In fact, under the circumstances, Hu Honua's good faith dedication to the Project mandated that it proceed despite the pendency of the appeal; it had no other option but to proceed in the manner that it did. The waiver was not challenged on appeal; it remained effective. Neither the

¹⁰⁰ See 2017 D&O at 27-31, 62.

¹⁰¹ See *id.*

¹⁰² Competitive Bidding Framework at Section II.A.3 and 4.

¹⁰³ And for good reason: given the massive expenses that developers undertake in committing to the construction of alternative energy facilities once a waiver is granted, there must be at least a baseline of finality and predictability as to the terms upon which such projects are approved for a waiver.

Hawaii Supreme Court nor the Commission stayed the 2017 D&O or otherwise imposed a moratorium on the Project.

There is more. Hu Honua was legally obligated to continue construction in reliance on the waiver and 2017 D&O given that the Commission ordered Hu Honua to “make all reasonable attempts to complete the project” on a timely basis, stating:

The A&R PPA sets the Commercial Operation Date deadline at 18 months after PUC Approval of Amendment Date, as that term is defined in the A&R PPA. Hu Honua has represented that the project is 50% complete and that meeting the Commercial Operation Date deadline will allow the project to qualify for federal tax incentives. Given these factors, the commission expects Hu Honua and HELCO to make all reasonable attempts to complete the project according to this schedule and does not expect future requests to extend the Commercial Operation Date deadline.¹⁰⁴

Given that the 2017 D&O was an administrative decision that remained effective during the appeal,¹⁰⁵ and given that no stay had been entered by the Hawaii Supreme Court, Hu Honua was obligated to expeditiously complete construction as ordered by the Commission in order to meet the A&R PPA Commercial Operation Date deadline.¹⁰⁶

Moreover, the Commission was aware that Hu Honua needed to continue construction in an effort to meet the Federal ITC safe harbor deadline and, in the event the safe harbor deadline could not be met, to comply with the continuous efforts to

¹⁰⁴ 2017 D&O at 61 (emphasis added); The Commercial Operation Date Deadline is 18-Months after PUC Approval of Amendment Date. See Attachment B to the A&R PPA, dated May 9, 2017. PUC Approval of Amendment Date is defined in Section 25.12(D) of PPA. The PUC Approval of Amendment Date shall be the date upon which the PUC Approval of Amendment Order becomes a non-appealable order within the meaning of the definition of a Non-appealable PUC Approval of Amendment Order in Section 25.12(B) of the PPA, which as of this writing has not yet occurred yet. Accordingly, Hu Honua is still well-within its Commercial Operation Date deadline under the A&R PPA.

¹⁰⁵ See HRS § 269-15.5 (appeals from the Commission shall not stay the operation of the order appealed from unless stayed by the appellate court upon motion and a hearing).

¹⁰⁶ 2017 D&O at 61 (“... [T]he commission expects Hu Honua and HELCO to make all reasonable attempts to complete the project according to this schedule and does not expect future requests to extend the Commercial Operation deadline.”)

advance the project towards completion requirement to still qualify for the Federal ITC,¹⁰⁷ which Hu Honua did in reliance on the Commission's waiver approval for the A&R PPA.

Prior to the Order Revoking Waiver, the Commission never informed Hu Honua that the waiver approval for the A&R PPA was no longer effective. The Commission was fully aware and knew that Hu Honua was ordered to diligently continue construction towards achieving commercial operations, and was doing so in order to meet the Commercial Operation Date deadline. Moreover, the Commission knew that Hu Honua had to continue construction in order to qualify for the Federal ITC.¹⁰⁸ Even if the Commission had the authority to revoke the A&R PPA's waiver, which the Commission did not, between the issuance of the 2017 D&O and the Order Revoking Waiver, the Commission never indicated that it was considering the revocation of Hu Honua's waiver and that it wanted the Project to bid into some non-existent future RFP.

In good faith and to its great detriment, Hu Honua reasonably relied on the Commission's waiver approval, and expended substantial sums to continue construction on the Project to meet applicable deadlines, including the Commercial Operation Date deadline and to comply with the safe harbor and continuous construction requirements for the Federal ITC. The Commission was fully aware of Hu Honua's actions and its substantial expenditures, but the staggering magnitude of those expenditures bears

¹⁰⁷ See Letter from W. Lee to Commission Re: Docket No. 2017-0122 – Updated Information, filed July 8, 2019, Hu Honua's Supplemental Briefing on Issue Nos. 1 to 3, filed September 17, 2019, at 4, Response to Tawhiri/HHB-IR-20, filed December 9, 2019, Prehearing Testimony of Warren Lee ("Warren Lee Testimony T-1"), filed January 29, 2020, at 25, and Prehearing Testimony of Jon Miyata ("Jon Miyata Testimony T-3"), filed January 28, 2020, at 4.

¹⁰⁸ See Docket 2017-0122, Letter From: B. Bailey To: Commission Re: Docket No. 2017-0122 - Hawaii'i Electric Light Company, Inc.'s Hu Honua Project Status Update, filed February 12, 2019 (explaining that HELCO and Hu Honua have been working expeditiously and closely in order to assure that HELCO can accept Hu Honua's generation if and when the project is able to be placed into service); Hu Honua Bioenergy, LLC's Status Report, filed July 10, 2019, at 3-10.

repeating here.

Since the 2017 D&O was issued on July 28, 2017, Hu Honua has expended in excess of \$314 million dollars in order to comply with the 2017 D&O. Because of the Commission directive in the 2017 D&O to complete by the Commercial Operation Date, Hu Honua incurred millions of dollars in unanticipated and unplanned overtime, supervision, tools, freight costs, and other expenses in order to accelerate construction to ensure completion by the Commercial Operation Date, yet the A&R PPA pricing to ratepayers approved by the Commission remains unchanged. **In total, Hu Honua has invested over \$474 million to construct and develop the Project which is presently approximately 99% complete.**¹⁰⁹ As noted above, the doctrine of equitable estoppel has its foundation in the concepts of honesty, justice, and fair dealing.¹¹⁰ The Commission's decision to revoke the waiver, and kill the Project on the goal line, offends all of those concepts; unsurprisingly, all of the elements required for equitable estoppel's application are present here.¹¹¹ The Commission's decision to revoke the waiver perpetuates a manifest injustice not only to Hu Honua but to all stakeholders – private and public – who stand to benefit from the Project's completion. Accordingly, Hu Honua requests that the Commission reconsider its revocation of the waiver and reinstate Hu Honua's vested right to proceed and complete the Project.¹¹²

¹⁰⁹ Affidavit of Jon Miyata at ¶4.

¹¹⁰ Filipo, 62 Haw. at 635, 618 P.2d at 300 (“[a] citizen has a right to expect the same standard of honesty, justice and fair dealing in his contact with the State or other political entity, which he is legally accorded in his dealings with other individuals.”).

¹¹¹ Life of the Land, 61 Haw. 390, 453, 606 P.2d 866, 902

¹¹² The doctrine of equitable estoppel is closely intertwined with the concept of “vested rights.” See Nukolii, 65 Haw. at 325, 653 P.2d at 772 (“Estoppel focuses on whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by government regulation.”)(quoting Allen v. City & County, 58 Haw. 432, 435, 571 P.2d 328, 329 (1977)), “Though theoretically distinct, courts across

C. The Commission’s revocation of the A&R PPA’s waiver without notice and a hearing violated Hu Honua’s right to due process of law.

Even if the Commission did have the authority to revoke the waiver from the Competitive Bidding Framework for the A&R PPA, which it did not, the Commission’s revocation of its previously granted waiver without affording Hu Honua notice and an opportunity to be heard violated Hu Honua’s right to procedural due process under federal and Hawaii law.

There is a well-developed legal framework in Hawaii to determine whether a party has a property interest that is entitled to due process protection and, if so, what procedures are required to protect that property interest. Due process requires procedural protections whenever the claimant seeks to protect a “property interest,” in other words, a benefit to which the claimant is legitimately entitled.¹¹³ Hawaii courts apply a two-step analysis to claims of a due process right to a hearing: (1) is the particular interest which claimant seeks to protect by a hearing ‘property’ within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is ‘property,’ what specific procedures are required to protect it.¹¹⁴

1. The Commission’s grant of a waiver for the A&R PPA, and Hu Honua’s vested right to proceed with the Project, are “property interests or legal entitlements” protected by due process.

For purposes of the procedural due process analysis, so-called “property interests” takes on a broad definition. Such interests “may take many forms because courts have long recognized that property interests protected by procedural due process extend well

the country seem to reach the same results when applying these defenses to identical factual situations,” *Allen*, 58 Haw. at 435, 571 P.2d at 329.

¹¹³ *In re Application of Maui Elec. Co., Ltd.* (“MECO”) 141 Haw. 249, 260, 408 P.3d 1, 12 (2017) (quoting *Pele Def. Fund v. Puna Geothermal Venture*, 77 Haw. 64, 68, 881 P.2d 1210, 1214 (1994)).

¹¹⁴ *Id.* (quoting *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989)).

beyond actual ownership of real estate, chattels, or money.”¹¹⁵ A property interest exists, tangible or otherwise, in a benefit to which a party has “a legitimate claim of entitlement.”¹¹⁶ The Hawaii Supreme Court has recognized protected property interests in a “range of entitlements”, including driving privileges, the continued practice of medicine at a publicly funded hospital, and Native Hawaiian water rights.¹¹⁷ These interests “are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law – rules or understanding that secure certain benefits and that support claims of entitlement to those benefits.”¹¹⁸

Generally, “constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a ‘right’ or a ‘privilege.’”¹¹⁹ As explained by the United States Supreme Court,

[o]nce licenses are issued ... their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.¹²⁰

Accordingly, the Hawaii Supreme Court has recognized that “[a]lthough driving is a ‘privilege’ rather than a constitutional ‘right,’ once conferred, a license becomes a constitutionally protected property interest.”¹²¹ For the same reason, the Hawaii Supreme Court has held that an issued permit is considered a “property interest” for due process

¹¹⁵ MECO, 141 Hawaii at 260, 408 P.3d at 12 (internal quotation marks and citations omitted).

¹¹⁶ Id. (citation omitted).

¹¹⁷ Id. (citations omitted).

¹¹⁸ Id. (quoting In re ‘Āao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawaii’i 228, 241, 287 P.3d 129, 142 (2012)).

¹¹⁹ Bell v. Burson, 402 U.S. 535, 539 (1971).

¹²⁰ Id.

¹²¹ Kernan v. Tanaka, 75 Haw. 1, 22, 856 P.2d 1207, 1218 (1993) (citing Bell, 402 U.S. at 539)

purposes.¹²²

Similar to an approved permit or variance, the Commission's waiver provided Hu Honua with a property interest entitled to protection by due process of law.¹²³ Hu Honua's continued possession of the waiver is essential to the viability of the Project. Indeed, the same facts that warrant equitable estoppel support the conclusion that, under all the circumstances here, Hu Honua's right to complete the Project are fully vested and "cannot be taken away by government regulation" such as the Order Revoking Waiver.¹²⁴ At a minimum, those rights cannot be taken away without the procedural due process required by the Fourteenth Amendment and the Hawaii Constitution.

2. Hu Honua was entitled to notice and a hearing to protect its property interest in the A&R PPA waiver.

"The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.¹²⁵ Regarding the determination of what specific procedures are required to protect due process rights, Hawaii courts consider,

(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.¹²⁶

As discussed below, consideration of those factors inexorably leads to the

¹²² See Brown v. Thompson, 91 Hawaii 1, 11, 979 P.2d 586, 596 (1999), as amended (July 13, 1999); see also Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 496, 522 P.2d 1255, 1267 (1974); Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-433 (1982) (holding that adjudicatory procedures may, in certain circumstances, constitute a property right).

¹²³ See Brown, 91 Hawaii at 11, 979 P.2d at 596; see also Life of the Land, 61 Haw. 390, 453, 606 P.2d 866, 902.

¹²⁴ Nukolii, 65 Haw. at 325, 653 P.2d at 772; Allen, 58 Haw. at 435, 571 P.2d at 329.

¹²⁵ Sandy Beach Defense Fund, 70 Haw. at 378, 773 P.2d at 261.

¹²⁶ In re HELCO, 145 Haw. at 17, 445 P.3d at 689 (citing Sandy Beach Def. Fund, 70 Haw. at 378, 773 P.2d at 261).

conclusion that Hu Honua was entitled to proper notice that the Commission was considering whether to revoke the waiver, as well as the opportunity to participate in an evidentiary hearing on that specific issue, assuming the Commission had the authority to do so, which it did not. In violation of its constitutional rights to due process, Hu Honua received nothing of the sort¹²⁷.

a. Private interest.

Hu Honua has a significant private interest at stake. As already explained, Hu Honua expended more than \$474 million on the Project. It expended that money in reasonable reliance on the Commission's waiver. The Project is nearly complete; Hu Honua fully intends to complete the Project as soon as possible. The Order Revoking Waiver kills the Project and wastes Hu Honua's nearly half-billion dollar investment. Hu Honua's private interest in proceeding with and completing the Project warrants protection and a meaningful opportunity to be heard.

b. Risk of erroneous deprivation.

The risk of an erroneous deprivation here is plain. Neither Hu Honua nor HELCO knew (or could have known) that the Commission was considering a revocation of the A&R PPA waiver. Neither was given the opportunity to address the issue. Both Hu Honua and HELCO understood that the waiver was still effective, and for good reason.¹²⁸ In addition, as explained below, the Commission's Order Revoking Waiver relies on

¹²⁷ Given the Hawaii Supreme Court's opinion in In re HELCO, and the Court's lengthy discussion of the requirements for procedural due process, the Order Revoking Waiver is a knowing and intentional violation of Hu Honua's constitutional rights by the Commissioners.

¹²⁸ See Hu Honua Bioenergy, LLC's Supplemental Briefing on Issue Nos. 1 to 3, filed September 17, 2019, at 2-3 (recognizing that while the 2017 D&O was vacated, the Hawaii Supreme Court did not instruct the Commission to reconsider the waiver for the A&R PPA); Hawaii Electric Light Company, Inc.'s Memorandum in Opposition to Life of the Land's Motion to Compel, filed March 23, 2020, at 2-3 (stating that the scope of this docket on remand is limited to the GHG impacts of the Project).

information outside of this proceeding that neither considered nor made available in this proceeding, particularly with respect to information and discussions that occurred in the Phase 1 RFP.¹²⁹ Moreover, the parties in this proceeding were not afforded an opportunity to participate in the Phase 1 RFP proceeding, which preceded the reopened Hu Honua proceeding by nearly 2 years.

If the Commission intended to take official notice of matters outside the record that are judicially noticed by courts of the State or take notice of “generally recognized technical or scientific facts within its specialized knowledge”, it was required to give sufficient notice to the parties of the specific information under consideration so that the parties may contest those facts.¹³⁰ It failed to do so.

The Commission’s findings regarding these complex and disputed issues, without notice to Hu Honua and an opportunity to respond, posed an unacceptable risk of an erroneous deprivation of Hu Honua’s property interest. The erroneous Order Revoking Waiver was the result.

An evidentiary hearing on these complex and disputed issues would add significant value and help avoid an erroneous deprivation of Hu Honua’s interests. This is particularly true given both Hu Honua and HELCO’s understanding that the waiver approval was not within the scope of this remanded proceeding and given that the parties were given no notice of specific information and discussions that occurred in the Phase 1 RFP that were being considered by the Commission.

c. Governmental interest.

Finally, the parties have been working for over a year to prepare for the evidentiary

¹²⁹ Order Revoking Waiver, at 27-34.

¹³⁰ See HAR § 16-601-48.

hearing ordered by the Hawaii Supreme Court. All that remains left in this docket is the evidentiary hearing ordered by the Hawaii Supreme Court. The additional burden on the Commission under these circumstances would be minimal. This circumstances here are sufficiently specific, including that (1) the 2017 D&O was appealed and the proceeding remanded by the Hawaii Supreme Court to the Commission and (2) the Commission has *sua sponte* decided to revoke a previously granted waiver under the Competitive Bidding Framework, such that requiring additional procedural safeguards would not entail a substantial burden on the Commission.

D. The Waiver is Still Justified under Part II.A.3.d. of the Competitive Bidding Framework as the Hu Honua Project is an Expedient Means to Increase the Amount of Firm Renewable Energy on HELCO's system and is in the Public Interest.

1. A waiver is still justified as Hu Honua is still the most expedient opportunity to increase the amount of firm renewable energy on HELCO's system and would also provide firm capacity and grid services necessary and essential to support intermittent renewable resources, such as solar and wind projects, all without foregoing federal ITC benefits.

Assuming *arguendo* that the Commission could revisit the waiver approval on remand, which it cannot, and assuming that the Commission is not equitably estopped from revoking the waiver, which it is, the Commission has made numerous erroneous findings and ignored additional important considerations that Hawaii law requires the Commission to consider when making a waiver determination under the Competitive Bidding Framework.

Part II.A.3.d. provides for a waiver from the Competitive Bidding Framework “upon a showing that the waiver will likely result in a lower cost supply of electricity to the utility’s general body of ratepayers, increase the reliable supply of electricity to the utility’s general body of ratepayers, or is otherwise in the public interest.” The Commission concluded

less than two years ago that the waiver for the A&R PPA is justified under the Competitive Bidding Framework because it is an “opportunity to increase the amount of renewable energy on HELCO's system, without increasing the amount of as-available, intermittent renewable energy resources on HELCO's system.”¹³¹ This remains true today. The Commission also concluded that “the Project provides the most viable opportunity to add firm, dispatchable, renewable generation in the near term, and requiring the Project to enter the next round of competitive bidding would very likely forego the opportunity to utilize the federal ITC benefits.”¹³² This also remains true today.

The Hu Honua Project is still the best and most expedient opportunity to increase the amount of firm renewable energy on HELCO's system, without increasing the amount of as-available, intermittent renewable energy resources on HELCO's system. HRS § 269-92 requires Hawaii's electric utilities to achieve a renewable portfolio standard (“RPS”) for net electricity sales of (1) thirty percent by the end of 2020, (2) forty percent by the end of 2030, (3) seventy percent by the end of 2040, and (4) one hundred percent by the end of 2045. As a result, HELCO requires additional firm dispatchable capacity in order to reduce its use of oil-fired plants in order to achieve its one hundred percent RPS mandate.¹³³

In its 2017 D&O, the Commission in support of a finding that Hu Honua would support the State's RPS goals, noted “[a]s of the end of the first quarter of 2017, approximately 45.5% of all energy on [HELCO's] system was generated from renewables

¹³¹ 2017 D&O, at 30.

¹³² 2017 D&O, at 31.

¹³³ Jacobs Testimony T-4 at 8; HELCO T-1, p. 24, lines 1-8 (It remains true today that “the issues related to the integration of intermittent renewable energy resources on Hawaii Electric Light's system ‘are greater today than ever before.’”)

with approximately 20.1% generated from intermittent renewable energy sources, including utility scale photovoltaic[], hydro, wind, and customer-sited rooftop solar.”¹³⁴ Today, the percentage of energy from renewable resources on HELCO’s system is lower,¹³⁵ in part due to the volcanic/lava event that damaged the PGV facility in 2018 and prevents it from operating, which continues to be a concern given the potential for another lava volcanic/lava event. In addition, the percentage of energy generated from intermittent renewables is even higher today.¹³⁶

In its 2017 D&O, the Commission further recognized that “HELCO’s PSIP Update Report: December 2016 E3 plan ... shows that HELCO plans on adding more than 100 MW of intermittent renewable energy (30.4 MW of DG-PV and 72 MW of Wind) over the next 5 years, which will require sufficient firm dispatchable energy to ensure reliability of grid services.”¹³⁷ This also remains true today.¹³⁸ HELCO needs 24/7 firm dispatchable energy. This 24/7 firm energy on HELCO’s system currently comes from fossil fuel generation. The only new options to replace 24/7 firm fossil generation proposed by HELCO are Hu Honua’s 24/7 firm biomass or HELCO’s conversion of fossil fuel plants to significantly more expensive biofuels. In fact, HELCO’s bill impact analysis indicates that when HELCO converts its fossil-fuel plants to biofuels, the cost of biofuels will be significantly more expensive than Hu Honua.¹³⁹ The Hu Honua Project still provides the

¹³⁴ 2017 D&O at 30.

¹³⁵ See Docket No. 2007-0008, Letter From: K. Katsura To: Commission Re: Docket No. 2007-0008 – Renewable Portfolio Standards Law Examination, filed February 11, 2020, at 3 (Hawaii Island RPS percentage for year ended December 31, 2019 was 34.7%).

¹³⁶ Id.

¹³⁷ 2017 D&O at 30.

¹³⁸ Jacobs Testimony T-5 at 8, lines 5-7.

¹³⁹ See HELCO’s Response to HHB-HELCO-SIR-1(d), filed March 6, 2020 and HELCO’s Response to CA/HELCO-IR-23, filed December 2, 2019; Exhibits HELCO-302 through HELCO-305 attached to HELCO TESTIMONY T-3, filed January 28, 2020.

most viable opportunity to add firm, dispatchable, renewable generation in the near term, especially given that the Project is approximately 99% complete.¹⁴⁰

Contrary to the Commission's Order Revoking Waiver indicating that the Phase 1 RFP and Phase 2 RFP solar + 4 hour battery projects are not "firm" but intermittent – at best "4-hour firm". They are in fact powered by the sun, which is variable renewable resource affected by available sunlight and the weather, and though they have a 4 hour battery that can be filled assuming the sun happens to be shining, they are limited to 4 hours per day of battery dispatch at full capacity, unlike a 24/7 firm biomass plant that can be fully dispatched for 24 hours. Solar + 4-hour battery projects simply cannot provide the same level of system reliability and grid services as a 24/7 firm resource and that is why HELCO cannot remove or retire all of its 24/7 fossil fuel generation even with both Phase 1 RFP and Phase 2 RFP projects online.

The Project would also provide firm capacity and grid services necessary and essential to support intermittent renewable resources, such as solar and wind projects (including the increasing amounts of customer-sited solar generation), which are also important to achieve the state's 100% RPS mandate.¹⁴¹ Such grid services include more regulation, inertia, load-following, fault current, frequency and voltage support than can be provided by as-available variable resource.¹⁴²

¹⁴⁰ Warren Testimony T-1, at 11, lines 16-19; Miyata Affidavit at ¶ 4.

¹⁴¹ Jacobs Testimony T-5, at 8, line 18 to 9, line 7; see also HELCO's response to CA/HELCO-IR-29.i, filed December 9, 2019 ("If the Commission approves the contract pricing, the Company maintains that approval of the Amended and Restated PPA would be reasonable and warranted for the reasons previously set forth in the Commission's Decision and Order No. 31758 in Docket No. 2012-0212 (the Project will provide performance and operational features similar to the Company's existing steam generators with dispatchable capacity, inertial and primary frequency response, regulation and load following capabilities, and will add to the diversity of HELCO's existing portfolio of renewable energy resources), and also based on the Project's contribution to the State's renewable energy goals, the State's policy of promoting the long-term viability of agriculture, and other benefits.)

¹⁴² See HELCO's response to CA/HELCO-IR-37.a.1, filed February 18, 2020

2. HELCO has no current plan to retire any fossil-fired generators but might be able to do so if Hu Honua is operational.

The Commission's Order Revoking Waiver states that "it does not appear that granting a waiver to the Hu Honua Project will allow HELCO to expedite the retirement of fossil fuel plants. HELCO has previously informed Hu Honua that its planned retirement of its fossil fuel plants predated the Hu Honua Project".¹⁴³ This is a misstatement; in fact HELCO has made repeated statements in this docket that it does not plan to retire fossil generators:

- "There is no specific retirement schedule for all fossil-fuel fired generating plants on Hawaii Electric Light's system."¹⁴⁴
- "The disposition of Hill 5, 6 and Puna Steam units is yet to be determined. For the purposes of Hawai'i Electric Light's modeling used to develop the updated resource plans used for this analysis, Hill 5, 6 and Puna steam units were removed from service (i.e., deactivated), however, as noted in the response to CA/HELCO-IR-38, the Company anticipates that these units may still be needed and a holistic plan would need to be completed before deactivation or retirement."¹⁴⁵
- "Steam Units removed from service (i.e., deactivated) would utilize a layup method to ensure minimal corrosion to both internal and external surfaces of pressure components. While in layup, maintenance will continue with boiler repairs, servicing pumps and motors, turbine bearing inspections, control valve servicing, electrical circuit breakers and other auxiliary systems to keep units in a condition ready for reactivation to help ensure system availability and reliability."¹⁴⁶
- "The Company has not recently analyzed whether its thermal units could be decommissioned or retired. If Hu Honua comes online, as noted in the response to CA/HELCO-IR-38 the Company would need to develop a holistic plan that takes into account operating costs, system reliability, power quality, and renewable penetration."¹⁴⁷

¹⁴³ Order Revoking Waiver, at 36.

¹⁴⁴ HELCO's Response to TAWHIRI-HELCO-IR-16(a), filed December 9, 2019.

¹⁴⁵ HELCO's Response to CA/HELCO-IR-40(a), filed February 18, 2020.

¹⁴⁶ HELCO's Response to CA/HELCO-IR-40(b), filed February 18, 2020.

¹⁴⁷ HELCO's Response to CA/HELCO-IR-56(b), filed February 18, 2020.

- “For the purposes of Hawai’i Electric Light’s updated resource plans used for its analysis. Hill 5, 6 and Puna steam units were removed from service (i.e., deactivated). The impacts to system costs from removing Hill and Puna units from service were included in customer bill impact analysis. It is likely that changes will occur to Hawai’i Electric Light’s long term resource plan. However, future changes are unknown at this time, and impacts to bill impacts (increases or reductions) from future changes cannot be estimated.”¹⁴⁸
- “Thermal unit retirement will be considered when a thermal resource does not provide cost-competitive energy and is not required for reliable system operation or adequacy of supply. Decommissioning and/or retiring units involves many assumptions (system load, DG PV, fuel prices, etc.), and therefore, the Company’s plan is to make such final and irreversible decisions in the future when there is more certainty in these assumptions and system needs, after renewable resources are online and commercially proven with the expected level of reliability and provision of energy and grid services.”¹⁴⁹

Taking these together, HELCO intends to “deactivate” but not retire certain generators. Ratepayers will continue to pay fixed O&M costs for these plants as well return on ratebase (at HELCO’s full rate of return). HELCO is not making any firm commitment to retire anything at this point no matter what contracts are approved. HELCO may retire one or more thermal units but only if it must, when renewables have made them unnecessary, but they have not made such decision, nor projected what the financial consequences could be. Even if HELCO means it has already decided to retire Hill 5, Hill 6, and Puna, it cannot retire Keahole without replacing it with a 24/7 firm renewable resource running 24/7. Hu Honua and PGV together provide more capacity than Keahole. The same can be said for Hamakua Energy.

In other words, HELCO will not retire thermal capacity until the renewables that facilitate thermal retirement are in place and proven, but HELCO will not support the

¹⁴⁸ HELCO’s Response to HHB-HELCO-SIR-1(l), filed March 6, 2020, at 8-9.

¹⁴⁹ HELCO’s Response to CA/HELCO-SIR-19(a), filed March 6, 2020.

assumption that new renewables will lead to any beneficial thermal retirements. HELCO's current intention appears to be to convert at least Keahole and Hamakua Energy to biodiesel operation between 2030 and 2045. Based on HELCO's bill impact analysis it appears that will be a very expensive proposition.¹⁵⁰

E. The Finding that Hu Honua's Ability to Obtain the Federal ITC is "Speculative, at Best" is Unreasonable, Erroneous, and Misleading.

The Commission states that "Hu Honua has failed to achieve safe harbor of the federal ITC" and erroneously concludes that the "prospect of obtaining the federal ITC seem increasingly unlikely."¹⁵¹ The Commission states that it is "not convinced that a waiver is justified by the need to claim the federal ITC, as Hu Honua's ability to claim the federal ITC appears speculative at this point."¹⁵² Respectfully, the Commission's conclusions are speculative and erroneous.

In the Commission's 2017 D&O, the Commission concluded that "the same basis for granting the waiver for the Original PPA remains valid" and that "requiring the Project to enter the next round of competitive bidding would very likely forego the opportunity to utilize the federal ITC benefits."¹⁵³ The same circumstances apply today. Hu Honua has transparently disclosed that because the Project experienced unanticipated delays beyond 2018 which were outside of its control, obtaining the Federal ITC is no longer a guarantee under applicable safe harbor provisions.¹⁵⁴

The Commission has had ample time to explore any concerns or questions it has regarding the likelihood of recovery of the Federal ITC by way of information request but

¹⁵⁰ See HELCO's Response to CA/HELCO-IR-23, filed December 2, 2019 and HELCO Testimony T-3, at 8, and Exhibits HELCO-302 through HELCO-305, filed January 28, 2020.

¹⁵¹ Order Revoking Waiver, at 33-34.

¹⁵² *Id.* at 34.

¹⁵³ 2017 D&O, at 31.

¹⁵⁴ Jon Miyata Testimony T-3, filed January 28, 2020 at 3 line 20 to 4, line 17.

did not solicit further information from Hu Honua on this issue. Again, as explained *supra*, Hu Honua was not aware the Commission was considering a revocation of the waiver for the A&R PPA. If the Commission revokes the waiver on this basis, it would be a gross violation of Hu Honua's rights to procedural due process, which requires notice and an opportunity to be heard in a meaningful way.¹⁵⁵ Attached to this motion is the supplemental affidavit of Hu Honua's retained tax expert Eli Katz ("Mr. Katz"), which is intended to supplement the record pursuant to HAR § 16-601-139 and correct the Commission unfounded and unsupported statement that "obtaining the federal ITC seem[s] increasingly unlikely."¹⁵⁶

Mr. Katz's affidavit explains that the federal income tax credit for open-loop biomass projects in the United States was extended on December 20, 2019, as part of a bill signed into law by President Trump entitled the Fiscal Year 2020 Further Consolidated Appropriations Act.¹⁵⁷ Under current U.S. federal income tax law, a qualifying open-loop biomass project is eligible for an investment tax credit (the "ITC") if placed in service after December 31, 1992 and the construction of which begins no later than December 31, 2020 (December 31, 2020, referred to as the "ITC Deadline").¹⁵⁸

A qualifying open-loop biomass project is defined by the tax law to include any facility located in the United States that uses any of the following materials as a fuel source to produce electricity: solid, nonhazardous, cellulosic waste material or any lignin material which is derived from certain forest-related resources (mill and harvesting residues, pre-commercial thinnings, slash and brush), solid wood waste materials,

¹⁵⁵ Sandy Beach Defense Fund, 70 Haw. at 378, 773 P.2d at 261.

¹⁵⁶ Order Revoking Waiver, at 34.

¹⁵⁷ Affidavit of Eli Katz ("Katz Affidavit") at ¶ 6.

¹⁵⁸ Id. at ¶ 7.

including waste pallets, crates, dunnage, manufacturing and construction wood wastes (other than pressure-treated, chemically-treated, or painted wood wastes).¹⁵⁹

An open-loop biomass project is eligible for an ITC equal to 30% of the cost of property that is considered integral to the production of electrical power.¹⁶⁰ The ITC is available to the project owner in the taxable year in which the project is placed in service. Placed in service is generally defined as the date on which the project becomes operational and capable of producing power on a sustained and regular basis.¹⁶¹ If the Hu Honua Project is completed and placed in service by the end of 2020, it should certainly qualify for the ITC as it not only started construction prior to January 1, 2021 but will be completed before the ITC Deadline.¹⁶²

Even if the Hu Honua Project is delayed and placed in service after the ITC Deadline, it should still qualify for the ITC when completed under the rules promulgated by the Internal Revenue Service in a series of notices (the “IRS Notices”) that it issued on this topic.¹⁶³ In the IRS Notices, the Internal Revenue Service defined two alternative methods by which an owner of a biomass project may start construction.¹⁶⁴ The first is by commencing physical work of a significant nature and the second is by incurring at least 5% of the total eligible cost of the facility.¹⁶⁵ Once construction begins under either method, work on the project must be continuous.¹⁶⁶ The IRS Notices define continuous

¹⁵⁹ Id. at ¶ 8.

¹⁶⁰ Id. at ¶ 9.

¹⁶¹ Id. at ¶ 9.

¹⁶² Id. at ¶ 10.

¹⁶³ Id. at ¶ 11.

¹⁶⁴ Id. at ¶ 12.

¹⁶⁵ Id. at ¶ 12.

¹⁶⁶ Id. at ¶ 12.

in this context to mean that the project owner made continuous efforts to advance the project towards completion.¹⁶⁷

The Hu Honua Project satisfied both methods of beginning construction on account of its extensive physical work at the Hu Honua Project site and the fact that it incurred far in excess of 5% of the project costs prior to the ITC Deadline.¹⁶⁸ After beginning construction on the Project, Hu Honua and its affiliates should be viewed as having made continuous efforts to advance the project towards completion, including by paying amounts necessary for constructing the project, pursuing and obtaining permits, and engaging directly and through contractors on the ongoing construction of the project.¹⁶⁹ Therefore, the Commission's revocation of Hu Honua's waiver on this basis, which is supported by conjecture and speculation only, would be an arbitrary and capricious exercise of the Commission's duties.

F. New Markets Tax Credits (NMTC) that Benefit the State of Hawaii at Risk.

As indicated in the record, in addition to the federal ITC, Hu Honua had planned to apply for federal New Market Tax Credits ("NMTC").¹⁷⁰ The NMTC program incentivizes community development and economic growth through the use of tax credits that attract private capital to low-income communities. NMTC investors (each a "NMTC Investor") receive a tax credit against their federal income tax liability in exchange for making investments in Community Development Entities (each a "CDE"), which in turn invest

¹⁶⁷ Id. at ¶ 12.

¹⁶⁸ Id. at ¶ 13.

¹⁶⁹ Id. at ¶ 13.

¹⁷⁰ See response to LOL/HHB-IR-12, filed 12/19/19 (HHB plans to apply for federal ITC and NMTC, to the extent available).

such private capital in qualified, low-income census tracts. The NMTC program is managed by the U.S. Treasury Department's Community Development Financial Institutions Fund ("CDFI Fund"). The CDFI Fund awards NMTC allocation to certified CDEs through a competitive, annual application process. In 2019, 206 CDEs applied, requesting \$14.7 billion of NMTC allocation. The CDFI Fund awarded \$3.5 billion of NMTC allocation to 76 CDEs. A successful applicant must then enter into a binding Allocation Agreement with the CDFI Fund. The Allocation Agreement sets forth the terms and conditions under which the CDEs can deploy NMTC Investor capital, and often includes additional restrictions including funding deadlines and mandates to deploy capital in Non-Metropolitan census tracts.

Punawai'O Pu'uhonua, LLC ("Punawai") is a CDE formed in 2010 by American Savings Bank, FSB, and the Oahu Economic Development Board ("OEDB") to secure NMTC allocation for Hawaii. As the only active CDE in the state of Hawaii, Punawai has received \$135 million of NMTC allocation and has financed seven NMTC projects to date, including two healthcare facilities, two retail projects owned by Homestead Associations, two renewable energy projects, and a locally owned and operated hotel. Four of these projects were located on Hawaiian Home Lands, two were located in federally designated Medically Underserved Areas, and four were located in Non-Metropolitan Counties. These projects have created hundreds of jobs, provided thousands of patients with quality healthcare, and provided over 20,000 residents with low-cost renewable energy.

January 2017, Punawai and the CDFI Fund entered into an Allocation Agreement for \$55 million of NMTC allocation ("2017 Allocation Agreement"). The 2017 Allocation Agreement requires that Punawai close 100 percent of its NMTC allocation to qualified

projects by December 31, 2019. The 2017 Allocation Agreement also requires that Punawai close 55 percent of its NMTC allocation to qualified projects located in Non-Metropolitan Counties by December 31, 2019. In October 2017, the CDFI Fund released updated NMTC eligibility data, which caused the islands of Maui, Molokai, and Lanai to no longer be in Non-Metropolitan Counties and only the islands of Hawaii and Kauai remain in Non-Metropolitan Counties. Using the updated NMTC eligibility data, only 67 of the 351 census tracts in Hawaii, or 19%, are in Non-Metropolitan Counties. Punawai's remaining NMTC allocation that is bound to the 2017 Allocation Agreement was closed and deployed in Non-Metropolitan Counties in accordance with the allocation agreement requirements. The Pepekeo community, which the Hu Honua project is located within, is in a Non-Metropolitan County. Hu Honua expects to create approximately 200 operations-related jobs once the plant is operational.

Because of the requirements of Punawai's 2017 Allocation Agreement, there are few projects to which NMTCs can be deployed, Hu Honua being one of them. As such, Punawai and Hu Honua entered into an NMTC loan agreement with \$28.9 million of NMTC financing provided to Hu Honua in compliance with the 2017 Allocation Agreement requirements and another \$19.4 million, which closed in January 2020, relating to Punawai's 2018 Allocation. This essentially results in \$10.6 million of net benefit to Hu Honua with the additional community benefits of \$3.3 million to Punawai and its economic development efforts in the state. These funds, however, are currently being held in escrow and cannot be disbursed until there is an approved and non-appealable PPA.

If Hu Honua does not receive approval for its PPA with HELCO and the NMTC funds are unable to be disbursed, it could have significant negative impacts for the State

of Hawaii. Specifically, Punawai’s failure to meet the 2017 Allocation Agreement requirements could be an Event of Default and may have to be reported to the CDFI Fund as a Material Event. A Material Event may impact Punawai’s ability to receive future NMTC allocations and may also result in the termination of Punawai’s Allocation Agreements, thereby removing at least \$70 million of NMTC allocation in Hawaii currently committed to Punawai. This could also jeopardize Hawaii’s ability to access millions of dollars of additional private capital for community and economic development in Hawaii.¹⁷¹

G. The Order Revoking Waiver Unreasonably and Erroneously Ignores Hu Honua’s Significant Contributions to Other State Objectives.

Part II.A.3.c.(iii) of the Competitive Bidding Framework provides that other circumstances that could qualify for a waiver include “the acquisition of power from a non-fossil fuel facility (such as a waste-to-energy facility) that is being installed to meet a governmental objective.” Hu Honua would help decrease the State’s exposure fossil fuel price volatility, support the State’s public policy of promoting agriculture, contribute significantly to the economy of Hawaii Island and support employment, and help the State achieve its RPS goals.

1. Fossil fuel price volatility.

As demonstrated by the Commission’s current expedited proceeding in Docket No. 2020-0090, the State’s supply and cost of fossil fuel is currently volatile and uncertain. In that docket, the Commission is considering the HECO Companies’ request to amend their fuel supply contract with Par Hawaii Refining, LLC (“Par”) to significantly increase fossil fuel prices given that Par has represented that it is not economically viable for Par to

¹⁷¹ Affidavit of Jon Miyata at ¶¶ 5-9.

continue to supply fossil fuel to the HECO Companies at currently contracted rates.¹⁷² The Commission's previous approvals of the Hu Honua Project in 2013 and 2017 included as a reason for approval the "State's need to limit its dependence on fossil fuels and mitigate against volatility in oil pricing."¹⁷³ Limiting Hawaii's dependence on fossil fuels and mitigating against volatility in oil pricing is clearly still critical to Hawaii and can be furthered by the prompt approval of the Project.

Hu Honua's expert economist Dr. Plasch noted that Hu Honua will have a positive impact to lower price volatility and will result in a significant reduction of oil being imported to Hawaii to generate electricity.¹⁷⁴ It is projected that in the High Scenario, where Hu Honua's dispatch is maximized, the addition of Hu Honua will result in approximately 299,796 fewer barrels of oil being imported each year for a savings of about \$20,985,720.00.¹⁷⁵ The Order Revoking Waiver unreasonably and erroneously fails to address this critical issue.

2. The Commission disregards the State's public policy in favor of promoting Hawaii agricultural under HRS § 269-27.3.

The State has expressed a clear governmental objective to encourage energy projects that have a nexus with agricultural activity, as expressed in HRS § 269-27.3.¹⁷⁶ The Project can serve as a foundational energy and agricultural project because Hu Honua intends to locally source and cultivate, or have sourced and cultivated locally through a third-party supplier, its agricultural feedstock from Hawaii island, which includes

¹⁷² See Docket No. 2020-0090, Hawaiian Electric Company, Inc., Hawai'i Electric Light Company, Inc., and Maui Electric Company, Limited's Application; Verification, filed June 9, 2020, at 3-4.

¹⁷³ See Order No. 34726, issued July 28, 2017, at 60; Docket No. 2012-0212, Order No. 31758, filed December 20, 2013, at 52.

¹⁷⁴ See Prehearing Testimony of Dr. Bruce Plasch ("Plasch Testimony T-4"), filed January 28, 2020, at 5 line 17 to 6 line 4.

¹⁷⁵ Id. at 6 lines 2-4.

¹⁷⁶ Warren Lee Testimony T-1, filed January 29, 2020, at 10-11.

the harvesting and planting of trees locally, resulting in the generation of renewable energy in conjunction with agricultural activities.¹⁷⁷ Because the renewable energy from the Project will be generated in conjunction with the agricultural activities associated with utilizing, processing, and harvesting commercially grown crops, as well as the agricultural activities associated with the planting of future crops, Hu Honua is uniquely positioned to advance "the policy of the State [in] promot[ing] the long-term viability of agriculture" for which the legislature has mandated the "establish[ment] [of] mechanisms that provide for preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities" as contemplated under HRS § 269-27.3. Thus, the Project will further the State's goal to promote long-term agriculture under HRS § 269-27.3. By refusing to consider this factor in its waiver decision, the Commission ignored the Legislature's directive under HRS § 269-27.3, which must be considered under Part II.A.3.c.(iii) of the Competitive Bidding Framework.

3. Retirement of Fossil Fuel Fired Plants and the State's RPS Goals pursuant to HRS § 269-92.

HRS § 269-92 establishes the State's renewable portfolio standards. Previously, the Commission found that

[a]s a firm, dispatchable biomass resource, the Project provides diversification of HELCO's generation portfolio in two ways: (1) the Project's fuel source is different than any other energy resource and is less vulnerable to weather and climate-related reliability concerns, and (2) the Project adds another form of firm, dispatchable renewable energy with operational characteristics similar to HELCO's existing fossil-fueled steam generators.¹⁷⁸

This remains true today. As explained supra, the Phase 1 RFP projects simply do not

¹⁷⁷ Warren Lee Testimony T-1, at 10 line 15 to 11 line 15.

¹⁷⁸ Order No. 34726, at 59 (emphasis added).

have operational characteristics similar to HELCO's existing fossil-fueled steam generators that can help facilitate the retirement of the fossil-fuel steam generators. Thus, the Project will further the state's goal to achieve one hundred percent RPS by 2045 pursuant to HRS § 269-92.¹⁷⁹ The Commission unsupported reversal of its previous decisions in this regard is arbitrary and erroneous.

H. The Order Revoking Waiver Unreasonably and Erroneously Fails to Consider the Inherent Inefficiencies of Requiring Hu Honua to Participate in a Future RFP.

Even if the Commission had the authority to revoke the waiver for the A&R PPA, which it does not, and the Commission was not equitably estopped from doing so, it was the Commission's Order Revoking Waiver completely ignores the inherent inefficiencies that would be caused by requiring Hu Honua to participate in a speculative future RFP.

First, only two RFP processes have been initiated thus far.¹⁸⁰ Both RFPs sought proposals for variable renewable energy resources.¹⁸¹ The Hu Honua Project, as previously recognized by the Commission, is designed to be a firm source of renewable energy with operational characteristics similar to HELCO's existing fossil-fueled steam generators.¹⁸² Therefore, it would not have been feasible for Hu Honua to participate in either of the RFPs to date as the Companies were soliciting variable renewable energy projects for which Hu Honua would not have been suited.

¹⁷⁹ See also HELCO T-1, at 24 lines 19-21 ("A waiver of the Project would help to achieve other State objectives and policies such as increasing energy self-sufficiency, agricultural sustainability, and de-linking electricity pricing from fossil fuel prices".)

¹⁸⁰ See generally, Docket No. 2017-0352, To Institute a Proceeding Relating to a Competitive Bidding Process to Acquire Dispatchable and Renewable Generation.

¹⁸¹ See Docket No. 2017-0352, Hawaiian Electric Companies' Final Variable Requests for Proposals, filed February 27, 2018, at Exhibit 3, Section 1.2 (Company is seeking proposals for "variable renewable dispatchable generation"); Hawaiian Electric Companies' Final Stage 2; Renewable and Grid Services RFP's; Book 5 of 7, filed August 22, 2019, at Exhibit 3, at 5 (Company seeks "proposals for the supply of qualified variable renewable dispatchable generation and energy storage") and at Section 1.1.4 ("the primary purpose of this RFP is to obtain variable renewable energy and energy storage").

¹⁸² Order No. 34726, at 59 (emphasis added).

As to future RFPs, in response to LOL/HECLO-IR-92, HELCO indicated that “[t]here are no current plans for a targeted RFP specifically to secure biomass.”¹⁸³ Further, HELCO has informed that Commission that while it has an “openness to inclusion of biomass and/or other firm renewable technologies in a future procurement,” a “future procurement in this instance may not be the best alternative given the current status of the Project being near competition allowing the quickest route to add renewable firm resources to the system and the Project’s ability to meet other state objectives,” such as “increasing energy self-sufficiency, agricultural sustainability, and de-linking electricity pricing from fossil fuel prices.”¹⁸⁴ Hu Honua understands that to date HELCO has not indicated any intent to solicit 24/7 firm renewable resources in another RFP, such as Hu Honua, for Hawaii Island. Doing so would be in conflict with HELCO’s desire to keep its existing fossil fuel plants operating for as long as possible until it is forced to convert to more expensive biofuels by 2045.

In addition, HELCO and PGV recently proposed a new amended PPA to extend the life of PGV and to increase its capacity. In the HELCO’s application, it requests the Commission’s approval of a waiver from the Competitive Bidding Framework or, in the alternative, a declaratory order for an exemption from the Framework. If adding more firm renewable generation is no longer a sufficient basis to obtain a waiver because of the Phase 1 RFP and Phase 2 RFP projects, then Hu Honua is curious to know whether the PUC will require PGV to be competitively bid.

Even assuming that another RFP will be solicited, the RFP process will likely take a significant amount of time to conclude, followed by the initiation of a docket to seek

¹⁸³ See HELCO’s Response to LOL/HELCO-IR-92, filed December 9, 2019.

¹⁸⁴ HELCO’s Response to PUC-HELCO-IR-16, filed February 7, 2020.

approval of any resulting PPAs. This is more egregious given that the Commission’s reasoning in support of revoking Hu Honua’s waiver is founded upon the Phase 1 RFP, which the Commission itself accelerated during the pendency of the appeal of the A&R PPA to the Hawaii Supreme Court. On June 15, 2018, the Commission instructed the Companies “to accelerate the evaluation and selection of the Final Award Group so as to begin the Contract Negotiations phase of this process with the Final Award Group as soon as possible” and stated that it “intends to prioritize its review of any power purchase agreements for projects on Hawaii Island that may arise out of Phase 1 of this RFP process,” due to the uncertainty regarding the PGV facility resulting from volcanic activity on Hawaii Island.¹⁸⁵

When HELCO initially filed its Phase 2 Draft RFPs, its targeted procurement for Hawaii island was 70,000 MWh, annually, to account for the potential of Hu Honua and PGV being online.¹⁸⁶ On June 10, 2019, one month after the Hawaii Supreme Court issued its ruling in In re HELCO on May 10, 2019, the Commission proceeded to “strongly” encourage the Companies to solicit the maximum number of MWh proposed by the Companies for Hawaii Island (444,000 Mwh) in its Phase 2 RFP solicitation – over six times more than what HELCO believed was necessary when it assumed PGV and Hu Honua would be online.¹⁸⁷ The Commission knew that Hu Honua was continuing construction as ordered by the Commission in its 2017 D&O and operating under the waiver for the A&R PPA while also soliciting the very projects that the Commission is now using as a basis to revoke the A&R PPA waiver.

¹⁸⁵ Docket No. 2017-0352, Order No. 35529, filed June 15, 2018, at 11.

¹⁸⁶ Docket No. 2017-0352, Phase 2 Draft Requests for Proposals, filed April 1, 2019, at Exhibit 1, at 7.

¹⁸⁷ Docket 2017-0352, Order No. 36356, filed June 10, 2019, at 12.

As explained above, if the Commission revokes the A&R PPA's waiver, it will result in the abandonment of a state of the art biomass facility that is 99% complete, the abandonment of employees and their expertise developed during the Project's development period, the elimination of hundreds of future jobs, the disruption of a network of commercial relationships, and the forfeiture of significant federal tax credits that can still be secured for the Project. Hu Honua respectfully submits that the Commission's revocation of a waiver under these circumstances will serve as a stern warning to investors to stay out of Hawaii because they cannot rely on state approvals and efficiency at a time when Hawaii's economy is in desperate need of investment, jobs, and capital to aid in the diversification of the State's energy portfolio.

I. **The Commission Unreasonably and Unlawfully Failed to Make Findings Regarding GHG in Contravention of its Explicit Duties Set Forth in HRS § 296-6(b) and as Directed by the Hawaii Supreme Court.**

As discussed above, the Court remanded this matter back to the Commission for the limited purpose of giving "explicit consideration to the reduction of GHG emissions in determining whether to approve the Amended PPA, and make the findings necessary for this court to determine whether the Commission satisfied its obligations under HRS § 269-6(b)."¹⁸⁸

HRS § 269-6(b) states:

The public utilities commission shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation in exercising its authority and duties under this chapter. **In making determinations of the reasonableness of the costs of utility system capital improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions.**

¹⁸⁸ See In re HELCO, 145 Hawaii at 25, 445 P.3d at 697.

The commission may determine that short-term costs or direct costs that are higher than alternatives relying more heavily on fossil fuels are reasonable, considering the impacts resulting from the use of fossil fuels.¹⁸⁹

The requirement set forth in HRS § 269-6(b) to reduce reliance on fossil fuels and to consider GHG emissions applies to the fulfillment of all of the Commission’s duties.¹⁹⁰

The Hawaii Supreme Court recently examined the requirements of HRS § 269-6 in In the Matter of the Application of The Gas Company, LLC dba Hawaii Gas for Approval of Rate Increases and Revised Rate Schedules and Rules, No. SCOT-19-0000044, June 9, 2020 (“Hawaii Gas”). In Hawaii Gas, the Court held that HRS §269-6(b) requires the Commission to consider the “hidden” GHG emissions impacts, which includes GHG emissions impacts that occur out-of-state because even though the emissions occur outside of the State’s borders, the GHG emissions still impact Hawaii due to its global nature.¹⁹¹

In addition, the Court in Hawaii Gas questioned the Commission’s “limited and perfunctory review of GHG emissions.”¹⁹² The Court determined that the Commission could not have fulfilled its “affirmative duty to reduce the State’s reliance of fossil fuels through energy efficiency and increased renewable generation” as required by HRS § 269-6(b) because the Commission could not have explicitly considered the effect of State’s reliance on fossil fuels on the level of GHG emissions.¹⁹³ Further, the Court pointed to the fact that the Commission did not conduct a “quantitative or qualitative

¹⁸⁹ (Emphasis added).

¹⁹⁰ See MECO, 141 Haw. at 263, 408 P.3d at 15.

¹⁹¹ See Hawaii Gas, No. SCOT-19-0000044, June 9, 2020, at 28-29 (The Hawaii Supreme Court agreed with the Appellants contention that GHG emissions impacts include GHG emissions from the extraction, development, production and transport of gas, which occur out-of-state, but which impact Hawaii due to the global nature of GHG emissions.)

¹⁹² See Hawaii Gas, No. SCOT-19-0000044, June 9, 2020, at 33.

¹⁹³ See Hawaii Gas, No. SCOT-19-0000044, June 9, 2020, at 33.

analysis” that substantiated its finding that Hawaii Gas’s projects will decrease GHG emissions.¹⁹⁴

Based upon the foregoing, and in addition to the Court’s explicit remand in In re HELCO,¹⁹⁵ it is clear that the Commission had a statutory and legal obligation to make findings and explicitly consider, quantitatively or qualitatively, the GHG emissions impact of the Project as part of its review of the A&R PPA. However, contrary to its legal and statutory duties, the Commission admits that it “[did] not make any express findings or conclusions regarding Issue No. 4, regarding the estimated impacts of GHG emissions.”¹⁹⁶

Although the Commission did not find it necessary to make findings on the issue of the Project’s estimated GHG emissions impact in light of its unreasonable and unlawful revocation of the waiver,¹⁹⁷ it offers a lengthy discussion regarding the projected GHG impacts of the Project because it is “mindful of the legal guidance provided by the Hawaii Supreme Court.”¹⁹⁸ The Commission ultimately states that although no findings were made, there are still “lingering concerns regarding the impact of the Project’s GHG emissions”.¹⁹⁹

Notwithstanding the Commission’s failure to fulfill its statutory and legal obligations regarding its determination and findings related to the Project’s GHG emissions impact, the Order Revoking Waiver unreasonably mischaracterizes, ignores, and/or misstates the evidence presented by Hu Honua regarding its GHG analysis, as discussed below:

¹⁹⁴ See Hawaii Gas, No. SCOT-19-0000044, June 9, 2020, at 33.

¹⁹⁵ In re HELCO, 145 Hawaii at 24-25, 445 P.3d at 696-97.

¹⁹⁶ See Order Revoking Waiver, at 44 (emphasis added).

¹⁹⁷ See Order Revoking Waiver, at 53.

¹⁹⁸ See Order Revoking Waiver, at 45.

¹⁹⁹ See Order Revoking Waiver, at 53.

1. The Commission's statement that Hu Honua failed to provide a net lifecycle GHG emissions impact analysis that considered biogenic emissions is patently erroneous and misleading, as demonstrated by the supplemental analysis submitted by Hu Honua in its prehearing testimonies.

The Order Revoking Waiver erroneously states:

While Hu Honua did not provide a net lifecycle GHG emissions impact analysis that included biogenic emissions, the fact that the inclusion of biogenic emissions in the net smokestack analysis resulted in an increase in net GHG project emissions infers that an increase in net lifecycle GHG emissions would have resulted had biogenic emissions been included.²⁰⁰

It is true that the initial GHG Emissions Impact Analysis for the Hu Honua Bioenergy Project ("Hu Honua GHG Analysis"), filed October 21, 2019, did not include biogenic emissions as such emissions were assumed to be carbon neutral pursuant to the United States' Environmental Protection Agency's biomass policy statement.²⁰¹ However, following comments by Parties and Participants, Hu Honua supplemented its GHG Analysis with the Supplemental Calculations & Update to the GHG Emissions Impact Analysis for the Hu Honua Bioenergy Project ("Hu Honua GHG Analysis Supplement & Update"), dated January 2020,²⁰² which explicitly includes all biogenic emissions and explicitly accounts for the reforestation efforts associated with the project. Table 1 in the Hu Honua GHG Analysis Supplement & Update provides three different methods of assessing GHG reductions which specifically contemplate and include biogenic CO₂ emissions and reforestation efforts.²⁰³ Depending on the method used, the Hu Honua GHG Analysis Supplement & Update reveals that the projected net reduction of GHG

²⁰⁰ See Order Revoking Waiver, at 48.

