SCOT-22-0000418

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

HU HONUA BIOENERGY, LLC, a Delaware Limited Liability Company Appellant, PUBLIC UTILITIES COMMISSION, State of Hawai'i; HAWAII ELECTRIC LIGHT COMPANY, INC., a domestic profit corporation; DIVISION OF CONSUMER ADVOCACY, Department of Commerce and Consumer Affairs; HAWAIIAN ELECTRIC COMPANY, INC., a domestic profit corporation; LIFE OF THE LAND, a Hawaii non-profit corporation; TAWHIRI POWER, LLC, a domestic limited liability company; and HAMAKUA ENERGY, LLC, a domestic limited liability company. Appellees.	SCOT-22-0000418 IN THE MATTER OF THE APPLICATION OF HAWAI'I ELECTRIC LIGHT COMPANY, INC. FOR APPROVAL OF A POWER PURCHASE AGREEMENT FOR RENEWABLE DISPATCHABLE FIRM ENERGY AND CAPACITY APPEAL FROM THE PUBLIC UTILITIES COMMISSION [DKT. NO. 2017-0122]

APPELLANT HU HONUA BIOENERGY, LLC'S OPENING BRIEF

APPENDICES "A"-"D"

CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

SCOT-22-0000418

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HU HONUA BIOENERGY, LLC, a Delaware Limited Liability Company Appellant, PUBLIC UTILITIES COMMISSION, State of Hawai'i; HAWAII ELECTRIC LIGHT COMPANY, INC., a domestic profit corporation; DIVISION OF CONSUMER ADVOCACY, Department of Commerce and Consumer Affairs; HAWAIIAN ELECTRIC COMPANY, INC., a domestic profit corporation; LIFE OF THE LAND, a Hawaii non-profit corporation; TAWHIRI POWER, LLC, a domestic limited liability company; and HAMAKUA ENERGY, LLC, a domestic limited liability company. Appellees.	)	SCOT-22-0000418 HU HONUA BIOENERGY, LLC'S OPENING BRIEF

APPELLANT HU HONUA BIOENERGY, LLC'S OPENING BRIEF

Appellant HU HONUA BIOENERGY, LLC ("Hu Honua"), by and through its counsel, Lung Rose Voss & Wagnild, respectfully submits its Opening Brief.

I. STATEMENT OF THE CASE

A. Nature of the Case

For the third time in five years, the Public Utilities Commission ("PUC") has committed reversible error in Docket No. 2017-0122 ("2017 Docket"), resulting in another round of costly and potentially devastating delays for Hu Honua and its $500 million renewable energy project ("Project"), which is 99% complete. In the past three years, the Court has twice commanded the PUC to give explicit consideration to one discrete issue: whether, in light of the potential impact of the Project's GHG emissions, the Amended and Restated Power Purchase Agreement between applicants Hawaii Electric Light Company ("HELCO") and Hu Honua ("Amended PPA") should be approved. The uncontroverted evidence in the record demonstrates that, on the one issue that the Court ordered the PUC and the parties to address, Hu Honua

carried its burden to show that the Project would result in the significant reduction of GHG emissions; therefore, the Amended PPA should have been approved months – if not years – ago.

Unfortunately, the record also demonstrates the PUC's yearslong commitment to denying the Amended PPA, regardless of the evidence, the Court's mandate, HRS Chapter 269, or other applicable law. As a result, and as explained in further detail below, the PUC's most recent rulings in the 2017 Docket must be vacated, like those that came before; however, Hu Honua requests that, this time, the Court provide the PUC with a new straightforward mandate: to reopen the 2017 Docket for the sole purpose of approving the Amended PPA. Under the circumstances, such a mandate is not only appropriate, but necessary.

B. Relevant Background

Given the Court's familiarity with the extensive background of this matter, only the facts most pertinent to establishing the Court's jurisdiction over this appeal are set forth here.

1. The PUC's Initial Approval of the Amended PPA and Project

In Docket No. 2012-0212, the PUC conducted a detailed review of the Project, and approved Hu Honua's original Power Purchase Agreement with HELCO ("Original PPA"). See Dkt. 54, Record on Appeal ("ROA"), Volume ("Vol.") 39, at 24-29.

On May 9, 2017, HELCO filed the Amended PPA, for which the PUC opened up the 2017 Docket. See id. at 30. On July 28, 2017, the PUC filed its Order No. 34726 ("2017 D&O"), in which the PUC granted the Project a waiver from the Competitive Bidding Framework ("Waiver"), and the PUC approved the Amended PPA. See id. at 88. In granting the Waiver and approving the Amended PPA, the PUC directed Hu Honua to work expeditiously to complete the Project by the Commercial Operation Date, ordering "Hu Honua and HELCO to make all reasonable attempts to complete the Project according to this schedule," without "further requests to extend the Commercial Operation Date deadline." See id. at 87.

2. HELCO I

After the PUC entered the 2017 D&O, Life of the Land ("LOL") – which the PUC had granted conditional participant status in Docket No. 2017-0122, see Dkt. 54, ROA, Vol. 39, at 30 – directly appealed to this Court. See In re Haw. Elec. Light Co., 145 Hawai`i 1, 10, 445 P.3d 673, 682 (2019) ("HELCO I"). On May 10, 2019, the Court issued HELCO I, holding, among other things, (1) that the PUC erred when it failed to expressly consider the reduction of greenhouse gas ("GHG") emissions in its decision-making pursuant to HRS Section

269-6(b) and (2) that LOL should have been afforded an opportunity to be heard regarding the impact of the Amended PPA on LOL's interest in a clean and healthful environment, as defined by HRS Chapter 269. See id. The Court remanded the proceeding and ordered the PUC 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 determine whether the [PUC] satisfied its obligations under HRS § 269-6(b)." HELCO I, 145 Hawai`i at 25, 445 P.3d at 697 (emphasis in original, bracketing added). The Court also instructed the PUC to hold "a hearing that complies with procedural due process." Id. at 26, 445 P.3d at 698.

3. Proceedings in the 2017 Docket following Remand in HELCO I

On June 20, 2019, the PUC issued Order No. 36382, reopening Docket No. 2017-0122 ("2019 Reopening Order"). See Dkt. 55, ROA, Vol. 40, at 25-46. Acknowledging its mandate from the Court on remand, the PUC initially stated that it would establish a procedural schedule which would comply with that mandate by, among other things, holding "an evidentiary hearing that is intended to explore, among other things, the [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." Id. at 27.

Despite acknowledging its mandate from the Court following HELCO I, the PUC never held the evidentiary hearing it admitted that it was obligated to hold. Instead, more than a year later, on July 9, 2020, the PUC issued Decision and 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" ("Order Revoking Waiver"). See also Dkt. 141, ROA, Vol. 121, at 34-92. In the Order Revoking Waiver, the PUC claimed that the Waiver's existence was a threshold issue to the other issues that the Court explicitly ordered the PUC to address through an evidentiary hearing. See, e.g., Dkt. 141, ROA, Vol. 121, at 78. By that faulty logic, after erroneously revoking the Waiver without proper notice or a hearing, the PUC claimed that the Court-ordered evidentiary hearing was no longer necessary. See id.

On July 20, 2020, Hu Honua timely filed for reconsideration of the Order Revoking Waiver, contending, among other things, that the PUC had: disregarded the Court's

mandate to conduct an evidentiary hearing on the Amended PPA; violated Hu Honua's constitutional due process rights; and blatantly misstated the facts and evidence in the record. See, e.g., Dkt. 142, ROA, Vol. 122, at 7-107.

On September 9, 2020, the PUC issued Decision and Order No. 37306, "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" ("2020 Order Denying Reconsideration"). See also Dkt. 162, ROA, Vol. 141, at 40-108. After denying Hu Honua's request for relief, the PUC stated that it was closing the 2017 Docket. See id. at 105.

4. HELCO II

On September 16, 2020, Hu Honua noticed its appeal from the Order Revoking Waiver and the 2020 Order Denying Reconsideration directly to this Court. See In re Haw. Elec. Light Co., 149 Hawai`i 239, 487 P.3d 708 (2021) ("HELCO II"). On May 24, 2021, the Court issued its opinion in HELCO II, in which the Court agreed with Hu Honua that the PUC had erred once more by reconsidering and then revoking the Waiver, rather than simply doing what the Court told the PUC to do following HELCO I. See id. at 241, 487 P.3d at 710. Accordingly, the Court remanded once again, for further proceedings in the 2017 Docket, in accordance with Court's prior instructions in HELCO I, as reiterated in HELCO II:

> We thus remand this case to the PUC for a hearing on the Amended PPA that 'complies with procedural due process' as well as the requirements of HRS Chapter 269. 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.

Id. at 242, 487 P.3d at 711 (quoting HELCO I, 145 Hawai`i at 26, 445 P.3d at 698).

5. Proceedings in the 2017 Docket following Remand in HELCO II

On June 30, 2021, the PUC reopened the 2017 Docket following the Court's issuance of HELCO II ("2021 Reopening Order"). See Dkt. 171, ROA, Vol. 150, at 20-47. In its 2021 Reopening Order, the PUC formulated an initial Statement of Issues to address in the reopened 2017 Docket, based on its interpretation of HELCO I and HELCO II. ("Statement of

Issues"). See id. at 27-28. Although the PUC acknowledged the recent passage of Act 82, which amended the language of HRS Section 269-6(b), the PUC stated that the amendments did not substantively affect its obligations under that statute, "as previously set forth in MECO, HELCO I, and HELCO II." See id. at 29 n.9. The PUC also offered the parties "an opportunity to make the case" that Act 82's amendments to HRS Section 269-6 warranted further consideration. See id. at 39 n.35.

Accordingly, Hu Honua requested that the PUC consider Hu Honua's interpretation of HRS Section 269-6(b), as amended, and that the PUC amend the Statement of Issues accordingly. See Dkt. 173, ROA, Vol. 152, at 21-68. The PUC denied Hu Honua's request, which it characterized as, among other things, untimely ("Order re: Statement of Issues"). See Dkt. 175, ROA, Vol. 154, at 79-117 (Order No. 37910, pp. 103-105, 111). However, in the same Order re: Statement of Issues, the PUC partially granted a similar request from the Consumer Advocate, despite the fact that the Consumer Advocate's request was filed three days after Hu Honua's purportedly "untimely" submission, and the PUC classified the Consumer Advocate's submission as "technically moot." See id. at 111-112.

Ultimately, in its Order re: Statement of Issues, the PUC broadened the scope of the Statement of Issues in accordance with the Consumer Advocate's request, while also mischaracterizing those changes as "non-substantive." See id. Because the Statement of Issues, as modified, went far beyond the scope of the Court's remand in HELCO I, HELCO II, and misstated the PUC's obligations and powers under HRS Section 269-6(b), Hu Honua requested that the PUC reconsider the Order re: Statement of Issues. See Dkt. 176, ROA, Vol. 155, at 15-30. Only four days later, the PUC summarily denied Hu Honua's request. See id. at 53-69.

By then, Hu Honua was no stranger to the PUC's machinations or its agenda, which had become plain: by broadening the scope of the Statement of Issues beyond the limited scope of remand in HELCO I, HELCO II, and HRS Section 269-6(b), as amended, the PUC was laying groundwork to deny the Amended PPA and kill the Project, regardless of the Court's prior instructions, the plain language of HRS Section 269-6(b), and what the evidence at the hearing would eventually show. Accordingly, prior the evidentiary hearing, Hu Honua tried once more to convince the PUC to formulate a Statement of Issues that would fairly and accurately comport with the scope of the Court's instructions on remand in HELCO I and HELCO II, as well as HRS Section 269(b), as amended.

On January 4, 2022, Hu Honua filed its Motion to Confirm that Hawaii Revised Statutes Section 269(b), as Amended by Act 82, Applies to This Proceeding ("Motion to Confirm"). See Dkt. 207, ROA, Vol. 184, at 215-229. Noting that the PUC never specified whether it intended to apply (1) HRS Section 269-6(b), as amended by Act 82, or (2) the prior version of HRS Section 269-6(b) that was in effect at the time the Court decided HELCO I and HELCO II, Hu Honua urged the PUC to apply HRS Section 269-6(b), as amended, in a manner that comported with the statute's plain language. See id. at 217-218, 222-224.

Once again, the PUC made short work of Hu Honua's request. On January 13, 2022, the PUC issued Order No. 38183, in which the PUC purported to "address" the Motion to Confirm, while actually denying it. See generally Dkt. 209, ROA, Vol. 186, at 22-34. The PUC stated that it would apply HRS Section 269-6(b), as amended, but dismissed the amendments to the statute's language as nothing more than non-material, "grammatical changes," which would not affect its analysis of the evidence presented at the evidentiary hearing. See id. at 2, 6.

Eventually, the evidentiary hearing began March 1, 2022 and adjourned on March 5, 2022. See Dkt. 221, ROA, Vol. 198, at 18-248, 249-525, 526-755; Dkt. 222, ROA, Vol. 199, at 7-240, 241-314.

Following adjournment of the evidentiary hearing, the parties and participants submitted post-hearing briefs on March 29, 2022. See Dkt. 213, ROA, Vol. 190, at 43-113, 114-148; Dkt. 214, ROA, Vol. 191, at 7-126; Dkt. 215, ROA, Vol. 192, at 7-83; Dkt. 216, ROA, Vol. 193, at 7-35, 36-69. As detailed in HELCO's and Hu Honua's post-hearing briefing, the evidence presented at the hearing established that the Project's operations would result in significantly decreased GHG emissions, and provide the State with a clean source of firm, renewable, and dispatchable energy, thereby reducing the State's reliance on fossil fuel energy and diversifying the State's portfolio, while also providing the State and Island of Hawaii with myriad other benefits. See, e.g., Dkt. 213, ROA, Vol. 190, at 114-148; Dkt. 214, ROA, Vol. 191, at 7-126; Dkt. 215, ROA, Vol. 192, at 7-83. Even though it had carried its burden to show that the Amended PPA should be approved, Hu Honua went one step further, offering various conditions to approval of the Amended PPA, including, among other things, commitments to ensure that the Project would be the first carbon-negative energy project in the State of Hawaii, certain additional conditions suggested by the Consumer Advocate, and any other reasonable

modifications or conditions to approval that the PUC might deem appropriate. See, e.g., Dkt. 214, ROA, Vol. 191, at 11-16.

Predictably, two of the three PUC commissioners ("PUC Majority") were unmoved by the presentation at the evidentiary hearing. The PUC Majority simply stuck to their guns and shot the Project down, as they had intended to do all along, regardless of the law or what the evidence demonstrated. On May 23, 2022, the PUC Majority issued their Decision and Order No. 38395 ("Order Denying Amended PPA"), from which PUC commissioner Leodoloff R. Asuncion, Jr. dissented ("Dissent"). See Dkt. 218, ROA, Vol. 195, at 31-194; see also Appendix "A".

On June 2, 2022, HELCO and Hu Honua each moved for reconsideration of the Order Denying Amended PPA. See Dkt. 218, ROA, Vol. 195, at 200-228; Dkt. 219, ROA, Vol. 196, at 7-441; Dkt. 220, ROA, Vol. 197, at 7-333. Given the significance of the interests at stake, Hu Honua requested a hearing on the Motion for Reconsideration. See Dkt. 219, ROA, Vol. 196, at 8-9. Hu Honua detailed how, in the Order Denying Amended PPA, the PUC Majority erred by, among other things: exceeding its authority by considering issues beyond the limited scope of remand in HELCO I and HELCO II; failing to make the findings necessary to determine whether the PUC satisfied its obligations under HRS Section 269-6(b), as amended; refusing to recognize that Hu Honua met its burden as to the central issue on remand, given Hu Honua's demonstration that the Project would reduce GHG emissions over the term of the Amended PPA and that, as a result, the "costs" of the Amended PPA were reasonable; creating a novel standard of review for the impacts of GHG emissions, which lacked any basis in law or PUC precedent; creating and relying upon its own "evidence" and "expert opinion" to reject the Amended PPA; applying a standard of proof higher than that required by the applicable preponderance of evidence standard; and minimizing or ignoring the overall benefits that the Project would provide. See, e.g., id. at 14-21.

The PUC permitted other parties the chance to respond to HELCO's and Hu Honua's motions for reconsideration, and allowed HELCO and Hu Honua opportunities to file replies in support of their motions for reconsideration. See Dkt. 221, ROA, Vol. 198, at 8-10. HELCO and Hu Honua filed their replies on June 17, 2022. See Dkt. 222, ROA, Vol. 199, at 442-509; id. at 510-531.

Seven days later, on June 24, 2022 (and without the hearing Hu Honua had requested), the PUC issued its Order No. 38443 (1) Denying Hawaii Electric Light Company, Inc.'s Motion for Reconsideration of Decision and Order No. 38395; and (2) Denying Hu Honua Bioenergy LLC's Motion for Clarification, and Further Hearing of Order No. 38395, Filed May 23, 2022 ("Order Denying Reconsideration"). See Dkt. 222, ROA, Vol. 199, at 532-578; see also Appendix "B".

On June 29, 2022, Hu Honua timely noticed this appeal from the Order Denying Amended PPA and Order Denying Reconsideration. See Dkt. 1; see also Dkt. 5.

II. POINTS OF ERROR

The PUC's Orders Denying Amended PPA and Denying Reconsideration ("Orders") must be vacated because:

1. Following remand in HELCO II, the PUC once again exceeded the limited scope of issues that this Court ordered the PUC to consider and address in the 2017 Docket. Twice, in HELCO I and HELCO II, this Court has vacated the PUC's final decisions, and remanded with explicit and specific directions on how to proceed. Each time, there were only two issues that this Court directed the PUC to address on remand, namely: (1) to allow LOL an opportunity to meaningfully address the impacts on LOL's members' right to a clean and healthful environment; and (2) to give express consideration of GHG emissions that would result from approving the Amended PPA, pursuant to the requirements of HRS Section 269-6. See HELCO I, 145 Hawai`i at 26, 445 P.3d at 698; HELCO II, 149 Hawai`i at 242, 487 P.3d at 711.[1] For the second time, the PUC erred by treating this Court's direction on the second issue as a nebulous suggestion, rather than a clear mandate that the PUC was obligated to follow. Hu Honua repeatedly objected to the PUC's improper attempts to broaden the scope of issues to address on remand.[2] The PUC repeatedly dismissed Hu Honua's concerns.[3]

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[1] There is no dispute that, in the proceedings that followed this Court's remand, the issue of allowing LOL to meaningfully participate has been adequately addressed. LOL has not filed any appeal from the PUC's decisions in the most recent proceedings in the 2017 Docket.

[2] See, e.g., Dkt. 173, ROA, Vol. 152, at 21-68; Dkt. 176, ROA, Vol. 155, at 15-30; Dkt. 219, ROA, Vol. 196, at 18-19, 22-27, 65-68, 95-98; Dkt. 222, ROA, Vol. 199, at 449-456.

[3] See, e.g., Dkt. 175, ROA, Vol. 154 at 111-117 (Order re: Statement of Issues, amending Statement of Issues in accordance with Consumer Advocates' untimely and admittedly "moot" request); Dkt. 176, ROA, Vol. 155, at 53-69; Dkt. 218, ROA, Vol. 195, at 125-129, 164, ¶11; Dkt. 222, ROA, Vol. 199, at 541-543.

2. The PUC once again failed to "make findings necessary for this [C]ourt to determine whether the PUC satisfied its obligations under HRS Section 269-6(b)," as amended by Act 82. HELCO I, 145 Hawai`i at 25, 445 P.3d at 697; HELCO II, 149 Hawai`i at 242, 487 P.3d at 711. With each reversal and remand, this Court made clear that the PUC needed to evaluate the Amended PPA in accordance with HRS Section 269-6(b) which, in many ways, is the centerpiece of the entire statutory scheme that the PUC is charged with administering.[4] Previously, the PUC failed its obligation by avoiding the analysis altogether. HELCO I, 145 Hawai`i at 25, 445 P.3d at 697; HELCO II, 149 Hawai`i at 242, 487 P.3d at 487. This time, the PUC failed by misinterpreting and misapplying relevant statutory language, and by failing to articulate or apply any objective, workable standard to guide its analysis. Hu Honua repeatedly objected.[5] The PUC refused to correct these fundamental errors.[6]

3. Having misinterpreted and misapplied the Court's mandate and its obligations under HRS Section 269-6(b), the PUC Majority went on to disregard and misconstrue the evidence presented in the contested case hearing. As the Dissent recognized, the PUC Majority ignored, minimized, and mischaracterized the evidence properly in the record which "clearly establishe[d] that [Hu Honua met its burden] in showing that the Project will result in a significant reduction in GHG emissions over the course of the 30-year Amended PPA term, and consequently, that the costs of the Amended PPA are reasonable in light of the potential for GHG emissions." See Dkt. 218, ROA, Vol. 195, at 173 (Dissent). The PUC Majority's treatment of the evidence led the Dissent to conclude that "there will never be an analysis that would be deemed sufficient in the Majority's subjective eyes, nor will there ever be a set of conditions or outcome upon which the Majority would approve this Project." Dkt. 218,

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[4] See id.; see also In re Maui Elec. Co., 141 Hawai`i 249, 262-63, 408 P.3d 1, 14-15 (2017) ("MECO") (tracing legislative history of HRS Chapter 269 in general and HRS Section 269-6(b) in particular); see also HELCO I, 145 Hawai`i at 23-25, 445 P.3d at 695-97.

[5] See, e.g., Dkt. 173, ROA, Vol. 152, at 21-68; Dkt. 176, ROA, Vol. 155, at 15-30; Dkt. 219, ROA, Vol. 196, at 16-17, 20, 65-69, 101-114; Dkt. 222, ROA, Vol. 199, at 456-464.

[6] See, e.g., Dkt. 175, ROA, Vol. 154, at 81, 102-111; Dkt. 176, ROA, Vol. 155, at 61-67; Dkt. 218, ROA, Vol. 195, at 125-129, 164-171; Dkt. 222, ROA, Vol. 199, at 541-543, 565-567.

ROA, Vol. 195, at 185. Hu Honua tried to change the manner in which the PUC Majority's "subjective eyes" had viewed the evidence.[7] The PUC Majority refused.[8]

4. The PUC violated Hu Honua's statutory and constitutional rights to due process and equal protection under the law. In the 2017 Docket, the PUC was obligated to hold an evidentiary hearing that complied with procedural due process and the requirements of HRS Chapters 91 and 269. The manner in which the PUC conducted proceedings in the 2017 Docket confirmed that, following HELCO I and HELCO II, the PUC had no intention of complying with those requirements. Following remand in HELCO II, the PUC took the following actions, in pursuit of reaching the PUC's predetermined and desired result, and in violation of Hu Honua's constitutional and statutory rights to due process: creating a novel standard of review for renewable energy projects' GHG emissions, which lacked any basis in law or PUC precedent; creating and relying upon its own evidence and expert opinion, neither of which was properly part of the record in the contested case hearing; and imposing an evidentiary standard on Hu Honua that was higher than the "preponderance of the evidence" standard dictated by HRS Section 91-10(5). By targeting Hu Honua for this unique, unprecedented, and unfair treatment, the PUC created a "class of one" and violated Hu Honua's right to equal protection under the law. Hu Honua brought these errors to the PUC's attention.[9] Once again, the PUC refused to recognize or correct its errors.[10]

5. In addition to gerrymandering the scope of issues to address pursuant to the Court's mandate and HRS Section 269-6, and manipulating the evidence and standards related to those issues, the PUC also erred by minimizing and misrepresenting other critical benefits that the Project would provide, all of which supported approval of the Amended PPA. Prior to this Court's ruling in HELCO I, the PUC in 2017 recognized and extolled those same benefits, and determined that approval of the Amended PPA would serve the public interest. See,

[7] See, e.g., Dkt. 219, ROA, Vol. 196, at 15-20, 27-101, 106-114; Dkt. 222, ROA, Vol. 199, at 457-464, 466-473.

[8] See, e.g., Dkt. 222, ROA, Vol. 199, at 533, 543-564, 575.

[9] See, e.g., Dkt. 219, ROA, Vol. 196, at 15-22, 98-101, 106-114; Dkt. 222, ROA, Vol. 199, at 458-463, 466-473.

[10] See, e.g., Dkt. 222, ROA, Vol. 199, at 533, 543-555, 560-561, 567-570.

e.g., Dkt. 54, ROA, Vol. 39, at 82, 85-86. As Hu Honua demonstrated over the course of the contested case hearing, those findings were not disturbed by the appeals which led to HELCO I or HELCO II; Hu Honua remains able and committed to providing those and other benefits to the State and Island of Hawai`i, and those benefits remain in the public interest that the PUC is supposed to serve.[11] However, the PUC Majority ignored those benefits, confirming that it was more committed to its own agenda than the public interest.[12]

Each and every one of the foregoing Points of Error warrants vacatur of the Orders.

III. STANDARDS OF REVIEW

A. Constitutional Provisions

With regard to questions of constitutional law, this Court exercises its "own independent judgment based on the facts of the case." County of Kaua`i ex rel. Nakazawa v. Baptiste, 115 Hawai`i 15, 25, 165 P.3d 916, 926 (2007), as corrected (Aug. 7, 2007) (quoting City & County of Honolulu v. Sherman, 110 Hawai`i 39, 49, 129 P.3d 542, 552 (2006)). Questions of constitutional law are "reviewed under the 'right/wrong' standard." Id.

B. Review of Orders in Contested Cases

HRS Chapter 91 applies to all contested cases arising under HRS Chapter 269, unless conflict arises, in which case HRS Chapter 269 controls. See HRS § 269-15.51. Pursuant to HRS Section 91-14:

> (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; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; or
> (4) Affected by other error of law; or
> (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.

Id.

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[11] See, e.g., Dkt. 219, ROA, Vol. 196, at 14-21, 113-114.

[12] See generally Dkt. 218, ROA, Vol. 195, at 31-171 (omitting discussion of these benefits); Dkt. 222, ROA, Vol. 199, at 532-578 (omitting discussion of these benefits).

"[U]nder HRS § 91–14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6)." In re Hawaiian Elec. Co., 81 Hawai`i 459, 465, 918 P.2d 561, 567 (1996) (citing Outdoor Circle v. Harold K.L. Castle Trust Estate, 4 Haw. App. 633, 638–39, 675 P.2d 784, 789 (1983)).

Findings of fact, and conclusions of law which present mixed questions of fact and law, are reviewed for clear error pursuant to HRS Section 91-14(g)(5). Such findings and conclusions are "clearly erroneous" when "(1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made." In re Water Use Permit Applications, 105 Hawai`i 1, 8, 93 P.3d 643, 650 (2004) (defining substantial evidence as "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.").

The abuse of discretion standard under HRS Section 91–14(g)(6) applies if "the agency determination under review was the type of agency action within the boundaries of the agency's delegated authority. To the extent that the legislature has authorized an administrative agency to define the parameters of a particular statute, that agency's interpretation should be accorded deference." Paul's Elec. Serv., Inc. v. Befitel, 104 Hawai`i 412, 417, 91 P.3d 494, 499 (2004) (as corrected July 14, 2004) (citations omitted). However, where the statute does not grant "agency discretion with which to interpret or implement that statute, then that agency's legal conclusions will be reviewed de novo." Id. (footnote and citation omitted).

C. Statutory Interpretation

"Statutory interpretation is a question of law reviewable de novo." Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & County of Honolulu, 114 Hawai`i 184, 193–94, 159 P.3d 143, 152–53 (2007) (quoted cases and internal quotation marks omitted). Judicial deference to agency interpretation of a statute is unwarranted where the agency's interpretation is unreasonable, erroneous, or in contravention of the legislature's manifest purpose. Government Employees Ins. Co. v. Dang, 89 Hawai`i 8, 15, 967 P.2d 1066, 1073 (1998) (appellate courts "have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation"); Dir. Dept. Labor & Indus. Relations v. Kiewit Pac. Co., 104 Hawai`i 22, 29, 84 P.3d 530, 537 (App. 2004);

State v. Dillingham Corp., 60 Haw. 393, 409, 591 P.2d 1049, 1059 (1979) ("[N]either official construction nor usage, no matter how long indulged in, can be successfully invoked to defeat the purpose and effect of a statute which is free from ambiguity . . . .").

IV. ARGUMENT

A. The PUC Impermissibly Broadened the Scope of Issues to Consider on Remand

At best, the PUC's Orders "spring from a misreading of the holding in" HELCO I. See HELCO II, 149 Hawai`i at 240, 487 P.3d at 709. More likely, the PUC's Orders spring from the PUC's yearslong quest to search for and seize upon ways to deny the Amended PPA, regardless of the Court's mandate. Either way, the Orders cannot stand, and the Court must once again vacate and remand.

1. The PUC Was Obligated to Follow Instructions on Remand

To be clear, the Court's instructions were not – as the PUC seems to believe – a mere suggestion; they amounted to a command that the PUC was obligated to follow. In HELCO II, the Court emphasized that "[o]n remand, [the PUC] must closely adhere to the true intent and meaning of the [Court's] mandate." See id. at 241, 487 P.3d at 710 (further citations omitted, bracketing and emphasis added) (quoting State v. Lincoln, 72 Haw. 480, 485, 825 P.2d 64, 68 (1992); see also Chun v. Bd. of Trs. of Emps.' Ret. Sys., 106 Hawai`i 416, 439, 106 P.3d 339, 362 (2005) (stating "(1) that it 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.") (cleaned up); Diamond v. Dobbin, 132 Hawai`i 9, 35, 319 P.3d 1017, 1043 (2014) (holding that an agency decision "reflect[ed] an abuse of discretion because it arbitrarily and capriciously failed to follow the instructions of the court on remand from its earlier decision.").

To properly interpret and closely adhere to the Court's mandate, the PUC was obligated to examine the Court's opinions in HELCO I and HELCO II "'in conjunction with the opinion of the [Court] and the particular facts, circumstances, and procedural history of the case.'" HELCO II, 149 Hawai`i at 242, 487 P.3d at 711 (quoting SugarHouse HSP Gaming, L.P. v. Pennsylvania Gaming Control Bd., 162 A.3d 353, 371 (Pa. 2017) (bracketing added)). The Court chastised the PUC for the "blinkered approach" previously employed following remand in

HELCO I. See HELCO II, 149 Hawai`i at 241-42, 487 P.3d at 710-11 (citing United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996)).

The Court's direction to the PUC did not amount to an open invitation for the PUC to revisit, reconsider, or revise prior decisions on issues that were outside the limited scope of the appeal in HELCO I or the Court's resulting mandate, repeated in HELCO II. See HELCO II, 149 Hawai`i at 241, 487 P.3d at 710. As the court in Parker – whose opinion the Court cited favorably in HELCO II – stated: "[i]f the opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the [agency] is limited to correcting that error." Parker, 101 F.3d at 528 (bracketing added). "A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal because the remand did not affect it." Id.[13]

2. The PUC Failed to Follow Instructions on Remand

For purposes of this appeal, the Court identified one "discrete, particular error" that the PUC committed in issuing the 2017 D&O, which needed to be corrected on remand; namely, PUC had failed to give explicit consideration to the reduction of GHG emissions associated with the Project. See HELCO I, 145 Hawai`i at 25-26, 445 P.3d at 697-698 ("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)."") (emphasis

[13] Courts from Hawai`i and the Ninth Circuit are in accord. See, e.g., Grinpas v. Kapaa 382, Ltd. Liab. Co., 148 Hawai`i 277, 472 P.3d 575, 2020 Haw. LEXIS 302, *19 (Haw. June 29, 2020) ("[HRAP] Rule 35(e) (2010) provides, the phrase 'vacate and remand' indicates the litigation continues in the court or agency in accordance with the appellate court's instruction.' […] In addition, the law of the case doctrine generally operates to foreclose re-examination of decided issues either on remand or on a subsequent appeal.") (bracketing and ellipses added, emphasis in original); see also Mendez-Gutierrez v. Gonzales, 444 F.3d 1168, 1172 (9th Cir. 2006) ("[W]e have repeatedly held, in both civil and criminal cases, that a district court is limited by this court's remand in situations where the scope of remand is clear.") (citations omitted); Blake C. v. Dep't of Educ., No. 06-00335 JMS/BMK, 2007 U.S. Dist. LEXIS 31363, at *18-19 (D. Haw. Apr. 26, 2007) ("on remand a Hearings Officer's jurisdiction is narrowly limited to the scope of the remanded question.") (citations omitted); Lara v. Rackauckas, No. SA CV 09-01090-VBF, 2014 U.S. Dist. LEXIS 206561, at *20 (C.D. Cal. Nov. 5, 2014) ("Generally in our circuit, 'a party waives a new contention that could have been but was not raised on [a] prior appeal.'") (citations omitted).

in original); HELCO II, 149 Hawai`i at 242, 487 P.3d at 711.[14] In HELCO II, the Court emphasized once again that the purpose of remand was "delimited" and "circumscribed" to address that issue. See HELCO II, 149 Hawai`i at 242, 487 P.3d at 711. The Court also clarified that its opinion in HELCO II did not broaden or alter the scope of the Court's mandate in HELCO I, which the PUC remained obligated to follow. See id.

However, the PUC once again ignored the true intent and meaning of the Court's mandate. Following HELCO I, the PUC erred by making the issue of Hu Honua's Waiver a focus of the remanded proceedings in the 2017 Docket. See id. at 240-42, 487 P.3d at 709-11. Following HELCO II, the PUC similarly erred by making the issue of the Project's "total costs" – which the PUC broadly and improperly defined to include "pricing" – front and center. See Dkt. 171, ROA, Vol. 150 at 27-28; Dkt. 175, ROA, Vol. 154 at 111-117. To be clear, the manner in which the PUC formulated its Statement of Issues following remand in HELCO II was no accident; it was by design: the PUC ultimately denied approval of the Amended PPA, in large part due to the PUC's purported concerns over pricing. See, e.g., Dkt. 218, ROA, Vol. 195, at 125-136, 164-170; Dkt. 222, ROA, Vol. 199, at 541-543. But that issue was off-limits on remand.

Given the Court's opinions and the particular facts, circumstances, and procedural history of the case, the PUC was not empowered to revisit, much less completely reverse, its previously stated position regarding the Project's pricing: that issue had been settled, and it was not raised on appeal. In the 2017 D&O, the PUC examined the Amended PPA's pricing and found it to be reasonable.[15] That finding was not challenged on LOL's appeal of the 2017 D&O, and that finding was left undisturbed by the Court's opinion in HELCO I. See HELCO I, 145 Hawai`i at 17, 445 P.3d at 682 (setting forth limited issues on appeal); Dkt. 218, ROA, Vol. 195, at 175 (Dissent) ("No other issues, including the pricing or costs associated with the Amended

[14] Hu Honua acknowledges that there was an additional error that the Court identified and directed the PUC to correct on remand – ensuring LOL had an opportunity to participate meaningfully in the 2017 Docket. See id. However, there is no dispute that error was addressed and corrected following remand, and it is not germane to this appeal. See generally Dkt. (reflecting absence of any cross-appeal from LOL).