²⁰¹ Prehearing Testimony of David Weaver ("Weaver Testimony T-6"), filed January 28, 2020, at 16, lines 1-15.

²⁰² See Exhibit HU HONUA-601 to Weaver Testimony T-6.

²⁰³ See Exhibit HU HONUA-601, at 2.

emissions that would result from the Project, even when including biogenic CO₂ emissions, varies between 40% and 250%, depending on the time horizon that is considered for vegetation growth.²⁰⁴

Further, to the extent that Table 2 in the Order Revoking Waiver is intended to demonstrate that the Project will result in an increase in net lifecycle GHG emissions,²⁰⁵ the purported summary of “net lifecycle GHG emissions” contained in Table 2 is erroneous and misleading. The “net lifecycle GHG emissions” identified in Table 2 should correctly be identified as the “Net Lifecycle GHG emissions **REDUCTION** versus Ramboll/HELCO Production Simulation without Hu Honua”. The figures shown as the “net lifecycle GHG emissions” reveal the actual reductions in the GHG metric tons of CO_{2e} generated by the Project’s construction and operation in comparison with the HELCO system without the addition of Hu Honua. If the Commission had considered the Hu Honua GHG Analysis Supplement & Update, the figures contained in Table 2 would accurately depict the net avoided lifecycle GHG emissions as follows:

²⁰⁴ See Exhibit HU HONUA-601, at 2; Weaver Testimony T-6, at 7, line 15 to 10, line 17.

²⁰⁵ See Order Revoking Waiver, at 48.

Table 2 (Revised with Information from Exhibit Hu Honua 601)				
Net Avoided "Lifecycle" GHG Emissions (metric tons of CO _{2e})				
	Excluding Biogenic CO _{2e}		Including Biogenic CO _{2e}	
	With PGV	Without PGV	With PGV	Without PGV
Avoided Lifecycle GHG Emissions from HELCO system (Ramboll)	2,148,354	2,625,971	2,454,014	3,052,952
Lifecycle GHG Emissions from the Hu Honua Project (ERM)	280,000	294,000		
Hu Honua 601 Method 1			582,681	619,679
Hu Honua 601 Method 2			-5,421,763	-5,929,647
Hu Honua 601 Method 3			1,947,701	2,096,605
Net Lifecycle GHG emissions REDUCTION versus Ramboll/HECO Production Simulation without Hu Honua	1,868,354	2,331,971		
Hu Honua 601 Method 1			1,871,333	2,433,273
Hu Honua 601 Method 2			7,875,777	8,982,599
Hu Honua 601 Method 3			506,313	956,347

As shown in Table 2 above, contrary to the Commission's statement, the Project is estimated to result in a net reduction of GHG emissions, even when biogenic CO_{2e} emissions are included, regardless of the method employed.

In addition, the net "smokestack" emissions contained in Table 1 of the Order Revoking Order²⁰⁶ were provided in response to the Commission's specific instruction to generate the estimated "smokestack" emissions. "Smokestack" emissions are an important input in calculating the Project's emissions. However, "smokestack" emissions are just part of the analysis as shown in Table 2 above, as opposed to a final result as implied in Table 1 of the Order Revoking Order.

The lifecycle analysis presented by the Hu Honua GHG Analysis Supplement & Update also correctly accounts for the sequestration of carbon, which are the result of

²⁰⁶ Order Revoking Waiver, at 47.

existing biomass plantations secured by Hu Honua as well as the sequestration that is projected to result from future planting/growing.²⁰⁷ While the Order Revoking Waiver acknowledges Hu Honua's stance on carbon neutrality,²⁰⁸ the Commission states that it shares the Consumer Advocate's concern that such treatment "obscures the actual GHG emission intensity associated with burning biomass feedstock."²⁰⁹

The Commission cites to the Consumer Advocate's statements and GHG analysis as support for its erroneous non-findings regarding GHG in the Order Revoking Waiver.²¹⁰ The Commission's reliance on the Consumer Advocate's stance regarding the GHG impacts of the Project is misplaced. The Consumer Advocate has acknowledged that the GHG sequestration resulting from the planting/growing of vegetation should be accounted for.²¹¹ However, the Consumer Advocate concedes that it only considered GHG calculations that do not account for carbon sequestered by the planting/growing of vegetation.²¹² The Hu Honua GHG Analysis Supplement & Update provides a carbon sequestration plan that explicitly includes the anticipated carbon emissions that will occur because of the harvesting, transport, and consumption of feedstock, as well as a detailed

²⁰⁷ See HU HONUA-601, filed January 28, 2020, at 2 and Hu Honua Testimony T-6, Testimony of David Weaver, at 7, line 15 to 10, line 17.

²⁰⁸ See Order Revoking Waiver, at 49. The Commission also acknowledges that Hu Honua is supported by the HAR governing DOH's GHG emission reduction plans, which consider biogenic emissions to be zero, as well as the EPA's 2018 policy statement which generally considers biogenic sources to be carbon neutral.

²⁰⁹ See Order Revoking Waiver, at 50 (citing to the Division of Consumer Advocacy's Supplemental Briefing on the Filed Greenhouse Gas Emissions Analyses, filed January 14, 2020, at 19.

²¹⁰ Order Revoking Waiver, at 50-53.

²¹¹ See Consumer Advocate's Response to HHB-CA-IR-23(b), filed February 18, 2020 ("Planting and/or growing trees will reduce the amount of carbon in the atmosphere and some reduction will occur whether the planting and growing occurs before, during, or after the project. The carbon sequestration plan should, however, clearly illustrate how the anticipated carbon emissions that will occur because of the harvesting, transport, and consumption of the feedstock will be offset, including, but not limited to, the consumption of older trees that have more time to absorb carbon emissions as compared to the time allowed to grow new feedstock.")

²¹² See Consumer Advocate's Response to HHB-CA-IR-24(c), filed February 18, 2020.

year-by-year phased harvest and regrowth analysis to offset the carbon emissions.²¹³ The sequestration plan accounts for the consumption of older trees that have more time to absorb carbon emissions as compared to the time allowed to grow new feedstock.²¹⁴ However, for unknown reasons, the Consumer Advocate and Commission have completely ignored Hu Honua's carbon sequestration plan and commitment to plant/grown more trees than it harvests.²¹⁵

By omitting and ignoring the benefits of carbon sequestration as part of the GHG lifecycle analysis, the Commission is implying, without explanation or reason, that it would not consider the sequestration impacts of any reforestation or vegetation regrowth. The Commission appears to take the stance that reforestation and revegetation does not remove carbon from the atmosphere. This stance sets a precedent that will be detrimental to Hawaii's ability to achieve its climate change goals. For example, this stance infers that the Commission would not consider the GHG benefits from a standalone reforestation project. Not accounting for the GHG benefits from a reforestation project would reduce financial incentives to undergo such types of reforestation projects, which would lead to fewer reforestation projects. In addition, this approach would be contrary to how certain international agreements, such as the Paris Agreement that Hawaii has signed, attempt to combat climate change. The Paris Agreement "encourages Parties to conserve and enhance, as appropriate, sinks and reservoirs of GHGs as referred to in Article 4, paragraph 1(d) of the Convention, including

²¹³ See Exhibit HU HONUA-601, at 3-4.

²¹⁴ See Exhibit HU HONUA-601, at 3-4.

²¹⁵ See response to CA/Hu Honua-IR-107(c), filed February 28, 2020 and CA/Hu Honua-SIR-27, filed March 9, 2020.

forests."²¹⁶ The Commission's stance inhibits Hawaii's ability to fulfill its Paris Agreement commitments because it implies that the Commission, and perhaps the State, will not consider the GHG benefits of reforestation and other beneficial agricultural projects, regardless of whether such projects are tied to power production.

It is well recognized that climate change and carbon emissions are global challenges²¹⁷ and planting/growing vegetation is a key tool to combat climate change.²¹⁸ Hu Honua has committed to plant/grow more trees than it harvests from commercially managed forests and has committed that the Project will be carbon negative as soon as practicable, or by 2045 at the latest.²¹⁹ Hu Honua's carbon sequestration model will not only provide a benefit related to state and/or global GHG emissions, it will provide the additional benefits discussed above, i.e. supporting and sustaining the agricultural industry on Hawaii Island and creating and sustaining hundreds of jobs for local residents. In addition to Hu Honua's carbon sequestration plan, consistent with what Hu Honua indicated in the record regarding carbon credits,²²⁰ in effort to further reduce carbon emissions and/or be carbon negative, Hu Honua, by its affiliate(s), will also plant 1.25 million trees planted through the National Forest Foundation during the first five years of the Project for the benefit of offsetting GHG in connection with the Project. Hu Honua will

²¹⁶ <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement>

²¹⁷ See Hawaii Gas, No. SCOT-19-0000044, June 9, 2020, at 28-29 (The Hawaii Supreme Court agreed with the Appellants contention that GHG emissions impacts include GHG emissions from the extraction, development, production and transport of gas, which occur out-of-state, but which impact Hawaii due to the global nature of GHG emissions. The Hawaii Supreme Court further noted that the Greenhouse Gas Emissions Reduction Task Force established by Act 34 insisted that the lifecycle impact of energy sources be considered in any adopted energy laws.)

²¹⁸ See, e.g., Testimony of Braulio Pikman, Hu Honua T-7, at 5, line 19 – 6, line 2 ("...Hu Honua will help move toward reducing Hawaii and international GHG emissions. Emissions in Hawaii will be reduced compared to fossil fuels because of the growth of biomass. Emissions outside of Hawaii will be reduced because the reduction in fossil fuel will reduce the need for fossil fuel exploration, refining, and transport.")

²¹⁹ See response to CA/Hu Honua-IR-107(c), filed February 28, 2020 and CA/Hu Honua-SIR-27, filed March 9, 2020.

²²⁰ See response to CA/Hu Honua-IR-101, filed February 18, 2020.

also, above and beyond the carbon sequestration plan, fund a project through “Friends of Hawai‘i Volcanoes National Park” to clear 30 acres of invasive species and replant native species within the Hawai‘i Volcanoes National Park-Special Ecological Area.²²¹

Hu Honua has presented a thorough quantitative and qualitative lifecycle analysis regarding the GHG impacts related to its Project. If all components of the GHG lifecycle analysis are properly considered, including biogenic emissions and carbon sequestration from reforestation, Hu Honua’s Project is projected to result in a reduction of GHG emissions. More importantly, and unlike other renewable energy projects in Hawaii, Hu Honua has committed to a reforestation plan, whereby it will plant/grow more trees than it harvest that the Project will be carbon negative as soon as practicable, or by 2045 at the latest. Accordingly, the Commission’s non-findings described above are erroneous, misleading, and unreasonably ignore the extensive analysis completed by Hu Honua.

2. The Order Revoking Waiver Erroneously and Unreasonably Ignores the Fact That The End Result is the Same Regardless of Which Assumptions Are Used, i.e. Hu Honua’s Project Will Reduce GHG Emissions.

The Commission states that “it appears there are discrepancies in the assumptions used by Ramboll and ERM”.²²² Hu Honua agrees that different assumptions were used. However, as demonstrated in the revised Table 2 above, the Project still results in a substantial lifecycle GHG reduction, even when considering the intensities provided by HELCO that displaces both fossil fuel and renewable energy.

²²¹ See Affidavit of Jon Miyata, at ¶ 10 and Exhibit 1.

²²² See Order Revoking Waiver, at 50.

3. Hu Honua Conducted its GHG Analysis in Accordance with the Commission's Order Reopening Docket Which Provided Specific and Unambiguous Instructions With Respect to Calculating the Estimated Net Smokestack Emissions.

The Commission erroneously and unreasonably states that ERM “substituted its own judgment as to how HELCO’s generation facilities should be dispatched and used those assumptions to model the Project’s net lifecycle emissions”²²³ by comparing Hu Honua’s smokestack emissions to smokestack emissions from fossil fuel plants rather than a combination of fossil fuel and renewable generation sources.

In its Order Reopening the Docket, the Commission provided the following clear and unambiguous direction to Applicants with respect to analyzing the GHG impacts of the Project:

- 2) Estimate Net “Smokestack” GHG Emissions Impact from operation of the Hu Honua plant (**Net “Smokestack” Emissions = Avoided Emissions from Fossil Fueled Plants – Emissions from Hu Honua plant**).²²⁴ The Commission expects that the Applicants will work together to estimate the CO₂ emissions per MWh of the Hu Honua plant output. The Applicants should document all assumptions in developing these estimates.
- 3) Estimate Net Lifecycle GHG Emissions Impact from operation of the Hu Honua plant. (**Net Lifecycle Emissions = Avoided Lifecycle Emissions from Fossil Fueled Plants – Lifecycle emissions from Hu Honua plant**). For this analysis, Applicants will have to estimate GHG emission for all “upstream” activities from delivering fossil fuels and biomass to the Hu Honua plant, and emissions from constructing the Hu Honua plant. The Commission understands that this can become a complicated analysis and suggests that the Applicants may want to identify values based on peer-reviewed literature that can serve as a reasonable proxy in the

²²³ See Order Revoking Waiver, at 51-52.

²²⁴ In a footnote, the Commission stated that “[i]n this context, ‘smokestack’ emissions refers to a measurement of the CO₂ emissions from combustion of the fuel at the Hu Honua plant and does not include emissions from other activities prior to producing electricity.” Order Reopening Docket, at 11 n.14.

absence of detailed Hawaii – and/or project-specific data.²²⁵ The Commission encourages Hu Honua to provide as much project-specific data as possible. All input assumptions used for the analysis shall be documented and provided in the record.²²⁶

In the Order Revoking Waiver, the Commission acknowledges the substance of its instructions but states that “this was not intended as a license to ignore HELCO’s resource planning.”²²⁷ Hu Honua did not ignore HELCO’s resource planning, it followed the Commission instructions to calculate GHG emissions based on the above equation. The Commission has the discretion and ability to ask that Hu Honua provide an amended analysis if it wanted to consider an alternative calculation but did not do so. Hu Honua appropriately relied upon and followed the Commission’s order which clearly and unambiguously states that the net smokestack emissions are avoided emissions from fossil fueled plants – less the emissions from Hu Honua’s plant.²²⁸ Thus, the assertion that Hu Honua used its own judgment as to how HELCO’s generation facilities should be dispatched is unsupported and contradicted by the record.

V. **CONCLUSION.**

Given the above impacts of the Order Revoking Waiver, especially the loss of economic benefit and the hundreds of local jobs in the balance, Hu Honua respectfully requests that the Commission hold a hearing and expedite its decision-making on this

²²⁵ In a footnote, the Commission cited as an example, “NREL’s U.S. Life Cycle Inventory Database, <https://www.nrel.gov/lci/>.” Order Reopening Docket, at 11 n.15.

²²⁶ See Order Reopening Docket, at 11-12.

²²⁷ See Order Revoking Waiver, at 51-52, n. 118.

²²⁸ While Hu Honua recognizes that the Commission’s Orders are not contracts, Hu Honua points out that it is well established in contract law that terms are interpreted according to their plain, ordinary and accepted sense in common speech. See for example, Cho Mark Oriental Food, Ltd. v. K&K Intern., 73 Haw. 509, 520, 836 P.2d 1057, 1064 (1992)(Contract terms are interpreted according to their plain, ordinary, and accepted sense in common speech); Sierra Club v. Hawai’i Tourism Auth., 100 Hawaii 242, 253, 59 P.3d 877, 888 (2002)(Where terms are undefined, the court may resort to legal or other well-accepted dictionaries to determine their ordinary meaning).

Motion for Reconsideration within 2 to 3 weeks. For the reasons stated herein, Hu Honua respectfully seeks reconsideration of the Commission's Order Revoking Waiver and requests that the Commission vacate the Order Revoking Waiver in its entirety and schedule an evidentiary hearing, as instructed by the Hawaii Supreme Court in In re HELCO, without delay for the limited purpose of expressly considering the reduction of GHG emissions in its decision-making pursuant to HRS § 269-6(b) and to afford LOL an opportunity to be heard regarding the impact of the A&R PPA on LOL's interest in a clean and healthful environment.

DATED: Honolulu, Hawaii, July 20, 2020.



DEAN T. YAMAMOTO
WIL K. YAMAMOTO
BRADLEY S. DIXON

YAMAMOTO CALIBOSO
A Limited Liability Law Company

Counsel for HU HONUA BIOENERGY,
LLC



BRUCE D. VOSS
JOHN D. FERRY

Bays Lung Rose & Holma

Co-Counsel for HU HONUA
BIOENERGY, LLC

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

AFFIDAVIT OF JON MIYATA

STATE OF HAWAII)
COUNTY OF HAWAII) SS.

JON MIYATA, being first duly sworn on oath, deposes and says:

1. I am the Director of Finance for Hu Honua Bioenergy, LLC ("Hu Honua"). I am familiar with all aspects of Hu Honua's history, business, and operations. My specific duties and responsibilities include budgeting, financial forecasting, accounting, department operations, and tax credit/equity financing for Hu Honua's Biomass Project ("Project"). My CV has already been submitted in this docket attached to my prehearing testimony as Exhibit HU-HONUA-300, filed on January 28, 2020.

2. I make this affidavit based on my personal knowledge and belief, and I am competent to attest to the matters discussed herein.

3. On January 28, 2020, I submitted written testimony in this Docket No. 2017-0122 as Hu Honua Testimony T-3. In that submission I reported that as of January 28, 2020, Hu Honua had expended approximately \$336 million in construction costs at the Project, which represented a then completion percentage of approximately ninety-five percent (95%). The purpose of this Affidavit is to update both the total amount expended

and completion percentage of the Project, to provide updated and supplemental information regarding the tax credit/equity financing for the Project, and to address erroneous findings in in Order No. 37205, issued by the Public Utilities Commission of the State of Hawaii in this docket on July 9, 2020.

4. At present, incurred Project development and construction costs and accrued interest total approximately \$474,027,138.00, which represents a Project completion percentage of approximately ninety-nine percent (99%). Since the Hawaii Public Utilities Commission's July 28, 2017 approval of the Amended and Restated Power Purchase Agreement ("A&R PPA") through June 30, 2020, Hu Honua incurred \$314,454,846.00 on Project development and construction costs and accrued interest.

5. As indicated in the record, in addition to the federal ITC, Hu Honua had planned to apply for federal New Market Tax Credits ("NMTC"). The NMTC program incentivizes community development and economic growth through the use of tax credits that attract private capital to low-income communities. NMTC investors (each a "NMTC Investor") receive a tax credit against their federal income tax liability in exchange for making investments in Community Development Entities (each a "CDE"), which in turn invest such private capital in qualified, low-income census tracts. The NMTC program is managed by the U.S. Treasury Department's Community Development Financial Institutions Fund ("CDFI Fund"). In 2019, 206 CDEs applied, requesting \$14.7 billion of NMTC allocation. The CDFI Fund awarded \$3.5 billion of NMTC allocation to 76 CDEs. A successful applicant must then enter into a binding Allocation Agreement with the CDFI Fund. The Allocation Agreement sets forth the terms and conditions under which the CDEs can deploy NMTC Investor capital, and often includes additional restrictions

including funding deadlines and mandates to deploy capital in Non-Metropolitan census tracts.

6. Punawai is a CDE formed in 2010 by American Savings Bank, FSB, and the Oahu Economic Development Board ("OEDB") to secure NMTC allocation for Hawaii. As the only active CDE in the state of Hawaii, Punawai has received \$135 million of NMTC allocation and has financed seven NMTC projects to date, including two healthcare facilities, two retail projects owned by Homestead Associations, two renewable energy projects, and a locally owned and operated hotel. Four of these projects were located on Hawaiian Home Lands, two were located in federally designated Medically Underserved Areas, and four were located in Non-Metropolitan Counties. These projects have created hundreds of jobs, provided thousands of patients with quality healthcare, and provided over 20,000 residents with low-cost renewable energy.

7. In January 2017, Punawai and the CDFI Fund entered into an Allocation Agreement for \$55 million of NMTC allocation ("2017 Allocation Agreement"). The 2017 Allocation Agreement requires that Punawai close 100 percent of its NMTC allocation to qualified projects by December 31, 2019. The 2017 Allocation Agreement also requires that Punawai close 55 percent of its NMTC allocation to qualified projects located in Non-Metropolitan Counties by December 31, 2019. In October 2017, the CDFI Fund released updated NMTC eligibility data, which caused the islands of Maui, Molokai, and Lanai to no longer be in Non-Metropolitan Counties and only the islands of Hawaii and Kauai remain in Non-Metropolitan Counties. Using the updated NMTC eligibility data, only 67 of the 351 census tracts in Hawaii, or 19%, are in Non-Metropolitan Counties. Punawai's remaining NMTC allocation that is bound to the 2017 Allocation Agreement was closed

and deployed in Non-Metropolitan Counties in accordance with the allocation agreement requirements. The Pepeekeo community, which the Project is located within, is in a Non-Metropolitan County. Hu Honua expects to create approximately 200 operations-related jobs once the plant is operational.

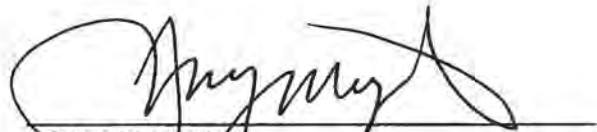
8. Because of the requirements of Punawai's 2017 Allocation Agreement, there are few projects that the NMTCs can be deployed to, Hu Honua being one of them. As such, Punawai and Hu Honua entered into an NMTC loan agreement with \$28.9 million of NMTC financing provided to Hu Honua in compliance with the 2017 Allocation Agreement requirements and another \$19.4 million, which closed in January 2020, relating to Punawai's 2018 Allocation. This essentially results in \$10.6 million of net benefit to Hu Honua with the additional community benefits of \$3.3 million to Punawai and its economic development efforts in the state. These funds, however, are currently being held in escrow and cannot be disbursed until there is an approved and non-appealable PPA.

9. If Hu Honua does not receive approval for the A&R PPA and the NMTC, funds are unable to be disbursed, it could have significant negative impacts for the State of Hawaii. Specifically, Punawai's failure to meet the 2017 Allocation Agreement requirements could be an Event of Default and may have to be reported to the CDFI Fund as a Material Event. A Material Event may impact Punawai's ability to receive future NMTC allocations and may also result in the termination of Punawai's Allocation Agreements, thereby removing at least \$70 million of NMTC allocation in Hawaii currently committed to Punawai. This could also jeopardize Hawaii's ability to access millions of dollars of additional private capital for community and economic development in Hawaii.

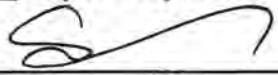
10. In addition, Hu Honua has indicated that it may, through or by its affiliate, purchase carbon credits for the benefit of offsetting GHG in connection with the Project. Consistent with this, Hu Honua, by its affiliate, entered into two Pledge Agreements. The first Pledge Agreement ensures that 1.25 million trees will be planted through the National Forest Foundation during the first five years of the Project. The second Pledge Agreement funds a project with the Friends of Hawaii Volcanoes National Park to clear 30 acres of invasive species and replant native species within the Hawaii Volcanoes National Park. Both Pledge Agreements are contingent upon the approval of the A&R PPA. Attached hereto as Exhibit 1 is a true and correct copy of a letter dated July 18, 2020, which assigns the carbon credits generated by the Pledge Agreements to Hu Honua should the A&R PPA be approved.

[Remainder of the page intentionally left blank]

FURTHER AFFIANT SAYETH NAUGHT.


JON MIYATA

Subscribed and sworn to before me this
20th day of July, 2020.



Name: SOPHIA M CABRAL-MAIKU I

Notary Public, State of Hawaii

My Commission expires: 07-18-2022



NOTARY CERTIFICATION

Document Date: 07-20-2020

No. of Pages: 5

Document Description: _____

3rd Circuit

Affidavit of JON MIYATA



Signature of Notary



07-20-2020

Date of Notarization

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

AFFIDAVIT OF ELI KATZ

STATE OF New York)
COUNTY OF Queens) SS.

Eli Katz, being first duly sworn on oath, deposes and says:

1. I am Eli Katz, a partner in the New York office of Latham & Watkins LLP.
2. I make this affidavit based on my personal knowledge and belief, and I am competent to attest to the matters discussed herein.
3. I was admitted to the New York State Bar in 1999 and have focused my practice over the past two decades in the area of United States federal income tax law.
4. A significant part of my practice involves counseling private clients on the United States federal income tax implications of transactions in the power and energy sector, with a particular focus on renewable energy power plants and transactions. In this capacity, I have been recognized as a leading authority in renewable energy and alternative energy tax matters by many industry publications, including Chambers Global, Chambers USA, and Legal 500.

5. I was retained by Hu Honua Bioenergy, LLC (“Hu Honua”) approximately 6 years ago to advise on tax credit qualification and related transactional matters pertaining to a biomass project that Hu Honua was developing in Hawaii (the “Hu Honua Project”).

6. The federal income tax credit for open-loop biomass projects in the United States was extended on December 20, 2019, as part of a bill signed into law by President Trump entitled the Fiscal Year 2020 Further Consolidated Appropriations Act.

7. Under current U.S. federal income tax law, a qualifying open-loop biomass project is eligible for an investment tax credit (the “ITC”) if it placed in service after December 31, 1992 and the construction of which begins no later than December 31, 2020 (December 31, 2020, referred to as the “ITC Deadline”).

8. A qualifying open-loop biomass project is defined by the tax law to include any facility located in the United States that uses any of the following materials as a fuel source to produce electricity: solid, nonhazardous, cellulosic waste material or any lignin material which is derived from certain forest-related resources (mill and harvesting residues, pre-commercial thinnings, slash and brush), solid wood waste materials, including waste pallets, crates, dunnage, manufacturing and construction wood wastes (other than pressure-treated, chemically-treated, or painted wood wastes).

9. An open-loop biomass project is eligible for an ITC equal to 30% of the cost of property that is considered integral to the production of electrical power. The ITC is available to the project owner in the taxable year in which the project is placed in service. Placed in service is generally defined as the date on which the project becomes operational and capable of producing power on a sustained and regular basis.

10. If the Hu Honua Project is completed and placed in service by the end of 2020, it should certainly qualify for the ITC as it not only started construction prior to January 1, 2021 but will be completed before the ITC Deadline.

11. Even if the Hu Honua Project is delayed and placed in service after the ITC Deadline, it should still qualify for the ITC when completed under the rules promulgated by the Internal Revenue Service in a series of notices (the "**IRS Notices**") that it issued on this topic.

12. In the IRS Notices, the Internal Revenue Service defined two alternative methods by which an owner of a biomass project may start construction. The first is by commencing physical work of a significant nature and the second is by incurring at least 5% of the total eligible cost of the facility. Once construction begins under either method, work on the project must be continuous. The IRS Notices define continuous in this context to mean that the project owner made continuous efforts to advance the project towards completion.

13. The Hu Honua Project satisfied both methods of beginning construction on account of its extensive physical work at the Hu Honua Project site and the fact that it incurred far in excess of 5% of the project costs prior to the ITC Deadline. After beginning construction on the Hu Honua Project, Hu Honua and its affiliates should be viewed as having made continuous efforts to advance the project towards completion, including by paying amounts necessary for constructing the project, pursuing and obtaining permits, and engaging directly and through contractors on the ongoing construction of the project. If the Hu Honua Project is not completed until after the ITC

Deadline, it may still qualify for the ITC, but only if it can satisfy the continuous efforts standard through the completion date.

FURTHER AFFIANT SAYETH NAUGHT.

[Signature]
ELI KATZ

Subscribed and sworn to before me this

20 day of July, 2020,

[Signature]

Name: Leatrice Harris

Notary Public, State of New York

My Commission expires: 12/31/2023



[stamp]

NOTARY CERTIFICATION

Document Date: July 20, 2020

No. of Pages: 4

Document Description: _____

_____ Circuit

Affidavit of Eli Katz

[stamp]

[Signature]
Signature of Notary

07/20/2020
Date of Notarization

July 18, 2020

Warren Lee
President
Hu Honua Bioenergy, LLC
28-283 Sugar Mill Road
Pepeekeo, Hawaii 96783

RE: Carbon Credit Agreements

Dear Mr. Lee:

Enclosed herewith please find a copy of the following Pledge Agreements:

The first Pledge Agreement is by and between myself and The National Forest Foundation which ensures the planting of 1,250,000 native trees in publicly-owned, U.S. National forests, between 2020 and 2025.


The second Pledge Agreement is by and between myself and The Friends of Hawaii Volcanoes National Park, which describes a five-year plan to plant approximately 4,000 common and rare native trees and plants on Hawaii island.

Both Pledge Agreements are contingent upon the approval of the Amended and Restated Power Purchase Agreement ("A&R PPA") between HELCO and Hu Honua which is the subject of Docket No. 2017-0122.

I commit to assigning the carbon credits generated by the planting/growing of native trees as set forth in the Pledge Agreements to Hu Honua Bioenergy, LLC ("Hu Honua") should the A&R PPA be approved by the Public Utilities Commission, such that the carbon credits may be utilized to facilitate the Project becoming carbon neutral and/or carbon negative.

Thank you.

Very Truly Yours,



Jennifer M. Johnson

**PLEDGE AGREEMENT BETWEEN
JENNIFER M. JOHNSON AND
THE NATIONAL FOREST FOUNDATION**

This Pledge Agreement articulates an agreement for pledge of annual donations between the Jennifer M. Johnson (“J.Johnson”) with offices located at 1 Franklin Parkway #960 San Mateo, California 94403 and the National Forest Foundation (“NFF”) with offices located at Building 27, Suite 3, Fort Missoula Road, Missoula, MT 59804. J. Johnson and the NFF are establishing a five-year agreement whereby J. Johnson will donate to the NFF’s tree-planting campaign based on the terms outlined below and the NFF will ensure appropriate planting is completed and J. Johnson and/or her designee is acknowledged and recognized appropriately.

NFF Obligations:

General Program:

- The NFF shall ensure the planting of *1,250,000 native trees* total in publicly-owned, U.S. National Forests, over a five year period (2020-2025). See Attachment B.
- The NFF will administer funds to complete reforestation projects through the following means:
 - The NFF shall provide annually J. Johnson a suite of high priority tree-planting projects to attain at least 1,250,000 trees planted by 2025.
 - The NFF and its partner, the U.S. Forest Service, shall plant only native trees, appropriate to each planting site, using the best available science and practices to maximize conservation impact.
 - All seedling sourcing and planting activities shall be under the supervision of U.S. Forest Service foresters.
- The NFF and J. Johnson understand and acknowledge that the annual availability of tree-planting projects is dependent on the U.S. Forest Service, weather conditions, and other factors beyond the control of the NFF.
- If the NFF or the USFS cannot execute a tree planting project(s) due to unforeseeable ecological or site condition factors, the NFF shall immediately inform J. Johnson and the parties shall make every effort to identify and pursue a mutually-agreeable similar project within the same timeframe and geographic region.
- The NFF shall designate Wes Swaffar, Director of Reforestation and Partnerships, as a dedicated staff liaison to manage, report and administer this partnership.

Communications and Reporting:

- The NFF shall provide J. Johnson with unlimited use of any images, copy, video, electronic and web media, or graphics developed for this partnership.
- The NFF shall provide narrative project descriptions, brief tag lines, and any other editorial content needed by J.Johnson in reference to this agreement.
- The NFF shall provide to J. Johnson annually a detailed, illustrated tree-planting report at the conclusion of each years planting.
- The NFF shall provide basic project data about species, planting density and planting locations to J. Johnson to conduct independent carbon sequestration estimates about the impact of this agreement.

- Any independent carbon estimates are the responsibility and property of J. Johnson. As such, J. Johnson shall assume all liability for carbon reduction claims.

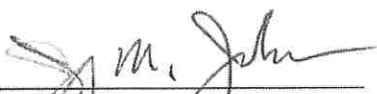
J.Johnson Obligations:

- J. Johnson and the NFF understand that award of this grant, and each payment hereunder, is/are contingent upon the Hu Honua Biomass Plant being placed in service. While J. Johnson expects this to occur by September 15, 2020, external factors may delay this timeframe.
- In the event that the Hu Honua Biomass Plant is not placed in service before a payment becomes due, the NFF and J. Johnson can: (a) amend this agreement to structure payments dates in line with annual planting schedules, or (b) terminate this agreement at the sole discretion of J.Johnson.
- J.Johnson intends to donate a total of \$1,250,000 to the NFF across five (5) renewable annual payments. Payments shall be made by wire transfer as follows:
 - \$250,000 by September 30, 2020 or, if the Hu Honua Biomass Plant is placed in service after the target date above, then this payment will occur within thirty (30) days of the plant being placed in service.
 - \$250,000 by September 30, 2021
 - \$250,000 by September 30, 2022
 - \$250,000 by September 30, 2023
 - \$250,000 by September 30, 2024
- J.Johnson shall provide the NFF with an opportunity to review and approve its proposed use of the NFF's logo and name prior to the first such use. The NFF shall reply promptly to accommodate J.Johnson's production needs.
- J.Johnson understands that the NFF invests 85% of partnership funds directly on tree planting and direct partnership activities, with the balance (15%) allocated for program management, including financial stewardship, reporting, and other expenses. See Agreement Budget in Attachment A.


Mutual Obligations:

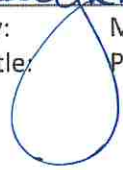
- Neither the NFF nor J.Johnson will hold the other liable for any claims made under, during, or as a result of this Agreement, and the parties hereby agree to indemnify each from any claims hereunder.
- The NFF and J.Johnson acknowledge that this Agreement represents a voluntary pledge designed for charitable purposes.
- This partnership does not confer or imply endorsement of J.Johnson by the NFF or the U.S. Forest Service, nor endorsement of the NFF or the U.S. Forest Service by J.Johnson.

Signed:


By: Jennifer M. Johnson
Title: Donor

Date: 11/20/19



By: Mary K. Mitsos
Title: President and CEO




Date:

ATTACHMENT A

Agreement Budget

Purpose	Amount
Reforestation Expenses	\$1,062,500
NFF Program Management	\$187,500
Total	\$1,250,000

ATTACHMENT B

Project Investments

Projects fund will be invested annually in one or more high priority reforestation projects, which vary on an annual basis. Each year, NFF will present to J. Johnson a selection of 3-5 potential projects, drawn from the following planting regions:

- Pacific Northwest
- Intermountain West
- Great Lakes region
- Southwestern U.S.
- Southeastern U.S.

Year	Number of Trees	Location
2020	250,000	TBD
2021	250,000	TBD
2022	250,000	TBD
2023	250,000	TBD
2024	250,000	TBD

**PLEDGE AGREEMENT BETWEEN
JENNIFER M. JOHNSON AND
THE FRIENDS OF HAWAII VOLCANOES NATIONAL PARK**

This Pledge Agreement articulates an agreement for a pledge of donations between Jennifer M. Johnson (“J. Johnson”), with offices located at 1 Franklin Parkway #960 San Mateo, California 94403 and the Friends of Hawai‘i Volcanoes National Park (“FHVNP”) with offices located at 1 Crater Rim Drive, Quarters 19, Hawai‘i National Park, HI 96718. J. Johnson and the FHVNP are establishing a five-year pledge whereby J. Johnson will donate to the FHVNP, based on the terms outlined below, and the FHVNP will ensure the designated projects are completed. In addition, J. Johnson and/or her designee will be acknowledged and recognized within the guidelines of the FHVNP’s Philanthropic Partnership Agreement and Donor Recognition with the National Park Service.

FHVNP Obligations:

Kahuku Dry Forest Project:

- The FHVNP shall ensure the Kahuku Dry Forest Project is completed within the five-year plan (as identified in Exhibit A). The FHVNP shall administer funds to complete the project as follows:

1. **Year 1 - 30 acres cleared of invasive Christmasberry and lantana treated.** This work will be mapped in GIS layer and the number of plants removed summarized in the HAVO-SEA (Hawai‘i Volcanoes National Park-Special Ecological Area) database. Systematic weed sweeps will be conducted to remove disruptive alien taxonomic groups. An initial knockdown of target weeds will be conducted by systematically sweeping areas with work crews paced at five-to-10 meters intervals in parallel transects in order to cover the kipuka. All target alien weeds will be treated with herbicide or by manual uprooting individual plants and left on site. Chemical treatments have been developed for all target species requiring chemical control. The number of plants treated, area treated, and amount of herbicide used will be recorded in the HAVO Alien Plant Control database and routinely incorporated in the APCAM databases and will be shared with the Friends of Hawai‘i Volcanoes National Park for incorporation in their Annual Report to donor J. Johnson.

Initial funding in year one will include the cost of chemicals and labor, as well as the purchase of a 4-wheel drive van. This donation/draw request will require \$125,000.00 (year one only).

The Annual Report, as described above, will include a full accounting of funds expended. FHVNP & J. Johnson understand and acknowledge that the work in year one can be done at anytime (no planting schedule is required).

2. Years two through five shall be done as described in Exhibit A. Donation/draw requests will be in equal amounts of \$66,250.00 each. Annual Reports will be provided for each year and will include a full accounting of funds expended.

Kilauea Forest Restoration Project:

- Working with the NRM Alien Plant Control staff, FHVNP will clear five miles of trails at the Kilauea site. We will plant 4,000 common and rare native trees and plants. We will collect 50 lbs. of native Mamane seed pods and pound pods for an estimated yield of 200,000 seeds. These seeds will be utilized for future restoration of native forests within Hawai'i Volcanoes National Park. See Exhibit B
- This project will be completed in two years and donation/draw requests will be in equal amounts of \$55,000.00. Annual Reports will be provided for each year and will include a full accounting of funds expended.
- The FHVNP and J. Johnson understand and acknowledge that the Kahuku Dry Forest Project and the Kilauea Forest Restoration Project are dependent on the National Park Service, weather conditions, and other factors that may be beyond the control of the FHVNP. However, these projects being in Hawai'i, and specifically the Kahuku Unit and the Kilauea Summit area of Hawai'i Volcanoes National Park, they are likely to face few obstacles, given the locations of the project work.
- If the FHVNP or the NPS cannot execute the Kahuku Dry Forest Project and/or the Kilauea Forest Restoration Project due to unforeseeable ecological or site condition factors, the FHVNP shall immediately inform J. Johnson and the parties shall identify and pursue mutually agreeable similar project(s) within the same timeframe in Hawai'i Volcanoes National Park. Hawai'i Volcanoes National Park comprises 330,000 acres and offers numerous planting projects that could be done in lieu of the Kahuku Dry Forest Project and the Kilauea Forest Restoration Project.
- FHVNP shall fully and completely indemnify J. Johnson from each any and all legal administrative or other claims, causes, or actions arising from any party in connection with the work undertaken by FHVNP.

Communications and Reporting:

- The FHVNP shall provide J. Johnson with unlimited use of any images, copy, video, electronic and web media, or graphics developed for this partnership.
- The FHVNP shall provide narrative project descriptions, brief tag lines, and any other editorial content needed by J. Johnson in reference to this agreement.
- The FHVNP shall provide to J. Johnson annually a detailed, illustrated report at the conclusion of each years of site preparation, planting & nursery propagation.
- As stated above, FHVNP shall provide annual reports detailing project(s) progress and will include full accounting of all funds expended.

J. Johnson Obligations:

- J. Johnson and the FHVNP understand that award of this directed donation, and each payment hereunder, is/are contingent upon the approval of the power purchase agreement Honua Ola


Bioenergy and Hawaiian Electric by the Public Utilities Commission, as well as the approval of all permitting necessary for the plant to operate. While J. Johnson expects this to occur by August 31, 2020, external factors may delay this timeframe.

- In the event that the Honua Ola Bioenergy plant is not placed in service by October 1, 2020, the FHVNP and J. Johnson can: (a) amend this agreement to structure payments dates in line with annual site preparation and planting schedules, or (b) terminate this agreement at the sole discretion of J. Johnson.
- J. Johnson intends to donate a total of \$500,000.00 to the FHVNP across five (5) annual payments. Payments shall be made by wire transfer as follows:
 - \$180,000.00 by September 1, 2020 or, if the Honua Ola Bioenergy Plant is placed in service after the target date above, then this payment will occur within thirty (30) days of the plant being placed in service.
 - \$121,250.00 by September 1, 2021
 - \$ 66,250.00 by September 1, 2022
 - \$ 66,250.00 by September 1, 2023
 - \$ 66,250.00 by September 1, 2024
- J. Johnson shall provide the FHVNP with an opportunity to review and approve its proposed use of the FHVNP’s logo and name prior to the first such use. The FHVNP shall reply promptly to accommodate J. Johnson’s production needs.
- J. Johnson understands that the FHVNP invests 85 percent of partnership funds directly on the projects described herein, and direct partnership activities, with the balance (15%) allocated for program management, including financial stewardship, reporting, and other expenses.

Mutual Obligations:

- Neither the FHVNP nor J. Johnson will hold the other liable for any claims made under, during, or as a result of this Agreement, and the parties hereby agree to indemnify each from any claims hereunder.
- The FHVNP and J. Johnson acknowledge that this agreement represents a voluntary pledge designed for charitable purposes.
- This partnership does not confer or imply endorsement of J. Johnson by the FHVNP or the National Park Service, nor endorsement of the FHVNP or the National Park Service by J. Johnson.

Signed:

DocuSigned by:

717483CBB4FB45D...

5/14/2020

By: Jennifer M. Johnson

Date:

Title: Donor

DocuSigned by:

Elizabeth Fien

5/14/2020

4D5543858BE74E3...
By: Elizabeth Fien

Date:

Title: President and CEO

Friends of Hawai'i Volcanoes National Park

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
 HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
 For Approval of a Power Purchase)
 Agreement for Renewable Dispatchable)
 Firm Energy and Capacity)
 _____)

CERTIFICATE OF SERVICE

I hereby certify that on this date copies of the foregoing document, together with this Certificate of Service, were duly served on the following parties as set forth below:

Parties	U.S. Mail	Hand Delivery	E-Mail
Dean Nishina Executive Director Department of Commerce and Consumer Affairs Division of Consumer Advocacy dnishina@dcca.hawaii.gov consumeradvocate@dcca.hawaii.gov dca@dcca.hawaii.gov	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Kevin M. Katsura Director, Regulatory Non-Rate Proceedings Hawaiian Electric Company, Inc. kevin.katsura@hawaiianelectric.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
David M. Louie Joseph A. Stewart Aaron R. Mun Kobayashi, Sugita, & Goda LLP Attorneys for Hawai'i Electric Light Company, Inc. dml@ksglaw.com jas@ksglaw.com arm@ksglaw.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Sandra-Ann Y.H. Wong Attorney at Law, A Law Corporation Attorney for Tawhiri Power LLC sawonglaw@hawaii.rr.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ted N. Pettit Mark G. Valencia Case Lombardi & Pettit, A Law Corporation Attorneys for Hamakua Energy, LLC tpettit@caselombardi.com mvalencia@caselombardi.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Shannon S. Broome Hunton Andrews Kurth LLP Attorney for Hamakua Energy, LLC sbroome@huntonak.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Myles F. Reynolds Hunton Andrews Kurth LLP Attorney for Hamakua Energy, LLC mreynolds@huntonak.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Henry Q. Curtis Vice President for Consumer Issues Kat Brady Vice President for Social Justice Life of the Land henry.lifeoftheland@gmail.com kat.lifeoftheland@gmail.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

DATED: Honolulu, Hawaii, July 20, 2020.



WIL K. YAMAMOTO

YAMAMOTO CALIBOSO
A Limited Liability Law Company

Counsel for HU HONUA BIOENERGY, LLC

Home News & Events Dockets **Filing & Forms** Information About

Contact Us

Home » Filing & Forms

THE HAWAII PUBLIC UTILITIES COMMISSION ACKNOWLEDGES RECEIPT OF YOUR SUBMITTAL.

Form:	Hawaii PUC eFile Docketed
Entity:	Yamamoto Caliboso
Confirmation Number:	MAMB20142508676
Date and Time Received:	Jul 20 2020 02:25 PM
Date Filed:	Jul 20 2020

NOTICE OF ELECTRONIC FILING: Your electronic filing has been accepted. Submittals received after 4:30 p.m. shall be deemed filed the next business day. The mere fact of filing shall not waive any failure to comply with [Hawaii Administrative Rules Chapter 6-61, Rules of Practice and Procedure Before the Public Utilities Commission](#), or any other application requirements, and the Hawaii PUC may entertain timely motions in connection with your filing or require you to amend your filing.

[PUC Home](#)

[Filing](#)

[DMS Home](#)

FILING & FORMS

- Filing Complaints
- Filing Docketed Documents
- Filing Non-Docketed Documents
- Motor Carriers Forms
- Office Forms
- Payments
- Utilities Forms
- Water Carriers Forms

EFILING

Individuals seeking to eFile must **register online**. Within 2 business days of registering you will

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
)

**HU HONUA BIOENERGY, LLC'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF HU HONUA BIOENERGY LLC'S MOTION FOR
RECONSIDERATION OF ORDER NO. 37205, ISSUED JULY 9, 2020**

AFFIDAVIT OF JONATHAN JACOBS

AFFIDAVIT OF BRUCE PLASCH

AND

CERTIFICATE OF SERVICE

BRUCE D. VOSS

BAYS LUNG ROSE & HOLMA
Topa Financial Center
700 Bishop Street, Suite 900
Honolulu, Hawaii 96813
Phone No. (808) 523-9000
Facsimile No. (808) 533-4184
Email: bvoss@legalthawaii.com

Counsel for HU HONUA BIOENERGY, LLC

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
A.	The Commission’s findings that RDG-PPAs from Phase 1 RFP Are Comparable to Hu Honua are Erroneous.....	2
1.	The RDG-PPA projects cannot provide the full range of capabilities and grid services that a firm dispatchable resource can.....	2
2.	The Commission has significantly understated the cost of the Phase 1 RFP RDG-PPAs.....	8
3.	The Commission ignores that the Project is essentially complete while also ignoring the apparent delays and uncertainty regarding the Phase 1 RFP and Phase 2 RFP projects.....	15
B.	The Commission’s statements regarding jobs and economic benefits by Hu Honua as compared to other renewable energy projects are erroneous.....	16
II.	CONCLUSION.....	23

TABLE OF AUTHORITIES

CASES

In re Hawaii Electric Light Company, Inc., 145 Hawaii, 445 P.3d..... 23

STATUTES

HRS § 269-6(b)..... 23

RULES

HAR § 16-601-139 2
HAR § 16-601-22 1
HAR § 16-601-41 1
HAR 16-601-137 1

OTHER AUTHORITIES

Affidavit of Jon Miyata..... 16
Consumer Advocate’s Response to HHB/CA-IR-1.a, filed December 6, 2019 16
Decision and Order No. 34726, filed July 28, 2017 17
Docket No. 2017-0122, Order No. 37205 Denying Hawaii Electric Light Company, Inc.'s Request
For A Waiver And Dismissing Letter Request For Approval Of Amended And Restated Power
Purchase Agreement, filed July 9, 2020 passim
Docket No. 2017-0352, Hawaiian Electric Companies' Final Stage 2; Renewable and Grid Services
RFPs; Book 5 of 7, filed August 22, 2019 4, 7
Docket No. 2017-0352, Hawaiian Electric Companies' Final Variable Requests for Proposals, filed
February 27, 2018 4
Docket No. 2018-0102, HECO’s Responses to PUC-IR-109, filed January 15, 2019..... 6
Docket No. 2018-0430, Application, filed December 31, 2019 5, 12, 13, 14
Docket No. 2018-0430, Order No. 36233, filed March 25, 2019..... 9
Docket No. 2018-0431, HECO’s Response to PUC-HECO-IR-14, filed July 16, 2020..... 16
Docket No. 2018-0432, Application, filed December 31, 2018 5, 13, 14
Docket No. 2018-0432, Order No. 36234, filed March 25, 2019..... 10
HELCO’s Response to TAWHIRI-HELCO-IR-7, filed December 9, 2019..... 7

Hu Honua’s Response to Tawhiri/HHB-IR-12, filed December 9, 2019 16

HU HONUA-401, filed January 28, 2020 17, 18

NREL, Inertial and the Power Grid: A Guide Without the Spin (May 2020) 6

PA Consulting Report passim

PJM Capacity Performance Proposal, dated August 20, 2014 4

Prehearing Testimony of Jonathan Jacobs, filed January 28, 2020 8, 13

S&P Global Market Intelligence, Essential Energy Insights – June 11, 2020..... 4

Supplemental Affidavit of Dr. Bruce Plasch 18, 19, 20

Supplemental Affidavit of Dr. Jonathan Jacobs 2, 8

U.S. Dept. of Energy, Energy Storage Technology and Cost Characterization Report, (July 2019)
..... 11, 12

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

**HU HONUA BIOENERGY, LLC'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF HU HONUA BIOENERGY LLC'S MOTION FOR
RECONSIDERATION OF ORDER NO. 37205, ISSUED JULY 9, 2020**

I. INTRODUCTION.

Hu Honua Bioenergy, LLC, a Hawaii limited liability company ("Hu Honua"), by and through its undersigned counsel, Bruce Voss of Bays Lung Rose & Holma, hereby submits this supplemental memorandum in support of Hu Honua's Motion for Reconsideration of Order No. 37205 ("Order Revoking Waiver"), issued by the Public Utilities Commission of the State of Hawaii ("Commission") on July 9, 2020, pursuant to Hawaii Administrative Rules ("HAR") §§ 16-601-41 and 16-601-137¹

This supplemental memorandum in support of the Motion for Reconsideration is submitted to demonstrate that the Commission's reliance on pricing comparisons between the Hu Honua project and the Phase 1 RDG-PPAs are erroneous and misleading, and to correct the unsupported and erroneous findings by the Commission regarding its comparison of jobs and economic benefits between Hu Honua and the Phase 1 RFP projects on Hawaii Island.

¹ Hu Honua's supplemental memorandum is timely filed. Pursuant to HAR 16-601-137, a motion for reconsideration "shall be filed within ten days after the decision or order is served upon the party." Order No. 37205 was served by email on July 9, 2020. Ten days therefrom is Sunday, July 19, 2020. HAR § 16-601-22 provides that in the computation of time under Title 16, Chapter 601, where the last day of a period specified falls on a Saturday, Sunday, or holiday, the period runs until the next day that is not a Saturday, Sunday, or holiday. Accordingly, this memorandum is due on or before Monday, July 20, 2020, and is timely filed.

A. The Commission’s findings that RDG-PPAs from Phase 1 RFP Are Comparable to Hu Honua are Erroneous.

The Commission’s Order Revoking Waiver states that the RDG-PPAs that resulted from Docket 2017-0352 “have produced real alternatives against which to evaluate the benefits and costs of the Hu Honua Project and diminish the persuasiveness of the Applicants’ wavier arguments.”² The Commission cites the AES Waikoloa Solar and Hale Kuawehi Solar projects on Hawaii Island that will be capable of producing 30 MW(ac) paired with a battery energy storage system (“BESS”) capable of storing 120 MWh of energy (4-hours) that is charged from the PV system.³

Attached to this memorandum is the supplemental affidavit of Hu Honua’s retained expert Dr. Jonathan Jacobs (“Dr. Jacobs”), which is intended to support this supplementation of the record pursuant to HAR § 16-601-139 (“Jacobs Affidavit”). The record is being supplemented because the Commission in its Order Revoking Waiver apparently relied on information outside of this docket and erroneously compared the Hu Honua Project to the Phase 1 RFP projects in development on Hawaii Island, which was not previously the focus of this docket.⁴ Hu Honua appreciates the Commission’s consideration of this additional information.

1. The RDG-PPA projects cannot provide the full range of capabilities and grid services that a firm dispatchable resource can.⁵

The Commission’s Order Revoking Waiver states, “the RDG-PPA projects are capable of providing grid supportive services.”⁶ This is not true, certainly not if the Commission means capability at the same level as Hu Honua. Hu Honua can support the two key aspects of system reliability – resource adequacy and system security. It can provide this support at any time of day,

² Order Revoking Waiver, at 27.

³ Order Revoking Waiver, at 28.

⁴ Jacobs Affidavit at ¶ 5.

⁵ Jacobs Affidavit at ¶¶ 5-7.

⁶ Order Revoking Waiver, at 32.

whereas the capability of the RDG-PPA solar projects are constrained by the storage capacity of the BESS components, the availability of solar energy from the photovoltaic components to charge the BESS daily, and the as-available and intermittent operation of the photovoltaic components themselves. Resources like Hu Honua, that are firmly dispatchable 24/7, can replace fossil-fired generation; resources like the RDG-PPA solar projects cannot.

The limited storage of a battery energy storage system means it cannot serve all requirements. The Commission's Order Revoking Waiver quotes HELCO as saying, "[HELCO] anticipates that it will dispatch the battery energy storage system's stored energy to [HELCO's] grid to, among other things, help with ramping towards [HELCO's] periods of peak energy demand (rather than ramping up conventional generation), offset night-time fossil fuel generation, and assist in grid stabilization subject to discharge limits."⁷ However, what the Commission fails to recognize is that the limited storage creates additional opportunity costs. For example, if the BESS is used to offset night-time fossil fuel use, it will not be able to ramp up to meet the morning load pickup. If it is used to support the morning ramp, it probably will not have enough energy to maintain that dispatch until the PV panels begin generating and some other generator will have to ramp up to replace it.

The Phase 1 RFP and Phase 2 RFP solicitations do not demonstrate that the need for grid supportive services can be met by a competitive bidding process for RDG-PPA projects because, by their nature, the RDG-PPA projects are not capable of supplying all the grid supportive services that a traditional fossil fuel plant and Hu Honua can. A system operator requires these services in order to operate the grid. Grid supportive services are used to maintain system reliability.

Power engineers assess reliability in two dimensions: resource adequacy and system

⁷ Order Revoking Waiver, at 32.

security.

Resource adequacy means having enough physical capacity to cover the peak load plus a reserve margin. When the Eastern Pools first defined “installed capacity” requirements, they were dominated by fossil-fired generation and did not have to worry about how long that capacity could operate, but with increases in renewable generation and storage it became important to specify. For at least the last 15 to 20 years, system operators have generally required that a resource could only count towards resource adequacy if it was capable of, and could demonstrate, operation at full output for four consecutive hours. This is the standard against which the Phase 1 RFP and Phase 2 RFP bids were judged.⁸

In recent years system operators have argued that the four-hour duration is not long enough to assure resource adequacy. PJM has filed a new standard of ten hours: “With respect to qualification as the Base Capacity product, PJM proposes that storage resources qualify to provide that amount of Installed Capacity for which they can provide energy for ten continuous hours.”⁹ This 10-hour requirement will significantly increase the cost of obtaining resource adequacy from batteries, and as a consequence has been strenuously opposed.¹⁰ The New York ISO has considered increasing its own four-hour standard to eight hours. And PJM has gone further by setting up a separate requirement for “capacity performance” resources that are capable of sustained, predictable operation for 16 hours per day for three consecutive days.

HELCO’s Applications for approval of the AES Waikoloa and Hale Kuawehi contracts

⁸ Docket No. 2017-0352, Hawaiian Electric Companies' Final Variable Requests for Proposals, filed February 27, 2018, at § 1.2.12; Hawaiian Electric Companies' Final Stage 2; Renewable and Grid Services RFPs; Book 5 of 7, filed August 22, 2019, at § 1.2.13.

⁹ See PJM Capacity Performance Proposal, dated August 20, 2014, at 13, available at <https://www.pjm.com/-/media/committees-groups/committees/elc/20140822/20140822-pjm-capacity-performance-proposal.ashx>

¹⁰ S&P Global Market Intelligence, Essential Energy Insights – June 11, 2020, “Split FERC shortens time frame for PJM to devise new rules for storage resources”, <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/split-ferc-shortens-time-frame-for-pjm-to-devise-new-rules-for-storage-resources-58011132> (last accessed July 17, 2020).

identify these resources as *load-shifting resources*, which does not necessarily even mean they meet the four-hour standard for *resource adequacy*.¹¹ While the BESS systems may be adequate for energy shifting from the middle of the day to evening/night hours, they cannot be charged from the grid¹² so each Phase 1 RFP resource can deliver no more power in a four-hour period than its PV generation that day – less about 14% for losses. Based on the PVWatts simulation conducted for the PA Report, there will be 72 days out of the year – one-fifth of the year – on which the BESS associated with a plant like AES Waikoloa cannot store enough energy to discharge for four hours.

Hu Honua, on the other hand, can provide resource adequacy regardless of any duration requirements. It has no energy-availability constraint on its operation and is capable of full dispatch 24/7 year-round.

System security means ability of a power system to withstand sudden disturbances. There are a number of services that contribute to security including inertia, frequency regulation, ramping, spinning and non-spinning operating reserves, etc. The ability of BESS to provide many of these services is limited by its limited storage and physical properties; we will concentrate here on one of them, frequency response.

One of the most important aspects of system security is the ability to maintain a steady frequency. Frequency maintenance includes frequency regulation under automatic generator control singles (usually sent about every six (6) seconds). Like Hu Honua, a BESS system can provide upward and downward regulation while generating (discharging).

¹¹ See Docket No. 2018-0430, Application, filed December 31, 2019, at 3 (“The Facility as a whole will provide grid services and additional capabilities to the Hawai’i Electric Light system. In particular, the storage capability of the Facility will allow the Company to shift the delivery to the grid of the energy generated by the Facility to times when the need is greater.”); Docket No. 2018-0432, Application, filed December 31, 2018, at 3 (“The Facility as a whole will provide grid services and additional capabilities to the Hawai’i Electric Light system. In particular, the battery energy storage system will allow the Company to store energy from the PV system during the times of the day when demand is lower and shift the delivery of such stored energy to the grid when demand is higher).

¹² See AES Waikoloa Application, at 15; Exhibit 2 at 4; Hale Kuawehi Application, at 15, Exhibit 2 at 4.

Frequency control is required at a finer timescale than six seconds. Rotating generators like Hu Honua have speed governors which passively maintain their rotational speed, and the grid's electrical frequency. They also have physical inertia that helps cushion them – and the grid -- against sudden stops. Batteries and PV are purely electronic devices and lack these physical features. While there are some studies that have demonstrated that that inverter-based resources can provide synthetic inertia that matches the performance of spinning inertia from traditional thermal generators, there is no meaningful example of a power grid operated on mostly synthetic inertia.

Fast frequency response (“FFR”) describes the ability of some resources, including inverter-based generators and load response, to increase the net supply of energy much faster than traditional mechanical-based primary frequency response (PFR). This helps offset the loss of system inertia from fossil-fired generators because the more-rapid decline in frequency that can result from lower inertia can be balanced by the more-rapid response from FFR.¹³ In discussing whether Phase 1 RFP projects could provide FFR, HECO stated:

[T]he batteries in the solar-plus-storage projects are not contractually required to provide the fast response necessary for contingency reserves. The performance standards for these projects require primary frequency response (“PFR”), but do not require fast frequency response (“FFR”)...Even if the solar-plus-storage projects are able to deliver a faster response for FFR1 contingency reserves, there are still limits to when these reserves would be available. If the energy was depleted due to load shifting, or if the contingency event happened at night or an extended period without sun, there would be insufficient reserves available to provide this grid service.¹⁴

¹³ See NREL, *Inertial and the Power Grid: A Guide Without the Spin* (May 2020), accessible at <https://www.nrel.gov/docs/fy20osti/73856.pdf>.

¹⁴ See Docket No. 2018-0102, HECO's Responses to PUC-IR-109, filed January 15, 2019; see also HECO's Response to PUC-IR-110.

In other words, the Phase 1 RFP RDG-PPAs cannot provide FFR. The Phase 2 RFP permitted bids including 1-hour “contingency storage” outfitted to provide FFR,¹⁵ but the passage above indicates that their ability to serve as FFR reserves is severely limited. The applications for approval for the two Phase 1 RFP RDG-PPAs do not include any details of the provision of synthetic inertia and none of the Phase 2 RFP RDG-PPAs (which are still being negotiated) have been executed and made public yet.

Hu Honua actually provides something more valuable than FFR, inertial frequency response (“IFR”). Hu Honua’s IFR does not have the same limits that HECO attributed to FFR because it is able to provide 24/7 dispatchability. HELCO has stated its belief in the importance of IFR:

The Hu Honua facility provides true rotational inertia from a rotating mass, that is the actual rotor of the generator and all the turbine mass attached to its shaft. Rotational inertia is important for limiting the rate of change of frequency for faults and contingencies. Wind and solar and storage are not synchronous machines and cannot provide a true inertia. Inverter based resources do not have the physical inertia response and the behavior of the resource is determined by the programmed logic in the controls. Some inverter resources can be programmed to have a change in active power in relationship to a fast rate of frequency change, which is sometimes described as “synthetic inertia” but is not equivalent to true inertia and if not configured carefully can worsen rather than improve system performance following disturbances as it is not instantaneous but requires a system measurement to deploy and is eventually withdrawn: whereas true rotational inertia is provided inherently by the electromechanical physics of the synchronous machine.¹⁶

¹⁵ Docket No. 2017-0352, Hawaiian Electric Companies' Final Stage 2; Renewable and Grid Services RFPs; Book 5 of 7, filed August 22, 2019, at § 1.2.13.

¹⁶ HELCO’s Response to TAWHIRI-HELCO-IR-7, filed December 9, 2019.

2. The Commission has significantly understated the cost of the Phase 1 RFP RDG-PPAs.¹⁷¹⁸

In his testimony¹⁹ and the accompanying report,²⁰ Dr. Jacobs points out that the “unit prices” of \$0.08/kWh and \$0.09/kWh for the RDG-PPAs that the Commission quoted its Order Revoking Waiver²¹ are actually not prices for delivered energy such as might be found in the Hu Honua A&R PPA or most other Power Purchase Agreement. They are based on a new form of RDG-PPA which provides a fixed monthly payment for a certain amount of capacity, which the buyer is obligated to pay regardless of the volume of energy actually delivered.²²

One way to look at comparative pricing would be to consider how much it would cost just to achieve 24/7 deliverability from projects like these. Since the BESS associated with each of them is capable of providing 4-hour deliverability, the simplest way to estimate that cost is to assume that six versions of one of the RDG-PPA projects were built (one to cover each 4-hour period in a day), but scaled to the size of Hu Honua (21.5 MW). That total cost would have to be allocated across the assumed production of each of those six versions.

For the purposes of this comparison, PA assumed the six versions together would deliver at least at Hu Honua’s minimum level of 10 MW, but also that during the day they would deliver at least as much as a single 21.5 MW PV-only installation. Although we only assume 10 MW discharge in many hours (e.g., overnight), the full 21.5 MW must still be built so it will be available if needed. This resulted in the following average prices per delivered kWh:

¹⁷ Dr. Jacobs has previously referred to these as Variable Renewable Generation contracts. The Commission refers to them as Renewable Dispatchable Generation (RDG) contracts and we have adopted that language here.

¹⁸ Jacobs Affidavit at ¶¶ 5-7.

¹⁹ Prehearing Testimony of Jonathan Jacobs (“Jacobs Testimony T-5”), filed January 28, 2020, at 16, line 10 to 17, line 6.

²⁰ “Comparison of the ratepayer cost of the Hu Honua Bioenergy contract with alternatives that may be available to HELCO”, Exhibit HU HONUA-501 to Jacobs Testimony T-5 (“PA Consulting Report”).

²¹ Order Revoking Waiver, at 21.

²² PA Consulting Report, at 27-28.

AES Waikoloa	\$0.250/kWh
Hale Kuawehi	\$0.287/kWh

Therefore, if solar plus BESS projects are scaled to provide 21.5 MW of 24/7 deliverability, the average prices per delivered kWh would be higher than Hu Honua, yet would still not be able to provide the same level of capabilities that Hu Honua provides, as discussed below. Intermittent renewable energy sources with a 4-hour BESS are not comparable to a truly 24/7 firm energy dispatchable source such as Hu Honua. High level approximations of the cost to replicate 24/7 firm dispatchability with RDG-PPAs are several times the “unit prices” of those contracts.

The prices in the RDG-PPAs are based on “Net Energy Potential” (referred to herein as “NEP”).²³ The NEP is supposed to represent the total amount of energy each PV plant can produce in a year with 95% confidence, that is, the fifth percentile of the probability distribution of annual production.²⁴ Thus:

- The price estimates upon which the Commission relies are understated because the unit price of the AES Waikoloa contract is \$0.07945508/kWh and the Commission relies on AES’s projected NEP of 81,406 MWh per year to estimate a total annual Lump Sum Payment of approximately \$6.486 million/year.²⁵ If the project delivers less than the projected 81,406 MWh in a year, the average price per kWh delivered will be higher – for example, if the project delivers 40,000 MWh the average price of energy from the contract will be approximately twice the contractual “unit price” of \$0.07945508/kWh, and instead the actual unit price would be \$0.15891016/kWh.

²³ PA Consulting Report, at 28.

²⁴ PA Consulting Report, at 28.

²⁵ Docket No. 2018-0430, Order No. 36233, filed March 25, 2019, at 52-55; Order Revoking Waiver, at 28-31.

- The unit price of the Hale Kuawehi contract is \$0.087399188/kWh and the Commission relies on the projected NEP of 87,415 MWh per year to estimate a total annual Lump Sum Payment of approximately \$7.64 million/year.²⁶ If the project delivers less than 40,000 MWh in a year, the average price per kWh from the contract will be over twice the contractual “unit price” of \$0.087399188/kWh, and instead the actual unit price would be \$0.191000000/kWh.

There are a number of reasons why the energy delivered from these two projects will almost certainly be less than their NEP, some of which are outlined in the Jacobs testimony and the PA Consulting Report:²⁷

1. The NEP estimates themselves appear to be based on optimistic forecasts of the production capability of the photovoltaic components of the Phase 1 RDG-PPA projects. PA Consulting has not reviewed the specific NEP computations. However, PA Consulting used the publicly available PVWatts model and information in the AES Waikoloa proposal to estimate the production of that plant in a “typical year”. The figure PA Consulting computed was 78,537 MWh, close to but about 3.5% less than the projections for that project. Importantly, the production in a typical year should be similar to the 50th percentile of the probability distribution, not the 5th (which would be lower). If the PVWatts projection is less than the projected NEP, then since the fifth percentile would most likely be even lower than a “typical year” projection, then it is reasonable to suspect that 87,415 MWh/year is an optimistic forecast of the NEP.

²⁶Docket No. 2018-0432, Order No. 36234, filed March 25, 2019, at 52-55; Order Revoking Waiver, at 28-31.

²⁷ See generally PA Consulting Report.

2. The amount of energy actually delivered by the RDG-PPAs will be less than the production capability of their photovoltaic components due to round-trip energy losses in the BESS components. Photovoltaic plants exhibit their greatest production during a limited set of hours in the afternoon. Geographic diversity can mitigate some of the intermittency of photovoltaic power caused by local weather, but it cannot affect that underlying temporal correlation, especially when projects are all on a single island the size of Hawaii.²⁸ With the increasing penetration of distributed PV (e.g., rooftop solar) that HELCO forecasts, it is very likely that in those hours renewable generators will be trying to inject more power into HELCO's grid than demand can accept. HELCO cannot prevent customers who own PV from using it to meet their own energy needs, and prior renewable contracts generally provide for curtailment by seniority. That means that HELCO's first option in matching generation to load will have to be to reduce the injection from the RDG-PPAs by directing them to either store their production (until the associated BESS systems are fully charged) or to reduce their production.

Because the amount of storage in each is limited to 120 MWh (four hours' worth of solar production at full capacity), not all the photovoltaic output can be stored. Furthermore, storage of energy in lithium-ion batteries involves round-trip energy losses. Published figures indicate that a reasonable estimate of round-trip losses is 14%.²⁹ “[E]stimates as low of 77 percent and as high as 98 percent were

²⁸ PA Consulting Report, at 22.

²⁹ See U.S. Dept. of Energy, Energy Storage Technology and Cost Characterization Report, (July 2019), Table ES.1, located at https://www.energy.gov/sites/prod/files/2019/07/f65/Storage%20Cost%20and%20Performance%20Characterization%20Report_Final.pdf (indicates a round-trip efficiency of 86%, i.e., 14% losses) (last accessed July 16, 2020).

reported. PNNL testing of grid-scale batteries yielded an AC-AC RTE of 83–87 percent over 1.5 years of testing, while RTE for a battery >5 years old was 81 percent.”³⁰ These figures are based on the energy stored; not the energy delivered. For example, the ranges from PNNL’s testing indicated losses of 15% to 20.5% of the actual deliveries to the grid, and the worst-case figure implies that there could be round trip energy losses of as much as 29.9% of deliveries. In other words, if HELCO dispatched the plants every day so as to fill storage with 120 MWh of energy for later use – whether due to over-generation, economics or operational considerations – then, using PNNL’s summary figure, even if HELCO accepted all the rest of the PV production, deliveries from the project would be reduced by 7,130 MWh/year in round-trip energy losses (almost 9% of production, which is not part of the system losses of over 7%) - almost 9% of the estimated NEP of Waikoloa.

3. Solar energy production from the RDG-PPA projects will decline due to natural degradation of the photovoltaic panels. Silicon photocells’ production degrades physically over time. The AES Waikoloa RDG-PPA indicates that it actually plans to install 45 MW of PV panels, but inverter capacity will be limited to 30 MW.³¹ In other words, they will actually have more solar capacity than the contract quantity but will limit the amount of power they can extract from that capacity. Developers do so in part to increase the capacity factor of solar plants, but also as a hedge against degradation. As the extra 15 MW (in this case) of panel capacity

³⁰See U.S. Dept. of Energy, Energy Storage Technology and Cost Characterization Report, (July 2019) available at 4.15, located at https://www.energy.gov/sites/prod/files/2019/07/f65/Storage%20Cost%20and%20Performance%20Characterization%20Report_Final.pdf (last accessed July 16, 2020).

³¹ Docket No. 2018-0430, Hawai’i Electric Light Company, Inc.’s Application, filed December 31, 2018, at 13.

degrades, the plant will still be able to deliver up to 30 MW to the grid and will not suffer a performance penalty; however, its generation in hours of less-than-maximal DC output will be reduced, so total annual production will decline.³²

4. HELCO has recognized that neither RDG-PPA project, taken by itself, will ever achieve the level of deliveries implied by the NEP estimate. HELCO's Applications for approval of the two Phase 1 RFP-RDG contracts included delivery forecasts by year, in tables of "Renewable Portfolio Percentage", that clearly recognize that energy deliveries from each contract will be less than the NEP of each contract.³³ In fact, no annual delivery forecast exceeds 90% of the associated project's NEP, and the forecasts decline precipitously over the first eight contract years.
5. If both Phase 1 RDG-PPA projects are completed, the production of each will be even less than is implied by the HELCO Applications. The figures cited in the previous paragraph almost certainly overestimate the two contracts' deliveries. Both projects are expected to come online in 2022; yet based on Exhibit 3 of each Application,³⁴ each contract was evaluated in the absence of the other. It was noted above that the reason for the declining dispatch of each project is the correlation of production from different PV resources; it is certainly the case that these two resources' production is correlated. With both resources present, the reductions in dispatch from each will be exacerbated.

³² Jacobs testimony, p.16 line 20 – p. 17 line 2.

³³ See Docket No. 2018-0430, Hawai'i Electric Light Company, Inc.'s Application ("AES Waikoloa Application"), filed December 31, 2018, at Exhibit 6; Docket No. 2018-0432, Hawai'i Electric Light Company, Inc.'s Application, at Exhibit 6 to Application ("Hale Kuawehi Application"), filed December 31, 2018.

³⁴ See AES Waikoloa Application at Exhibit 3; Hale Kuawehi Application at Exhibit 3.

6. While we do not have enough information to accurately estimate all the effects cited in the previous paragraphs, we can estimate a worst case in the form of a minimum for the likely deliveries. There is a reasonable lower bound to the energy deliveries of each resource, and it is the total amount of production that can be stored for later use. Each BESS can store 120 MWh (if there is enough sunshine) and cycle daily; except that on days when the amount of associated PV production is less than 120 MWh the BESS can store no more than that amount. Both contracts also allow for a 4% Equivalent Forced Outage Factor.³⁵ Based on the simulated PV production from the PVWatts model used for the PA Consulting Report, and derated 4% for forced outages, that amount is 41,570 MWh. At that delivery level the average price per kWh would be \$0.156/kWh for AES Waikoloa and \$0.184/kWh for Hale Kuawehi.
7. HELCO's estimates, and even the "lower bound" estimate just provided still do not account for unfavorable weather. The estimates in paragraphs 4-6 are all contingent on the weather conditions. HELCO has said that conditions they modeled are "historical averages [that] include both good and bad weather events". That is not necessarily the same as a "typical year" as is usually used in modeling the operation of PV resources. A "historical average" for a particular day would average out the weather conditions on that month and day (or nearby days) over multiple years. Historical averages show very little variation from day to day. A typical year, which may be created synthetically, should have the same total PV energy available but with a typical pattern of sequences of high- and low-solar days, with more

³⁵ See AES Waikoloa Application at Exhibit 1, at 29; Hale Kuawehi Application at Exhibit 1, at 29.

extremes. That is important when modeling portfolio dispatch. A PV plant will generally be curtailed or dispatched downward more when modelled in a “typical year” than an “average year”. If HELCO modeled “historical average” years rather than “typical” years, it would be overstating the deliveries from the RDG-PA contracts and understating their energy costs.

Moreover, based on the PA’s PVWatts simulation, on low-solar days the total production from the PV component of an RDG-PPA project can fall well below the less required to fully charge the BESS component. Therefore, it may not even be possible to achieve the lower bound cited in paragraph 7.

Finally, not every year is typical. In some years extended periods of storms and overcast reduce the available amount of photovoltaic energy. Initial simulation work by PA indicates that the average price of power from the RDG-PPA project could be an additional 7% higher in as many as 4 out of every 10 years.

These seven points support the contention that the Commission has used an incorrect representation of the average cost of energy from the Phase 1 RDG-PPA projects. The cost modifications address only the cost to provide energy from the RDG-PPA resources. As noted above, the RDG-PPA projects do not have the same capabilities as Hu Honua, capabilities that will be critical to reducing the use of, and replacing, fossil fuel oil-fired generation.

3. The Commission ignores that the Project is essentially complete while also ignoring the apparent delays and uncertainty regarding the Phase 1 RFP and Phase 2 RFP projects.

The Commission’s Order Revoking Waiver also completely ignores the current uncertainty regarding the Phase 1 and 2 RFP projects resulting from COVID-19. Prior to the outbreak of COVID-19, the Consumer Advocate admitted in this proceeding that it is “not aware of possible additions of new utility-scale firm, dispatchable energy resources for the island of Hawaii in the

year 2020.”³⁶ COVID-19 has caused significant additional harm to Hawaii’s economy and workforce and will likely result in delays for the both Phase 1 RFP and Phase 2 RFP projects. For the Phase 1 RFP projects, significant delays associated with the interconnection process have been reported, and they have yet to go through Commission approval proceedings regarding overhead lines before they can commence construction – potentially pushing back commercial operations to 2022 or 2023.³⁷ In contrast, the Hu Honua Project is 99% complete.³⁸

In addition, to date there have not been any RDG-PPAs *executed and approved* by the Commission for the Phase 2 RFP to determine the firmness of those projects, so accounting for such future generation (and associated firmness) would be too speculative at this time. Hu Honua's capacity and ancillary services will also immediately increase the reliable supply of electricity to HELCO's system beginning as early as 2020. In light of recent events on Hawaii island, including the current shutdown of the Puna Geothermal Ventures (“PGV”) project as a result of volcanic activity and the great uncertainty recently caused by COVID-19, Hu Honua can help provide energy security as biomass will be grown on island. Hu Honua’s Project is less exposed to volcanic lava flow risks, and the Project is near completion.³⁹ Waiting several years for a firm renewable RFP (none are currently available) would frustrate this outcome.

B. The Commission’s statements regarding jobs and economic benefits by Hu Honua as compared to other renewable energy projects are erroneous.

The Commission’s Order Revoking Waiver states that “[a]rguably, any renewable project selected for Hawaii Island would provide economic stimulation and job creation, in that a facility would need to be built, maintained, and operated.”⁴⁰ The Commission, relying on this unfounded

³⁶ Consumer Advocate’s Response to HHB/CA-IR-1.a, filed December 6, 2019.

³⁷ See Docket No. 2018-0431, HECO’s Response to PUC-HECO-IR-14, filed July 16, 2020 (Table reporting delays for each Phase 1 RFP Project).

³⁸ Miyata Affidavit at ¶ 4.

³⁹ See Hu Honua’s Response to Tawhiri/HHB-IR-12, filed December 9, 2019.

⁴⁰ Order Revoking Waiver, at 35.

assumption, concludes that it is “not persuaded that these circumstances [unique community benefits] are sufficient to distinguish the Project from any other competitively bid project to the level necessary to justify a waiver.”⁴¹ The Commission’s conclusion that the benefits of the Project, as compared to the RFP projects, are not sufficiently different to justify a waiver from the Competitive Bidding Framework is wrong.

Previously, in the 2017 D&O the Commission found that the Project is “anticipated to provide community benefits, including economic stimulation and the creation of jobs, both at the Hu Honua facility and supporting jobs in industries such as forestry, harvesting, and hauling.”⁴² This continues to remain true today. Hu Honua will provide a significant benefit to Hawaii Island unique to its Project in that it will provide numerous permanent local jobs for Hawaii Island and the State. Hu Honua will continue to create hundreds of temporary and permanent jobs in construction, forestry, and transport. Proof of Hu Honua’s economic benefit is shown by the many jobs created in connection with plant operations, including administration, most of which have already been filled by residents of Hawaii island. Hu Honua can replicate East Hawaii’s former sugar industry by providing demand for the forestry sector for the next 30 years.

Hu Honua’s consultant, economist Bruce Plasch, utilized the State’s economic input-output model of Hawaii’s economy to estimate the economic activity (direct and indirect) that the Project will generate. With respect to employment, Dr. Plasch found that during construction, Hu Honua will create 245 jobs on Hawaii island and 313 jobs statewide.⁴³ During operations at the full Committed Capacity (“High Scenario”), Hu Honua will create approximately 188 jobs on Hawaii island and about 227 jobs statewide, which include: 38 plant operation jobs, 66 forestry jobs, 12

⁴¹ Id.

⁴² See Decision and Order No. 34726, filed July 28, 2017, at 60.

⁴³ See HU HONUA-401, filed January 28, 2020, at Table 2.

trucking jobs, 72 additional “indirect” jobs generated by secondary activity related to Hu Honua, and 39 more indirect jobs statewide.⁴⁴ The projected payroll at the High Scenario is projected to amount to approximately \$11,183,786.00 per year.⁴⁵ These earnings are projected to support about 542 residents living in about 227 households statewide.⁴⁶

Attached to this memorandum is the supplemental affidavit of Hu Honua’s retained economist Dr. Bruce Plasch (“Dr. Plasch”), which is intended to supplement the record pursuant to HAR § 16-601-139 (“Plasch Affidavit”). The record is being supplemented because the Commission in its Order Revoking Waiver apparently relied on information outside of this docket and erroneously compared the Hu Honua Project to the Phase 1 projects in development on Hawaii Island, which was not previously the focus of this docket or previous analysis.⁴⁷ For example, the Commission’s Order Revoking Waiver states, without support, that “any renewable project selected for Hawaii Island would provide economic stimulation and job creation, in that a facility would need to be built, maintained, and operated” and concluded Hu Honua’s project as compared with other renewable project “is not persuaded that these circumstances are sufficient to distinguish the Project from any other competitively bid project to the level necessary to justify a waiver.”⁴⁸ The Commission fails to cite evidence to support its assumptions and conclusions.

Hu Honua respectfully submits the additional affidavit of Dr. Plasch to supplement the record and show the Commission that its assumptions are unfounded and erroneous. As shown in Supplemental Table 1, Hu Honua would provide many more jobs and far greater economic benefits than would a 30 MW solar + 4-hour battery project.⁴⁹

⁴⁴ See HU HONUA-401, filed January 28, 2020, at Table 3.

⁴⁵ See HU HONUA-401, filed January 28, 2020, at Table 3.

⁴⁶ See HU HONUA-401, filed January 28, 2020, at Table 3.

⁴⁷ Plasch Affidavit at ¶ 2.

⁴⁸ Order Revoking Waiver, at 35.

⁴⁹ Plasch Affidavit at ¶ 7.

- **Construction**

- Construction jobs and indirect jobs of about 1,878 man-years for Hu Honua vs about 90 man-years for solar (5% of the Hu Honua jobs).⁵⁰ Employment for solar is relatively low because most of the jobs only involve preparing the footings and assembling imported components (frames, solar panels, inverters, etc.).
- Payroll for construction jobs and indirect jobs of about \$125.2 million for Hu Honua vs about \$5.6 million for solar (5%).⁵¹
- State tax revenues of about \$22.7 million for Hu Honua vs about \$3.4 million for solar (15%).⁵²

- **Operations**

- Over its 30-year term, Hu Honua will generate about 6,810 man-years of work (operating and indirect jobs) vs about 54 man-years for solar over its 25-year term (1% of the Hu Honua jobs).⁵³
- Operating and indirect employment of about 227 jobs for Hu Honua vs about 2.2 jobs for solar (1%).⁵⁴
- Payroll for operating and indirect jobs of about \$11.2 million per year for Hu Honua vs about \$135,300 for solar (1%).⁵⁵
- State tax revenues of about \$2.2 million per year for Hu Honua vs about \$270,000 per year for solar (12%).⁵⁶

⁵⁰ Plasch Affidavit at ¶ 7.

⁵¹ Plasch Affidavit at ¶ 7.

⁵² Plasch Affidavit at ¶ 7.

⁵³ Plasch Affidavit at ¶ 8.

⁵⁴ Plasch Affidavit at ¶ 8.

⁵⁵ Plasch Affidavit at ¶ 8.

⁵⁶ Plasch Affidavit at ¶ 8.

- County property taxes on new structures of about \$1.8 million per year for Hu Honua vs none for solar (0%).⁵⁷

Hu Honua is providing jobs and economic stimulus now, which is desperately needed in the current uncertain economic environment. As demonstrated above, the current RFP solar projects are qualitatively different from Hu Honua and are incapable of providing the jobs to the people of Hawaii that are desperately needed right now.

⁵⁷ Plasch Affidavit at ¶ 8.

Table 1. Economic Impacts: Hu Honua Bioenergy vs Phase 1 RFP Solar + 4-Hour Battery
(Values in 2017 dollars)

Item	Hu Honua Bioenergy	Solar + 4-Hour Battery	Units	Solar Farm + 4-Battery, Source or Multiplier
1. STATUS	Built, ready to operate in 2020	Possible operation in 2022		
2. CAPACITY				
Power Plant/Solar Farm				
Available Capacity	30.0	30	MW	
Committed Capacity	21.5			
Battery Capacity		120	MWH	
Duration		4	hours	
3. CONSTRUCTION				
Construction Period	6	0.5	years	PEP
Expenditures and Sales				
Construction Expenditures	\$ 337,500,000	\$ 75,000,000		\$ 2,500,000 per MW
Spent in Hawaii	55%	20%		PEP
Indirect Sales				
Annual	\$ 36,196,875	\$ 35,100,000	per year	
Cumulative	\$ 217,181,250	\$ 17,550,000		117% of amount spent in Hawaii
Total Expenditures and Sales	\$ 554,681,250	\$ 92,550,000		
Sales Taxed at 4%				
Construction Expenditures	\$ 337,500,000	\$ 75,000,000		
Consumption Expenditures	\$ 68,837,088	\$ 3,104,125		55% of payroll
Total Final Sales	\$ 406,337,088	\$ 78,104,125		
Sales Taxed at 0.5%	\$ 148,344,162	\$ 14,445,875		Residual
Employment				
Average During Construction				
Construction Jobs	139	75	jobs	PEP
Less Mainland Specialists	(21)	not estimated	jobs	
Indirect Jobs				1.41 of construction jobs
Big Island	127	69	jobs	65%
Oahu	68	37	jobs	35%
Total Jobs	313	181	jobs	
Total Work (man-years)	1,878	90	man-years	
Payroll				
Average During Construction				
Construction Payroll	\$ 11,947,320	\$ 6,465,000	per year	\$ 86,200 per job
Indirect Payroll, Big Island	\$ 5,424,049	\$ 2,935,091	per year	\$ 42,700 per job
Indirect Payroll, Oahu	\$ 3,488,354	\$ 1,887,638	per year	\$ 51,000 per job
Total Annual Payroll	\$ 20,859,723	\$ 11,287,729	per year	
Cumulative Payroll	\$ 125,158,338	\$ 5,643,864		
State Taxes (cumulative)				
Excise Taxes				
On Final Sales	\$ 16,253,484	\$ 3,124,165		4.0% of expenditures
On Intermediate Sales	\$ 741,721	\$ 72,229		0.5% of expenditures
Personal Income Taxes	\$ 5,131,492	\$ 231,398		4.1% of payroll
Total State Taxes	\$ 22,126,696	\$ 3,427,793		
Collected by Year-end 2020	100%	0%		

Table 1. Economic Impacts: Hu Honua Bioenergy vs Phase 1 RFP Solar + 4-Hour Battery

(Values in 2017 dollars)

(Continued)

Item	Hu Honua Bioenergy	Solar + 4-Hour Battery	Units	Solar Farm + Battery, Source or Multiplier
4. OPERATIONS				
Term of Power Plant/Solar Farm	30	25	years	
Electricity Supplied	180,600	81,406	MWh/yr	AES Waikaloa
Use of Available Capacity	69%	31%		
Sales				
Electricity Sales	\$ 34,675,200	\$ 6,512,480	per year	\$ 0.08 per kWh
Indirect Sales	\$ 28,352,151	\$ 74,427	per year	55% of payroll
Total Sales	\$ 63,027,351	\$ 6,586,907	per year	
Sales Taxed at 4%	\$ 40,826,283	\$ 6,586,907	per year	
Sales Taxed at 0.5%	\$ 22,201,068	\$ -	per year	Residual
Employment				
Power Plant/Solar Farm Jobs	38	1.5	jobs	PEP
Forestry Jobs	66		jobs	
Trucking Jobs	12		jobs	
Indirect Jobs				
Big Island	72	0.7	jobs	45% of solar farm jobs
Oahu	39		jobs	
Total Jobs	227	2.2	jobs	
Total Work over Term (man-years)	6,810	54	man-years	
Payroll				
Power Plant/Solar Farm Payroll	\$ 2,633,400	\$ 106,500	per year	\$ 71,000 per job
Forestry Payroll	\$ 2,961,943		per year	
Trucking Payroll	\$ 504,676		per year	
Payroll of Indirect Jobs	\$ 5,083,767	\$ 28,823	per year	\$ 42,700 per job
Total Annual Payroll	\$ 11,183,786	\$ 135,323	per year	
Total Payroll over Term	\$ 335,513,580	\$ 3,383,063		
State Taxes				
Excise Taxes				
On Final Sales	\$ 1,633,051	\$ 263,476	per year	4.0% of expenditures
On Intermediate Sales	\$ 111,005	\$ -	per year	0.5% of expenditures
Personal Income Taxes	\$ 458,535	\$ 5,548	per year	4.1% of payroll
Total Annual State Taxes	\$ 2,202,592	\$ 269,025	per year	
Total State Taxes over Term	\$ 66,077,757	\$ 6,725,613		
County Property Taxes				
Value of New Structures	\$ 183,763,400	\$ 75,000,000		
Annual County Property Taxes	\$ 1,846,822	not taxed	per year	\$ 10.05 per \$1,000 of value
Total County Property Taxes over Term	\$ 55,404,665	\$ -		

Table 1. Economic Impacts: Hu Honua Bioenergy vs Phase 1 RFP Solar + 4-Hour Battery

(Values in 2017 dollars)

(Continued)

Sources

Before the Public Utilities Commission of the State of Hawaii, in the Matter of the Application of Hawaii Electric Light Company, Inc., For Approval of Power Purchase Agreement for Renewable Dispatchable Generation with AES Waikoloa Solar, LLC (AES Waikoloa), Docket No. 2018-0430.

Before the Public Utilities Commission of the State of Hawaii, in the Matter of the Application of Hawaii Electric Light Company, Inc., For Approval of Power Purchase Agreement for Renewable Dispatchable Generation with Hale Kuawehi Solar LLC, Docket No. 2018-0432.

Hawaii State Energy Office. Hawaii Renewable Energy Projects Directory. July 2020.

Plasch Econ Pacific LLC, "Hu Honua Bioenergy: Updated Economic Impacts and Benefits," January 2020.

Plasch Econ Pacific LLC (PEP) review of solar projects, 2019 and 2020.

II. CONCLUSION.

For the additional reasons stated herein, Hu Honua respectfully seeks reconsideration of the Commission's Order Revoking Waiver and that the Commission vacate the Order Revoking Waiver in its entirety. Given the impacts of the Order Revoking Waiver, including the hundreds of jobs and economic benefits and stake, Hu Honua respectfully requests that a hearing be held on the Motion for Reconsideration and that the Commission expedite decision-making within two to three weeks.

Hu Honua also requests that the Commission schedule an evidentiary hearing, as instructed by the Hawaii Supreme Court in In re HELCO, without delay for the limited purpose of expressly considering the reduction of GHG emissions in its decision-making pursuant to HRS § 269-6(b) and to afford LOL an opportunity to be heard regarding the impact of the A&R PPA on LOL's interest in a clean and healthful environment.

DATED: Honolulu, Hawaii, July 20, 2020

Bruce D. Voss

BRUCE D. VOSS

Counsel for HU HONUA BIOENERGY, LLC

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

AFFIDAVIT OF JONATHAN JACOBS

STATE OF CALIFORNIA)
) SS.
COUNTY OF ALAMEDA)

JONATHAN JACOBS, being first duly sworn on oath, deposes and says:

1. My name is Jonathan Jacobs and I am the Managing Consultant for PA Consulting Group, Inc. My CV was previously submitted along with my testimony in this docket as Exhibit HU HONUA-500, filed on January 28, 2020.

2. I have been retained by Hu Honua Bioenergy, LLC ("Hu Honua") to evaluate the reasonableness of the pricing of the Amended & Restated Power Purchase Agreement ("A&R PPA") between Hawaii Electric Light Co. ("HELCO") and Hu Honua given the developments in the Hawaii island electric market since the Commission's approval of the A&R PPA in Decision and Order No. 34726, filed July 28, 2017.

3. I make this affidavit based on my personal knowledge and belief, and I am competent to attest to the matters discussed herein.

4. I have reviewed the Commission's comparison in Order No. 37205 ("Order Revoking Waiver"), issued by the Public Utilities Commission of the State of Hawaii ("Commission") in this docket on July 9, 2020, with respect to the Commission's

comparison between the Hu Honua Project and the RDG-PPA solar + battery projects' capabilities and pricing.

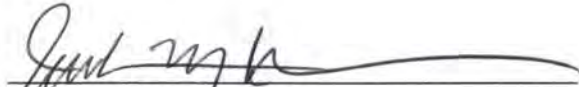
5. I have been asked by Hu Honua to provide an analysis of the Commission's pricing comparison in its Order Revoking Waiver in order to supplement the record, address erroneous findings, and to provide a reasonably accurate comparison between the Hu Honua project and the Phase 1 RFP 30 MW Solar + 4-Hour Battery projects on Hawaii Island ("RFP 1 Solar Projects"), as the specific comparison of the capabilities and pricing, including pricing based on scaling the RFP 1 Solar Projects to provide similar 24/7 firm capabilities as the Hu Honua Project, were not previously the focus of this docket.

6. I have reviewed Hu Honua's Supplemental Memorandum in Support of Hu Honua's Motion for Reconsideration of Order Revoking Waiver ("Supplemental Memorandum"), to which this affidavit is attached.

7. My response and analysis of the Commission's comparison between the Hu Honua Project and the RFP 1 Solar Projects is found at Section A of the Supplemental Memorandum, along with citations to the sources I used to support my analysis which are sources reasonably relied upon by experts in my field, are true and correct to the best of my knowledge.

[Remainder of the page intentionally left blank]

FURTHER AFFIANT SAYETH NAUGHT.



JONATHAN JACOBS

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

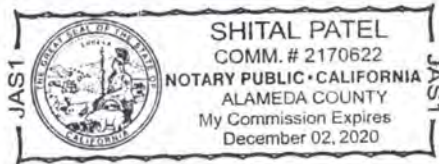
County of Alameda

Subscribed and sworn to (or affirmed) before me on this

20th day of July, 2020, by Jonathan Jacobs

proved to me on the basis of satisfactory evidence to be the person(s) who appeared

before me



(Seal)



Signature of Notary

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
)
_____)

AFFIDAVIT OF BRUCE PLASCH

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

BRUCE PLASCH, being first duly sworn on oath, deposes and says:

1. My name is Bruce S. Plasch, Ph.D. and I am the Owner and President of Plasch Econ Pacific, LLC, an economic consultancy that specializes in the economic issues of Hawaii. My CV was previously submitted along with my testimony in this docket as Exhibit HU HONUA-400, filed on January 28, 2020.

2. I have been retained by Hu Honua Bioenergy, LLC ("Hu Honua") to evaluate the projected economic impact and benefits that may result from the Hu Honua project ("Project"). I have reviewed the Commission's comparison in Order No. 37205 ("Order Revoking Waiver"), issued by the Public Utilities Commission of the State of Hawaii ("Commission") in this docket on July 9, 2020, with respect to the Commission's comparison of the Hu Honua Project to the RDG-PPA solar projects' economic and job benefits, and I am supplementing the record to address what I believe are unsupported and erroneous findings made by the Commission in its Order Revoking Waiver.

3. I make this affidavit based on my personal knowledge and belief, and I am competent to attest to the matters discussed herein.

4. I have prepared a supplemental table, titled Table 1. Economic Impacts: Hu Honua Bioenergy vs Phase 1 RFP Solar + 4-Hour Battery ("Supplemental Table 1"), that has been included in Hu Honua's Supplemental Memorandum in Support of Hu Honua's Motion for Reconsideration of Order Revoking Waiver ("Supplemental Memorandum"), to which this affidavit is attached in support.

5. Most of the figures in Supplemental Table 1 for the Hu Honua Project are already in the record in this docket as they were included with my prehearing testimony, Hu Honua Testimony T-4, and the accompanying report submitted as Exhibit HU HONUA-401, titled Hu Honua Bioenergy: Updated Economic Impacts and Benefits Report, dated January 2020, filed on January 28, 2020.

6. Additional figures for the Hu Honua Project and the Phase 1 RFP 30 MW Solar + 4-Hour Battery projects on Hawaii Island ("RFP 1 Solar Project") have been added to Supplemental Table 1 to create a reasonably accurate comparison between the economic benefits of the Hu Honua Project and an RFP 1 Solar Project. The sources I have used to obtain additional information are cited below Supplemental Table 1. The estimates I have used are based on available information regarding planned development and operations, market conditions, tax rates, and other factors and to the best of my knowledge are true and correct.

7. I have concluded that the Hu Honua Project would provide many more jobs and far greater economic benefits than an RFP 1 Solar Project. For example, during construction, the Hu Honua Project would create about 1,878 man-years of construction

jobs and indirect jobs compared with only 90 man-years for an RFP 1 Solar Project, which is only about 5% of the Hu Honua Project's created man-years. Employment for solar is relatively low because most of the jobs only involve preparing the footings and assembling imported components (frames, solar panels, inverters, etc.). This is reflected in the payroll as well, as the Hu Honua Project would have a payroll of about \$125.2 million compared with only \$5.6 million for an RFP 1 Solar Project. In both instances, the RFP 1 Solar Project would create only 5% of the man-hours and payroll during construction that Hu Honua would create. During construction, the Hu Honua Project would create state tax revenues of about \$22.7 million compared with \$3.4 million for an RFP 1 Solar Project.

8. I have concluded that over its 30-year term, the Hu Honua Project will create about 6,810 man-years of work (operating and indirect jobs) compared with only about 54 man-years for an RFP 1 Solar Project over its 25-year term, which is only about 1% of the Hu Honua Project's created man-years of work. Hu Honua would create about 227 direct and indirect jobs, whereas an RFP 1 Solar Project would create only 1% of that number at 2.2 jobs. This is also reflected in payroll totals where Hu Honua would create a payroll of about \$11.2 million per year, whereas an RFP 1 Solar Project would create about 1% of that number at \$135,300 per year. The Hu Honua Project would also create about \$2.2 million per year in state tax revenues, whereas an RFP 1 Solar Project would create about \$270,000 per year. Finally, the Hu Honua Project would pay county property taxes on new structures of about \$1.8 million per year, whereas an RFP 1 Solar Project would pay none.

[Remainder of the page intentionally left blank]

FURTHER AFFIANT SAYETH NAUGHT.

Bruce S. Plasch
BRUCE PLASCH

Subscribed and sworn to before me this

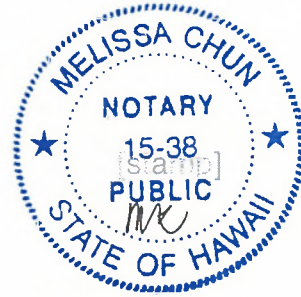
20 day of July, 2020.

Melissa Chun

Name: Melissa Chun

Notary Public, State of Hawaii

My Commission expires: 2-8-2023



NOTARY CERTIFICATION

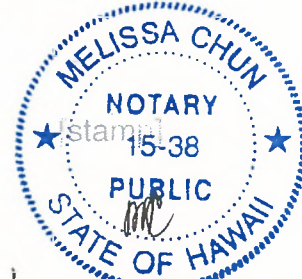
Document Date: Undated at time of Notary

No. of Pages: 4

Document Description: _____

First Circuit

Affidavit of Bruce Plasch



Melissa Chun

Signature of Notary

July 20, 2020
Date of Notarization

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
 HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
 For Approval of a Power Purchase)
 Agreement for Renewable Dispatchable)
 Firm Energy and Capacity)
 _____)

CERTIFICATE OF SERVICE

I hereby certify that on this date copies of the foregoing document, together with this Certificate of Service, were duly served on the following parties as set forth below:

Parties	U.S. Mail	Hand Delivery	E-Mail
Dean Nishina Executive Director Department of Commerce and Consumer Affairs Division of Consumer Advocacy dnishina@dcca.hawaii.gov consumeradvocate@dcca.hawaii.gov dca@dcca.hawaii.gov	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Kevin M. Katsura Director, Regulatory Non-Rate Proceedings Hawaiian Electric Company, Inc. kevin.katsura@hawaiianelectric.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
David M. Louie Joseph A. Stewart Aaron R. Mun Kobayashi, Sugita, & Goda LLP Attorneys for Hawai'i Electric Light Company, Inc. dml@ksglaw.com jas@ksglaw.com arm@ksglaw.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Sandra-Ann Y.H. Wong Attorney at Law, A Law Corporation Attorney for Tawhiri Power LLC sawonglaw@hawaii.rr.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ted N. Pettit Mark G. Valencia Case Lombardi & Pettit, A Law Corporation Attorneys for Hamakua Energy, LLC tpettit@caselombardi.com mvalencia@caselombardi.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Shannon S. Broome Hunton Andrews Kurth LLP Attorney for Hamakua Energy, LLC sbroome@huntonak.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Myles F. Reynolds Hunton Andrews Kurth LLP Attorney for Hamakua Energy, LLC mreynolds@huntonak.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Henry Q. Curtis Vice President for Consumer Issues Kat Brady Vice President for Social Justice Life of the Land henry.lifeoftheland@gmail.com kat.lifeoftheland@gmail.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

DATED: Honolulu, Hawaii, July 20, 2020.



BRUCE D. VOSS

BAYS LUNG ROSE & HOLMA

Counsel for HU HONUA BIOENERGY, LLC

Home News & Events Dockets **Filing & Forms** Information About

Contact Us

Home » Filing & Forms

THE HAWAII PUBLIC UTILITIES COMMISSION ACKNOWLEDGES RECEIPT OF YOUR SUBMITTAL.

Form:	Hawaii PUC eFile Docketed
Entity:	Bays Lung Rose
Confirmation Number:	MAMB20143039584
Date and Time Received:	Jul 20 2020 02:30 PM
Date Filed:	Jul 20 2020

NOTICE OF ELECTRONIC FILING: Your electronic filing has been accepted. Submittals received after 4:30 p.m. shall be deemed filed the next business day. The mere fact of filing shall not waive any failure to comply with [Hawaii Administrative Rules Chapter 6-61, Rules of Practice and Procedure Before the Public Utilities Commission](#), or any other application requirements, and the Hawaii PUC may entertain timely motions in connection with your filing or require you to amend your filing.

[PUC Home](#)

[Filing](#)

[DMS Home](#)

FILING & FORMS

- Filing Complaints
- Filing Docketed Documents
- Filing Non-Docketed Documents
- Motor Carriers Forms
- Office Forms
- Payments
- Utilities Forms
- Water Carriers Forms

EFILING

Individuals seeking to eFile must **register online**. Within 2 business days of registering you will

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

**HU HONUA BIOENERGY, LLC'S RESPONSE TO THE DIVISION OF CONSUMER
ADVOCACY'S, TAWHIRI POWER LLC'S, AND LIFE OF THE LAND'S REPLIES
TO HU HONUA BIOENERGY, LLC'S MOTION FOR RECONSIDERATION
OF ORDER NO. 37205, FILED JULY 20, 2020**

AFFIDAVIT OF WARREN LEE

AFFIDAVIT OF JONATHAN JACOBS

AFFIDAVIT OF JON MIYATA

EXHIBITS "1" TO "2"

AND

CERTIFICATE OF SERVICE

DEAN T. YAMAMOTO
WIL K. YAMAMOTO
BRADLEY S. DIXON

YAMAMOTO CALIBOSO
A Limited Liability Law Company
1100 Alakea Street, Suite 3100
Honolulu, Hawaii 96813
Phone No. (808) 540-4500
Facsimile No. (808) 540-4530
Emails: dyamamoto@ychawaii.com
wyamamoto@ychawaii.com
bdixon@ychawaii.com

Counsel for HU HONUA BIOENERGY, LLC.

BRUCE D. VOSS
JOHN D. FERRY

BAYS LUNG ROSE & HOLMA
Topa Financial Center
700 Bishop Street, Ste. 900
Honolulu, Hawaii 96813
Phone No. (808) 523-9000
Facsimile No. (808) 533-4184
Emails: bvoss@legalthawaii.com
jferry@legalthawaii.com

Co-Counsel for HU HONUA BIOENERGY,
LLC.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
)	
HAWAII ELECTRIC LIGHT COMPANY, INC.	)	DOCKET NO. 2017-0122
)	
For Approval of a Power Purchase)	
Agreement for Renewable Dispatchable)	
Firm Energy and Capacity)	
<hr/>		

**HU HONUA BIOENERGY, LLC’S RESPONSE TO THE DIVISION OF CONSUMER
ADVOCACY’S, TAWHIRI POWER LLC’S, AND LIFE OF THE LAND’S REPLIES
TO HU HONUA BIOENERGY, LLC’S MOTION FOR RECONSIDERATION
OF ORDER NO. 37205, FILED JULY 20, 2020**

Hu Honua Bioenergy, LLC, a Delaware limited liability company (“Hu Honua”), by and through its undersigned counsel, Yamamoto Caliboso, LLLC, hereby respectfully submits its attached Response¹ to the Division of Consumer Advocacy’s, Tawhiri Power LLC’s, and Life of the Land’s Replies to Hu Honua’s Motion for Reconsideration of Order No. 37205, filed July 20, 2020.

Hu Honua respectfully requests a decision on its Motion for Reconsideration by September 30, 2020. As more fully explained in the attached Response, unless the Commission makes its decision on the Motion for Reconsideration by this date, Hu Honua will regretfully be forced to start laying off its employees.

¹ On July 31, 2020, Hu Honua filed its Motion for Leave to File a Response to the Parties' and Participants' Replies to Hu Honua's Motion for Reconsideration of Order No. 37205 and Supplemental Memorandum in Support of Same, which sought leave to file the Response attached hereto.

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND..... 1

II. ARGUMENT..... 4

 A. Hu Honua’s Motion for Reconsideration satisfied Hu Honua’s burden to show that the Commission’s Order Revoking Waiver was unreasonable, unlawful, or erroneous pursuant to HAR § 16-601-137..... 4

 B. The Commission’s Order Revoking Waiver exceeded the Hawaii Supreme Court’s remand instructions in In re HELCO..... 9

 C. The Commission violated Hu Honua’s due process rights by failing to give Hu Honua notice and an opportunity to be heard before it revoked the A&R PPA’s waiver..... 14

 1. Hu Honua had a property interest protected by due process in the A&R PPA’s Waiver from the Framework..... 14

 2. Hu Honua had no notice that the Commission intended to redecide the waiver issue on remand and what specific information and criteria the Commission intended to evaluate and consider in reaching its decision. 16

 3. The Commission’s failure to allow Hu Honua to address new information that arose after briefing on the waiver issue violated Hu Honua’s right to procedural due process..... 20

 D. Hu Honua was entitled to rely on the Commission’s waiver for the A&R PPA, which could not be revoked under the Framework and, even if it could be revoked or redecided, Hu Honua was entitled to proper notice and an opportunity to be heard. 22

 E. The Commission is equitably estopped from revoking its waiver..... 23

 F. The Waiver is still justified under Part II.A.3.d. of the Framework as the Hu Honua Project is the most expeditious means to increase the amount of firm renewable energy on HELCO’s system and is in the public interest..... 29

 1. The addition of firm renewable energy onto HELCO’s grid is a valid basis upon which to support a waiver. 29

 2. Fossil-fuel price volatility has become an even more important factor weighing in favor of the waiver. 37

 G. The Order Revoking Waiver unreasonably and erroneously fails to consider the inherent inefficiencies of requiring Hu Honua to participate in a future RFP. 39

1.	There is no current RFP for firm renewable energy, such as biomass, and it would take years to go through a competitive bidding process even if one existed.	39
2.	The Commission created the circumstances now used to justify the revocation of the A&R PPA's waiver.	41
3.	HELCO does not intend to retire its fossil-fuel plants.	44
H.	There is no dispute that the Commission failed to make findings regarding GHG as directed by the Hawaii Supreme Court.	54
1.	The Commission failed to comply with HRS § 269-6(b) and the Hawaii Supreme Court's remand instructions.	54
2.	The arguments in LOL's Reply are irrelevant and misstate the record.	57
I.	Reply to the irrelevant arguments contained in LOL's Reply.	66
1.	Hu Honua will not discharge pollutants.	66
2.	Hu Honua's updated traffic assessment will not affect the start of operations.	66
3.	LOL has failed to present any evidence that Hu Honua will infringe upon LOL's members' constitutionally protected right to a clean and healthful environment.	67
4.	Hu Honua is not seeking to recover overtime costs from ratepayers.	68
J.	Request for a timely decision on the Motion for Reconsideration.	68
III.	CONCLUSION.	69

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>County of Maui, Hawaii v. Hawaii Wildlife Fund</u> , 140 S.Ct. 1462, 1477, 206 L.Ed.2d 640 (2020)	67
<u>Filipo v. Chang</u> , 62 Haw. 626, 635, 618 P.2d 295, 300 (1980).....	26
<u>Hawaii Gas</u> , No. SCOT-19-0000044, June 9, 2020	56
<u>Hoku Lele, LLC v. City & County of Honolulu</u> , 143 Hawaii 233, 426 P.3d 457, 2018 WL 4520946.....	15
<u>In re HELCO</u> , 145 Hawaii 1, 445 P.3d 673 (2019)	10, 11, 13
<u>In re HELCO</u> , SCOT-17-0000630, Order Denying Motion for Stay, issued on April 16, 2018.....	27
<u>Life of Land v. City Council of Honolulu</u> , 61 Haw. 390, 453, 606 P.2d 866, 902 (1980).24	
<u>Sandy Beach Defense Fund v. City Council of City & Cty. of Honolulu</u> , 70 Haw. 361, 378, 773 P.2d250, 261 (1989)	15, 21
 <u>STATUTES</u>	
HRS § 225P-4	40
HRS § 269-27.2	34, 40, 53
HRS § 269-27.3	34, 40, 53
HRS § 269-92	30
HRS § 91-14(g)	10, 11
 <u>RULES</u>	
<u>HAR § 16-601-137</u>	1, 4, 6
<u>HAR § 16-601-139</u>	4

HAR § 16-601-41 1

HAR § 16-601-48 7

OTHER AUTHORITIES

“California’s Shift from Natural Gas to Solar is Playing a Role in Rolling Blackouts”, Green Tech Media, August 17, 2020, <https://www-greentechmedia-com.cdn.ampproject.org/c/s/www.greentechmedia.com/amp/article/how-californias-shift-from-natural-gas-to-solar-is-playing-a-role-in-rolling-blackouts>. 30

Dave Segal, *Electric Bills on Oahu set to go up \$4.52 a month in October*, STAR ADVERTISER, (Aug. 20. 2020), <https://www.staradvertiser.com/2020/08/20/hawaii-news/electric-bills-on-oahu-set-to-go-up-4-52-a-month-in-october/?HSA=fe74c5d80dc9af3db84be9dc76fbeeaa37097d56b>. 38

Docket 2020-0090, HECO’s Response to CA-IR-12, filed July 17, 2020 38

Docket No 2020-0090, Interim D&O 37256. filed Aug. 4, 2020 38

Docket No. 03-0372, “In re Public Utilities Commission Instituting a Proceeding to Investigate Competitive Bidding for New Generating Capacity in Hawaii,” Decision and Order No. 23121, filed December 11, 2006 32

Docket No. 2012-0212, Decision and Order No. 31758, filed December 20, 2013 . 33, 37

Docket No. 2017-0352, Hawaiian Electric Companies' Final Stage 2; Renewable and Grid Services RFP's; Book 5 of 7, filed August 22, 2019..... 5, 21

Docket No. 2017-0352, Order No. 35405, filed April 6, 2018 42

Docket No. 2017-0352, Order No. 35529, filed June 15, 2018..... 42

Docket No. 2017-0352, Order No. 36187, filed February 27, 2019 4, 42

Docket No. 2017-0352, Order No. 36356, filed June 10, 2019..... 44

Docket No. 2017-0352, Phase 2 Draft Requests for Proposals, filed April 1, 2019..... 42

Docket No. 2017-0352, Status Conference #2, filed May 1, 2019..... 43

Docket No. 2019-0050, Application for Approval of Power Purchase Agreement for Renewable Dispatchable Generation with AES West Oahu Solar, LLC, filed February 28, 2019..... 60

Docket No. 2020-0090, Hawaiian Electric Company, Inc., Hawai'i Electric Light Company, Inc., and Maui Electric Company, Limited's Application; Verification, filed June 9, 2020 37

Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008..... 33

Hawaiian Electric, *Hawaiian Electric selects 16 projects in largest quest for renewable energy, energy storage for 3 islands*, at <https://www.hawaiianelectric.com/hawaiian-electric-selects-16-projects-in-largest-quest-for-renewable-energy-energy-storage-for-3-islands> 5, 21

HECO's press release dated May 11, 2020, <https://www.hawaiianelectric.com/hawaiian-electric-selects-16-projects-in-largest-quest-for-renewable-energy-energy-storage-for-3-islands> 44

**HU HONUA BIOENERGY, LLC'S RESPONSE TO THE DIVISION OF CONSUMER
ADVOCACY'S, TAWHIRI POWER LLC'S, AND LIFE OF THE LAND'S REPLIES
TO HU HONUA BIOENERGY, LLC'S MOTION FOR RECONSIDERATION
OF ORDER NO. 37205, FILED JULY 20, 2020**

I. PROCEDURAL BACKGROUND.

On July 9, 2020, the Commission issued Order No. 37205, which revoked the Commission's previously granted waiver from the Competitive Bidding Framework ("Framework") for the Amended and Restated Power Purchase Agreement ("A&R PPA") between Hu Honua and Hawaii Electric Light Company, Inc. ("HELCO") on the basis that HELCO had not met its burden to justify a waiver ("Order Revoking Waiver").¹ Accordingly, the Commission dismissed the A&R PPA without prejudice and closed the docket.²

On July 20, 2020, Hu Honua timely filed its Motion for Reconsideration of the Order Revoking Waiver ("Motion for Reconsideration") within ten (10) days pursuant to Hawaii Administrative Rules ("HAR") §§ 16-601-41 and 16-601-137.³

On July 22, 2020, Life of the Land ("LOL") filed its "Motion for Leave to Oppose Hu Honua's Motion for Reconsideration of Order No. 37205" and "Memorandum in Support" of the same ("LOL Motion for Leave").⁴ On July 24, 2020, the Commission issued Order No. 37233 ("Order Requesting Replies"),⁵ stating, on its own motion, that "[p]ursuant to HAR § 16-601-140, the Commission finds it desirable and necessary to receive replies to

¹ Order Revoking Waiver, at 26-43.