[15] See Dkt. 54, ROA, Vol. 39, at 86, ¶14 ("The purchased power costs and arrangements set forth in the [Amended PPA] appear reasonable, prudent, and in the public interest, and consistent with HRS chapter 269 in general, and HRS §269-27.2(c), in particular.").

PPA, were discussed or adjudicated by the Hawaii Supreme Court."). In other words, the Court never authorized the PUC to engage in a "compulsory 'redo'" of the entire proceeding, cf. HELCO II, 149 Hawai`i at 240-41, 487 P.3d at 709-10, in which the PUC was free to revisit the previously decided pricing issue and deny the Amended PPA on that basis. See also Parker, 101 F.3d at 528 ("A party cannot use the accident of a remand to raise in a second appeal an issue that" could have been, but was not, raised in the first appeal").

Nevertheless, the PUC Majority attempts to justify its decision to revisit the pricing issue by misreading the Court's opinions in HELCO I and HELCO II. See, e.g., Dkt. 218, ROA, Vol. 195, at 128 (stating that the "Court explicitly contemplated that review of the Amended PPA's terms, including its pricing, would be considered on remand, along with the Project's GHG impact.") (citing HELCO II, 149 Hawai`i at 242, 487 P.3d at 711 (quoting HELCO I, 144 Hawai`i at 26, 445 P.3d at 698)). That is false. The PUC Majority's latest tortured and self-serving interpretation of the Court's directions is unreasonable, divorced from context, and part and parcel of the same blinkered approach that led to HELCO II.

As the Court explained in HELCO I, the only "costs" that that the PUC was directed to consider on remand were the potential "hidden and long-term environmental and public health costs of reliance on energy produced at the [Project]," which the Court defined as consisting of "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." HELCO I, 145 Hawai`i at 24, 445 P.3d at 696 (quotations omitted).

Thus, the only "costs" that the Court directed the PUC to consider on remand were those potentially affecting the environment and public health. That makes sense, given the one discrete, particular error actually raised on appeal that the Court identified and ordered the PUC to address and correct: its failure to consider and make findings regarding the impact of potential GHG emissions from the Project. That is all. Tellingly, the PUC Majority is unable locate any specific language in HELCO I or HELCO II expressing concern over the Amended PPA's pricing, or explicitly directing further consideration of any such "costs." See generally Dkt. 218, ROA, Vol. 195, at 31-171. No such language exists. See id. at 175-178 (Dissent).

Even if the PUC Majority was entitled to shoehorn considerations of pricing into the "costs" that the Court referenced in HELCO I and HELCO II, which it was not, then the PUC

Majority had a corresponding obligation to consider Hu Honua's request for preferential rates pursuant to HRS Section 269-27.3.[16] There is no dispute that renewable energy from the Project would be produced "in conjunction with agricultural activities," see id.; therefore, Hu Honua's "bona fide" request should have qualified for preferential rates. But because granting such a request would have undermined its proffered concerns over pricing, the PUC Majority summarily denied Hu Honua's request, citing its "discretion" to ignore its statutory obligation (and the express policy of the State). See Dkt. 218, ROA, Vol. 195, at 154-155. While unfortunate, the PUC's treatment of Hu Honua's request is hardly surprising.

The simple but unfortunate truth is that the PUC Majority determined three years ago that it was going to deny the Amended PPA. That is why, at the outset of each remanded proceeding following HELCO I, the PUC has redrawn the issues to suit its purposes, regardless of the Court's explicit commands and guidance. The first time, the Waiver was the new issue that the PUC used as the means to justify the ends. This time, the pricing was the new issue that the PUC Majority used as the means to justify the ends. Basically, this is the same pig, with a different shade of lipstick.

In short, and as the Dissent properly recognized, the PUC Majority erred when it "considered total costs, including energy and capacity costs, instead of the 'hidden' costs associated with or attributable to GHG emissions," in direct contravention of the Court's mandate. See id. at 177-178. Accordingly, the Orders giving rise to this appeal must be vacated.

B. The PUC Failed to Make Required Findings under HRS Section 269-6(b)

In addition to misinterpreting the Court's mandate, the PUC Majority erred by misinterpreting and misapplying HRS Section 269-(b), as amended by Act 82. As a result, the

[16] HRS Section 269-27.3 provides:

> It is the policy of the State to promote the long-term viability of agriculture by establishing mechanisms that provide for preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities. The public utilities commission shall have the authority to establish preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities.
>
> Upon receipt of a bona fide request for preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities, and proof that the renewable energy is produced in conjunction with agricultural activities, a public utility shall forward the request for preferential rates to the public utilities commission for approval.

PUC Majority failed to do the one thing that the Court actually ordered it to do on remand: "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)." HELCO I, 145 Hawai`i at 25, 445 P.3d at 697 (emphasis in original). In the end, the PUC Majority's findings regarding the Project's GHG emissions, and the steps that the PUC Majority took to reach those findings, only confirm that the PUC Majority did not satisfy its obligations under HRS Section 269-6(b).

1. The PUC Was Obligated to Interpret and Apply HRS Section 269-6(b) Pursuant to Its Plain Language and Purpose

A court or agency, such as the PUC, is obligated to "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Jackson v. Jackson, 84 Hawai`i 319, 332, 933 P.2d 1353, 1366 (App. 1997) (citations and quotation omitted). Statutes must be interpreted and applied according to their unambiguous and plain meaning. See Dir. Dept. Labor & Indus. Relations v. Kiewit Pac. Co., 104 Hawai`i 22, 29, 84 P.3d 530, 537 (App. 2004). An agency's interpretation and application of a statute does not merit deference when it would contravene the purpose and effect of a clear and unambiguous statute.[17]

2. The PUC Failed to Interpret and Apply Section 269-6(b) Pursuant to Plain Language, Legislative Purpose, or Precedent

a. The PUC Majority Did Not Properly Interpret HRS Section 269-6(b)

After the Court issued its opinion in HELCO II, the Legislature passed Act 82, which amended HRS Section 269-6(b). As amended, HRS Section 269-6(b) reads as follows:

> 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 pertaining to electric or gas utility system capital

[17] See id. (judicial deference to agency interpretation of statute unwarranted where agency's interpretation contravenes legislature's manifest purpose); Government Employees Ins. Co. v. Dang, 89 Hawai`i 8, 15, 967 P.2d 1066, 1073 (1998) (appellate courts "have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation").

> improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on:
>
> (1) Price volatility;
> (2) Export of funds for fuel imports;
> (3) Fuel supply reliability risk; and
> (4) Greenhouse gas emissions.
>
> The commission may determine that short-term costs or direct costs of renewable energy generation that are higher than alternatives relying more heavily on fossil fuels are reasonable, considering the impacts resulting from the use of fossil fuels. The public utilities commission shall determine whether such analysis is necessary for proceedings involving water, wastewater, or telecommunications providers on an individual basis.

HRS § 269-6(b).[18]

The amendments contained in Act 82 clarified the manner in which the PUC was obligated to discharge its duties under HRS Section 269-6(b) and in the evidentiary hearing regarding the Project. The lodestar is the State's overarching "need to reduce [its] reliance on fossil fuels through […] renewable energy generation." See id.; see also HRS § 269-92 (setting forth Hawai`i's renewable energy portfolio standards ("RPS")). Consistent with that overarching purpose, which the PUC has an affirmative duty to advance,[19] the remainder of HRS Section 269-6(b) sets forth the steps that the PUC must take in determining whether "costs" of a proposed source of renewable energy are reasonable.

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[18] The prior version of HRS Section 269-6(b) read as follows:

> 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.

HRS § 269-6(b) (Lexis 2020).

[19] The Court has stated that the PUC has an "affirmative duty to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation, as HRS § 269-6(b) requires." In re Gas Co., LLC, 147 Hawai`i 186, 202, 465 P.3d 633, 649 (2020) (emphasis in original; citation and quotation omitted).

First, the PUC must give explicit consideration to the "effect of the State's reliance on fossil fuels on" each of the following four factors: (1) price volatility; (2) export of funds for fuel imports; (3) fuel supply reliability risk; and (4) GHG emissions. See HRS §269-6(b). (Presumably, as to each factor, the effects of State's reliance on fossil fuels would be detrimental, and therefore costly, to the State's environmental and economic interests.) See id.

Second, having given such explicit consideration to the effects of the State's reliance on fossil fuels, the State must then compare those effects to the costs of the renewable energy project at issue, i.e., the Project. That comparison is the proper framework for the reasonableness determination that the PUC is obligated to make under HRS Section 269-6(b). Additionally, the PUC retains discretion to determine that a renewable energy project's costs are reasonable, even if those costs are higher than an alternative more reliant on fossil fuels. See id.

Thus, for purposes of determining "reasonableness of the costs" of energy generation under HRS Section 269-6(b), the requisite – and only permissible – comparison for the PUC to draw is between (a) fossil-fuel fired plants (upon which the State wants to reduce and eventually eliminate its reliance) on one hand and (b) renewable energy projects (upon which the State intends to increase its reliance) on the other. Any discretion that the PUC has in making that comparison, and its ultimate determination, should be guided by the State's goal to move away from fossil fuel dependence and toward a robust and diverse renewable energy portfolio. See id. There is no indication in the statute that allows for an alternative mode of analysis, or comparison of renewable energy projects against other renewable energy projects. See id.

On multiple occasions throughout the proceedings following remand in HELCO II, Hu Honua attempted to ensure that the PUC would interpret and apply HRS Section 269-6(b) in accordance with its language and purpose.[20] Each time, the PUC refused, complaining that Hu Honua's proffered interpretation would somehow limit the scope of the PUC's review and duties in a manner that the Legislature did not intend.[21] However, the PUC never provided any substantive analysis – based on the text of the statute, the legislative history, or interpretive

[20] See, e.g., Dkt. 173, ROA, Vol. 152, at 21-68; Dkt. 176, ROA, Vol. 155, at 15-30; Dkt. 219, ROA, Vol. 196, at 16-17, 20, 65-69, 101-114; Dkt. 222, ROA, Vol. 199, at 456-464.

[21] See, e.g., Dkt. 175, ROA, Vol. 154 at 81, 102-111; Dkt. 176, ROA, Vol. 155, at 61-67; Dkt. 218, ROA, Vol. 195, at 125-129, 164-171; Dkt. 222, ROA, Vol. 199, at 541-543, 565-567.

caselaw – in support of its position. See id. That is because no such support exists for the PUC's position.

To the contrary, Hu Honua's interpretation of HRS Section 269-6(b) is not only consistent with the statute's plain language, it is also entirely consistent with relevant statutory history and interpretative caselaw (upon which the PUC purportedly relied in rejecting Hu Honua's proffered interpretation).[22] In fact, Hu Honua's interpretation is entirely consistent with the PUC's own prior interpretation of HRS Section 269-6(b)'s text and purpose. See Appendix C, PUC Answering Brief, filed March 28, 2018 in HELCO I, at 27-29; see also Appendix D, Hu Honua Answering Brief, filed February 26, 2018 in HELCO I, at 33-37. Given the PUC's prior position, stated on the record, see Appendix C, at 27-29, coupled with the PUC's repeated assertion in these proceedings that Act 82 did not materially affect HRS Section 269-6(b) or how it should be interpreted, see, e.g., Dkt. 209, ROA, Vol. 186, at 2, 6, the PUC's sudden about-face is difficult – if not impossible – to reconcile.

b. The PUC Majority Did Not Properly Apply HRS Section 269-6(b)

The PUC Majority's mistaken interpretation of HRS Section 269-6(b) led directly to its misapplication, and, in turn, to denial of the Amended PPA. The manner in which the PUC Majority applied HRS Section 269-6(b) bore little, if any, resemblance to the language or purpose of the statute itself, or the manner in which the PUC has applied HRS Section 269-6(b) to renewable energy projects in the past.

The PUC Majority never articulated an applicable standard of review, and it never made any explicit determinations, regarding the four factors listed in HRS Section 269-6(b)(1)-(4), as the statute requires. See generally Dkt. 218, ROA, Vol. 195, 31-171. That failure alone

[22] See, e.g., MECO, 141 Hawai`i at 261-63, 408 P.3d at 13-15 (reviewing legislative history of HRS Section 269-6(b) and concluding, among other things, that "the legislature has repeatedly communicated its intent that the [PUC] is to reduce the State's dependence on fossil fuels and utilize renewable energy sources," which is "manifest" in "the legislative history of [HRS] Chapter 269, which unequivocally demonstrates an established State policy of prioritizing the utilization of renewable energy sources to reduce pollution in addition to securing the potential economic benefits and enhanced reliability of the State's energy supply"; "a primary purpose of the amended law 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[,] […] potentially harmful climate change due to the release of harmful greenhouse gases," along with greater oil and gas price volatility) (bracketing, ellipses and emphasis added; quotations and citations omitted).

should be sufficient to find that the PUC Majority violated the Court's specific mandate and HRS Section 269-6(b) requirements. There is no valid excuse for the PUC Majority's failures on this point. As Hu Honua noted in its briefing seeking reconsideration of the Order Denying Amended PPA, the PUC had conducted the requisite analysis of all four factors in dockets involving other projects. See, e.g., Dkt. 219, ROA, Vol. 196, at 93-94; id. at n.307 (citing PUC decisions in other dockets). Therefore, the PUC appears to understand that the analysis is required, and the PUC appears capable of conducting that analysis. However, the PUC never attempted to explain its failure to perform the requisite analysis of the Project under HRS Section 269-6(b) and the Court's mandate. See generally Dkt. 218, ROA, Vol. 195, 31-171; see also Dkt. 222, ROA, Vol. 199, at 532-576.

If the PUC had performed the proper analysis under HRS Section 269-6(b), and made explicit findings regarding each of the four listed factors in light of the State's need to reduce its reliance on fossil fuels, the PUC Majority would have been compelled to determine that the Project's costs were reasonable, by any legitimate means of comparison. See Dkt. 205, ROA, Vol. 182, at 12-27; Dkt. 214, ROA, Vol. 191,12-16, 28-36.

As it did following remand in HELCO I, when it erroneously purported to "deny" the Waiver, the PUC Majority relied heavily upon comparing the Project's "costs" to those of other renewable energy projects, especially the PUC Majority's favored solar projects, rather than to those of fossil-fueled energy projects. See, e.g., Dkt. 218, ROA, Vol. 218, at 2-3; Dkt. 222, ROA, Vol. 199, at 2-3. Of course, the mode of comparison that the PUC Majority employed to deny the Amended PPA is not contemplated or allowed by the plain language and purpose of HRS Section 269-6(b).

While the PUC Majority's refusal to tie its analysis to the plain language or purpose of HRS Section 269-6(b) is, by itself, reversible error, the PUC Majority's refusal was more than just that. By freeing itself from the constraints of the Court's mandate, its obligations under HRS Section 269-6(b), or any objective standard, the PUC Majority freed "its subjective eyes" to go searching for reasons to justify denying the Amended PPA. Cf. Dkt. 218, ROA, Vol. 195, at 185 (Dissent). And that is precisely what the PUC Majority did.

c. The PUC Majority Did Not Satisfy Its Obligations under the Court's Mandate or HRS Section 269-6(b)

Again, the Court's specific instructions to the PUC on remand were 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 determine whether the PUC satisfied its obligations under HRS § 269-6(b)." HELCO I, 145 Hawai`i at 25, 445 P.3d at 697 (emphasis in original). In its rush to deny the Amended PPA, the PUC Majority failed to follow those instructions. Therefore, on the question of "whether the PUC satisfied its obligations under HRS [Section] 269-6(b)," the answer is clearly "no." Accordingly, the PUC's Orders giving rise to this appeal must be vacated.

C. The PUC Majority Erred in its Consideration and Adjudication of the Evidence

Notwithstanding the PUC's errors (or efforts) in misinterpreting and misapplying the Court's mandate or HRS Section 269-6(b), Hu Honua still carried its burden to show that the Project would result in a significant reduction of GHG emissions over the course of the Amended PPA. As the Dissent noted:

> Based on a review of the entire record, including the evidentiary hearing held in this matter in March 2022 ('Evidentiary Hearing'), the evidence clearly establishes that the Applicants [HELCO and Hu Honua] have met their burden in showing that the Project will result in significant reduction in GHG emissions over the course of the 30-year Amended PPA term, and consequently, that the costs of the Amended PPA are reasonable in light of the potential for GHG emissions.

Dkt. 218, ROA, Vol. 195, at 173 (emphasis and bracketing added).

That showing would have been enough for an unbiased tribunal objectively reviewing the evidence (it certainly was for the Dissent); however, the PUC Majority concluded that Hu Honua's evidentiary showing fell short. In its attempt to lend support to that erroneous conclusion, the PUC Majority: raised the applicable evidentiary standard; manipulated, misconstrued, or misrepresented evidence favorable to Hu Honua; and, when that was not enough, the PUC Majority created and relied upon its own self-created evidence and expert opinion, which it did not allow Hu Honua to test or rebut. The PUC Majority's approach to Hu Honua's evidence was that of an adversary, rather than that of an objective tribunal properly administering its duties and adjudicating a contested case under HRS Chapter 269.

1. The PUC Was Obligated to Review Evidence in the Record and Determine Whether Hu Honua Satisfied Its Evidentiary Burden Pursuant to HRS Section 91-10(5)

HRS Section 91-10(5) dictates the burden of proof in contested case hearings and provides that "the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence." (Emphasis added). The Court has endorsed commentary describing that standard as follows: "[t]he preponderance of evidence standard directs the factfinder to decide whether the existence of the contested facts is more probable than its nonexistence […] [T]o prevail, a plaintiff need only offer evidence sufficient to tip the scale slightly in his or her favor, and defendant can succeed by merely keeping the scale evenly balanced." Kekona v. Abastillas, 113 Hawai`i 174, 180, 150 P.3d 823, 829 (2006).

2. The PUC Held Hu Honua to Higher Evidentiary Burden and Improperly Construed and Created Evidence to Reach a Predetermined Result

a. The PUC Majority Imposed a Clear and Convincing Standard

As noted above, the quality and quantum of evidence presented led the Dissent to break from the PUC Majority and declare that Hu Honua had met and exceeded the applicable burden of proof. See Dkt. 218, ROA, Vol. 195, at 173 (Dissent). However, with the scale tipped decidedly in Hu Honua's favor, the PUC Majority simply recalibrated the scale and raised the evidentiary standard.

The Order Denying Amended PPA is rife with instances in which the PUC Majority (erroneously) claimed that a particular fact was "unclear,"[23] engaged in rank speculation regarding future events (and drew unreasonable and negative inferences from that speculation),[24] and (based largely on its own speculation and unreasonable inferences) declared

[23] See, e.g., Dkt. 218, ROA, Vol. 195, at 86 ("it is unclear…"), 87 ("it is unclear…"), 93 ("While the exact impact […] is unclear…"), 95 ("it is unclear…"), 96 ("it is unclear…"), 108 ("It is unclear…"), 118-119 ("it is unclear…"), 119 ("it is unclear…"), ("it is unclear…"), 131 ("It is unclear…"), 150 ("it is unclear…"), 152 ("it is unclear…"), 153 ("it is unclear…"), id. ("it is unclear…").

[24] See generally id.; see also id. at 96 (speculating regarding lease agreements), 101-102 (speculating on potential impact of a one-percent deviation in certain inputs in the ERM Analysis), 104 (speculating about various "uncertainties" and their potential impact on GHG emissions), 104-105 (speculating on the impact that "expected growth of other renewable projects on Hawai`i Island" over the next 30 years might have "on the avoided lifecycle emissions").

itself "not convinced" that the Amended PPA should be approved.[25] The PUC Majority's discussion of the evidence, and the findings and conclusions it ultimately reached based on that discussion, bear all the hallmarks of a "clear and convincing" evidentiary standard, "the highest civil standard of proof" recognized under Hawai`i law, Kekona v. Bornemann, 135 Hawai`i 254, 263, 349 P.3d 361, 370 (2015), substantially "more exacting"[26] than the standard that the PUC Majority was obligated to apply and Hu Honua was required to (and did) satisfy. Cf. Kekona, 113 Hawai`i at 180, 150 P.3d at 829. Under HRS Section 91-10(5), approval of the Amended PPA was not some presumptively "extraordinary remedy," akin to a punitive damages award, Kekona, 135 Hawai`i at 263, 349 P.3d at 370, which would warrant imposition of a clear and convincing standard; the PUC Majority just treated it that way.

b. The PUC Majority Misconstrued, Misrepresented, or Otherwise Dismissed What the Evidence Showed

Nevertheless, the PUC Majority insisted that it did not "subject Hu Honua's Project to unreasonably rigorous scrutiny, but merely engaged in basic inquiries" regarding (what was supposed to be) the central (and sole) issue for review and adjudication on remand: whether and how the Project would affect GHG emissions over the term of the Amended PPA. See, e.g., Dkt. 218, ROA, Vol. 195, at 545. However, a review of the evidentiary record reveals otherwise. Throughout its Order Denying Amended PPA, the PUC Majority repeatedly went out of its way to undermine and impugn the evidence which, fairly viewed, demonstrated that the Project would result in a significant reduction of GHG emissions. See, e.g., Dkt. 219, ROA, Vol.

[25] See, e.g., Dkt. 218, ROA, Vol. 195, at 35 ("the [PUC Majority] is not convinced that the Project will reduce GHG emissions…."), 123 ("the [PUC Majority] is not convinced that Hu Honua has adequately demonstrated a reasonable plan for purchasing carbon credits…."), 156 ("The [PUC Majority] is not convinced that the Project will result in long-term environmental benefits for Hawai`i Island.").

[26] "[T]he clear and convincing evidence standard has been recognized as a more exacting standard that has been applied to a wide variety of civil cases where for policy reasons the courts require a higher than ordinary degree of certitude before making factual findings." Iddings v. Mee-Lee, 82 Hawai`i 1, 13, 919 P.2d 263, 275 (1996) (cleaned up). Clear and convincing evidence "is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable." Id.

196, at 15-22, 27-60, 63-98; Dkt. 222, ROA, Vol. 199, at 458-464; Dkt. 222, ROA, Vol. 199, at 520-522, 525-526. That is not adjudication, that is advocacy.

Presumably, the PUC Majority felt compelled to engage in such advocacy because none of the parties or participants (who opposed the Project) provided their own competent evidence or expert analysis rebutting the evidence and expert analysis that Hu Honua (and HELCO) provided, which demonstrated that the Project would result in significantly reduced GHG emissions. See Dkt. 214, ROA, Vol. 191, at 20-24; Dkt. 219, ROA, Vol. 196, at 15-16; Dkt. 218, ROA, Vol. 195, at 209-214; see also Dkt. 218, ROA, Vol. 195, at 179-187 (Dissent) (noting, among other things, that "[n]o other Party or Participant has offered an independent analysis to substitute or rebut Hu Honua and HELCO's respective 2021 GHG analyses or proffered any substantial evidence that undermines the ultimate conclusions of their analyses indicating that the Project will result in a significant reduction of GHG emissions. Additionally, there is no material evidence in the record that contradicts the Applicants' GHG Analyses, suggesting that HELCO and Hu Honua's assumptions and methodologies are indeed reasonable."). (LOL's omission is perhaps the most remarkable, given that LOL was the only party to appeal from the 2017 D&O, on the basis that LOL was entitled to an opportunity to challenge the Project's GHG emissions. See generally id.)

c. The PUC Majority Formulated and Imposed a New Methodology for Evaluating the Project's GHG Emissions

Going a step further, the PUC Majority conjured a new standard, or methodology, for evaluating GHG emissions that it employed to deny the Amended PPA. See Dkt. 218, ROA, Vol. 195, at 206, 209-214; Dkt. 219, ROA, Vol. 196, at 47-48, 53-54, 64, 110-112; Dkt. 222, ROA, Vol. 199, at 517-522; Dkt. 222, ROA, Vol. 199, at 458-461. Previously, the PUC's methodology consisted of evaluating the subject project's net GHG emissions over the project's term. See generally id. In fact, that is the same methodology that the PUC previously indicated it would employ in the 2017 Docket. See, e.g., Dkt. 55, ROA, Vol. 40, at 36 (directing the parties to "estimate Net Lifecyle Emissions Impact" and making no reference to "cumulative" means of analysis); see also Dkt. 171, ROA, Vol. 150, at 38 (referencing parties' prior submissions regarding net lifecycle GHG emissions, without reference to "cumulative" basis).

However, once Hu Honua put forth evidence which would have satisfied the established standard, the PUC Majority switched gears, and implemented an entirely new

methodology. Pursuant to that new methodology, applied for the first time to the Project, the PUC Majority evaluated Project GHG emissions on a cumulative basis, which – predictably, but wrongfully – the PUC Majority used as a basis to deny the Amended PPA. See Dkt. 218, ROA, Vol. 195, at 206, 209-214; Dkt. 219, ROA, Vol. 196, at 47-48, 53-54, 64, 110-112; Dkt. 222, ROA, Vol. 199, at 517-522; Dkt. 222, ROA, Vol. 199, at 458-461.

Still not done, the PUC Majority also used Hu Honua's unprecedented carbon-negative commitment against it. Although being carbon-negative was not a required condition to Project approval, the PUC Majority nevertheless relied upon its own skepticism and speculation regarding that commitment to deny approval of the Amended PPA.[27] In a twist of the knife, the PUC Majority turned what should have been a reason to approve the Amended PPA into a reason to deny it.

The upshot is that the PUC Majority not only held the Project to a new, previously unannounced standard regarding GHG emissions; the PUC Majority also, as an additional condition of Project approval, required Hu Honua to demonstrate (by clear and convincing evidence) that the Project would be carbon-negative.[28] Neither of the new standards that the PUC Majority employed to deny approval of the Amended PPA – purportedly based on the PUC Majority's concerns over potential Project GHG emissions – has any basis in law, fact, or precedent. See id.

d. The PUC Created and Relied upon Its Own "Evidence" and "Expert" Opinion Regarding GHG Emissions

In addition to imposing the highest civil standard of proof recognized under Hawai`i law, and skewing the evidence and the means it used to evaluate that evidence, the PUC Majority improperly created and relied upon its own evidence and expert opinion to support its conclusion that Hu Honua failed to satisfy its burden regarding the Project's GHG emissions and their impacts. See, e.g., Dkt. 219, ROA, Vol. 196, at 30, 33, 38-54, 64, 97-98, 109, 112-114, 120;

[27] See id.; see also Dkt. 218, ROA, Vol. 195, at 210 (noting that the Order Denying Amended PPA "focuses so much attention on the Project's carbon negativity and comparatively little on the significant GHG reductions that will result when considering the avoided GHG emissions, represents a wholesale change in approach by this Commission.")

[28] See Dkt. 218, ROA, Vol. 195, at 206, 209-214; Dkt. 219, ROA, Vol. 196, at 47-48, 53-54, 64, 110-112; Dkt. 222, ROA, Vol. 199, at 517-522; Dkt. 222, ROA, Vol. 199, at 458-461.

Dkt. 222, ROA, Vol. 199, at 448, 466-471, 484, 490, 506-507; Dkt. 222, ROA, Vol. 199, at 518-522.

The PUC Majority's creation of and reliance upon its "Table 4" to deny the Amended PPA is a prime example. See Dkt. 219, ROA, Vol. 196, at 47-54; Dkt. 218, ROA, Vol. 195, at 210-214; Dkt. 222, ROA, Vol. 199, at 468-471; Dkt. 222, ROA, Vol. 199, at 518-522. The PUC Majority's Table 4 includes 178 new values that the PUC Majority created after performing its own "expert" analysis and calculations, which, in turn, are based on the PUC Majority's unwarranted speculation and assumptions, rather than any evidence actually in the record. See id. If a party had come forward with such "expert" opinion regarding the Project's GHG emissions, it would have been subject to exclusion, or, at best, little to no weight, given (a) its untimeliness, (b) the PUC Majority's failure to provide a properly supported and detailed explanation of how the PUC Majority reached its ultimate conclusions, and (c) the evident flaws that inhered in both the PUC Majority's analysis and its conclusions. See id. In seeking reconsideration of the Order Denying the Amended PPA, Hu Honua and HELCO pointed out procedural and substantive errors in the PUC Majority's reliance upon its own self-created evidence in Table 4. See id. However, the PUC Majority was not interested: it denied Hu Honua's request for a further hearing to address the creation and reliance upon the PUC Majority's self-created "evidence" and "expert" opinion, and the procedural concerns that come with such action. See id.; see also Dkt. 222, ROA, Vol. 199, at 539, 575.[29]

If anything, the PUC Majority's need to create and rely upon its own evidence and expert opinion to support its decision only proved that, on the record properly before the PUC, Hu Honua had fully satisfied its evidentiary burden. Otherwise, the PUC Majority would not have needed to go to such lengths. For an agency, "fact-finding" should not mean "finding" – and reshaping – "facts" to fit a predetermined narrative or result, but that is what happened here. See Dkt. 218, ROA, Vol. 195, at 185 (Dissent) ("there will never be an analysis that would be deemed sufficient in the Majority's subjective eyes, nor will there be a set of conditions or outcome upon which the Majority would approve the Project."). The Orders giving rise to this

[29] Of course, even if the PUC had granted Hu Honua's request for a hearing on its Motion for Reconsideration, Hu Honua could not have cross-examined the members of the PUC Majority, which only highlights the inherent unfairness of those self-qualified "expert witnesses" bolstering their majority opinion with their own "expert" opinion.

appeal, and the erroneous findings and conclusions reached in those Orders, are the product of the PUC Majority's arbitrary and capricious abuses of discretion. [30] Accordingly, the Orders must be vacated.

D. The PUC Violated Statutory and Constitutional Rights to Due Process and Equal Protection under the Law

The PUC Majority's formulation and imposition of new, more stringent standards than those set forth in HRS Chapter 91 and PUC precedent, the injection of issues and evidence that were outside the scope of remand and the record, and its skewed review and treatment of the evidence properly in the record violated HRS Chapter 91 and Hu Honua's rights to due process and equal protection.

1. The Contested Case Hearing Implicated Hu Honua's Statutory and Constitutional Rights

HRS Chapter 91 applied to the proceedings in the 2017 Docket. See HRS § 269-15.51(a). HRS Chapter 91 codifies fundamental elements of constitutional due process and equal protection guaranteed to parties, such as Hu Honua, appearing before the PUC.[31] Pursuant to HRS Sections 91-9(g), 91-10(3)-(5), and fundamental concepts of due process, the PUC Majority

[30] See, e.g., In re Water Use Permit Applications, 105 Hawai`i at 11, 93 P.3d at 653 (agency's findings based on unwarranted "assumptions" of fact were "arbitrary and speculative" and erroneous); Honda v. Bd. of Trs. of Emples. Ret. Sys., 108 Hawai`i 212, 216-17, 118 P.3d 1155, 1159-60 (2005) (agency committed reversible error by entering findings which lacked substantial evidentiary support and which also mischaracterized evidence actually in the record); Sifagaloa v. Bd. of Trs. of Employees' Ret. Sys., 74 Haw. 181, 194-96, 840 P.2d 367, 369 (1992) (where findings of fact were contrary to "uncontroverted reliable, probative and substantive testimonial evidence," and sole expert opinion in the record, findings of fact were clearly erroneous; matter reversed and remanded with directions to enter judgment in favor of claimant).

[31] See Bush v. Hawaiian Homes Comm'n, 76 Hawai`i 128, 133, 870 P.2d 1272, 1277 (1994) (noting that HRS Chapter 91 was adopted "to provide uniform administrative procedures for all state and county boards, commissions, departments or offices which would encompass procedure of rule-making and adjudication of contested cases.") (quoting Hse. Stand. Comm. Rep. No. 8, in 1961 House Journal, at 653); see also Alejado v. City & Cty. of Honolulu, 89 Hawai`i 221, 230, 971 P.2d 310, 319 (App. 1998) ("As an 'agency' under HRS Chapter 91, the Commission must follow the procedures set forth in [the Hawai`i Administrative Procedures Act ("HAPA")] in order to satisfy Appellant's due process rights.") (bracketing added); Aguiar v. Haw. Hous. Auth., 55 Haw. 478, 498-99, 522 P.2d 1255, 1268 (1974) (HAPA "procedures embody the specific elements of notice and an opportunity to be heard which lie at the heart of all due process guarantees.").

was required to ensure that Hu Honua had sufficient notice and a fair and meaningful opportunity to participate in the contested case hearing, in which the fate of Hu Honua's half-billion-dollar Project was at stake.[32]

2. The PUC Violated Hu Honua's Statutory and Constitutional Rights to Due Process

"A fair trial in a fair tribunal is a basic requirement of due process." Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai`i 376, 380, 363 P.3d 224, 228 (2015) (quotation and citations omitted); Clements v. Airport Auth., 69 F.3d 321, 333 (9th Cir. 1995) ("**A biased proceeding is not a procedurally adequate one.** At a minimum, Due Process requires a hearing before an impartial tribunal.") (emphasis added). Over the past three years, the PUC has demonstrated little regard – if any – for the significance of Hu Honua's half-billion-dollar investment or Hu Honua's attendant statutory and constitutional rights. The PUC Majority's most recent performance was more of the same. A few examples follow.

As set forth above, the PUC Majority formulated new, previously unannounced, and more exacting standards than those specified in HRS Section 91-10(5) and established through the PUC's past evaluation of GHG emissions. See § IV.C., supra. In violation of HRS Chapter 91 and Hu Honua's due process rights, the PUC Majority then relied upon and applied

[32] "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." HELCO I, 145 Hawai`i at 25, 445 P.3d at 697. Pursuant to HRS Section 91-9(g), "[n]o matters outside the record shall be considered by the agency in making its decision." Additionally, pursuant to HRS Section 91-10(3)-(5):

> (3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence;
>
> (4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed; and
>
> (5) […] The degree or quantum of proof shall be a preponderance of the evidence.

(Ellipses and bracketing added).

those newly announced standards to justify its denial of the Amended PPA,[33] without affording Hu Honua a meaningful opportunity to respond.