² Order Revoking Waiver, at 26-43.

³ Docket No. 2017-0122, Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020, filed July 20, 2020. A Memorandum and Supplemental Memorandum were filed in support of the Motion for Reconsideration on the same date.

⁴ Life of the Land's Motion for Leave to Oppose Hu Honua's Motion for Reconsideration of Order No. 37205; Memorandum in Support of Motion for Leave, filed July 22, 2020.

⁵ Order No. 37233, Allowing Replies to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, issued July 9, 2020, filed July 20, 2020.

Hu Honua’s Motion and Supplemental Memo from other Parties and Participants in this proceeding.”⁶ The Commission provided the Parties and Participants fifteen (15) days from the date of the order, July 24, 2020, to file their respective replies,⁷ which offered the Parties and Participants more time than Hu Honua to prepare and file its Motion for Reconsideration. Curiously, the Commission also did not address Hu Honua’s ability to respond to those replies, including any opposition by the Parties and Participants to Hu Honua’s position challenging the Commission’s Order Revoking Waiver.

On July 31, 2020, Hu Honua filed its Motion for Leave to File a Response to the Parties’ and Participants’ Replies to Hu Honua’s Motion for Reconsideration, among other things, on the basis that it is warranted given the specific circumstances of the Order Revoking Waiver, including the new information presented by the Commission for the first time, the significant negative impacts on Hu Honua’s interests and due process rights, and the significant negative impacts on the community and the public interest.⁸

On August 10, 2020, HELCO,⁹ the Division of Consumer Advocacy (“Consumer Advocate”),¹⁰ Tawhiri Power LLC (“Tawhiri”),¹¹ and LOL¹² filed their respective replies to Hu Honua’s Motion for Reconsideration (“HELCO Position Statement (Reply)”, “CA Reply”, “Tawhiri Reply”, and “LOL Reply”, respectively). HELCO continues to support the

⁶ Order Requesting Replies, at 2.

⁷ Order Requesting Replies, at 3.

⁸ Docket No. 2017-0122, Hu Honua Bioenergy, LLC's Motion for Leave to File a Response to the Parties' and Participants' Replies to Hu Honua's Motion for Reconsideration of Order No. 37205 and Supplemental Memorandum in Support of Same, filed July 31, 2020, at 4-5.

⁹ Docket No. 2017-0122, Hawai'i Electric Light Company, Inc.'s Position Statement in Response to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020, filed August 10, 2020.

¹⁰ Docket No. 2017-0122, Division of Consumer Advocacy's Response to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020, filed August 10, 2020.

¹¹ Docket No. 2017-0122, Tawhiri Power LLC's Reply to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Filed on July 9, 2020, filed August 10, 2020.

¹² Docket No. 2017-0122, Life of the Land's Response to Order No. 37233, filed August 10, 2020.

waiver for the A&R PPA and asks that the Commission reconsider its Order Revoking Waiver.¹³ To date, the Commission has not yet ruled on Hu Honua's Motion for Leave filed over three weeks ago on July 31, 2020.

Hu Honua's response ("Response") responds to the Parties' and Participants' replies, and requests, for the reasons discussed in Section II.G, which includes HELCO's willingness to re-run its production simulation and submit another bill impact analysis, that the Commission investigate and evaluate the assumptions made by HELCO in the 2020 Bill Impact Analysis (including, among other things, the changed assumption regarding the 30-year fuel forecast). The changed assumptions made by HELCO (without consultation with Hu Honua for appropriateness) resulted in the substantial change from HELCO's 2017 Bill Impact Analysis showing a reduction in customer bills to HELCO's 2020 Bill Impact Analysis estimating an increase in customer bills. Based on discussions with HELCO that occurred prior to the issuance of the Order Revoking Waiver on July 9, 2020, HELCO had agreed to re-run and submit another bill impact analysis, but the Commission had issued its order before this new analysis could be completed.

Given that the Commission relied upon the 2020 Bill Impact Analysis, without investigating the appropriateness of the assumptions and analysis and without providing an opportunity for briefing in making its decision, this along should warrant reconsideration of the Order Revoking Waiver, or at a minimum, to allow for the Commission's review of the assumptions for appropriateness and the submittal and consideration of such updated analysis.

The Commission should also consider the contingency benefit of pursuing the

¹³ See generally HELCO Position Statement (Reply).

Phase 2 RFP projects together with both Hu Honua and PGV pursuant to the Commission's guidance in Docket No. 2017-0352, Order No. 36187, filed February 27, 2019, at 12.

II. ARGUMENT.

A. Hu Honua's Motion for Reconsideration satisfied Hu Honua's burden to show that the Commission's Order Revoking Waiver was unreasonable, unlawful, or erroneous pursuant to HAR § 16-601-137.

A motion for reconsideration must demonstrate that the Commission's order for which reconsideration is sought is "unreasonable, unlawful, or erroneous."¹⁴ A movant may introduce new evidence in a motion for reconsideration, that is not cumulative, if the movant explains "why that evidence was not previously adduced."¹⁵

The Consumer Advocate argues that Hu Honua's Motion for Reconsideration fails to meet the applicable standard for such relief because it "appears to present no new evidence or arguments that were unable to be presented at earlier portions of the docket" and "has presented no new evidence or arguments that could not be ascertained from the record as far as it is presented in the docket."¹⁶ Conversely, Tawhiri argues that Hu Honua's Motion for Reconsideration improperly introduces new evidence and affidavits in an attempt to relitigate the case.¹⁷ LOL similarly claims that Hu Honua is trying to supplement the record for the purposes of appeal.¹⁸

Hu Honua's Motion for Reconsideration appropriately introduced new evidence pursuant to HAR § 16-601-137 to address erroneous and unsupported justifications advanced by the Commission to support its Order Revoking Waiver. Hu Honua's Motion

¹⁴ HAR § 16-601-137.

¹⁵ HAR § 16-601-139.

¹⁶ CA Reply, at 4.

¹⁷ Tawhiri Reply, at 9.

¹⁸ LOL Motion for Leave, at 11-13.

for Reconsideration and/or Supplemental Memorandum¹⁹ included additional evidence from experts Bruce Plasch, Jonathan Jacobs, and Eli Katz to address issues raised by the Commission in its Order Revoking Waiver that Hu Honua was not previously able to address in this docket.²⁰ For example, following the remand of this proceeding from the Hawaii Supreme Court, the Commission sought, *inter alia*, updates regarding Issue No. 1 (waiver from the Framework) from the Parties and Participants by September 17, 2019, which were provided to the Commission.²¹ However, the Commission's Order Revoking Waiver relied on information developed after the supplemental briefing on Issue Nos. 1-3 was completed and after the information request periods and prehearing testimony were completed.²² For example, the Commission's Order Revoking Waiver notes that the

Final Award Selection for the second phase of the Hawaiian Electric Companies' (including HELCO) competitive RFP had been completed in Docket No. 2017-0352, resulting in 'the largest renewable energy procurement ever undertaken in Hawaii,' which has the potential to 'produce 460 [MW] of solar energy and nearly 3 [GW] hours of energy storage on [those islands].'²³

HECO was required to make its Final Award Selection for Phase 2 RFP by May 8, 2020²⁴ and announced its selection publicly on May 11, 2020.²⁵ **The Commission gave Hu Honua no opportunity to respond to these new developments before the Commission made its decision to revoke the A&R PPA's waiver.** The issues

¹⁹ See Hu Honua Bioenergy, LLC's Supplemental Memorandum in Support of Hu Honua Bioenergy LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020, filed July 20, 2020 ("Supplemental Memorandum").

²⁰ See e.g. Supplemental Memorandum, at 15-16.

²¹ See Order Reopening Docket, at 14-15; Order No. 36456, filed August 6, 2019, at 10.

²² See Order Revoking Waiver, at 20-23.

²³ Order Revoking Waiver, at 16-17.

²⁴ See Docket No. 2017-0352, Hawaiian Electric Companies' Final Stage 2; Renewable and Grid Services RFP's; Book 5 of 7, filed August 22, 2019, at Section 3.1 (Selection of Final Award by May 8, 2020).

²⁵ See Hawaiian Electric, *Hawaiian Electric selects 16 projects in largest quest for renewable energy, energy storage for 3 islands*, at <https://www.hawaiianelectric.com/hawaiian-electric-selects-16-projects-in-largest-quest-for-renewable-energy-energy-storage-for-3-islands> (last visited August 13, 2020).

involving the Phase 1 and Phase 2 RFP Projects' impacts on pricing and intermittent renewable energy penetration on HELCO's grid are interconnected and cannot be separated. Accordingly, in Hu Honua's Supplemental Memorandum, Hu Honua's retained expert, Jonathan Jacobs, appropriately addressed the comparison of Hu Honua with the Phase 1 and Phase 2 RFP Projects and the specific comparison criteria that the Commission identified for the first time and relied upon in its Order Revoking Waiver and supplemented the record with new information accordingly.²⁶

In addition, the Commission's Order Revoking Waiver relied upon additional information that developed after supplemental briefing on the waiver issue and the information request process were completed and after prehearing testimonies were submitted in this docket. For example, the Commission's Order Revoking Waiver relied upon changes to the State's economy as a result of COVID-19, citing orders from the governor issued March 5, 2020 and later.²⁷ Hu Honua could not have previously addressed these new developments relied upon by the Commission, and the Commission gave Hu Honua no opportunity to address these new developments before issuing its Order Revoking Waiver. Therefore, this information is also a proper subject for the presentation of new evidence and additional arguments in a motion for reconsideration under HAR §§ 16-601-137 and 16-601-139.

The Commission's Order Revoking Waiver also relied on unsupported and

²⁶ See Order Revoking Waiver, at 20-23.

²⁷ Order Revoking Waiver, at 31; and the Commission's footnote in the Order Revoking Waiver, at 31, n. 77 ("On March 5, 2020, Governor David Y. Ige issued his first Emergency Proclamation related to COVID-19, authorizing and invoking a variety of provisions related to the State's response to the COVID-19 emergency situation, available at: https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation_COVID-19.pdf. The Governor has issued nine additional Proclamations since that time, providing details regarding the State's response to the COVID-19 Pandemic. See <https://governor.hawaii.gov/emergency-proclamations/>, last accessed July 7, 2020.")

erroneous findings that are not supported by findings in the record in this docket, which are also appropriate subjects for a Motion for Reconsideration. For example, there is no evidence in the record to support the Commission's erroneous comparison between the economic benefits of the Phase 1 RFP projects and Hu Honua.²⁸ Hu Honua's Supplemental Memorandum provided the Commission additional evidence from Hu Honua's expert economist Bruce Plasch to address unsupported and erroneous statements in the Commission's Order Revoking Waiver.²⁹ Had the Commission given Hu Honua notice that it intended to rely on matters outside of the record regarding the anticipated economic benefits of the Phase 1 RFP projects, which it is required to do under its own rules,³⁰ Hu Honua would have had the opportunity to address these issues in the underlying docket. However, the Commission revoked Hu Honua's waiver, without notice and an opportunity to be heard regarding this extraneous supposition, resulting in the Commission's revocation of the A&R PPA's waiver without complete and accurate information. Hu Honua's Motion for Reconsideration and Supplemental Memorandum address these erroneous findings to which it has not previously had an opportunity to respond.

Finally, Hu Honua's Motion for Reconsideration addressed the Commission's erroneous and unsupported finding that Hu Honua's ability to claim the federal ITC is speculative. This characterization by the Commission was inaccurate as the record already established that Hu Honua remained hopeful of being able to secure the federal

²⁸ Order Revoking Waiver, at 34-35.

²⁹ Supplemental Memorandum, at 16-23.

³⁰ See HAR § 16-601-48 ("The commission may take official notice of those matters as may be judicially noticed by the courts of the State. It may also take official notice of generally recognized technical or scientific facts within its specialized knowledge, upon notice to all parties before or during the hearing. Any party may contest the facts so noticed.") (Emphasis added).

ITC based on “continuous construction and other circumstances.”³¹ Hu Honua’s Motion for Reconsideration supplements the record to correct the Commission’s erroneous understanding through the additional and clarifying testimony of Hu Honua’s tax expert Eli Katz, who explained further why Hu Honua could still secure the federal ITC because the Project has been in continuous construction,³² consistent with what Hu Honua previously indicated in the record.³³

LOL’s Motion for Leave argues that Hu Honua does not meet the standard for reconsideration because the Commission “decided that a Waiver from [the] Competitive Bidding [Framework] can expire and no party contested that position” citing the Commission’s decision in the 2017 D&O that the waiver from the Original PPA could not be transferred to the A&R PPA.³⁴ Hu Honua’s Motion for Reconsideration has already addressed why this situation is not analogous to the Commission’s previous decision that the Original PPA’s waiver could not be transferred to the A&R PPA: (1) in this case, the same agreement, the A&R PPA, is under consideration for which the Commission has already granted a waiver; (2) previously, the Commission found that it was impossible for Hu Honua to comply with the conditions placed upon the waiver for the Original PPA with respect to a PPA that had been changed/amended — the A&R PPA — and, therefore, the waiver could not be transferred; and (3) in this case, only twenty-three (23) months have passed since the Commission granted the waiver for the A&R PPA, in comparison

³¹ Testimony of Jon Miyata T-3, filed January 28, 2020, at 3-4.

³² Order Revoking Waiver, at 34; Motion for Reconsideration, at 45-48.

³³ See Letter From W. Lee to Commission Re: Docket No. 2017-0122 – Updated Information, filed July 8, 2019, Hu Honua’s Supplemental Briefing on Issues Nos. 1 to 3, filed September 17, 2019, at 4, Hu Honua’s Response to Tawhiri/HHB-IR-20, filed December 9, 2019, Prehearing Testimony of Warren Lee (“Lee Testimony T-1”), filed January 28, 2020, at 25, Prehearing Testimony of Jon Miyata (“Miyata Testimony T-3”), filed January 28, 2020, at 3-4, Hu Honua’s Response to CA/Hu Honua-IR-102(a), filed February 18, 2020.

³⁴ LOL’s Motion for Leave, at 3-4.

to the circumstances in 2017 where 8.5 years had passed between the original waiver and the A&R PPA.³⁵ The Commission's previous decision that the waiver for the Original PPA could not be transferred to the new A&R PPA is neither binding on the facts here nor persuasive precedent regarding the question now before the Commission — whether the Commission had the power to revoke (or should have revoked) the 2017 waiver approval from the Framework for the A&R PPA.

B. The Commission's Order Revoking Waiver exceeded the Hawaii Supreme Court's remand instructions in In re HELCO.

Hu Honua's Motion for Reconsideration argued that the Commission's revocation of the A&R PPA's waiver exceed the scope of remand from the Hawaii Supreme Court following its decision in In re HELCO because the Commission must strictly comply with the Court's instructions on remand.³⁶ The Consumer Advocate agrees with Hu Honua's assertion that the Commission was required to strictly comply with the Hawaii Supreme Court's instructions upon remand in In re HELCO,³⁷ but the Consumer Advocate disagrees with Hu Honua's interpretation of the scope of remand of In re HELCO, arguing

³⁵ See Motion for Reconsideration, at 26-28. Hu Honua does not concede that a new waiver determination was required or permitted in 2017. As the Commission re-issued the waiver in 2017, the issue was moot and not contested.

³⁶ Motion for Reconsideration, at 17-25.

³⁷ LOL's Motion for Leave disagrees with Hu Honua's citation to Standard Management, Inc. v. Kekona for the proposition that "[w]hen a reviewing court remands a matter with specific instructions, the trial court is powerless to undertake any proceedings beyond those specified therein." Standard Management, Inc. v. Kekona, 99 Hawaii 125, 137, 53 P.3d 264, 276 (Haw. App. 2001) (quoting Foster v. Civil Service Commission, 255 Ill.App.3d 30, 194 Ill.Dec. 169, 627 N.E.2d 285, 290 (Ct.1993)) (emphasis added). LOL mistakenly claims that the language cited from Standard Management was in the context of a *res judicata* argument. It was not. The ICA in Standard Management found that the circuit court had no jurisdiction on remand to adjudicate the issue of punitive damages and, therefore, a subsequent claim of *res judicata* could not have operated against it. Id. Hu Honua cited Standard Management appropriately for the very different proposition that lower tribunals must strictly comply with the appellate court's instructions on remand. Further, the primary authority cited by Hu Honua, Chun v. Bd. of Trustees of Employees' Ret. Sys. of State of Hawai'i, 106 Hawaii 416, 439, 106 P.3d 339, 362 (2005) supports the same principles as Standard Management, explaining that the trial court on remand must strictly comply with the appellate court's mandate and the inferior court cannot vary it or give any other further relief or intermeddle with it other than to settle so much as has been remanded.

that the Hawaii Supreme Court's remand was a general remand that also vacated the Commission's 2017 D&O's finding that a waiver for the A&R PPA was justified.³⁸ LOL asserts the same in its Motion for Leave.³⁹ Both the Consumer Advocate and LOL are wrong.

Hu Honua's Motion for Reconsideration explained in detail why the Consumer Advocate's and LOL's position is incorrect.⁴⁰ The language used by the Hawaii Supreme Court in In re HELCO does not suggest that it intended a general remand back to the Commission to reconsider all issues; to the contrary, the Court's language was explicit — the action was remanded to the Commission for specific limited factual findings regarding GHG. In In re HELCO, the Hawaii Supreme Court found

the 2017 D&O was not supported by findings regarding GHG emissions of the Hu Honua facility "sufficient to allow the reviewing court to track the steps by which the [PUC] reached its decision." Kauai Springs, Inc., 133 Hawai'i at 164, 324 P.3d at 974. Without such explicit findings, this court cannot determine whether the PUC adequately considered GHG emissions as required by HRS § 269-6(b).⁴¹

Accordingly, the Supreme Court directed that a remand pursuant to HRS § 91-14(g) was appropriate, stating that

"[a] remand pursuant to HRS § 91-14(g) is appropriate if an agency's findings are incomplete and provide no basis for review." Int'l Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 328, 713 P.2d 943, 953 (1986) (citing In re Kauai Elec. Div. of Citizens Util. Co., 60 Haw. 166, 185–86, 590 P.2d 524, 538 (1978)). HRS § 91–14(g) provides as follows:

Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the

³⁸ CA's Reply, at 7-8.

³⁹ LOL's Motion for Leave, at 11.

⁴⁰ Motion for Reconsideration, at 17-27.

⁴¹ In re HELCO, 145 Hawaii 1, 24, 445 P.3d 673, 696 (2019).

administrative findings, conclusions, decisions, or orders are: (1) In violation of constitutional or statutory provisions;

....

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Where the PUC's failure to make sufficient findings leaves this court unable to determine the validity of its conclusions, it is appropriate to remand the case to the PUC for further proceedings, pursuant to HRS § 91-14(g), **in order for the PUC to make findings necessary for judicial review**. *Application of Hawaiian Tel. Co.*, 54 Haw. 663, 669, 513 P.2d 1376, 1379 (1973); *see also In re Kauai Elec. Div. of Citizens Util. Co.*, 60 Haw. at 185, 590 P.2d at 537 (remanding the case to the PUC for further proceedings, pursuant to HRS § 91-14(g), because the PUC's order was "unsupported by findings of fact and conclusions").

Here, remand to the PUC for further proceedings is appropriate. **On remand, the PUC shall give explicit consideration to the reduction of GHG emissions in determining whether to approve the Amended PPA, and make the findings necessary for this court to determine whether the PUC satisfied its obligations under HRS § 269-6(b).**⁴²

The Hawaii Supreme Court explicitly stated that it was remanding this case back to the Commission "in order for the PUC to make findings necessary for judicial review"⁴³ and instructed that the Commission "PUC shall give explicit consideration to the reduction of GHG emissions in determining whether to approve the [A&R PPA], and make the findings necessary for this court to determine whether the PUC satisfied its obligations under HRS § 269-6(b)."⁴⁴ The Court's remand to the Commission was a limited remand for the limited purpose — to require the Commission to consider the reduction of GHG emissions (and the associated costs of GHG) in its review of the A&R PPA and to supplement the record with its findings.

HRS § 269-6(b) provides:

⁴² 145 Hawaii 1, 24-25, 445 P.3d 673, 696-97 (2019) (emphasis added).

⁴³ 145 Hawaii 1, 25, 445 P.3d 673, 697 (emphasis in original).

⁴⁴ *Id.*

(b) The public utilities commission shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation in exercising its authority and duties under this chapter. In making determinations of the reasonableness of the costs of utility system capital improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions. The commission may determine that short-term costs or direct costs that are higher than alternatives relying more heavily on fossil fuels are reasonable, considering the impacts resulting from the use of fossil fuels.

(Emphasis added). Thus, even the review of pricing was narrowly prescribed to the costs associated with greenhouse gas emissions within the context of HRS § 269-6(b). Here, the evidence demonstrates that the Hu Honua project will result in a net reduction of greenhouse gas emissions, so there will be no hidden greenhouse gas related costs and no higher pricing to factor into the pricing review of the A&R PPA on remand.

LOL and the Consumer Advocate both argue that Hu Honua should have been placed on notice that the waiver issue could be redecided by the Commission on remand because the Hawaii Supreme Court remanded the case back to the Commission and allowed the Commission to redecide the scope of LOL's participation in the proceeding.⁴⁵ LOL also argues that because the Hawaii Supreme Court made no findings regarding the waiver issue in In re HELCO, the waiver issue can be redecided on remand.⁴⁶ The Consumer Advocate and LOL's analyses are flawed.

It is critical here to understand that LOL did not appeal the Commission's grant of waiver for the A&R PPA. It simply was not an issue on appeal and, therefore, was not considered by the Hawaii Supreme Court in In re HELCO. Accordingly, as argued in Hu

⁴⁵ See CA Reply, at 9; LOL Motion for Leave, at 6.

⁴⁶ LOL Motion for Leave, at 5-6.

Honua's Motion for Reconsideration,⁴⁷ the A&R PPA's waiver was left undisturbed by the Hawaii Supreme Court's remand for the limited purpose to explicitly consider GHG emissions and supplement the record accordingly.⁴⁸ The Hawaii Supreme Court did not decide whether the Commission should have allowed LOL to intervene as a party (as opposed to as a participant) in this proceeding, finding that on remand the Commission had discretion to determine the extent of LOL's participation.⁴⁹ As explained above, the Hawaii Supreme Court's remand was limited to the specific issue raised by LOL in its appeal to the Hawaii Supreme Court – the consideration of GHG emissions and the impact of the A&R PPA on LOL's right to a clean and healthful environment.⁵⁰ LOL's participation on remand was thus limited to the scope of remand — the Commission's consideration of the reduction of GHG emissions in determining whether to approve the A&R PPA under HRS § 269-6(b).⁵¹

The Consumer Advocate appears to argue that the Commission's approach on remand to redecide the waiver issue, irrespective of what appellate law and rules require, was reasonable so as to avoid the possibility of a subsequent appeal made upon the claim the Commission failed to consider all issues on remand. The argument rings particularly hollow under these circumstances.⁵² The Commission's Order Revoking Waiver only redecides Issue No. 1 (the waiver issue) without addressing any of the remaining issues in this proceeding. In so doing, the Commission explicitly circumvents the Hawaii Supreme Court's actual instruction to the Commission to hold an evidentiary

⁴⁷ Motion for Reconsideration, at 17-27.

⁴⁸ See generally, In re HELCO, 145 Hawaii 1, 445 P.3d 673 (2019).

⁴⁹ In re HELCO, 145 Hawaii at 28, 445 P.3d 673 at 700.

⁵⁰ In re HELCO, 145 Hawaii at 28, 445 P.3d at 700.

⁵¹ In re HELCO, 145 Hawaii 1, 25, 445 P.3d 673, 697.

⁵² CA Reply, at 8.

due process hearing on remand to supplement the record and to “give explicit consideration to the reduction of GHG emissions in determining whether to approve the Amended PPA, and make the findings necessary for [the Hawaii Supreme Court] to determine whether the PUC satisfied its obligations under HRS § 269-6(b).”⁵³ The Commission’s Order Revoking Waiver fails to comply with the Hawaii Supreme Court’s instructions on remand by refusing to consider the merits of the A&R PPA as related to GHG emissions. In so doing, the Commission disserves the public interest, abandons the project, and destroys an approximately \$474 million dollar investment into Hawaii Island, leaving Hu Honua and its investors with no means to recover its investment.

Further, as explained below, even if the Commission had the discretion to reopen the waiver issue, which it did not, the Commission’s Order Reopening Docket and subsequent proceedings failed to provide adequate notice to the Parties that the Commission intended to redecide the waiver issue and what specific information and criteria would be evaluated and considered to reach its decision.

C. The Commission violated Hu Honua’s due process rights by failing to give Hu Honua notice and an opportunity to be heard before it revoked the A&R PPA’s waiver.

1. Hu Honua had a property interest protected by due process in the A&R PPA’s Waiver from the Framework.

The Consumer Advocate appears to contest that Hu Honua had a property interest protected by due process in the 2017 D&O’s grant of a waiver for the A&R PPA from the Framework.⁵⁴ The Consumer Advocate argues, without supporting authority, that “a waiver is the most initial and partial approval by the Commission in a purchase power

⁵³ 145 Hawaii 1, 24-25, 445 P.3d 673, 696-97 (emphasis added).

⁵⁴ CA Reply, at 15.

proceeding, and so the worst candidate for creating a lasting property interest.”⁵⁵ The Consumer Advocate misunderstands Hu Honua’s actual argument in its Motion for Reconsideration. Hu Honua argues that the A&R PPA’s waiver is a property interest that is protected by the due process clause, which means that the Commission cannot revoke the waiver, *sua sponte*, without providing Hu Honua adequate notice and a meaningful opportunity to be heard.⁵⁶

The Hawaii Intermediate Court of Appeals (“ICA”) has ruled that even in the case of building permits erroneously and invalidly issued, the permit holder has a protectible property interest in the invalid permit and is entitled to procedural due process before the permit may be revoked.⁵⁷ The ICA rejected arguments similar to the arguments that the Consumer Advocate makes here:

The City’s position would allow it to determine that a building permit, in which the holder otherwise has a due process property interest, could be unilaterally declared invalid by the City and the permit holder has no right to contest that decision because the City has made that decision. Such a position would allow the City to arbitrarily revoke a permit, on the basis that it was invalidly issued, without any process whatsoever. In addition, we note that there are procedures that must be followed to suspend or revoke a building permit that the DPP believes was issued in error. Accordingly, it appears that a permit holder has a legitimate claim of entitlement protected by due process in a building permit that the City later considers to have been issued in error.⁵⁸

The A&R PPA’s waiver was a property interest for which Hu Honua was entitled to receive, at a minimum, the basic protections of due process.

⁵⁵ CA Reply, at 15.

⁵⁶ See Sandy Beach Defense Fund v. City Council of City & Cty. of Honolulu, 70 Haw. 361, 378, 773 P.2d250, 261 (1989) (“The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.”)

⁵⁷ Hoku Lele, LLC v. City & County of Honolulu, 143 Hawaii 233, 426 P.3d 457, 2018 WL 4520946, at *5 (Haw. App. 2018) (Mem. Op.)

⁵⁸ Id.

2. Hu Honua had no notice that the Commission intended to redecide the waiver issue on remand and what specific information and criteria the Commission intended to evaluate and consider in reaching its decision.

The Consumer Advocate claims that Hu Honua and HELCO should have known that the Commission intended to reconsider the waiver issue upon remand “because the Commission reinstated all the issues from the vacated order, added the GHG issue, and allowed LOL to participate fully in all issues of the proceeding.”⁵⁹ Tawhiri likewise makes the incorrect assertion that Hu Honua’s Motion to Reconsider was the first time the scope of these proceeding was raised by Hu Honua.⁶⁰

Both arguments miss the mark. The Commission’s Order Reopening Docket did not explicitly state that it was reopening Issue No. 1 (waiver from the Framework) for redecision. The Order Reopening Docket stated that the Commission “reopens this docket for further proceedings to review”⁶¹ the A&R PPA and that

the procedural schedule for this matter will incorporate an evidentiary hearing that is intended to explore, among other things, the greenhouse gas “GHG” emissions that would result from approving the A&R PPA, whether the cost of energy under the A&R PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the A&R PPA are prudent and in the public interest, in light of its potential hidden and long-term consequences.⁶²

The Order Reopening Docket also stated,

the commission (A) directs the Parties and Participants to file supplemental briefing on the initial issues established by Order No. 34597 (Issue Nos. 1 to 3, including subparts) taking into consideration events that have occurred in Hawaii Island's energy market and developments on HELCO's system, since the commission issued Decision and Order No. 34726.⁶³

⁵⁹ CA Reply, at 9.

⁶⁰ Tawhiri Reply, at 7.

⁶¹ Order Reopening Docket, at 1.

⁶² Order Reopening Docket, at 2.

⁶³ Order Reopening Docket, at 4.

Despite the Consumer Advocate's belief that Hu Honua and HELCO should have inferred the intent of the Commission, both Hu Honua and HELCO expressed their respective understandings in briefing that, in fact, the A&R PPA's waiver from the Framework was not an open issue on remand. On September 17, 2019, Hu Honua submitted, as instructed, its supplemental briefing on Issue Nos. 1 through 3 and stated that while Hu Honua recognized the 2017 D&O was vacated, the Hawaii Supreme Court did not instruct the Commission to reconsider the waiver for the A&R PPA.⁶⁴ However, because the Commission requested supplemental briefing, Hu Honua dutifully complied with the Commission's request in good faith with the understanding that the waiver for the A&R PPA was still effective and that the Commission sought updates to inform its decision on whether to approve the A&R PPA in accordance with the Hawaii Supreme Court's remand instructions.

On March 23, 2020, in its opposition to LOL's motion to compel, HELCO stated its understanding that the scope of this docket on remand was limited to the GHG impacts of the Project.⁶⁵ HELCO argued:

It is worth noting that, although the Commission amended the scope of participation such that all participants are permitted to participate on all issues, the issue here on remand (and thus LOL's participation in the same) is limited to consideration of the GHG emissions that would result from approval of the Amended PPA. To be sure, the Commission's direction to Applicants in this reopened docket is limited to the GHG impacts of the project: "[i]n accordance with the Hawaii Supreme Court's decision in SCOT-17-0000630, the commission directs the Applicants to analyze the GHG impacts of the Project and supplement the record with these analyses[.]" Order No. 36382 at 10 (emphasis added).⁶⁶

⁶⁴ See Hu Honua Bioenergy, LLC's Supplemental Briefing on Issue Nos. 1 to 3, filed September 17, 2019, at 2-3.

⁶⁵ See Hawai'i Electric Light Company, Inc.'s Memorandum in Opposition to Life of the Land's Motion to Compel, filed March 23, 2020, at 2-3.

⁶⁶ Hawai'i Electric Light Company, Inc.'s Memorandum in Opposition to Life of the Land's Motion to Compel, filed March 23, 2020, at 3 (emphasis in original).

The Commission never notified the Parties that it considered the waiver issue to be a live issue on remand, despite knowing for almost a year that the Parties in this docket had a very different understanding than the Commission regarding the scope of this proceeding. Hu Honua's attempts to work cooperatively with the Commission, the decision-maker in this proceeding and the government agency responsible for the Supreme Court remanding the 2017 D&O in the first place for not explicitly considering GHG in its written 2017 D&O, should not be used against Hu Honua to claim that Hu Honua was on notice that the Commission intended to redecide the waiver issue. Hu Honua had no notice.

Tawhiri argues that Hu Honua was provided notice because the Commission's Order Reopening Docket requested supplemental briefing on initial issues established by Order No. 34597 (Issue Nos. 1 to 3, including sub-parts), taking into consideration events that have occurred in Hawaii Island's energy market and developments on the HELCO system since Decision and Order No. 34726, including: (1) the initiation of competitive bidding in Docket No. 2017-0352; (2) the upcoming Phase 2 of competitive bidding in Docket No. 2017-0352; and (3) the A&R PPA terms compared to competitive benchmarks established in PPAs approved by the Commission pursuant to Phase 1 of the competitive procurement in Docket No. 2017-0352.⁶⁷ However, Tawhiri (and the Commission) ignore the fact that the Phase 1 and Phase 2 competitive bidding in Docket No. 2017-0352 was for variable renewable energy and targeted variable renewable resources such as solar or wind with 4 hours of storage. As such, these projects are inherently and fundamentally different than 24/7 firm resources, such as fossil fuel plants or Hu Honua's biomass plant, with variable solar + 4 hours of storage providing significantly less reliability, capability,

⁶⁷ See Tawhiri Reply, at 3.

and annual MWh availability for a similar sized plant.

Not only did the Commission not provide any guidance or instruction on how to appropriately compare the competitive benchmarks of such fundamentally different resources in order for the parties to provide briefing on the matter, but it did not provide the specific criteria it would be evaluating and considering in order to make such comparison. For example, the Commission did not instruct the parties to compare pricing on a cost/kwh basis or any other basis of comparison. Nor did the Commission instruct the parties to compare the pricing of Hu Honua on a fair “apples to apples” basis with solar and enough battery capacity to match the reliability, capability, and annual MWh availability of a 24/7 fossil fuel or biomass plant, for example. As such, the parties were provided no notice and opportunity for briefing regarding the Commission’s intent to compare the pricing of Phase 1 solar + 4 hour battery projects against Hu Honua’s 24/7 firm biomass on a cost/kwh basis only without any adjustment for reliability, capability, annual MWh availability, and ability to retire existing fossil fuel plants. Had Hu Honua been provided notice and an opportunity to brief this issue, Hu Honua would have explained that this is a completely unfair comparison.

As HELCO noted, “the Hu Honua Project provides true firm, dispatchable, renewable energy to the Hawaii Electric grid. As true firm generation, this Project has additional benefits to the grid beyond the solar and battery projects being procured in the Phase 1 and Phase 2 RFPs.”⁶⁸ Moreover, HELCO confirmed that the Commission’s previous position that this Project represents an “opportunity to increase the amount of renewable energy on HELCO’s system, without increasing the amount of as-available,

⁶⁸ See HELCO Position Statement (Reply), at 6.

intermittent renewable energy resources on HELCO's system" remains true today, and that the issues related to the integration of intermittent renewable energy resources on HELCO's system "are greater today than ever before."⁶⁹

3. The Commission's failure to allow Hu Honua to address new information that arose after briefing on the waiver issue violated Hu Honua's right to procedural due process.

Just as egregious as the Commission's failure to clarify its decision regarding the scope of remand from the Hawaii Supreme Court and to place the parties on notice regarding its apparent intent to compare qualitatively different resources, the Commission revoked the A&R PPA's waiver without giving Hu Honua the chance to address new information considered and relied upon by the Commission in its Order Revoking Waiver, as explained *supra*. The Commission asked for updates regarding the waiver issue by September 17, 2019, which were provided to the Commission as directed.⁷⁰ The Commission's Order Revoking Waiver relied on information obtained by the Commission outside of this docket after the updates were provided. For example, the Commission's Order Revoking Waiver relied on changes to the State's economy caused by COVID-19, citing orders from the governor issued on March 5, 2020 and later.⁷¹ The Commission's Order Revoking Waiver also relies upon the outcome of the Phase 2 RFP, stating the

Final Award Selection for the second phase of the Hawaiian Electric Companies' (including HELCO) competitive RFP had been completed in Docket No. 2017-0352, resulting in 'the largest renewable energy procurement ever undertaken in Hawaii,' which has the potential to 'produce

⁶⁹ *Id.*

⁷⁰ See Hu Honua Bioenergy, LLC's Supplemental Briefing on Issue Nos. 1 to 3, filed September 17, 2019; Hawai'i Electric Light Company, Inc.'s Supplemental Brief, filed September 17, 2019; Division of Consumer Advocacy's Supplemental Briefing on Issue Nos. 1 to 3 in Response to Order No. 36382 Reopening Docket; filed September 17, 2019.

⁷¹ Order Revoking Waiver, at 31.

460 [MW] of solar energy and nearly 3 [GW] hours of energy storage on [those islands].⁷²

The Hawaiian Electric Companies were required to make their Final Award Selection by May 8, 2020⁷³ and announced their selection on May 11, 2020.⁷⁴ The Commission's Order Revoking Waiver also references and relies upon the current status of the RFP 1 Projects by reference to HECO's Renewable Project Status Board, which the Commission indicates it last accessed on July 7, 2020.⁷⁵

"The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.⁷⁶ As demonstrated above, the Commission revoked the A&R PPA's waiver based on information that developed many months after Hu Honua's supplemental briefing to provide updates to the Commission regarding the waiver issue. The Commission gave Hu Honua no notice and no opportunity to respond to the above-referenced new information relied upon by the Commission in making its decision to revoke the A&R PPA's waiver. Given the devastating impact the decision would have on Hu Honua, it is remarkable that the Commission left Hu Honua and HELCO in the dark regarding the Commission's decision on the scope of remand and reddecided the waiver issue without affording the parties adequate notice and a full opportunity to be heard, which is the bare minimum required to satisfy due process of law.⁷⁷ At the very least, the Commission must

⁷² Order Revoking Waiver at 16-17.

⁷³ See Docket No. 2017-0352, Hawaiian Electric Companies' Final Stage 2; Renewable and Grid Services RFP's; Book 5 of 7, filed August 22, 2019, at Section 3.1 (Selection of Final Award by May 8, 2020).

⁷⁴ See Hawaiian Electric, *Hawaiian Electric selects 16 projects in largest quest for renewable energy, energy storage for 3 islands*, at <https://www.hawaiianelectric.com/hawaiian-electric-selects-16-projects-in-largest-quest-for-renewable-energy-energy-storage-for-3-islands> (last visited August 13, 2020).

⁷⁵ Order Revoking Waiver, at 41, n.94.

⁷⁶ Sandy Beach Defense Fund, 70 Haw. at 378, 773 P.2d at 261.

⁷⁷ Id.

afford Hu Honua the opportunity to provide a full and fair analysis of the issues and new information in this docket that bear upon the Commission's waiver decision through an evidentiary hearing in order to satisfy procedural due process.

D. Hu Honua was entitled to rely on the Commission's waiver for the A&R PPA, which could not be revoked under the Framework and, even if it could be revoked or redecided, Hu Honua was entitled to proper notice and an opportunity to be heard.

Hu Honua's Motion for Reconsideration explained why Hu Honua was entitled to rely on the Commission's waiver for the A&R PPA as the grant of the waiver was not appealed by LOL and the revocation of a waiver is not permitted under the Framework.⁷⁸

The Consumer Advocate's Reply argues:

[t]here should be a balance between the finality and effect of Commission approvals, even preliminary ones, on the one hand, and how the Commission addresses subsequent problems with a project, on the other hand. Careful and predictable procedure for examining such problems is the fulcrum for that balance. Applicants before the Commission, unregulated developers as well as regulated utilities, make investments of time and money towards the state's energy goals, confident in the Commission's approvals and directions. However, a waiver under the [Competitive Bidding] Framework is not a guarantee of ultimate approval by any means, and applicants should know that.⁷⁹

Hu Honua agrees with the Consumer Advocate that finality of Commission approvals, even preliminary approvals, are critical and that careful and predictable Commission procedures are vitally important given that developers must rely on these decisions in making business investments. Indeed, the Commission's improper revocation of the previously issued waiver is precisely the type of unbridled regulatory action that dissuades business investment and expansion of the State's economy.

However, the Consumer Advocate's statement above that Hu Honua should have

⁷⁸ Motion for Reconsideration, at 17-27.

⁷⁹ CA Reply, at 6-7.

known that a waiver under the Framework is not a guarantee of ultimate approval by the Commission of the A&R PPA is a strawman that evades the merits of Hu Honua's actual arguments. Hu Honua has never argued that the approval of the A&R PPA is certain. All Hu Honua seeks is the evidentiary hearing to which it is entitled so that it may demonstrate the merits of the Hu Honua Project to ratepayers, the Commission, and the State. The Commission's revocation of Hu Honua's waiver aborts this process before it begins and deprives Hu Honua of the opportunity to prove the merits of the A&R PPA.

Despite the Consumer Advocate's claim that careful and predictable procedures before the Commission are necessary to protect investment by utilities and developers, the Consumer Advocate's briefing completely ignores that the Framework itself does not allow for the revocation of a granted waiver. The Framework then necessarily provides no standards or procedure to guide the Commission's consideration of a revocation because no revocation procedure is contemplated under the Framework. It is simply indisputable that the action taken by the Commission in this proceeding is not supported by any existing rule or legal authority, precedent, or practice, and is not the "[c]areful and predictable procedure" advocated by the Consumer Advocate.⁸⁰

E. The Commission is equitably estopped from revoking its waiver.

Hu Honua's Motion for Reconsideration argued that the Commission is equitably estopped from revoking and/or denying the waiver for the A&R PPA.⁸¹ The Consumer Advocate claims equitable estoppel is not appropriate under the circumstances of this case as this situation is not analogous to the authorities cited by Hu Honua.⁸² The

⁸⁰ CA Reply, at 6-7.

⁸¹ Motion for Reconsideration, at 28-34.

⁸² CA Reply, at 12-13.

Consumer Advocate does not explain its position that equitable estoppel principles “borrowed from real estate development, zoning decisions and building permits” are a poor analogy to the circumstances present here.⁸³ That is simply not true. The focus in equitable estoppel is whether the developer has received “official assurance on which [he] has a right to rely [that] he may safely proceed with the project.”⁸⁴ Nothing in the case law limits the application of these principles to “real estate development, “zoning decisions,” or “building permits”, and the Consumer Advocate cites no authority to the contrary.

In any event, the circumstances here are directly on point with the circumstances in which the doctrine has previously been considered and applied by Hawaii courts. Hu Honua, a developer, relied on the Commission’s waiver for the A&R PPA, a governmental approval, to expend significant amounts of money and effort to comply with the Commission’s order in the 2017 D&O to expeditiously complete the development and construction of the Project.⁸⁵ The facts here are analogous to the cases cited by Hu Honua and compelling in this case as it would protect Hu Honua from the same harm contemplated under the case law — government action that would penalize a developer’s change of position, evidenced by the substantial expenditure of money, in reliance on official assurance upon which it has the right to rely.⁸⁶

Within the Framework, there should be no doubt that the issuance of a waiver is the functional equivalent of the issuance of a permit or approval of a variance, signaling

⁸³ CA Reply, at 12.

⁸⁴ Life of Land v. City Council of Honolulu, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980).

⁸⁵ 2017 D&O at 61.

⁸⁶ Life of the Land, Inc. v. City Council of City & County of Honolulu, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980).

that development and construction may and must proceed; the A&R PPA's waiver and the waiver that preceded it permitted and signaled to Hu Honua to proceed with the Project. There were no conditions attached to the A&R PPA's waiver, and the Framework neither provides for nor contemplates summary revocation of issued waivers. No explicit or implicit rule or procedure exists for revocation of a waiver in the Framework. Hu Honua relied on the Commission's own procedures, including those established by the Commission itself in the Framework, in deciding to continue to invest in the Hu Honua Project. If waivers from the Framework do not constitute "official assurance" upon which developers have a right to rely that they may safely proceed with their renewable energy projects, then the Framework is broken from a legal and a business perspective. Such an erratic regulatory approach would signal to future investors that investments in Hawaii may be subject to arbitrary and capricious decisions by the Commission. As potential investors in Hawaii factor these risks into financing, this will increase the cost of doing business in Hawaii, which will ultimately be a burden borne by ratepayers.

The Consumer Advocate also argues that equitable estoppel against the government is not favored,⁸⁷ but ignores the authorities cited by Hu Honua that addressed equitable estoppel claims against the government.⁸⁸ As the Hawaii Supreme Court has previously stated in applying equitable estoppel against the government, "[a] citizen has a right to expect the same standard of honesty, justice and fair dealing in his contact with

⁸⁷ CA Reply, at 12.

⁸⁸ See Motion for Reconsideration, at 28-33; Life of the Land, Inc. v. City Council of City & County of Honolulu, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980); County of Kauai v. Pacific Standard Life Insurance Co., 65 Haw. 318, 327, 653 P.2d 766, 774 (1982).

the State or other political entity, which he is legally accorded in his dealings with other individuals.”⁸⁹

The Consumer Advocate next claims that it is the Commission’s duty to protect the public interest and that, therefore, the Commission may reexamine previous approvals in order to safeguard the public interest.⁹⁰ The Consumer Advocate cites no authority for this, and we are unaware of any authority (statute or rule) or Commission precedent that supports the Consumer Advocate’s claim that the Commission may reexamine previous waiver approvals in order to safeguard the public interest. The authority to redetermine or revoke a previously granted waiver is found nowhere in the Framework or in any other applicable authority. The Consumer Advocate also argues that Hu Honua should have been on notice that the Commission could revoke the waiver if it so chose based on a change in circumstances.⁹¹ Hu Honua has already explained *supra* why the Commission’s action here to revoke the A&R PPA’s waiver is not analogous to the prior refusal by the Commission to transfer a waiver from the Original PPA to the A&R PPA. The Order Revoking Waiver sets a dangerous precedent that developers cannot rely upon a governmental decision. This precedent will deter and discourage investors, thereby harming the State’s economy, because there is no guarantee of finality in government decisions. In addition, if no consideration is given to, or no importance is placed upon, the developer’s investment of significant sums of capital over a long duration of time.

The Consumer Advocate would shift the entire burden onto Hu Honua to divine the

⁸⁹ *Filipo v. Chang*, 62 Haw. 626, 635, 618 P.2d 295, 300 (1980).

⁹⁰ CA Reply, at 12-13.

⁹¹ CA Reply, at 12-13.

intent of the Commission regarding the value of an issued waiver⁹² “for what a waiver is worth,” in the words of the Consumer Advocate.⁹³ The Consumer Advocate argues that Hu Honua willingly assumed the risk of expending money during the appeal of the 2017 D&O and notes that the A&R PPA was conditioned on a non-appealable approval from the Commission.⁹⁴ The Consumer Advocate ignores, however, that the 2017 D&O was not stayed during the pendency of LOL’s appeal, and that the Commission *itself* argued against LOL’s request to stay the 2017 D&O, stating that Hu Honua could continue to construct regardless of the stay as the 2017 D&O would only affect whether the A&R PPA had an operative Commission approval.⁹⁵ At no time did the Commission indicate that Hu Honua should disregard the Commission’s instruction that it expected Hu Honua and HELCO to “make all reasonable attempts to complete the project according to this schedule and [did] not expect future requests to extend the Commercial Operation Date deadline.”⁹⁶

If the Commission agrees with the Consumer Advocate’s position, every project that is granted a waiver from the Framework and is subsequently appealed will be effectively killed. Each time such an appeal is remanded to the Commission, the waiver issue will have to be redecided and then would be subject to additional appeals. This is not the process contemplated under or permitted by the Framework.

In addition, if the Commission takes the position that it is not killing the Project, it is merely asking that the Project be competitively bid, the Commission knows full well that

⁹² CA Reply, at 13-14.

⁹³ CA Reply, at 7.

⁹⁴ CA Reply, at 13-14.

⁹⁵ See In re HELCO, SCOT-17-0000630, Order Denying Motion for Stay, issued on April 16, 2018.

⁹⁶ 2017 D&O at 61 (emphasis added); In re HELCO, SCOT-17-0000630, Commission’s Opposition to Appellant’s Emergency Motion for Stay upon Appeal, or in the Alternative, to Appoint an Environmental Circuit Court Judge Master to Conduct an Evidentiary Hearing, filed March 12, 2019, at 5-6.

this is the equivalent of killing the project.⁹⁷ There has been no competitive RFP to date that would have allowed Hu Honua to fairly bid into and according to HELCO it has no plans to issue a competitive RFP for biomass or true firm renewable energy. Moreover, even if HELCO were to issue a new competitive RFP for biomass or true firm renewable energy, it would likely result in several years of delay (e.g., around 5 years) to go through the competitive bidding and Commission approval processes.⁹⁸ This lengthy delay would likely result in Hu Honua having to discontinue its “continuous efforts” to advance the Project’s completion, resulting in Hu Honua losing its ability to recover the federal ITC,⁹⁹ as well as incur continued carrying costs and other negative impacts to financing and possibly permitting, all or some of which could effectively kill the Project which has already invested approximately \$474 million and is 99% complete. In addition, bidders into such biomass or true firm RFP would not be able to take advantage of federal tax credits currently available to Hu Honua, potentially resulting in higher prices.

Again, this unpredictable approach by the Commission will effectively discourage or significantly increase the costs of future investments in Hawaii renewable energy projects as investors will be required to factor in additional and significant regulatory risk

⁹⁷ In fact, the Commission is aware that its denial of a waiver of the Eurus Energy America Corporation (EE Ewa LLC) wind project in Docket No. 2018-0400 resulted in the developer deciding to give up on the wind project, among other things, due to the unavailability of federal tax credits (and its impact on its proposed pricing) after having to go through a lengthy competitive bid, and resulting in the developer losing money invested into the project to get to that point.

⁹⁸ See HELCO’s Response to CA/HELCO-IR-57(a), filed February 18, 2020 (explaining the delays incurred if the project had to be competitively bid). An example of the lengthy timing associated with a competitive bid are the Phase 1 RFP projects in Docket No. 2017-0352 where it took several months beginning in 2016 for Hawaiian Electric to develop an RFP, then submit to the Commission for approval in 2017, then solicit bids, select awardees, and negotiate PPAs in 2018, then obtain PPA approval in 2019, and these Phase 1 RFP projects still need to obtain overhead line approval before they can even begin construction – hopefully by end of 2020. Thus, the competitive bid process can take approximately five (5) years before a developer would be able to start construction.

⁹⁹ See Motion for Reconsideration at 47-78, Katz Affidavit at ¶¶ 11-13 (“If the Hu Honua Project is not completed until after the ITC Deadline, it may still qualify for the ITC, but only if it can satisfy the continuous efforts standard through the completion date.”)

into financing that will ultimately be a burden borne by ratepayers.

The Order Revoking Waiver may also result in an additional economic impact to the parties due to its unique procedural stance. As the record demonstrates, the Original PPA was terminated by HELCO, followed by a lawsuit by Hu Honua against Hawaiian Electric Industries, Inc. (“HEI”), Hawaiian Electric Company (“HECO”), HELCO, Nextera Energy, Inc., and Hamakua Energy Partners, L.P. challenging the termination of the Original PPA and raising other claims.¹⁰⁰ Hu Honua and HELCO, HECO, and HEI were able to reach a settlement, and HELCO agreed to rescind the termination and enter into the A&R PPA.¹⁰¹ The settlement is conditioned upon the Commission’s timely, non-appealable final approval of the A&R PPA.¹⁰² As discussed above, the Order Revoking Waiver essentially kills the Project, which undermines the settlement achieved between Hu Honua and HELCO, HECO and HEI. This may result in the resumption of the lawsuit in which Hu Honua seeks an award of damages of more than \$555 million, which in turn may negatively impact HEI, HECO, and/or HELCO financially, including the utility’s bond rating, which would likely be detrimental to the utility and its ratepayers.

F. The Waiver is still justified under Part II.A.3.d. of the Framework as the Hu Honua Project is the most expeditious means to increase the amount of firm renewable energy on HELCO’s system and is in the public interest.

1. The addition of firm renewable energy onto HELCO’s grid is a valid basis upon which to support a waiver.

Hu Honua’s Motion for Reconsideration and Supplemental Memorandum also explained why the waiver for the A&R PPA from the Framework is still justified as Hu

¹⁰⁰ See Request for Approval of A&R PPA, filed May 9, 2017, at 4.

¹⁰¹ See Request for Approval of A&R PPA, filed May 9, 2017, at 4.

¹⁰² See Request for Approval of A&R PPA, filed May 9, 2017, at 4.

Honua is still the most expeditious opportunity to increase the amount of firm renewable energy on HELCO's system and would also provide firm capacity and grid services necessary and essential to support intermittent renewable resources, such as solar and wind projects, all without foregoing federal ITC benefits.¹⁰³

HELCO is procuring renewable energy to meet the state's 100% renewable portfolio standard ("RPS") goal,¹⁰⁴ which would mean the retirement of HELCO's fossil fuel plants. Fossil fuel generators provide dispatchable, 24/7 true firm generation, inertial frequency response, voltage support and other system services, and renewable replacements for fossil-fueled plants must provide these capabilities. Indeed, the recent rolling blackouts in California illustrate the shortcomings of over-reliance on solar energy and the comparative benefits of true firm generation.¹⁰⁵ The ultimate cause of California's energy shortages was higher energy demand, including in the evening, caused by a heat wave. "[T]he blackouts were ... a side effect of the state's increasing shift to solar power and away from natural-gas-fired generators, according to state grid operator CAISO and Wood Mackenzie analysts ... leaving CAISO with less dispatchable generation to fill in shortfalls between supply and demand."¹⁰⁶ "[W]ithout changes to how the state manages its grid capacity needs, the same shortfalls could plague the state for years to come" and blame was placed on "California policymakers' failure to prepare for this eventuality" as "[t]he situation ... could have been avoided." CAISO has told regulators for years that "there is inadequate power available during the net peak, the

¹⁰³ See Motion for Reconsideration, at 39-45; Supplemental Memorandum, at 2-24.

¹⁰⁴ See HRS § 269-92

¹⁰⁵ See "California's Shift from Natural Gas to Solar is Playing a Role in Rolling Blackouts", Green Tech Media, August 17, 2020, <https://www.greentechmedia.com.cdn.ampproject.org/c/s/www.greentechmedia.com/amp/article/how-californias-shift-from-natural-gas-to-solar-is-playing-a-role-in-rolling-blackouts>.

¹⁰⁶ Id.

hours when the solar [generation] has left the system.”¹⁰⁷ California “just hasn’t done enough to keep resource adequacy where it should be, and the reserve margins have gotten tighter more quickly.”¹⁰⁸ Expanding energy storage capacity can help shift solar power into the evening hours now facing grid shortages. But “batteries [alone] won’t fix this problem,” as they cannot generate their own power.¹⁰⁹ “Solar power will have to be overbuilt to charge the batteries” as well as provide power to the grid ... and “converting the power grid to run entirely on [solar] renewable resources could be much more expensive [than a truly firm resource], since such a path may need to rely on building excess solar ... capacity and battery storage to cover shortfalls such as those [California] is now facing.”¹¹⁰

Thus, in order for HELCO’s fossil fuel plants retire to meet the state’s 100% RPS goal, truly firm renewable energy capable of providing reliable capacity, grid services, and resource adequacy is needed. Intermittent solar – even when paired with battery storage – simply cannot provide the same levels of reliability and resource adequacy in order to fully and cost-effectively replace true firm fossil fuel plants, whereas a true firm renewable biomass plant such as Hu Honua can. If Hawaii Island were increasingly to rely on solar energy while retiring true firm fossil fuel plants, it too could face resource inadequacy in extended periods of high energy demand. True firm renewable plants are needed to replace the capabilities of existing fossil fuel plants.

Tawhiri’s Reply states that “Hu Honua even goes so far as claiming that by adding more firm renewable generation is justification for a waiver from the Competitive Bidding

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id.

Framework. Clearly, Hu Honua's claim is wrong and is not supported by the Competitive Bidding Framework."¹¹¹ Tawhiri is incorrect. The Framework states that "the Commission may waive this Framework ... upon a showing that the waiver will likely ... increase the reliable supply of electricity to the utility's general body of ratepayers."¹¹² The services provided by firm, dispatchable rotating generators such as Hu Honua include operating reserve, frequency regulation, voltage support and inertial response, all of which are necessary for the reliable supply and secure operation of the power system. A very limited pool of available renewable resources like Hu Honua that are capable of providing a reliable supply of 24/7 electricity exist on Hawaii Island. Neither Tawhiri nor the Commission have identified a new renewable resource with a reliable supply of 24/7 electricity capable of retiring existing fossil fuel plants on Hawaii Island that is less costly and capable of being operational sooner than Hu Honua. There are none.

In addition, Hu Honua's Motion for Reconsideration explains that HELCO has indicated that it has no plans for a targeted RFP for firm renewable resources and that, historically, adding firm renewable resources has been a basis upon which waivers from the Framework have been previously granted by the Commission.¹¹³ Hu Honua then questions whether PGV would be required to be competitively bid if adding more firm renewable generation is no longer a sufficient basis to obtain a waiver.¹¹⁴

Indeed, the Commission has twice found that a waiver was justified under the Framework because the Hu Honua Project can provide HELCO firm renewable energy

¹¹¹ Tawhiri Reply, at 8 (citing Hu Honua's Motion for Reconsideration at 55).

¹¹² See Docket No. 03-0372, "In re Public Utilities Commission Instituting a Proceeding to Investigate Competitive Bidding for New Generating Capacity in Hawaii," Decision and Order No. 23121, filed December 11, 2006, at Part II.A.3.d.

¹¹³ Motion for Reconsideration, at 55.

¹¹⁴ Motion for Reconsideration, at 55.

without increasing intermittent as-available energy on HELCO's system.¹¹⁵ The Original PPA for the Project was negotiated pursuant to a waiver granted by the Commission under Part II.A.3.d of the Commission's Framework.¹¹⁶ Part II.A.3.d provides that

the Commission may waive this Framework or any part thereof upon a showing that the waiver will likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.

The Commission granted the requested waiver under this provision, finding that the waiver was in the public interest because it “could provide an opportunity to increase the amount of renewable energy on HELCO's system, without increasing the amount of as-available, intermittent renewable energy resources on HELCO's system.”¹¹⁷ The Commission also stated that “given that the commission has already approved a waiver for [Hamakua Biomass Energy, LLC]; *in fairness to Hu Honua*, it is appropriate to also grant a waiver to Hu Honua.”¹¹⁸ The Original PPA was subsequently approved by the Commission in Docket No. 2012-0212 in December of 2013.¹¹⁹ Following a dispute with HELCO regarding the meeting of certain Guaranteed Project Milestones, termination of the PPA by HELCO, and litigation, the parties worked collaboratively to reach a settlement agreement whereby HELCO rescinded its termination of the Original PPA and the parties entered into the A&R PPA.¹²⁰

On May 30, 2017, HELCO filed its Memorandum in Support of Request to Waive

¹¹⁵ See Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008, at 7; 2017 D&O, at 30.

¹¹⁶ See Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008, at 7.

¹¹⁷ See Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008, at 7.

¹¹⁸ See Docket. No. 2008-0143, Decision and Order, filed on November 14, 2008, at 7.

¹¹⁹ See Docket No. 2012-0212, Decision and Order No. 31758, filed December 20, 2013.

¹²⁰ See Letter Request for Approval of Amended and Restated Power Purchase Agreement, filed May 9, 2017, at 3-4.

Framework for Competitive Bidding for the Commission's initial pre-remand consideration of a waiver for the Project in connection with the A&R PPA from the Framework.¹²¹ HELCO based its request for a waiver on multiple provisions of the Framework, including as follows, each of which still applies:

1. Part II.A.3.b(iv) of the Framework - as competitive bidding under the current circumstances will impede achievement of the government objectives and policies set forth in HRS §§ 269-27.2 and 269-27.3 and the RPS law.
2. Part II.A.3.b(iii) of the Framework - as competitive bidding under the current circumstances could result in the less efficient procurement of more expensive biomass generation (due to the expiration of the Investment Tax Credit ("ITC").
3. Part II.A.3.c(iii) of the Framework - as the Hu Honua Project will help meet the government objectives and policies set forth in HRS §§ 269-27.2 and 269-27.3 and the RPS law.
4. Part II.A.3.d of the Framework - as a waiver for the Hu Honua project is in the public interest because the Hu Honua project currently presents the most expeditious means to increase the amount of renewable energy on Hawaii Electric Light's system without increasing the amount of as-available, intermittent renewable energy resources on Hawaii Electric Light's system. Further, the project will provide capacity and ancillary services necessary to support the reliability of a system with an existing high penetration of renewable intermittent resources.
5. Part II.A.3.d of the Framework - under current circumstances, a waiver is in the public interest as: (a) the project will likely result in an increase in the reliable supply of renewable firm dispatchable electricity to customers, (b) if completed on schedule by the end of 2018, the project will be able to take advantage of the federal ITC for renewable energy (in lieu of a Production Tax Credit) , (c) the renewable generation from the Hu Honua project, if completed on schedule, will be available much sooner than if the project was put out for bid via a competitive solicitation, (d) the project is anticipated to provide community benefits including economic stimulation, employment

¹²¹ Docket 2017-0122, Hawaii Electric Light Company, Inc.'s Memorandum in Support of Request to Waive Framework for Competitive Bidding; Attachment A; and Certificate of Service, filed on May 30, 2017 ("Waiver Memorandum").

creation (through direct jobs at the Hu Honua facility and indirect forestry, harvesting, and hauling jobs), promotion of long-term local agriculture industry, and increases in energy security, (e) the price remains delinked from the price of fossil fuel generated electricity; and (f) the addition of Hu Honua would enable the Company to expedite retirement of fossil-fuel plants.¹²²

In the Commission's 2017 D&O, the Commission found and concluded that the "opportunity to increase the amount of renewable energy on HELCO's system, without increasing the amount of as-available, intermittent renewable energy resources on HELCO's system[,] continues to be in the public interest."¹²³ In support of that finding, the Commission noted that "[a]s of the end of the first quarter of 2017, approximately 45.5% of all energy on [HELCO's] system was generated from renewables with approximately 20.1% generated from intermittent renewable energy sources, including utility scale photovoltaic[], hydro, wind, and customer-sited rooftop solar."¹²⁴ The Commission further recognized that "HELCO's PSIP Update Report: December 2016 E3 plan ... shows that HELCO plans on adding more than 100 MW of intermittent renewable energy (30.4 MW of DG-PV and 72 MW of Wind) over the next 5 years, which will require sufficient firm dispatchable energy to ensure reliability of grid services."¹²⁵ Solar + battery energy storage systems, such as those approved by the Commission in the Phase 1 RFP and selected by HELCO in the Phase 2 RFP, cannot provide 24/7 deliverability.¹²⁶ Consistent with the Commission's 2017 findings, the Hu Honua project provides firm, dispatchable renewable energy that ensures reliability of grid services 24/7.

¹²² 2017 Waiver Memorandum, at 3-4.

¹²³ 2017 D&O, at 30.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Supplemental Memorandum, at 9.

The Commission ultimately concluded that “the same basis for granting the waiver for the Original PPA remains valid” and “the Project provides the most viable opportunity to add firm, dispatchable, renewable generation in the near term, and requiring the Project to enter the next round of competitive bidding would very likely forego the opportunity to utilize the federal ITC benefits.”¹²⁷ In addition, the Project would provide capacity and ancillary services necessary to support the reliability of a system with an existing high penetration of renewable intermittent resources, which was also a basis upon which HELCO sought a waiver for the Project.¹²⁸

Tawhiri’s claimed surprise at and apparent objection to the principle that the opportunity to add firm renewable energy to HELCO’s system can and has historically been justification for a waiver from the Competitive Bidding Framework is curious as it is not supported by either the Framework or the Commission’s prior decisions.

The Consumer Advocate states that “[t]he elements of the waiver provisions in the Framework cited in the applicants’ request are fact-intensive. They deal with the technical qualities of a proposed generating facility ... [which] are qualitative and implicitly comparative to alternatives as those could be secured through competitive bidding.”¹²⁹ The services provided by those technical capabilities are not themselves qualitative. Rather, the value of such technical capabilities has not been measured and accounted for by either HELCO or the Commission. HELCO is in the best position to quantify the value of these technical capabilities but has not yet done so, nor has the Commission requested that HELCO do so. As noted in Hu Honua’s Motion and Supplemental

¹²⁷ 2017 D&O, at 31.

¹²⁸ See HELCO Position Statement (Reply), at 3; Waiver Memorandum, at 3.

¹²⁹ CA Reply at 15, filed August 10, 2020.

Memorandum, currently proposed or available renewable alternatives that have been competitively bid do not have these technical capabilities, so there is no comparable resource to appropriately compare Hu Honua against through competitive bidding.

2. Fossil-fuel price volatility has become an even more important factor weighing in favor of the waiver.

As explained in Hu Honua's Motion for Reconsideration, helping the State achieve other important governmental policies also supports a waiver for the A&R PPA from the Framework.¹³⁰ One of the many important governmental objectives that Hu Honua would serve is to help the State "limit its dependence on fossil fuels and mitigate against volatility in oil pricing."¹³¹ Hu Honua's Motion for Reconsideration referenced the Commission's current expedited proceeding in Docket No. 2020-0090 to show that the State's supply and cost of fossil fuel is still volatile and uncertain, which has been a longstanding policy issue in the State.¹³² In that docket, the Commission is considering the HECO Companies' request to amend their fuel supply contract with Par Hawaii Refining, LLC ("Par") to significantly increase fossil fuel prices given that Par has represented that it is not economically viable for Par to continue to supply fossil fuel to the HECO Companies at currently contracted rates.¹³³

Since Hu Honua filed its Motion for Reconsideration, the Commission has issued its Interim Decision and Order No. 37256, approving the HECO Companies' request that will likely raise consumers' monthly electric bills by an estimated \$4.52 per month for a

¹³⁰ Motion for Reconsideration, at 51-54.

¹³¹ See Decision and Order No. 34726, issued July 28, 2017, at 60; Docket No. 2012-0212, Order No. 31758, filed December 20, 2013, at 52; see also Motion for Reconsideration, at 51-52.

¹³² See Motion for Reconsideration, at 52-52.

¹³³ See Docket No. 2020-0090, Hawaiian Electric Company, Inc., Hawai'i Electric Light Company, Inc., and Maui Electric Company, Limited's Application; Verification, filed June 9, 2020, at 3-4.

typical household using 500 kilowatt-hours of energy.¹³⁴ The Commission also found that if it did not approve the price increase and Par terminated the original fuel supply contract, it “would most likely cause fuel supply security issues on Oahu and potentially elsewhere in the State.”¹³⁵ Hawaiian Electric also admitted that “[t]he Companies will be unable to provide uninterrupted electric service without a supply for LSFO.”¹³⁶ Hawaiian Electric issued a Request for Proposal for the procurement of low sulfur fuel oil (“LSFO RFP”) on June 5, 2020, and the Commission has instructed that this issue remains open until the record has been more fully developed in the next phase of the docket.¹³⁷ The increased cost for consumers is retroactive to July 15, 2020 and will start to impact ratepayers in October 2020.¹³⁸ This illustrates that now, more than ever, Hawaii remains vulnerable to volatile fluctuations in the cost of fossil-fuels resulting from Hawaiian Electric’s continued dependence on and refusal to replace its firm fossil-fuel fired plants.

The HECO Companies’ reliance on fossil-fuel fired plants for the foreseeable future will continue to subject Hawaii ratepayers to electric bills subject to the ebbs and flows of fossil-fuel pricing. This volatility was only one of the many reasons the Commission had previously approved a waiver for the A&R PPA.¹³⁹ Hu Honua would provide a local renewable firm source of energy that would help stabilize HELCO’s fuel supply. The Commission’s Order Revoking Waiver completely ignores this important policy objective

¹³⁴ See Docket No 2020-0090, Interim D&O 37256, filed Aug. 4, 2020, at 12.

¹³⁵ Id. at 23.

¹³⁶ Docket 2020-0090, HECO’s Response to CA-IR-12, filed July 17, 2020.

¹³⁷ Id. at 27.

¹³⁸ See Dave Segal, *Electric Bills on Oahu set to go up \$4.52 a month in October*, STAR ADVERTISER, (Aug. 20, 2020), <https://www.staradvertiser.com/2020/08/20/hawaii-news/electric-bills-on-oahu-set-to-go-up-4-52-a-month-in-october/?HSA=fe74c5d80dc9af3db84be9dc76fbee37097d56b>.

¹³⁹ 2017 D&O at 60 (“While the commission, in this instance, finds the pricing to be reasonable, the commission makes clear that its decision to approve the A&R PPA is not based solely on pricing, but includes other factors such as the State’s need to limit its dependence on fossil fuels and mitigate against volatility in oil pricing.”)

served by the Hu Honua Project at the very time when fossil fuel price volatility and security are of paramount concern to the State.

G. The Order Revoking Waiver unreasonably and erroneously fails to consider the inherent inefficiencies of requiring Hu Honua to participate in a future RFP.

1. There is no current RFP for firm renewable energy, such as biomass, and it would take years to go through a competitive bidding process even if one existed.

It is indisputable that right now there is no process in place to permit Hu Honua to bid into an RFP and, even if such a process were commenced immediately, it would be years before the Project could be approved by the Commission following competitive bidding. The HECO Companies have only initiated two RFP processes thus far.¹⁴⁰ Both RFPs sought proposals for variable renewable energy resources that, when paired with storage, had a minimum storage capacity of four hours.¹⁴¹ The Hu Honua Project, as previously recognized by the Commission, is designed to be a truly firm source of renewable energy with operational characteristics similar to HELCO's existing fossil-fueled steam generators.¹⁴² Therefore, it would not have been feasible for Hu Honua to participate in either of the RFPs to date as the Companies were soliciting variable

¹⁴⁰ See generally, Docket No. 2017-0352, To Institute a Proceeding Relating to a Competitive Bidding Process to Acquire Dispatchable and Renewable Generation.

¹⁴¹ See Docket No. 2017-0352, Hawaiian Electric Companies' Final Variable Requests for Proposals, filed February 27, 2018, at Exhibit 3, Sections 1.2 and 1.2.12 (Company is seeking proposals for "variable renewable dispatchable generation" and "energy storage should be sized at a minimum to provide sufficient storage capacity equal to the greatest amount of projected energy produced from the Facility during the Facility's projected most productive continuous four hours ..."); Hawaiian Electric Companies' Final Stage 2; Renewable and Grid Services RFP's; Book 5 of 7, filed August 22, 2019, at Exhibit 3, at 5 (Company seeks "proposals for the supply of qualified variable renewable dispatchable generation and energy storage") and at Sections 1.1.4 and 1.2.13 ("the primary purpose of this RFP is to obtain variable renewable energy and energy storage" and "[t]he energy storage component must be sized to support the Facility's Allowed Capacity (in MW) for a minimum of four (4) continuous hours throughout the term of the PPA"); see also HELCO's Response to CA/HELCO-IR-57(a), filed February 18, 2020 (The Stage 1 RFPs did not contemplate firm generation resources, so the evaluation process would be different for an RFP for firm, dispatchable renewable generation.)

¹⁴² Decision and Order No. 34726, at 59 (emphasis added).

renewable energy projects for which Hu Honua would not have been suited.

As to future RFPs, in response to LOL/HECLO-IR-92, HELCO indicated that “[t]here are no current plans for a targeted RFP specifically to secure biomass.”¹⁴³ Hu Honua understands that at present HELCO has not indicated any intent to solicit 24/7 firm renewable resources in another RFP for Hawaii Island. The solicitation of a truly firm renewable energy project would conflict with HELCO’s desire to keep its existing fossil fuel plants operating for as long as possible until it is forced to convert to more expensive biofuels by 2045. HELCO has also explained that if it were to issue an RFP for firm dispatchable generation, it would take at least a year to issue the RFP and would likely require another year to negotiate the PPA and obtain Commission approval.¹⁴⁴ It would then likely take several years to actually build the facility.¹⁴⁵

Competitive bidding under these circumstances would impede the achievement of important governmental objectives and policies set forth in HRS §§ 269-27.2 (utilization of electricity generated from non-fossil fuels), 269-27.3 (promote long-term viability of agriculture by providing preferential rates and supporting renewable energy produced in conjunction with agricultural activities) and 269-92 (100% RPS), which were bases upon which HELCO sought a waiver for the Project,¹⁴⁶ as well as HRS § 225P-4 (carbon sequestration and GHG neutral). The delay caused by the requirement to competitively bid the Project would also result in a less efficient procurement of more expensive biomass or other 24/7 firm renewable generation due to the unavailability of the federal ITC, which was also one of the bases upon which HELCO sought a waiver for the

¹⁴³ See HELCO’s Response to LOL/HELCO-IR-92, filed December 9, 2019.

¹⁴⁴ See HELCO’s Response to CA/HELCO-IR-57(a), filed February 18, 2020.

¹⁴⁵ Id.

¹⁴⁶ See HELCO Position Statement (Reply), at 2; Waiver Memorandum, at 3.

Project.¹⁴⁷

The Hu Honua Project is 99% complete, Hu Honua’s employees have jobs now, and fossil-fuel price volatility and availability are significant risks to the economy and to ratepayers now, who are already suffering from debilitating unemployment — the Commission’s decision to require the Hu Honua Project to go through a speculative future competitive bidding and to delay the Project for years, when the Commission has previously approved two waivers for the Project and Hu Honua has spent several hundred million dollars in reliance on the Commission’s waivers, which is now back before the Commission through no fault of Hu Honua, defies logic and common sense and will harm ratepayers.

2. The Commission created the circumstances now used to justify the revocation of the A&R PPA’s waiver.

The Commission is well aware of the length of time it would take to solicit and conclude an RFP process given its role and participation in the Phase 1 and Phase 2 RFPs, which the Commission uses in support of the Order Revoking Waiver.¹⁴⁸ As discussed in the Motion for Reconsideration, the Commission itself accelerated the Phase 1 RFP during the pendency of the appeal of the A&R PPA to the Hawaii Supreme Court.¹⁴⁹

On June 15, 2018, the Commission instructed the Companies “to accelerate the evaluation and selection of the Final Award Group so as to begin the Contract Negotiations phase of this process with the Final Award Group as soon as possible” and stated that it “intends to prioritize its review of any power purchase agreements for

¹⁴⁷ See HELCO Position Statement (Reply), at 3; Waiver Memorandum, at 3.

¹⁴⁸ Order Revoking Waiver, at 20-23, 28-33.

¹⁴⁹ Motion for Reconsideration, at 56.

projects on Hawaii Island that may arise out of Phase 1 of this RFP process,” due to the uncertainty regarding the PGV facility resulting from volcanic activity on Hawaii Island.¹⁵⁰ The Commission even incentivized HELCO by establishing a Performance Incentive Mechanism for Phase 1 RFP projects, which had HELCO accelerate contract negotiations and resulted in power purchase agreements that were submitted to the Commission for approval by the end of 2018.¹⁵¹

When HELCO initially filed its Phase 2 Draft RFPs, its targeted procurement for Hawaii island was 70,000 MWh, annually, to account for the potential of Hu Honua and PGV being online.¹⁵² On February 27, 2019 the Commission provided the following guidance:

In addition, HELCO’s Parallel (1) Combined RFP + (2) Expedited Grid Services RFP can and should build in contingencies for uncertainties surrounding PGV and Hu Honua, recognizing the contingency benefits of procuring additional renewable resources on Hawaii Island even if both PGV and Hu Honua are put into service, as planned.¹⁵³

The Commission recognized the importance of contingency planning for both the Hu Honua and PGV projects while realizing that adding renewable resources such as solar + batteries, even if both Hu Honua and PGV are put into service, provide the benefits of additional renewable energy procurement – though the Commission never clarified how the additional renewable resources would not result in an overabundance of renewable energy if both Hu Honua and PGV are also put into service. On May 1, 2019, the Companies stated that “the Stage 2 RFP target for Hawaii Island remains the same, 70,000 MWH” and that “if PGV returns to service and Hu Honua comes on line, and the

¹⁵⁰ Docket No. 2017-0352, Order No. 35529, filed June 15, 2018, at 11.

¹⁵¹ Docket No. 2017-0352, Order No. 35405, filed April 6, 2018, at 12.

¹⁵² Docket No. 2017-0352, Phase 2 Draft Requests for Proposals, filed April 1, 2019, at 7.

¹⁵³ Docket No. 2017-0352, Order No. 36187, filed February 27, 2019, at 12.

RFP targets for Stage 1 and Stage 2 are met, Hawaii Island will achieve approximately 96% RPS in 2022, consistent with the 2016 PSIP.”¹⁵⁴ However, the Companies also stated that “if, at the time of [Stage 2 RFP] project selection, it is clear that PGV and/or Hu Honua will not be placed into service” then the Company “can select an increased amount of energy and storage” of approximately “271,000 MWh if no PGV” and “103,000 MWh if no Hu Honua”.¹⁵⁵ In other words, the Company suggested that it would only select the increased contingency amount of renewable energy procurement in the Stage 2 RFP if it became clear that PGV or Hu Honua will not be placed into service.

Despite the Company’s suggestion, on June 10, 2019, after the Commission became aware of the limited scope of the Supreme Court’s remand decision to consider GHG impacts on May 10, 2019, and just ten days prior to issuing the Order Reopening Docket, the Commission proceeded to “strongly encourage[]” [or instruct] the Companies to solicit the maximum number of MWh proposed by the Companies for Hawaii Island (i.e., all 444,000 MWh) in its Phase 2 RFP solicitation – over six times more than what HELCO believed was necessary when it assumed PGV and Hu Honua would be online.¹⁵⁶

Based on the Commission’s instruction, the Companies ultimately selected 492,000 MWh for Hawaii Island.¹⁵⁷ Only 23 months had passed between the 2017 D&O and the remand of this proceeding by the Hawaii Supreme Court, yet during that time, the Commission acted to expedite and orchestrate the solicitation of the projects that the Commission now claims justify abandoning the Hu Honua Project. The Commission’s

¹⁵⁴ Docket No. 2017-0352, Status Conference #2, filed May 1, 2019, at 6.

¹⁵⁵ Docket No. 2017-0352, Status Conference #2, filed May 1, 2019, at 7. The Companies established the maximum amount of energy for the Phase 2 RFP to be 70,000 MWh + 271,000 MWh (if no PGV) + 103,000 MWh (if no Hu Honua) = 444,000 MWh.

¹⁵⁶ Docket No. 2017-0352, Order No. 36356, filed June 10, 2019, at 12.

¹⁵⁷ See HECO’s press release dated May 11, 2020, <https://www.hawaiianelectric.com/hawaiian-electric-selects-16-projects-in-largest-quest-for-renewable-energy-energy-storage-for-3-islands>.

abandonment of the Hu Honua project is also contrary to the guidance it provided the Companies in Order No. 36187 where it indicated that it recognized the contingency benefits of procuring additional renewable resources on Hawaii Island even if both PGV and Hu Honua are put into service. The Commission inappropriately led Hu Honua to believe that the increased renewable energy procurement of the Phase 2 RFP projects would be complimentary to Hu Honua coming online. Instead, the Commission is now using the not-yet-contracted Phase 2 RFP projects as alternatives to Hu Honua and as justification to abandon Hu Honua.

If the Commission's decision to revoke the waiver stands, which would kill the Hu Honua project, the "contingency plan" would become the only plan. If the Phase 2 projects had been increased for contingency planning it would make sense to contract most of the capacity – the contingency capacity – with conditions precedent related to the failure of the PGV or Hu Honua projects, but it is not good resource planning to drive or force one of those projects to failure.

3. HELCO does not intend to retire its fossil-fuel plants.

As stated in the Motion for Reconsideration, the solicitation of a 24/7 firm renewable resource through an RFP would potentially conflict with HELCO's desire to keep its existing fossil fuel plants operating until it is forced to convert to more expensive biofuels by 2045.¹⁵⁸ LOL objects to this argument, claiming that the record contains no statement that HELCO wants to keep its fossil fuel plants burning as long as possible.¹⁵⁹ LOL further states that the "idea that fossil fuel plants will be displaced by biofuel in 2045 dates from the 2016 Power Supply Improvement Plans, a document that everyone agrees

¹⁵⁸ Motion for Reconsideration, at 55.

¹⁵⁹ LOL Reply, at 17.

is woefully out of date.”¹⁶⁰ LOL’s defense of HELCO’s continued use of fossil-fuel fired plants is curious.

Regardless, LOL again misstates the record. HELCO has indicated in its IR responses that it does not have a specific retirement schedule for its fossil-generating units and that it plans to keep all units in operating condition to convert into biofuels and/or as needed to serve energy needs:

- In response to Tawhiri-HELCO-IR-16, Q: *Please provide a current retirement schedule for all Fossil Fuel-Fired Generating Plants on the HELCO system*, HELCO states:

There is no specific retirement schedule for all fossil-fuel fired generating plants on Hawaii Electric Light's system. Plants may cycle offline, have limited use, or remain in standby as renewable energy increases but would only be considered for retirement if they are no longer cost effective and the capacity, energy, and essential grid services are no longer useful or required for reliable operation of the power system.¹⁶¹

- In response to Tawhiri-HELCO-SIR-3(a), Q: *If, and when, Hu Honua comes on-line, does HELCO still intend to continue to run its fossil fuel-fired generation stations for the foreseeable future?*, HELCO states:

It is expected that Hawai'i Electric Light will continue to operate those fossil units that are most cost effective as needed to reliably and cost-effectively serve energy needs, including emergency and replacement reserves. As renewable resources and supplemental enabling technologies are added to the system, the energy provided from fossil resources is expected to reduce and/or the operation reduced and/or changed to standby.

¹⁶⁰ LOL Reply, at 17.

¹⁶¹ See HELCO’s Response to Tawhiri-HELCO-IR-16, filed December 9, 2019.

- In response to Tawhiri-HELCO-SIR-3(b), Q: *If the answer to subpart a is yes, is HELCO planning to convert any or all its fossil fuel- fired generation stations to biodiesel?*, HELCO states:

To the extent that biofuel generation is a resource type that will be needed to achieve the State's renewable energy goals, Hawai'i Electric Light may convert several or all of its fossil fuel fired generation stations to biofuels.¹⁶²

- In response to CA/HELCO-IR-38, *[C]ould HELCO retire existing generating plants and avoid significant costs of ownership- and operations? Furthermore, could HELCO terminate its agreement with HEP after its 2030 expiration date to avoid HEP costs after 2030*, HELCO states:

As discussed below, Hawaii Electric Light has not evaluated retiring existing generating plants to avoid the costs of ownership and operations,' nor refusing to extend the agreement with HEP after its current contract's expiration date of 2030. There are many reasons for this.

Ever since lava flow removed PGV output from the Hawaii Electric Light system, any subsequent unscheduled or forced outage of a combined cycle unit (HEP or Keahole) has caused actual or potential reserve capacity shortages. Hawaii Electric Light's units are critically valuable to getting through such periods. It presently remains to be seen whether anticipated new photovoltaic + battery energy storage projects can provide comparable coverage in such a situation. Furthermore, Hawai'i Electric Light's units currently contribute to providing regulating reserve, fault current, load-following, inertia, frequency and voltage support. When variable renewables and batteries are able to prove capable of providing the necessary amounts of such services, then decommissioning or retirement of existing units is possible. A prudent retirement plan would be based on a holistic analysis that does not merely contemplate ownership and operating costs, but also system reliability and power quality.

For similar reasons and system needs, based solely on the potential addition of the Project, Hawaii Electric Light has not

¹⁶² See HELCO's Response to Tawhiri-HELCO-SIR-3(b), filed January 6, 2020.

presently considered refusing to extend the agreement with HEP after its current contract expiration date of 2030.¹⁶³

- In response to CA/HELCO-SIR-19, *Given that one of the purported benefits of the Hu Honua units would be the reduced use of fossil fuels, please discuss why there should not be an expectation of an analysis of the need for the existing thermal units to be maintained and operated under a business as usual philosophy, HELCO states:*

It is not the position of the Company that following the addition of Hu Honua, the existing thermal units will be maintained and operated under a business as usual philosophy. As renewable energy resources are added to the system, including Hu Honua, existing thermal generation will increasingly transition to supplementing renewable resources as required to meet system energy and grid services requirements. To that regard, analysis with Hu Honua online explicitly allows for the resources to transition from continuous operation to cycling; being brought online only as required for reliability and energy needs. Most savings that are incurred will be the result of reduced hours of operation and reduced fuel expenses. Thermal unit retirement will be considered when a thermal resource does not provide cost-competitive energy and is not required for reliable system operation or adequacy of supply. Decommissioning and/or retiring units involves many assumptions (system load, DG PV, fuel prices, etc.), and therefore, the Company's plan is to make such final and irreversible decisions in the future when there is more certainty in these assumptions and system needs, after renewable resources are online and commercially proven with the expected level of reliability and provision of energy and grid services. As slated above, the majority of expenses are associated with operating costs (i.e., fuel and variable O&M, versus amortization of any remaining capital costs and fixed O&M). Therefore, the analysis captures the avoided cost benefit of adding Hu Honua (fuel & variable O&M). by the modeling of displaced thermal resources which were previously operated continuously. Further, once thermal generation is no longer needed for cost-effective energy, reliability, or resource adequacy, the Company will consider if the resource can continue to provide customer value through

¹⁶³ See HELCO's Response to CA/HELCO-IR-38, filed February 18, 2020 (emphasis added).

possible alternate uses such as synchronous condenser or backup generation, if such is needed and provision from converted resources is more cost effective than acquiring new supplemental resources.¹⁶⁴

- In response to Tawhiri-HELCO-IR-12, HELCO states that the contract term for the Hamakua Energy Power Purchase Agreement expires on December 31, 2030 and that while the parties have not entered into any discussion for an extension of the Power Purchase Agreement, HELCO does not have a firm retirement date for the Hamakua Energy plant.¹⁶⁵

While HELCO's concern for continued use of its steam units in the base case may be a valid concern, in the alternate case where Hu Honua provides similar grid benefits, continued operation of the HELCO steam units should, at most, be a mitigation measure until Hu Honua and/or PGV comes online. Therefore, the alternate plan should reflect the HELCO steam units as retired when Hu Honua comes online.

Notwithstanding HELCO's plan not to retire any of its fossil fuel generation at this time (perhaps, unless requested by the Commission), in 2017 HELCO admitted in its request for a waiver for the A&R PPA that Hu Honua would enable HELCO to expedite the retirement of its fossil-fuel plants.¹⁶⁶

On this point, following HELCO's filing of its Updated Bill Impact Analysis in response to the Consumer Advocate's information requests and in its Pre-hearing Testimony,¹⁶⁷ Hu Honua questioned HELCO on how the 2017 vs. 2020 bill impact analyses filed by HELCO could result in a range of bill impacts from a \$2.50 average net

¹⁶⁴ See HELCO's Response to CA/HELCO-SIR-19, filed March 6, 2020 (emphasis added).

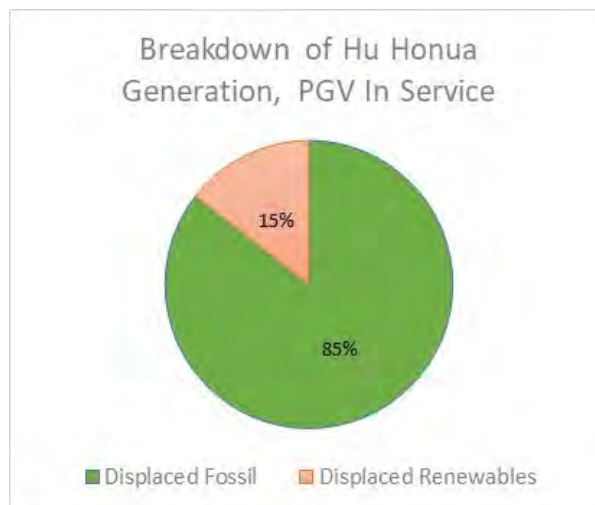
¹⁶⁵ See HELCO's Response to Tawhiri-HELCO-IR-12, filed December 9, 2019.

¹⁶⁶ See HELCO Position Statement (Reply) at 3; Waiver Memorandum, at 3-4.

¹⁶⁷ See HELCO's Response to CA/HELCO-IR-23, filed December 2, 2019, Exhibits HELCO-302 through HELCO-305 attached to HELCO TESTIMONY T-3, filed January 28, 2020.

savings to an average net increase of \$10.97 (a +\$13.47 difference)¹⁶⁸ given that only two Phase 1 RFP solar projects with a combined annual MWh capacity of approximately one-half (1/2) the Available Capacity of Hu Honua in annual MWh was being added to HELCO's grid.¹⁶⁹

The headlined difference between the analyses is in the resource plans: the 2020 analysis assumed that the two new solar + battery projects would be operational. One might assume that the bills had increased because Hu Honua was being dispatched instead of the solar projects, which have effectively zero cost (the payments for their contracts are independent of their production, depending only on “net energy potential”). During a discussion with Hu Honua, HELCO suggested that the change is driven by such displacement of solar power by Hu Honua. However, that is not the case; displacement of solar power will have a small effect on customer bills.¹⁷⁰



In the worst case, relatively small amounts of renewable energy are being replaced by energy priced according to Hu Honua's A&R PPA, and in the worst case the variable

¹⁶⁸ Affidavit of Warren Lee (“Lee Affidavit”) at ¶3.

¹⁶⁹ Affidavit of Jonathan Jacobs (“Jacobs Affidavit”) at ¶ 6 .

¹⁷⁰ Jacobs Affidavit at ¶ 7.

cost of that energy to HELCO would have been zero. Thus, the total cost impact of that replacement is the volume of displaced renewables multiplied by Hu Honua's energy price. The total bill impact is the cost impact, plus revenue tax, divided by sales to get a rate per kWh and multiplied by 500 kWh/month. Unless there were no renewable displacement in the 2017 analysis, the change in bill impacts would have to be less.¹⁷¹

With PGV in service, 15% of Hu Honua's generation would be attributable to displaced renewables. The total bill impact of displacing renewables over the 30-year period is an average of \$2.47/month. Therefore, the change in bill impacts attributable to renewable displacement is *at most* \$2.47/month, which would only be about 18% of the \$13.47 increase between the 2017 and 2020 HELCO Bill Impact Analyses – the rest of the projected bill increase appears to be based on other changed assumptions made solely by HELCO.¹⁷²

The change in bill impacts attributable to the change in fuel prices is most likely much larger. The average energy price of HELCO's fossil-fueled units was computed for each year based on the 2017 forecast and on HELCO's current forecast (underlying the recent analysis). The amount of fossil energy displaced each year was multiplied by the change in energy price to estimate what the change in system cost would be. The estimated change in bill impact is the estimated change in cost impact, plus revenue tax, divided by sales to get a rate per kWh and multiplied by 500 kWh/month. With PGV in service, the average is \$17.81/month over the 30-year period. This is by itself higher than the \$13.47 increase but there are other differences that may offset it, in particular the

¹⁷¹ Jacobs Affidavit at ¶ 8.

¹⁷² Jacobs Affidavit at ¶ 9.

greater amount of Hu Honua generation simulated in 2020.¹⁷³

The 2017 and 2020 bill impact analyses, when read together, reflected a large range of uncertainty in the assumptions (in addition to the two Phase 1 RFP solar projects) that HELCO used and changed between 2017 and 2020. This is especially true of long-term fuel price forecast, which as we have seen is both very changeable and very impactful upon residential bills. A prudent approach to resource planning would be based not just on the current optimistic forecast but on what could happen if the trajectory of fuel prices was much more adverse.¹⁷⁴

The 2020 bill impact analysis was based on several assumptions and methodologies that were not fully transparent, and included several changed assumptions with which Hu Honua did not agree. Hu Honua issued information requests to HELCO on this subject¹⁷⁵ and had several discussions and meetings with representatives of HELCO over the course of several months to discuss the changed assumptions including, for example:

1. The 30-year fuel price forecast chosen by HELCO for the 2020 bill impact analysis;
2. The 30-year sales forecast for future distributed generation resources (DG-PV) chosen by HELCO for the 2020 bill impact analysis;
3. The resource plan for reducing the size of future energy storage additions chosen by HELCO for the 2020 bill impact analysis;
4. The assumptions regarding the retirement of HELCO fossil fuel plants;

¹⁷³ Jacobs Affidavit at ¶ 10.

¹⁷⁴ Jacobs Affidavit at ¶ 11 .

¹⁷⁵ See HELCO's Response to HHB-HELCO-SIR-1, filed March 6, 2020.

5. The assumptions regarding the dispatch of Hu Honua over 30 years; and
6. The assumptions regarding Hamakua Energy being extended beyond its PPA term which ends in 2030.¹⁷⁶

As a result of those discussion and meetings, in early July 2020 HELCO agreed to do another production simulation model run in order to submit an additional bill impact analysis to the Commission focused on selecting an appropriate (a) 30-year fuel cost assumption, (b) future distributed generation resource 30-year sales forecast to account for expiring tax credits and other factors, and (c) energy storage addition assumption. Submitting an additional bill impact analysis would inform the Commission of another estimate of customer bill impacts using reasonable alternative assumptions that would most likely demonstrate a lower bill impact than an average net increase of \$10.97 (and a lower delta than the \$13.47 difference between the 2017 and 2020 analyses). However, the Commission issued Order No. 37205 on July 9, 2020, before HELCO was able to perform and submit its production simulation.¹⁷⁷

Given HELCO's willingness to do another production simulation model run based on the focus described above, and given HELCO's assumption and plan for purposes of its 2020 bill impact analysis was to not assume the retirement of any of its existing fossil fuel units following the addition of Hu Honua, the Commission should reconsider its Order Revoking Waiver. In addition to the drivers(s) of the changes in the bill impacts analysis since 2017, the Commission should question the assumption that HELCO will not be retiring any existing fossil-fuel plants thanks to Hu Honua given the legislative mandate and government objectives/policies set forth in HRS §§ 269-27.2, 269-27.3 and 269-92

¹⁷⁶ Lee Affidavit at ¶ 4 .

¹⁷⁷ Lee Affidavit at ¶ 5.

(100% RPS law), as well as consider the estimated customer bill impacts from HELCO's new production simulation model run.

To explore the impact of such a degree of uncertainty reflected in the 2017 vs 2020 bill impact analyses, multiple sensitivity cases should be run. Given the relatively small amount of annual renewable energy being added to the grid from the two Phase 1 solar projects (as compared to Hu Honua), most of the uncertainty (and resulting bill increase) was likely the result of the change in the 30-year fuel forecast.

For example, if a 30-year fuel forecast that changed after only two years or so could have such a huge impact on the thirty-year projection of customer bills, the Commission should investigate and call into question whether HELCO used an appropriate 30-year fuel forecast and whether additional sensitivity runs should be performed, as well as call into question HELCO's excessively optimistic forecast of DG-PV penetration and refusal to assume the retirement of any of its fossil plants, before summarily concluding that the addition of Hu Honua will increase customer bills in the amount stated in HELCO's 2020 bill impact analysis and using that as a basis to revoke a waiver for the project.

The Commission's Order Revoking Waiver would only serve to maintain the status quo and prolong the continued use of HELCO's fossil fuel plants – an ironic result given that the basis upon which the 2017 D&O was appealed was that the Commission failed to perform its obligation under HRS § 269-6(b) “to explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions.” By revoking the waiver and denying the A&R PPA approval application, and in effect deciding

to prolong the continued use of HELCO's fossil fuel plants (instead of using Hu Honua as an opportunity to retire and replace them with renewable energy), the Commission has still failed to comply with HRS § 269-6(b) in that it failed to explicitly consider the effect of the State's reliance on fossil fuels on *price volatility, export of funds for fuel imports, fuel supply reliability risk*, as well as greenhouse gas emissions in its decision.

H. There is no dispute that the Commission failed to make findings regarding GHG as directed by the Hawaii Supreme Court.

1. The Commission failed to comply with HRS § 269-6(b) and the Hawaii Supreme Court's remand instructions.

As stated in the Motion for Reconsideration, the Hawaii Supreme Court provided specific remand instructions that the Commission give "explicit consideration to the reduction of GHG emissions in determining whether to approve the [A&R PPA], and make findings necessary for this court to determine whether the Commission satisfied its obligations under HRS §269-6(b)."¹⁷⁸ The requirement described in HRS § 269-6(b) to reduce reliance on fossil fuels and to consider GHG emissions applies to the fulfillment of all of the Commission's duties.¹⁷⁹

The Consumer Advocate agrees that the Hawaii Supreme Court mandated that specific findings be made regarding GHG in "analyzing the costs associated with the A&R PPA under HRS § 269-6(b),"¹⁸⁰ as well with respect to threshold issue of determining the extent of LOL's participation.¹⁸¹ The Consumer Advocate states that the Commission, in acknowledgement of the mandate, discussed the GHG analysis as a "threshold constitutional issue within the waiver analysis."¹⁸² However, the Consumer Advocate

¹⁷⁸ In re HELCO, 145 Hawaii at 25, 445 P.3d at 697.

¹⁷⁹ MECO, 141 Haw. at 263, 408 P.3d at 15 (emphasis added).

¹⁸⁰ CA Reply, at 10.

¹⁸¹ CA Reply, at 10.

¹⁸² CA Reply, at 10.

agrees that the Commission did not conduct a comprehensive review and make determinations regarding GHG emissions.¹⁸³

There is no dispute that the Commission “[did] not make any express findings or conclusions”¹⁸⁴ regarding the GHG impacts of the Project. Thus, there can be no dispute that the Commission failed to fulfill its statutory and legal obligation to make findings and explicitly consider the GHG emissions impact of the Project which are required by HRS § 269-6(b) and the Hawaii Supreme Court’s remand in In re HELCO.

While the Consumer Advocate states that it “may be reasonable to comprehensively review all issues in this proceeding so that parties do not claim that their due process was somehow denied,”¹⁸⁵ it also states that it recognizes that the Commission is still determining the level of detail necessary for its decisions regarding GHG analyses.¹⁸⁶ This issue was recently addressed¹⁸⁶ by the Hawaii Supreme Court in In the Matter of the Application of The Gas Company, LLC dba Hawaii Gas for Approval of Rate Increases and Revised Rate Schedules and Rules, No. SCOT-19-0000044, June 9, 2020 (“Hawaii Gas”). There, in its GHG analysis, the Commission merely repeated the Applicant’s representation that the GHG emissions from its synthetic natural gas (“SNG”) plant would decrease where the liquid natural gas (“LNG”) displaced SNG.¹⁸⁷ However, there was no information provided regarding the GHG emissions related to the LNG used by Applicant.¹⁸⁸ Consequently, the Hawaii Supreme Court questioned the Commission’s

¹⁸³ CA Reply, at 10-11 (“..the Commission might consider reopening this docket just to make the good faith effort to complete its comprehensive review of all issues, including – but not limited to – its determinations on GHG emissions within the contest of HRS § 269-6(b)...”).

¹⁸⁴ Order Revoking Waiver, at 44 (emphasis added).

¹⁸⁵ CA Reply, at 10.

¹⁸⁶ CA Reply, at 10.

¹⁸⁷ Hawaii Gas, No. SCOT-19-0000044, June 9, 2020, at 33.

¹⁸⁸ Hawaii Gas, No. SCOT-19-0000044, June 9, 2020, at 33.

“limited and perfunctory” review and found that the Commission could not have fulfilled its affirmative duties required by HRS § 269-6(b).¹⁸⁹ The Hawaii Supreme Court also criticized the Commission’s failure to conduct a quantitative or qualitative analysis to substantiate its findings regarding the GHG emissions impacts.¹⁹⁰

Here, similar to what occurred in Hawaii Gas, the Commission did not make any specific findings regarding the GHG impacts of the Project and did not conduct any quantitative or qualitative analysis. Instead, the Commission simply repeated select portions of the record and relied heavily upon the concerns expressed by the Consumer Advocate without affording Hu Honua the evidentiary hearing required by the Hawaii Supreme Court.¹⁹¹ In addition, without explanation, the Commission erroneously and unreasonably ignores the extensive evidence and testimony that Hu Honua submitted for the Commission’s consideration. For example, on January 28, 2020, Hu Honua submitted its Supplemental Calculations & Update to the GHG Emissions Impact Analysis for the Hu Honua Bioenergy Project, dated January 2020 (“Hu Honua GHG Analysis Supplement & Update”).¹⁹² The Hu Honua GHG Analysis Supplement & Update includes a detailed analysis that considers all biogenic emissions as well as a carbon sequestration plan, which is further explained by the prehearing testimony of Hu Honua’s consultant, David Weaver.¹⁹³ The Hu Honua GHG Analysis Supplement & Update provides a significant level of detail and contains a model of year-by-year harvesting, planting, transport, fertilizing, soil carbon change, and ash transport for Hu Honua, which includes

¹⁸⁹ Hawaii Gas, No. SCOT-19-0000044, June 9, 2020, at 33.

¹⁹⁰ Hawaii Gas, No. SCOT-19-0000044, June 9, 2020, at 33.

¹⁹¹ Order Revoking Waiver, at 44-53.

¹⁹² Exhibit HU HONUA-601 to Prehearing Testimony of David Weaver (“Weaver Testimony T-6”), filed January 28, 2020.

¹⁹³ Exhibit HU HONUA-601, at 2-4 and Weaver Testimony T-6, at 6-10.

on-island as well as embodied off-island emissions.¹⁹⁴ However, the Order Revoking Waiver not only ignores this analysis but it also erroneously claims that Hu Honua failed to complete an analysis which contemplates biogenic emissions.¹⁹⁵ Most significantly, the Commission fails to recognize or address Hu Honua’s carbon sequestration plan and Hu Honua’s repeatedly stated commitment to plant/grow more trees than it harvests as part of its operations.¹⁹⁶ The Consumer Advocate recognizes that GHG sequestration resulting from the planting/growing of vegetation should be considered as part of the analysis.¹⁹⁷ However, the Commission, without reason, fails to consider the sequestration impacts of reforestation and vegetation growth.

2. The arguments in LOL’s Reply are irrelevant and misstate the record.

LOL’s Reply contains arguments related to GHG impacts that are not relevant to the relief requested in the Motion for Reconsideration. Rather, LOL’s Reply is an attempt to rehash its arguments which have already been extensively briefed in the proceeding. Despite the lack of relevance to the Motion for Reconsideration, Hu Honua addresses LOL’s misguided statements to correct the record.

The crux of LOL’s Reply regarding the GHG impacts of the project is that: (a) Hu Honua failed to provide verification of the GHG offsets because “there is absolutely nothing in the record about who will plant trees, where they will be planted, how the offset will be evaluated, measured, and verified”;¹⁹⁸ (b) “global warming” and “climate change” should be included as conditions in the A&R PPA;¹⁹⁹ (c) Hu Honua’s use of third-party

¹⁹⁴ Exhibit HU HONUA-601.

¹⁹⁵ Order Revoking Waiver, at 48.

¹⁹⁶ Hu Honua’s Response to CA/Hu Honua-IR-107(c), filed February 28, 2020 and CA/Hu Honua-SIR-27, filed March 9, 2020.

¹⁹⁷ Consumer Advocate’s Response to HHB-CA-IR-23(b), filed February 18, 2020.

¹⁹⁸ LOL Reply, at 9.

¹⁹⁹ LOL Reply, at 10.

contractors for its harvesting and planting operations is impermissible and/or improper;²⁰⁰ (d) the corporate structure of Hu Honua’s “family of companies” is related to the issue of GHG impacts;²⁰¹ and (e) disputes that Hu Honua will result in a net reduction of GHG emissions.²⁰² Hu Honua responds to each of these unfounded arguments, in turn.

a. Verification regarding planting of trees.

First, LOL’s allegation that Hu Honua failed to provide any “verification” related to who will be planting the trees, where the trees will be planted, and how the offset will be measured and verified is wrong. LOL has been provided with a copy of the Fuel Sales and Purchase Agreement, dated October 22, 2018, between Hu Honua and its fuel supplier CN Renewable Resources, LLC (“CNRR”).²⁰³ The Fuel Sales and Purchase Agreement provides that CNRR will supply biomass feedstock to Hu Honua, and that silviculture and planting is part of the services that CNRR will perform. LOL is well aware of this fact given that it has submitted and received responses to numerous information requests regarding the Fuel Sales and Purchase Agreement.²⁰⁴ The issue has also been discussed in Hu Honua’s prehearing testimonies.²⁰⁵

LOL takes the unreasonable and unjustified position that Hu Honua is required to secure sufficient land rights for biomass for the entire term of its 30-year A&R PPA before approval by the Commission.²⁰⁶ LOL’s position is unreasonable and unjustifiable. It is reasonable to expect that landowners from whom Hu Honua will secure feedstock will

²⁰⁰ LOL Reply, at 10.

²⁰¹ LOL Reply, at 10.

²⁰² LOL Reply, at 11.

²⁰³ Exhibit 1 to Hu Honua’s response to LOL/HHB-SIR-65, filed January 6, 2020, designated Confidential and Restricted based on the confidentiality justifications provided therein.

²⁰⁴ Hu Honua’s Response to LOL/HHB-SIR-60, filed January 6, 2020. See also Hu Honua’s Response to LOL/HHB-SIR-18, filed January 6, 2020, Hu Honua’s Response to LOL/HHB-SIR-35, filed January 6, 2020,

²⁰⁵ Miyata Testimony T-3, at 8-9.

²⁰⁶ LOL Reply, at 10.

want assurances regarding the approval of the Project before entering into long-term agreements. Further, imposing such a requirement prior to PPA approval would require a significant and risky financial investment that would be another burden borne by ratepayers. On one hand, LOL would require Hu Honua to spend a significant sum to secure thirty years of land rights before obtaining a final and non-appealable order from the Commission approving the A&R PPA, but yet LOL criticizes and questions the investment that Hu Honua has made thus far in order to bring its Facility to near completion. Should a non-appealable final order approving the A&R PPA be issued by the Commission, Hu Honua is confident that it will be able secure sufficient plots for feedstock to supplement the substantial amount of feedstock already secured.²⁰⁷

The planting and growing of biomass will occur regardless of whether Hu Honua itself or its third-party contractor performs the work. In a similar vein, Hu Honua has stated, several times over, that it plans to source and cultivate its agricultural feedstock locally from Hawaii island.²⁰⁸ Regardless of who plants the agricultural feedstock or where specifically on Hawaii island such feedstock is planted and grown, the planting and growing will occur on commercially managed forests and will ultimately remove GHG from the atmosphere. This is consistent with the analytical approach for several renewable projects that the Commission has approved which account for GHG emissions that are off island.²⁰⁹

Moreover, in a further effort to reduce carbon emissions, Hu Honua has partnered

²⁰⁷ Hu Honua's Response to CA/Hu Honua-SIR-16(a)(1), filed March 9, 2020; Biomass Fuel Supply Report Update, dated February 15, 2019, prepared by Forest Solutions, Inc., attached as Exhibit 3 to Hu Honua's Response to CA/Hu Honua-SIR-9(a), filed January 6, 2020, at 4, designated Confidential and Restricted Information based on the confidentiality justifications provided therein.

²⁰⁸ See, for example, Lee Testimony T-1, at 11.

²⁰⁹ See, for example, Docket No. 2019-0050, Application for Approval of Power Purchase Agreement for Renewable Dispatchable Generation with AES West Oahu Solar, LLC.

with the National Forest Foundation (“NFF”) to plant 3,125,000 trees in high priority areas on U.S. National Forests, which amounts to 625,000 native trees per year for the next five years beginning when the Hu Honua Project is placed in service.²¹⁰ The NFF estimates that each tree will sequester at least half a ton of carbon dioxide over its lifetime, which comes out to at least 312,500 tons of carbon dioxide removed for each year worth of trees planted. This is more biomass grown than is projected to be used per year by Hu Honua and, therefore, would make the Project carbon neutral for the first 5 years in and of itself; however Hu Honua has not taken credit for these plantings in its quantitative assessment. These NFF plantings are above and beyond the already carbon neutral assessment – Hu Honua is growing and will grow enough biomass on Hawaii Island to replace all that the biomass used by the Project, so the NFF plantings are above and beyond the Project’s carbon neutrality. Assuming a twenty-year growth period for these trees, this amounts to an additional over 78,000 tons of carbon dioxide removed from the atmosphere each year for the twenty years of growth of these trees.

In addition to its partnership with NFF, Hu Honua will also fund a project through “Friends of Hawai’i Volcanoes National Park” to clear 30 acres of invasive species and replant native species within the Hawai’i Volcanoes National Park-Special Ecological Area.²¹¹

Hu Honua’s efforts will contribute to accelerating GHG reductions globally. The NFF summary states that “[w]ithout proactive tree planting, forests in many parts of the country will take decades or longer to recover, if they recover at all.” It also states

²¹⁰ See Addendum to Pledge Agreement, dated August 14, 2020, attached as Exhibit 1, National Forest Foundation and Johnson Family Partnership Summary, attached as Exhibit 2, and Affidavit of Jon Miyata (“Miyata Affidavit”), at ¶¶ 4-5.