The PUC Majority also violated Hu Honua's rights by creating, introducing, and relying upon previously undisclosed "evidence" and "expert" opinion to deny the Amended PPA. First, neither the "facts" nor the "expert" opinion regarding the Project's GHG emissions, upon which the PUC Majority relied, were properly made part of the record at any time prior to or during the course of the evidentiary hearing. See HRS §91-9(g); see also § IV.C., supra. Moreover, after the PUC Majority wrongfully snuck that "evidence" and "expert" opinion in through the backdoor, Hu Honua requested a hearing and meaningful opportunity to address that "evidence" and "expert" opinion; however, the PUC Majority compounded its error by denying Hu Honua's request, in violation of HRS Section 91-10(3).[34]

Additionally, the "facts" that the PUC Majority created and treated as probative "evidence" supporting denial of the Amended PPA did not qualify for judicial notice pursuant to HRS Section 91-10(4).[35] See § IV.C., supra. Even if those so-called "facts" did so qualify, the

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[33] Cf. Singh v. INS, 213 F.3d 1050, 1054 (9th Cir. 2000) (announcement and application of new evidentiary standard was due process violation); In re Hawaiian Elec. Co., 5 Haw. App. 445, 448, 698 P.2d 304, 307-08 (1985) (PUC's denial of requested adjustment, in departure from past practice in prior case, denied HECO meaningful opportunity to be heard); In re Hawaiian Elec. Co., 81 Hawai'i 459, 468, 918 P.2d 561, 570 (1996) ("'[A]djudicated cases may and do . . . serve as vehicles for the formation of agency policies, which are applied and announced therein,' and such cases 'generally provide a guide to action that the agency may be expected to take in future cases.'") (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969)).

[34] See Town v. Land Use Comm'n, 55 Haw. 538, 549, 524 P.2d 84, 92 (1974) (Land Use Commission's receipt of field report from commissioner in contested case hearing, without affording proper notice or opportunity to contest reported "facts," violated HAPA and warranted reversal).

[35] "A fact is a proper subject for judicial notice if it is common knowledge or is easily verifiable." In re Estate of Herbert, 90 Hawai'i 443, 466, 979 P.2d 39, 62 (1999) (citing Almeida v. Correa, 51 Haw. 594, 465 P.2d 564 (1970)); see also HRE Rule 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). Examples include the fact that a pregnancy generally lasts approximately nine months, Almeida, 51 Haw. at 605, 465 P.2d at 571-72, or that Waianae is located on the west side of Oahu. See State v. Holbron, 78 Hawai`i 422, 428, 895 P.2d 173, 178-79 (App. 1995).

PUC Majority failed to provide Hu Honua with proper advance notice or an opportunity to be heard, as required by HRS Sections 91-10(3) and (4).

Likewise, the PUC Majority's "expert" opinion regarding the Project's potential GHG emissions was not properly disclosed or made part of the record in the contested case hearing. Moreover, the PUC Majority's undisclosed "expert" opinion was not based upon any "generally recognized technical or scientific facts," much less any such "facts" within the PUC Majority's "specialized knowledge." See id. Rather, the analysis and conclusions set forth in the PUC Majority's "expert" opinion were deeply flawed, and the PUC Majority cited no facts, much less "generally recognized technical or scientific facts" within the PUC Majority's "specialized knowledge," that legitimately challenged or called into question the opinions offered by ERM or Ramboll, two of the most well-recognized and respected experts in the field. See § IV.C., supra.

But even if its own "expert" opinion had such a foundation (which it did not), the PUC Majority was obligated to provide the parties with advance notice of its intentions, as well as the "material" that purportedly supported the PUC Majority's "expert" opinion, either "before or during" the evidentiary hearing. See HRS § 91-10(4). The PUC Majority provided no such notice; instead, its Order Denying Amended PPA was the first time that the PUC Majority deigned to share its "expert" opinion with the parties. Making matters worse, the PUC denied Hu Honua's request for an additional hearing and opportunity to address the PUC Majority's previously undisclosed, flawed, and baseless "expert" opinion in a meaningful manner.

3. The PUC Violated Hu Honua's Right to Equal Protection

One of the purposes of HRS Chapter 91 is to ensure that agencies adjudicate contested cases in a fair and uniform manner;[36] similarly, the equal protection clauses of the Hawai`i and U.S. constitutions "mandate[] that all persons similarly situated shall be treated alike, both in the privileges conferred and in the liabilities imposed."[37] In violation of those

[36] See Bush, 76 Hawai`i at 133, 870 P.2d at 1277 (HRS Chapter 91 was adopted "to provide uniform administrative procedures for all state and county boards, commissions, departments or offices which would encompass procedure of rule-making and adjudication of contested cases.").

[37] DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC, 134 Hawai`i 187, 219, 339 P.3d 685, 717 (2014).

principles and constitutional mandate, the PUC Majority singled out Hu Honua and its Project for unfair and disparate treatment, giving rise to a "class of one" equal protection claim.[38]

As detailed above, Hu Honua is not the first or only applicant to seek the PUC's approval of a renewable energy project; however, Hu Honua is the first and only applicant to be subjected to a clear and convincing evidentiary standard, and Hu Honua is the first and only applicant whose Project was subjected to the PUC Majority's newly created methodology for evaluating GHG emissions on a "cumulative" basis, rather than netting out emissions over the Project's term. See § IV.C., supra. The PUC Majority created and applied these unique, and more stringent, standards of review to support its predetermined (but unsupported) decision to deny the Amended PPA. Therefore, the PUC Majority lacked any rational basis for singling out and subjecting Hu Honua to such unprecedented and heightened standards of review. By doing so, the PUC Majority not only deprived the State of a renewable energy project that would help the State achieve critical goals and provide the benefits that HRS Chapter 269 is supposed to foster, it also exposed the State to substantial liability.

In summary, each and every one of the PUC Majority's violations of HRS Chapter 91 and Hu Honua's constitutional rights was unlawful, unfair, and deeply prejudicial. Rather than expose the State to substantial liability, the better course is to vacate the Orders giving rise to this appeal.

E. The PUC Ignored or Minimized the Wide-Ranging Benefits the Project Will Provide

In addition to depriving Hu Honua of its rights to due process and equal protection, the PUC Majority also erroneously divested State and Island of Hawai`i of benefits that the Project is ready to provide to the environment, economy, and community as a whole – the pursuit of which is strongly encouraged, if not mandated, by HRS Chapter 269.

The PUC previously recognized that those and other benefits would serve the public interest, and therefore provided additional support for approval of the Amended PPA. See, e.g., Dkt. 54, ROA, Vol. 39, at 56-57, 85-86 (noting that Project would, among other things,

[38] Bridge Aina Lea, 134 Hawai`i at 220, 339 P.3d at 718 ("an equal protection claim may be brought by a 'class of one,' 'where the plaintiff alleges that [he/she] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'") (quoting Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)).

"increase the amount of as-available, intermittent renewable energy resources," "add firm, dispatchable, renewable generation in the near term," "provide[] diversification of HELCO's generation portfolio" in multiple ways, and "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 . . . .").

The observations that the PUC made back in 2017 remain just as true today; however, in its Order Denying the Amended PPA, the PUC Majority decided that those same benefits no longer mattered or were of only minimal importance, and unworthy of discussion or consideration. See generally Dkt. 218, ROA, Vol. 195, at 34-171. By looking only toward its desired result – denial of the Amended PPA, the PUC Majority's "subjective eyes" led it astray once more, to the detriment of Hu Honua and the public interest. In the words of the Dissent, the PUC Majority's "decision not only prejudices Hu Honua, but also deprives the community of the benefits that could be realized from the Project, which would provide for the replacement of existing firm dispatchable fossil fuel generation and grid services with Hu Honua's firm dispatchable renewable energy and grid services." Dkt. 218, ROA, Vol. 195, at 192. The Orders must be reversed.

F. Remand to the PUC with Directions to Approve the Amended PPA Is Appropriate

Ordinarily, the foregoing errors would lead to vacatur and remand, with another set of instructions to the PUC directing further proceedings in the 2017 Docket. See generally HELCO I and HELCO II. However, the circumstances here are far from ordinary: over the past five years, the Court has vacated and remanded twice, with the same set of clear instructions to address and make sufficient findings regarding one single issue. Twice, the PUC has failed to follow the Court's instructions, if not outright defied them, in a manner that raises serious questions about the PUC's willingness or ability to evaluate and adjudicate this matter fairly, or in accordance with the Court's mandate and applicable law.[39] The record on the single remaining issue in the 2017 Docket is fully developed, and leads to one inescapable conclusion: Hu Honua overwhelmingly satisfied its burden to show that the Project would significantly reduce GHG

[39] See Dkt. 218, ROA, Vol. 195, at 185 (Dissent) (concluding that "there will never be an analysis that would be deemed sufficient in the Majority's subjective eyes, nor will there be a set of conditions or outcome upon which the Majority would approve the Project.").

emissions; therefore, pursuant to the Court's mandate and HRS Section 269-6(b), the Amended PPA must be approved.[40]

Under these circumstances, there is no reason for further delay, or to provide the PUC with the same directions for a third time, in hopes that the PUC might finally get it right and bring this "never ending loop" to an end.[41] Given its mishandling of the 2017 Docket over the past three years, the PUC does not deserve the benefit of any doubt or a third opportunity. Accordingly, Hu Honua respectfully requests that the Court vacate the Orders and remand to the PUC with express direction to reopen the 2017 Docket and approve the Amended PPA.

V. CONCLUSION

Based on the foregoing, Hu Honua respectfully requests that this Court: vacate Decision and Order No. 38395, filed May 23, 2022; vacate Decision and Order No. Order No.

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[40] See Dkt. 218, ROA, Vol. 195, at 173 ("Based on a review of the entire record, including the evidentiary hearing held in this matter in March 2022 ('Evidentiary Hearing'), the evidence clearly establishes that the Applicants [HELCO and Hu Honua] have met their burden in showing that the Project will result in significant reduction in GHG emissions over the course of the 30-year Amended PPA term, and consequently, that the costs of the Amended PPA are reasonable in light of the potential for GHG emissions.") (emphasis and bracketing added).

[41] Cf. Santiago v. Tanaka, 137 Hawai`i 137, 160, 366 P.3d 612, 635 (2015) (where record was sufficiently complete and demonstrated trial court's clear error, vacating judgment in favor of defendant and remanding with instructions to enter judgment in favor of plaintiffs); Sifagaloa, 74 Haw. at 194-96, 840 P.2d at 369 (reviewing record; reversing and remanding with instructions to enter judgment for claimant); Dobbin, 132 Hawai`i 9, 319 P.3d 1017 (where agency failed to follow court's instructions after first remand, remanding again with modified – and specifically limiting – instructions on second remand); see also McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316, 319 (D.D.C. 1995) (agencies should not get a "second bite at the apple," or the opportunity to repackage prior decisions on remand, when the record is sufficiently developed for appellate court to decide the matter on its own; otherwise, "administrative law would be a never ending loop from which aggrieved parties would never receive justice."); Sierra Club v. United States EPA, 346 F.3d 955 (9th Cir. 2003) (remanding with instructions to designate an area with a specific classification where the record was "fully developed, and the conclusions that must follow from it are clear."); Sakonnet Rogers, Inc. v. Coastal Resources Management Council, 536 A.2d 893 (R.I. 1988) (remanding with instructions to enter judgment in favor of a petitioner based on review of evidentiary record and agency's failure to base its decision on applicable statutory criteria); Greene v. Babbitt, 943 F. Supp. 1278 (W.D. Wash. 1996) ("[W]hen agency delays or violations of procedural requirements are so extreme that the court has no confidence in the agency's ability to decide the matter expeditiously and fairly, it is not obligated not remand.").

38443, filed June 24, 2022; and remand to the PUC with directions to approve the Amended PPA.

DATED: Honolulu, Hawai`i, October 5, 2022.

/s/ Bruce D. Voss
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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.	)	

DECISION AND ORDER NO. 38395

AND

DISSENTING OPINION OF LEODOLOFF R. ASUNCION, JR., COMMISSIONER

APPENDIX A

TABLE OF CONTENTS

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.	)	DECISION AND ORDER NO. 38395

DECISION AND ORDER

By this Decision and Order,[1] the Public Utilities Commission ("Commission") denies HELCO's Letter Request, filed May 9, 2017, in Docket No. 2012-0212,[2] for approval of the

[1]The 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 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"). By letter filed January 12, 2022, Hamakua notified the Commission that it was withdrawing from this proceeding.

[2]Pursuant 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.

Amended and Restated Power Purchase Agreement dated May 5, 2017 ("Amended PPA")[3] between HELCO and Hu Honua to purchase energy and capacity from Hu Honua's biomass facility on Hawai`i island (the "Project").

In so doing, the Commission finds that: (1) the Project will result in significant GHG emissions; and (2) Hu Honua's proposed "carbon commitment" ("Carbon Commitment") to sequester more GHG emissions than are produced by the Project relies on speculative assumptions and unsupported assertions. As a result, the Commission is not convinced that the Project will reduce GHG emissions, and has concerns about the potentially significant long-term environmental and public health impacts of the Project if the Amended PPA is approved.

In addition, the Commission finds that the Amended PPA is likely to result in high costs to ratepayers, both through its relatively high cost of electricity and through the potential displacement of other, lower cost, renewable resources. In comparison, the Project is not expected to deliver unique benefits to HELCO's system, nor it is urgently required at

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

this time. Upon weighing these considerations, the Commission concludes, based on the record before it, that approving the Amended PPA is not prudent or in the public interest and denies HELCO's Letter's Request.

The Commission's reasoning is discussed in further detail below.

I.

BACKGROUND

The history of the Project is extensive and spans multiple dockets and several Hawai`i Supreme Court ("Court") appeals. For purposes of this Decision and Order, the Commission highlights relevant key events; however, a full record of this proceeding can be found on the Commission's electronic Document Management System, available at https://dms.puc.hawaii.gov/dms/PUC.jsp, and entering "2017-0122" in the "Docket Quick Link" field.

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 Letter Request (the following day, May 18, 2017, the Commission issued Order No. 34556 in

Docket No. 2012-0212, which transferred HELCO's Letter Request from Docket No. 2012-0212 to this docket).[4]

In addition, the Commission, on its own motion, named Hu Honua as a party to this proceeding.[5] Order No. 34554 also granted Participant status to Tawhiri, Hamakua, and LOL.[6] The Commission subsequently ruled that Tawhiri, Hamakua, and LOL's scope of participation included whether the Amended PPA was prudent and in the public interest; further, LOL was also granted permission to participate on the additional sub-issue of whether the energy price components in the Amended PPA properly reflect the cost of biomass fuel supply.[7]

On July 28, 2017, the Commission issued Decision and Order No. 34726, which approved the Amended PPA ("Amended PPA D&O").

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[4]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. 20212-0212 on May 9, 2017," filed on May 17, 2017 ("Order No. 34554"); and Docket No. 2012-0212, 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 on May 18, 2017.

[5]Order No. 34554 at 11.

[6]Order No. 34554 at 13.

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

LOL filed an appeal of the Amended PPA D&O to the Court and, on May 10, 2019, following briefing and oral argument, the Court vacated the Amended PPA D&O and remanded the matter back to the Commission.[8] 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."[9]

On June 20, 2019, pursuant to the Court's decision, the Commission issued Order No. 36382, which re-opened this docket for further proceedings to review the Amended PPA.[10]

On July 9, 2020, the Commission issued Order No. 37205, in which the Commission found that HELCO had not sufficiently supported its request for a waiver for the Project from the Competitive Bidding Framework.[11] Although the Commission had

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[8]See In the Matter of Haw. Elec. Light Co., Inc., 145 Hawaii 1, 445 P.3d 673 (2019) ("HELCO I").

[9]HELCO I, 145 Hawaii at 5, 445 P.3d at 677.

[10]Order No. 36382, "Reopening Docket," June 20, 2019 ("Order No. 36382").

[11]See 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 on July 9, 2020 ("Order No. 37205").

previously approved HELCO's request for a waiver for the Project, the Commission concluded that this approval had been voided, along with the rest of the Amended PPA D&O, based on the Court's ruling in HELCO I.[12] As a result, upon reviewing this issue on remand, the Commission denied HELCO's request for a waiver for the Project.[13] Concomitantly, the Commission concluded that consideration of the merits of the Amended PPA was moot and dismissed HELCO's request for approval of the Amended PPA as such.[14]

Hu Honua subsequently filed for reconsideration of Order No. 37205 on July 20, 2020.[15] On September 9, 2020, the Commission issued Order No. 37306, denying Hu Honua's request for reconsideration.[16]

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[12]See Order No. 37205 at 26-27.

[13]See Order No. 37205 at 38-42.

[14]Order No. 37205 at 43.

[15]"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," filed on July 20, 2020; and "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," filed on July 20, 2020.

[16]Order No. 37306, "(1) Denying Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020; and (2) Addressing Related Procedural Motions," filed on September 9, 2020 ("Order No. 37306").

Thereafter, Hu Honua appealed Order Nos. 37205 and 37306 to the Court, and, on May 24, 2021, following briefing and oral argument, the Court vacated Order Nos. 37205 and 37306 and remanded the matter to the Commission.[17] In particular, the Court held that the Commission had misinterpreted the Court's ruling in HELCO I by revisiting the issue of HELCO's request for a waiver for the Project from the Competitive Bidding Framework, and instead should have focused on reviewing the Amended PPA in a manner that respected LOL's due process rights.[18] As a result, the Court remanded this matter back to the Commission with the explicit instructions that the Commission's proceedings:

> [M]ust 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.[19]

On June 30, 2021, the Commission issued Order No. 37852, which re-opened this proceeding to comply with the Court's

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[17]See In the Matter of Haw. Elec. Light Co., Inc., 149 Hawaii 239, 487 P.3d 708 (2021) ("HELCO II").

[18]See HELCO II, 149 Hawaii at 241-242, 487 P.3d at 710-711.

[19]HELCO II, 149 Hawaii at 242, 487 P.3d at 711 (citing HELCO I, 145 Hawaii at 26, 445 P.3d at 698).

directives in HELCO II.[20] In pertinent part, Order No. 37852 established a Statement of Issues on remand, as well as a procedural schedule. Subsequently, Tawhiri, LOL, Hu Honua, and the Consumer Advocate submitted filings addressing the Statement of Issues.[21]

On August 11, 2021, the Commission issued Order No. 37910, which, in pertinent part, denied LOL's, Tawhiri's, and Hu Honua's respective requests to modify the Statement of Issues, but adopted a slight modification to the Statement of Issues in response to the Consumer Advocate's request.[22]

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[20]See Order No. 37852, "Reopening the Docket," filed on June 30, 2021 ("Order No. 37852").

[21]"Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed on June 30, 2021; Memorandum in Support of Motion; and Certificate of Service," filed on July 12, 2021; "Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 or in the Alternative to Rescind the 2017 Waiver of the Competitive Bidding Framework; Memorandum in Support of Motion; and Certificate of Service," filed on July 12, 2021; "Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening Docket; Memorandum in Support of Motion; and Certificate of Service," filed on July 20, 2021 ("Hu Honua Act 82 Motion"); "Division of Consumer Advocacy's Motion for Leave to Respond [to Tawhiri's and LOL's motions]," filed on July 23, 2021; and Letter From: Consumer Advocate To: Commission Re: Docket No. 2017-0122 – Re Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening Docket, filed on July 23, 2021.

[22]Order No. 37910, "(1) Denying Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 Filed July 12, 2021; (2) Denying Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed on June 30, 2021,

Pursuant to the procedural schedule set forth in Order No. 37852, the Parties and Participants exchanged information requests ("IRs") through August 2, 2021.[23]

On September 16, 2021, the Parties and Participants submitted their Prehearing Testimonies and Exhibits.[24]

Filed July 12, 2021; (3) Denying Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening Docket Filed July 20, 2021; (4) Partially Granting the Division of Consumer Advocacy's Motion for Leave to Respond Filed July 23, 2021; and (5) Dismissing All Other Related Procedural Motions," filed August 11, 2021 ("Order No. 37910").

[23]See Order No. 37852 at 12. Responses to IRs are designated in this Decision and Order as follows: "[Party/Participant] Response to XX-IR-XX." The filing date of an IR responses will only be noted in the first instance of use.

[24]See "Tawhiri Power LLC's Prehearing Testimony; and Certificate of Service," filed on September 16, 2021 ("Tawhiri Prehearing Testimony"); "Life of the Land's Testimony, Verification, Exhibits; and Certificate of Service (including Attachments 1-24), filed on September 16, 2021 ("LOL Prehearing Testimony"); "Hu Honua Bioenergy, LLC's Prehearing Testimonies; Exhibits 'Hu Honua-100' – 'Hu Honua-800'; and Certificate of Service," filed on September 16, 2021 ("Hu Honua Prehearing Testimony"); Letter From: K. Katsura To: Commission Re: Docket No. 2017-0122 – Hawai`i Electric Light Company, Inc. Amended and Restated PPA with Hu Honua Bioenergy, LLC; Hawai`i Electric Light Company, Inc.'s Updated Prehearing Testimonies and Exhibits, filed on September 16, 2021 ("HELCO Prehearing Testimony"); and "Division of Consumer Advocacy's Submission of Prehearing Testimonies and Exhibits," filed on September 16, 2021 ("CA Prehearing Testimony").

On September 17, 2021, the Consumer Advocate submitted the portions of its Prehearing Testimony containing confidential and restricted material. The Consumer Advocate clarified that while it had been unable to file these sealed portions along with the rest of its Prehearing Testimony on September 16, 2021, it had provided the parties and participants with copies of these portions on September 16, 2021. Letter From: Consumer Advocate To:

During October and November 2021, the Parties and Participants exchanged IRs and supplemental IRs ("SIRs")[25] on each other's Prehearing Testimonies.

On December 7, 2021, the Commission issued Order No. 38104, which granted, in part, the Consumer Advocate's request to modify the procedural schedule and extend the deadline for submission of Prehearing Statements of Position ("PSOPs"), as well as all other remaining deadlines.[26]

On December 21, 2021, consistent with the modified schedule set forth in Order No. 38104, the Parties and Participants filed their PSOPs.[27]

Commission Re: Docket No. 2017-0122 – Application of Hawaii Electric Light Company, Inc. for Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity, fled on September 17, 2021.

[25]References to SIRs are designated in this Decision and Order as follows: "[Party/Participant] Response to XX-SIR-XX." The filing date of an SIR responses will only be noted in the first instance of use.

[26]Order No. 38104, "Granting, with Modifications, the Division of Consumer Advocacy's Motion for Enlargement of Time Filed on December 3, 2021," filed on December 7, 2021, ("Order No. 38104"). The Commission clarified that it was unable to grant the Consumer Advocate's requested changes in full due to conflicts with preexisting events on the Commission's schedule. Id. at 6-7.

[27]"Hawai`i Electric Light Company, Inc.'s Prehearing Statement of Position; and Certificate of Service," filed on December 21, 2021 ("HELCO PSOP"); "Tawhiri Power LLC's Prehearing Statement of Position; Exhibits 'A' and "B'; and Certificate of Service," filed on December 21, 2021 ("Tawhiri PSOP"); "Life of the Land's Pre-Hearing Statement of Position,

On January 3, 2022, Hu Honua filed a motion to continue the evidentiary hearing, which was scheduled for the week of January 31, 2022.[28] Hu Honua sought to continue the hearing "until such time that the City and County of Honolulu's ongoing state of emergency or disaster period has ended (or when there are no restrictions to holding the Hearing in-person) such that the Hearing can be conducted in-person, and not virtually."[29]

Verification; and Certificate of Service," filed on December 21, 2021 ("LOL PSOP"); and "Hu Honua Bioenergy, LLC's Prehearing Statement of Position; Exhibits '1' – '4'; and Certificate of Service," filed on December 21, 2021 ("Hu Honua PSOP").

On December 28, 2021, the Consumer Advocate filed a letter with the Commission noting that although it electronically filed its PSOP on December 21, 2021, it was not reflected on the Commission's Document Management System, and thus, in an abundance of caution, the Consumer Advocate was re-submitting its PSOP. Letter From: Consumer Advocate To: Commission Re: Docket No. 2017-0122 – In the Matter of the Application of Hawaii Electric Light Company, Inc. of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity, filed on December 28, 2021 ("CA PSOP"). The Commission credits the Consumer Advocate's representations that it filed its PSOP on December 21, 2021, and thus, notwithstanding its resubmittal on December 28, 2021, considers the Consumer Advocate's PSOP timely filed.

On January 3, 2022, the Consumer Advocate filed an errata to its PSOP, which incorporated changes based on its supplemental response to HHB-CA-SIR-16, which it also filed on January 3, 2022.

[28]"Hu Honua Bioenergy, LLC's Motion to Continue Hearing; Memorandum in Support of Motion; and Certificate of Service," filed on January 3, 2022 ("Hu Honua Motion to Continue").

[29]Hu Honua Motion to Continue at 1.

On January 6, 2022, the Commission issued Order No. 38169, which denied Hu Honua's Motion to Continue.[30] In doing so, the Commission noted, inter alia, that Hu Honua had not previously raised objections with the hearing date or virtual format, and that its request essentially amounted to an indefinite delay of the evidentiary hearing, which would correspondingly delay resolution of this proceeding, and would not be in the public interest.[31]

The following day, January 4, 2022, Hu Honua filed another motion styled as a motion to "confirm" that HRS § 269-6(b), "as amended by Act 82, applies to this proceeding."[32] The Commission addressed Hu Honua's Second Act 82 Motion on January 31, 2022, through Order No. 38183, in which the Commission affirmed that it would apply the version of HRS § 269-6(b) currently in effect, i.e., the amended version, but clarified that the Commission had previously addressed this issue and "does not find that Act 82 materially changes the Commission's review of the

[30]Order No. 38169, "Denying Hu Honua Bioenergy, LLC's Motion to Continue Hearing," filed January 6, 2022 ("Order No. 38169").

[31]See Order No. 38169 at 6-12.

[32]"Hu Honua Bioenergy, LLC's Motion to Confirm that Hawaii Revised Statutes Section 269-6(b), as Amended by Act 82, Applies to this Proceeding; Memorandum in Support of Motion; and Certificate of Service," filed on January 4, 2022 ("Hu Honua Second Act 82 Motion").

Project under HRS § 269-6(b) or otherwise alter the applicability and holdings in HELCO I and HELCO II to this remanded proceeding."[33]

On January 14, 2022, the Commission held a Prehearing Conference with the Parties and Participants, which was reflected in Prehearing Conference Order No. 38188, filed on January 19, 2022.[34]

On January 24, 2022, Hu Honua filed a Notice of Appeal with the Court, challenging the Commission's denial of Hu Honua's Motion to Continue and Second Act 82 Motion.[35] As a result, on January 26, 2022, the Commission issued Order No. 38198, suspending the docket pending resolution of Hu Honua's appeal.

On February 4, 2022, the Court dismissed Hu Honua's appeal.[36] As a result, on February 7, 2022, the Commission issued Order No. 38215, which lifted the docket suspension and amended

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[33]Order No. 38183, "Addressing Hu Honua Bioenergy, LLC's Motion Regarding Applicability of HRS Section 269-6," filed on January 13, 2022 ("Order No. 38183"), at 1-2.

[34]Prehearing Conference Order No. 38188, filed on January 19, 2022 ("Prehearing Conference Order").

[35]See Order No. 38198, "Suspending the Docket," filed on January 26, 2022 ("Order No. 38198").

[36]See Order No. 38215, "Lifting Docket Suspension and Modifying the Procedural Schedule," filed on February 7, 2022, at 3 (citing SCOT-22-0000024, In re Hawai`i Elec. Light Co., Inc., "Order Granting Appellee Life of the Land's Motion to Dismiss Appeal for Lack of Appellate Jurisdiction," filed on February 4, 2022).

the procedural schedule to hold the evidentiary hearing on March 1-4, 2022.[37]

The Commission held an evidentiary hearing on March 1-4, and March 7, 2022.[38]

On March 29, 2022, pursuant to the modified schedule set forth in Order No. 38215, the Parties and Participants filed their Post-Hearing Briefs.[39]

Pursuant to the procedural schedule, as originally set forth in Order No. 37852, and as modified through Order Nos. 38104 and 38215, there are no procedural steps remaining, and this matter is ready for decision-making.

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[37]Order No. 38215 at 3. See also, "Amended Notice of Evidentiary Hearing," filed on February 7, 2022.

[38]Recordings of the hearing are available on the Commission's YouTube webpage. See Letter From: Commission To: Service List Re: Docket No. 2017-0122 – For Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity – Notice of Hearing Recording, filed on March 8, 2022.

[39]"Life of the Land's Post Evidentiary Hearing Brief; and Certificate of Service," filed on March 29, 2022 ("LOL Post-Hearing Brief"); "Hawaii Electric Light Company, Inc.'s Post-Hearing Brief; and Certificate of Service," filed on March 29, 2022 ("HELCO Post-Hearing Brief"); "Hu Honua Bioenergy, LLC's Post-Hearing Brief; Exhibits 'A' – 'F'; and Certificate of Service," filed on March 29, 2022 ("Hu Honua Post-Hearing Brief"); "Tawhiri Power LLC's Post-Hearing Brief; and Certificate of Service," filed on March 29, 2022 ("Tawhiri Post-Hearing Brief"); and "Division of Consumer Advocacy's Post-Hearing Brief; and Certificate of Service," filed on March 29, 2022 ("CA Post-Hearing Brief").

II.

PARTIES AND POSITIONS

A.

HELCO

HELCO supports approval of the Amended PPA. HELCO notes that the Commission approved the Amended PPA in 2017, and since that time, the terms have not changed and the previously recognized benefits from implementation of the Project may still be realized.[40]

HELCO asserts that the Project will provide the following benefits: an increase in renewable energy on HELCO's system without an increase in intermittent renewable energy; addition of firm and dispatchable renewable generation in the near-term; performance and operational features similar to HELCO's existing steam generators; an alternate fuel source to existing units that is less vulnerable to weather- and climate-related reliability concerns; the displacement of fossil fuel generation; and other community benefits related to agricultural jobs and vegetation management.[41]

In support of its position, HELCO submitted testimony and exhibits discussing the Amended PPA, including changes from

[40]See HELCO PSOP at 2.

[41]See HELCO PSOP at 37.

the original PPA approved in Docket No. 2012-0212, as well as various analyses to support the purported benefits of the Project, including estimates of its contribution to the State's Renewable Portfolio Standards ("RPS"), the amount of energy expected to be produced by the Project over the Amended PPA's 30-year term, a comparison of HELCO's resource plan with and without the Project (which is used to model production scenarios), estimated net revenue requirement impact, estimated avoided fuel consumption, estimated total revenue requirement associated with the Project, a customer bill impact analysis, and a GHG emissions analysis for the Project.[42]

Subsequently, in response to a Commission IR, HELCO updated some of its analyses to take into account recent

[42]See HELCO Prehearing Testimony, T-1 (Rebecca Dayhuff Matsushima) (regulatory history of the Project, changes reflected in Amended PPA, and information regarding Hu Honua's request for preferential rates); T-2 (Christopher Lau) (methodology for estimating Project's RPS contributions) and Exhibit HELCO-201; T-3 (Robert Y. Uyeunten) (methodology for estimating Project's impact to HELCO's system, including avoided fuel use, changes to system costs, net present value of revenue requirements, and estimated customer bill impacts) and Exhibits HELCO-301, HELCO-303, HELCO-304, and HELCO-305; T-4 (Karin Kimura) (GHG analysis performed by Ramboll); and T-5 (Abigail Kirchofer) (methodology utilized by Ramboll to estimate Project GHG emissions) and Exhibit HELCO-501. As discussed below, the GHG analysis for the Project is composed of several different studies, including an avoided emissions analysis prepared by HELCO's consultant, supplemented by Project emissions analyses prepared by Hu Honua's consultants.

developments, particularly the withdrawal of the Puako Solar project on Hawai`i Island.[43]

HELCO asserts that there are "only two remaining, limited issues before the Commission at this time: (1) completing sufficient analysis of the impacts of the Project on [GHG] emissions; and (2) allowing participant Life of the Land a full opportunity to meaningfully participate in this docket."[44] HELCO asserts that these issues have been addressed in the docket record.[45]

Regarding the Project's GHG emissions, HELCO points to the Avoided GHG Emissions analysis prepared by its consultant, Ramboll US Corporation ("Ramboll"), which estimates the avoided lifecycle GHG emissions associated with operating the Project;

[43]See HELCO Response to PUC-HELCO-IR-17.b. HELCO provided its response to this IR in two parts. HELCO initially responded on November 17, 2021, with updates to all studies except for Exhibit HELCO-501 (i.e., the GHG analysis for the Project). On November 29, 2021, HELCO submitted an updated version of Exhibit HELCO-501, which contained an updated GHG analysis. For clarity, this Decision and Order shall refer to HELCO's November 22, 2017 filing as "HELCO Response to PUC-HELCO-IR-17," and HELCO's November 29, 2021 filing as "HELCO Supplemental Response to PUC-HELCO-IR-17."

[44]HELCO PSOP at 3.

[45]See HELCO PSOP at 3.

i.e., the reduction in GHG emissions that would result from HELCO's fossil fuel units if the Project is not placed into service.[46]

Ramboll's avoided lifecycle GHG emissions analysis relied on avoided fuel consumption data provided by HELCO. HELCO estimated the quantity of fuel (MMBtu) by fuel type by estimating the amount of energy that would be generated by each of its powerplants using the PLEXOS software model with and without the Project. Ramboll's estimates of avoided lifecycle emissions for each Project stage is summarized in Table 1 below:

TABLE 1
Results of Avoided GHG Emissions Analysis Prepared by Ramboll[47]

Project Stage	Avoided GHG Intensity (kg CO_2e / MWh)	Avoided GHG Emissions (MT CO_2e)
Avoided Upstream	117	347,479
Avoided Transportation	15	44,084
Avoided Operations[3]	351	1,042,680
Avoided Lifecycle	**483**	**1,434,243**

[46] See HELCO Prehearing Testimony, T-5 (Abigail Kirchofer) at 4. As noted in the footnotes above, HELCO initially submitted Ramboll's GHG analysis as part of HELCO's Pre-Hearing Testimony, Exhibit HELCO-501, but subsequently submitted an updated version as part of HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3.

[47] See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3.