²¹¹ Exhibit 1 to Motion for Reconsideration.

“[r]eforestation accelerates, sustains, and increases the carbon sequestration of our National Forests. Fortunately, reforestation efforts help replenish many resources including carbon sequestration.” Finally, addressing the global nature of GHG, it states “[n]o matter where the trees are planted, they will help to sequester carbon and greenhouse gas emissions globally in light of the global nature of carbon and greenhouse gas emissions.”²¹²

LOL’s allegation that Hu Honua has not provided any verification as to how the GHG offset resulting from the Project will be evaluated, measured, and verified, is again contradicted by the record. The Hu Honua GHG Analysis Supplement & Update identifies the source of biomass for the first several years of operations.²¹³ The Hu Honua GHG Analysis Supplement & Update also provides a detailed carbon sequestration plan.²¹⁴ Hu Honua plans to track the plantings and regrowth of trees and measure the amount of biomass used, to demonstrate conformance with its carbon sequestration plan. This information can be made available at the request of the Commission. With respect to the trees that will be planted through the partnership with NFF, Hu Honua will submit annual reports documenting where the 625,000 trees were planted and its projected GHG impacts. The Hu Honua GHG Analysis Supplement & Update further models all harvesting, planting, and fertilizer use on site, as well as management steps attributable to growing/planting trees such as weeding and use of fertilizer.²¹⁵

²¹² See National Forest Foundation and Johnson Family Partnership Summary, attached as Exhibit 2 to Miyata Affidavit and Miyata Affidavit at ¶5.

²¹³ Biomass Fuel Supply Report Update, dated February 15, 2019, prepared by Forest Solutions, Inc., attached as Exhibit 3 to Hu Honua’s Response to CA/Hu Honua-SIR-9(a), filed January 6, 2020, at 4, designated Confidential and Restricted Information based on the confidentiality justifications provided therein.

²¹⁴ Exhibit HU HONUA-601, at 3-4.

²¹⁵ Exhibit HU HONUA-601.

b. Conditions sought to be imposed by LOL.

Second, LOL argues that “global warming” and “climate change” should be included as conditions in the A&R PPA.²¹⁶ LOL is not a party to the A&R PPA and, therefore, has no standing or right to impose contractual obligations upon HELCO or Hu Honua. Further, there is no legal, regulatory, or other requirement of which Hu Honua is aware that require “global warming” and “climate change” be included as a contractual provision in power purchase agreements, whatever that means. There are already sufficient statutory obligations imposed by HRS § 269-6(b) to ensure that GHG emissions are considered as part of the Commission’s review process.

c. Use of third-party contractors.

Third, LOL argues that Hu Honua’s use of third-party contractors for its harvesting and planting operations is impermissible and/or improper.²¹⁷ LOL continues to rehash its baseless and unsupported argument that Hu Honua’s hiring of third-party contractors as part of its operations is improper or impermissible. Regardless of whether Hu Honua itself, or a third-party contractor, performs the work necessary for operations, which includes planting and other agricultural activities, the work is being performed. LOL’s claims are offensive and damaging to philanthropic and other vegetation support efforts because it attempts to deprive any benefits for organizations that are funding these important projects, thereby disincentivizing reforestation efforts.

d. Hu Honua’s corporate structure.

Fourth, LOL claims that the corporate structure of Hu Honua’s “family of

²¹⁶ LOL Reply, at 10.

²¹⁷ LOL Reply, at 10.

companies” is related to the issue of GHG impacts.²¹⁸ LOL continues to embark on its fishing expedition into what it describes as Hu Honua’s “family of companies.” LOL continues to imply that the mere fact that Hu Honua may be affiliated with or in contract with other entities is evidence of some wrongdoing in an apparent attempt to generate controversy where none exists. LOL has been provided with information and documents relevant to the issues in this docket. For example, LOL has been provided with a copy of the Fuel Sales and Purchase Agreement with CNRR.²¹⁹ Hu Honua disclosed that CNRR is related to Hu Honua through common ownership, but it is neither a subsidiary of nor an owner of Hu Honua.²²⁰ The pricing under the A&R PPA between Hu Honua and HELCO is not affected by any increase in the cost of feedstock.²²¹ Hu Honua and its affiliates not only have very little control over the cost of feedstock made available by third-party landowners and harvesting companies, but there is absolutely no incentive for Hu Honua to inflate the cost as Hu Honua is not permitted to charge more under the A&R PPA even if the cost of feedstock goes up.²²²

As an independent power producer (“IPP”) and privately held company, Hu Honua is free to contract or affiliate with any other entity. Although LOL has committed significant effort to obtain this information,²²³ LOL has yet to explain how this has any bearing on the issue of GHG emissions or how this would impact LOL’s members’ right to a clean

²¹⁸ LOL Reply, at 10.

²¹⁹ Exhibit 1 to Hu Honua’s response to LOL/HHB-SIR-65, filed January 6, 2020, designated Confidential and Restricted based on the confidentiality justifications provided therein.

²²⁰ Hu Honua’s Response to LOL/HHB-SIR-20, filed January 6, 2020; see also Hu Honua’s response to LOL/HHB-SIR-35, filed January 6, 2020.

²²¹ Miyata Testimony T-3, at 9.

²²² Miyata Testimony T-3, at 8-9.

²²³ In addition to its several IRs on the issue, LOL filed several Motions seeking the disclosure of this information. See LOL’s Motion to Compel, filed January 28, 2020, LOL’s Motion for a Subpoena Duces Tecum or, In the Alternative, Motion to Add Parties to the Docket, filed January 28, 2020, and LOL’s [Second] Motion to Compel, filed March 16, 2020, as Amended on March 18, 2020.

and healthful environment. Curiously, while LOL has expended significant time and effort seeking disclosure of Hu Honua's business relations, including its relations with other companies or corporations, LOL has spent less effort to address its alleged concerns regarding the GHG impacts of the Project. For example, despite being provided with the opportunity to fully address its concerns regarding the Project's GHG emissions, LOL has not commissioned or conducted its own GHG analysis to meaningfully address Hu Honua's and HELCO's GHG analyses.

e. Net reduction in GHG emissions.

Fifth, LOL continues to dispute that Hu Honua will result in a net reduction of GHG emissions,²²⁴ despite the fact that the same conclusion was reached by HELCO.²²⁵ LOL is not an expert regarding these matters and has not retained an expert to conduct an analysis or provide the specialized insight necessary to actually assist the Commission in its consideration of the Project's GHG impacts.

Further, despite Hu Honua's repeated assertions that its fuel will only be obtained from commercially planted and managed forests, LOL continues to assume that these commercial forests will continue to remain in their current states if Hu Honua does not become operational. These commercial forests were planted with the intent that they be harvested and would not exist but for anticipated commercial use.²²⁶ The GHG that these commercial forests hold would not have been trapped in these forests and would have been in the atmosphere had there not been a commercial market for eucalyptus trees at the time of planting. Before these commercial forest markets existed, these plantations

²²⁴ LOL Response, at 11.

²²⁵ Hawaii Electric Light Company, Inc.'s Response to Order No. 36382 and Greenhouse Gas Analyses, filed October 21, 2019.

²²⁶ Hu Honua's Response to LOL/HHB-IR-341, filed March 6, 2020.

contained sugarcane or other various uses which would likely not sequester a substantial amount of GHG. The potential of a biomass market (which the Commission is dangerously close to destroying) caused these trees to be planted and caused GHG to be removed from the atmosphere. The approval of Hu Honua will generate additional agricultural activities associated with the planting of future crops, and result in the planting of more eucalyptus which will remove GHG from the atmosphere. This is why the biomass market and biomass cycle for these trees started in the past and removed GHG from the atmosphere. When Hu Honua and other renewable biomass projects begin, they will create a market for biomass whereby people will begin to plant more and more trees and vegetation, thereby removing GHG from the atmosphere.

Hu Honua acknowledges that the Commission and parties have expressed concerns regarding potential GHG emissions resulting from biomass. If the natural carbon cycle is broken and native forests are simply removed and used for fuel, there would be a net increase of GHG emissions, and this would be contrary to the State's and the world community's ability to achieve their GHG reduction goals. As stated in Hu Honua's prehearing testimonies: "[i]f native forests were to be used and there was no regrowth, the Project would likely not be less carbon intensive than fossil fuels."²²⁷ Deforestation is a threat to the planet in terms of climate change, GHG emissions, and biodiversity. However, this is not the case with Hu Honua. Hu Honua has committed to plant and grow more trees than it harvests and has committed that the Project will be carbon negative as soon as practicable, or by 2045 at the latest.²²⁸ In addition, the vegetation that will be used for fuel was planted with the express intent and purpose for

²²⁷ Weaver Testimony T-6, at 17.

²²⁸ See response to CA/Hu Honua-IR-101, filed February 18, 2020.

harvesting and was planted on land that originally did not have trees growing on it. This was specifically discussed and explained in Hu Honua's prehearing testimonies.²²⁹

I. Reply to the irrelevant arguments contained in LOL's Reply.

LOL's Reply contains several false statements that are not relevant to the relief requested in the Motion for Reconsideration. Though the statements are not relevant to the relief requested, Hu Honua addresses the statements to correct the record:

1. Hu Honua will not discharge pollutants.

LOL argues, without a basis, that if this proceeding moves forward, Hu Honua will need to "immediately conducts [sic] an Environmental Impact Statement" in relation with the discharge of water from its Underground Injection Control ("UIC") wells, in accordance with the United States Supreme Court decision County of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S.Ct. 1462, 206 L.Ed.2d 640 (2020).²³⁰

County of Maui does not stand for the proposition that LOL claims. In County of Maui, the United States Supreme Court held that a permit is required when there is a direct discharge of pollutants from a point source into navigable waters or when there is a functional equivalent of a direct discharge.²³¹ Hu Honua does not anticipate that County of Maui will have any bearing on Hu Honua because based upon its preliminary thermal analysis, Hu Honua will not directly discharge pollutants, including thermal pollutants.

2. Hu Honua's updated traffic assessment will not affect the start of operations.

LOL argues, without basis or any factual support, that the updated traffic assessment requested by the Department of Transportation, State of Hawaii ("DOT") will

²²⁹ Weaver Testimony T-6, at 14-18.

²³⁰ LOL Reply, at 12-13.

²³¹ County of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S.Ct. 1462, 1477, 206 L.Ed.2d 640 (2020)

delay the start of Hu Honua’s operations. This is not true. The updated traffic assessment will not affect the start of Hu Honua’s operations. Notwithstanding this, the conclusion reached in the updated traffic assessment is the same as the original traffic assessment, which is that access to the Hu Honua facility is not expected to significantly impact the intersection near the facility.

3. LOL has failed to present any evidence that Hu Honua will infringe upon LOL’s members’ constitutionally protected right to a clean and healthful environment.

LOL continues to argue, without factual support, that Hu Honua’s Project includes “undisclosed agricultural impacts that infringe on the Life of the Land’s constitutionally protected rights.”²³² LOL does not define what it considers to be “agricultural impacts.”

As stated by the Hawaii Supreme Court, LOL must be afforded an “opportunity to meaningfully address the impacts of approving the [A&R PPA] on LOL’s members’ rights to a clean and healthful environment, as defined by HRS Chapter 269.”²³³ The “agricultural impact” that falls under the Commission’s review pursuant to HRS Chapter 269 is GHG. Any “agricultural impacts” outside of HRS Chapter 269 are not before the Commission and should be reviewed by the appropriate and responsible administrative or other governmental agency.

With respect to GHG, as discussed above, LOL continues to dispute that Hu Honua’s Project will result in a net reduction of GHG emissions despite the fact that the same conclusion was reached by HELCO as a result of its own analysis.²³⁴ Despite being provided with the opportunity to meaningfully participate in the reopened proceeding, LOL

²³² LOL Reply, at 19.

²³³ In re HELCO, 145 Hawaii at 26, 445 P.3d at 698.

²³⁴ Hawaii Electric Light Company, Inc.’s Response to Order No. 36382 and Greenhouse Gas Analyses, filed October 21, 2019.

has not commissioned its own GHG analysis or provided any evidence to contradict these findings. Instead, LOL has focused significant attention on its attempts to discover the corporate structure and business relationships of Hu Honua.

4. Hu Honua is not seeking to recover overtime costs from ratepayers.

LOL falsely implies that Hu Honua is seeking to recover its “unspecified overtime” from ratepayers.²³⁵ This is a clear misrepresentation of Hu Honua’s statements in its Motion for Reconsideration. Hu Honua merely stated that it has expended over \$474 million dollars to construct and develop the Project in its efforts to comply with the 2017 D&O, which includes millions of dollars in unanticipated and unplanned overtime.²³⁶ Hu Honua did not state that it is seeking to recover such overtime costs from ratepayers and the pricing terms of the A&R PPA remain the same as when it was approved by the Commission in 2017.

J. Request for a timely decision on the Motion for Reconsideration.

Hu Honua has done its best to keep workers employed since 2017, throughout LOL’s appeal, the proceedings before the Commission on remand, and most recently during the high unemployment period caused by the COVID-19 pandemic. However, given that the Commission has not given Hu Honua any indication to date whether there will be a possible path forward for the Project, Hu Honua has no choice but to consider when it will have to start laying off its employees. While Hu Honua is still hopeful that the Commission will reconsider its decision, especially considering the fact that the plant is 99% complete and approximately \$474 million has been invested, if the Commission is unable to make a decision on the Motion for Reconsideration by September 30, 2020 that

²³⁵ LOL Reply, at 17.

²³⁶ Motion for Reconsideration, at 33.

provides a possible path forward, Hu Honua will have no choice but to start laying off its workforce.

III. CONCLUSION.

For the reasons stated herein, Hu Honua respectfully seeks reconsideration of the Commission's Order Revoking Waiver and requests that the Commission vacate the Order Revoking Waiver in its entirety and schedule an evidentiary hearing, as instructed by the Hawaii Supreme Court in In re HELCO, without delay for the limited purpose of expressly considering the reduction of GHG emissions in its decision-making pursuant to HRS § 269-6(b) and to afford LOL an opportunity to be heard regarding the impact of the A&R PPA on LOL's interest in a clean and healthful environment. Hu Honua respectfully requests that the Commission decide whether it will grant Hu Honua's Motion for Reconsideration and conduct an evidentiary hearing before September 30, 2020 so that Hu Honua can avoid the start of layoffs of its workforce.

DATED: Honolulu, Hawaii, August 23, 2020.



DEAN T. YAMAMOTO
WIL K. YAMAMOTO
BRADLEY S. DIXON

YAMAMOTO CALIBOSO
A Limited Liability Law Company

Counsel for HU HONUA BIOENERGY,
LLC



BRUCE D. VOSS
JOHN D. FERRY

Bays Lung Rose & Holma

Co-Counsel for HU HONUA
BIOENERGY, LLC

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

AFFIDAVIT OF WARREN LEE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

WARREN LEE, being first duly sworn on oath, deposes and says:

1. I am the President of Hu Honua Bioenergy, LLC ("Hu Honua"). I am familiar with all aspects of Hu Honua's history, business, and operations. My CV has already been submitted in this docket attached to my prehearing testimony as Exhibit HU-HONUA-100, filed on January 28, 2020.

2. I make this affidavit based on my personal knowledge and belief, and I am competent to attest to the matters discussed herein.

3. Following Hawaiian Electric Light Company, Inc.'s ("HELCO") filing of its Updated Bill Impact Analysis in response to the Consumer Advocate's information requests and in its Pre-hearing Testimony, Hu Honua questioned HELCO on how the 2017 vs. 2020 bill impact analyses filed by HELCO could result in a range of bill impacts from a \$2.50 average net savings to an average net increase of \$10.97 (a +\$13.47 difference).

4. Hu Honua had several discussions and meetings with representatives of HELCO over the course of several months to discuss the changed assumptions including, for example:

1. The 30-year fuel price forecast chosen by HELCO for the 2020 bill impact analysis;
2. The 30-year sales forecast for future distributed generation resources (DG-PV) chosen by HELCO for the 2020 bill impact analysis;
3. The resource plan for reducing the size of future energy storage additions chosen by HELCO for the 2020 bill impact analysis;
4. The assumptions regarding the retirement of HELCO fossil fuel plants;
5. The assumptions regarding the dispatch of Hu Honua over 30 years; and
6. The assumptions regarding Hamakua Energy being extended beyond its PPA term which ends in 2030.

5. As a result of those discussion and meetings, in early July 2020 HELCO agreed to do another production simulation model run in order to submit an additional bill impact analysis to the Commission focused on selecting an appropriate (a) 30-year fuel cost assumption, (b) future distributed generation resource 30-year sales forecast to account for expiring tax credits and other factors, and (c) energy storage addition assumption. Submitting an additional bill impact analysis would inform the Commission of another estimate of customer bill impacts using reasonable alternative assumptions that would demonstrate a lower bill impact than an average net increase of \$10.97 (and a lower delta than the \$13.47 difference between the 2017 and 2020 analyses). However, the Commission issued Order No. 37205 on July 9, 2020, before HELCO was able to perform and submit its production simulation.

FURTHER AFFIANT SAYETH NAUGHT.

Warren Lee
WARREN LEE

Subscribed and sworn to before me this

23rd day of August, 2020.

Lynn M. Lai Hipp

Name: Lynn M. Lai Hipp

Notary Public, State of Hawaii

My Commission expires: 10-20-2023



NOTARY CERTIFICATION

Document Date: Aug. 23, 2020

No. of Pages: 3

Document Description: _____

First Circuit

Affidavit of Warren Lee



Lynn M. Lai Hipp
Signature of Notary

Aug. 23, 2023
Date of Notarization

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
)

AFFIDAVIT OF JONATHAN JACOBS

STATE OF CALIFORNIA)
) SS.
COUNTY OF ALAMEDA)

JONATHAN JACOBS, being first duly sworn on oath, deposes and says:

1. My name is Jonathan Jacobs and I am a Managing Consultant for PA Consulting Group, Inc. My CV was previously submitted along with my testimony in this docket as Exhibit HU HONUA-500, filed on January 28, 2020.

2. I have been retained by Hu Honua Bioenergy, LLC ("Hu Honua") to evaluate the reasonableness of the pricing of the Amended & Restated Power Purchase Agreement ("A&R PPA") between Hawaii Electric Light Co. ("HELCO") and Hu Honua given the developments in the Hawaii island electric market since the Commission's approval of the A&R PPA in Decision and Order No. 34726, filed July 28, 2017.

3. I make this affidavit based on my personal knowledge and belief, and I am competent to attest to the matters discussed herein.

4. I reviewed Order No. 37205 ("Order Revoking Waiver"), issued by the Public Utilities Commission of the State of Hawaii ("Commission") in this docket on July 9, 2020.

5. I have also reviewed the replies filed on August 10, 2020, by the Division of Consumer Advocacy ("Consumer Advocate"), Tawhiri Power LLC ("Tawhiri"), Life of the Land ("LOL"), and Hawaii Electric Light Company, Inc. ("HELCO") which caused me to review additional information and make additional conclusions, which are described below.

6. I have been informed that Hu Honua questioned HELCO on how the 2017 vs. 2020 bill impact analyses filed by HELCO could result in a range of bill impacts from a \$2.50 average net savings to an average net increase of \$10.97 (a +\$13.47 difference). This is important given that only two Phase 1 RFP solar projects with a combined annual MWh capacity of approximately one-half (1/2) the Available Capacity of Hu Honua in annual MWh was being added to HELCO's grid.

7. The headlined difference between the analyses is in the resource plans is as follows: the 2020 analysis assumed that the two new solar + battery projects would be operational. One might assume that the bills had increased because Hu Honua was being dispatched instead of the solar projects, which have effectively zero cost (the payments for their contracts are independent of their production, depending only on "net energy potential"). I was present during a discussion between Hu Honua and HELCO in which HELCO suggested that the change is driven by such displacement of solar power by Hu Honua. However, I have determined that is not the case; displacement of solar power will have a small effect on customer bills.

Generation by Fuel
Category: PPA's generation



8. In the worst case, relatively small amounts of renewable energy are being replaced by energy priced according to Hu Honua's PPA, and in the worst case the variable cost of that energy to HELCO would have been zero. Thus, the total cost impact of that replacement is the volume of displaced renewables multiplied by Hu Honua's energy price. The total bill impact is the cost impact, plus revenue tax, divided by sales to get a rate per kWh and multiplied by 500 kWh/month. Unless there were no renewable displacement in the 2017 analysis, the change in bill impacts would have to be less.

9. With PGV in service, 15% of Hu Honua's generation would be attributable to displaced renewables. The total bill impact of displacing renewables over the 30-year period is an average of \$2.47/month. Therefore, the change in bill impacts attributable to renewable displacement is *at most* \$2.47/month, which would only be about 18% of the \$13.47 increase between the 2017 and 2020 HELCO Bill Impact Analyses – the rest of the projected bill increase appears to be based on other changed assumptions made solely by HELCO.

10. The change in bill impacts attributable to the change in fuel prices is most likely much larger. I computed what the average energy price of HELCO's fossil-fueled

units would be each year based on the 2017 forecast and on HELCO's current forecast (underlying the recent analysis). The amount of fossil energy displaced each year was multiplied by the change in energy price to estimate what the change in system cost would be. The estimated change in bill impact is the estimated change in cost impact, plus revenue tax, divided by sales to get a rate per kWh and multiplied by 500 kWh/month. With PGV in service, the average is \$17.81/month over the 30-year period. This is by itself higher than the \$13.47 increase but there are other differences that may offset it, in particular the greater amount of Hu Honua generation simulated in 2020.

11. The 2017 and 2020 bill impact analyses, when read together, reflected a large range of uncertainty in the assumptions (in addition to the two Phase 1 RFP solar projects) that HELCO used and changed between 2017 and 2020. This is especially true of long-term fuel price forecast, which as we have seen is both very changeable and very impactful upon residential bills. A prudent approach to resource planning would be based not just on the current optimistic forecast but on what could happen if the trajectory of fuel prices was much more adverse.

12. My analysis and conclusions are true and correct to the best of my knowledge.

[Remainder of the page intentionally left blank]

FURTHER AFFIANT SAYETH NAUGHT.



JONATHAN JACOBS

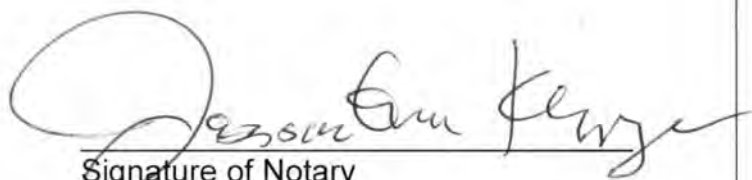
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Alameda

Subscribed and sworn to (or affirmed) before me on this
23rd day of August, 2020, by Jonathan M. Jacobs

proved to me on the basis of satisfactory evidence to be the person(s) who appeared
before me





Signature of Notary

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

AFFIDAVIT OF JON MIYATA

STATE OF HAWAII)
COUNTY OF HAWAII) SS.

JON MIYATA, being first duly sworn on oath, deposes and says:

1. I am the Director of Finance for Hu Honua Bioenergy, LLC ("Hu Honua"). I am familiar with all aspects of Hu Honua's history, business, and operations. My specific duties and responsibilities include budgeting, financial forecasting, accounting, department operations, and tax credit/equity financing for Hu Honua's Biomass Project ("Project"). My CV has already been submitted in this docket attached to my prehearing testimony as Exhibit HU-HONUA-300, filed on January 28, 2020.

2. I make this affidavit based on my personal knowledge and belief, and I am competent to attest to the matters discussed herein.

3. On July 20, 2020, Hu Honua filed its Motion for Reconsideration of Order No. 37205 Issued July 9, 2020 ("Motion for Reconsideration"). Attached as Exhibit 1 to the Motion for Reconsideration was a letter dated July 18, 2020, which assigns the carbon credits generated by two Pledge Agreements secured by Hu Honua's affiliate to Hu Honua. The first Pledge Agreement ensures that 1,250,000 trees will be planted through

the National Forest Foundation (“NFF”) during the first five years of the Project. The second Pledge Agreement funds a project with the Friends of Hawaii Volcanoes National Park to clear 30 acres of invasive species and replant native species within the Hawaii Volcanoes National Park.

4. Attached hereto as Exhibit 1 is a copy of an Addendum to the Pledge Agreement with NFF, dated August 14, 2020, which was provided to Hu Honua by its affiliate. The purpose of the Addendum is to reflect an increase in the number of trees intended to be planted through the partnership with NFF, from 1,250,000 trees to 3,125,000 trees, during the first five years of the Project.

5. Attached hereto as Exhibit 2 is a copy of the National Forest Foundation and Johnson Family Partnership Summary (“NFF Summary”), which was provided to Hu Honua by its affiliate. The NFF Summary provides more details regarding the NFF Pledge Agreement and Addendum. As stated in the NFF summary, Hu Honua, by and through its affiliate, has partnered with NFF to plant 3,125,000 trees in high priority areas on U.S. National Forests, which amounts to 625,000 native trees per year for the next five years beginning when the Hu Honua Project is placed in service.

[Remainder of the page intentionally left blank]


FURTHER AFFIANT SAYETH NAUGHT.



JON MIYATA

Subscribed and sworn to before me this

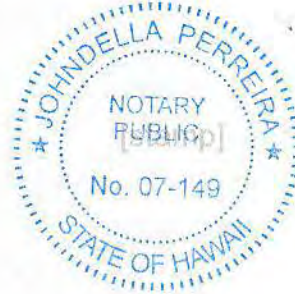
20th day of August, 2020.



Name: Johnella Pereira

Notary Public, State of Hawaii

My Commission expires: 04/08/2023



NOTARY CERTIFICATION

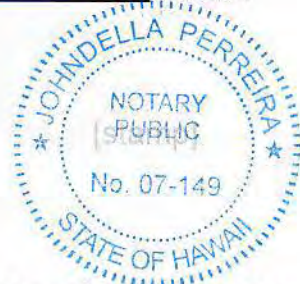
Document Date: Undated

No. of Pages: 3

Document Description: #2

Hind Circuit

Affidavit of Jon Miyata





Signature of Notary

August 20, 2020
Date of Notarization

ADDENDUM TO PLEDGE AGREEMENT

This Addendum to the Pledge Agreement between Jennifer M. Johnson and The National Forest Foundation, dated November 2019 ("Pledge Agreement"), is made by and between Jennifer M. Johnson ("J. Johnson"), with offices located at 1 Franklin Parkway #960 San Mateo, California 94403 and the National Forest Foundation ("NFF"), with offices located at Building 27, Suite 3, Fort Missoula Road, Missoula, MT 59804.

To reflect an increase in the number of trees intended to be planted through this partnership, J. Johnson and NFF hereby amend the Pledge Agreement, and Attachment "A" and Attachment "B", thereto, to replace the original terms as follows:

NFF Obligations:

General Program:

- The NFF shall ensure the planting of 3,125,000 native trees total in publicly-owned, U.S. National Forests, over a five year period (2020-2025). See Attachment B.
(shall replace: The NFF shall ensure the planting of 1,250,000 native trees total in publicly-owned, U.S. National Forests, over a five year period (2020-2025). See Attachment B.)
- The NFF will administer funds to complete reforestation projects through the following means:
 - The NFF shall provide annually J. Johnson a suite of high priority tree-planting projects to attain at least 3,125,000 trees planted by 2025.
(shall replace: The NFF shall provide annually J. Johnson a suite of high priority tree planting projects to attain at least 1,250,000 trees planted by 2025.)
- The NFF shall designate Dayle Wallien, Director of Conservation Partnerships, as a dedicated staff liaison to manage, report and administer this partnership.
(shall replace: The NFF shall designate Wes Swaffar, Director of Reforestation and Partnerships, as a dedicated staff liaison to manage, report and administer this partnership.)

J. Johnson Obligations:

- J. Johnson intends to donate a total of \$3,125,000 to the NFF across five (5) renewable annual payments. Payments shall be made by wire transfer as follows:
 - \$625,000 by September 30, 2020 or, if the Hu Honua Biomass Plant is placed in service after the target date above, then this payment will occur within thirty (30) days of the plant being placed in service.
 - \$625,000 by September 30, 2021
 - \$625,000 by September 30, 2022
 - \$625,000 by September 30, 2023
 - \$625,000 by September 30, 2024

JJ 8/14/20

(shall replace: J. Johnson intends to donate a total of \$1,250,000 to the NFF across five (5) renewable annual payments. Payments shall be made by wire transfer as follows:

- o \$250,000 by April 15, 2020 or, if the Hu Honua Biomass Plant is placed in service after the target date above, then this payment will occur within thirty (30) days of the plant being placed in service.
- o \$250,000 by September 1, 2020
- o \$250,000 by September 1, 2021
- o \$250,000 by September 1, 2022
- o \$250,000 by September 1, 2023)

ATTACHMENT "A"
Revised Agreement Budget


Purpose	Amount
Reforestation Expenses	\$2,656,250
NFF Program Management	\$468,750
Total	\$3,125,000.00

ATTACHMENT "B"
Revised Project Investments

Year	Number of Trees	Location
2020	625,000	TBD
2021	625,000	TBD
2022	625,000	TBD
2023	625,000	TBD
2024	625,000	TBD

The parties acknowledge that the Pledge Agreement is being modified only by revising the above provisions, and agree that nothing else in the Pledge Agreement shall be affected by this Addendum.

Signed:


By: Jennifer M. Johnson
Title: Donor

8/14/20
Date:


By: Mary K. Mitsos
Title: President and CEO

August 18, 2020
Date:



National Forest Foundation and Johnson Family Partnership Summary

The National Forest Foundation (NFF) is grateful to partner with the Johnson Family, on behalf of the Hu Honua Biomass Plant, to plant 3,125,000 trees in high priority areas on our U.S. National Forests. The Johnson Family has pledged to plant 625,000 native trees per year for the next five years across our National Forest system beginning when the Hu Honua Biomass Plant in Pepe'ekeo, Hawaii is placed in service.

Trees play an invaluable role in our ecosystems. Trees sequester carbon dioxide, mitigating the effects of global climate change. Trees capture and filter rain and snowmelt, ultimately providing drinking water for millions of Americans. Trees anchor soil in place, preventing landslides. Native trees provide habitat for wildlife and maintain biodiversity.

Our National Forest System is the centerpiece of America's public lands. These public lands stretch across 41 states and Puerto Rico, providing Americans with clean air, clean water and open space. Our nation's forests provide our country with the most efficient natural system for extracting carbon dioxide from the atmosphere. Our U.S. forests sequester approximately 12% of our country's carbon emissions, in a year.

There are more than 1 million acres on our National Forests that are in need of reforestation due to natural disturbances, including wildfire, disease, and hurricanes. Without proactive tree planting, forests in many parts of the country will take decades or longer to recover, if they recover at all. To help address this deficit, the NFF is working with the U.S. Forest Service to plant 50 Million trees by the end of 2025 in high priority areas on our National Forests through our 50 Million For Our Forests campaign. This native tree planting pledge by the Johnson Family will help us accomplish that goal. For every \$1 invested, the NFF guarantees that at least one native tree will be planted on our National Forest System. Every private dollar invested leverages two federal dollars for this critical conservation work.

Reforestation accelerates, sustains, and increases the carbon sequestration of our National Forests. Fortunately, reforestation efforts help replenish many resources including carbon sequestration. We conservatively estimate that each tree planted through the Johnson Family's pledge will sequester at least one-half a ton of carbon dioxide over its lifetime.

The National Forests where native trees will be planted with the Johnson Family will be selected annually. Geographies will include: coniferous forests of the western U.S. impacted by recent wildfires; long leaf pine habitat in the southeastern U.S. critical for endangered species including the red cockaded woodpecker; and forests of the northcentral U.S. and Great Lakes region. No matter where the trees are planted, they will help to sequester carbon and greenhouse gas emissions globally in light of the global nature of carbon and greenhouse gas emissions.

The NFF works on behalf of the American public to inspire personal and meaningful connections to our National Forests. By directly engaging Americans and leveraging private and public funding, the NFF leads forest conservation efforts and promotes responsible recreation on our 193 million acre National Forest System. Along with planting trees, the NFF restores fish and wildlife habitat and improves recreation opportunities.

For more information about the NFF and its tree planting program, visit www.nationalforests.org.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
 HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
 For Approval of a Power Purchase)
 Agreement for Renewable Dispatchable)
 Firm Energy and Capacity)
 _____)

CERTIFICATE OF SERVICE

I hereby certify that on this date copies of the foregoing document, together with this Certificate of Service, were duly served on the following parties as set forth below:

Parties	U.S. Mail	Hand Delivery	E-Mail
Dean Nishina Executive Director Department of Commerce and Consumer Affairs Division of Consumer Advocacy dnishina@dcca.hawaii.gov consumeradvocate@dcca.hawaii.gov dca@dcca.hawaii.gov	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Kevin M. Katsura Director, Regulatory Non-Rate Proceedings Hawaiian Electric Company, Inc. kevin.katsura@hawaiianelectric.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
David M. Louie Joseph A. Stewart Aaron R. Mun Kobayashi, Sugita, & Goda LLP Attorneys for Hawai'i Electric Light Company, Inc. dml@ksglaw.com jas@ksglaw.com arm@ksglaw.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Sandra-Ann Y.H. Wong Attorney at Law, A Law Corporation Attorney for Tawhiri Power LLC sawonglaw@hawaii.rr.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ted N. Pettit Mark G. Valencia Case Lombardi & Pettit, A Law Corporation Attorneys for Hamakua Energy, LLC tpettit@caselombardi.com mvalencia@caselombardi.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Shannon S. Broome Hunton Andrews Kurth LLP Attorney for Hamakua Energy, LLC sbroome@huntonak.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Myles F. Reynolds Hunton Andrews Kurth LLP Attorney for Hamakua Energy, LLC mreynolds@huntonak.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Henry Q. Curtis Vice President for Consumer Issues Kat Brady Vice President for Social Justice Life of the Land henry.lifeoftheland@gmail.com kat.lifeoftheland@gmail.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

DATED: Honolulu, Hawaii, August 23, 2020.



WIL K. YAMAMOTO

YAMAMOTO CALIBOSO
A Limited Liability Law Company

Counsel for HU HONUA BIOENERGY, LLC



text resize Text size: [Smaller](#) | [Reset](#) | [Larger](#)



State of Hawaii
Public Utilities Commission



Search this site



[Home](#) [News & Events](#) [Dockets](#) [Filing & Forms](#) [Information](#) [About](#) [Contact Us](#)

Home » [Filing & Forms](#)

THE HAWAII PUBLIC UTILITIES COMMISSION ACKNOWLEDGES RECEIPT OF YOUR SUBMITTAL.

Form:	Hawaii PUC eFile Docketed
Entity:	Yamamoto Caliboso
Confirmation Number:	MAMB20170531129
Date and Time Received:	Aug 23 2020 05:05 PM
Date Filed:	Aug 24 2020

NOTICE OF ELECTRONIC FILING: Your electronic filing has been accepted. Submittals received after 4:30 p.m. shall be deemed filed the next business day. The mere fact of filing shall not waive any failure to comply with [Hawaii Administrative Rules Chapter 6-61, Rules of Practice and Procedure Before the Public Utilities Commission](#), or any other application requirements, and the Hawaii PUC may entertain timely motions in connection with your filing or require you to amend your filing.

[PUC Home](#)

[Filing](#)

[DMS Home](#)

FILING & FORMS

- [Filing Complaints](#)
- [Filing Docketed Documents](#)
- [Filing Non-Docketed Documents](#)
- [Motor Carriers Forms](#)
- [Office Forms](#)
- [Payments](#)
- [Utilities Forms](#)
- [Water Carriers Forms](#)

EFILING

Individuals seeking to eFile must **register online**. Within 2 business days of registering you will receive an email to active your account.

0BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
)

**HU HONUA BIOENERGY, LLC'S SUPPLEMENTAL RESPONSE TO THE
DIVISION OF CONSUMER ADVOCACY'S, TAWHIRI POWER LLC'S, AND
LIFE OF THE LAND'S REPLIES TO HU HONUA BIOENERGY, LLC'S MOTION
FOR RECONSIDERATION OF ORDER NO. 37205, FILED JULY 20, 2020**

AFFIDAVIT OF JONATHAN JACOBS

AND

CERTIFICATE OF SERVICE

BRUCE D. VOSS
JOHN D. FERRY

BAYS LUNG ROSE & HOLMA
Topa Financial Center
700 Bishop Street, Ste. 900
Honolulu, Hawaii 96813
Phone No. (808) 523-9000
Facsimile No. (808) 533-4184
Emails: bvoss@legalthawaii.com
jferry@legalthawaii.com

Co-Counsel for HU HONUA BIOENERGY,
LLC.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

**HU HONUA BIOENERGY, LLC’S SUPPLEMENTAL RESPONSE TO THE
DIVISION OF CONSUMER ADVOCACY’S, TAWHIRI POWER LLC’S, AND
LIFE OF THE LAND’S REPLIES TO HU HONUA BIOENERGY, LLC’S MOTION
FOR RECONSIDERATION OF ORDER NO. 37205, FILED JULY 20, 2020**

Hu Honua Bioenergy, LLC, a Delaware limited liability company (“Hu Honua”), by and through its undersigned counsel, Bays Lung Rose & Holma, hereby respectfully submits its supplemental response (“Supplemental Response”) in support of Hu Honua’s Response to the Division of Consumer Advocacy’s (“Consumer Advocate”), Tawhiri Power LLC (“Tawhiri”) and Life of the Land’s (“LOL”) Replies to Hu Honua’s Motion for Reconsideration of Order No. 37205, filed July 20, 2020 (“Motion for Reconsideration”).

This Supplemental Response is submitted to address the portions of the replies filed on August 10, 2020, by the Consumer Advocate,¹ Tawhiri,² and LOL,³ (“CA Reply”, “Tawhiri Reply”, and “LOL Reply”, respectively), that address the Hu Honua Bioenergy, LLC’s Supplemental Memorandum in Support of Hu Honua Bioenergy LLC’s Motion for Reconsideration of Order No. 37205, issued July 9, 2020, filed August 14, 2020 (“Supplemental

¹ Division of Consumer Advocacy’s Response to Hu Honua Bioenergy, LLC’s Motion for Reconsideration of Order No. 37205, Issued July 9, 2020, filed August 10, 2020.

² Tawhiri Power LLC’s Reply to Hu Honua Bioenergy, LLC’s Motion for Reconsideration of Order No. 37205, Filed on July 9, 2020, filed August 10, 2020.

³ Life of the Land’s Response to Order No. 37233, filed August 10, 2020.

Memorandum”).

I. ARGUMENT.

A. Hu Honua’s Motion for Reconsideration met Hu Honua’s burden to show that the Commission’s Order Revoking Waiver was unreasonable, unlawful, or erroneous pursuant to HAR § 16-601-137.

The Consumer Advocate argues that Hu Honua’s Motion for Reconsideration fails to meet the standard for such a motion because it “appears to present no new evidence or arguments that were unable to be presented at earlier portions of the docket” and “has presented no new evidence or arguments that could not be ascertained from the record as far as it is presented in the docket.”⁴ Tawhiri argues that Hu Honua’s Motion for Reconsideration improperly introduces new evidence and affidavits in an attempt to relitigate the case.⁵ LOL similarly claims that Hu Honua is trying to supplement the record for the purposes of appeal.⁶

Hu Honua’s Supplemental Memorandum appropriately introduced new evidence pursuant to HAR § 16-601-137 to address erroneous and unsupported justifications provided by the Hawaii State Public Utilities Commission (“Commission”) to support its Order No. 37205 Denying Hawaii Electric Light Company, Inc.’s Request for a Waiver and Dismissing Letter Request for Approval of Amended and Restated Power Purchase Agreement, filed July 9, 2020 (“Order Revoking Waiver”). Hu Honua’s Supplemental Memorandum included additional evidence from experts Bruce Plasch and Jonathan Jacobs to address new information and issues introduced for the first time by the Commission in its Order Revoking Waiver. Hu Honua was never notified that the Commission would be evaluating and considering such new information and, thus, was previously unable to address such information in this proceeding.⁷

⁴ Motion for Reconsideration, at 4.

⁵ Tawhiri Reply, at 9.

⁶ LOL Motion for Leave, at 11-13.

⁷ See e.g. Supplemental Memorandum, at 15-16.

With respect to the Affidavit of Dr. Plasch and related discussion in the Supplemental Memorandum, the information regarding the economic benefits and impacts from Hu Honua’s construction and operations came from material that is already in the record.⁸ Dr. Plasch introduced new information comparing against Hu Honua the economic benefits and impacts of constructing and operating the Phase 1 RFP Solar Projects (30 MW Solar + 4-Hour Battery) in direct response to the Commission’s findings in the Order Revoking Waiver. Also, a number of the economic impacts were converted to cumulative estimates (annual averages × years) in order to fairly compare Hu Honua against the Phase 1 RFP Solar Projects inasmuch as the two projects have different terms for both construction and operations.

The Affidavit of Dr. Jacobs and related discussion in the Supplemental Memorandum introduced new information regarding the capability and pricing comparison of Hu Honua and the Phase 1 and Phase 2 RFP solar + 4-hour battery storage projects because the Commission relied on such comparison in Order No. 37205 in its decision to revoke the 2017 waiver approval.

The “new” information submitted by Dr. Plasch and Dr. Jacobs was necessary and justified in light of the Commission’s introduction of erroneous and misleading comparison information in the Order Revoking Waiver. Specifically, the Commission stated that “any renewable project on Hawaii Island would provide economic stimulation and job creation, in that a facility would need to be built, maintained, and operated”⁹ and that it is “unclear how or whether requiring the Hu Honua Project to go through competitive bidding would eliminate these benefits, in that the winning bid ... would still be required to build and operate a renewable facility on Hawaii island,” implying that the level of economic stimulation and job creation of Hu Honua as compared with

⁸ See Affidavit of Bruce Plasch, attached to the Supplemental Memorandum, at 2.

⁹ Order Revoking Waiver, at 35.

any other renewable project, including the Phase 1 RFP projects, would be similar.¹⁰ The Commission also stated that the AES Waikoloa Solar and Hale Kuawehi Solar projects on Hawaii Island will be capable of producing 30 MW paired with a battery energy storage system (“BESS”) capable of storing 120 MWh of energy (4-hours) that is charged from the PV system, and that such projects “have produced real alternatives against which to evaluate the benefits and costs of the Hu Honua Project and diminish the persuasiveness of the Applicant’s waiver arguments,” implying that a solar + 4-hour battery project is a “real alternative” in terms of capability to Hu Honua’s 24/7 true firm plant.¹¹

In light of the above-mentioned comparisons by the Commission of Hu Honua and the Phase 1 and Phase 2 projects in development on Hawaii Island, which was not the focus of this docket, or prior requested analysis, Dr. Plasch and Dr. Jacobs conducted a supplemental analysis to address the Commission’s erroneous assumptions. Dr. Plasch’s supplemental analysis demonstrated that the Commission’s assumptions were erroneous and unreasonable and that the Hu Honua Project would provide significantly more jobs and much greater economic benefits than a Phase 1 RFP solar project.¹² Dr. Jacobs’s analysis, among other things, demonstrated that Hu

¹⁰ Order Revoking Waiver, at 35.

¹¹ Order Revoking Waiver, at 27-28.

¹² Hu Honua’s Supplemental Memorandum, at 17-22 and Affidavit of Bruce Plasch attached to the Supplemental Memorandum, at 2-3. LOL attempts to undermine the jobs that have been and will be created by Hu Honua’s operations. LOL argues that Hu Honua “only” directly pays 30 plant employees and discredits the number of jobs that have been and will be created as a result of the trucking and forestry operations, because such operations are contracted out by Hu Honua. LOL’s Response, at 14. LOL conveniently ignores that these trucking, forestry, and other jobs related to the construction and operations of Hu Honua are created by the existence and operation of Hu Honua. Whether Hu Honua directly pays these wages or pays the wages by way of paying a contractor is inconsequential. LOL’s disregard for the Hawaii Island residents who stand to lose their jobs as a result of the Order Revoking Waiver must be rejected.

LOL further attempts to discredit the economic benefits that Hu Honua is projected to provide by referencing selective portions of Dr. Plasch’s analysis. LOL’s Response, at 14-15. Hu Honua notes that LOL references the Plasch Economic Impacts and Benefits Report, filed June 16, 2017. However, Dr. Plasch has since updated his report based on new and additional information. See Hu Honua Bioenergy: Updated Economic Impacts and Benefits Report, dated January 2020, attached as HU-HONUA-401 (“Plasch Updated Report”) to the Prehearing Testimony of Bruce Plasch (“Plasch Testimony T-4”), filed January 28, 2020. LOL argues that the wages projected to be paid by Hu Honua does not justify the cost of the A&R PPA. LOL’s Response, at 14-15. LOL’s arguments are unfounded and baseless. As

Honua’s facility would provide significantly more capabilities that would allow for the retirement of existing fossil fuel plants and that if the solar + 4-hour battery projects were scaled to provide capabilities similar to those to be provided by Hu Honua, the cost would be significantly higher than the 8 or 9 cents/kwh referenced by the Commission.

B. Capability and pricing comparison of Hu Honua versus Phase 1 and Phase 2 RFP solar + 4-hour battery projects.

HELCO has indicated that the reliability services it can obtain from Hu Honua are valuable and that they justify the waiver: “Specifically, the Hu Honua Project provides true firm, dispatchable, renewable energy to the Hawaii Electric Light grid. As true firm generation, this Project has additional benefits to the grid beyond the solar and battery projects being procured in the Phase 1 and Phase 2 RFPs.”¹³

In light of the Commission’s unorthodox comparison of Hu Honua’s 24/7 true firm capabilities and pricing against that of variable solar + 4-hour battery storage in Order No. 37205, Hu Honua has attempted to quantify the benefit of some of Hu Honua’s technical capabilities, in particular its ability to operate at capacity if needed 24/7 year-round, for as long or as short a time as might be required. Such quantification demonstrates that price comparisons such as pricing for delivered energy versus. pricing based on net energy potential, or pricing for a limited duration of operation versus. pricing for an unlimited duration, are not truly apples-to-apples comparisons. Competitive bidding is intended to focus on achieving lower pricing but creates the danger of a purely price-based decision that ignores differences in capability and other value components, or is based on a faulty comparison due to the parameters of the type of resource being procured. That

demonstrated by the Plasch Updated Report filed with Hu Honua’s Prehearing Testimonies, Hu Honua’s economic benefits include several different factors, including payroll, tax revenue, and sales. See Plasch Updated Report.

¹³ See Hawai’i Electric Light Company, Inc.’s Position Statement in Response to Hu Honua Bioenergy, LLC’s Motion for Reconsideration of Order No. 37205, Issued July 9, 202, filed August 10, 2020 (“HELCO Reply”) at 6.

would “impede or create a disincentive for the achievement of IRP goals,” which the Framework lists as a reason to waive bidding.¹⁴

HELCO is procuring energy to achieve a 100% renewable future, which would mean the retirement of HELCO's fossil fuel generators. The fossil fuel generators provide dispatchable, firm generation, inertial frequency response, voltage support and other services that support grid reliability. Hu Honua can provide such services and contribute to the retirement of these fossil generators; the Phase 1 solar + 4-hour battery projects cannot. Comparing the prices of those resources with that of Hu Honua is unfair and unjustified. The following table (Table 1) provides comparative pricing and describes three firm renewable options in order to make a fairer comparison:

¹⁴ See D&O 23121, issued Dec. 8, 2006, in Docket 2003-0372, Exhibit A, at 4.

Table 1: Pricing for a HELCO fossil fuel power plant and renewable options for replacing it.¹⁵

Power plant	Price per kWh	Comments
<u>NON-FIRM</u> Solar + Battery ¹⁶ [Cannot fully replace 24 hour fossil fuel power plants – <u>NOT AN OPTION</u>]	\$0.08 to \$0.09	Phase 1 RFP solar + 4 hour battery PPA pricing. ¹⁷ May appear less costly than the other options, but this is because it provides less capability and value. Cannot be relied upon to fully replace fossil fuel plants and reliably support the grid. Therefore, you still need to run fossil fuel plants OR the firm renewable options below.
<u>TRUE FIRM</u> Keahole Fossil Fuel Plant (available 24 hours daily)	\$0.28 to \$0.30	This is what exists today (fossil fuel combined cycle plant that must be replaced to achieve 100% RPS)
<u>NEAR-FIRM</u> Solar + 22.5 hour Battery ¹⁸ (available 24 hours for a single day)	\$0.25 to \$0.32 (\$0.50 to \$0.54 to hold enough energy for two-day outage)	Pricing based on the Phase 1 RFP solar + 4 hour battery PPA projects, ¹⁹ plus the addition of 18.5 hours of battery storage to ensure availability to support the grid at all hours of a single 24-hour day. Total of 22.5 hours of battery. If the projects had to hold enough energy for a two-day outage the price would rise to \$0.50 to \$0.54/kWh.
<u>TRUE FIRM</u> Biodiesel Power Plant (convert existing fossil fuel plant to operate on biodiesel) (available 24 hours daily)	\$0.42 to \$0.43	A biodiesel plant – cost estimate reflects conversion of Keahole (fossil fuel plant) to biodiesel in 2021. ²⁰
<u>TRUE FIRM</u> Hu Honua Biomass Power Plant (available 24 hours daily)	\$0.20 to \$0.22	Based on running at its full capability (24 hours/day) less scheduled two-week maintenance period (either 30 MW Available Capacity at 20 cents/kwh or 200,000 MWh at 22 cents/kwh)

¹⁵ Affidavit of Jonathan Jacobs “Jacobs Affidavit”) at ¶4.

¹⁶ To achieve Hawaii’s goal of 100% renewable electricity, Hawaii Island needs one or more resources that can be called upon to replace the output of a generator that suffers an outage, or to cover for load spikes, capable of running all day long. Hu Honua can operate continuously using its biomass fuel source stored onsite. A 30 MW photovoltaic generator paired with 120 MWh of battery storage (4 hours) can only provide a limited amount of energy to the grid and cannot even support the grid through a single 24-hour period. That is why the Phase 1 RDG resources are NON-FIRM and not capable of fully replacing a fossil fuel plant.

The PPA pricing of the Phase 1 RFP solar + 4-hour battery projects is for resources that by design, which cannot match the grid reliability support of a fossil fuel plant, are in the first row (light green). The second row, shaded gray, gives the cost of the Keahole fossil fuel plant which must be fully replaced by renewable resources in order to reach 100% RPS. The third, fourth, and fifth rows describe three renewable options for replacing HELCO's existing fossil fuel plant (dark green): a solar + battery project with 22.5 hours of battery storage equipment as described above; a biodiesel-fired power plant; and Hu Honua. However, it must be noted that the solar + 22.5 hour battery plant is still only “near-firm” (not truly firm) because it has not been equipped to be a full replacement of a true firm fossil fuel plant and to do so would be even more costly than the pricing indicated.²¹

As a point of comparison, using HELCO’s own fuel price forecast, the average “all-in”

¹⁷ See Phase 1 RFP PPAs for Hawaii Island in Docket No. 2018-0430, Hawai'i Electric Light Company, Inc.'s Application (“[AES Waikoloa Application](#)”), filed December 31, 2018; Docket No. 2018-0432, Hawai'i Electric Light Company, Inc.'s Application (“[Hale Kuawehi Application](#)”), filed December 31, 2018.

¹⁸ To some extent, the solar + battery projects – such as the Phase 1 RDG solar + 4 hour battery projects on Hawaii Island – can be modified to provide 24 hour availability by adding additional storage. Based on modeling conducted by PA Consulting, the batteries would have to be upsized significantly to allow a project such as AES Waikoloa to fill the gap of a fossil fuel plant for a day. On the worst (rainiest) day of a typical year, that plant can generate only 44 MWh of solar energy (so it can deliver 30 MW for just under 1.5 hours). To deliver 30 MW around the clock, 720 MWh would be required, and thus, it would require a total of 676 MWh of stored energy.

The cost of adding 556 MWh of batteries to the 120 MWh AES Waikoloa proposed for the plant to hold 676 MWh of energy would more than triple the installed cost of the plant and drive up the price considerably to \$0.29/kWh. Hale Kuawehi is more productive, but also more expensive; outfitting it for 24-hour availability would raise its price to \$0.32/kWh.

In addition, adverse weather events such as a multi-day rainstorm would require even more stored energy with little to no replenishment from solar. For example, in 2017 there were 2 consecutive days of adverse weather on which we estimate that a project such as AES Waikoloa would have yielded less than 100 MWh of solar energy each day. To be capable throughout the year of meeting a 2-day outage, the plant would need 1240 MWh of batteries (2*720 – 200) and the cost would go as high as \$0.50 to \$0.54/kWh. Moreover, the storage only helps with firmness, ensuring that the plants are available each day when needed, but not with other needs such as “system inertia.” Meeting those needs would drive up the cost (and per-kWh price) even more.

¹⁹ See Phase 1 RFP PPAs for Hawaii Island in PUC Docket No. 2018-0430 AES Waikoloa Solar, LLC and 2018-0432 Hale Kuawehi Solar LLC.

²⁰ For the PSIP, HECO estimated the cost to convert two combined cycle units to use LNG at \$7.8 million. While there is no known estimate of the cost of converting the Keahole combined cycle plant to use biodiesel, HECO’s estimate to convert to LNG provides an approximate comparable estimate.

²¹ Jacobs Affidavit at ¶5.

cost of the Keahole combined-cycle plant (a fossil-fueled plant used to support the grid) will be 28 to 30 cents/kWh. Depending on the amount of capacity that HELCO takes from Hu Honua, the 30-year levelized cost of energy from Hu Honua would be 20 to 22 cents/kWh (the Commission's 2017 D&O and recent Order No. 37205, filed July 20, 2020, referenced the cost of Hu Honua at 22.1 cents/kWh). If Keahole were converted to biodiesel today and was used in the same way, its all-in cost would be 42 to 43 cents/kWh.²²

In order to get closer to an apples-to-apples comparison, it is instructive to estimate how much greater the cost of the Phase 1 projects would have been if they had been designed to provide grid supportive services. HELCO has indicated that these attributes are important and cited grid support as a reason to waive competitive bidding and approve the Hu Honua A&R PPA. HELCO has not, however, quantified the value of those services. That could be because HELCO's analytic methods have been designed around metrics the Commission has requested in the past, such as the bill impacts analysis of new capacity under strictly "with" and "without" scenarios and assuming average conditions each day (in which additional reliability support to account for the bad weather days is not needed).²³

Hu Honua considered one aspect of reliability, which is the ability to cover for an outage of another generator. In the Supplemental Memorandum this was called "24x7 deliverability". If an operating generator suffers an outage, Hu Honua has the ability to run at its full capacity to cover that amount of the load that was being served by the failed generator. Hu Honua can do so for as long as it takes; that is 24x7 deliverability. A Phase 1 RFP solar + 4-hour battery project cannot operate at full capacity for that length of time. It may be too much to expect a solar + battery project to cover a month-long outage, or even a week, but it is reasonable to expect it to

²² Jacobs Affidavit at ¶6.