Ramboll then combined this avoided GHG emissions estimate with the Project's estimated lifecycle GHG emissions, calculated by Hu Honua's consultant, Environmental Resources Management ("ERM"), to reach an overall conclusion that the Project will result in a net reduction of 1,464,742 metric tons of carbon dioxide equivalents ("MT CO_2e").[48] HELCO maintains that the Ramboll Analysis satisfies the Court's mandate that the Commission explicitly consider the Project's GHG emissions, pursuant to its statutory duties under HRS Chapter 269, and demonstrates that the Project will "significantly reduce GHG emissions in our planet's atmosphere."[49]

HELCO contends that "no substantive testimony was raised by any party or participant questioning the methodology of the [Ramboll Analysis]," and that the Ramboll Analysis concludes that

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[48]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 (ERM's updated analysis is included as "Attachment B" to Ramboll's updated GHG analysis) (the avoided GHG emissions analysis, as well as total GHG impact estimate submitted by Ramboll, is referred to as the "Ramboll Analysis," while the specific Project analysis performed by ERM is referred to as the "ERM Analysis").

The ERM Analysis also relied upon GHG emissions associated with Project construction, which were independently calculated by another Hu Honua consultant, JPB, LLC ("JPB"). The results of JPB's analysis were incorporated into the ERM Analysis. See Hu Honua Prehearing Testimony, T-6 (Joshua Pearson), and Exhibit Hu Honua-601; and HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 52 (referencing the "2021 JPB report for construction emission calculations").

[49]HELCO Post-Hearing Brief at 11.

approval of the Project "would result in a significant reduction in lifecycle and Project GHG Emissions, relative to the baseline without the Project."[50] HELCO responds to concerns raised by the Consumer Advocate, LOL, and Tawhiri in turn, asserting that none of them had produced any credible evidence to discredit the Ramboll Analysis.[51]

Regarding LOL's opportunity to participate in this proceeding, HELCO asserts that LOL has been provided with a meaningful opportunity to be heard regarding "the [Amended] PPA's impact on LOL's property interest in a clean and healthful environment, as defined by HRS Chapter 269."[52] Specifically, HELCO maintains that LOL has been "afforded a robust opportunity" as demonstrated by LOL's "expanded participation to include all issues in this Docket," and "by way of information requests, pre-hearing briefing, the evidentiary hearing, and post-hearing briefing."[53]

HELCO argues that other evidence in the record that is outside the scope of the two above issues should not be

[50]See HELCO Post-Hearing Brief at 9-10.

[51]See HELCO Post-Hearing Brief at 12-15.

[52]HELCO Post-Hearing Brief at 16.

[53]HELCO Post-Hearing Brief at 17.

given weight in this decision.[54] Specifically, HELCO argues that because the Amended PPA's pricing has not changed since the Amended PPA D&O, re-visiting the pricing now, in light of the Court's remand, "would be essentially raising an entirely new issue beyond the scope of the remand and would inevitably lead to another appeal consistent with HELCO II."[55]

HELCO also addresses Hu Honua's request for preferential rates. In its Letter Request introducing the Amended PPA to the Commission, HELCO clarified that it and Hu Honua had agreed upon all terms of the Amended PPA except for the Contract Price, for which reason Hu Honua was submitting a request for the Contract Price to be approved as a "preferential rate" pursuant to HRS § 269-27.3.[56] HELCO explained that it was forwarding Hu Honua's request, as it believed that it met the minimum requirements set forth in HRS § 269-27.3, and is thus "bona fide" and ripe for the Commission's consideration.[57]

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[54]See HELCO Post-Hearing Brief at 2 and 26.

[55]HELCO Post Hearing-Brief at 27.

[56]See HELCO Letter Request at 1 and Exhibit B.

[57]See HELCO Letter Request at 2. See also, HELCO PSOP at 30-35.

B.

Hu Honua

Hu Honua maintains that the two remaining issues before the Commission on remand have been satisfied as "all Parties and Participants, including LOL, have been given the opportunity to meaningfully participate in this docket and at the Hearing, and co-applicants HELCO and Hu Honua have presented undisputed evidence demonstrating that Hu Honua's state-of-the-art bioenergy facility [] will significantly reduce GHG emissions over the 30-year term of the [Amended] PPA."[58]

Regarding GHG emissions associated with the Project, Hu Honua has offered a "carbon emissions reduction commitment and plan" ("Carbon Commitment"), which Hu Honua states will ensure that the Project is net negative by at least 30,000 MT CO_2e by the end of the Amended PPA's 30-year term, as well as becoming "carbon negative in the year 2035 and each year thereafter, assuming operations [begin] in 2022."[59] Hu Honua clarifies that this would be "completely independent of the overall GHG emissions that would be avoided as a result of the Project[,]" i.e., the avoided GHG emissions estimated by the Ramboll Analysis.[60]

[58]Hu Honua Post Hearing Brief at 2.

[59]Hu Honua Pre-Hearing Testimony, T-2 (Jon Miyata) at 8. See also, id., T-1 (Warren Lee) at 29-34; and Exhibit Hu Honua-201.

[60]Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 30.

Hu Honua maintains that "[b]ecause there will be a Net GHG emissions reduction, the Project will reduce air pollution due to the lifecycle GHG emissions of the Project, and therefore, there will be no 'long-term environmental and public health costs of reliance on energy produced at the proposed facility.'"[61]

To achieve its Carbon Commitment, Hu Honua states that it will prioritize replanting trees on land leased on Hawai`i Island for feedstock, followed by replanting on other areas on Hawai`i Island "or elsewhere within the State of Hawaii, as identified by our partners."[62] If none of these options are available, Hu Honua states that it will consider growing biomass outside of the State or, if necessary, "purchase offsets from reputable sources using Nature Based offsets to ensure growth of vegetation (e.g., VERRA or ACR) to ensure that [the Carbon Commitment is met]."[63] Further, "[i]f Hu Honua fails to purchase carbon offsets in sufficient quantity to make the GHG inventory Carbon Negative, Hu Honua will pay a monetary amount for

[61]Hu Honua Pre-Hearing Testimony, T-4 (David Weaver) at 3. See also Hu Honua PSOP at 14; and Hu Honua Post-Hearing Brief at 11, 13, and 14.

[62]Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 31.

[63]Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 31.

the purpose of procuring sufficient carbon offsets to achieve a Carbon Negative GHG inventory."[64]

Hu Honua also states that it will seek to work with partners such as the Friends of Hawai`i Volcano National Park ("FHVNP"), One Tree Planted ("OTP"), and the National Forest Foundation ("NFF") to secure additional replanting efforts.[65] Hu Honua states that "[a]ll vegetation planted and grown in any of these scenarios will be subject to annual inventories and verification every five years."[66]

To demonstrate that Hu Honua can meet the Carbon Commitment, Hu Honua relies on the ERM Analysis, which estimates the Project's GHG emissions and associated

[64]Hu Honua Prehearing Testimony, T-4 (David Weaver) at 16.

[65]Hu Honua Prehearing Testimony, T-2 (Jon Miyata) at 9-10. Hu Honua indicates that there are agreements in place with these entities that are expected to result in planting or replanting efforts for which Hu Honua may receive credit. See id., Exhibits Hu Honua-202 (pledge agreement between Jennifer M. Johnson and FHVNP ("FHVNP Agreement")), -203 (business donor agreement between Hu Honua and OTP ("OTP Agreement")), -204 (pledge agreement between Jennifer M. Johnson and NFF), -205 (addendum to pledge agreement between Jennifer M. Johnson and NFF)(collectively, Exhibits Hu Honua-204 and -205 are referred to as the "NFF Agreement"), and -206 (letter signed by Jennifer M. Johnson assigning credits from pledge agreements with FHVNP and NFF to Hu Honua)("Credit Assignment Letter").

[66]Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 31.

sequestration efforts.[67] The ERM Analysis analyzed the Project under two scenarios, one based on the Project dispatch simulated by HELCO, approximately 11.8 MW ("HELCO Dispatch Scenario"), and another based on the full dispatch allowed under the Amended PPA, 21.5 MW ("Full Dispatch Scenario"), and concluded that Hu Honua will be able to meet the Carbon Commitment under either scenario.[68] As discussed further below,[69] the Commission finds the HELCO Dispatch Scenario more reasonable based on

[67]See Hu Honua Prehearing Testimony T-4 (David Weaver) and Exhibits Hu Honua-401 and -402; and HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3, Attachment B (reflecting the updated ERM Analysis as part of the updated Ramboll Analysis).

Note: the ERM Analysis alternatingly reports emissions and sequestration values in short tons and metric tons. To support consistency in this Decision and Order, the Commission has converted any figures reported in short tons into metric tons, using the following conversion: 0.90718474 metric tons / short tons, as reported by ERM. See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 60 (table labeled "Conversion and other factors"). As a result, there may be slight discrepancies in values in this Decision and Order due to this conversion and rounding, but these do not materially affect the overall results.

[68]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 32 and 34. Specifically, the ERM Analysis estimates GHG emissions and sequestration for the Project under: (1) a scenario that models the Project operating at a lower level of dispatch based on HELCO's production simulation of 2,972.2 GWh for the 30-year duration of the PPA (which translates into an average dispatch of approximately 11.8 MW); and (2) a scenario that models the Project operating at Hu Honua's full capacity dispatch level under the Amended PPA of 21.5 MW (approximately 5,418 GWh for the 30-year term of the Amended PPA).

[69]See Section IV.C.3.ii, infra (discussing modeling of HELCO's expected dispatch of the Project).

the record, and thus focuses its discussion of the ERM Analysis as it pertains to this scenario.

The ERM Analysis states that "[b]ecause Hu Honua's actual dispatch will likely vary and is not within Hu Honua's control ([HELCO] controls the level of dispatch within the limits of the PPA), a 'Carbon Calculator' spreadsheet is included that will calculate, track, and demonstrate Project GHG Emissions during operations."[70] According to the ERM Analysis, the Carbon Calculator "is set up to calculate GHG emissions from the [Project] and other variable positive lifecycle emissions (e.g., transportation and fertilizer use), as well as the corresponding GHG emissions removed from the atmosphere through vegetation growth and offsets."[71] Hu Honua states that the Carbon Calculator "provides a method by which Hu Honua will track actual operational parameters and emissions year-by-year during project operation" and that it "will be used to ensure that Hu Honua meets the GHG commitments it has made as described in [its] testimony and the Project GHG Analysis."[72]

[70]HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 34.

[71]HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 34.

[72]Hu Honua Prehearing Testimony, T-4 (David Weaver) at 8.

The Carbon Calculator reflects GHG emissions and sequestration associated with a number of factors, including: Project operations, sequestration associated with vegetation growth on Hawai`i Island, sequestration associated with vegetation growth off-island, sequestration associated with trees planted under the NFF Agreement, and sequestration associated with "Other Mitigation Strategies."[73] Its underlying calculations consider a number of additional factors, belowground carbon loss, stack emissions, and other variables associated with the Project's lifecycle, such as fertilizer use, harvesting, transportation, and commissioning and decommissioning of the Project.[74]

As reflected in the Carbon Calculator, Project emissions are expected to primarily result from stack emissions (approximately 5,921,950 MT CO_2e from 2022 through 2051) and belowground carbon loss (approximately 1,722,319 MT CO_2e from 2022 through 2051).[75] Project emissions are expected to be offset by the following three primary sequestration sources: (1) sequestration from aboveground biomass growth on

[73]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 40-41.

[74]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 42-43.

[75]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 60. In the accompanying .xlsx Excel workbook, see "Table 2 - CO2 Calculation Simulation" and Calculation Tab "Emission Sim". Conversion: 0.90718474 metric tons / short tons.

Hawai`i Island (approximately 5,882,332 MT CO_2e from 2017 through 2051); (2) sequestration from belowground biomass and soil organic carbon gain (approximately 1,925,172 MT CO_2e from 2017 through 2051); and (3) sequestration from trees planted pursuant to the NFF Agreement (approximately 437,500 MT CO2e from 2022 through 2051).[76]

Hu Honua also estimated the social cost savings of the Project by assigning a dollar value attributed to the Project's GHG emissions reduction estimates provided in the ERM Analysis, i.e, a net reduction of approximately 30,499 MT CO_2e over the Project's lifetime.[77] Hu Honua's consultant, PA Consulting Group, Inc. ("PA Consulting"), accomplished this by modeling the comparative costs of dispatching the Project versus relying on HELCO's fossil fuel units and then applying the Federal Government's "estimates of the cost to society of GHG emissions" to conclude that the Project would result in a

[76]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 47 and 60. In the accompanying .xlsx Excel workbook, see "Table 2 - CO2 Calculation Simulation" and Calculation Tab "Emission Sim". Conversion: 0.90718474 metric tons / short ton. While the Carbon Calculator includes columns to account for sequestration from other sources, for purposes of demonstrating that Hu Honua will be able to meet its Carbon Commitment, only sequestration estimates for Hawai`i Island vegetation and the NFF Agreement are included. These assumptions are used in ERM's analysis for both the HELCO Dispatch Scenario (Table 2) and the Full Dispatch Scenario (Table 3).

[77]See Hu Honua Prehearing Testimony, T-7 (Jonathan Jacobs).

social cost savings of $132 million (Full Dispatch scenario) or $98 million (HELCO Dispatch Scenario).[78]

In addition to the above, Hu Honua states that the Project will result in several additional benefits, including the provision of essential grid services currently provided by fossil fuel plants,[79] improved reliability compared to solar and energy storage projects,[80] potential utilization of invasive species as an additional fuel source,[81] grid support functions enabled by the Project's synchronous condensers,[82] and job creation and other economic impacts.[83] Hu Honua also provides information regarding community feedback on the Project, including letters of support in the docket[84] and the results of a survey by Anthology Market Group conducted on Hu Honua's behalf in December 2021.[85]

Hu Honua also identifies a potential benefit of providing excess energy from the Project to produce hydrogen.

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[78]See Hu Honua PSOP at 22.

[79]See Hu Honua PSOP at 46.

[80]See Hu Honua PSOP, Exhibit 2 at 18-21.

[81]Hu Honua PSOP at 45.

[82]See Hu Honua PSOP, Exhibit 2 at 22-25.

[83]See Hu Honua Testimony, T-1 (Warren Lee) at 11-12; T-8(Bruce Plasch); and Exhibit Hu Honua-801.

[84]Hu Honua PSOP, Exhibit 3.

[85]Hu Honua PSOP, Exhibit 4.

Under this proposal, energy generated at the Project in excess of the Amended PPA's maximum 21.5 MW Committed Capacity, estimated to be an additional 8.5 MW, could be used to produce hydrogen.[86] Hu Honua has executed a memorandum of understanding with H2 Energy, LLC ("H2 MOU")[87] for a hydrogen pilot program and has been exploring development of hydrogen infrastructure to support a hydrogen fueling station on Hawai`i Island.[88]

Hu Honua maintains that it "desires and intends to source all of its biomass locally in Hawaii as its primary feedstock will consist of locally available eucalyptus," and that this would provide "insurance against having to export funds to pay for fossil fuel imports."[89] Hu Honua also states that it could use "invasive species on Hawaii Island as an additional fuel source for the Project to generate electricity, subject to whether the wood content of the invasive species meets the operating parameters of the boiler."[90]

Hu Honua states that its fuel supplier, CN Renewable Resources, LLC ("CNRR"), will initially source

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[86]See Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 9.

[87]See Hu Honua Prehearing Testimony, Exhibit Hu Honua-101.

[88]See Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 10.

[89]Hu Honua Post-Hearing Brief at 22.

[90]Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 8. See also Hu Honua Post-Hearing Brief at 27.

eucalyptus feedstock from Pahala, Paauhau, and Hamakua plantations on Hawai`i Island.[91] Hu Honua claims that "[t]he need for sourcing feedstock outside of Hawaii Island would only arise as a last resort or because of an emergency shortage of feedstock outside of Hu Honua's or its fuel supplier's control" and "believes the likelihood of the emergency situations is very low."[92] Further, Hu Honua states:

> If such an emergency situation does arise resulting in an insufficient quantity of secured local feedstock being available for use at the Project on a timely basis, Hu Honua will have no choice but to attempt to source biomass from other commercial forest locations. These locations listed in order of priority are as follows: (1) other areas on Hawaii Island, (2) other islands within the State of Hawaii, (3) areas in the continental United States, such as the Pacific Northwest, (4) other areas internationally, and (5) using biodiesel.[93]

Hu Honua indicates that the feedstock produced on the three Hawai`i Island plantations would allow the Project to be operated for 9 years based under HELCO's Dispatch Scenario (reduced to 6 years, if the Project were dispatched under the Full Dispatch Scenario).[94]

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[91]See Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 16.

[92]Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 17.

[93]Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 17.

[94]See Hu Honua Response to PUC-Hu Honua-IR-48, filed on December 1, 2021.

Relatedly, Hu Honua maintains that growing and harvesting eucalyptus for biomass feedstock for electricity generation is an "agricultural activity" and therefore, the Amended PPA's pricing should be approved as a "preferential rate" pursuant to HRS § 269-27.3.[95]

In its Post-Hearing Brief, Hu Honua states that it would agree to the following supplementary conditions:

> - Hu Honua agrees to place $100,000 (or in the alternative, a range of up to $450,000 if the Commission believes a higher amount is more appropriate) of "seed money", which may include marketable liquid assets, into a reserve fund or escrow account in Year 1 which will remain in the account for the entire 30 year [Amended] PPA term (or in the alternative, a lesser term if the Commission believes a lesser period of time is more appropriate) to serve as cushion of available funds to ensure that its carbon negative commitments are met. If there is any carbon sequestration deficit in the annual reporting to the [Commission], Hu Honua will also place additional funds into the account each year over the 30-year term to cover the deficit and purchase carbon offsets (approximately $15/ton);
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> - Hu Honua agrees to a condition requiring Hu Honua to provide a minimum of 3 prospective names of independent verifiers to the [Commission], allow all parties to comment, then the [Commission] can approve which prospective names are qualified to perform the independent five-year verification, then Hu Honua will select the independent verifier from the [Commission] approved list;
>
> - Hu Honua agrees to a condition that within 60 months after a final non-appealable approval

[95]See Hu Honua PSOP at 40-41.

order from the [Commission], Hu Honua will provide documentation to the [Commission] demonstrating that it has secured additional acreage on Hawaii Island to provide the feedstock for the remaining term of the [Amended] PPA;

- Hu Honua agrees not to receive a preferential rate for any period of energy generation using out-of-state feedstock; rather, Hu Honua would only be able to recover the Avoided Cost Rate as published monthly by HELCO for such period assuming such rate is lower than the [Amended] PPA rate;

- Hu Honua agrees to all of the recommended conditions within Hu Honua's control described in Section II.F of the [Consumer Advocate's] Prehearing Statement of Position; and

- Hu Honua stipulates to ongoing review by the [Commission] for purposes of reviewing and enforcing Hu Honua's carbon negative commitments and any other commitments proffered by Hu Honua in this proceeding. If Hu Honua fails to meet any commitments, it agrees to cure any shortcomings within a reasonable period of time to ensure that Hu Honua's commitments are met.[96]

Further, Hu Honua offers that "in the event the above proposed conditions . . . are insufficient or require further clarity for the Commission, Hu Honua agrees to adopt any reasonable modifications and/or additional conditions ordered by the Commission that will enable the Commission to hold Hu Honua accountable and enforce any conditions of approval."[97] Hu Honua maintains that these conditions "should provide sufficient

[96]Hu Honua Post-Hearing Brief at 4-5.

[97]Hu Honua Post-Hearing Brief at 5.

assurance that the Project will be carbon negative and GHG emissions will be reduced."[98]

Hu Honua states that to comport with the Court's decision in HELCO I, review of "costs" in this proceeding should be "limited to the 'hidden and long-term costs' associated within 'GHG emissions' within the context of HRS § 269-69(b)."[99] That being said, Hu Honua alternatively argues that even if the Amended PPA's "total costs" are considered, Hu Honua contends that they should be "confined to the context of HRS § 269-6(b)," "which allows the [Commission] to determine that renewable energy costs that are higher than fossil fuel alternatives are reasonable."[100] In support of this point, Hu Honua points to the analysis performed by PA Consulting.[101]

Further, Hu Honua maintains that Act 82 amended HRS § 269-6(b), such that the pertinent inquiry is the Amended PPA's costs "*as compared to fossil fuel generation* (not against other renewable generation) given the impacts of fossil fuels on (1) price volatility, (2) export of funds for fuel imports, (3) fuel supply reliability risk,

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[98]Hu Honua Post-Hearing Brief at 5.

[99]Hu Honua Post-Hearing Brief at 19.

[100]Hu Honua Post-Hearing Brief at 20.

[101]See Hu Honua Post-Hearing Brief at 20-22.

and (4) GHG emissions."[102] With respect to these four factors, Hu Honua maintains that the Project will provide benefits, by reducing exposure to price volatility, the need to purchase fuel imports, fuel supply reliability, and the costs associated with GHG emissions.[103]

When compared against fossil fuel generation, Hu Honua contends that the Amended PPA will result in customer savings, which Hu Honua estimates to be an average of $1.13 (under the HELCO Dispatch Scenario) or $8.31 (under the Full Dispatch Scenario).[104] Hu Honua disagrees with the results of HELCO's bill impact analysis, arguing that it "is not reliable[,] given that it was not done in the context of HRS § 269-6(b), nor did it evaluate the cost of Hu Honua against just fossil generation[,]" as well as challenging other assumptions.[105]

[102]Hu Honua Post-Hearing Brief at 21-22.

[103]Hu Honua Post-Hearing Brief at 22-23.

[104]Hu Honua Post-Hearing Brief at 24 (citing Hu Honua Supplemental Response to PUC-Hu Honua-IR-41, filed on December 30, 2021, at 3, Tables 1 and 2).

[105]Hu Honua Post-Hearing Brief at 24.

C.

The Consumer Advocate

The Consumer Advocate does not believe that the Amended PPA is in the public interest based on the current record.[106] Nevertheless, the Consumer Advocate recommends a number of conditions for the Commission to consider should the Commission be inclined to approve the Amended PPA.[107]

Regarding GHG emissions, the Consumer Advocate believes there are remaining questions and concerns with respect to the ERM Analysis presented by Hu Honua due to the estimated figures in the Carbon Calculator not being supported by Project-specific data. These questions and concerns relate to: (1) upstream GHG emissions from cultivation, harvesting, and transportation of feedstock; (2) sequestered GHG emissions from the regrowth of the biomass feedstock; and 3) Hu Honua's Carbon Commitment.[108]

The Consumer Advocate's questions and concerns relating to upstream GHG emissions from cultivation, harvesting, and transportation stem from a lack of evidentiary support that Hu Honua's feedstock will be cultivated and harvested on Hawai`i Island as assumed in the Carbon Calculator.

[106]CA Post-Hearing Brief at 2.

[107]CA Post-Hearing Brief at 2.

[108]CA Post-Hearing Brief at 7-13.

The Consumer Advocate acknowledges that the estimated GHG emissions associated with the first 7-9 years of the Amended PPA appear to be reasonably supported and documented; however, the Consumer Advocate also notes that there are no references in Hu Honua's Fuel Sales and Purchase Agreement with CNRR indicating the source or type of the feedstock for the Project.[109] Without this information, the Consumer Advocate asserts that it cannot determine if there are any potential upstream GHG emissions related to the cultivation, harvesting, and transportation of feedstock that may be not be properly accounted for in the Carbon Calculator.[110]

The Consumer Advocate also retains questions and concerns relating to the Carbon Calculator's assumptions underlying its estimated sequestered GHG emissions from the regrowth of the biomass feedstock. Specifically, the Consumer Advocate notes that "plots designated for replanting are not identified, leaving a general estimation of how much biomass would need to be regrown annually to meet the [sic] Hu Honua's commitment to be 30,000 MT carbon negative," as well as Hu Honua's stated intent that it does not plan to plant or regrow

[109]See CA Post-Hearing Brief at 8-9.

[110]CA Post-Hearing Brief at 8-9.

the plots at the Pahala and Hamakua plantations.[111] Consequently, the Consumer Advocate believes that "it is not clear at this time if Hu Honua will be able to coppice and replant biomass on currently held leases as stipulated as first and second priority orders, detailed in Hu Honua-201, Hu Honua Carbon Emissions Reduction Commitment and Plan."[112]

The Consumer Advocate also notes that further clarification is needed regarding other possible sources of biomass feedstock raised by Hu Honua at the evidentiary hearing, such as Hawai`i Island County green waste or invasive species biomass.[113] The Consumer Advocate observes that no analyses have been conducted for these potential sources, making it difficult for the Commission to reasonably ascertain the impact those sources of biomass feedstock might have on GHG emissions.[114]

Finally, the Consumer Advocate asserts that Hu Honua's Carbon Commitment lacks sufficient details about how to monitor, verify and seek enforcement if there are any shortcomings, and further questions whether the use of carbon offsets comports

[111]CA Post-Hearing Brief at 11.

[112]CA Post-Hearing Brief at 11.

[113]CA Post-Hearing Brief at 12.

[114]CA Post-Hearing Brief at 12.

with the intent of the Legislature given that carbon offsets can just as easily be applied to a fossil fuel facility.[115]

The Consumer Advocate also maintains that production simulation results indicate that HELCO "has no specific need for the Hu Honua facility right now."[116] With respect to Hu Honua's suggestion that the Project would be a relatively lower cost generation source if fuel prices were higher, the Consumer Advocate argues that: (1) there may be due process concerns if the Commission were to consider certain updates to modeling inputs at this point in the proceeding; (2) higher oil prices would only make the Project relatively less expensive (but still raise bills for HELCO ratepayers, overall); (3) oil prices become less relevant into the future as fossil fuel generation is replaced with renewable energy; and (4) Hu Honua's argument is solely concerned with pricing, and does not consider other factors like relative capacities.[117]

Relatedly, the Consumer Advocate notes that the Amended PPA's thirty-year term "may only serve to lock in [the Amended PPA's] high price for an unreasonably long time" and that HELCO and Hu Honua have failed to demonstrate that the

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[115]CA Post-Hearing Brief at 12-13.

[116]CA Post-Hearing Brief at 13.

[117]CA Post-Hearing Brief at 14-17.

benefits associated with the approval of the Amended PPA will exceed the costs of the Amended PPA.[118]

Regarding Hu Honua's request for preferential rates, the Consumer Advocate contends that given that the Project "is not needed for reliability purposes and that there are less expensive generation options to continue Hawaii Island's progress towards RPS compliance, the need to grant a request for preferential rates has not been supported."[119] The Consumer Advocate specifically argues that the Commission, in exercising its statutory discretion to approve preferential rates, should apply the "just and reasonable" standard in HRS § 269-27.2(d)(1) and the "best interest of the general public" standard in HRS § 269-27.2(d)(5).[120] Under these standards, the Consumer Advocate submits that the Amended PPA is neither "just and reasonable" nor in the "best interest of the general public because the Amended PPA's pricing would raise Hawai`i Island ratepayers' bills and, based on the current record, would not result in benefits exceeding costs.[121] The Consumer Advocate also notes that Hu Honua may not meet the statutory requirement that it produce renewable energy "in

[118]CA Post-Hearing Brief at 19.

[119]CA Post-Hearing Brief at 22.

[120]CA Post-Hearing Brief at 22.

[121]CA Post-Hearing Brief at 23.

conjunction with agricultural activities" within the State because of the possibility that it may need to import its feedstock.[122]

Notwithstanding the Consumer Advocate's position that the Amended PPA is not in the public interest, should the Commission be inclined to approve the Amended PPA, the Consumer Advocate recommends adopting the following conditions:

> - Requiring [HELCO] and Hu Honua to submit for Commission approval any Amended PPA amendments, including, but not limited to, a definition of "emergency" when Hu Honua may source feedstock from outside Hawaii Island.
>
> - Requiring the filing of direct benefits from the [Project], such as the number of jobs and payroll.
>
> - Requiring the filing of reports on community outreach activities to provide timely information on efforts to address remaining community concerns.
>
> - Requiring Hu Honua to provide verifiable and enforceable details on its proposed reserve account for buying carbon offsets if necessary to fulfill its Carbon Commitment.
>
> - Requiring [HELCO] to submit a plan, triggered once the proposed Hu Honua facility is in operation for a sufficient amount of time and properly vetted, to remove existing fossil fuel units, such as Puna Steam, Hill 5, and Hill 6 units, from service.[123]

[122]CA Post-Hearing Brief at 23.

[123]CA Post-Hearing Brief at 26-27.

Should the Commission grant Hu Honua's request for preferential rates, the Consumer Advocate further recommends the adoption of the following conditions:

- Requiring a means of verification, such as the filing of reports to address assertions offered as benefit and justification for the preferential rate request, such as: 1) reporting on the total amount of locally sourced feedstock burned in each year, 2) the revenues and benefits associated with the harvesting and use of the feedstock, 3) the forestry management plan - including the total annual amount of replanted trees and jobs associated with the replanting, 4) the assessment of whether the operations of Hu Honua is carbon neural or not, 5) Hu Honua's carbon sequestration plan, and 6) the total number of jobs and payroll generated. Such reporting could be used to cross-check any periodic information offered by Hu Honua in relation to its carbon neutrality commitment and benefits that [HELCO] and Hu Honua ha[ve] offered to the Commission as justification for the project.

- Requiring the filing of a fuel/feedstock report by Hu Honua to evaluate whether there are any cost savings that should be passed to customers.

- As indicated by Hu Honua Witness A at the hearing, Hu Honua's energy and capacity payments should be at a Commission-approved, lower, non-preferential rate for any energy or capacity produced with feedstock sourced off Hawaii Island.

- Any potential revenues from third-party sales should be used to reduce the preferential rates.[124]

[124]CA Post-Hearing Brief at 27-28 (internal citations omitted) While these conditions are prefaced as being "In the alternative," the Commission observes that the Consumer Advocate's concerns with

D.

LOL

LOL recommends that the Commission reject the Amended PPA for the following reasons.

First, LOL asserts that HELCO and Hu Honua have failed to meet their respective evidentiary burdens.[125]

Second, LOL states that HELCO's support for the Amended PPA is suspicious in light of prior litigation between HELCO and Hu Honua arising from the original 2012 PPA.[126]

Third, LOL contends that Hu Honua has not transparently disclosed its business dealings or corporate structure, nor has HELCO satisfactorily provided an evaluation of the Amended PPA, which precludes an informed review of the Amended PPA and related requests.[127]

Fourth, LOL argues that the Project is unnecessary and against the public interest, as HELCO does not currently have a need for the Project, and competitively bid solar-plus-storage

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the application of preferential rates would appear to be in addition to its concerns with the Project's alleged benefits to ratepayers, rather than an alternative set of concerns.

[125]LOL Post-Hearing Brief at 9-10.

[126]See LOL Post-Hearing Brief at 10-14.

[127]See LOL Post-Hearing Brief at 14-16.

projects are available as lower cost resources.[128] Relatedly, LOL argues that the Project's claimed ancillary services are unnecessary and can be achieved through lower cost renewable projects, such as the solar-plus-storage projects that are currently under development.[129]

Fifth, because HELCO and its related utilities, Hawaiian Electric Company, Inc. and Maui Electric Company, Limited, are currently ahead of their RPS mandate for 2020, a new proposed generation project must provide cost reduction benefits to ratepayers by improving the integration of lower cost renewable energy, which the Amended PPA does not accomplish.[130] Moreover, LOL asserts that the Amended PPA will result in the displacement and curtailment of lower cost, "less harmful" renewable energy projects.[131]

Sixth, LOL states that the Amended PPA's costs are unreasonable and will increase monthly bills for ratepayers.[132] Relatedly, LOL argues that Hu Honua is not entitled to a

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[128]See LOL Post-Hearing Brief at 17-19.

[129]LOL Post-Hearing Brief at 21.

[130]LOL Post-Hearing Brief at 20 (citing Docket No. 2021-0185, Decision and Order No. 31759, filed December 23, 2013, at 96; and Docket No. 2012-0212, Decision and Order No. 31758, filed on December 20, 2013, at 121).

[131]LOL Post-Hearing Brief at 21-22.

[132]LOL Post-Hearing Brief at 26-28.

determination of preferential rates under HRS § 269-27.3, as Hu Honua "is not planning to engage in silviculture activities[,] but is instead planning to contract that work out to third parties."[133] Further, LOL argues that "there is nothing in the record before the Commission that would provide any meaningful guidance with respect to the determination of that preferential rate, including how those considerations should be balanced against all of the other considerations related to the [Commission's] evaluation . . . ."[134]

Seventh, LOL states that when considering the long-term and hidden costs of the Project, the Project is unreasonable and contrary to the public interest. LOL argues that the Project, which relies on the harvesting, transportation, and combustion of biomass, will result in comparatively higher lifecycle GHG emissions than a fossil fuel unit.[135] LOL does not find HELCO's or Hu Honua's GHG analysis methodologies for the Project credible, and takes particular issue with Hu Honua's potential reliance on sequestration from trees outside the State.[136] Moreover, LOL raises concerns that offsets accomplished out-of-State may not be

[133]LOL Post-Hearing Brief at 28.

[134]LOL Post-Hearing Brief at 31.

[135]LOL Post-Hearing Brief at 34-35.

[136]See LOL Post-Hearing Brief at 35.

accurately verifiable, and could be subject to double-claiming of offsets.[137]

LOL also argues that it is not currently possible to estimate the GHG emissions associated with upstream harvesting and transportation of feedstock for the Project, since Hu Honua has not determined where it will source its feedstock for the majority of the Amended PPA term.[138]

Eighth, LOL argues that biogenic CO_2 emissions might be considered carbon neutral over a lengthy period of time, but they offer little help in addressing the urgent problems presented by the climate emergency.[139]

Ninth, LOL states that in addition to unnecessary and excessive GHG emissions associated with the Project, other hidden and long-term costs include toxic air emissions, water use and emissions, harm to biodiversity, and negative impacts to the community.[140]

[137]LOL Post-Hearing Brief at 36.

[138]See LOL Post-Hearing Brief at 36-37.

[139]LOL Post-Hearing Brief at 42.

[140]LOL Post-Hearing Brief at 45-54.

Tenth, LOL remains skeptical of Hu Honua's proposals to utilize invasive species as feedstock and sell excess energy from the Project as hydrogen.[141]

Lastly, LOL states that numerous questions remain as to how, if at all, the Commission would be able to ensure that Hu Honua complies with the Amended PPA and its Carbon Commitment.[142] For example, LOL argues that "there is no evidence in the record as to how the Commission . . . could or would respond if the verification analysis reveals that Hu Honua is not in compliance [with its Carbon Commitment]."[143] LOL cautions that "[w]ithout clearly articulated conditions and consequences being included in the [Amended] PPA, it is unlikely that the Commission (or HELCO) would have the legal authority necessary to bring [Hu Honua] into compliance."[144] In this regard, LOL maintains that "[its] due process rights will be violated if the [Amended] PPA is approved without the Commission first definitively determining Hu Honua's obligations related to the [Amended] PPA, the compliance

[141]See LOL Post-Hearing Brief at 60-64.