²³ Jacobs Affidavit at ¶7.

cover for a one-day outage, for example.²⁴

In Hu Honua's Supplemental Memorandum, filed July 20, 2020, Hu Honua estimated that to cover a full-day outage would require six copies of a solar+battery project.²⁵ Hu Honua calculated a total cost of 25 to 29 cents per delivered kWh for such a reinforced project.²⁶ The methodology used in that estimate was complex and difficult to explain to a lay audience. It was based on the cost of delivered energy, not net energy potential, because much of the energy produced by six copies of one project would have to be rejected by the grid.²⁷

An alternative and more direct and meaningful approach would be to examine what it would take to enable a single solar + storage project to deliver energy at its full capacity for an entire day. Just as utilities assess conventional capacity based on its ability to support reliability on the highest-stress day of the year – the system peak – Hu Honua considered the day on which it would be most difficult for a solar + battery plant to cover load. That would be the day of lowest solar production in a typical year.²⁸

Based on a high-level PA simulation of one of the Phase 1 RFP solar + battery plants on the lowest-solar day of the year, it would produce enough energy to run at full capacity for 90 minutes. At best it could also use 4 hours-worth of energy stored previously in its battery but would still be unable to deliver energy for 18.5 hours. To obtain 24x7 deliverability, the project would have had to install an additional 18.5 hours-worth of batteries and keep them charged and ready for use.²⁹

²⁴ Jacobs Affidavit at ¶8.

²⁵ Supplemental Memorandum, at 8.

²⁶ Supplemental Memorandum, at 8-9.

²⁷ Jacobs Affidavit at ¶9.

²⁸ Jacobs Affidavit at ¶10.

²⁹ Jacobs Affidavit at ¶11.

Based on figures in the PSIP, it was estimated that the batteries represent 57% of the cost of a 30 MW photovoltaic plant with 120 MWh of battery storage. If the project's price is 8 cents/kWh, then 57% of that, or 4.56 cents/kWh, is the cost of the batteries. Dividing by 4, each hour of battery capacity was responsible for 1.14 cents/kWh of the project's price. Adding another 18.5 hours would then add 18.5 times 1.14 cents/kWh, or 21 cents/kWh, to the project cost. Instead of 8 cents/kWh the project price would have to be 29 cents/kWh. In the same way, one would calculate that the price of a 9 cents/kWh Phase 1 RFP solar project would increase to 33 cents – but based on PA's simulation the specific 9 cents/kWh project would produce a little more than 1.5 hours' worth of solar power on the year's lowest day, and need a little less than 18.5 MWh of additional batteries, with the result that the price would only increase to 32 cents/kWh.³⁰

We have now two ranges for the price of a solar + battery project that was capable of 24x7 deliverability, and therefore more comparable to Hu Honua: 25 to 29 cents/kWh and 29 to 32 cents/kWh. Putting them together gives a range of 25 to 32 cents/kWh. Note this pricing reflects equipment needed to cover a 1-day outage. If additional equipment must be added to the plant to allow it to cover a 2-day outage, this would drive the cost up to 50 to 54 cents/kWh. Thus, in order to provide the reliability support services that a fossil fuel plant, or Hu Honua, can provide, solar + battery would cost more than Hu Honua on a cost/kwh basis. The table above summarizes these cost estimates.³¹

LOL provides a faulty comparison of Hu Honua vs the Phase 1 RFP solar + 4-hour battery projects. LOL begins by stating that the Hu Honua A&R PPA "asserts" that Hu Honua will supply 200,000 MWh/year.³² However, the A&R PPA makes no such assertion regarding actual volumes

³⁰ Jacobs Affidavit at ¶12.

³¹ Jacobs Affidavit at ¶13.

³² See LOL Reply at 13, filed August 10, 2020.

of dispatch. The 200,000 MWh/year figure was referenced in 2017 to indicate how much energy it may deliver. LOL then states that the total cost of Hu Honua in a year would be \$44.2 million while the total cost of the two Phase 1 RFP solar projects would be only \$27.2 million. However, LOL conveniently ignores key differences between them such as (a) the total net energy potential of the two Phase 1 RFP solar projects is 168,821 MWh/year, which is significantly less than 200,000 MWh/year and Hu Honua's Available Capacity of 30 MW which is capable of generating 252,720 MWh/year; (b) HELCO projects that in many years each Phase 1 RFP project on its own would actually produce less than 70% of its net energy potential,³³ and given this, the two solar projects' actual production would total 119,960 MWh/year (40% less than Hu Honua's 200,000 MWh/year and 53% less than Hu Honua's 252,720 MWh/year); and (c) HELCO evaluated each project in isolation. Due to saturation of the grid during hours of solar production, the two solar projects together would likely deliver less than 100,000 MWh/year on average.³⁴

LOL makes the unsupported assertion that "batteries are offsetting the need for 24/7 firm power."³⁵ This is not true. Because none of the Phase 1 RFP solar + 4-hour storage projects are operational yet, no grid-scale experience with solar + battery storage exists to support LOL's argument. And, given the fact that the batteries to be installed from the Phase 1 RFP are simply not capable of 24/7 operation, LOL's argument is patently false.

LOL also criticizes Hu Honua's reasonable position that HELCO would like to keep its fossil-fueled plant operational and in ratebase – along with possible additional capital expenditures – until it can convert them to burn biodiesel.³⁶ However, for unexplained reasons, LOL ignores the record in which HELCO admits that it has "*no specific retirement schedule for all fossil-fuel*

³³See AES Waikoloa Application, at Exhibit 6; Hale Kuawehi Application, at Exhibit 6.

³⁴Jacobs Affidavit at ¶14.

³⁵See LOL Reply at 17, filed August 10, 2020.

³⁶See LOL Reply at 17, filed August 10, 2020.

*fired generating plants on [HELCO's] system” and that it intends to retain those assets until it “convert[s] several or all of its fossil fuel fired generation stations to biofuels.”*³⁷ In addition, while Hu Honua was designed and previously approved by the Commission to replace existing fossil-fuel plants, HELCO admits that it has “*no plan to immediately retire any specific generating plants once the Hu Honua plant begins providing energy and capacity to the system*” and that it “*has not evaluated retiring existing generating plants to avoid the costs of ownership and operations.*”³⁸

LOL also claims that “[t]he idea that fossil fuel plants will be displaced by biofuel in 2045 dates from the 2016 Power Supply Improvement Plans, a document that everyone agrees is woefully out-of-date.” However, not “everyone” agrees with that, in particular not HELCO, who continues to include the biodiesel conversion in the Resource Plans contained in its bill impacts analyses for (1) the two Phase 1 RFP solar projects in Docket No. 2017-0352,³⁹ (2) the Hu Honua A&R PPA in Docket No. 2017-0122,⁴⁰ and (3) the Puna Geothermal A&R PPA in Docket No. 2019-0333.⁴¹

The Phase 1 and Phase 2 RFP competitive bid procurements have been tailored to variable, not firm, generation. HELCO has not demonstrated an interest in procuring true firm renewable energy for Hawaii Island. Competitive bids to date in Docket No. 2017-0352 have been initiated by HECO, to meet the needs provided by HECO, using evaluation criteria developed by HECO, and with the blessing of the Commission – all of which targeted variable renewable energy with a

³⁷ See HELCO Response to Tawhiri-HELCO-IR-16, filed December 2, 2019, and Tawhiri-HELCO-SIR-3(b), filed January 6, 2020.

³⁸ See HELCO Response to Tawhiri-HELCO-SIR-6(a), filed January 6, 2020, and CA/HELCO-IR-38, filed February 18, 2020.

³⁹ See AES Waikoloa Application, Attachment 1 to Exhibit 3; Hale Kuawehi Application, Attachment 1 to Exhibit 3.

⁴⁰ See HELCO 301, filed January 28, 2020.

⁴¹ See Docket No. 2019-0133, Application of Hawaii Electric Light Company, Inc. for Approval of Amended and Restated Power Purchase Agreement with Puna Geothermal Venture, filed December 31, 2019, Attachment 1 to Exhibit 3.

4-hour storage component. In addition, HELCO stated it has no plans to issue an RFP for biomass or other true firm resource. Put simply, Hu Honua provides the only near-term opportunity to provide firm dispatchable renewable energy on Hawaii island.

II. CONCLUSION.

For the reasons stated herein and in the Response, Hu Honua respectfully seeks reconsideration of the Commission's Order Revoking Waiver and requests that the Commission vacate the Order Revoking Waiver in its entirety and schedule an evidentiary hearing, as instructed by the Hawaii Supreme Court in In re HELCO, without delay for the limited purpose of expressly considering the reduction of GHG emissions in its decision-making pursuant to HRS § 269-6(b) and to hold a due process evidentiary hearing.

DATED: Honolulu, Hawaii, August 23, 2020.



BRUCE D. VOSS
JOHN D. FERRY

Bays Lung Rose & Holma

Co-Counsel for HU HONUA BIOENERGY, LLC

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

AFFIDAVIT OF JONATHAN JACOBS

STATE OF CALIFORNIA)
) SS.
COUNTY OF ALAMEDA)

JONATHAN JACOBS, being first duly sworn on oath, deposes and says:

1. My name is Jonathan Jacobs and I am a Managing Consultant for PA Consulting Group, Inc. My CV was previously submitted along with my testimony in this docket as Exhibit HU HONUUA-500, filed on January 28, 2020.

2. I have been retained by Hu Honua Bioenergy, LLC ("Hu Honua") to evaluate the reasonableness of the pricing of the Amended & Restated Power Purchase Agreement ("A&R PPA") between Hawaii Electric Light Co. ("HELCO") and Hu Honua given the developments in the Hawaii island electric market since the Commission's approval of the A&R PPA in Decision and Order No. 34726, filed July 28, 2017.

3. I make this affidavit based on my personal knowledge and belief, and I am competent to attest to the matters discussed herein.

4. I prepared and performed the calculations for the figures in Table 1 in Hu Honua's Supplemental Response: Pricing for a HELCO fossil fuel power plant and renewable options for replacing it.

5. The PPA pricing of the Phase 1 RFP solar + 4-hour battery projects is for resources that by design cannot match the grid reliability support of a fossil fuel plant. The Keahole fossil fuel plant must be fully replaced by renewable resources in order to reach 100% RPS. There are three renewable options for replacing HELCO's existing fossil fuel plant: a solar + battery project with 22.5 hours of battery storage equipment; a biodiesel-fired power plant; and Hu Honua. However, it must be noted that the solar + 22.5 hour battery plant is still only “near-firm” (not truly firm) because it has not been equipped to be a full replacement of a true firm fossil fuel plant and to do so would be even more costly than the pricing indicated.

6. As a point of comparison, using HELCO's own fuel price forecast, the average “all-in” cost of the Keahole combined-cycle plant (a fossil-fueled plant used to support the grid) will be 28 to 30 cents/kWh. Depending on the amount of capacity that HELCO takes from Hu Honua, I estimate the 30-year levelized cost of energy from Hu Honua to be 20 to 22 cents/kWh (the Commission's 2017 D&O and recent Order No. 37205, filed July 20, 2020, referenced the cost of Hu Honua at 22.1 cents/kWh). If Keahole were converted to biodiesel today and was used in the same way, its all-in cost would be 42 to 43 cents/kWh.

7. In order to get closer to an apples to apples comparison, it is instructive to estimate how much greater the cost of the Phase 1 projects would have been if they had been designed to provide grid supportive services. HELCO has indicated that these attributes are important and cited grid support as a reason to waive competitive bidding and approve the Hu Honua A&R PPA. HELCO has not, however, quantified the value of those services. That could be because HELCO's analytic methods have been designed around metrics the Commission has requested in the past, such as the bill impacts analysis of new capacity under strictly “with” and “without” scenarios and

assuming average conditions each day (in which additional reliability support to account for the bad weather days is not needed).

8. Hu Honua considered one aspect of reliability, which is the ability to cover for an outage of another generator. In the Supplemental Memorandum this was called “24/7 deliverability.” If an operating generator suffers an outage, Hu Honua has the ability to run at its full capacity to cover that amount of the load that was being served by the failed generator. Hu Honua can do so for as long as it takes; that is 24/7 deliverability. A Phase 1 RFP solar + 4-hour battery project cannot operate at full capacity for that length of time. It may be too much to expect a solar + battery project to cover a month-long outage, or even a week, but it is reasonable to expect it to cover for a one-day outage, for example.

9. The methodology used in the estimate in Hu Honua Supplemental Memorandum, filed July 20, 2020 regarding the requirement for six copies of a solar+battery project to cover a fully-day outage at a calculated cost of 25 to 29 cents per delivered kWh for such project was complex and difficult to explain to a lay audience. It was based on the cost of delivered energy, not net energy potential, because much of the energy produced by six copies of one project would have to be rejected by the grid.

10. An alternative and more direct and meaningful approach would be to examine what it would take to enable a single solar + storage project to deliver energy at its full capacity for an entire day. Just as utilities assess conventional capacity based on its ability to support reliability on the highest-stress day of the year—the system peak—I considered the day on which it would be most difficult for a solar + battery plant to cover load. That would be the day of lowest solar production in a typical year.

11. Based on a high-level PA simulation of one of the Phase 1 RFP solar + battery plants on the lowest-solar day of the year, it would produce enough energy to run at full capacity for 90 minutes. At best it could also use 4 hours-worth of energy stored previously in its battery but would still be unable to deliver energy for 18.5 hours. To obtain 24/7 deliverability, the project would have had to install an additional 18.5 hours-worth of batteries and keep them charged and ready for use.

12. Based on figures in the PSIP, I estimated that the batteries represent 57% of the cost of a 30 MW photovoltaic plant with 120 MWh of battery storage. If the project's price is 8 cents/kWh, then 57% of that, or 4.56 cents/kWh, is the cost of the batteries. Dividing by 4, each hour of battery capacity was responsible for 1.14 cents/kWh of the project's price. Adding another 18.5 hours would then add 18.5 times 1.14 cents/kWh, or 21 cents/kWh, to the project cost. Instead of 8 cents/kWh the project price would have to be 29 cents/kWh. In the same way, one would calculate that the price of a 9 cents/kWh Phase 1 RFP solar project would increase to 33 cents—but based on PA's simulation the specific 9 cents/kWh project would produce a little more than 1.5 hours' worth of solar power on the year's lowest day, and need a little less than 18.5 MWh of additional batteries, with the result that the price would only increase to 32 cents/kWh.

13. I have now two ranges for the price of a solar + battery project that was capable of 24/7 deliverability, and therefore more comparable to Hu Honua: 25 to 29 cents/kWh and 29 to 32 cents/kWh. Putting them together gives a range of 25 to 32 cents/kWh. Note this pricing reflects equipment needed to cover a 1-day outage. If additional equipment must be added to the plant to allow it to cover a 2-day outage, this would drive the cost up to 50 to 54 cents/kWh. Thus, in order to provide the reliability support services that a fossil fuel plant, or Hu Honua, can provide, solar + battery would cost more than Hu Honua on a cost/kwh basis.

14. The two Phase 1 RFP solar projects' actual production would total 119,960 MWh/year (40% less than Hu Honua's 200,000 MWh/year and 53% less than Hu Honua's 252,720 MWh/year), and HELCO evaluated each project in isolation. Due to saturation of the grid during hours of solar production, the two solar projects together would likely deliver less than 100,000 MWh/year on average.

[Remainder of the page intentionally left blank]

FURTHER AFFIANT SAYETH NAUGHT.



JONATHAN JACOBS

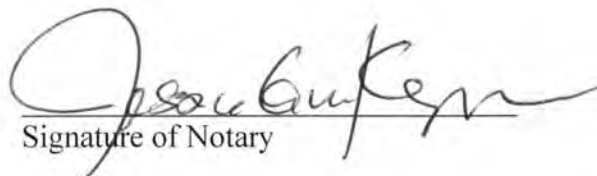
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Alameda

Subscribed and sworn to (or affirmed) before me on this
23rd day of August, 2020, by Jonathan M. Jacobs

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me

(Seal)  JESSICA GWEN KLINGER
Notary Public - California
Los Angeles County
Commission # 2246633
My Comm. Expires Jun 18, 2022



Signature of Notary

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
))
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
))
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on this date copies of the foregoing document, together with this Certificate of Service, were duly served on the following parties as set forth below:

Parties	U.S. Mail	Hand Delivery	E-Mail
Dean Nishina Executive Director Department of Commerce and Consumer Affairs Division of Consumer Advocacy dnishina@dcca.hawaii.gov consumeradvocate@dcca.hawaii.gov dca@dcca.hawaii.gov	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Kevin M. Katsura Director, Regulatory Non-Rate Proceedings Hawaiian Electric Company, Inc. kevin.katsura@hawaiianelectric.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
David M. Louie Joseph A. Stewart Aaron R. Mun Kobayashi, Sugita, & Goda LLP Attorneys for Hawai'i Electric Light Company, Inc. dml@ksglaw.com jas@ksglaw.com arm@ksglaw.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Sandra-Ann Y.H. Wong Attorney at Law, A Law Corporation Attorney for Tawhiri Power LLC sawonglaw@hawaii.rr.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ted N. Pettit Mark G. Valencia Case Lombardi & Pettit, A Law Corporation Attorneys for Hamakua Energy, LLC tpettit@caselombardi.com mvalencia@caselombardi.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Shannon S. Broome Hunton Andrews Kurth LLP Attorney for Hamakua Energy, LLC sbroome@huntonak.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Myles F. Reynolds Hunton Andrews Kurth LLP Attorney for Hamakua Energy, LLC mreynolds@huntonak.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Henry Q. Curtis Vice President for Consumer Issues Kat Brady Vice President for Social Justice Life of the Land henry.lifeoftheland@gmail.com kat.lifeoftheland@gmail.com	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

DATED: Honolulu, Hawaii, August 23, 2020.

Bruce D. Voss

BRUCE D. VOSS

Bays Lung Rose & Holma

Co-Counsel for HU HONUA BIOENERGY, LLC



text resize Text size: [Smaller](#) | [Reset](#) | [Larger](#)



State of Hawaii
Public Utilities Commission



Search this site



[Home](#) [News & Events](#) [Dockets](#) [Filing & Forms](#) [Information](#) [About](#) [Contact Us](#)

Home » [Filing & Forms](#)

THE HAWAII PUBLIC UTILITIES COMMISSION ACKNOWLEDGES RECEIPT OF YOUR SUBMITTAL.

Form:	Hawaii PUC eFile Docketed
Entity:	Bays Lung Rose
Confirmation Number:	MAMB20171107305
Date and Time Received:	Aug 23 2020 05:11 PM
Date Filed:	Aug 24 2020

NOTICE OF ELECTRONIC FILING: Your electronic filing has been accepted. Submittals received after 4:30 p.m. shall be deemed filed the next business day. The mere fact of filing shall not waive any failure to comply with [Hawaii Administrative Rules Chapter 6-61, Rules of Practice and Procedure Before the Public Utilities Commission](#), or any other application requirements, and the Hawaii PUC may entertain timely motions in connection with your filing or require you to amend your filing.

[PUC Home](#)

[Filing](#)

[DMS Home](#)

FILING & FORMS

- [Filing Complaints](#)
- [Filing Docketed Documents](#)
- [Filing Non-Docketed Documents](#)
- [Motor Carriers Forms](#)
- [Office Forms](#)
- [Payments](#)
- [Utilities Forms](#)
- [Water Carriers Forms](#)

EFILING

Individuals seeking to eFile must **register online**. Within 2 business days of registering you will receive an email to active your account.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
HAWAII ELECTRIC LIGHT COMPANY, INC.) DOCKET NO. 2017-0122
)
For Approval of a Power Purchase)
Agreement for Renewable Dispatchable)
Firm Energy and Capacity.)
_____)

ORDER NO. 37306

(1) DENYING HU HONUA BIOENERGY, LLC'S MOTION FOR RECONSIDERATION
OF ORDER NO. 37205, ISSUED JULY 9, 2020, FILED JULY 20, 2020;
AND (2) ADDRESSING RELATED PROCEDURAL MOTIONS

TABLE OF CONTENTS

I. BACKGROUND3

II. DISCUSSION7

 A. Denying Hu Honua's Request For
 A Hearing On Its Motion For Reconsideration..... 7

 B. Legal Standard..... 9

 C. Denying Hu Honua's Motion For Reconsideration..... 10

 1. The Hawaii Supreme Court's
 Decision To Vacate The 2017 D&O
 Required The Commission To
 Re-Examine All Issues On Remand..... 11

 2. The Commission Provided Hu Honua
 With Sufficient Notice That HELCO's
 Request For A Waiver Was Part Of
 The Re-Opened Proceeding On Remand..... 17

 3. Hu Honua Fails To Meet Its
 Burden To Justify Reconsideration..... 19

 D. Addressing Related Procedural Motions..... 59

 1. LOL's Motion For Leave..... 59

 2. Hu Honua's Motion For Leave..... 60

 3. LOL's Motion For Leave To File A Response..... 60

 4. Tawhiri's Motion To Strike..... 61

 E. Community Considerations..... 62

III. ORDERS64

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
)	
HAWAII ELECTRIC LIGHT COMPANY, INC.	)	DOCKET NO. 2017-0122
)	
For Approval of a Power Purchase	)	ORDER NO. 37306
Agreement for Renewable Dispatchable)	
Firm Energy and Capacity.)	
<hr/>		

(1) DENYING HU HONUA BIOENERGY, LLC'S MOTION FOR RECONSIDERATION OF ORDER NO. 37205, ISSUED JULY 9, 2020, FILED JULY 20, 2020;
AND (2) ADDRESSING RELATED PROCEDURAL MOTIONS

By this Order,¹ the Public Utilities Commission ("Commission"), denies Hu Honua's Motion for Reconsideration, filed July 20, 2020, including its request for a hearing on its Motion for Reconsideration.² Relatedly, the Commission also

¹The Parties to this docket are HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), HU HONUA BIOENERGY, LLC ("Hu Honua"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Commission has also granted Participant status to LIFE OF THE LAND ("LOL"), TAWHIRI POWER, LLC ("Tawhiri"), and HAMAKUA ENERGY, LLC ("Hamakua"). See Order No. 34554, "Opening a Docket to Review and Adjudicate Hawaii Electric Light Company, Inc.'s Letter Request for Approval of Amended and Restated Power Purchase Agreement, Filed in Docket No. 2012-0212 on May 9, 2017," filed May 17, 2017 ("Order No. 34554").

²"Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issue July 9, 2020; Memorandum in Support of Motion; Affidavit of Jon Miyata; Affidavit of Eli Katz; Exhibit 1; and Certificate of Service," filed July 20, 2020 ("Hu Honua Motion for Reconsideration").

addresses a number of procedural motions filed by various Parties and Participants as follows: (1) dismisses LOL's Motion for Leave to Oppose Hu Honua's Motion for Reconsideration of Order No. 37205 as moot;³ (2) grants, in part, Hu Honua's Motion for Leave to File a Response to the Parties' and Participants' Replies to Hu Honua's Motion for Reconsideration;⁴ (3) dismisses LOL's Motion for Leave to file a response to Hu Honua's Motion for Leave as moot;⁵ and (4) dismisses Tawhiri's Motion to Strike Hu Honua's Response and Supplemental Response to the Parties' and Participants' replies to Hu Honua's Motion for Reconsideration as moot.⁶

As a result, there are no remaining issues for resolution in this proceeding and this docket is considered closed.

³"Life of the Land's Motion for Leave to Oppose Hu Honua's Motion for Reconsideration of Order No. 37205; Memorandum in Support of Motion for Leave; Declaration; and Certificate of Service, filed July 22, 2020 ("LOL Motion for Leave").

⁴"Hu Honua Bioenergy, LLC's Motion for Leave to File a Response to the Parties' and Participants' Replies to Hu Honua's Motion for Reconsideration of Order No. 37205 and Supplemental Memorandum in Support of Same; and Certificate of Service," filed July 31, 2020 ("Hu Honua Motion for Leave").

⁵"Life of the Land's Motion for Leave; Memo Re Response to Hu Honua's 7/31/20 Request; and Certificate of Service," filed August 6, 2020 ("LOL Motion for Leave to File Response").

⁶"Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Response and Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy's Motion for Reconsideration of Order No. 37205, Filed on July 20, 2020; Memorandum in Support of Motion; and Certificate of Service," filed August 25, 2020 ("Tawhiri Motion to Strike").

I.

BACKGROUND

On July 9, 2020, the Commission issued Order No. 37205, which denied HELCO's request for a waiver from the Competitive Bidding Framework ("Framework") for the Amended and Restated Power Purchase Agreement, dated May 5, 2017, between HELCO and Hu Honua ("Amended PPA") under which HELCO would purchase energy and capacity from Hu Honua's biomass facility on Hawaii Island (the "Project").⁷ In pertinent part, the Commission found that HELCO had not demonstrated that a waiver from the Framework was necessary or justified, particularly in light of HELCO's recent competitive solicitations that were successful in cost-effectively procuring multiple large-scale renewable energy projects.⁸

As approval of the waiver from the Framework was a threshold issue prior to considering the Amended PPA in this docket, the Commission also dismissed the Amended PPA without prejudice.⁹

On July 20, 2020, Hu Honua filed its Motion for Reconsideration, requesting "that the Commission vacate [Order

⁷Order No. 37205, "Denying Hawaii Electric Light Company, Inc.'s Request for a Waiver and Dismissing Letter Request for Approval of Amended and Restated Power Purchase Agreement," filed July 20, 2020 ("Order No. 37205").

⁸See Order No. 37205 at 2.

⁹See Order No. 37205 at 43.

No. 37205] in its entirety.”¹⁰ Also on July 20, 2020, Hu Honua filed a “Supplemental Memorandum” to its Motion for Reconsideration, which contained additional arguments and evidence.¹¹

On July 22, 2020, LOL filed its Motion for Leave, requesting leave to file a memorandum responding to Hu Honua’s Motion for Reconsideration.¹²

On July 24, 2020, the Commission, on its own motion, issued Order No. 37233, which provided the other Parties and Participants an opportunity to file replies to Hu Honua’s Motion for Reconsideration, including Hu Honua’s Supplemental Memorandum.¹³ Any such, replies were due within fifteen (15) days of Order No. 37233.¹⁴

¹⁰Hu Honua Motion for Reconsideration at 1.

¹¹“Hu Honua Bioenergy, LLC’s Supplemental Memorandum in Support of Hu Honua Bioenergy LLC’s Motion for Reconsideration of Order No. 37205, Issued July 9, 2020; Affidavit of Jonathon Jacobs; Affidavit of Bruce Plasch; and Certificate of Service,” filed July 20, 2020 (“Hu Honua Supplemental Memorandum”).

¹²LOL attached its proposed response to its Motion for Leave.

¹³Order No. 37233, “Allowing Replies to Hu Honua Bioenergy, LLC’s Motion for Reconsideration of Order No. 37205, Issued July 9, 2020, Filed July 20, 2020,” filed July 24, 2020 (“Order No. 37233”).

¹⁴Order No. 37233 at 3.

On July 31, 2020, Hu Honua filed its Motion for Leave seeking permission to respond to the replies permitted by Order No. 37233.

Pursuant to Order No. 37233, on August 10, 2020, the Consumer Advocate, Tawhiri, and LOL all filed replies to Hu Honua's Motion for Reconsideration.¹⁵ HELCO submitted a "position statement" in support of Hu Honua's Motion for Reconsideration.¹⁶

On August 6, 2020, LOL filed its Motion for Leave to File Response.

On August 24, 2020, Hu Honua submitted a response to the Consumer Advocate's Reply, Tawhiri's Reply, and LOL's Reply.¹⁷ Also on August 24, 2020, Hu Honua submitted a "Supplemental

¹⁵Division of Consumer Advocacy's Response to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020," filed August 10, 2020 ("CA Reply"); "Tawhiri Power LLC's Reply to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Filed on July 9, 2020," filed August 10, 2020 ("Tawhiri Reply"); and "Life of the Land's Response to Order No. 37233; Declaration; and Certificate of Service," filed August 10, 2020 ("LOL Reply").

¹⁶"Hawaii Electric Light Company, Inc's Position Statement in Response to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020; and Certificate of Service," filed August 10, 2020 ("HELCO Position Statement").

¹⁷"Hu Honua Bioenergy, LLC's Response to the Division of Consumer Advocacy's Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Filed July 20, 2020; Affidavit of Warren Lee; Affidavit of Jonathan Jacobs; Affidavit of Jon Miyata; Exhibits '1' to '2'; and Certificate of Service," filed August 24, 2020 ("Hu Honua Reply").

Response" to the Parties' replies, which contained additional arguments and evidence.¹⁸

On August 25, 2020, Tawhiri filed its Motion to Strike, seeking to strike Hu Honua's Reply and its Supplemental Reply.

Also on August 25, 2020, LOL filed a joinder to Tawhiri's Motion to Strike.¹⁹

On September 1, 2020, Hu Honua filed an opposition to Tawhiri's Motion to Strike and LOL's Joinder.²⁰

On September 2, 2020, HELCO filed a position statement in response to Tawhiri's Motion to Strike, in which HELCO noted Hu

¹⁸"Hu Honua Bioenergy, LLC's Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Filed July 20, 2020; Affidavit of Jonathan Jacobs; and Certificate of Service," filed August 24, 2020 ("Hu Honua Supplemental Reply").

¹⁹"Life of the Land's Joinder to Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Response and Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy's Motion for Reconsideration of Order No. 37205, Filed on July 20, 2020; Memorandum in Support of Motion; and Certificate of Service," filed August 25, 2020 ("LOL Joinder to Tawhiri Motion to Strike").

²⁰"Hu Honua Bioenergy, LLC's Memorandum in Opposition to Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Response and Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power, LLC's, and Life of the Land's Replies to Hu Honua Bioenergy's Motion for Reconsideration of Order No. 37205, Filed July 20, 2020, Filed on August 25, 2020, and Life of the Land's Joinder to Tawhiri Power LLC's Motion to Strike; and Certificate of Service," filed September 1, 2020.

Honua's pending Motion for Leave and reiterated its non-opposition to said motion.²¹

II.

DISCUSSION

A.

Denying Hu Honua's Request For A Hearing On Its Motion For Reconsideration

In its Motion for Reconsideration, Hu Honua requests a hearing on its Motion pursuant to HAR § 16-601-41.²² While acknowledging that HAR § 16-601-142 is the controlling authority for hearings on a motion for reconsideration, Hu Honua nonetheless seeks a hearing on its Motion pursuant to HAR § 16-601-41²³

As HAR § 16-601-142 is the more specific rule governing this situation, it is controlling, compared to HAR § 16-601-41.²⁴

²¹"Hawaii Electric Light Company, Inc.'s Statement of Position to Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Response and Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy's Motion for Reconsideration of Order No. 37205, Filed on July 20, 2020; and Certificate of Service," filed September 2, 2020.

²²Hu Honua Motion for Reconsideration at 1.

²³Hu Honua Motion for Reconsideration at 2.

²⁴See County of Hawaii v. UNIDEV, LLC, 129 Hawaii 378, 390, 301 P.3d 588, 600 (2013)(citing State v. Hussein, 122 Hawaii 495, 525, 229 P.3d 313, 343 (2010)) ("It is well settled that 'where there is a plainly irreconcilable conflict between a general and

As Hu Honua acknowledges, HAR § 16-601-142 provides: "Oral argument shall not be allowed on a motion for reconsideration, rehearing, or stay, unless requested by the [C]ommission or a commissioner who concurred in the decision." No commissioner concurred in Order No. 37205, nor has the Commission requested a hearing on Hu Honua's Motion for Reconsideration. Thus, Hu Honua's request for a hearing on its Motion is denied.

Further, as discussed below, the Commission is granting, in part, Hu Honua's Motion for Leave and considering Hu Honua's Reply and Supplemental Reply. In addition to allowing Hu Honua to respond to the arguments raised in the other Parties' responses and replies, this permits Hu Honua to submit approximately 250 pages of briefing in support of its position. In addition, as discussed below, the Commission has denied LOL's request to submit a response to Hu Honua's Reply, thus allowing Hu Honua to have the "last word" in support of its Motion for Reconsideration. These provide Hu Honua with sufficient opportunity to make its case for reconsideration.

a specific statute concerning the same subject matter, the specific will be favored.'").

B.

Legal Standard

Motions for reconsideration are governed by HAR chapter 16-601, which include subchapter 14. HAR §§ 16-601-137, 16-601-139, 16-601-140, and 16-601-142 of subchapter 14 provide:

§6-61-137 Motion for reconsideration or rehearing. A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or in a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

. . . .

§6-61-139 Additional evidence. When, in a motion filed under this subchapter, a request is made to introduce new evidence, the evidence adduced shall be stated briefly, that evidence must not be cumulative, and an explanation must be given why that evidence was not previously adduced.

§6-61-140 Replies to motions. The commission may allow replies to a motion for rehearing or reconsideration or a stay, if it deems those replies desirable or necessary.

. . . .

§6-61-142 Oral argument. Oral argument shall not be allowed on a motion for reconsideration, rehearing, or stay, unless requested by the commission or a commissioner who concurred in the decision.

"[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Tagupa v. Tagupa, 108 Hawai'i 459, 465, 121 P.2d 924, 930 (Haw. Ct. App. 2000). However, "[r]econsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." Id. (citing Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (Haw. 2002) and quoting Sousaris v. Miller, 92 Hawai'i at 513, 993 P.3d at 547).

C.

Denying Hu Honua's Motion For Reconsideration

Based on review of the record, including Hu Honua's Motion and related filings and responsive briefings from the other Parties and Participants, the Commission finds and concludes that Hu Honua has not met its burden to support reconsideration of Order No. 37205.

To facilitate the Commission's discussion and review of Hu Honua's Motion, the Commission addresses two major assumptions underlying Hu Honua's arguments first.

1.

The Hawaii Supreme Court's Decision To Vacate The 2017 D&O
Required The Commission To Re-Examine All Issues On Remand

Hu Honua's leading argument in its Motion for Reconsideration contends that the Hawaii Supreme Court's decision In re HELCO, 145 Hawaii 1, 445 P.3d 673 (2019), where the Court examined, and ultimately vacated and remanded, the Commission's original decision and order approving the Amended PPA (the "2017 D&O"),²⁵ did not address the waiver approval portion of the 2017 D&O and, thus, could not be re-examined by the Commission on remand.²⁶ This premise is mistaken and not supported by a plain reading of In re HELCO and the caselaw in Hawaii.

In In re HELCO, the Hawaii Supreme Court found that the Commission had not: (1) expressly considered the reduction of GHG emissions in determining whether the costs associated with the Amended PPA were reasonable; and (2) did not afford LOL an opportunity to be heard at a meaningful time and in a meaningful manner regarding the Amended PPA's impact on LOL's property interest in a clean and healthful environment, as defined by HRS Chapter 269.²⁷

²⁵Decision and Order No. 34726, filed July 28, 2017.

²⁶See Hu Honua Motion for Reconsideration at 17-25.

²⁷In re HELCO, 145 Hawaii at 28, 445 P.3d at 700.

The Court held, in relevant part (internal citations omitted):

Accordingly, LOL was entitled to an opportunity to be heard at a meaningful time and in a meaningful manner regarding the Amended PPA's impact on its right to a clean and healthful environment, as defined by HRS Chapter 269.

LOL was not afforded a sufficient opportunity to address the Amended PPA's impact on its constitutional right to a clean and healthful environment, as defined by HRS Chapter 269. The PUC allowed LOL to participate in the 2017 Docket with respect to sub-issues: (2.a.i) whether the energy price components in the Amended PPA properly reflect the cost of biomass fuel supply, and (2.b) whether HELCO's purchase power arrangements under the Amended PPA are prudent and in the public interest.

. . .

. . . HELCO refused to respond to LOL's IRs regarding environment impacts of the project and production of an environmental site assessment because those topics were outside the scope of LOL's participation. Hu Honua similarly objected to LOL's IRs regarding loss of stored carbon from tree harvesting, environmental impacts of the project, and production of an environmental assessment as outside the scope of LOL's restricted participation. . . .

Thus, although the 2017 D&O acknowledged LOL's attempts to discuss the Amended PPA's impacts on LOL's right to a clean and healthful environment, as defined by HRS Chapter 269, in addressing whether the Amended PPA is prudent and in the public interest, the PUC did not afford LOL an opportunity to be heard regarding this issue at a meaningful time and in a meaningful manner. Rather, the PUC prevented LOL from meaningfully addressing the impact that approving the Amended PPA would have on LOL's asserted property interest, based on its determination that LOL's environmental concerns were beyond the scope of the 2017 Docket. . . .

Due to the PUC's failure to allow LOL to present evidence and argument concerning its right to a clean and healthful environment, this court must vacate the PUC's 2017 D&O and remand this case to the PUC for hearing

that complies with procedural due process. In order to comply with statutory and constitutional requirements, the PUC's post-remand hearing must afford LOL an opportunity to meaningfully address the impacts of approving the Amended PPA on LOL's members' right to a clean and healthful environment, as defined by HRS Chapter 269. The hearing must also include express consideration of GHG emissions that would result from approving the Amended PPA, whether the cost of energy under the Amended PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the Amended PPA are prudent and in the public interest in light of its potential hidden and long-term consequences.²⁸

While "[i]t is the duty of a trial court, on remand, to comply strictly with the mandate of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court[,] This is not to say that a trial court is bound to perform the mandate of an appellate court under subsequently changed circumstances or is not free to decide issues not covered in the mandate."²⁹

In light of the Court's ruling vacating the 2017 D&O in its entirety,³⁰ on remand, the Commission was required to "redo"

²⁸In re HELCO, 145 Hawaii at 25-26, 445 P.3d at 697-98.

²⁹State v. Lincoln, 72 Haw. 480, 485, 825 P.2d 64, 68 (1992). See also, Liberty Mut. Ins. Co. v. E.E.O.C., 691 F.2d 438, 441 (9th Cir. 1982) ("Lower courts are free to decide issues on remand so long as they were not decided on a prior appeal. [citations omitted] Thus, the law of the case would preclude the district court from reconsidering only issues decided explicitly or by necessary implication in this court's previous disposition." (citation omitted)).

³⁰See In re HELCO, 145 Hawaii at 28, 445 P.3d at 700.

the proceeding to ensure that LOL was provided a meaningful opportunity to be heard on the Project's impacts on its members' constitutional rights under HRS Chapter 269. This is consistent with the Court's findings that LOL's limited scope in the first proceeding was insufficient, the Court's instruction to the Commission to "afford LOL an opportunity to meaningfully address" the Project's impacts on its members' rights, and the Court's decision to vacate, without qualification and in its entirety, the 2017 D&O.

To do otherwise would risk depriving LOL of its meaningful opportunity, under the circumstances. The application of the constitutional right to a clean and healthful environment in Hawaii to Commission proceedings has only been recently recognized³¹ and is still being developed (as it was here in In re HELCO). In light of the evolving nature of this body of law, and the specific findings by the Court that LOL had not been provided a meaningful opportunity earlier and must be provided such an opportunity on remand, re-starting the proceeding and providing LOL (and the other Participants) with the ability to address all issues pertaining to the Amended PPA and the Project was the most prudent course of action to ensure LOL had a

³¹See In re Maui Elec. Co., Ltd., 141 Hawaii 249, 408 P.3d 1 (2017).

meaningful opportunity to address the impacts of the Amended PPA on LOL's members' constitutional rights under HRS Chapter 269.³²

Thus, contrary to Hu Honua's assertions that the Commission "exceeded its authority" in addressing the waiver issue on remand,³³ and that the waiver was "not at issue in In re HELCO and not impacted by that decision on remand,"³⁴ the Commission did not exceed the Court's instructions on remand.

Further, the fact that the Hawaii Supreme Court was silent on the issue of HELCO's waiver in In re HELCO and vacated the 2017 D&O in its entirety makes this case distinguishable from the caselaw cited by Hu Honua in its Motion for Reconsideration. In both Chun v. Brd. Of Trustees of Employers' Retirement System of State of Hawaii, 106 Hawaii 416, 106 P.3d 339 (2005) and

³²See e.g., In re Water Use Permit Applications, 130 Hawaii 346, 310 P.3d 1047, 2010 WL 4113179 (App. 2010)(unpublished disposition, referenced pursuant to Haw. R. App. Proc. 35(c)(2)(holding that Commission on Water Resource Management ('Water Commission') erred, on remand from the Hawaii Supreme Court, in not considering appellants' arguments related to the "reasonable-beneficial use of water standard"; though not addressed by the Supreme Court's remand, the Intermediate Court of Appeals held that the Water Commission should have considered appellants' arguments regarding the reasonable-beneficial use standard noting that a "tribunal on remand may reconsider [an] issue based on new evidence or changed circumstances," and emphasizing the importance of these considerations given the State's obligation to protect the public trust under Article XI, Section 7 of the State Constitution).

³³Hu Honua Motion for Reconsideration at 22.

³⁴Hu Honua Motion for Reconsideration at 17.

Standard Mngmt., Inc. v. Kekona, 99 Hawaii 125, 53 P.3d 264 (Haw. App. 2001),³⁵ the reviewing court's remands were explicit and narrowly tailored as to which portions of the appealed decision was affirmed and which portions were vacated and remanded.³⁶

Accordingly, Hu Honua's characterization of the denial of HELCO's request for a waiver in Order No. 37205 as a "revocation" of the waiver is incorrect. The issue of the waiver, along with all the other findings and conclusions in the 2017 D&O, were vacated by the Court's decision and then expressly re-opened for decision by the Commission. Indeed, Hu Honua's conduct in the remanded proceeding was consistent with this understanding, as Hu Honua never objected to or challenged the Commission's examination of the waiver issue and also submitted briefing and testimony on this issue leading up to Order No. 37205, as discussed below.

³⁵See Hu Honua Motion for Reconsideration at 22.

³⁶See Chun, 106 Hawaii at 441, 106 P.3d at 364 (affirming portion of October 18, 2000 order as to the granting of attorneys' fees, reversing portion of October 18, 2000 order granting post-judgment interest, and affirming February 14, 2001 order granting stay of proceedings); and Kekona, 99 Hawaii at 137, 53 P.3d at 276 (finding that prior remand order that only vacated portions of a judgment, but affirmed the judgment "in all other respects," precluded the circuit court, on remand, from addressing the issue of punitive damages, which was not one of the express issues designated on remand).

2.

The Commission Provided Hu Honua With Sufficient
Notice That HELCO's Request For A Waiver Was
Part Of The Re-Opened Proceeding On Remand

Consequently, in re-opening the docket on remand, the Commission, in relevant part:

(A) Directed HELCO and Hu Honua to supplement the Amended PPA with any updated information;

(B) Directed HELCO and Hu Honua to provide a status report on the Project, including progress toward achieving Project milestones and the status of outstanding government permits;

(C) Established a new Issue No. 4 to specifically address GHG emissions linked to the Project;

(D) Expanded the scope of LOL's (and all other Participants') participation to addressing all issues in the re-opened proceeding; and

(E) Instructed the Parties and Participants to submit supplemental briefing on Issue Nos. 1-3 (i.e., including the waiver issue), "taking into consideration events that have occurred in Hawaii Island's energy market and developments on HELCO's system, since the [C]ommission issued [the 2017 D&O.]"³⁷

As discussed above, this was consistent with the Court's decision to vacate the 2017 D&O in its entirety and instruct the

³⁷Order No. 36382, "Reopening Docket," filed June 20, 2019 ("Order No. 36382").

Commission to ensure that LOL had a meaningful opportunity to address the Project's impacts on its members' constitutional rights under HRS Chapter 269.

Further, in describing the supplemental briefing required for Issue Nos. 1-3 (including the waiver issue), the Commission explicitly instructed the Parties and Participants:

The supplemental briefs on Issue Nos. 1 to 3 (including sub-parts) should be filed within sixty (60) days after [HELCO and Hu Honua's] Status Report is filed. The briefing on Issue Nos. 1 to 3 may reference information previously filed in this record, and shall include consideration of changes in the Hawaii Island energy market since [the 2017 D&O] was filed on July 28, 2017, which include but are not limited to:

- Initiation of competitive bidding in Docket No. 2017-0352;
- The upcoming Phase 2 of competitive bidding in Docket No. 2017-0352; and
- The [Amended PPA] terms compared to competitive benchmarks established in the PPAs approved by the [C]ommission pursuant to Phase 1 of the competitive procurement in Docket No. 2017-0352.³⁸

This clearly placed all the Parties and Participants on notice that the waiver issue was part of the re-opened proceeding and that consideration of the waiver issue would necessarily include a comparison of the Project to the competitively bid large-scale renewable projects arising from Docket No. 2017-0352 (the Requests for Proposals or "RFP" proceeding).

³⁸Order No. 36382 at 14 (emphasis added).

Hu Honua did not file a motion seeking reconsideration or clarification of Order No. 36382. Further, at no time during the remainder of the re-opened proceeding did Hu Honua raise an objection to the consideration of the waiver issue, and instead complied by filing supplemental briefing and pre-hearing testimony that addressed the waiver issue.³⁹

3.

Hu Honua Fails To Meet Its Burden To Justify Reconsideration

Taking the above into account, upon reviewing Hu Honua's arguments in its Motion for Reconsideration, Supplemental Memorandum, Reply, and Supplemental Reply, the Commission does not find any of them persuasive. Critically, in light of the fact that Hu Honua did, in fact, receive adequate notice that the waiver issue was re-opened as part of the remanded Commission proceeding,

³⁹See "Hu Honua Bioenergy, LLC's Supplemental Briefing on Issue Nos. 1 to 3; and Certificate of Service," filed September 17, 2019 ("Hu Honua Pre-Hearing Supplemental Briefing"), at 2-5 (while noting that the Hawaii Supreme Court did not expressly instruct the Commission to reconsider its earlier approval of HELCO's waiver request, Hu Honua did not object to the examination of this issue); and "Hu Honua Bioenergy, LLC's Prehearing Testimonies; Attachment A; Exhibits 'Hu Honua-100' - 'Hu Honua-800'; and Certificate of Service," filed January 28, 2020 ("Hu Honua Prehearing Testimony"), Hu Honua Testimony T-3 (testimony of Jon Miyata on the waiver issue), Testimony T-5 (testimony of Jonathan Jacobs arguing, in part, that the Amended PPA's pricing is reasonable and favorable when compared to other renewable energy projects, including the two approved RFP Phase 1 projects for Hawaii Island).

much of its arguments and evidence fail to meet the standard of "new evidence and/or arguments that could not have been presented during the earlier adjudicated motion."⁴⁰ Rather, they attempt to belatedly raise arguments and introduce evidence that "could and should have been brought during the earlier proceeding."⁴¹

This includes Hu Honua's contention that the Commission should reconsider Order No. 37205 on the basis of HELCO's willingness to do another bill impact analysis. Hu Honua states that it disagreed with several of the assumptions and methodologies used by HELCO in its 2020 bill impact analysis.⁴² Yet, the fact that Hu Honua issued IRs on this issue⁴³ indicates that Hu Honua was clearly aware of it earlier and could have addressed this issue in its Prehearing Testimony. Hu Honua's proposal to reconsider Order No. 37205 based on a speculative result of proposed new analysis is improper, particularly given the length of this proceeding and the opportunities to address this issue earlier.

⁴⁰Tagupa, 108 Hawai'i at 465, 121 P.2d at 930.

⁴¹Tagupa, 108 Hawaii at 456, 121 P.2d at 930 (citing Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (Haw. 2002) and quoting Sousaris v. Miller, 92 Hawai'i at 513, 993 P.3d at 547).

⁴²Hu Honua Reply at 51.

⁴³See Hu Honua Reply at 51 (citing HELCO response to HHB-HELCO-SIR-1, filed March 6, 2020).

As a result, the Commission finds that Hu Honua's arguments fail for this threshold reason, alone. That being said, in light of the circumstances, the Commission will still address the specific arguments raised by Hu Honua in its Motion for Reconsideration and related briefing.⁴⁴

Hu Honua argument No. 1: The waiver issue was not disturbed by the In re HELCO decision.⁴⁵ As discussed above, this contention mischaracterizes the Hawaii Supreme Court's ruling and is not supported by the caselaw cited in Hu Honua's Motion for Reconsideration. The Court's ruling vacated the 2017 D&O in its entirety, without qualification, and remanded the proceeding back to the Commission with instructions to provide LOL with a meaningful opportunity to be heard regarding the Amended PPA's impact on LOL's members' constitutional rights under HRS Chapter 269.

In interpreting the Court's ruling, taking into account the history of this case and the recent rulings recognizing the right to a clean and healthful environment as applied to Commission proceedings, the Commission reasonably chose to re-open

⁴⁴The numbering for these arguments is based on the sequential order in which they are presented in Hu Honua's Motion for Reconsideration.

⁴⁵See Hu Honua Motion for Reconsideration at 17-25; and Hu Honua Reply at 9-14.

examination of all issues on remand and to expand the scope of LOL's participation (along with all other Participants) to ensure that a "meaningful opportunity" was provided. This interpretation is consistent with the Court's findings that LOL's earlier limited scope was insufficient to address its constitutional rights and consistent with Hawaii caselaw providing discretion to effectuate the Court's intent on remand.

Furthermore, the Commission clearly made its intent to re-open all issues known on remand, as set forth in Order No. 36382, which Hu Honua did not challenge or ask the Commission to reconsider. Hu Honua's acceptance of the scope of the Commission's proceeding on remand, as well as its compliance in submitting post-remand briefing, testimony, and evidence on the issue of HELCO's request for a waiver judicially estops Hu Honua from belatedly challenging this issue now.⁴⁶

Hu Honua's related arguments that the Order No. 37205 constitutes a "revocation" of HELCO's waiver approved in the

⁴⁶See Lee v. Puamana Community Ass'n, 109 Hawaii 561, 575-76, 128 P.3d 874, 888-89 (2006) ("Pursuant to the doctrine of judicial estoppel, '[a] party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action.'").

2017 D&O is similarly unconvincing.⁴⁷ As discussed above, the Court's ruling vacated the 2017 D&O in its entirety, including the approval of HELCO's waiver. Even if not expressly stated, the ruling to vacate, without exception, combined with the Court's direction to provide LOL with a meaningful opportunity to address its members' constitutional rights on remand, reasonably compelled a complete re-examination of all issues, which the Commission explicitly announced in Order No. 36382. Consequently, Hu Honua's related arguments that a "revocation" is not permitted under the Competitive Bidding Framework is not persuasive, as it relies on a mischaracterization of the Court's decision and is also at odds with Hu Honua's conduct on remand, where it never argued that re-examination of the waiver issue was improper or could constitute a "revocation."

Hu Honua argument No. 2: The Commission is equitably estopped from revoking HELCO's waiver for the Project.⁴⁸

Hu Honua's argument that it reasonably relied on the 2017 D&O to proceed with the Project is unpersuasive. Based on the language of the Amended PPA, Hu Honua did not have a reasonable basis for proceeding with the Project during LOL's appeal.

⁴⁷See Hu Honua Motion for Reconsideration at 25-26.

⁴⁸See Hu Honua Motion for Reconsideration at 28-33; and Hu Honua Reply at 23-29.

The 2017 D&O states: "The [Amended PPA] sets the Commercial Operations Date deadline at 18 months after PUC Approval of Amendment Date, as that term is defined in the [Amended PPA]. . . . Given these factors, the [C]ommission expects Hu Honua and HELCO to make all reasonable attempts to complete the [P]roject according to this schedule and does not expect future requests to extend the Commercial Operation Date deadline."⁴⁹

Accordingly, the Commission's directives to move forward with the Project were expressly placed within the context of meeting the Commercial Operations Date deadline as set forth in the Amended PPA. Amended PPA, Article I (Definitions) states: "'PUC Approval of Amendment Date' shall have the meaning set forth in Section 25.12(D) (PUC Approval of Amendment Date)."⁵⁰ In turn, Section 25.12(D)(2) of the Amended PPA, "PUC Approval," provides, in relevant part:

(a) If a PUC Approval of Amendment Order is issued and is not made subject to a motion for reconsideration filed with the PUC or an appeal, the PUC Approval of Amendment Order Date shall be the date one Day after the expiration of Appeal Period following the issuance of the PUC Approval of Amendment Order;

⁴⁹2017 D&O at 61 (emphasis added).

⁵⁰"Amended and Restated Power Purchase Agreement dated May 5, 2017," filed May 9, 2017, at 18 of 238. The Amended PPA is attached as "Exhibit" to this filing. For ease of reference, the Commission's references to the "Amended PPA" in this Order refer to pages number of "Exhibit A."

(b) If the PUC Approval of Amendment Order became subject to a motion for reconsideration, and the motion for reconsideration is denied or the PUC Approval of Amendment Order is affirmed after reconsideration, and such order is not made subject to an appeal, the PUC Approval of Amendment Date shall be deemed to be the date one Day after the expiration of the Appeal Period following the order denying reconsideration of or affirming the PUC Approval of Amendment Order; or

(c) If the PUC Approval of Amendment Order, or an order denying reconsideration of the PUC Approval of Amendment Order or affirming approval of the PUC Approval of Amendment Order after reconsideration, becomes subject to an appeal, then the PUC Approval of Amendment Date shall be the date upon which the PUC Approval of Amendment Order becomes a non-appealable order within the meaning of the definition of a Non-appealable PUC Approval of Amendment Order in Section 25.12(B) (Non-appealable PUC Approval of Amendment Order).⁵¹

Thus, Hu Honua's argument that it "had no choice" but to rush ahead with developing the Project⁵² after the 2017 D&O is inconsistent with the plain language of the 2017 D&O and the Amended PPA. The 2017 D&O states that the Hu Honua and HELCO

⁵¹Amended PPA at 125-26 of 238 (emphasis added). Amended PPA, Section 25.12(B) states, in relevant part: "The term 'Non-appealable PUC Approval of Amendment Order' means a PUC Approval of Amendment Order that is not subject to appeal to any Circuit Court of the State of Hawaii, Intermediate Court of Appeal of the State of Hawaii or the Supreme Court of the State of Hawaii, because the permitted period for such an appeal (the 'Appeal Period') has passed without the filing of a notice of such an appeal, or that was affirmed on appeal . . . or was affirmed upon further appeal or appellate process, and that is not subject to further appeal,"

⁵²See Hu Honua Motion for Reconsideration at 31.

should make their best efforts to meet the COD as defined in the Amended PPA. The Amended PPA states clearly, at Section 25.12, that an appeal will toll the "PUC Approval of Amendment Date", which in turn will toll the Commercial Operations Date.

On August 7, 2017, the Consumer Advocate filed a Motion for Modification of the 2017 D&O; while this was not the basis for the subsequent appeal, pursuant to Amended PPA, Section 25.12, Hu Honua should have known that this would toll the Commercial Operations Date and could have sought clarification from the Commission as to how this affected the Commission's directives in the 2017 D&O. In any event, LOL filed a notice of appeal shortly after, which also notified Hu Honua that the "PUC Approval of Amendment Date" (and thus Commercial Operations Deadline deadline) were subject to change and would be tolled.⁵³ Indeed, on April 20, 2018, and February 12, 2019, Hu Honua and/or HELCO submitted letters to the Commission in which they acknowledged that LOL's (then) pending appeal of the 2017 D&O with the Hawaii Supreme Court was "preventing a Non-appealable PUC Approval of Amendment Order" ⁵⁴

⁵³LOL also filed a motion to stay the Project in its appeal of the 2017 D&O, which Hu Honua opposed, which provided Hu Honua with further notice that the Commercial Operations Date deadline would be tolled.