[142]LOL Post-Hearing Brief at 66.

[143]LOL Post-Hearing Brief at 66.

[144]LOL Post-Hearing Brief at 66.

verification methodology, the mechanism for enforcement, and/or other important outstanding issues."[145]

E.

Tawhiri

Tawhiri opposes approval of the Amended PPA. In support of its position, Tawhiri states that the terms and conditions of the Amended PPA are not prudent and in the public interest.[146] Tawhiri states that the Amended PPA will result in higher monthly bills for ratepayers, which HELCO estimates to be an increase of $10.97 increase per month for an average residential customer,[147] and will also increase HELCO's revenue requirements by $285,746,325 over the 30-year term.[148]

Tawhiri states that it shares the concerns of the Consumer Advocate and LOL regarding HELCO's and Hu Honua's GHG analyses (i.e., the Ramboll Analysis and ERM Analysis) and the potential negative impact to the environment and public health.[149] Tawhiri also voices concerns that curtailment of renewable

[145]LOL Post-Hearing Brief at 67 (bold in the original).

[146]Tawhiri Post-Hearing Brief at 19.

[147]Tawhiri Post-Hearing Brief at 9.

[148]Tawhiri Post-Hearing Brief at 10.

[149]Testimony of Sandra-Ann Wong, Recording of Hearing, Day 5, March 7, 2022, at 01:51:58 – 01:52:14.

resources caused by the Project was not included in the Ramboll Analysis.[150] Further, Tawhiri states that Hu Honua has made many promises regarding carbon neutrality, but has made no firm financial commitment to guarantee them.[151]

Based on the above, Tawhiri recommends the Commission deny HELCO's Letter Request for approval of the Amended PPA and instead recommend that Hu Honua submit the Project for consideration in HELCO's upcoming third round of solicitations for competitive bidding for renewable projects.[152] Alternatively, if the Commission is inclined to approve the application, Tawhiri recommends that the Commission should include the following conditions:

- HELCO will not curtail existing renewable generators, such as Tawhiri, to take energy from the Project;
- HELCO and Hu Honua will negotiate "a more just and reasonable price for its energy and capacity that would be more in line with the current energy market on Hawaii Island and more palatable for HELCO ratepayers"; and

[150]Testimony of Sandra-Ann Wong, Recording of Hearing, Day 5, March 7, 2022, at 01:52:15 – 01:52:29.

[151]Testimony of Sandra-Ann Wong, Recording of Hearing, Day 5, March 7, 2022, at 01:52:31 – 01:52:42.

[152]Tawhiri Post-Hearing Brief at 25.

- "Hu Honua will fully fund the Reserve Account to cover its commitment of 30,000 tons of carbon offsets."[153]

III.

STATEMENT OF ISSUES

Pursuant to Order No. 37852,[154] as modified by Order No. 37910, the Statement of Issues governing this remanded proceeding is as follows:

1. What are the long-term environmental and public health costs of reliance on energy produced at the proposed facility?

    a. What is the potential for increased air pollution due to the lifecycle GHG emissions of the Project?

2. What are the GHG emissions that would result from approving the Amended PPA?

3. Whether the total costs under the Amended PPA, including but not limited to the energy and capacity costs are reasonable in light of the potential for GHG emissions.

4. Whether the terms of the Amended PPA are prudent and in the public interest, in light of the Amended PPA's hidden and long-term consequences.[155]

[153]Tawhiri Post-Hearing Brief at 26.

[154]As noted in Order No. 37852, these issues on remand are rooted in the Court's decisions in HELCO I and HELCO II. See Order No. 37852 at 8-10.

[155]Order No. 37910 at 32-33.

IV.

DISCUSSION

A.

Issue No. 1: Long-Term Environmental And Public Health Costs Of Reliance On Energy Produced At The Project

The Commission is concerned that the Project may result in long-term environmental and public health costs for Hawai`i Island. Although Hu Honua portrays the Project as having a net GHG emissions reduction over the Project's lifetime, the Commission does not find Hu Honua's position sufficiently supported. The Project is expected to result in a significant amount of GHG emissions, and Hu Honua's claims to sequester enough carbon to offset these amounts is subject to speculation and uncertainty, creating the risk that the Project could become a net emitter of GHGs over its lifetime.

According to Hu Honua, the Project is estimated to produce more than 8,000,000 metric tons of CO_2 over the term of the Amended PPA. As the vast majority of these emissions are associated with the stack emissions associated with operating the Project, based on HELCO's simulated dispatch models, there is a high degree of confidence that such emissions will result if the Amended PPA is approved.

To mitigate these significant GHG emissions, Hu Honua commits to sequester GHGs, or to purchase carbon offsets,

sufficient to ensure the Project is net carbon negative by 30,000 metric tons by the end of the PPA term (2051). However, as discussed below, the Commission does not find this claim to credible, due to Hu Honua's reliance on a number of speculative assumptions to support its estimated sequestration results. The Commission's concerns are exacerbated by the sensitivity of the ERM Analysis, which leaves little margin for error. For example, a relatively small change in certain key inputs (e.g., a change of 1% to stack emissions, belowground carbon loss, aboveground carbon sequestration, or belowground carbon sequestration), could negate the net 30,000 MT CO_2e reduction estimated in the ERM Analysis, and instead result in the Project being a net emitter of GHGs over its lifetime. Even when taking into account the avoided lifecycle GHG emissions calculated by the Ramboll Analysis, estimated to be roughly 1,400,000 MT CO_2e, the uncertainty surrounding Hu Honua's ability to sufficiently sequester carbon could still result in the Project being a significant net emitter of GHGs.

This undermines confidence in Hu Honua's represented ability to sequester enough carbon to offset the significant GHG emissions the Project is expected to produce. Should sequestration efforts fall short, Hu Honua's plan to purchase carbon offsets has not been sufficiently developed, and it is uncertain whether it would be sufficiently robust.

Furthermore, it is unclear whether and how the Commission would be able to oversee and enforce Hu Honua's Carbon Commitment throughout the 30-year term of the Amended PPA, should Hu Honua fail to comply with the Carbon Commitment, assign or terminate the Amended PPA mid-term, or otherwise deviate from delivering the purported environmental benefits offered in support of approving the Amended PPA.

While the Commission recognizes that Hu Honua has offered to adopt "any reasonable modifications and/or additional conditions" to hold Hu Honua accountable for its Carbon Commitment,[156] the Commission does not find this proposal reasonable or appropriate under the circumstances. It is the Applicants' burden to demonstrate that their proposal is reasonable and in the public interest. Moreover, given the concerns identified by the Commission, discussed below, this is not a situation in which the Commission's concerns revolve around minor disputes that could be addressed through "reasonable modifications" or "additional conditions." Rather, the Commission's concerns go to fundamental aspects of Hu Honua's Carbon Commitment, such as the availability of land on Hawai`i Island for feedstock and sequestration, the potentially significant fluctuations in GHG emissions and sequestration based

[156]Hu Honua Post-Hearing Brief at 29.

on actual performance, the lack of information supporting Hu Honua's backstop of purchasing carbon offsets, and questions and concerns regarding the enforceability of the Carbon Commitment. Relatedly, it is unclear what modifications would be considered "reasonable" by Hu Honua, which may result in a situation where potential modifications or conditions are immediately challenged.

Upon considering the above, the Commission finds that there is the potential for increased air pollution due to the lifecycle GHG emissions from the Project. Consequently, the Commission has concerns about the long-term environmental and public health costs that may result from the Project, and does not find that the GHG analyses, Carbon Commitment, or other evidence in the record reasonably mitigates these concerns.

1.

Concerns About The Project's GHG Emissions

i.

The Project Is Expected To Emit Significant GHG Emissions

The following Table 2 summarizes the results from the ERM Analysis using the HELCO Dispatch Scenario for projected lifecycle emissions from 2017-2051 (this includes the 30-year PPA term in addition to purported tree growth on plantations leased by

CNRR from 2017-2021 and estimated sequestration associated with trees planted pursuant to the NFF Agreement):

TABLE 2 **Summary of GHG Emissions Estimates** **Adapted from Project GHG Analysis prepared by ERM[157]** ***HELCO Dispatch Scenario: 11.8 MW/2,972.2 GWh for the 30-year duration of the PPA***	
ERM Project Emissions Estimates	**Total 2017-2051 (MT CO2e)**
Stack Emissions	5,921,950
Belowground Biomass+Soil Organic Carbon Loss/Emissions	1,722,319
Fertilizing	121,614
Purchase of Electricity	74,024
Combustion of Biodiesel	67,000
Harvesting	37,661
Transport of Biomass	36,648
Lifecycle Factor Diesel	16,065
Air Pollution Control Device	15,865
Construction	14,848
Ash Transport Emissions	3,714
Site Prep/Weeding Emissions	2,551
Decommissioning	1,485
Transport of Biodiesel	60
Total Emissions Estimate	***8,035,804***

[157] See HELCO Supplemental Response to PUC-HELCO-IR-17.b., Attachment 3 at 60. In the accompanying .xlsx Excel workbook, this is reflected in Calculation Tab: "Emission Sim." The Commission converted all amounts reported in short tons to metric tons at the following conversion rate provided in the .xlsx Excel workbook prepared by ERM: 0.90718474 metric tons / short ton.

ERM Sequestration Estimates[158]	Total 2017-2051 (MT CO2e)
On-Island CO2e Aboveground Sequestration	(5,882,322)
Belowground Biomass+Soil Organic Carbon Gain/Sequestered	(1,746,487)
National Forest Foundation ("NFF") agreement	(437,500)
Total Sequestration Estimate	***(8,066,309)***
Total Project GHG Emissions Estimate[159]	**(30,505)**[160]

The above emissions and sequestration figures are determined through ERM's Carbon Calculator, which Hu Honua states, "provides a method by which Hu Honua will track actual operational parameters and emissions year-by-year during project operation" and "will be used to ensure that Hu Honua meets the GHG commitments

[158]Sequestration estimates are based on HELCO Supplemental Response to PUC-HELCO-IR-17.b., Attachment 3 at 47 (Table 2) and 60. In the accompanying .xlsx Excel workbook, this is reflected in "Table 2 – CO2 Calculation Simulation" and Calculation Tab: "Emission Sim." The "Emission Sim" calculation tab does not break down aboveground sequestration estimates between Hawai`i Island and NFF trees; however, these figures can be derived by referring to Table 2. Compare HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 60 (reflecting approximately 6,966,403 short tons of sequestered carbon from "CO_2e Sequestration (Excluding Belowground), converted into 6,319,815 metric tons, using conversion: 0.90718474 metric tons/short tons) with id., Attachment 3 at 47 (sum of "Net Aboveground Biomass Growth On Island" column, 5,882,322 MT CO_2e, and "NFF Trees" column, 437,500 MT CO_2e, equaling approximately 6,319,822 MT CO_2e).

[159]ERM defines "Project GHG Emissions" as "net emissions minus net sequestrations." Hu Honua Prehearing Testimony, Exhibit Hu Honua-401 at 8.

[160]Due to rounding, Net Lifecycle Emissions Estimate is (30,505) MT CO_2e in this table, however, in accompanying .xlsx Excel workbook, Calculation Tab: "Emission Sim" Cells, ERM's rounded conversion of Lifecycle Emissions reported in Cell AC43 is (30,499) MT CO_2e.

it has made as described in [its] testimony and the Project GHG Analysis."[161]

As reflected in Table 2, above, the Project is estimated to produce a significant amount of GHG emissions (approximately 8,035,804 MT CO_2e) over the 30-year term of the Amended PPA. The ERM Analysis concludes that these emissions will be offset by carbon sequestered through planting of trees (on Hawai`i Island and pursuant to the NFF Agreement), resulting in a net GHG reduction of approximately 30,500 MT CO_2e.[162] This forms the basis of Hu Honua's "Carbon Commitment." However, upon reviewing the Analysis, the Commission is left with a number of concerns, which are discussed below.

[161]Hu Honua Prehearing Testimony, T-4 (David Weaver) at 8.

[162]See Hu Honua Prehearing Testimony, T-4 (David Weaver) at 13 (stating that Tables 2 and 3 of Exhibit Hu Honua-402 "detail how Hu Honua will produce Carbon Negative electricity by using eucalyptus from commercial plantations as its primary fuel and by growing more biomass than it consumes."); and HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3, at 47-48 (reflecting updated Tables 2 and 3, and attributing sequestration to "Net Aboveground Biomass Growth On Island" and "NFF Trees").

Hu Honua states that its Carbon Commitment does not include the "avoided emissions" from offsetting fossil fuel use on HELCO's system, which Ramboll estimates to be approximately 1,400,000 MT CO_2e. In other words, the Carbon Commitment is to be at least 30,000 MT CO_2e carbon negative in addition to any avoided emissions from displaced fossil fuels on HELCO's system.

ii.

Uncertainty Of Assumptions Underlying Sequestration Estimates

The Carbon Calculator relies on assumptions for its sequestration estimates that have not been reasonably established in the record. Review of the Carbon Calculator shows that "Net Aboveground Biomass Growth On Island" is the greatest contributor to sequestration, totaling an estimated 5,882,322 MT CO_2e sequestered.[163] Hu Honua states that it has contracted to receive local feedstock through a Fuel Sales and Purchase Agreement with CNRR ("Fuel Sales Agreement"), which, in turn, has separate agreements with three Hawai`i Island locations in Pahala, Paauhau, and Hamakua.[164] Although the Fuel Sales Agreement is intended for feedstock purposes (i.e., acquiring biomass to fuel the Project), it appears that the plantations leased by CNRR are also considered sources of sequestration in the ERM Analysis.[165]

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[163]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 47.

[164]See Hu Honua Prehearing Testimony, T-2 (Jon Miyata) at 3-6; see also, Hu Honua Response to CA/Hu Honua-IR-145, filed October 21, 2021; and Hu Honua Response to LOL-IR-2021-03, filed on July 26, 2021, Exhibit 1("2020 Biomass Fuel Supply Report Update for CN Renewable Resources," dated April 13, 2020, prepared by Forest Solutions, Inc.)(filed under seal).

[165]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 47 (assigning sequestration values for the 2017-2021 period). See also, Hu Honua Response to PUC-Hu Honua-IR-14, filed on October 29, 2021 (indicating that the

In the Carbon Calculator, sequestration amounts can be divided into past sequestered estimates (i.e., for years 2017-2021) and future sequestration estimates (for years 2022-2051). The Commission has concerns with both.

Regarding past sequestration estimates, the Commission notes that Hu Honua has not provided consistent information regarding its past harvesting efforts on the plantations leased by CNRR.[166] ERM assumes roughly 330,321 MT CO_2e are sequestered in the years 2017-2021,[167] and assumes that no harvesting has taken place on plantations during this period.[168] However, Hu Honua has indicated that harvesting has, in fact, occurred during this period at the Pahala location.[169] This may impact the level of GHG

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sequestration values for the 2017-2021 period are associated with the plantations Hu Honua currently has under lease); and Hu Honua Response to PUC-Hu Honua-IR-37.a, filed on October 29, 2021 (stating that trees may be "planted, replanted, or coppiced for sequestration purposes only [and will not be] harvested for Hu Honua feedstock.").

[166]Compare Hu Honua Response to LOL-Hu Honua-IR-2021-03, Exhibit 1 (filed under seal), at 23 and 28 with Hu Honua Response to PUC-Hu Honua-IR-65, filed on January 10, 2022.

[167]HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 47 (sum of years 2017-2021 for "Net Aboveground Biomass Growth On Island column). In accompanying .xlsx Excel workbook, see "Table 2 - CO2 Calculation Simulation", Column G.

[168]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 47 (table at right side, column titled "Approximate Acres Harvested").

[169]See Hu Honua Prehearing Testimony, T-2 (Jon Miyata) at 8; and Hu Honua Response to PUC-Hu Honua-IR-65.

emissions associated with harvesting, as well as the number of trees remaining on plantations available to sequester carbon during this period. While the exact impact these harvest assumptions play in the ERM Analysis is unclear, the inconsistency between ERM's and Hu Honua's understanding of this issue is an example of uncertainty with the ERM Analysis' assumptions that causes the Commission to doubt the reliability of its results.

Regarding future sequestration estimates, the Carbon Calculator appears to assume continuation and/or expansion of Hawai`i Island leases. For example, the column labeled "Net Aboveground Biomass Growth on Island," shows increasing levels of annual sequestration.[170] Specifically, historic amounts of sequestration, noted for years 2017-2021, increase from 86,650 MT CO_2e in 2021 to approximately 100,000 MT CO_2e annually during 2022-2023, before increasing to 150,000 MT CO_2e annually during 2024-2028, and then increasing again to 200,000 MT CO_2e annually in 2029 and remaining at this annual level for each year for the rest of the PPA term through 2051.[171]

[170] See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 47. In accompanying .xlsx Excel workbook, see calculation tab, "Table 2 - CO2 Calculation Simulation."

[171] See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 47. In accompanying .xlsx Excel workbook, see calculation tab, "Table 2 - CO2 Calculation Simulation."

However, at this time, lease agreements with the existing Hawai`i Island locations do not extend through the 30-year term of the PPA.[172] Further, it does not appear that planting or regrowing of trees is occurring on the plantations currently leased by Hu Honua,[173] indicating that future sequestration estimates are premised on Hu Honua's ability to extend its existing leases or secure new lease agreements. Although Hu Honua states that it is in negotiations to extend the existing leases, no lease extensions or new leases have been obtained, and Hu Honua has indicated that completing negotiations for new or extended leases will require Commission approval of the Amended PPA first.[174]

While the Commission recognizes Hu Honua's representations that it is engaged in ongoing efforts to secure extended and/or additional leases, and that Commission approval would facilitate negotiations, the Commission does not consider these reasonable assurances under the circumstances, as the outcome of these negotiations would not be known until after Commission approval has been given, at which point, the Commission would have little recourse if negotiations are not successful.

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[172]See Hu Honua Response to LOL-Hu Honua-IR-2021-03, Exhibit 1 (filed under seal), at 6.

[173]See Hu Honua Response to CA/Hu Honua-IR-95.a, filed on February 18, 2020.

[174]See Hu Honua Response to CA/Hu Honua-IR-135, filed on October 21, 2021.

Although Hu Honua has offered to provide, within 60 months of a final non-appealable approval order from the Commission, documentation demonstrating that it has secured additional acreage on Hawai`i Island, this offer is not premised on any binding agreement, but arises from "good faith discussions" with a potential landowner.[175]

Further, it is unclear what "additional acreage" constitutes in this situation. For example, even if Hu Honua were able to successfully extend or potentially obtain additional acreage on Hawai`i Island, the Commission's concern is whether this will allow Hu Honua to achieve sequestration as set forth in the ERM Analysis, which, as noted above, contemplate a significant increase in sequestration for the remainder of the Amended PPA term. Thus, this condition, as proposed, does not adequately address the Commission's concerns, as Hu Honua could strictly comply with the condition by demonstrating an extension of an existing lease or negotiation of a new lease; however, if the associated acreage is not enough to provide the sequestration estimated by ERM, then the Commission's concerns about potential Hawai`i Island sequestration shortfalls would remain.

[175]See Hu Honua Post-Hearing Brief at 28-29, n.145 (referring to "good faith discussions" with Kamehameha Schools ("KS"); and Exhibit F (clarifying that "[t]his proposal is subject to KS's internal review and final approval, and this letter is not legally binding upon either [Kamehameha Schools] or CNRR.").

Hu Honua has also stated that it would not be "financially viable" for it to secure acreage for the entire duration of the Amended PPA prior to receiving Commission approval.[176] However, this does not address the issue at hand. Regardless of whether it is "financially viable" for Hu Honua to contractually secure acreage for the duration of the Amended PPA, Hu Honua must present some reasonable form of evidence to support its assumptions regarding sequestration on Hawai`i Island as estimated in the ERM Analysis. Aside from evidence of non-binding "good faith" discussions, Hu Honua has not done so. For example, the Consumer Advocate has queried why Hu Honua could not enter into conditional agreements with landowners, where the agreement would be conditioned on approval of the Amended PPA.[177] Further, if not "financially viable" to secure leases for the entire Amended PPA term, it is unclear why leases could not be secured for at least a significant portion of the PPA term, which could help bolster sequestration assumptions.

Further, if Hu Honua is unable to extend or secure new lease agreements on Hawai`i Island, it would presumably need to procure feedstock from other islands within the State,

[176]Hu Honua Response to PUC-Hu Honua-IR-35.e, filed on October 29, 2021.

[177]See CA Post-Hearing Brief at 10.

the continental United States, or internationally.[178] As noted by the Consumer Advocate in its Post-Hearing Brief, this raises the possibility of additional GHG emissions associated with cultivating, harvesting, and transporting feedstock off-island that are not currently captured in the ERM Analysis.[179]

Another significant source of CO_2e sequestration comes from trees planted under the NFF Agreement, which is estimated to result in approximately 437,500 MT CO_2e.[180] However, these figures are based on a generalized carbon sequestration rate, tree survival rate, and tree lifetime information Hu Honua states it received from NFF, and may not accurately reflect the actual performance of the planted trees, which will depend on the tree species, planting schedules, location, survival rate, growth rate, and sequestration rate.[181] The lack of specific information blunts the credibility of the sequestration estimates from the NFF Agreement and injects further uncertainty as to the amount of GHG emissions that may be sequestered to offset Project emissions.

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[178]See Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 17 and T-2 (Jon Miyata) at 4-5.

[179]See CA Post-Hearing Brief at 8-9.

[180]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 47.

[181]See Hu Honua Response to PUC-Hu Honua-IR-19.b, filed on October 29, 2021. See also Hu Honua Response to PUC-Hu Honua-IR-68, filed on January 10, 2022.

Hu Honua also refers to sequestration resulting from the OTP Agreement and from the FHVNP Agreement; however, neither of these agreements are reflected in the ERM Analysis' Carbon Calculator.[182] Thus, it is impossible to reasonably estimate, based on the record, what amount, if any, of sequestered CO_2e may arise from these agreements.

The uncertainties and speculation associated with the ERM Analysis are particularly concerning, given the Carbon Calculator's high degree of sensitivity to changes in key input values, discussed further below.

iii.

Sensitivity Of The Carbon Calculator To Changes In Inputs

The Commission observes that the Carbon Calculator is highly sensitive to inputs from key emissions categories, with small changes having a significant impact on overall results. The following Table 3 reflects the major categories of emissions and sequestrations from the ERM Analysis:

[182] See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 47 of 61 (reflecting no sequestration estimates for "Other Mitigation Strategies").

TABLE 3[183] **Project Emissions by Major Lifecycle Category** **(MT CO_2e)**	
Lifecycle Step	**MT CO_2e**
Stack Emissions	5,921,950
Belowground Carbon Loss/Emissions	1,722,319
Aboveground CO_2e Sequestration	(6,319,815)[184]
Belowground Carbon Gain/Sequestered	(1,746,487)
Other[185]	375,201
Construction	14,848
Decommissioning	1,485
Total	(30,498)[186]

[183]Figures drawn from HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 60. In the accompanying .xlsx Excel workbook, see calculation tab, "Emission Sim." The Commission converted all amounts reported in short tons to metric tons at the following conversion rate: 0.90718474 metric tons / short ton. Slight variations in resulting values may be attributed to rounding.

[184]This figure appears to account for aboveground sequestration from both Hawai`i Island, as well as the NFF Agreement. See n. 159, supra.

[185]"Other" includes ERM's projected emissions associated with the following categories: Purchase of Electricity, Combustion of Biodiesel, Air Pollution Control Device, Transport of Biomass, Ash Transport Emissions, Site Prep/Weeding, Harvesting, Transport of Biodiesel, Lifecyle Factor Diesel, and Fertilizing. See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 60.

[186]As noted above, the total net emission figures in Table 3 may not exactly match those in Table 2 due to rounding and the conversion of figures from short tons to metric tons.

As reflected above, the four categories contributing the most towards GHG emissions increases and reductions are: above ground carbon sequestration, stack emissions, belowground carbon sequestration (i.e., carbon sequestered and stored belowground in roots and soil), and belowground carbon loss/emissions (i.e., loss of carbon stored below ground associated with activities such as harvesting).

The Commission considers these values significant, as they are critical to supporting the ERM Analysis' overall conclusion that the Project will be net negative by approximately 30,000 MT CO_2e over the term of the Amended PPA. The Commission further considers the relative risk associated with each of these emission and sequestration categories. Specifically, stack emissions and belowground carbon loss are direct outcomes of the Project's operations. These estimates are based on HELCO's simulated dispatch of the Project, but actual emissions could be higher depending on a number of factors, e.g., if the Project is dispatched at a greater level, if the carbon content of the feedstock is greater than estimated,[187] or if the Project operates at a lower efficiency than expected (thereby

[187]For example, the ERM Analysis assumed a particular type of eucalyptus would be used for feedstock, but the Commission notes that Hu Honua has referenced potentially using other forms of vegetation for feedstock, such as invasive species, which may have different characteristics.

requiring more feedstock to sustain operations). Conversely, as discussed above, assumptions supporting ERM's sequestration figures are speculative and may not represent actual sequestration results.

This is particularly concerning, as the Commission's review indicates that even a one-percent deviation in any of the above four categories could cause the ERM Analysis' total estimated amount of CO_2e emissions to fluctuate significantly in either direction, which could easily turn the Project into a net emitter of GHG emissions, contrary to the Carbon Commitment. For example, a one-percent decrease in CO_2e aboveground sequestration (including sequestration from NFF trees) is estimated to increase CO_2e emissions by approximately 63,200 metric tons. This amount is more than double the approximately 30,500 metric tons of CO_2e net reduction calculated by ERM, and would turn the Project into a net CO_2e emitter of 32,700 metric tons over its lifecycle.[188] Similarly, a one percent increase in the biomass consumed to produce an equivalent amount of power would make the Project a net CO_2e emitter. That being said, the opposite would occur if there was a one percent increase in sequestration or a one percent decrease in biomass consumption.

[188] 32,700 metric tons is the sum of (30,500) metric tons and 63,200 metric tons.

This high level of sensitivity leaves little margin for error. When taking into account the many uncertainties underlying ERM's sequestration assumptions, discussed above, the likelihood that the Project will achieve net carbon negativity as claimed by Hu Honua becomes increasingly uncertain and poses the risk that the Project will instead become a net emitter of GHG emissions over its lifecycle. On this point, the Commission observes that the approximately 30,000 MT of carbon reduction pledged by Hu Honua in its Carbon Commitment represents a relatively small fraction of the 8,035,803 metric tons of overall GHG emissions expected to result from the Project (less than one-half of one percent).[189] This means that Hu Honua will need to achieve a significant amount of sequestration to offset the Project's emissions, and if Hu Honua's sequestration efforts deviate by even a small fraction from ERM's assumptions, the Project could become a net GHG emitter. Given the high sensitivity of the Carbon Calculator and the magnitude of emissions associated with certain key factors, the net 30,000 MT CO_2e estimated in the Carbon Commitment does not offer sufficient reassurance against the risk of the Project becoming a net GHG emitter, as it could be quickly swallowed by a relatively small change in assumptions.

[189] 30,000 / 8,035,803 = 0.37%

iv.

Uncertainty Regarding The Project's Total GHG Impact

As noted above, HELCO submitted a separate GHG analysis performed by Ramboll, which reported the total net GHG emissions impact associated with the Project.[190] In so doing, Ramboll independently estimated the avoided GHG emissions associated with the Project, while relying on ERM's estimates for the Project's lifecycle GHG impact,[191] to arrive at a total "Net Emissions" GHG impact for the Project.

Ramboll defines the Project's "Net Lifecycle Emissions" as the Avoided Emissions from Fossil Fueled Plants ("Avoided Lifecycle Emissions") less the Emissions from the Project ("Project Lifecycle Emissions"), which Ramboll relied on ERM to provide. Accordingly, Ramboll applied ERM's Project Emissions estimate of (30,499) MT CO_2e to its estimate of Avoided Lifecycle Emissions to conclude that the Project will result in a Net Lifecycle Emissions Reduction of 1,464,742 MT CO_2e:[192]

[190] See HELCO Prehearing Testimony, Exhibit HELCO-501.

[191] See HELCO Prehearing Testimony, Exhibit HELCO-501 at 5-11; and HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 5-11.

[192] See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 11.

Net Lifecycle Emissions Reduction	=	Avoided Lifecycle Emissions	-	Project Lifecycle Emissions
1,464,742 MT CO_2e	=	1,434,243 MT CO_2e	-	-30,499 MT CO_2e

Thus, to reach its conclusion of "Net Lifecyle Emissions Reduction," Ramboll relied upon Project GHG emissions results from the ERM Analysis. However, as discussed above, there are concerns with the reliability of the results of the ERM Analysis. As reflected in the calculation above, a change in the Project Lifecycle Emissions would affect the overall Net Lifecycle Emissions associated with the Project. Given the 30-year term of the Amended PPA, as well as the uncertainties surrounding the results of the ERM Analysis, it is possible that the Project Lifecycle Emissions might swing in a different direction and begin to offset, if not completely cancel, the Avoided Lifecycle Emissions estimated by Ramboll.

On this point, the Commission notes that the ERM Analysis' results are highly sensitive to even slight changes in assumptions, and even a relatively slight change in Project efficiency or sequestration efforts could significantly swing the amount of actual Project emissions either way. Additionally, an acceleration in expected growth of other renewable projects on Hawai`i Island during the Amended PPA term could reduce estimated avoided emissions, as these would displace fossil fuel-based units

on HELCO's system, which could also affect the Project's total net GHG impact.

Accordingly, given the uncertainties around the estimated Project emissions, the Commission does not find Ramboll's estimate of Net Lifecycle Emissions dispositive on this matter.

2.

Additional Concerns With The ERM Analysis

i.

Opacity Of Carbon Calculator Inputs

The Carbon Calculator contains a number of hard-coded cells, which limits the Commission's ability to assess the reasonableness of the Carbon Calculator's inputs and outputs. For example, the Carbon Calculator assumes a fixed, hard-coded value of 180,983 metric tons of biomass combusted each year for its 11.8 MW average output analysis.[193] The record does not indicate how ERM arrived at this value – for example, there is no accompanying analysis regarding the heat content of the feedstock, its carbon ratio, or its water content to determine the amount of biomass necessary to fuel a Project output of approximately

[193] See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3, at 47 (column titled "Biomass Combusted"). This is shown in the accompanying .xlsx Excel workbook, Table 2 – CO2 Calculation Simulation, Column F, "Biomass Combusted."

11.8 MW. The Consumer Advocate sought the formulas and underlying data for these hard-coded numerical values, but Hu Honua declined to provide the underlying calculations and data, and instead stated that it would "calculate biomass removed based on weighing the biomass at the facility with its truck scale."[194]

Similarly, the Carbon Calculator includes hard-coded values for aboveground sequestration on Hawai`i Island.[195] As discussed above, this is the largest source of estimated sequestered carbon, approximately 5,882,322 MT CO_2e, and is a primary driver for ERM's conclusion that the Project will achieve net "carbon negativity" by the end of the Amended PPA's term. However, these figures are hard-coded into the Carbon Calculator without sufficient explanation as to how these figures were determined or deemed to be reasonable, or the basis for their escalation over the 30-year term. Again, in response to a request by the Consumer Advocate for the underlying formulas and data for the hard-coded values in the "Net Aboveground Biomass Growth on Island," Hu Honua declined to provide the actual formulas and data,

[194]Hu Honua Response to CA/Hu Honua-IR-155, filed October 21, 2021.

[195]See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3, at 47 (column titled "Net Aboveground Biomass Growth On Island"). This is shown in the accompanying .xlsx Excel workbook, Table 2 – CO2 Calculation Simulation, Column G, "Net Aboveground Biomass Growth On Island."

and instead referred to "calculations based on the acreage growing and the mass per acre calculated for the Hu Honua leased acres based on the [Forest Solutions Report]."[196] Given the uncertainty about whether, and to what extent, Hu Honua will be able to secure acreage on-island throughout the 30-year term, the lack of supporting rationale for these hard-coded figures casts doubt on the credibility of the Carbon Calculator's results.

Given the sensitivity of the Carbon Calculator to certain inputs, including the amount of biomass combusted at the Project and the amount of aboveground sequestration, the reasonableness of these inputs is particularly important, and the lack of transparency as to how ERM arrived at these values further call into doubt the reliability of the ERM Analysis' results.

Further, these hard-coded aboveground sequestration outputs drive some of the underlying calculations for the Carbon Calculator. For example, "Table 2" of the Carbon Calculator reflects the results of the HELCO Dispatch Scenario, with the underlying calculations performed in the "Emission Sim" spreadsheet of the accompanying .xlsx Excel workbook.[197]

[196]Hu Honua Response to CA-Hu Honua-IR-155.

[197]A .pdf version of the Emission Sim workbook is reflected in HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3

Upon review, the numerical values provided in the "calculations tabs" in the Emission Sim for aboveground sequestration are set to be equal to the values ERM provides for aboveground sequestration in Table 2 (Column G, labeled "Net Aboveground Biomass Growth On Island")).[198] Thus, it appears that the Carbon Calculator is configured such that its results (i.e., sequestration values provided in Table 2) are used as inputs into the worksheet to drive calculations (i.e., sequestration values in calculation tab, Emission Sim – Column P). It is unclear why the Carbon Calculator is configured in this manner, and raises additional questions as to the reasonableness and reliability of the Calculator as a tool to track and measure emissions and sequestration resulting from the Project.

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at 60 ("CO2 Calculator Example Simulated Production Emissions from Hu Honua Plant Over 30 Year Duration").

[198] Compare, HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3, at 60 (column labeled "CO2e Sequestration (Excluding Belowground)" (in the accompanying .xlsx Excel workbook, see calculation tab, "Emission Sim", Column P, labeled "CO2e Sequestration (Excluding Belowground)") with id., Attachment 3 at 47 (Table 2, column labeled "Net Aboveground Biomass Growth On Island") (in accompanying .xlsx Excel workbook, see calculation tab, "2 – CO2 Simulation," Column G, labeled "Net Aboveground Biomass Growth On Island").

ii.

Sequestered Carbon Is Not Estimated
To Overtake Accumulated GHG Emissions Until 2047

Even assuming, arguendo, that the Carbon Calculator was not subject to the above uncertainties, the purported GHG benefits of the Project may not result until very late in the Amended PPA's 30-year term.

As part of Hu Honua's Carbon Commitment, Hu Honua pledges to be carbon negative on an annual basis by the end of 2035, and each year thereafter until the end of the PPA term (assuming operations begin in 2022).[199] However, this statement is premised on comparing GHG emissions and sequestration in each particular year of the Amended PPA ("Annual Basis"), and does not consider the cumulative impact of prior years' worth of emissions and sequestration ("Cumulative Basis"). When analyzed from a Cumulative Basis, that is, taking into account all of the prior years' worth of accumulated GHG emissions and sequestration, total carbon sequestration does not overtake total GHG emissions until 2047, near the end of the Amended PPA term, and after the State's 2045 zero emissions clean economy target,[200] as shown in the following Table 4:

[199]See Hu Honua Prehearing Testimony, T-1 at 29.

[200]See https://www.capitol.hawaii.gov/hrscurrent/vol04_ch0201-0257/HRS0225P/HRS_0225P-0005.htm.

TABLE 4
Emissions and Sequestration Presented on an Annual Basis vs. on a Cumulative Basis
(Adapted from the ERM Analysis)[201]

	A. Total Emissions	B. Cumulative Emissions	C. Total Sequestration	D. Cumulative Sequestration	E. Net Annual Emissions	F. Cumulative Emissions
YEAR	**(MT CO_2e)**	Cumulative of A **(MT CO_2e)**	**(MT CO_2e)**	Cumulative of C **(MT CO_2e)**	**E = A + C (MT CO_2e)**	Cumulative of E **(MT CO_2e)**
-	16,333	16,333	0	0	16,333	16,333
2017	0	16,333	(32,707)	(32,707)	(32,707)	(16,374)
2018	0	16,333	(80,121)	(112,827)	(80,121)	(96,495)
2019	0	16,333	(90,814)	(203,641)	(90,814)	(187,308)
2020	0	16,333	(112,377)	(316,018)	(112,377)	(299,686)
2021	0	16,333	(112,377)	(428,396)	(112,377)	(412,063)
2022	265,290	281,623	(132,815)	(561,211)	132,475	(279,588)
2023	267,386	549,008	(138,534)	(699,745)	128,851	(150,737)
2024	267,386	816,394	(203,910)	(903,655)	63,475	(87,262)
2025	267,386	1,083,779	(207,035)	(1,110,691)	60,350	(26,912)
2026	267,386	1,351,165	(210,160)	(1,320,851)	57,225	30,313
2027	267,386	1,618,550	(210,160)	(1,531,012)	57,225	87,539
2028	267,386	1,885,936	(210,160)	(1,741,172)	57,225	144,764
2029	267,386	2,153,321	(275,006)	(2,016,178)	(7,620)	137,143
2030	267,386	2,420,707	(275,006)	(2,291,184)	(7,620)	129,523
2031	267,386	2,688,092	(275,006)	(2,566,189)	(7,620)	121,903
2032	267,386	2,955,478	(275,006)	(2,841,195)	(7,620)	114,283
2033	267,386	3,222,863	(275,006)	(3,116,200)	(7,620)	106,663
2034	267,386	3,490,249	(275,006)	(3,391,206)	(7,620)	99,043
2035	267,386	3,757,634	(275,006)	(3,666,212)	(7,620)	91,423

[201] See HELCO Supplemental Response to PUC-HELCO-IR-17.b., Attachment 3 at 60. In the accompanying .xlsx Excel workbook, see Calculation Tab: "Emission Sim" Cells E43, F43, G43, J43, L43, M43, N43, O43, P43, Q43, T43, U43, V43, W43, X43, Y43. Conversion: 0.90718474 metric tons / short tons (slight differences attributed to rounding). Note that columns B, D, and F in Table 4 represent the cumulative amounts for the preceding columns, which the Commission calculated using columns A, C, and E, which are based on the Carbon Calculator.

	A. Total Emissions	**B. Cumulative Emissions**	**C. Total Sequestration**	**D. Cumulative Sequestration**	**E. Net Annual Emissions**	**F. Cumulative Emissions**
YEAR	**(MT CO_2e)**	Cumulative of A **(MT CO_2e)**	**(MT CO_2e)**	Cumulative of C **(MT CO_2e)**	**E = A + C (MT CO_2e)**	Cumulative of E **(MT CO_2e)**
2036	267,386	4,025,020	(275,006)	(3,941,217)	(7,620)	83,803
2037	267,386	4,292,405	(275,006)	(4,216,223)	(7,620)	76,183
2038	267,386	4,559,791	(275,006)	(4,491,228)	(7,620)	68,563
2039	267,386	4,827,177	(275,006)	(4,766,234)	(7,620)	60,942
2040	267,386	5,094,562	(275,006)	(5,041,240)	(7,620)	53,322
2041	267,386	5,361,948	(275,006)	(5,316,245)	(7,620)	45,702
2042	267,386	5,629,333	(275,006)	(5,591,251)	(7,620)	38,082
2043	267,386	5,896,719	(275,006)	(5,866,257)	(7,620)	30,462
2044	267,386	6,164,104	(275,006)	(6,141,262)	(7,620)	22,842
2045	267,386	6,431,490	(275,006)	(6,416,268)	(7,620)	15,222
2046	267,386	6,698,875	(275,006)	(6,691,273)	(7,620)	7,602
2047	267,386	6,966,261	(275,006)	(6,966,279)	(7,620)	(18)
2048	267,386	7,233,646	(275,006)	(7,241,285)	(7,620)	(7,639)
2049	267,386	7,501,032	(275,006)	(7,516,290)	(7,620)	(15,259)
2050	267,386	7,768,417	(275,006)	(7,791,296)	(7,620)	(22,879)
2051	267,386	8,035,803	(275,006)	(8,066,302)	(7,620)	(30,499)
	Total: 8,035,803		Total: (8,066,302)		Total:) (30,499)[202]	

When viewed from the Cumulative Basis, as reflected in Table 4 above, if one were to take into account all of the prior years' worth of accumulated GHG emissions and sequestration in the year 2035, Hu Honua would be a net emitter of 91,423 MT CO_2e in 2035, as shown in Column F, above. When considering this

[202]As noted above, the 30,500 MT CO_2e figure is an approximate result, and slight variations are attributed to rounding and conversion from short tons to metric tons.

perspective, it is notable that even if one accepts Hu Honua's speculative assumptions, cumulative GHG emissions are expected to exceed cumulative sequestration throughout the majority of the Amended PPA's term, up until 2047, at which point total carbon sequestration barely overtakes the accumulated amount of GHG emissions arising from the Project. This reflects a practical "frontloading" of GHG emissions and "backloading" of GHG reductions, and demonstrates that the Project is estimated to increase GHG emissions for decades before the purported sequestration "catches up" to emissions and begins to result in "carbon negativity."

3.

Concerns With Hu Honua's Carbon Commitment

i.

Hu Honua Has Not Demonstrated
A Developed Plan To Purchase Carbon Offsets

Hu Honua offers its Carbon Commitment as a backstop to ensure that the Project will achieve its carbon negativity goals, even if sequestration performance falls short of ERM's estimates. To this end, Hu Honua's Carbon Commitment includes an option to purchase carbon offsets to make up for any deficits in annual sequestration, or to provide funds for the purchase of carbon

offsets, to remedy any annual shortfalls in sequestered carbon.[203] However, the Commission finds that this component lacks sufficient detail and cannot be relied upon to support Hu Honua's Carbon Commitment.

In its Post-Hearing Brief, Hu Honua states:

> Hu Honua agrees to place $100,000 (or in the alternative, a range of up to $450,000 if the Commission believes a higher amount is more appropriate) of "seed money", which may include marketable liquid assets, into a reserve fund or escrow account in Year 1 which will remain in the account for the entire 30 year [Amended] PPA term (or in the alternative, a lesser term if the Commission believes a lesser period of time is more appropriate) to serve as cushion of available funds to ensure that its carbon negative commitments are met. If there is any carbon sequestration deficit in the annual reporting to the PUC, Hu Honua will also place additional funds into the account each year over the 30-year term to cover the deficit and purchase carbon offsets (approximately $15/ton)[.][204]

Aside from this, there is relatively little detail or information in the record regarding Hu Honua's plans for purchasing carbon offsets. Based on the Commission's review of the record, it appears as though Hu Honua views this as a largely unexplored

[203]See Hu Honua Prehearing Testimony, T-1 (Warren Lee) (stating that if in any year, Hu Honua has not sequestered enough carbon to comply with the Carbon Commitment, Hu Honua will purchase carbon offsets or pay a monetary amount for the purpose of procuring sufficient carbon offsets to satisfy the terms of the Carbon Commitment for that year).

[204]Hu Honua Post-Hearing Brief at 4.

remote possibility.[205] The Commission finds this concerning, given the likelihood that carbon offsets will be necessary for Hu Honua to fulfill its Carbon Commitment, in light of the uncertainties surrounding its estimated sequestration efforts, discussed above.

For example, Hu Honua does not appear to have considered the nature or potential costs of reasonable carbon offsets necessary to backstop its Carbon Commitment. Aside from stating

[205] See Hu Honua Response to PUC-Hu Honua-IR-34.a, -b, and -g, filed October 29, 2021 (only noting that Hu Honua will identify nature-based offsets from reputable sources, and Hu Honua also appears to only consider purchasing carbon offsets in 2035 after a need has been identified). See also Testimony of Warren Lee, Recording of Hearing, Hearing Day 2, March 2, 2022, at 7:27:30-7:30:30 (noting that Hu Honua does not expect to get to the point where carbon offsets are necessary; carbon offsets are a "fourth priority" right now after replanting trees either on the island, in the state, or somewhere else in the world; Hu Honua has made some very high preliminary inquiries regarding carbon offsets, but they would prefer not to go there; and declining to respond as to whether Hu Honua has undertaken calculations regarding what costs might be necessary for carbon commitment.), at 7:30:45-7:33:40 (introducing, for the first time, that Hu Honua would consider as a condition to the Carbon Commitment to set funds in a designated reserve fund account to ensure compliance with carbon commitment, provided the condition is reasonable.); and Testimony of Jon Miyata, Recording of Hearing, Hearing Day 3, March 3, 2022, at 0:25:00-0:28:30 (noting that there hopefully will not be any shortfalls of carbon sequestration, so they should not need to purchase carbon offsets upfront, but that they would contribute $15 per ton for carbon offsets if there is a shortfall, and that Hu Honua would be willing to seed this fund with $100,000.), and at 0:30:30-0:34:05 (unable to answer how familiar Hu Honua is with carbon offset markets or how Hu Honua would select a reputable firm for a carbon offset program, but that Hu Honua would consult with their GHG experts, and would begin funding for carbon offsets in year 1 of the Amended PPA.)

that Hu Honua would purchase carbon offsets from "reputable sources using Nature Based offsets to ensure growth of vegetation (e.g., VERRA or ACR),"[206] Hu Honua has offered little detail about where or how these carbon offsets would be sourced, purchased, and verified. For example, Hu Honua has not specified the potential source location of any needed carbon offsets, how the sequestration associated with these offsets would be verified, what assurances there would be that the offsets are not being double-counted and represent additional sequestration that would not otherwise occur, etc. Such information would help inform the Commission's analysis to determine if such carbon offsets represent a reasonable means to offset the significant GHG emissions Hu Honua estimates will be produced by the Project's operation. Hu Honua has also assumed that it can purchase carbon offsets for approximately $15 per metric ton,[207] which may be a reasonable valuation based on today's voluntary carbon offset market, but it is uncertain whether the price of carbon offsets will remain at this level or increase throughout the 30-year PPA term.

Moreover, the potential fluctuations in sequestration in any given year of the Amended PPA's 30-year term indicate that

[206]Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 31.

[207]See Hu Honua Post-Hearing Brief at 28.

Hu Honua's proposed reserve fund of up to $450,000 may be insufficient to support its Carbon Commitment. For example, assuming Hu Honua's valuation of $15 per metric ton of carbon offsets, $450,000 would allow Hu Honua to purchase approximately 30,000 metric tons of carbon offsets.[208] However, GHG emissions from Project operations in any given year of the Amended PPA's term, including after 2035, the year upon which Hu Honua pledges to become carbon negative on an annual basis, dwarf that amount; for example, the stack emissions component, alone, is estimated at 197,398 MT CO_2e, annually.[209] Taking this into consideration, if sequestration performance is below ERM's estimates, it does not appear that $450,000 would be sufficient to purchase enough carbon offsets to offset annual emissions.

Although the Commission acknowledges Hu Honua's offer to increase this seed money to a "higher amount" if deemed "appropriate," similar to Hu Honua's proffer to "reasonably modify" ERM's Carbon Calculator, the Commission again emphasizes that the Applicants carry the burden of proof, and it is not for the Commission to undertake this responsibility for Hu Honua.

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[208] 450,000 / 15 = 30,000.

[209] See HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 60. In accompanying .xlsx Excel workbook, see Calculation Tab: "Emission Sim" column Q (reflecting annual emissions in short tons). Conversion: 0.90718474 metric tons / short tons.

Thus, the Commission finds, based on the record before it, that Hu Honua's proposal to backstop its Carbon Commitment with purchasing carbon offsets lack sufficient detail and does not reasonably account for the potential scope of sequestration that may be required to fulfill the Carbon Commitment.

Regarding Hu Honua's offer to "pay a monetary amount for the purpose of procuring sufficient carbon offsets,"[210] Hu Honua has not offered sufficient information about this component, and only recently elaborated that it could explore procuring carbon offsets through "partnering with the State of Hawaii Department of Land and Natural Resources ('DLNR') and to pledge a monetary amount towards their 100 Million Tree Program to contribute to their planting efforts and in turn contribute towards Hu Honua's carbon commitments."[211]

Similar to Hu Honua's proposed purchase of carbon offsets, the Commission has concerns with the under-developed nature of this proposal in the record. While the 100 Million Tree Program appears laudable, there are virtually no details in the record about this program, including the nature, structure, or administration of this program; whether Hu Honua has reached

[210]See Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 32.

[211]Hu Honua Post-Hearing Brief at 17 (citing Testimony of Warren Lee, Recording of Hearing, Hearing Day 2, March 2, 2022, at 7:43:14-7:45:01).

out and had preliminary discussions with relevant agency personnel; where, and on what timeline DLNR intends to begin its conservation efforts; and whether, and by whom, sequestration associated with this program would be monitored and verified. Furthermore, Hu Honua does not indicate how much money it would be willing to put forth to support this program, and the ERM Analysis lacks necessary inputs and assumptions for the Commission to make an informed finding about the certainty of emissions impacts associated with this type of program and whether such impacts can directly be attributed to Hu Honua's funding.

Additionally, there is no proposed framework for the Commission to review, monitor, and/or verify carbon offsets purchased by Hu Honua. While Hu Honua does propose a process to verify its sequestration of GHG emissions, in which an independent third party would verify the results of Hu Honua's annual reports in comparison with the carbon negativity goals of the Carbon Commitment,[212] Hu Honua does not propose a framework for review of carbon offset projects in this approach. Furthermore, as the Commission's authority is limited to public utilities operating within the State, it is unclear what recourse the Commission would have if these carbon offset projects, which may be located out-of-State, were found to operating in a manner

[212]See Hu Honua PSOP at 16.

inconsistent with Hu Honua's Carbon Commitment. In the absence of more details about how carbon offsets would be accounted for and verified, the Commission cannot be reasonably confident in the efficacy of this part of the Carbon Commitment.

ii.

It Is Unclear Whether The Carbon Commitment Would Be Enforceable

Overshadowing the above concerns is the larger concern of whether the Commission would be able to hold Hu Honua to its Carbon Commitment following approval of the Amended PPA. Although Hu Honua has "stipulate[d] to ongoing review by the [Commission] for purposes of reviewing and enforcing Hu Honua's carbon negative commitments," and "agree[d] to cure any shortcomings within a reasonable period of time,"[213] the Commission does not find this proffer sufficiently reassuring. First, it is unclear what would result if Hu Honua were to disagree with or object to a Commission finding that an aspect of the Carbon Commitment was not being met. If Hu Honua were to challenge the Commission's finding, including a potential appeal, this could result in an ongoing cycle of legal disputes throughout the 30-year term of the Amended PPA.[214]

[213]Hu Honua Post-Hearing Brief at 5.

[214]The Commission observes that this is not idle speculation, as Hu Honua has filed a number of procedural motions challenging

Second, aside from Hu Honua's assertions that it will comply with ongoing Commission review, there would be few options if Hu Honua decided to ignore the Commission's authority. The Commission does not possess direct regulatory authority over independent power producers such as Hu Honua, and thus is limited in its ability to compel specific actions by Hu Honua. The Commission does retain authority over public utilities, such as HELCO, as well as the Amended PPA; however, taking action against these would involve a drastic result, such as suspending payment by HELCO or voiding the Amended PPA, which could have severe consequences that could be disproportionate to the situation. Put another way, the Commission would be left with very few, extremely blunt tools by which to hold Hu Honua to its Carbon Commitment. These tools are not without cost to ratepayers, either; for example, if the Commission were to void the Amended PPA, this would terminate the PPA mid-term, potentially at a point where the purported GHG benefits of the Project have not yet been delivered to ratepayers (as discussed above, a large majority of the Project's sequestered GHGs are expected to occur during the latter half of the 30-year term).

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the Commission's rulings during this remanded proceeding, and even sought an interlocutory appeal to the Court, which delayed commencement of the evidentiary hearing.

Ultimately, the uncertainties surrounding the ERM Analysis, as well as lack of a well-developed plan to support the Carbon Commitment if local sequestration efforts fall short of ERM's estimates, indicate that Hu Honua's pledge is premised heavily on trust, rather than a robust plan and accompanying support. Taking all of this into account, the Commission has serious concerns about whether, and to what extent, it would be able to hold Hu Honua to its Carbon Commitment if it approved the Amended PPA.

4.

Additional Concerns

It is unclear what impact Hu Honua's intent to sell excess energy in the form of hydrogen may have on the Project's GHG emission profile.[215] Hu Honua has provided a copy of a H2 MOU to potentially sell hydrogen energy from the Project.[216] Specifically, the MOU states that Hu Honua would,

[215]The Commission notes there remains disagreement between HELCO and Hu Honua on whether such an arrangement between Hu Honua and a third party for the purchase of excess energy is permissible within the Amended PPA or would require additional amendments. Compare HELCO Response to CA/HELCO-IR-58.a, filed on October 21, 2021 with Hu Honua Response to CA/Hu Honua-IR-124.b, filed on October 21, 2021. Despite this disagreement, Hu Honua continues to incorporate this purported benefit. See Hu Honua Post-Hearing Brief at 5-6 and at 27.

[216]Hu Honua Prehearing Testimony, Exhibit Hu Honua-101.

"[p]rovide electricity for the hydrogen system(s) at a rate of $0.10 per kWh, subject to, but not limited to the following: a. The power purchase agreement ('PPA') between Hu Honua and [HELCO] is approved by the [Commission] and becomes non-appealable."[217]

The Commission is concerned with the carbon accounting associated with the Excess Energy Agreement, considering additional feedstock, presumably procured from the same leases as feedstock supporting the Amended PPA, would be burned, releasing additional GHG emissions into the atmosphere. Hu Honua does not account for these emissions in the Ramboll Analysis or the ERM Analysis. Without accounting for emissions associated with this excess energy agreement for developing hydrogen energy in the Carbon Calculator, the Commission is not able to reasonably determine the long-term environmental costs of this proposal for Hawai`i Island customers.

Although the Commission understands that Hu Honua intends to be at least carbon neutral for any third-party agreements,[218] this intention is harder to enforce than Hu Honua's

[217]Hu Honua Prehearing Testimony, Exhibit Hu Honua-101 at 2. The Commission observes that the proposed rate of $0.10 per kWh is well below the cost of energy Hu Honua would charge HELCO under the Amended PPA.

[218]See Hu Honua Post-Hearing Brief, Exhibit D at 11-12.

Carbon Commitment for the Amended PPA. Absent any sure way to ensure that this Excess Energy Agreement is carbon-neutral, the record does not contain any reasonable assurances that the associated long-term environmental costs of the Excess Energy Agreement will be offset by Hu Honua's Carbon Commitment. Further, having this unregulated agreement for excess energy arising from approval of the Amended PPA, a regulated agreement, could result in ratepayers subsidizing the costs of this unregulated agreement, to the benefit of the owners of the Project.

B.

Issue No. 2: GHG Emissions
That Will Result From Approving the PPA

As discussed above, in light of the significant GHG emissions expected to result from the Project, the speculation and uncertainty underlying Hu Honua's sequestration efforts raises concerns that Hu Honua will not be able to offset emissions, and that the Project may ultimately become a net emitter of GHGs over its lifetime. Additionally, the Commission is not convinced that Hu Honua has adequately demonstrated a reasonable plan for purchasing carbon credits to offset the Project's considerable GHG emissions if sequestration efforts fall short of ERM's estimates. Lastly, it is unclear whether, and to what extent the Commission would have authority to enforce Hu Honua to the Carbon Commitment. Accordingly, based on the record before it, the Commission finds

that there is the potential that the Project may result in a net increase in GHG emissions, as there are too many uncertainties regarding whether, how, and to what extent, Hu Honua will be able to successfully offset the GHG emissions expected to be produced by the Project.

C.

Issue No. 3: Reasonableness Of Total Costs Of The PPA In Light Of The Potential For GHG Emissions

Review of the Amended PPA reveals that it will result in significant costs to ratepayers. Ratepayers are expected to experience significant increases to their monthly bills as a result of the Amended PPA, and the PPA's provisions are expected to result in forced un-economic dispatch of the Project and the displacement of lower-cost resources, including other lower-cost renewable resources. These costs are further exacerbated by the fact that the Project is not currently expected to serve urgent grid needs, provide unique grid services, or offer other benefits, such as expedited retirement of HELCO's fossil fuel plants. Taking into account these considerations and weighing them against the uncertainties and concerns with the Project's GHG emissions, discussed above, the Commission does not believe that the total costs of the Amended PPA are reasonable under the circumstances.

1.

Consideration Of PPA Costs

As a preliminary matter, the Commission addresses some of the arguments raised by Hu Honua and HELCO regarding the scope of this issue on remand.

First, Hu Honua argues that the Court's remand instructions indicate that the Project's potential GHG impacts are a threshold issue – i.e., only if there is a likely potential for net GHG emissions, should the Commission turn to considering whether the Amended PPA's costs are reasonable.[219] Although the Commission disagrees with this interpretation, it notes that this argument is rendered moot, given the concerns with the Project's GHG impacts discussed above.

Second, the Commission does not agree with Hu Honua's interpretation of HRS § 269-6(b), as amended, which would limit review of the Amended PPA's costs to comparing it to fossil fuel alternatives. The Commission notes that Hu Honua has raised this argument several times on remand, including in its Act 82 Motion and Second Act 82 Motion,[220] and the Commission has consistently affirmed its interpretation that Act 82 does not reflect an intent by the Legislature to narrow the scope or applicability of,

[219]See Hu Honua Post-Hearing Brief t 18.

[220]See Hu Honua Act 82 Motion, Memorandum in Support at 17-26; and Hu Honua Second Act 82 Motion, Memorandum in Support at 6-8.

or otherwise reduce the Commission's statutory duties under, HRS § 269-6(b), as guided by the Court's decisions.[221] The Commission again clarifies that it does not believe that Act 82 has altered the nature or scope of the Commission's statutory duties under HRS § 269-6(b), as previously defined by the Court in its past decisions, including HELCO I.

Interpreting Act 82 as argued by Hu Honua would significantly diminish the scope of review under HRS § 269-6(b) in this proceeding and exclude consideration of significant amounts of GHG emissions. For example, in its initial Act 82 Motion, Hu Honua argued that Act 82 modified HRS § 269-6(b) such that only GHG emissions from fossil fuel sources should now be considered, which would effectively preclude review of the GHG emissions associated with the Project, except, perhaps, incidental emissions associated with harvesting, transportation, and construction.[222] Subsequently, in its Second Act 82 Motion, Hu Honua slightly modified its position and argued that Act 82 revised the Commission's statutory duties by narrowing the scope of review to the reasonableness of the cost of renewable energy generation

[221] See Order No. 37910 at 23-32; and Order No. 38183.

[222] See Hu Honua Act 82 Motion, Memorandum in Support at 3 (arguing that Act 82 reflected a Legislative intent to "limit[] the scope of the Commission's statutory obligations under HRS § 269-6(b) to just fossil fuel GHG emissions.").

projects, such as the Project, solely against fossil fuel generation, but excluding consideration of other renewable generation.[223]

Under either construction, review would be incomplete. Looking at GHG emissions from only fossil fuel sources would eliminate review of the substantial GHG emissions associated with Project operations (estimated by ERM to be approximately 8,035,804 MT CO_2e over the 30-year term[224]). Limiting review of the Project exclusively to fossil fuel generation would create an unrealistic comparison that would not accurately reflect the true impact of the Project on HELCO's system and customer bills (such as the costs associated with displacement of other, lower cost renewable resources), as discussed in greater detail below.

The Commission does not believe such results were intended by the Legislature, given that they dramatically diminish consideration of the GHG impacts resulting from a project and would also undermine the caselaw built around this issue as developed by

[223]See Hu Honua Second Act 82 Motion, Memorandum in Support at 5.

[224]See Table 2, supra. See also, HELCO Supplemental Response to PUC-HELCO-IR-17.b, Attachment 3 at 60.

the Court in recent years.[225] Consequently, the Commission does not believe Act 82 limits its review during remand.

Relatedly, the Commission is not persuaded by HELCO's argument that the issue of the Amended PPA's costs are outside the scope of this proceeding on remand simply because the PPA's pricing has not changed.[226] As noted above, first, this presumes that the Project is not expected to result in GHG emissions, which the Commission has concluded is not reasonably established.

Moreover, the Commission observes that the Court expressly instructed the Commission to consider, in addition, to GHG emissions, "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."[227] Thus, the Court explicitly contemplated that review of the Amended PPA's terms, including its pricing, would be considered on remand, along with the Project's GHG impact.

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[225] C.f., Order No. 37910 at 26-32 (discussing the Legislative history of Act 82 and concluding that it reflects a conscious decision to not exempt biomass projects from the scope of HRS § 269-6(b)). See also, In re MECO, HELCO I, and Matter of Gas Company, LLC, 147 Hawaii 186, 465 P.3d 633 (2020).

[226] See HELCO Post-Hearing Brief at 27.

[227] HELCO II, 149 Hawaii at 242, 487 P.3d at 711 (quoting HELCO I, 144 Hawaii at 26, 445 P.3d at 698).

Accordingly, the Commission finds that review of the total costs of the Amended PPA is within the scope of this issue on remand.

2.

The Amended PPA Pricing Structure

The Commission notes that the pricing structure for the Project changed between the original PPA and the Amended PPA. In renegotiating and submitting the Amended PPA in 2017, HELCO and Hu Honua "agreed upon all terms set forth in the Amended and Restated PPA . . . except for the Capacity Charge and Energy Charge (collectively, the 'Contract Price')."[228] Article 5 of the Amended PPA ("Rates for Purchase"), outlines the components of the Contract Price and related contract items.

Section 5.1.F describes the monthly Energy Charge, which is determined by multiplying the Fuel Component and the Variable Operations & Maintenance ("O&M") Component by the amount of energy served in kWh for that month. The Fuel Component is $0.08005 per kWh of energy provided, adjusted annually and increased by 15% on the sixth anniversary of the Commercial Operations Date. The Variable O&M Component is $0.0099 per kWh of energy provided, adjusted annually.

[228]Amended PPA at 2.

Section 5.1.G describes the monthly Capacity Charge, which is determined by multiplying the Capacity Charge Rate and the Fixed O&M Rate by the Firm Capacity of the Project from the prior month, which is 21.5 MW unless derated during that month. The Capacity Charge Rate is $54,000 per MW. The Fixed O&M Rate is $25,000 per MW, adjusted annually.[229] The Fuel and Variable O&M Components of the Energy Charge and the Fixed O&M Rate of the Capacity Charge are "adjusted each year on January 1, starting in 2018, at one hundred percent (100%) of the change in [the Gross Domestic Product Implicit Price Deflator ("GDPIPD")] but shall not exceed 4% increase in any given term year, using the adjustment methodology set forth in Attachment I (Adjustment of Charges)."[230]

The Commission notes that only the Updated Report of the Pricing of the PPA, provided as an exhibit attached to Hu Honua's Prehearing SOP and developed by PA Consulting, contains an estimate of the inflation-adjusted rates identified above for mid-2022.[231] The following are PA Consulting's estimates of the inflation-adjusted mid-2022 rates for the three components that

[229]Amended PPA, Exhibit A at 68.

[230]Amended PPA, Exhibit A at 68 and 69.

[231]See Hu Honua PSOP, Exhibit 2 ("Updated Report of the Pricing of the Amended & Restated PPA," prepared by Jonathan Jacobs and Venkat Krishnan of PA Consulting for Hu Honua).

adjust with inflation: Fixed O&M Rate: $28,259.07 per MW per month; Fuel Component: $0.09049 per kWh; and Variable O&M Component: $0.01119 per kWh.[232] The Commission utilizes these inflation-adjusted rates for the purpose of analyzing the dispatch and associated costs for the Project.

The Commission also observes that there is a spike in energy prices built into the Amended PPA pricing structure for the sixth year. In the Contract Price, a 15% increase is built into the Fuel Component on the sixth anniversary of the commercial operations date.[233] However, this increase is separate from the adjustments for inflation, and is applied only to the Fuel Component (and not the Variable O&M Component, Fixed O&M Rate, or Capacity Charge Rate), and the record does not explain how or why this specific 15% increase is reasonable. It is unclear why the Fuel Component should increase in addition to the inflation adjustments, while the Fixed O&M and Variable O&M do not. This one-time increase, in conjunction with the annual inflation adjustments, results in increasing costs over time for

[232]Hu Honua PSOP, Exhibit 2 at 7. The projected Fixed O&M Charge for mid-2022 is $607,570 per month. Dividing this by the committed capacity of 21.5 MW finds this estimate of the monthly Fixed O&M Charge of $28,259.07 per MW per month.

[233]Amended PPA, Exhibit A at 69.

the Amended PPA, rather than a fixed price for the lifetime of their agreement.

The Commission further notes that HELCO was unable to reach agreement with Hu Honua on this pricing structure[234] and has indicated that the Project involves higher than market rates and cannot compete with lower-cost renewables under the current pricing structure. In this regard, the Commission observes that because fixed costs make up a large portion of the Amended PPA's pricing structure, HELCO will be required to make significant payments to Hu Honua even if utilization of the Project is low.

Furthermore, the Amended PPA includes terms that require HELCO to dispatch the Project, under normal conditions, within a dispatch range of 10.0 to 21.5 MW ("Minimum Dispatch Requirement")[235] all hours of the year, except for two weeks

[234]See Testimony of Rebecca Dayhuff-Matsushima, Recording of Hearing, Day 1, March 1, 2022, at 2:31:55-2:33:50. (Ms. Dayhuff-Matsushima noted that HELCO did not necessarily think that the contract price was appropriate, but did recognize that there were certain circumstances where it may make sense to pay more for a project if agricultural processes are included, so HELCO agreed to submit the contract price as preferential rate request. Ms. Dayhuff-Matsushima further confirmed that HELCO could not reach agreement with Hu Honua to find a reasonable price.)

[235]See Amended PPA, Exhibit A at 143 (Attachment D). Under certain circumstances, HELCO can reduce dispatch to an absolute minimum of 7 MW at HELCO's discretion during periods of "unusual operating conditions." Id. A at 49 (Section 3.2.C.3.f).

reserved for annual maintenance.[236] When considering the pricing structure of the Amended PPA, discussed above, in conjunction with the Minimum Dispatch Requirement provisions of the Amended PPA, it is likely that the Project will represent a relatively high-cost resource on HELCO's system, as further discussed below.

3.

Costs Of The Amended PPA

i.

The Amended PPA's Costs Are Significant

HELCO estimates that the revenue requirements for the Project (to be collected from customers) will exceed $1.2 billion over the 30-year term of the PPA.[237] HELCO further estimates that the Project will provide approximately 2,979,000,000 kWh of electricity.[238] Thus, the total revenue requirement for the Project

[236]See Amended PPA, Exhibit A at 43. Section 3.2(B)(6)(c), Normal Annual Maintenance Requirements, allows for two contiguous weeks of planned outages per Calendar Year for Maintenance and four contiguous weeks of planned outages every fifth year.

[237]HELCO Response to PUC-HELCO-IR-17.b, Attachment 2 (updated Exhibit HELCO-305) at 1 (sum of column a, "Hu Honua Total Revenue Requirement (Current Year $)"), equal to approximately $1,210,558,450.

[238]HELCO Response to PUC-HELCO-IR-17.b, Attachment 1 (updated Exhibit HELCO 201) at 1 (sum of column A, "Hu Honua Generation (GWh)"). Conversion: 1 GWh = 1,000,000 kWh.

is equivalent to approximately 40.64 cents per kWh over the Project's lifetime.[239]

As a result, the Project is expected to contribute to significantly higher customer bills over the 30-year PPA term. HELCO's updated bill impact analysis estimates that adding the Project to the grid would increase the typical residential bill by an average of $10.97 per month over the 30-year term of the Amended PPA, as reflected in Table 5 below:

TABLE 5[240]

Year	Estimated Monthly Impact on 500 kWh Residential Bill
2022	$2.36
2023	$7.57
2024	$8.97
2025	$12.18
2026	$12.09
2027	$9.88
2028	$10.99
2029	$10.64
2030	$12.31

[239]See HELCO Response to PUC-HELCO-IR-17.b, Attachments 1-2 (updated Exhibits HELCO-201 and HELCO-305). The sum of column "a" ("Hu Honua Total Revenue Requirement (Current Year $") in HELCO-305 divided by the sum of column A ("Hu Honua Generation (GWh)") in HELCO-201 yields the total revenue requirement above.

[240]See HELCO Response to PUC-HELCO-IR-17.b, Attachment 2 at updated Exhibit HELCO-305. The typical residential bill is defined for the bill impact analysis as a customer using 500 kWh of energy per month.

2031	$13.01
2032	$12.88
2033	$12.69
2034	$13.02
2035	$13.69
2036	$13.59
2037	$13.50
2038	$13.35
2039	$12.89
2040	$12.51
2041	$12.09
2042	$11.70
2043	$11.22
2044	$10.76
2045	$11.96
2046	$11.14
2047	$9.91
2048	$8.58
2049	$7.39
2050	$9.07
2051	$7.15
Average	$10.97

The Commission observes that this is a significant overall bill impact. Further, HELCO's analysis indicates that customers are expected to experience consistent average bill increases throughout the entire term of the Amended PPA. As reflected in Table 5, above, following the first year of the Amended PPA (i.e., beginning in 2023), the average monthly bill impact ranges from $7.15 to $13.69. The Commission observes that this significant bill impact is likely, given that HELCO has noted that under the pricing structure and the Minimum Dispatch Requirement in the Amended PPA, "[w]hile it could be theoretically

possible to fix the dispatch of Hu Honua instead of economic dispatch, [HELCO] does not agree that taken as a whole, with Hu Honua's energy and capacity payment structure, there is a method of dispatch, operation, or modelling assumptions could produce a net savings to the system or customer."[241]

ii.