⁵⁴See Joint Letter From: D. Yamamoto and B. Bailey to Commission Re: Docket No. 2017-0122 - Hu Honua Bioenergy, LLC and

Consequently, Hu Honua's decision to proceed with the Project during the appeal period, allegedly incurring overtime and additional charges in the process,⁵⁵ was at its own risk given the plain language of the Amended PPA.

Furthermore, to the extent Hu Honua references the Commission's original order granting a waiver for the Project,⁵⁶ this is not a convincing basis for reliance, as Hu Honua itself concedes that re-examination of the waiver following this original order was reasonable after HELCO and Hu Honua amended the original PPA.⁵⁷

"The theory of equitable estoppel requires proof that one person willfully caused another person to erroneously believe a certain state of things, and that person reasonably relied on this erroneous believe to his or her detriment."⁵⁸ In this instance the Commission clearly qualified its instructions for Hu Honua to

Hawaii Electric Light Company, Inc.'s Joint Letter Regarding Paragraph No. 5 of Decision and Order No. 34726, Issued July 28, 2017, filed April 20, 2018; and Letter From: B. Bailey To: Commission Re: Docket No. 2017-0122 - Hawaii Electric Light Company Inc.'s Hu Honua Project Status Update, filed February 12, 2019.

⁵⁵See Hu Honua Motion for Reconsideration at 33.

⁵⁶See Hu Honua Motion for Reconsideration at 29-30.

⁵⁷See Hu Honua Motion for Reconsideration at 26-27.

⁵⁸María v. Freitas, 73 Haw. 266, 273, 832 P.3d 259, 264 (1992) (citations omitted)(emphasis added).

proceed with achieving the Commercial Operations Date within the context of the terms of the Amended PPA, which provided for a tolling period until a final, non-appealable order was issued. Hu Honua's decision to proceed, at an accelerated pace, notwithstanding LOL's appeal and the lack of a final, non-appealable order, places the responsibility for the associated Project costs with Hu Honua. None of the Project costs can be reasonably or fairly attributed to "reasonable reliance" on the Commission's decisions (either the original Waiver Order or the 2017 D&O).

Hu Honua argument No. 3: The Commission did not afford Hu Honua due process before revoking HELCO's waiver.⁵⁹

Hu Honua's argument regarding due process is premised on its belief that the 2017 D&O provided Hu Honua with a valid property interest. Hu Honua's assumption is unpersuasive for a number of reasons.

First, the waiver from the Competitive Bidding Framework for the Project was requested by, and granted to, HELCO, not Hu Honua. Indeed, under the Framework, only a public utility is capable of requesting a waiver.⁶⁰ This was reflected in the

⁵⁹See Hu Honua Motion for Reconsideration at 34-39; and Hu Honua Reply at 14-19.

⁶⁰See In re Public Util. Comm'n, Docket No. 03-0372, Decision and Order No. 23121, filed December 8, 2006, Exhibit A (Competitive

statement of issues, where the Commission clearly framed the waiver issue as “Whether HELCO has met its burden of proof in support of its request to waive Hu Honua’s Project from the [C]ommission’s Framework for Competitive Bidding.”⁶¹ Thus, even if, for the sake of argument, the granting of a waiver created a legally recognized property interest, this right would be enforceable by HELCO, not Hu Honua.

Second, a granting of a waiver from the Competitive Bidding Framework is not a vested property interest in that a waiver does not confer any right “essential to the viability of the Project.”⁶² The granting of a waiver is merely a mechanism to bypass a competitive bidding process and place a proposed power purchase agreement before the Commission; it does not guarantee or

Bidding Framework), Section II.A.3.b (“Under certain circumstances, to be considered by the Commission in the context of an electric utility’s request for waiver under Part II.A.4, below, competitive bidding may not be appropriate.”) (emphasis added). See also, id. Section II.A.4.a (describing procedure for seeking a waiver and identifying the applicant as the “electric utility.”); and Section I (defining “electric utility” as “a provider of electric utility service that is regulated by and subject to the Commission’s jurisdiction pursuant to Chapter 269, Hawaii Revised Statutes.”).

⁶¹See Order No. 36382 at 5.

⁶²See Hu Honua Motion for Reconsideration at 35.

otherwise ensure that a proposed power purchase agreement will be approved.⁶³

For example, earlier in the history of the Project, HELCO submitted a separate application for a waiver from the Competitive Bidding Framework for the Project, highlighting that the issue of determining whether a waiver should be granted is distinct from whether to approve the Amended PPA.⁶⁴ Consistent with this understanding, Order No. 37205 explicitly did not rule on the merits of the Amended PPA and clarified that Hu Honua could propose its Project to HELCO for selection via the competitive bidding process.⁶⁵

Third, as noted above, Hu Honua's characterization of Order No. 37205 as a "revocation" of the earlier granting of a waiver in the 2017 D&O is incorrect. The Hawaii Supreme Court's

⁶³See CA Reply at 6 ("Waivers from competitive bidding are not final approvals, disposing of all remaining issues related to a project so far as the Commission is concerned. They are preliminary. They allow a utility and a developer to proceed with negotiating and seeking Commission approval for a PPA for a proposed facility.").

⁶⁴See In re Public Util. Comm'n, Docket No. 2008-0143, Decision and Order, filed November 14, 2008, at 7 (explicitly stating that the Commission was only granting HELCO's request for a waiver from the Competitive Bidding Framework and was "not approving the Hu Honua Project per se[,] and that any subsequent power purchase agreement between HELCO and Hu Honua related to the Project would be reviewed separately by the Commission.).

⁶⁵See Order No. 37205 at 38 and 54 (noting that Order No. 37205 dismisses, without prejudice, the Amended PPA).

decision expressly vacated the 2017 D&O and its instructions to the Commission on remand reasonably contemplated a re-opening of all issues for further proceeding, to provide LOL with a meaningful opportunity to address its members' constitutional rights. Moreover, to the extent that Hu Honua is alleging that the 2017 D&O somehow created or vested Hu Honua with a legitimate property interest, this argument is contradicted by the language of the Competitive Bidding Framework, the language of the Amended PPA, which requires a non-appealable Commission order, as well as the letters filed with the Commission by Hu Honua and HELCO in which they both acknowledged that LOL's appeal was preventing a final Commission order under the PPA.

Fourth, Hu Honua's comparison of the waiver to real property variances and permits is unpersuasive.⁶⁶ As discussed above, unlike a variance or permit, the granting of a waiver is not a final discretionary act by the Commission authorizing a project to proceed; rather, it is one of the first, preliminary steps in seeking Commission approval for the Project and cannot reasonably be construed to form a "legitimate claim of entitlement" or support "reasonable reliance" to proceed with the Project.⁶⁷

⁶⁶See Hu Honua Motion for Reconsideration at 36.

⁶⁷Further, as the Commission has already discussed above, even assuming arguendo that it did create a claim of entitlement, that claim would belong to HELCO.

This understanding is consistent with the Project's history. As noted above, when a waiver for the Project was initially granted in Docket No. 2008-0143, the Commission emphasized that granting of a waiver to HELCO did not equate to approval of a power purchase agreement, which the Commission stated would be reviewed separately and on its own merits.

Fifth, contrary to Hu Honua's assertions, the Commission provided Hu Honua with sufficient notice of the waiver issue on remand, including the intention to compare the Project to the recently approved RFP projects, which Hu Honua took advantage of by submitting testimony and evidence.⁶⁸ The Commission clearly notified all the Parties and Participants that in the remanded proceeding the Commission would be examining all issues, including whether HELCO should be granted a waiver from competitive bidding.⁶⁹

Further, in considering the waiver issue, the Commission expressly directed the Parties and Participants to consider

⁶⁸See Hu Honua Motion for Reconsideration at 36-37. See also, Hu Honua Reply at 15 ("The Consumer Advocate misunderstands Hu Honua's actual argument in its Motion for Reconsideration. Hu Honua argues that the [Amended PPA's] waiver is a property interest that is protected by the due process clause, which means that the Commission cannot revoke the waiver, *sua sponte*, without providing Hu Honua adequate notice and a meaningful opportunity to be heard.").

⁶⁹See Order No. 36382.

"changes in the Hawaii Island energy market since [the 2017 D&O] was filed," and specifically identified the initiation of competitive bidding in Docket No. 2017-0352 (the RFP docket), the upcoming Phase 2 competitive bidding in Docket No. 2017-0352, and comparison of the Amended PPA to the competitive benchmarks established in the power purchase agreements in Phase 1 of Docket No. 2017-0352.⁷⁰ Notably, the "competitive benchmarks" established for the power purchase agreements in Phase 1 of Docket No. 2017-0352 were based on the effective pricing of the power purchase agreements, which plainly notified the Parties and Participants that the Commission intended to evaluate the reasonableness of granting a waiver from competitive bidding.⁷¹

Not only did Hu Honua not object or seek clarification to the Commission's directives in Order No. 36382, Hu Honua submitted briefing, testimony, and evidence addressing the waiver issue, including evidence comparing its Project to the two RFP Phase 1 projects recently approved for Hawaii Island.⁷²

⁷⁰Order No. 36382 at 14.

⁷¹See In re Hawaiian Elec. Co., Inc., Hawaii Elec. Light Co., Inc., and Maui Elec. Co. Ltd., Docket No. 2017-0352, Order No. 35405, "Establishing a Performance Incentive Mechanism for Procurement in Phase 1 of the Hawaiian Electric Companies' Final Variable Requests for Proposals," filed April 6, 2018.

⁷²See Hu Honua Prehearing Testimony, Hu Honua Testimony T-3 (Jon Miyata)(addressing waiver issue); Hu Honua Testimony T-5 (Jonathan Jacobs); and exhibit Hu Honua-501 ("Hu Honua Bioenergy

Sixth, in light of the above, Hu Honua's analysis of its right to due process is not convincing.⁷³ In support of its due process argument, Hu Honua refers to the following procedures utilized by Hawaii courts to analyze such due process claims:

(1) The private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.⁷⁴

Hu Honua's justification of its "private interest"⁷⁵ is undermined by the fact that its "reliance" on the 2017 D&O was not reasonable. As discussed above, under the plain language of the

- Comparison of the ratepayer cost of the Hu Honua Bioenergy contract with alternatives that may be available to HELCO." The Commission notes that Section 5 specifically compares the Project to the two RFP Phase 1 renewable projects approved for Hawaii Island).

The two Phase 1 RFP projects ("Phase 1 RFP Projects") approved for Hawaii Island are being developed by AES Waikoloa Solar, LLC and Hale Kuawehi Solar LLC. See Docket Nos. 2018-0430 and 2018-0432. Hu Honua's counsel, Yamamoto Caliboso, LLLC, is uniquely familiar with these projects as they currently represent both AES Waikoloa Solar, LLC and Hale Kuawehi Solar LLC in the above-referenced dockets, which are still pending before the Commission.

⁷³See Hu Honua Motion for Reconsideration at 36-39.

⁷⁴Hu Honua Motion for Reconsideration at 36 (citing In re Haw. Elec. Light Co., Inc., 145 Hawaii 1, 11, 445 P.3d 673, 689 (2019)(citing Sandy Beach Def. Fund v. City Council of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)).

⁷⁵Hu Honua Motion for Reconsideration at 37.

Amended PPA, all contractual milestones were tolled based on the pending appeal filed by LOL; Hu Honua's decision to proceed with the Project during the appeal at an accelerated pace and at significant cost was at its own risk.

Similarly, Hu Honua's "risk of erroneous deprivation"⁷⁶ is unconvincing. While Hu Honua contends "[n]either Hu Honua nor HELCO knew (or could have known) that the Commission was considering a revocation of the [Amended] PPA waiver[,]” and “was [not] given the opportunity to address this issue[,]”⁷⁷ the record clearly contradicts these assertions. As already discussed, the Commission clearly identified this issue for consideration on remand in Order No. 36392 and neither Hu Honua nor HELCO sought reconsideration or clarification of Order No. 36392 or otherwise objected to the scope of issues set by the Commission on remand until Hu Honua filed its Motion for Reconsideration. Moreover, the fact that Hu Honua affirmatively addressed the waiver issue⁷⁸ and submitted testimony and exhibits specifically addressing the

⁷⁶Hu Honua Motion for Reconsideration at 37-38.

⁷⁷Hu Honua Motion for Reconsideration at 37.

⁷⁸See Hu Honua Prehearing Testimony, Hu Honua T-3; and HELCO Prehearing Testimony,

two RFP projects approved for Hawaii Island⁷⁹ demonstrates that Hu Honua had a reasonable opportunity to address this issue.

Seventh, Hu Honua's claim that it did not have a chance to address "new" evidence is unconvincing.⁸⁰ Hu Honua claims that the Commission relied on the recent COVID-19 pandemic and the status of the Phase 2 RFPs in its decision, but this ignores the fact that in Order No. 37205, the Commission identified the changed circumstances resulting from the ongoing competitive bidding process in support of its decision to deny HELCO's request for a waiver, which were known and available to Hu Honua and which Hu Honua explicitly addressed in its Prehearing Testimony. The references to Phase 2 of the RFPs were primarily to illustrate the rapidly growing field of renewable energy options, but the Phase 2 RFP did not form the basis for the Commission's decision to deny HELCO's request for a waiver. Further, the Commission's reference to the COVID-19 pandemic was merely to illustrate the sensitivity of customer bill impacts during this time; however, the Commission notes that such considerations would be present even outside of a global pandemic.

⁷⁹See Hu Honua Prehearing Testimony, Hu Honua T-5, including Hu Honua-501.

⁸⁰See Hu Honua Reply at 5-6 and 20-21.

Taken as a whole, the Commission finds that Hu Honua has not articulated an enforceable property interest under the circumstances, and that the Commission provided Hu Honua with sufficient notice and opportunity to address the waiver issue prior to issuing Order No. 37205. Thus, the Commission is not persuaded that Hu Honua's due process arguments warrant reconsideration of Order No. 37205.

Hu Honua argument No. 4: A waiver for the Project is still justified under the Competitive Bidding Framework.⁸¹

Hu Honua's attempt to re-argue for a waiver for a Project in its Motion is clearly improper. As discussed above, a Motion for Reconsideration is not a vehicle to re-litigate old matters or raise arguments or evidence that could have been brought earlier in the proceeding. First, as noted above, Hu Honua submitted Prehearing Testimony that argued that HELCO's waiver request should be granted, which evidences that Hu Honua had an opportunity to litigate this issue. Further, upon reviewing Hu Honua's arguments that a waiver is still justified, the Commission finds that none of these are based on new evidence or could not have otherwise been raised during the re-opened proceeding prior to Order No. 37205.

⁸¹See Hu Honua Motion for Reconsideration at 39-45; and Hu Honua Reply at 29-39.

As discussed above, the Commission provided Hu Honua with ample notice that the waiver issue was part of the re-opened proceedings and Hu Honua took advantage of that by submitting briefing and testimony on this issue. Hu Honua cannot now support its request for reconsideration by repeating arguments already raised or by belatedly attempting to introduce new arguments or evidence that were available to it earlier.

Hu Honua argument No. 5: Order No. 37205 unreasonably characterizes Hu Honua's ability to obtain the Federal Investment Tax Credit.⁸²

Hu Honua's arguments contesting the Commission's findings regarding Hu Honua's ability to receive the Federal Investment Tax Credit ("Fed ITC") are unconvincing. As stated in Order No. 37295, the Commission's finding that Hu Honua's ability to receive the Fed ITC is speculative is based on Hu Honua's own witness' testimony.⁸³ Hu Honua attempts to dilute this as "transparent disclos[ure]" in its Motion for Reconsideration and then improperly shifts its burden of proof to

⁸²See Hu Honua Motion for Reconsideration at 45-48.

⁸³See Order No. 37205 at 23-24; see also, Hu Honua Prehearing Testimony, Hu Honua T-3 at 3-4 ("Hu Honua had previously sought to meet the safe harbor requirements for the Investment Tax Credit ('ITC') by being placed into service by the end of 2018. Given that the Hu Honua Project experienced unanticipated delays beyond 2018 which were outside of its control, obtaining the ITC is no longer guaranteed under applicable safe harbor provisions.").

the Commission by contending that the Commission should have further explored concerns about Hu Honua's ability to obtain the Fed ITC.⁸⁴

As applicants, it was HELCO and Hu Honua's burden to make an affirmative case to the Commission convincing it to grant their requested relief. For Hu Honua to claim that the Commission was somehow obligated to ask further questions of Hu Honua to help Hu Honua make its own case regarding the Fed ITC is clearly improper and not supported by the Commission's rules or the understood concepts of burden of proof and fair play.

Relatedly, Hu Honua now seeks to admit new evidence regarding its ability to obtain the Fed ITC, pursuant to HAR § 16-601-139.⁸⁵ The Commission observes that HAR § 16-601-139 requires such a request to admit additional evidence to be made by motion and supported by an explanation as to why it was not previously adduced.⁸⁶ In addition to not submitting this request by separate motion, Hu Honua does not explain why this evidence was not provided earlier. Mr. Katz's supplemental affidavit

⁸⁴Hu Honua Motion for Reconsideration at 45-46.

⁸⁵Hu Honua Motion for Reconsideration at 46; and Supplemental Affidavit of Eli Katz.

⁸⁶HAR § 16-601-139 states, in full: "**Additional evidence.** When, in a motion filed under this subchapter, a request is made to introduce new evidence, the evidence adduced shall be stated briefly, that evidence must not be cumulative, and an explanation must be given why that evidence was not previously adduced."

pertains to an extended deadline for the Fed ITC and states that it was "extended on December 20, 2019, as part of a bill signed into law by President Trump entitled the Fiscal Year 2020 Further Consolidated Appropriations Act."⁸⁷

Hu Honua submitted its Prehearing Testimony on remand on January 28, 2020, and Hu Honua does not explain why it did not include Mr. Katz's testimony at that time.⁸⁸ Rather, Hu Honua instead chose to submit the testimony of Jon Miyata, which provided a completely opposite representation regarding the Fed ITC; i.e., "[g]iven that the Hu Honua project experienced unanticipated delays beyond 2018 which were outside of its control, obtaining the ITC is no longer a guarantee under applicable safe harbor provisions."⁸⁹

Based on the above, the Commission finds that Hu Honua's request to admit Mr. Katz's supplemental affidavit as additional evidence under HAR § 16-601-139 is insufficiently supported,

⁸⁷Hu Honua Motion for Reconsideration, Supplemental Affidavit of Eli Katz at paragraph 6.

⁸⁸Mr. Katz confirms that he was "retained by Hu Honua Bioenergy, LLC . . . approximately 6 years ago to advise on tax credit qualification and related transactional matters pertaining to . . . [the Project]." Hu Honua Motion for Reconsideration, Supplemental Affidavit of Eli Katz at paragraph 5. Thus, it is clear that at the time Hu Honua submitted its Prehearing Testimony, it had the benefit of Mr. Katz's services and the Fed ITC extension had already been signed into law.

⁸⁹Hu Honua Prehearing Testimony, Hu Honua Testimony T-3 at 4.

and denies Hu Honua's request under HAR § 16-601-139. Further, the Commission observes that even if were admitted, it would not support Hu Honua's Motion for Reconsideration as it is evidence that could have been brought before the Commission during the earlier proceeding.

Hu Honua argument No. 6: Denial of HELCO's waiver for the Project puts other new market tax credits at risk.⁹⁰

The Commission does not find Hu Honua's reference to purported plans to apply for New Market Tax Credits ("NMTC") persuasive. First, as already discussed several times, Hu Honua cannot support its Motion for Reconsideration with arguments or evidence that it could have raised earlier in the proceeding. The NMTC are not new evidence, as indicated by Hu Honua's reference to them in response to an information request from LOL.⁹¹

Second, this argument is attenuated as it relates to this proceeding as it refers to a separate agreement Hu Honua (not HELCO) has with another entity, Punawai O Pu'uhonua, LLC ("Punawai"), that is not involved in this proceeding.⁹²

⁹⁰See Hu Honua Motion for Reconsideration at 48-51.

⁹¹Hu Honua Motion for Reconsideration at 48 (referring to its response to LOL/HHB-IR-12, filed 12/9/19) (while Hu Honua's Motion states that its IR response was filed on "12/19/19," the Commission believes it intended to refer to its IR responses filed on 12/9/19).

⁹²See Hu Honua Motion for Reconsideration at 48-50.

According to Hu Honua, Punawai is a Community Development Entity ("CDE"), formed by American Savings Bank and the Oahu Economic Development Board, which is able to access capital from investors who can claim NMTC for investing in CDEs.⁹³ Funds for NMTC are allocated to CDEs by the U.S. Treasury Department's Community Development Financial Institutions Fund ("CDFI Fund") through a competitive, annual application process under which recipient CDEs must agree to deploy the NMTC pursuant to certain terms and conditions set by the CDFI Fund.⁹⁴ Apparently, in order to help meet the terms of Punawai's agreement with the CDFI Fund, Punawai entered into a separate NMTC loan agreement with Hu Honua to help finance the Project, which is conditioned on approval of the Amended PPA.⁹⁵

Hu Honua states that this "essentially results in \$10.6 million of net benefit to Hu Honua with the additional community benefits of \$3.3 million to Punawai and its economic

⁹³Hu Honua Motion for Reconsideration at 48-49.

⁹⁴Hu Honua Motion for Reconsideration at 49.

⁹⁵See Hu Honua Motion for Reconsideration at 49-50. Hu Honua states that it entered into an NMTC loan agreement with "\$28.9 million of NMTC financing provided to Hu Honua in compliance with the 2017 Allocation Agreement requirements and another \$19.4 million, which closed in January 2020, relating to Punawai's 2018 allocation." Id. at 50.

development efforts in the state.”⁹⁶ Hu Honua also notes that Punawai’s future ability to receive NMTC funds for community and economic development in the State of Hawaii hinges on the Project’s approval: “[i]f Hu Honua does not receive approval for its PPA with HELCO and the NMTC funds are unable to be disbursed, it could have significant negative impacts for the State of Hawaii.”⁹⁷

The Commission observes that this discussion in Hu Honua’s Motion for Reconsideration about its contract with Punawai is the first time Punawai’s relationship to Hu Honua has been raised in the record.⁹⁸ This is somewhat surprising given Punawai’s relationship with American Savings Bank, which is

⁹⁶Hu Honua Motion for Reconsideration at 50 (also stating that “Punawai and Hu Honua entered into an NMTC loan agreement with \$28.9 million of NMTC financing provided to Hu Honua in compliance with the 2017 Allocation Agreement requirements and another \$19.4 million, which closed in January 2020, relating to Punawai’s 2018 Allocation.”).

⁹⁷These negative impacts include Punawai’s “ability to receive future NMTC allocations and may also result in the termination of Punawai’s Allocation Agreements, thereby removing at least \$70 million of NMTC allocation in Hawaii currently committed to Punawai. This could also jeopardize Hawaii’s ability to access millions of dollars of additional private capital for community and economic development in Hawaii.” Hu Honua Motion for Reconsideration at 51.

⁹⁸The Commission further notes that in response to an information request regarding “What state and federal tax credits, rebates, grants, or other financial assistance is [Hu Honua] seeking, has or is acquiring, and/or expects to get?”, Hu Honua states only that it “plans to apply for federal investment tax credits and new market tax credits, to the extent available.” See Hu Honua Response to LOL/HHB-IR-12, filed on December 9, 2019.

affiliated with HELCO (HELCO's parent company, Hawaiian Electric Company, Inc., is owned by Hawaiian Electric Industries, Inc., which also owns American Savings Bank).⁹⁹ As this information was not made available in any of the Parties' filings prior to the Motion for Reconsideration, the Commission was unable to acquire more details about this relationship in this proceeding.

While beyond the scope of this Motion, the Commission is interested in this relationship given: (1) the issuance of the Commission's Affiliate Transaction Requirements on December 19, 2018, which are intended to mitigate the potential for market-power abuses and cross-subsidizations amongst regulated and un-regulated activities between Hawaiian Electric¹⁰⁰ and its affiliates;¹⁰¹ and (2) the fact that the agreement between Punawai and Hu Honua closed in January of 2020, which is near to or

⁹⁹See In re Public Util. Comm'n, Docket No. 2018-0065, Hawaiian Electric "2020 Compliance Plan Submission," filed on January 31, 2020, at 8 (including American Savings Bank as an affiliate for purposes of the Compliance Plan).

The State of Hawaii Business Registration Division's website lists American Savings Bank as a "Member/MGR" of Punawai 'O Pu'uhonua, LLC.

¹⁰⁰"Hawaiian Electric" refers collectively to HELCO, its sibling utility Maui Electric Company, Limited, and their joint parent company, Hawaiian Electric Company, Inc.

¹⁰¹See, Docket No. 2018-0065, Decision and Order No. 35962, filed December 19, 2018, as modified by Order No. 36112, filed January 24, 2019 (approving Affiliate Transaction Requirements to govern Hawaiian Electric).

contemporaneous with the filing of Hu Honua's and HELCO's Prehearing Testimony, and neither mentioned Punawai or the mechanics of the NMTC arrangement. Situations such as this emphasize the transparency and disclosure benefits of competitive bidding, to avoid even the potential for appearance of self-dealing, unfair advantage, and anti-competitive bias.

Lastly, the Commission notes that the arrangement between Hu Honua and Punawai is premised on approval of the Amended PPA. In light of LOL's appeal filed in 2017, as well as the Hawaii Supreme Court's order vacating the 2017 D&O and remanding the proceeding back to the Commission in May of 2019 and the Commission's order re-opening the proceeding on June 20, 2019, it was incumbent on Hu Honua to reasonably consider the risks that approval of the Amended PPA may not occur in time to claim the NMTC and either work with Punawai and/or other applicable entities to address this, or timely raise this issue with the Commission earlier in the proceeding.

Hu Honua argument No. 7: Order No. 37205 does not take into account the Project's contributions to other State objectives.¹⁰²

Hu Honua asserts that the Project "would help decrease the State's exposure [to] fossil fuel volatility, support the

¹⁰²See Hu Honua Motion for Reconsideration at 51-54.

State's public policy of promoting agriculture, contribute significantly to the economy of Hawaii and support employment, and help the State achieve its RPS goals."¹⁰³ The Commission does not find these arguments persuasive.

As discussed in Order No. 37205, the pertinent issue is not whether the Project can or is likely to provide such benefits, but rather, whether it should be granted a waiver from the Framework. Order No. 37205 noted that while the Project may be able to provide such benefits, a competitive bidding process allows HELCO to comprehensively evaluate such benefits compared to the benefits offered by other renewable energy projects.¹⁰⁴

The purpose of the Competitive Bidding Framework is to mandate competitive bidding "as the required mechanism for acquiring a future generation resource or a block of generation resources"¹⁰⁵ Waivers represent an exception to this rule and are only justified in instances where the Commission finds competitive bidding "unsuitable," based on a number of considerations. When the issue of HELCO's requested waiver for the Project was reviewed in 2008 and 2017,¹⁰⁶ the Project offered

¹⁰³Hu Honua Motion for Reconsideration at 51.

¹⁰⁴See Order No. 37205 at 28-36.

¹⁰⁵Competitive Bidding Framework, Section II.A.3.

¹⁰⁶See Waiver D&O, issued November 14, 2008; and D&O 34726, filed July 28, 2017.

particular benefits that, based on the circumstances at the time, supported the granting of a waiver.

However, as noted in Order No. 37205, since then, the renewable energy field has advanced such that many of the stated benefits of the Project could potentially be obtained from other projects at lower cost, and thus the balance of project costs and benefits are more appropriately addressed and evaluated in the context of competitive bidding.

To the extent that Hu Honua believes that the Project can provide these stated benefits in a superior manner, these are arguments that should be made as part of a competitive bid.

Hu Honua argument No. 8: Order No. 37205 does not consider the "inherent inefficiencies" of requiring Hu Honua to competitively bid the Project.¹⁰⁷

The Commission is not persuaded by the "inefficiencies" to having to competitively bid the Project asserted by Hu Honua. Hu Honua argues that there are currently no open solicitations for competitive bidding and that it does not believe that HELCO plans to issue any for Hawaii island. First, the Commission observes that the absence of an open or scheduled RFP is not, by itself, a strong basis for justifying a waiver, as a developer could simply

¹⁰⁷See Hu Honua Motion for Reconsideration at 54-57; and Hu Honua Reply at 39-44.

wait until a solicitation is concluded before asking the utility to request a waiver from the Competitive Bidding Framework.

Second, now that Phase 2 of Hawaiian Electric's renewable procurement is nearing its latter stages (see Docket No. 2017-0352), the Commission will direct HELCO to begin another round of competitive solicitations for an all-source procurement, which will provide Hu Honua with an opportunity to advance its Project for consideration. Subsequent direction regarding Phase 3 will be provided in Docket No. 2017-0352. In this regard, to the extent that Hu Honua contends that such a solicitation must be for "24/7 firm renewable resources" or otherwise narrowly-tailored to apply exclusively or near exclusively to the Project, the Commission clarifies that this is not required to give Hu Honua a reasonable opportunity to bid the Project. As noted above, the Commission intends for the competitive solicitation to be an all-source procurement. Indeed, given Hu Honua's assertions regarding the benefits of the Project when compared to other renewable projects,¹⁰⁸ it is for Hu Honua to determine whether these benefits will allow it to put forth a competitive proposal in this Phase 3 bidding process.

¹⁰⁸See Hu Honua Supplemental Memorandum; and Hu Honua Supplemental Reply.

Hu Honua also makes the assertion here that the timing of the RFPs is somehow indicative of an intention on the part of the Commission to negatively impact the Project. As is clear from the orders initiating the various phases of Phase 1 and Phase 2 of the RFPs, the docket was opened to provide "an opportunity for creative, competitive procurement to increase renewable energy in Hawaii, reduce costs to customers, address the planned retirement of existing fossil fuel generation, and further progress towards Hawaii's renewable energy goals."¹⁰⁹ The Commission appointed independent observers and, in addition, for Phase 2, a technical advisor, to provide oversight and protect the integrity of the process.¹¹⁰ These competitive procurements were not about any individual developer or project - they were about the need to solicit and acquire the best portfolio of clean energy projects and resources, which was best achieved through a robust, competitive process.

In addition, if anything, the history of this docket reflects the Commission's patience and understanding of Hu Honua's situation, as it allowed Hu Honua time to renegotiate and resubmit

¹⁰⁹In re Haw. Elec. Co., Inc., Haw. Elec. Light Co., Inc., and Maui Elec. Co., Ltd., Docket No. 2017-0352, Order No. 36474, "Approving the Hawaiian Electric Companies' Proposed Final Phase 2 Requests for Proposals, with Modifications," filed on August 15, 2019 ("Order No. 36474"), at 11-12.

¹¹⁰See Order No. 36474 at 12.

its Amended PPA with the Commission in 2017 and then provided a full opportunity for Hu Honua to address all issues on remand in the re-opened proceeding in 2019, specifically directing Hu Honua to consider the recent developments in the RFP docket.

Moreover, Hu Honua's argument implies that the Commission should have deprioritized or frozen all other initiatives to increase renewable energy generation until its Project was finalized. This premise ignores the fact that the State's RPS goals, pursuant to HRS § 269-92, require consistent, identifiable progress towards increasing renewable energy, and the Commission could not forego the opportunity to bring more renewable energy onto the system. The Commission is routinely faced with multiple proposals for renewable energy projects, and must balance the needs of the system, the utility, and the customer in making determinations regarding the reasonableness of any individual project. This leads back to the benefits of competitive bidding - it allows the utility to evaluate the costs and benefits of proposed projects against each other, including evaluation of established price and non-price criteria, such that the projects that best meet the identified needs of the utility's system as a whole (as determined by the established criteria) are selected and advanced to the Commission for review.

Hu Honua argument No. 9: In Order No. 37205, the Commission failed to make findings regarding GHGs, as instructed by the Hawaii Supreme Court.¹¹¹

The Commission does not find Hu Honua's arguments regarding GHG emissions convincing. As discussed above, on appeal, the Hawaii Supreme Court vacated the 2017 D&O in its entirety and remanded the matter back to the Commission for further proceedings. On remand, the Commission proceeded to re-establish all issues for examination, including the waiver issue. Upon re-examining the issues, consistent with the principle of administrative efficiency, the Commission began with the waiver issue, which is a threshold determination that comes before considering the merits of the underlying Amended PPA, for the obvious reason that if a project does not justify issuance of a waiver to the applicable utility, there is no need to proceed further with the inquiry.¹¹²

Consequently, the issue of the considering the Project's GHG emissions was not addressed because the Commission's finding on the waiver issue mooted consideration of the Amended PPA. As the Commission determined that HELCO was not entitled to a waiver

¹¹¹See Hu Honua Motion for Reconsideration at 57-68; and Hu Honua Reply at 54-57.

¹¹²See Order No. 37205 at 43 (citing In re Hawaiian Elec. Co., Inc., Docket No. 2018-0400, Order No. 36502, "Dismissing Application Without Prejudice," filed September 6, 2019).

for the Project, the Project could not be considered, procedurally, until it was vetted through competitive bidding.

In light of the Commission's denial of HELCO's request for a waiver, proceeding with findings regarding the Project's GHG emissions would have been inconsistent with the principle of administrative efficiency, delayed the proceeding, and could also interfere with Hu Honua's ability to subsequently competitively bid the Project. For example, if the Commission expressly found that the Project would or would not reduce GHG emissions after determining it was ineligible for a waiver, this could unfairly benefit or prejudice Hu Honua during competitive bidding, as other bidders would not have similar Commission findings regarding GHGs for their respective projects. Furthermore, as the relevant language of HRS § 269-6(b) contemplates a "determination of the reasonableness of the costs of utility system capital improvements and operations," making findings on GHG emissions would have been premature, as the Amended PPA was dismissed without prejudice and no new costs of system capital improvements or operations would occur as a result of Order No. 37205.¹¹³ Hu Honua's arguments

¹¹³See Order No. 37205 at 44 ("As the Commission's decision today renders moot consideration of the Project itself based on the waiver issue, the separate issue of LOL's due process right to be heard on the Project's impact on LOL's property interest in a clean and healthful environment is no longer germane, in that the Project will not proceed as a result of this docket.").

regarding the Commission's lack of findings regarding GHG emissions require an assumption that the Commission intended to approve the Amended PPA.

To the extent Hu Honua's Motion takes issue with the specific points raised in the Commission's discussion on GHG emissions in Order No. 37205, it is unclear how this supports Hu Honua's request for reconsideration. Order No. 37205 explicitly stated: "In light of the Commission's ruling above, the Commission does not make any express findings or conclusions regarding Issue No. 4, regarding estimated impacts of GHG emissions associated with the Hu Honua Project."¹¹⁴ Accordingly, this discussion did not support the Commission's decision to deny HELCO's request for a waiver and does not support a request for reconsidering Order No. 37205.

Furthermore, the premise of the Hawaii Supreme Court's instructions to explicitly consider GHG emissions on remand arose from the need to protect LOL's members' constitutional right to a clean and healthful environment that might have been impacted by approving the Project - not any right asserted by Hu Honua.¹¹⁵

¹¹⁴Order No. 37205 at 44.

¹¹⁵See In re HELCO, 145 Hawaii at 17, 445 P.3d at 689 ("First, the private interest to be affected is LOL's right to a clean and healthful environment, which 'includes the right that explicit consideration be given to reduction of [GHG] emissions in

Pursuant to the Commission's denial of HELCO's request for a waiver, and the dismissal, without prejudice, of the Amended PPA, Order No. 37205 does not impact LOL's members' right to a clean and healthful environment, as defined by HRS Chapter 269. Pertinently, LOL has not asserted that Order No. 37205 has violated its members' rights, as defined by HRS Chapter 269, and has not sought reconsideration of Order No. 37205. Rather, LOL has opposed Hu Honua's Motion for Reconsideration,¹¹⁶ indicating that LOL does not find Order No. 37205 violative of its members' constitutional rights. To the extent Hu Honua now attempts to contort the Court's ruling into a decision about Hu Honua's due process rights, this clearly ignores the nature of the underlying appeal to the Hawaii Supreme Court and the plain language of the Court's decision.

As a result, Hu Honua's reliance on the Court's GHG emissions instructions is unpersuasive, as it is based on the rights of another entity who has not challenged Order No. 37205.

Hu Honua argument No. 10: The Commission's comparison of the Project to the recent competitively procured large-scale renewable energy projects is erroneous.

Commission decision-making, as provided for in HRS Chapter 269.'") (brackets in the original).

¹¹⁶See LOL Reply at 19 ("The Motion for Reconsideration should be rejected with prejudice.").

In addition to its Motion for Reconsideration and Reply, Hu Honua also submitted a Supplemental Memorandum and Supplemental Reply, which contain specific arguments regarding the comparison of the Project to the Phase 1 RFP Projects in Order No. 37205.¹¹⁷ The Commission again notes that these materials are repetitive of testimony and evidence that Hu Honua submitted earlier and, thus, cannot form the basis for reconsideration. As stated by Hu Honua, the purpose of the Supplemental Memorandum is to address the Commission's comparison of the Project to the Phase 1 RFP Projects approved for Hawaii Island.¹¹⁸ Hu Honua then proceeds to raise a number of arguments objecting to the Commission's comparison of the Project to the Phase 1 RFP Projects, including the submission of supplemental affidavits from its experts, Dr. Jonathan Jacobs and Dr. Bruce Plasch.

The Commission does not find these arguments convincing. As stated above, Hu Honua had adequate notice and opportunity to address the issue of comparing the Project to the Phase 1 RFP Projects earlier. Order No. 36382 clearly stated that the waiver issue was subject to re-examination on remand and, in ordering supplemental briefing on this issue, specifically directed the Parties to "include consideration of changes in the Hawaii Island

¹¹⁷See Order No. 37205 at 27-36.

¹¹⁸Hu Honua Supplemental Memorandum at 1.

energy market since [the 2017 D&O] was filed on July 28, 2017," making explicit reference to:

- Initiation of competitive bidding in Docket No. 2017-0352;
- The upcoming Phase 2 of competitive bidding in Docket No. 2017-0352; and
- The [Amended PPA] terms compared to competitive benchmarks established in PPAs approved by the [C]ommission pursuant to Phase 1 of the competitive procurement in Docket No. 2017-0352.¹¹⁹

In its Prehearing Testimony, Hu Honua submitted testimony and exhibits directly addressing the comparison of the Project to the Phase 1 RFP Projects, including testimony from Dr. Jacobs and a study on this very issue.¹²⁰ Consequently, Hu Honua's arguments on this topic do not provide a valid basis for reconsideration as they could have been (and were) raised by Hu Honua earlier.

Relatedly, this undermines Hu Honua's requests to add the supplemental affidavits of Dr. Jacobs and Dr. Plasch, as Hu Honua does not provide an explanation of why this information

¹¹⁹Order No. 36382 at 14.

¹²⁰See Hu Honua Prehearing Testimony, Hu Honua Testimony T-5 at 16-19 and Hu Honua-501. Section 5 of Exhibit Hu Honua-501 is exclusively dedicated to comparing the Project to the Phase 1 RFP Projects.

was not provided earlier in Hu Honua's briefing or Prehearing Testimony.¹²¹ Consistent with the ruling above regarding Mr. Katz's supplemental affidavit, the Commission finds Hu Honua's request to admit Dr. Jacobs' and Dr. Plasch's supplemental affidavits as additional evidence under HAR § 16-601-139 to be insufficiently supported, and denies them as such. Further, the Commission observes that even if they were admitted, they would not support Hu Honua's Motion for Reconsideration as they are evidence that could have been brought before the Commission during the earlier proceeding.

Further, Hu Honua mischaracterizes the nature of the Phase 1 RFP Projects in comparing them to the Project. Hu Honua presumes that the Phase 1 RFP Projects must be capable of providing identical services and benefits to the Project to be comparable, and then hypothetically modifies the Phase 1 RFP Projects to argue in favor of the Project.¹²² However, Order No. 37205 did not state that the Phase 1 RFP Projects would provide identical benefits. Rather, it noted that the recently approved Phase 1 RFP Projects could provide similar benefits as the Project at a significantly lower cost to ratepayers.¹²³ A critical point made in Order

¹²¹See HAR § 16-601-139.

¹²²See Hu Honua Supplemental Memorandum at 8-15.

¹²³See Order No. 37205 at 27-36.

No. 37205 is the notable difference in cost (and resulting bill impact to ratepayers) between the Project and the Phase 1 RFP Projects.¹²⁴ From a ratepayer perspective, the Phase 1 RFP Projects are projected to decrease customer bills throughout the entire life of their 20+-year contracts; conversely, based on the information in the record, the Hu Honua Project's costs are projected to increase customer bills throughout much of the contract term, with bill decreases not anticipated until near the end of the contract term.¹²⁵

Here, due in part to the significantly higher costs, the Commission concluded that HELCO's request for a waiver from competitive bidding is not appropriate and Hu Honua should be required to competitively bid its Project against other renewable projects, where all these factors can be considered comprehensively.

¹²⁴See Order No. 302705 at 30 (providing chart illustrating price comparison of Project and Phase 1 RFP Projects).

¹²⁵See Order No. 37205 at 30-31 (citing Docket Nos. 2018-0430 (AES Waikoloa Solar LLC), Application, Exhibit 3, Attachment 4 at 1; HELCO Prehearing Testimonies, HELCO-305 at 1-3; CA Prehearing Testimony, CA-T-1 at 16; and Tawhiri Prehearing Testimony, Exhibit 1 at 7).

D.

Addressing Related Procedural Motions

The Commission observes that there are a number of pending procedural motions related to Hu Honua's Motion for Reconsideration, including LOL's Motion for Leave, Hu Honua's Motion for Leave, LOL's Motion for Leave to File a Response, and Tawhiri's Motion to Strike.

1.

LOL's Motion For Leave

LOL's Motion for Leave sought Commission permission to file a response to Hu Honua's Motion for Reconsideration. On July 27, 2020, the Commission issued Order No. 37233, in which the Commission, on its own motion, provided LOL (along with the other Party and Participants) an opportunity to submit a reply to Hu Honua's Motion for Reconsideration. Pursuant to Order No. 37233, LOL filed its Reply on August 10, 2020. Based on the above, the Commission dismisses LOL's Motion for Leave as moot.

2.

Hu Honua's Motion For Leave

Hu Honua's Motion for Leave sought Commission permission to file a response to the other Party and Participants' replies to Hu Honua's Motion for Reconsideration. As a preliminary matter, the Commission observes that Hu Honua filed its Reply and Supplemental Reply before waiting for a ruling on its Motion for Leave, which led Tawhiri to file its Motion to Strike. The Commission disfavors such presumptive action as it may cause confusion in the record, lead to unnecessary motions practice, and reflects a disregard for the Commission's rules of practice and procedure.

However, under these circumstances, the Commission will grant Hu Honua's Motion for Leave, in part. However, while the Commission will consider the additional arguments raised in Hu Honua's Reply and Supplemental Reply, as noted above, it denies Hu Honua's request to admit the supplemental affidavits of Mr. Katz, Dr. Jacobs, and Dr. Plasch, pursuant to HAR § 16-601-139.

3.

LOL's Motion For Leave To File A Response

LOL's Motion for Leave to File a Response sought Commission permission to file a response to Hu Honua's Reply. In

light of the Commission's ruling in this Order denying Hu Honua's Motion for Reconsideration, LOL's request, which would have provided further opposition to Hu Honua's Motion for Reconsideration, is moot. As a result, the Commission dismisses LOL's Motion for Leave to File a Response.

4.

Tawhiri's Motion to Strike

Tawhiri's Motion to Strike sought to strike Hu Honua's Reply and Supplemental Reply as improperly filed. As noted above, the Commission has decided, under the circumstances, to grant Hu Honua's Motion for Leave. In addition, it appears that Tawhiri's Motion to Strike was intended to prevent Hu Honua from submitting additional evidence in support of its Motion for Reconsideration. In light of the Commission's ruling in this Order denying Hu Honua's Motion for Reconsideration, Tawhiri's request is moot. As a result, the Commission dismisses Tawhiri's Motion to Strike.

E.

Community Considerations

The Commission is aware that this Project has generated a significant amount of interest, with many in the local community passionately advocating for or against the Project. The Commission has received a voluminous number of public comments, filed in the docket record in the Commission's document management system ("DMS"),¹²⁶ in recent days and appreciates that many people have

¹²⁶Available at: <https://dms.puc.hawaii.gov/>, enter 2017-0122 into the "Docket Quick Link" field on the left side of the page.

The Commission also notes that beginning on September 1, 2020, the Commission started to receive notifications from email account holders clarifying that prior public comments filed in support of the Project that were attributed to their email accounts were not authorized by the account holders. See Letter from the Commission to the Service List in Docket No. 2017-0122, filed on September 2, 2020. These emails were received in response to the Commission's email noting that the Commission had received their public comment, providing some basic information about how to access the docket record, and noting that the public comment would be included in that record. In light of the significant breach-of-privacy concerns implicated by this situation and the difficulty of ascertaining which comments may have been filed without permission, the Commission has redacted from public view public comments filed in this proceeding beginning with those brought to the Commission's notice on September 1, 2020. However, these public comments remain part of this docket record – they, and any responses received, have merely been filed under seal to protect the privacy of those who may have had unauthorized comments filed using their email address.

The Commission reiterates here that its focus is the protection of the privacy of the email account holders who have had comments filed with the Commission without their authorization. Following the Commission's September 2, 2020 letter regarding this situation, the Commission received several communications from Hu Honua and LOL regarding the unauthorized

strong opinions and feelings about this Project. The Commission is cognizant that its rulings will impact many in the local community in a personal way, and does not take such considerations

emails. See "Hu Honua Bioenergy, LLC's Response to the State of Hawaii Public Utilities Commission's ('PUC') Letter Dated September 2, 2020," filed on September 3, 2020; "Hu Honua Bioenergy, LLC Follow Up Response to the State of Hawaii Public Utilities Commission's ('PUC') Letter Dated September 2, 2020," filed on September 8, 2020; "Notice of Litigation/Litigation Hold Demand" Letter from Bruce Voss of Bays Lung Rose Holma on behalf of Hu Honua to Henry Curtis as representative of Life of the Land, dated September 4, 2020, filed on September 8, 2020; PDF of email from Melissa J. Chun of Yamamoto Caliboso LLLC regarding confidential pages to the "Hu Honua Bioenergy, LLC Follow Up Response to the State of Hawaii Public Utilities Commission's ('PUC') Letter Dated September 2, 2020," dated September 4, 2020, and filed on September 8, 2020; "Notice of Litigation/Litigation Hold Demand" Letter from Lance Collins, attorney for Life of the Land, to Bruce Voss of Bays Lung Rose Holma; "Life of the Land's Consultant Senior Cyber Adversary Threat Hunter Kent Backman, Confidentiality Agreement, Time-Sensitive Information Requests, Electronic Case Files, Violation of Commission Rules, Declaration of Henry Q. Curtis & Certificate of Service," filed on September 8, 2020; Curriculum Vitae for Kent Backman, filed on September 8, 2020; PDF of excerpt of Kent Backman's public LinkedIn profile, filed on September 8, 2020; and PUC Protective Agreement (Exhibit A), signed by Kent Backman, filed on September 8, 2020.

The Commission notes that both Hu Honua and LOL have stated that they may be pursuing legal action against the other regarding claims related to the unauthorized emails. Potential civil actions arising from this incident based upon claims of tortious interference, fraud, abuse of process, malicious prosecution, false light, invasion of privacy, defamation and/or others would be pursued in court (i.e., outside of this docket), and while the Commission reviews all public comments that are filed in the docket, as noted above, it is the evidence and argument that has been entered into this record via the Parties' and Participants' filings that form the basis for the Commission's decision here regarding Hu Honua's Motion for Reconsideration.

lightly. However, in this instance, the Commission affirms its belief that the public interest will be best served by requiring HELCO to evaluate Hu Honua's project through competitive bidding.

III.

ORDERS

THE COMMISSION ORDERS:

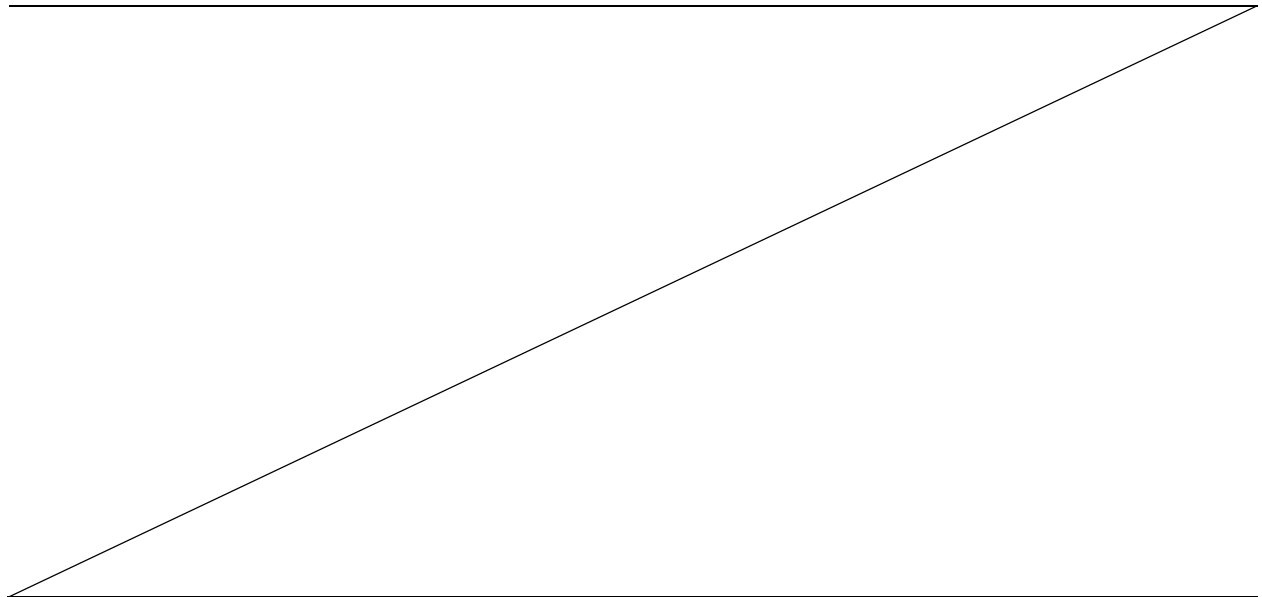
1. Hu Honua's request for a hearing on its Motion for Reconsideration is denied.

2. Hu Honua's Motion for Reconsideration is denied.

3. LOL's Motion for Leave is dismissed as moot.

4. Hu Honua's Motion for Leave is granted in part, as set forth above.

5. LOL's Motion for Leave to File a Response is dismissed as moot.

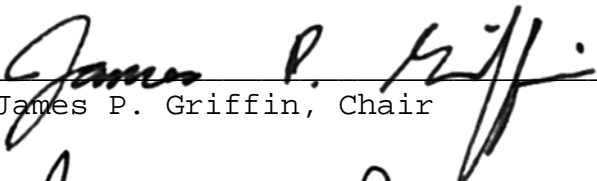


6. Tawhiri's Motion to Strike is dismissed as moot.

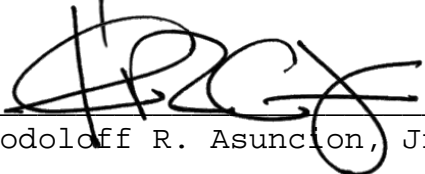
7. This docket is closed, unless ordered otherwise by the Commission.

DONE at Honolulu, Hawaii SEPTEMBER 9, 2020.

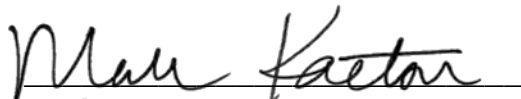
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
James P. Griffin, Chair

By 
Jennifer M. Potter, Commissioner

By 
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:


Mark Kaetsu
Commission Counsel

2017-0122.ljk

CERTIFICATE OF SERVICE

Pursuant to Order No. 37043, the foregoing order was served on the date it was uploaded to the Public Utilities Commission's Document Management System and served through the Document Management System's electronic Distribution List.

FILED

2020 Sep 09 AM 09:53

PUBLIC UTILITIES
COMMISSION

The foregoing document was electronically filed with the State of Hawaii Public Utilities Commission's Document Management System (DMS).

SCPW-_____

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN THE MATTER OF THE)
APPLICATION OF HAWAII ELECTRIC) CERTIFICATE OF SERVICE
LIGHT COMPANY, INC. [DKT. NO.)
2017-0122]) [RE: ORIGINAL PROCEEDING:
_____))
HU HONUA BIOENERGY, LLC,) PETITION FOR EXTRAORDINARY WRIT
AND/OR FOR WRIT OF MANDAMUS]
)
Petitioner,)
)
vs.)
)
JAMES P. GRIFFIN, CHAIRPERSON,)
STATE OF HAWAII PUBLIC UTILITIES)
COMMISSION; JENNIFER M. POTTER,)
COMMISSIONER, STATE OF HAWAII)
PUBLIC UTILITIES COMMISSION;)
LEODOLOFF R. ASUNCION,)
COMMISSIONER, STATE OF HAWAII)
PUBLIC UTILITIES COMMISSION,)
)
Respondents.)
_____)

CERTIFICATE OF SERVICE

Of Counsel:

BAYS LUNG ROSE & HOLMA

BRUCE D. VOSS 6532-0

Attorney at Law

A Law Corporation

JOHN D. FERRY III 9143-0

Topa Financial Center

700 Bishop Street, Suite 900

Honolulu, Hawaii 96813

Telephone: (808) 523-9000

Facsimile: (808) 533-4184

Email: bvoss@legalthawaii.com

jferry@legalthawaii.com

YAMAMOTO CALIBOSO

A Limited Liability Law Company

DEAN T. YAMAMOTO 5387-0

WIL K. YAMAMOTO 7817-0

BRADLEY S. DIXON 10192-0

YAMAMOTO CALIBOSO

A Limited Liability Law Company

1100 Alakea Street, Suite 3100

Honolulu, Hawaii 96813

Telephone: (808) 540-4500

Facsimile: (808) 540-4530

Email: dyamamoto@ychawaii.com

wyamamoto@ychawaii.com

bdixon@ychawaii.com

Attorneys for Petitioner

HU HONUA BIOENERGY, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was duly served on the following parties as set forth below on September 16, 2020:

CLARE E. CONNORS, ESQ. via U.S. Mail
Dept. of the Attorney General, State of Hawaii
830 Punchbowl St., #221
Honolulu, HI 96813

ATTORNEY GENERAL OF HAWAII

CAROLINE ISHIDA, ESQ. via U.S. Mail
Chief Counsel
State of Hawaii Public Utilities Commission
465 South King Street
Kekuanao`a Building, Room 103
Honolulu, Hawaii 96813
Email: caroline.ishida@hawaii.gov

ATTORNEY FOR
JAMES P. GRIFFIN, CHAIRPERSON,
JENNIFER M. POTTER, COMMISSIONER,
LEODOLOFF R. ASUNCION, COMMISSIONER,
STATE OF HAWAII PUBLIC UTILITIES COMMISSION

DATED: Honolulu, Hawaii, September 16, 2020.

/s/ Bruce D. Voss

BRUCE D. VOSS
JOHN D. FERRY III
DEAN T. YAMAMOTO
WIL K. YAMAMOTO
BRADLEY S. DIXON

Attorneys for Petitioner
HU HONUA BIOENERGY, LLC