The Project Is Expected To Displace Other Renewable Resources

To analyze estimated impacts of the Project, HELCO set up a resource plan for the Base Case that includes their assumptions for long-term resource additions based on recent planning considerations in Hawaiian Electric's Integrated Grid Planning process. HELCO then added the Project to the same resource plan for the Alternate Case, which is the sole difference between the Base Case and Alternate Case. Using the planning period of the Project's 30-year Amended PPA lifetime, 2022-2051, HELCO utilized PLEXOS, a production simulation program, to simulate how the system may operate in both the Base Case and Alternate Case. Key outputs from the production simulations include energy produced and fuel consumed by each generating unit for both utility and non-utility units, energy taken from each variable generation unit, and the cost of fuel consumed, which were

[241]HELCO Response to CA/HELCO-SIR-28.a.1.b, filed on November 18, 2021.

all used to analyze the impact of adding the Project to the resource plan.[242]

In HELCO's analysis, the Project was simulated as a 10 to 21.5 MW continuously operating biomass generator that can be economically dispatched, based on energy and operating and maintenance costs from the Amended PPA.[243] By limiting the change in the Alternate Case to the addition of the Project, HELCO was able to identify system cost changes that are solely due to the presence of the Project, rather than to any other changes on HELCO's system.[244] Results of the Alternate Case indicate that the Project would provide a sum of 2,979 GWh of generation over its 30-year lifetime.[245] Because Hu Honua is expected to dispatch all hours of the year except for two weeks of annual maintenance, as referenced above, converting this sum of generation to MWh (i.e., 2,979,000 MWh) and dividing by 252,000 hours[246] yields the

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[242]HELCO Prehearing Testimony, T-3 (Robert Uyeunten) at 4-5.

[243]HELCO Prehearing Testimony, HELCO T-3 (Robert Uyeunten) at 5.

[244]See HELCO Response to HHB-HELCO-SIR-14.a., filed on November 18, 2021

[245]See HELCO Response to PUC-HELCO-IR-17.b, Attachment 1 (updated Exhibit HELCO-201)(sum of column A, "Hu Honua Generation (GWh)").

[246]252,000 hours represents the number of hours of expected operation of the Project, given that it would operate 168 hours per week for 50 weeks of the year for 30 years.

expected average dispatch of 11.8 MW for the 30-year term of the Amended PPA.

This estimated dispatch level is corroborated by the Consumer Advocate's independent analysis, which concluded a similar result. The Consumer Advocate reviewed HELCO's production simulation analysis inputs and assumptions to check them and independently modeled the same scenarios.[247] The Consumer Advocate's modeling found a similar dispatch, cost, and displacement of renewable resources as HELCO's production simulation using separate models,[248] and concluded that the average annual energy output from the Project would be 98,620 MWh, which would correspond to an average dispatch of 11.3 MW,[249] indicating that the Project is rarely, if ever, selected for economic dispatch above its contractual minimum dispatch level.[250]

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[247]See Consumer Advocate Second Errata to Supplemental Response to HHB-CA-SIR-16, filed on January 3, 2022, at 3.

[248]See Consumer Advocate Second Errata to Supplemental Response to HHB-CA-SIR-16 at 4-6.

[249]Consumer Advocate Second Errata to Supplemental Response to HHB-CA-SIR-16 at 5.

[250]While not identical, the Commission finds that the Consumer Advocate's estimated dispatch estimate of 11.3 MW is similar enough to HELCO's estimated dispatch estimate of 11.8 MW to persuasively support the reasonableness of HELCO's estimated dispatch level. Based on the Commission's review of the Consumer Advocate's analysis, the Consumer Advocate used the hours associated with all 52 weeks of the year for its estimate, whereas HELCO's analysis utilized the hours associated with 50 weeks of the year, based on the assumption that the Project is

This indicates that the Project will likely be dispatched near its minimum contractual level throughout the Amended PPA term. This can be attributed to the Amended PPA's provisions, including its pricing structure and Minimum Dispatch Requirement, which make the Project uneconomical to dispatch compared to other, more cost effective resources on HELCO's system.

Relatedly, HELCO has stated that in order to accept more energy from the Project than is estimated in its production simulation, "without deviating from the principles of economic dispatch, would require a lower energy price from the facility so that its incremental cost is more competitive to other online resources."[251] Thus, as a result of the Amended PPA's

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expected to have two weeks of planned maintenance per year in which the Project will be offline. If the Consumer Advocate's analysis was updated to reflect this same assumption, its results would be more similar to HELCO's. To demonstrate this, the Commission observes that the total estimated dispatch in the Consumer Advocate's simulation is 2,958,615 MWh (see Consumer Advocate Supplemental Response to HHB-CA-SIR-16, filed on December 21, 2021, Exhibit HHB-CA-SIR-16, Table 3), whereas the total estimated dispatch in HELCO's simulation is 2,979,000 MWh (see HELCO Response to PUC-HELCO-IR-17.b, Attachment 1 (updated Exhibit HELCO-201)).

Regardless of how the average dispatch is calculated, the difference in total dispatch between the two simulations is less than 22,000 MWh, which represents less than a 1% difference. Taking this into account, the Commission finds that the Consumer Advocate's analysis is generally consistent with HELCO's analysis.

[251]See HELCO Response to CA-HELCO-IR-63.b.2, filed October 21, 2021.

Minimum Dispatch Requirement, HELCO may be required to dispatch the Project ahead of lower-cost renewable resources that would otherwise be prioritized on a cost basis for economic dispatch. This point has also been corroborated by the Consumer Advocate, whose own analysis concludes that the Project is expected to significantly displace other renewable energy resources on HELCO's system, not just fossil fuel units:

> The production simulation results indicate that Hu Honua will not operate near its maximum output during the duration of the study period and does not replace fossil fuel generation on a one for one basis as assumed in the Hu Honua cost analysis. It appears that Hu Honua operates near its minimum output of 10 MW per hour. It appears that Hu Honua will replace some fossil fuel generation and some renewable energy generation. The analysis indicated that on average[,] 42% of Hu Honua generation replaces fossil fuel generation (38 GWh) and 58% of Hu Honua generation replaces renewable energy generation (52GWh).[252]

[252]Consumer Advocate Second Errata to Supplemental Response to HHB-CA-SIR-16 at 8. Although the Consumer Advocate's analysis of the resources that would be displaced by the Project include the now-withdrawn Puako Solar project, the Commission still finds that the Consumer Advocate's analysis persuasively demonstrates that a significant portion of the generation displaced by the Project would be from other renewable resources. See Consumer Advocate Supplemental Response to HHB-CA-SIR-16, Exhibit HHB-CA-SIR-16, Table 3, "Hu Honua Annual Energy Generation – Consumer Advocate Estimate (MWh)," which reflects that the difference in total generation from the Project with and without the Puako Solar project is not dramatic (approximately 11%), indicating that even without the Puako Solar project, the Consumer Advocate's analysis would still show that a significant amount of the generation displaced by the Project would come from other renewable resources on HELCO's system.

HELCO has acknowledged that adding the Project to its system is likely to result in the displacement of other renewable resources on its system. As stated by HELCO, "[t]he minimum dispatch of Hu Honua makes it impossible to ensure that no renewable resource energy output will be partially displaced by Hu Honua."[253] HELCO has also stated that "many of the new renewable resources will have zero incremental cost and therefore, even [if Hu Honua were] at a lower cost, it would primarily compete with non-zero incremental resources when needed, and be utilized for reserve rather than dispatching at higher output."[254]

Thus, it is expected that the Project would displace generation from other, lower cost, renewable energy resources on HELCO's system, potentially by a significant proportion, in addition to generation from fossil fuel units.

iii.

The Project Does Not Serve An Urgent System Need

According to HELCO, adding the Project to the grid would not satisfy any urgent grid needs, as determined by the system's

[253]HELCO Response to CA/HELCO-SIR-26.c.1, filed on November 18, 2021. See also, HELCO Response to Tawhiri-HELCO-SIR-15.a, filed on November 18, 2021; HELCO Response to PUC-HELCO-IR-21, filed on December 1, 2021; and HELCO Response to CA/HELCO-SIR-28.a.1.b.

[254]HELCO Response to CA-HELCO-IR-63.b.2.

energy reserve margin, as well as from HELCO's adequacy of supply reports.[255] While the Project may provide certain grid services, as described by HELCO and Hu Honua,[256] these grid services are not

[255]See Testimony of Robert Y. Uyeunten, Recording of Hearing, Day 1, March 1, 2022, at 5:00:15-5:02:20 (Mr. Uyeunten indicated that HELCO determines the need for new generation based on a variety of drivers, including the energy reserve margins, the loss of the largest units, and bad weather conditions. Further, Mr. Uyeunten stated that HELCO does not need the Project right now based on the previous drivers), at 5:44:55-5:45:45 (In response to a question regarding whether there is a need for the Project considering the amount of fossil fuel generation that is still on HELCO's grid, Mr. Uyeunten noted that the analysis in the adequacy of supply report finds that the energy reserve margin is satisfied for nearly all the study period, indicating that HELCO does not need the Project); and Day 2, March 2, 2022, at 1:46:50-1:48:20 (Mr. Uyeunten confirmed that his earlier response indicating there is no need for the Hu Honua facility was made in the context of the adequacy of supply reports and whether there is a critical reliability need. Mr. Uyeunten stated that in the absence of an identified reliability need for the Project, the Project's case is partially dependent on economics, the ability to add renewable energy to the system, and the diversity of renewable energy resources on the system).

[256]See HELCO Response to CA-HELCO-IR-59.a, filed on October 29, 2021 (HELCO anticipates that HH will supply grid services including generation capacity, var support, inertia, short circuit current, frequency response, reserves, and ramping capability). See also Hu Honua Prehearing Testimony, T-1 (Warren Lee) at 9 ("The Project will . . . provide essential grid services that cannot be provided by intermittent forms of renewable energy and that are currently provided by energy produced from fossil fuels. Such essential grid services include MW generation capacity, dynamic var support, inertia support, fault current support, and primary frequency response.")

exclusive to the Project, and could be provided by other existing or future resources.[257]

On this point, the Commission notes that the Consumer Advocate asserts that firm renewable energy "should generally be procured only if it is at cost-effective rates" and that "any new generation should . . . reduce the Company's customer bills," but that the need for this Project "has not been supported by recent adequacy of supply reports."[258]

Furthermore, according to HELCO's witnesses, it is uncertain whether adding the Project would accelerate any retirements or removals from service of the existing fossil fuel units on HELCO's grid.[259] HELCO stated that it has not officially evaluated accelerated retirements that could occur with the approval of this Amended PPA, but that "it is envisioned that the existing steam fossil fuel units will transition to standby as other resources are monitored for reliable performance for a

[257]See Testimony of Lisa Dangelmeier, Recording of Hearing, Day 2, March 2, 2022, at 5:44:30-5:45:15 (Ms. Dangelmeier noted that it is theoretically possible to remove fossil fuel power sources and maintain steady mass for any of the steam units if you convert them to synchronous condensers, for example Hill or Puna.)

[258]See CA PSOP at 7 and 14.

[259]See Testimony of Robert Y. Uyeunten, Recording of Hearing, Day 1, March 1, 2022, at 5:00:15-5:02:20, at 5:44:55-5:45:45; and Day 2, March 2, 2022, at 1:46:50-1:48:20.

proving period before final retirement determination."[260] This indicates that while the Project may be able to contribute to system conditions to support retirement of fossil fuel units, HELCO does not expect it to facilitate accelerated retirement of any particular unit(s).

iv.

Hu Honua Relies On Unreasonable Assumptions For Its Bill Impact Analysis Of The Project

Although Hu Honua submitted an alternative analysis which reflects a more modest bill impact,[261] the Commission does not find this analysis persuasive. In its analysis, Hu Honua assumes that the Project will exclusively displace electricity provided by HELCO's fossil fuel-based Keahole powerplant to reach the conclusion that the Project will provide a net bill savings.[262] This narrowed comparison allows the Project to be modeled as more cost effective, as it eliminates comparison of the Project to other lower-cost renewable resources on HELCO's system. However, as noted above, the Consumer Advocate has estimated that more than

[260]See HELCO Response to Tawhiri-HELCO-SIR-23.a.

[261]See Hu Honua PSOP, Exhibit 2.

[262]See Hu Honua PSOP, Exhibit 2 at 7.

half of the energy produced by Hu Honua will displace other renewable energy resources.[263]

Further, HELCO maintains that the assumption that the Project would only displace Keahole is unrealistic, considering this assumption would be "contrary to the Company's practices and highly unlikely to represent the actual operational conditions."[264] Indeed, HELCO objected to a request from Hu Honua to model a simulation where the Project would be dispatched ahead of all fossil fuel resources, stating that such a simulation would violate the principles of economic dispatch governing system operations and would represent "inappropriate and unrealistic" alterations to operational parameters."[265] HELCO also argued that presenting multiple scenarios in which assumptions do not reflect their best planning assumptions is significantly less valuable for analysis.[266]

The Commission agrees that such a scenario would be unrealistic and would largely deprive HELCO of its ability to dispatch its portfolio of grid resources effectively and safely. HELCO's analysis appears more robust, given that it considered

[263]See Consumer Advocate Second Errata to Supplemental Response to HHB-CA-SIR-16 at 7-8 and 9.

[264]See HELCO Response to CA/HELCO-SIR-28.a.1.

[265]See HELCO Response to HHB-HELCO-SIR-1.a.

[266]See HELCO Response to CA/HELCO-IR-63.e.3.

escalations in fuel prices, the Amended PPA's energy rates, RPS requirements, and fuel switching,[267] whereas Hu Honua's analysis is a simple comparison between the Project and one of the many other units on HELCO's grid that Hu Honua could displace.

Hu Honua also argued that the Amended PPA's estimated bill impact should take into account benefits such as the social cost of carbon. PA Consulting concluded that the Project would result in "social cost savings of $132 million" (under the Full Dispatch Scenario; reduced to $68 million under the HELCO Dispatch Scenario of approximately 11.8 MW).[268] The Commission does not find this study convincing, though, as the study's estimated social carbon cost savings are premised on unreliable assumptions. First, the study relies on the Project's total net GHG emissions estimated by Ramboll and ERM,[269] which the Commission has determined are not dispositive. Furthermore, PA Consulting assumed that the Project would only displace electricity provided by HELCO's fossil fuel based powerplants,[270] which, as discussed above, the Commission does not find to be a reasonable

[267]See HELCO Response to CA/HELCO-SIR-28.a.2.

[268]Hu Honua Prehearing Testimony, T-7 (Jonathan Jacobs) at 7.

[269]See Hu Honua Prehearing Testimony, T-7 (Jonathan Jacobs) at 6.

[270]See Hu Honua Prehearing Testimony, Exhibit Hu Honua-701 at 6.

assumption.[271] HELCO's dispatch analysis shows that in addition to displacing fossil fuels, Hu Honua will also displace a considerable amount of renewables,[272] which PA Consulting's social cost analysis does not consider.[273]

Hu Honua also argued that HELCO should redo its bill impact analysis using an updated fuel price forecast. However, even if higher fuel costs were assumed, this would not necessarily address the issue of bill increases attributed to the Project. For example, HELCO has stated that the "large magnitude of the customer bill increases [due to the addition of the Project] suggests that it would take an extreme increase in fossil fuel prices or system demand for the dispatch of the Project to rise substantially above the minimum."[274] Further, HELCO states that the renewable energy pricing trends modeled in its Integrated Grid Planning process indicate that HELCO will in the future be "using Hu Honua energy less than other forecasted renewable energy resources."[275]

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[271]C.f. HELCO Response to CA/HELCO-SIR-28.

[272]See HELCO Response to CA/HELCO-IR-60, filed on October 21, 2021; and HELCO Response to CA/HELCO-SIR-26.

[273]See Hu Honua Prehearing Testimony, Exhibit Hu Honua-701 at 6.

[274]HELCO Response to HHB-HELCO-IR-16.d, filed on October 21, 2021.

[275]HELCO Response to CA/HELCO-IR-63.d.

Even assuming, arguendo, that the Commission were to rely upon Hu Honua's assumptions, the Project would still only provide marginal improvements to customer bill impacts and would be attended by significant risk. At Hu Honua's request, HELCO performed a sensitivity analysis in which all unapproved resources previously included in HELCO's bill impact analysis were excluded from consideration. In this analysis, the bill impact and dispatch of the Project do not significantly change until 2045, when HELCO assumes it will transition its fossil fuel units to biodiesel in its resource plan, at which point the high projected cost of biodiesel makes the Project more economical to dispatch for the final years of the Amended PPA (2045-2051).[276] The estimated typical bill impact of the Project for this scenario, prior to the fuel switch to biodiesel (2022-2044), averages an increase of $5.78 per month for the typical residential bill, while the estimated typical bill impact after the fuel switch to biodiesel (2045-2051) averages a savings of $20.52 per month for the typical residential bill.[277] Thus, in this scenario, the high costs and low dispatch of the Project in the first 23 years are partially mitigated by the last seven years of the Amended PPA

[276]See HELCO Response to HHB-HELCO-SIR-7.b.3.iii, filed on November 18, 2021.

[277]See HELCO Response to CA/HELCO-IR-63.e.3, Attachment 4.

term, when the Project is modeled to become more economic to dispatch with HELCO's assumed conversion of remaining fossil fuel units to biofuels for RPS compliance purposes in 2045.[278]

This scenario presents a large amount of risk to customers, as it reflects a "backloading" of customer savings, where ratepayers would likely still experience an increase in monthly bills for more than 20 years, with partially offsetting savings not occurring until far in the future. In addition, HELCO notes that such a narrow comparison does not take into account HELCO's long-term planning efforts,[279] nor does it consider renewable goals, system reliability needs, or grid services.[280] As such, based on the record before it, the Commission finds that Hu Honua's preferred modeling does not realistically capture likely grid operations or impacts.

Taking the above into consideration, the Commission does not find Hu Honua's alternative analyses convincing, and believes the analyses performed by HELCO and the Consumer Advocate are more reliable.

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[278]See HELCO Response to HHB-HELCO-SIR-7.b.3.iii.

[279]See HELCO Responses to HHB-HELCO-SIR-4.a and -4.b.2, filed on November 18, 2021.

[280]See HELCO Response to CA/HELCO-IR-63.e.3.

When adding all of the above considerations to the concerns about the Project's GHG emissions, the Commission does not find the total costs of the Amended PPA reasonable.

D.

Issue No. 4: Whether The Terms Of The PPA Are Prudent And In The Public Interest, Given The PPA's Hidden And Long-Term Consequences

For many of the reasons already discussed herein, the Commission finds that the terms of the Amended PPA are not prudent or in the public interest, which are summarized below.

First, it is unclear whether Hu Honua will be able to sequester enough carbon to offset the large amount of GHG emissions produced by the Project over its lifetime. Hu Honua's reliance on local sequestration efforts are based on unreliable assumptions and the likelihood that they will offset the Project's GHG emissions is correspondingly subject to doubt and uncertainty. The highly sensitive nature of the Carbon Calculator leaves little margin for error, and if actual performance for any key emissions categories varies, even slightly, from the ERM Analysis' estimates, it could drastically impact the Project's net GHG impact, and potentially make the Project a net GHG emitter.

Further, Hu Honua's proposal to backstop its Carbon Commitment through the purchase of carbon credits is not reasonably developed and lacks critical details addressing issues

such as a framework for implementation, analysis of potential costs, and means of verification and enforcement. When considering the high amount of GHG emission associated with the Project's operations and the unpredictability of Hu Honua's local sequestration performance, carbon offset costs could be far beyond the $100,000 to $450,000 range proposed by Hu Honua. This indicates that Hu Honua may not be adequately prepared to fulfill its Carbon Commitment, exposing ratepayers to the risk that they may not receive the full environmental benefits offered by Hu Honua.

Moreover, should Hu Honua fall short of its carbon offsetting goals as set forth in its Carbon Commitment, it is uncertain whether the Commission would be able to reasonably enforce these commitments on Hu Honua, exposing ratepayers to the risk that the environmental benefits of the Project may not be fully realized.

Second, there are high costs associated with approval of the Amended PPA. The Project is likely to result in a significant bill increase to ratepayers, which is estimated to last through the Amended PPA term.

Third, due to provisions of the Amended PPA, it is likely that HELCO will need to dispatch the Project in an un-economic manner that is expected to displace, in part, other lower-cost

renewable resources.[281] The Commission does not believe it is prudent to approve new high-cost generation that may prevent new renewables with significantly lower costs from being integrated during low net-load periods, and the Commission observes that high-cost, inflexible generation may hamper the ability of HELCO to interconnect new utility-scale and customer-sited renewable generation. HELCO further notes that the displacement of lower-cost resources is a core feature of the Minimum Dispatch Requirement, as "[a]ny resource with a minimum must-take will need to be operated ahead of lower-cost energy up to that must-run amount, and therefore any must-run constraint will limit cost optimization."[282]

Fourth, it is unclear if the Project will provide any additional benefits to HELCO's system. Although the Project can provide certain grid services, HELCO has stated that it does not have a current need for the Project. According to HELCO's witnesses, adding the Project to the grid would not satisfy any urgent grid needs, and it is uncertain whether adding the Project would accelerate any retirement or removal of HELCO's existing

[281]See HELCO Response to CA/HELCO-SIR-26.c.1.

[282]HELCO Response to PUC-HELCO-IR-21 at 1.

fossil fuel units.[283] While the Project may provide certain grid services, these grid services are not exclusive to the Project and could be provided by other existing or future resources.[284]

Fifth, it is unclear what remedy ratepayers would have if Hu Honua were to withdraw or terminate the Amended PPA midway through the PPA term. Based on the record, many of the Project costs are front-loaded, while many of the benefits are back-loaded. If Hu Honua were to terminate or assign the Amended PPA midway through the 30-year term, ratepayers would have paid the higher costs of the PPA and GHG emissions of the Project, but not have realized many of the benefits, potentially including sequestration and reductions in carbon emissions. Similarly, as discussed above, if Hu Honua were to encounter difficulties meeting its Carbon Commitment, it is unclear what recourse the Commission, and through extension, ratepayers, would have to enforce the delivery of the benefits promised by Hu Honua.

[283]See Testimony of Robert Y. Uyeunten, Recording of Hearing, Day 1, March 1, 2022, at 5:00:15-5:02:20, at 5:44:55-5:45:45; and Day 2, March 2, 2022, at 1:46:50-1:48:20.

[284]See Testimony of Lisa Dangelmeier, Recording of Hearing, Day 2, March 2, 2022, at 5:44:30-5:45:15 (Ms. Dangelmeier notes that it is theoretically possible to remove fossil fuel power sources and maintain steady mass for any of the steam units if you convert them to synchronous condensers, for example Hill or Puna.)

E.

Disposition Of HELCO's Letter Request

Based on the above, the Commission denies HELCO's Letter Request for approval of the Amended PPA. However, this denial is without prejudice. While the Commission is declining to approve the Amended PPA, based on the record before it in this docket, this is not to say that the Project cannot be re-visited in a different context. For example, Hu Honua may bid the Project in a future round of competitive bidding, where, if selected, it would have the opportunity to re-negotiate a new PPA with HELCO, for review by the Commission.

F.

Request For Preferential Rates

Pursuant to HRS § 269-27.3, the utility, "[u]pon receipt of a bona fide request" is required to forward the request to the Commission "for approval." The statute is silent on what further action is required, and the Commission reads this as authorizing the Commission to exercise its discretion in reviewing any such request.[285]

[285] C.f. Del Monte Fresh Produce (Hawaii), Inc. v. International Longshore and Warehouse Union, Local 142, AFL-CIO, 112 Hawaii 489, 499-500, 146 P.2d 1066, 1076-1077 (2006)("To the extent that the legislature has authorized an administrative agency to define the parameters of a particular statute, that agency's interpretation should be accorded deference.");

In this instance, given the Commission's denial of HELCO's Letter Request based on its consideration of the GHG and other environmental impacts under HRS § 269-6(b), and concomitant denial to recover purchased energy costs under HRS § 269-16.22, the Commission concludes that review of Hu Honua's request for preferential rates is unwarranted under the circumstances, and declines to exercise its authority to review Hu Honua's request.

V.

SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the foregoing, the Commission finds and concludes as follows:

Carlisle v. One(1) Boat, 1198 Hawai`i 245, 253, 195 P.3d 1177, 1185 (2008)("Further, '[t]his court has accorded persuasive weight to the construction of statutes by administrative agencies charged with overseeing and implementing a particular statutory scheme.'")(citing Sam Teague, Ltd. v. Hawai`i Ci. Rights Comm'n, 89 Hawai`i 269, 276 n. 2, 971 P.2d 1104, 1111 n. 2 (1999); Haole v. State, 111 Hawai`i 144, 150, 140 P.3d 377, 383 (2006) ("Where an agency is statutorily responsible for carrying out the mandate of a statute which contains broad or ambiguous language, the agency's interpretation and application of the statute is generally accorded judicial deference on appellate review.") (citing Vail v. Employees' Retirement System, 75 Haw. 42, 59, 856 p.2d 1227, 1237 (1993)); and Gillan v. Government Employees Ins. Co., 119 Hawai`i 109, 117-118, 194 P.3d 1071, 1079-1080 (2008) (Deference to an agency's interpretation of ambiguous statutory language reflects a sensitivity to the proper roles of the political and judicial branches, insofar as the resolution of ambiguity in a statutory text is often more a question of policy than law).

1. The Commission is not convinced that the Project will result in long-term environmental benefits for Hawai`i Island. As such, the Commission is concerned that reliance on energy produced at the Project could result in long-term environmental and public health costs.

2. According to Hu Honua, the Project is estimated to produce approximately 8,035,804 metric tons of CO_2e over the term of the Amended PPA. As the vast majority of these emissions are associated with the harvesting and stack emissions associated with operating the Project, there is a high degree of confidence that they will result if the Amended PPA is approved.

3. To mitigate these significant GHG emissions, Hu Honua has committed to sequester carbon emissions, or to purchase carbon offsets, in sufficient amounts to ensure that the Project is: (i) cumulatively carbon negative by 30,000 metric tons by the end of the Amended PPA term (2051); and (ii) carbon negative in the year 2035 and each year thereafter until the end of the Amended PPA term (assuming operations begin in 2022).

4. The Commission does not find this claim to credible.

A. A number of assumptions underlying the ERM Analysis' sequestration results are speculative.

B. "Net Aboveground Biomass Growth On Island" is the greatest contributor to sequestration, totaling an estimated 5,882,322 MT CO_2e sequestered.

C. Regarding sequestration estimates for 2017-2021, Hu Honua has not been clear in the record regarding its past harvesting efforts, and it is unclear whether harvesting has occurred on the plantations leased by CNRR during this period and whether such operations have been incorporated into the ERM Analysis.

D. Regarding sequestration estimates for 2022-2051, the ERM Analysis assumes continuation and/or expansion of Hawai`i Island leases; however, at this time, lease agreements with the existing Hawai`i Island locations do not extend through the 30-year term of the PPA.

E. Although Hu Honua states that it is in negotiations to extend the existing leases, no lease extensions or new leases have been obtained, and Hu Honua has indicated that completing negotiations for new or extended leases will require Commission approval of the Amended PPA first.

F. Hu Honua's proposal to provide, within 60 months of a final non-appealable approval order from the Commission, documentation demonstrating that it has secured additional acreage on Hawai`i Island, is not premised on any binding agreement, but arises from "good faith discussions" with a potential

landowner. Further, it is unclear what "additional acreage" constitutes in this situation and whether it would allow Hu Honua to achieve sequestration as set forth in the ERM Analysis.

G. If Hu Honua is unable to extend or secure new lease agreements on Hawai`i Island, it would presumably also need to procure feedstock from other islands in the State, the continental United States or internationally, which raises the possibility of additional GHG emissions associated with cultivating, harvesting, and transporting feedstock from the continental United States to Hawai`i Island that are not currently captured in the ERM Analysis.

H. Another significant source of CO_2e sequestration comes from trees planted under the NFF Agreement, which is estimated to result in approximately 437,500 MT CO_2e. However, these figures are based on a generalized information about carbon sequestration rate, tree survival rate, and tree lifetime Hu Honua states it received from NFF, and may not accurately reflect sequestration performance, which depends on specific data regarding tree species, planting schedules, location, survival rate, growth rate, and sequestration rate.

I. Hu Honua also refers to sequestration resulting from the OTP Agreement and from the FHVNP Agreement; however, as neither of these agreements are modeled in the ERM Analysis, it is impossible to reasonably estimate, based on the record,

what amount, if any, of sequestered CO_2e may arise from these agreements.

J. The ERM Analysis is highly sensitive to inputs from key emissions categories, with small changes having a significant impact on overall results.

K. The four categories contributing the most towards GHG emissions increases and reductions are: above ground carbon sequestration, stack emissions, belowground carbon sequestration (i.e., carbon sequestered and stored belowground in roots and soil), and belowground carbon loss/emissions (i.e., loss of carbon stored below ground associated with activities such as harvesting).

L. The Commission's review indicates that even a one-percent deviation in any of these four categories could cause the ERM Analysis' total estimated amount of CO_2e emissions to fluctuate significantly, which could turn the Project into a net GHG emitter.

5. HELCO submitted a separate GHG analysis performed by Ramboll, which reported the total net GHG impact associated with the Project, and relied on Ramboll's independent estimate of avoided GHG emissions associated with the Project, combined with ERM's estimates for the Project's lifecycle GHG impact, to arrive at a total "Net Emissions" GHG impact for the Project.

A. Ramboll defines the Project's Net Lifecyle Emissions as the Avoided Lifecycle Emissions less the Project Lifecycle Emissions, which Ramboll relied on ERM to provide.

B. Ramboll's overall estimate for Project's Net Lifecycle Emissions is not dispositive, give the concerns with the ERM Analysis' sequestration results, which could affect the Project Lifecycle Emissions, and thereby change the overall Project Net Lifecyle Emissions results. In addition, acceleration in the expected growth of other renewable projects on Hawai`i Island during the Amended PPA term could displace fossil fuel-based units on HELCO's system, which could affect Ramboll's Avoided Lifecycle Emissions calculation, and thereby affect the resulting Project Net Lifecycle Emissions.

6. There are additional concerns with the ERM Analysis, which undermines the credibility of its results.

A. The Carbon Calculator included as part of the ERM Analysis contains a number of hard-coded cells, which limits the Commission's ability to assess the reasonableness of the Carbon Calculator's inputs and outputs.

B. Even assuming, arguendo, that the Carbon Calculator was not subject to the above uncertainties, the purported GHG benefits of the Project may not result until very late in the Amended PPA's 30-year term.

C. Review of Hu Honua pledges to be carbon negative on an annual basis by the end of 2035, and each year thereafter until the end of the PPA term (assuming operations begin in 2022) reveals that it is premised on comparing GHG emissions and sequestration in each particular year of the Amended PPA, and does not consider the cumulative impact of prior years' worth of emissions and sequestration.

D. When analyzed from a Cumulative Basis, that is, taking into account all of the prior years' worth of accumulated GHG emissions and sequestration, total carbon sequestration does not overtake total GHG emissions until 2047, near the end of the Amended PPA term, and reflects a practical "frontloading" of GHG emissions and "backloading" of GHG reductions, and demonstrates that the Project is estimated to increase GHG emissions for decades before the claimed sequestration "catches up" to emissions and beings to result in "carbon negativity."

7. Hu Honua's proposed backstop of ensuring net carbon negativity through the purchase of carbon offsets if sequestration efforts are insufficient is not adequately developed.

A. Aside from stating that Hu Honua would purchase carbon offsets from "reputable sources using Nature Based offsets to ensure growth of vegetation (e.g., VERRA or ACR)," Hu Honua has offered little detail about where or how these carbon offsets would be sourced, purchased, and verified.

B. Hu Honua has also assumed that it can purchase carbon offsets for approximately $15 per metric ton, which may be a reasonable valuation based on today's voluntary carbon offset market, but it is uncertain whether the price of carbon offsets will remain at this level or increase throughout the 30-year PPA term.

C. The potential fluctuations in sequestration in any given year of the Amended PPA's 30-year term indicate that Hu Honua's proposed reserve fund of up to $450,000 maybe insufficient to support its Carbon Commitment.

D. Although Hu Honua has offered to increase this seed money to a "higher amount" if deemed "appropriate," the applicants carry the burden of proof, and it is not for the Commission to undertake this responsibility for Hu Honua.

E. Regarding Hu Honua's offer to "pay a monetary amount for the purpose of procuring sufficient carbon offsets," Hu Honua has only recently identified the DLNR's 100 Million Tree Program as a potential candidate, and has not offered sufficient information about how this program could be used to support Hu Honua's Carbon Commitment in a reasonable and verifiable manner.

F. There is no proposed framework for the Commission to review, monitor, and/or verify carbon offsets purchased by Hu Honua.

G. Furthermore, as the Commission's authority is limited to public utilities operating within the State, it is unclear what recourse the Commission would have if these carbon offset projects were found to operating in a manner inconsistent with Hu Honua's Carbon Commitment.

8. It is unclear whether the Commission would be able to enforce the Carbon Commitment on Hu Honua.

A. Although Hu Honua has "stipulate[d] to ongoing review by the [Commission] for purposes of reviewing and enforcing Hu Honua's carbon negative commitments," and "agree[d] to cure any shortcomings within a reasonable period of time,"[286] it is unclear what would result if Hu Honua were to disagree with or object to a Commission finding that an aspect of the Carbon Commitment was not being met.

B. Second, aside from Hu Honua's assertions that it will comply with ongoing Commission review, there would be few options if Hu Honua decided to ignore the Commission's authority, which may not be suited to the situation and which may have adverse consequences to ratepayers.

9. It is unclear what impact Hu Honua's intent to sell excess energy in the form of hydrogen may have on the Project's

[286]Hu Honua Post-Hearing Brief at 5.

GHG emission profile, as Hu Honua does not account for these emissions in the Ramboll Analysis or the ERM Analysis.

10. For these preceding reasons, the Commission also finds and concludes that the Project is likely to emit a significant amount of GHG emissions, and Hu Honua has not reasonably demonstrated that it will be able to successfully offset these emissions, creating the potential risk that the Project could result in net GHG emissions.

11. The Commission finds and concludes that Act 82 has not modified the scope of the Commission's review of GHG impacts associated with the Project, as set forth under the prior version of HRS § 269-6(b), and as discussed by the Hawaii Supreme Court in HELCO I and HELCO II.

A. Further, the Commission takes note of the Court's explicit instructions to the Commission in HELCO I and HELCO II, and reads them as explicitly contemplating that review of the Amended PPA's terms, including its pricing, would be considered on remand, along with the Project's GHG impact.

B. Accordingly, the Commission finds that review of the total costs of the Amended PPA is within the scope of this issue on remand.

12. Due various provisions of the Amended PPA, including the pricing structure and Minimum Dispatch Requirement,

the Project is expected to be dispatched near its contractually minimal level.

A. HELCO's production simulations indicate that based on the Amended PPA's pricing structure, the Project will likely be dispatched, on average, at a level of 11.8 MW, which near the Amended PPA minimum level of 10 MW, for much of the 30-year term.

B. HELCO's simulation results have been corroborated by the Consumer Advocate's independent review and analysis of HELCO's simulation data.

13. Accordingly, the Project is estimated to be a relatively high cost resource on HELCO's system, with a revenue requirement equivalent to approximately 40.64 cents per kWh over the term of the Amended PPA.

A. HELCO's bill impact analysis indicates that this would result in a typical residential customer likely experiencing a monthly bill increase of approximately $10.97, on average, across the 30-year term of the Amended PPA.

B. Relatedly, HELCO as asserted that, given the Amended PPA's pricing and Minimum Dispatch Requirement, "there is no method of dispatch, operation, or modeling assumptions that could produce a net savings to the system or customers."[287]

[287]HELCO Response to CA/HELCO-SIR-28.a.1.b.

14. Taking the Amended PPA's pricing and minimum dispatch requirements into account, HELCO's modeling shows that the Project will likely displace other, more economic, renewable resources on HELCO's system.

A. HELCO has acknowledged that "[t]he minimum dispatch of Hu Honua makes it impossible to ensure that no renewable resource energy output will be partially displaced by Hu Honua."[288]

B. This assessment has been corroborated by the Consumer Advocate's own analysis, which concludes that more than half (approximately 58%) of the generation displaced by the Project over the Amended PPA term would be other renewable generation.

15. According to HELCO, adding the Project to the grid would not satisfy any urgent grid needs, as determined by the system's energy reserve margin, as well as from HELCO's adequacy of supply reports.

A. While the Project may provide certain grid services, these grid services are not exclusive to the Project and may be provided by other existing or future resources on the HELCO system.

[288]HELCO Response to CA/HELCO-SIR-26.c.1. See also, HELCO Response to Tawhiri-HELCO-SIR-15; HELCO Response to PUC-HELCO-IR-21; and HELCO Response to CA/HELCO-SIR-28.a.1.b.

B. Furthermore, it is uncertain whether adding the Project would accelerate any retirements or removals of existing fossil fuel units from HELCO's grid.

16. Hu Honua's alternative bill impact analysis is not convincing, as it assumes that the Project will exclusively displace electricity provided by HELCO's fossil fuel Keahole powerplant.

A. This assumption runs contrary to the Consumer Advocate's production simulation analysis, which concludes that the Project is expected to displace other renewable energy resources, in addition to fossil fuel units.

B. This assumption also contradicts HELCO's operating practices, which lead HELCO to characterize such an assumption as "highly unlikely to represent the actual operational conditions."[289]

C. HELCO has also objected to a related request from Hu Honua to model a scenario where the Project would be dispatched ahead of all other fossil fuel resources on the basis that it would violate the principles of economic dispatch.

D. The Commission agrees that such a scenario is unrealistic, and finds HELCO's and the Consumer Advocate's analyses more credible.

[289]HELCO Response to CA/HELCO-SIR-28.a.1.

E. Further, Hu Honua's estimated social carbon cost savings are premised on unreasonable assumptions, such as the results of the ERM Analysis, and that the Project would only displace electricity provided by HELCO's fossil fuel based powerplants.

17. Even assuming, arguendo, that the Commission relied on Hu Honua's assumptions for a bill impact analysis, the Project's bill impact would only marginally improve, and be accompanied by significant risk.

A. At Hu Honua's request, HELCO performed a sensitivity analysis in which all unapproved resources previously included in HELCO's bill impact analysis were excluded from consideration.

B. Under this analysis, the Amended PPA is able to produce a customer bill savings, but only because of changes modeled to occur in the final years of the PPA (2045-2051), where HELCO is assumed to transition its fossil fuel units to biodiesel. Due to the estimated high cost of biodiesel, these final seven years of the Amended PPA term offset the high costs and low dispatch of the first 23 years.

C. Thus, even under this scenario, benefits are "backloaded," with customers expected to experience bill increases during the first 23 years of the Amended PPA, with partially offsetting savings not occurring until far in the future during

the last seven years of the Amended PPA, which increases risk to customers.

18. Taking the above into account, the Commission finds and concludes that the Amended PPA's total costs are not reasonable in light of the Project's potential for GHG emissions.

19. In addition upon considering the concerns summarized above, including concerns with Project GHG emissions, the total costs of the Amended PPA, and the impact the Project is expected to have on HELCO's system, the Commission finds and concludes that the terms of the Amended PPA are not prudent and in the public interest, upon considering the Amended PPA's hidden and long-term consequences.

A. Based on the record, the Amended PPA is expected to result in an increase in customer bills and require operation of the Project in a manner that displaces lower cost renewable resources.

B. Furthermore, many of the costs of the Amended PPA are front-loaded (e.g., the bill impact for the Amended PPA is much higher in early years of the Amended PPA), while many of the estimated benefits are back-loaded (e.g., much of the Amended PPA's customer bill savings are estimated to occur in 2045 when HELCO converts its fossil fuel plants to biodiesel, which is expected to be more expensive than biomass, and the majority of GHG

sequestration is estimated to occur during the latter half of the Amended PPA term).

C. If Hu Honua were to withdraw or terminate the Amended PPA partly through the 30-year term, HELCO ratepayers may have paid the higher costs of the Amended PPA (in both monetary and environmental ways) without receiving the full corresponding benefits.

D. In comparison, HELCO has stated that it does not have a current need for the Project, and that the grid services the Project offers can be provided through procuring other resources, and that the Project is not expected to expedite the retirement of any fossil fuel plants.

20. Based on the above, and considering the record in this proceeding and the statement of issues on remand, the Commission concludes that HELCO has not sufficiently met its burden for approval of its Letter Request.

In light of the attendant concerns with the Amended PPA and Project, the Commission determines that it is not necessary for it to exercise its authority to review Hu Honua's request for preferential rates under these circumstances.

VI.

ORDERS

THE COMMISSION ORDERS:

1. HELCO's Letter Request for approval of the Amended PPA is denied.

2. This docket is closed.

DONE at Honolulu, Hawaii MAY 23, 2022.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By _____
James P. Griffin, Chair

By _____
Jennifer M. Potter, Commissioner

APPROVED AS TO FORM:

_____
Mark Kaetsu
Commission Counsel

2017-0122.ljk

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.	)	
	)	

DISSENT OF LEODOLOFF R. ASUNCION, JR., COMMISSIONER

I respectfully dissent from the majority's decision ("Majority Decision") denying[1] the Amended and Restated Power Purchase Agreement between HELCO and Hu Honua ("Amended PPA").[2]

[1]The Parties to this docket are HELCO, HU HONUA BIOENERGY, LLC ("Hu Honua") (collectively, HELCO and Hu Honua are referred to as "Applicants"), and the 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"). On January 12, 2022, participant Hamakua Energy officially withdrew from this proceeding.

[2]"Hawaii Electric Light Company, Inc.'s Amended and Restated Power Purchase Agreement dated May 5, 2017," filed May 9, 2017. The project that is the subject of the Amended PPA is referred to herein as "the Project."

I.

INTRODUCTION[3]

On June 30, 2021, the Commission reopened the instant docket[4] to consider narrow issues related to the greenhouse gases ("GHG") emitted from the Project, as clarified by the Hawaii Supreme Court's decision in the Matter of Hawaii Elec. Light Co., Inc., 149 Hawai'i 239, 487 P.3d 708 (2021), filed on May 24, 2021 ("HELCO II"). Based on a review of the entire record, including the evidentiary hearing held in this matter in March 2022 ("Evidentiary Hearing"),[5] the evidence clearly establishes that the Applicants have met their burden in showing that the Project will result in a significant reduction in GHG emissions over the course of the 30-year Amended PPA term, and consequently, that the costs of the Amended PPA are reasonable in light of the potential for GHG emissions.

[3]The Majority Decision includes a discussion of the procedural background of this proceeding so it is not restated here.

[4]Order No. 37852, "Reopening the Docket," filed on June 30, 2021, at 12 ("Order No. 37852").

[5]See Notice of Evidentiary Hearing, filed on December 23, 2021; and Letter From: Commission To: Service List Re: Docket No. 2017-0122 – For Approval of a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity, "Notice of Hearing Recording," filed on March 8, 2022 (making the recording of the Evidentiary Hearing held from March 1-4 and 7, 2022, available to the Parties and Participants (accessed through YouTube at: https://www.youtube.com/channel/UCBVv_-iAjybJFDSKbTZ3hYA)).

II.

THE MAJORITY DECISION TO DENY THE AMENDED PPA IS BASED ON ISSUES OUTSIDE THE SCOPE OF THE HELCO II REMAND

The Commission first approved the Amended PPA in 2017 in Decision and Order No. 34726[6] on the basis that "[t]he 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[.]"[7] The Commission stated that while it "finds the pricing to be reasonable, the [C]ommission 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."[8]

LOL subsequently appealed the 2017 D&O, and the Hawai`i Supreme Court issued its decision in the Matter of Hawaii Elec. Light Co., Inc., 145 Hawai'i 1, 445 P.3d 673 (2019) ("HELCO I"), remanding the matter to the Commission for the *limited* purposes of: (1) completing sufficient analysis of the impacts underlying the Project on GHG emissions; and (2) allowing LOL an opportunity to meaningfully participate in the docket with respect

[6]Decision and Order No. 34726, filed on July 28, 2017 ("2017 D&O").

[7]2017 D&O at 60.

[8]2017 D&O at 60.

to its right to a clean and healthful environment, as defined by HRS Chapter 269.[9] No other issues, including the pricing or costs associated with the Amended PPA, were discussed or adjudicated by the Hawaii Supreme Court.[10]

On remand from HELCO I, the Commission issued a decision stating that the waiver granted to HELCO from the Commission's Framework for Competitive Bidding, previously issued pursuant to the 2017 D&O, was not appropriate, and thus denied approval of the Amended PPA on the basis of the waiver, without consideration of GHG emissions.[11]

Citing the Commission's inconsistency with the Court's remand instructions, Hu Honua filed an appeal, which resulted in

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[9]See HELCO I, 145 Hawai'i at 26, P.3d at 698; HELCO II, 149 Hawai'i at 242, 487 P.3d at 711.

[10]In its appeal, LOL raised the following three points of error: (1) the Commission was required under HRS § 269-6(b) to explicitly consider GHG emissions in determining whether the costs of the Amended PPA were reasonable; (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; and (3) the Commission erred in denying its request to upgrade its status from "participant" to "intervenor." HELCO I, 145 Hawai'i at 10, P.3d at 682.

[11]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 No. 37205"); see also Order No. 37306, "(1) Denying Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 8, 2020, Filed July 20, 2020; and (2) Addressing Related Procedural Motions," filed September 9, 2020.

HELCO II, wherein the Hawaii Supreme Court re-affirmed and reiterated its instructions in HELCO I that "[o]n remand, the PUC shall give explicit consideration to the reduction of [greenhouse gas] 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)."[12] HELCO II also confirmed that "the court [in HELCO I] explicitly delimited the purpose of the remand" and that "[t]hese remand instructions circumscribed the scope of the attendant vacatur."[13] The Court thus remanded the matter for a second time, and reiterated its instructions previously provided in HELCO I that the 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.[14]

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[12]HELCO II, 149 Hawai'i at 240, 487 P.3d at 709 (emphasis in original) (quoting HELCO I, 145 Hawai'i at 25, P.3d at 697).

[13]HELCO II, 149 Hawai'i at 240, 487 P.3d at 709.

[14]HELCO II, 149 Hawai'i at 242, 487 P.3d at 711 (quoting HELCO I, 145 Hawai'i at 26, P.3d at 698).

As noted in HELCO II, the Court's instructions on remand circumscribed the scope of the vacated PUC decision and *limited* the issues on remand in the Evidentiary Hearing to: (1) explicit consideration to the reduction of GHG emissions associated with the Project; and (2) allowing LOL its right to meaningfully address the impacts of approving the Amended PPA with respect to its right to a clean and healthful environment, as defined by HRS Chapter 269. In my opinion, the overwhelming testimony and evidence in the record clearly demonstrates that both issues have been addressed.

Despite the Hawaii Supreme Court's explicit instructions, the Majority considered total costs, including energy and capacity costs, instead of the "hidden" costs associated with or attributable to GHG emissions. Given that "administrative agencies are bound by reviewing courts' remand orders,"[15] and that the Majority's ruling undermines the "true intent and meaning" of the Hawaii Supreme Court's mandate,[16] I respectfully disagree with the Majority's decision to deny approval of the Amended PPA to the extent that it is based on a consideration of issues outside the explicit directives of the Hawaii Supreme Court in HELCO I and HELCO II, including the pricing

[15]HELCO II, 149 Hawai'i at 241, 487 P.3d at 710.

[16]HELCO II, 149 Hawai'i at 241, 487 P.3d at 710.

of the Amended PPA, which has not changed since the Commission approved the Amended PPA in 2017 and which was not raised on appeal.

III.

THE EVIDENCE SUPPORTS THAT THE PROJECT WILL RESULT IN A SIGNIFICANT REDUCTION IN GHG EMISSIONS AND SATISFIES THE HAWAI`I SUPREME COURT'S MANDATE TO GIVE EXPLICIT CONSIDERATION TO THE REDUCTION OF GHG EMISSIONS PURSUANT TO HRS § 269-6(b)

A.

The Evidence Demonstrates that the Project Will Result in Significant Reduction in GHG Emissions

In Order No. 37852, as modified by Order No. 37910,[17] with respect to the GHG emissions associated with the Project, the Commission set forth Issues 1., 1.a, and 2., which provide:

> 1. What are the long-term environmental and public health costs of reliance on energy produced at the proposed facility?
>
> a. What is the potential for increased air pollution due to the lifecycle GHG emissions of ~~directly attributed~~ the Project~~, as well as from earlier stages in the production process~~?

[17]Order No. 37910, "(1) Denying Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 Filed July 12, 2021; (2) Denying Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed on June 30, 2021, Filed July 12, 2021; (3) Denying Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address its Impact on Order No. 37852 Reopening Docket Filed July 20, 2021; (4) Partially Granting the Division of Consumer Advocacy's Motion for Leave to Respond Filed July 23, 2021; and (5) Dismissing All Other Related Procedural Motions," filed on August 11, 2021 ("Order No. 37910"), at 32.

2. What are the GHG emissions that would result from approving the Amended PPA?[18]

As discussed below, the undisputed evidence shows that the Project will significantly reduce GHG emissions over the 30-year term of the Amended PPA.[19]

Pursuant to the respective GHG analyses provided by HELCO's consultant Ramboll US Consulting, Inc. ("Ramboll") and Hu Honua's consultant Environmental Resource Management ("ERM"), the Project will result in a Net Lifecycle GHG Emission Reduction of 1,464,742 metric tons ("MT") of CO2e over the 30-year term of the Amended PPA.[20] This total emissions reduction consists of the estimated Avoided Lifecycle emissions[21] of 1,434,243 MT CO2e[22] and estimated Project Lifecycle GHG emissions of -30,499 MT CO2e.[23]

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[18]Order No. 37910 at 32.

[19]See HELCO Response to PUC-HELCO-IR-17.b, Attachment 3 "Additional Hu Honua GHG Analysis," prepared by Ramboll, filed on November 29, 2021 ("Ramboll Additional Hu Honua GHG Analysis"), at 1-61, including Attachment B: Project GHG Emissions Analysis Conducted by ERM (including Table 13: Summary Table) ("ERM Analysis").

[20]Ramboll Additional Hu Honua GHG Analysis at 3, 5, 10, 11, and 16.

[21]According to Ramboll, "[a]voided GHG emissions represents emissions that would be avoided and would not be emitted to the atmosphere if the Project is approved and built." Ramboll Additional Hu Honua GHG Analysis at 9.

[22]Ramboll Additional Hu Honua GHG Analysis at 9, 11, and 15.

[23]Ramboll Additional Hu Honua GHG Analysis at 6, 11, and 14. According to ERM, the Project Lifecycle GHG emissions account for

Additionally, while not a requirement in this proceeding, to ensure that the Project Lifecycle GHG emissions reduction that ERM projected is realized, Hu Honua has made firm commitments and agreed to, as a condition of approval of the Amended PPA, to the Project being: (1) at least 30,000 MT carbon negative cumulatively over the 30-year term of the Amended PPA (no matter the level of actual dispatch); and (2) carbon negative by the year 2035 and each year thereafter until the end of the PPA term (assuming operations allowed to begin in 2022).[24] No other Party or Participant has offered an independent analysis to substitute or rebut Hu Honua and HELCO's respective 2021 GHG analyses or proffered any substantial evidence that undermines the ultimate conclusions of their analyses indicating that the Project will result in a significant reduction of GHG emissions. Additionally, there is no material evidence in the record that contradicts the

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all lifecycle stages such as raw materials and extraction, transportation, construction, operations & maintenance, and decommissioning & disposal, as well as boiler combustion emissions, carbon sequestration, harvesting equipment, site preparation, electricity use, transportation, fuel production, and production of fertilizer. ERM Analysis at 2 (referenced in the Ramboll Additional Hu Honua GHG Analysis at 6).

[24]"Hu Honua Bioenergy LLC's Prehearing Testimonies ("Prehearing Testimony of _____"); Exhibits 'Hu Honua-100' - 'Hu Honua-800'; and Certificate of Service," filed on September 16, 2021, at Hu Honua T-1 at 7, 27, and 29-31.

Applicants' GHG Analyses,[25] suggesting that HELCO and Hu Honua's assumptions and methodologies are indeed reasonable.

For example, the Consumer Advocate's witness Michelle Daigle, Ph.D. ("Dr. Daigle") testified that she did not disagree with the statement that "[a]ccording to ERM, the Project will be more than 30,000 [MT CO2e] carbon negative cumulatively over the 30-year term of the PPA,"[26] and that she did not have any criticism of ERM's accounting of the actual stack emissions from the Project.[27] Dr. Daigle also testified that she did not dispute the methodologies in Ramboll's GHG analysis,[28] which shows the Project will result in 1,434,243 MT CO2e in Avoided Lifecycle GHG emissions. Hu Honua's witness, Dr. David Weaver ("Dr. Weaver") of ERM, testified to the conservative nature of ERM's analysis, explained in depth that such analysis overestimates the Project GHG emissions and underestimates sequestration, will hold Hu Honua to a higher bar, and in reality, will result in the Project negating even more emissions than what is reflected in

[25]"Hawaii Electric Light Company, Inc.'s Post-Hearing Brief; and Certificate of Service," filed on March 29, 2022, at 11-12.

[26]Testimony of Michelle Daigle, Recording of Hearing, Hearing Day 4, March 4, 2022, at 5:48:03-5:48:50.

[27]Testimony of Michelle Daigle, Recording of Hearing, Hearing Day 4, March 4, 2022, at 5:42:43-5:43:22.

[28]Testimony of Michelle Daigle, Recording of Hearing, Hearing Day 4, March 4, 2022, at 2:22:49-2:23:11.

the analysis.[29] HELCO's witness Dr. Abigail Kirchofer ("Dr. Kirchofer") of Ramboll confirmed her understanding that the Project would still reduce GHG emissions even if the Avoided Lifecycle GHG emissions were not accounted for, given the findings of the ERM Project GHG analysis and Hu Honua's commitment to reducing emissions separate from any considerations of the avoided emissions due to displaced fossil fuel electricity.[30]

Further, Hu Honua agreed on the record to adopt any reasonable assumptions and methodologies suggested by the Commission, or any other Party or Participant have offered. Hu Honua clarified at the Evidentiary Hearing[31] and reinforced through its Post-Hearing Brief,[32] that it agreed to supplementary conditions of approval that would enable the Commission to hold Hu Honua accountable to its carbon negative commitments, some of which were also proposed by the Consumer Advocate in its

[29]Testimony of David Weaver, Recording of Hearing, Hearing Day 2, March 2, 2022, at 5:04:49-5:05:45.

[30]Testimony of Abigail Kirchofer, Recording of Hearing, Hearing Day 2, March 2, 2022, at 2:20:19-2:20:54.

[31]See generally Testimony of Warren Lee, Recording of Hearing, Hearing Day 2, March 2, 2022, beginning at 6:22:25.

[32]"Hu Honua Bioenergy, LLC's Post-Hearing Brief; Exhibits 'A'-'F'; and Certificate of Service," filed on March 29, 2022 ("Hu Honua Post-Hearing Brief"), at 27-30.

Prehearing Statement of Position.[33] Hu Honua also expressed its willingness to accept any reasonable modification or additional condition(s) the Commission might suggest to ensure these commitments are realized.[34]

Hu Honua has sufficiently demonstrated its ability and willingness to comply with its carbon negative commitments as detailed in Hu Honua's Carbon Emissions Reduction Commitment and Plan.[35] In addition, Hu Honua has offered further supplemental conditions of approval to ensure accountability, including:

A. Direct oversight and enforcement of carbon commitments by the Commission;[36]

B. Submission of documentation demonstrating that it has secured additional acreage on Hawaii Island to provide feedstock for the remaining term of the Amended PPA within sixty months after a final, non-appealable approval;[37] and

C. Proposed a process to identify an independent third-party verifier that would allow the Parties to comment on, and the Commission to approve, the ultimate list of verifiers to be selected by Hu Honua.[38]

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[33]See "Division of Consumer Advocacy's Statement of Position," filed on December 21, 2021, at 45-46.

[34]Hu Honua Post-Hearing Brief at 29.

[35]See Hu Honua Prehearing Testimony, Exhibit Hu Honua-201.

[36]Hu Honua Post-Hearing Brief at 29.

[37]Hu Honua Post-Hearing Brief at 28-29.

[38]Hu Honua Post-Hearing Brief at 28.

Hu Honua offered, on the record and again in its Post-Hearing Brief, to modify or add any reasonable conditions that would allow for accountability and enforcement of its carbon negative commitments.[39]

The Majority states that the Project relies on speculative assumptions and unsupported assertions and therefore the GHG analysis is not sufficiently supported. The Majority questions the ability to sequester enough carbon to offset GHG emissions and determine that the plan to purchase offsets has not been sufficiently developed. However, the Majority misses the point that the evidence demonstrates that Hu Honua has agreed to plant significantly more trees than it harvests in order to be carbon negative and reduce emissions - and there is no evidence to the contrary that it will not follow through with its commitment.

The GHG analysis, by design, is based on assumptions and projections 30 years into the future because the Project has not started yet. For that reason, Hu Honua agreed to written

[39]Hu Honua Post-Hearing Brief at 29. In its Post-Hearing Brief, Hu Honua again clarified the additional issues raised by the Commission and other Parties and Participants and how Hu Honua had already addressed those concerns, including but not limited to, the potential use of invasive species as a feedstock source, Hu Honua's accounting of sequestration of National Forest Foundation trees, local sequestration efforts, Hu Honua's accounting for emissions related to decommissioning, familiarity with reputable carbon offset program, and recipient of payment for procuring sufficient carbon offsets. See id. at 15-17 and Exhibit D (Table of Concerns).

commitments that it would measure the actual emissions and sequestration on an annual basis over the 30-year term as it cannot reasonably know or predict with certainty what the emissions and sequestration will be.

What we do know, however, is that Hu Honua has committed, as a condition of approval, to be carbon negative, increasing the number of new trees it will plant or grow if needed to ensure that more emissions will be sequestered than emitted. To the extent there are any perceived deficiencies with how the Project will quantify and carry out this commitment, Hu Honua agreed to adopt any reasonable assumptions or methodology (for example, changes to its carbon calculator) that the Commission prefers. Given this and the fact that the Majority has not recommended any changes in the assumptions and methodology that would make the analysis sufficient, demonstrates that there will never be an analysis that would be deemed sufficient in the Majority's subjective eyes, nor will there ever be a set of conditions or outcome upon which the Majority would approve this Project.

I believe Applicants have met their burden to show the GHG emissions impacts and also have created a plan that enables them to measure actual conditions over the 30-year term to ensure that emissions will be reduced consistent with Hu Honua's carbon negative commitments.

As noted above, Hu Honua also stipulated to the Commission's continued oversight and agreed to adopt any reasonable conditions imposed by the Commission to ensure accountability and enforcement, yet the Majority has not suggested any conditions that would help to address its concerns.

In terms of potential further commitments, to ensure meaningful carbon sequestration, I would recommend that Hu Honua solicit 3rd party auditors to audit actual emissions each year, instead of every five years. I also would recommend that the input assumptions for any carbon sequestration analyses rely on actual field tests instead of reports and studies in the monitoring and validation phase of the reporting.

Moreover, the Consumer Advocate and Tawhiri both recommended the adoption of Commission conditions, should the Commission approve the amended PPA, which demonstrates that even those Parties agreed that there could be conditions placed upon the Project that would enable PPA approval.

In conclusion, Hu Honua has agreed to adopt any reasonable modifications and or additional conditions ordered by the Commission that will enable the Commission to hold Hu Honua accountable and enforce any conditions of approval, and these examples of additional conditions show that Hu Honua's commitments can be strengthened in simple ways that would help further ensure

that the Project will be carbon negative and GHG emissions will be reduced.

B.

The Costs Under the Amended PPA Are Reasonable in Light of the Potential for GHG Emissions

In Order No. 37852, as modified by Order No. 37910,[40] the Commission set forth Issue 3, which asks the Commission to consider:

> 3. Whether the total costs ~~of energy~~ under the Amended PPA, including but not limited to the energy and capacity costs ~~is~~ are reasonable in light of the potential for GHG emissions.[41]

HELCO and Hu Honua correctly note that the Hawaii Supreme Court's remand instructions to the Commission only contemplated consideration of the reasonableness of the Amended PPA cost "in light of the potential for GHG emissions" – i.e., the reasonableness of the cost associated with or

[40]Order No. 37910, "(1) Denying Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 Filed July 12, 2021; (2) Denying Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed on June 30, 2021, Filed July 12, 2021; (3) Denying Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address its Impact on Order No. 37852 Reopening Docket Filed July 20, 2021; (4) Partially Granting the Division of Consumer Advocacy's Motion for Leave to Respond Filed July 23, 2021; and (5) Dismissing All Other Related Procedural Motions," filed on August 11, 2021 ("Order No. 37910"), at 32.

[41]Order No. 37910 at 33.

attributable to GHG emissions – and given that GHG emissions will be reduced, as discussed above, there will be a reduction in costs associated with GHG emissions,[42] given that the "total costs" associated with the Amended PPA have not changed since it was first submitted for approval, and which the Commission found to be reasonable in its 2017 D&O.

The Majority's conclusion that the "total costs" under the Amended PPA are unreasonable rests on their position that the costs of the Amended PPA should be assessed "as a whole, without specific emphasis on any particular component, such as the 'energy charge,'" and that HRS § 269-6(b) requires the Commission to determine the "reasonableness of costs of utility system capital improvements and operations," including the Amended PPA's "total costs."[43] However, such issues, including those related to "energy charges" were never raised on appeal or considered by the Hawaii Supreme Court in HELCO I or HELCO II. The Hawaii Supreme Court only focused on the GHG emissions component of HRS § 269-6(b) and the only type of cost addressed by

[42]The Hawai`i Supreme Court in HELCO I and HELCO II did not address "total costs," "energy and capacity costs," or any other cost considerations not directly related to "the potential for GHG emissions." See generally HELCO I and HELCO II.

[43]Order No. 37936, "Denying Hu Honua Bioenergy LLC's Motion for Reconsideration of Order No. 37910, Issued August 11, 2021, Filed August 23, 2021," filed on August 27, 2021, at 10-12 (emphasis in original).

the Hawaii Supreme Court were the "hidden and long-term costs" associated with GHG emissions. Because of this background, I respectfully submit that the Majority's decision to consider the "total costs" associated with the Amended PPA is in error and contrary to the remanded scope of HELCO I and HELCO II.

IV.

THE COMMISSION SATISFIED ITS CONSTITUTIONAL OBLIGATIONS WITH RESPECT TO LOL'S RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT,AS DEFINED IN HRS CHAPTER 269

The Commission should not be considering other non-GHG related environmental impacts, absent a reasonable nexus between the threatened harm and the Project. No Party or Participant has demonstrated such nexus.[44] The evidence, including LOL's own testimonies and exhibits, demonstrate that LOL fails to meaningfully explain any connection between the Project and the harm to various environmental resources that they allege. Therefore, the purported non-GHG related environmental concerns raised by LOL, as well as Tawhiri and the Consumer Advocate, should have had no bearing on the Commission's review of the Amended PPA. The record for this proceeding clearly demonstrates that LOL was given a full opportunity to cross-examine all witnesses at the Evidentiary Hearing and submit various briefs,

[44]See In re Maui Elec. Co., Ltd., No. SCOT-21-0000041, filed on March 2, 2022, at 3-4 and 17-19.

motions, and information requests in connection with its property interest in a clean and healthful environment as defined by HRS Chapter 269 (and as contemplated by the Court in HELCO I).[45] Notwithstanding, LOL declined to direct any questions to Hu Honua's GHG witnesses, including Dr. Weaver, Braulio Pikman, and Joshua Pearson, regarding Hu Honua's Project GHG analysis.[46] LOL also declined to direct any questions to HELCO's GHG witnesses, including Dr. Kirchofer and Karen Kimura, regarding HELCO's Avoided Emissions GHG Analysis.[47]

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[45]See HELCO I, 145 Hawai'i at 17, P.3d at 689 ("[T]he 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 Commission decision-making, as provided for in HRS Chapter 269.'").

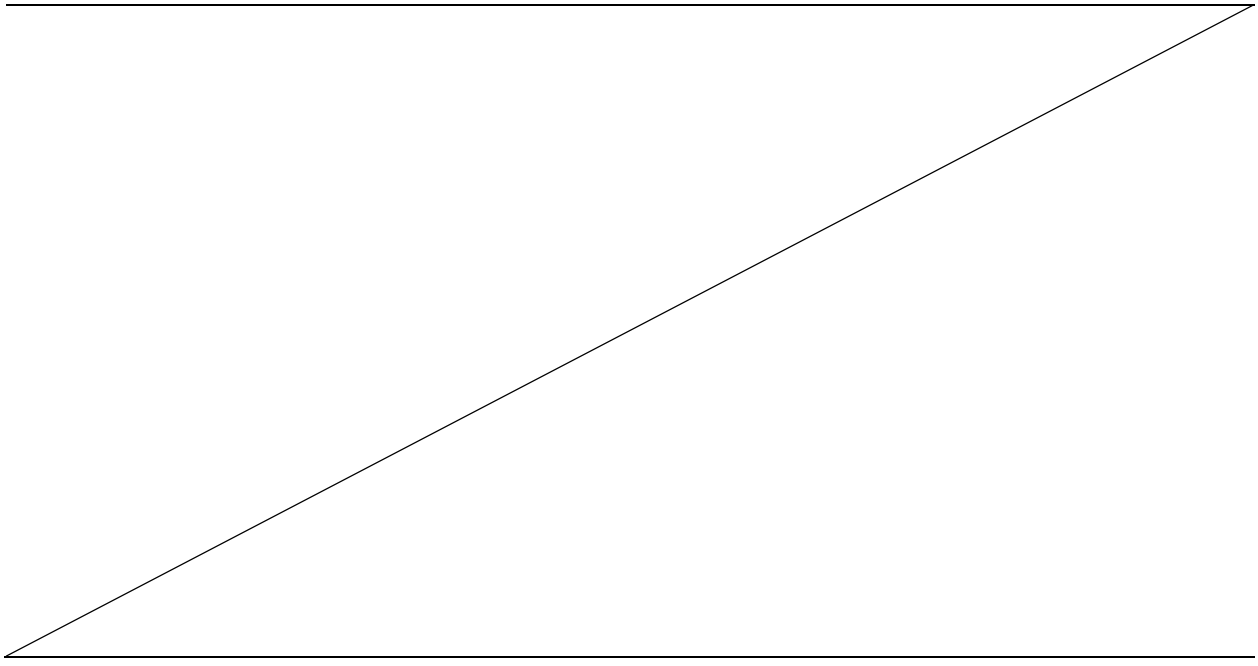
[46]Recording of Hearing, Hearing Day 2, March 2, 2022, at 4:06:14-4:06:17; ROH, Hrg. Day 3, March 3, 2022, 1:01:27-1:01:31; ROH, Hrg. Day 3, March 3, 2022, 1:07:35-1:07:39 (stating that LOL did not have questions for Dr. Weaver, Mr. Pikman, and Mr. Pearson, respectively).

[47]See Testimony of Abigail Kirchofer, Recording of Hearing, Hearing Day 2, March 2, 2022, at 2:23:38-2:24:31 (directing a few questions to Dr. Kirchofer about topics other than HELCO's Avoided Emissions GHG Analysis); Hearing Day 2, March 2, 2022, at 2:01:26-2:01:29 (stating that LOL did not have questions for Ms. Kimura). Although LOL was provided with the opportunity to question all of Hu Honua's witnesses, LOL only questioned Warren Lee, Hu Honua President (see Testimony of Warren Lee, Recording of Hearing, Hearing Day 2, March 2, 2022, at 6:58:52-7:16:32), and declined to question Hu Honua's remaining witnesses.

V.

CLOSING

The evidence clearly establishes that the Applicants have met their burden of showing that the Project will result in a significant reduction in GHG emissions over the course of the 30-year Amended PPA term (see Issues 1, 1.a, and 2), and consequently, that the costs of the Amended PPA are reasonable in light of the potential for GHG emissions (see Issue 3). The Project is 99% complete, consistent with this Commission's previous indication to Hu Honua that further extensions to complete the Project would not be given.[48]



[48]Upon the Commission's 2017 approval of the Project, the Commission instructed 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." See 2017 D&O at 61.

The Commission's decision not only prejudices Hu Honua, but also deprives the community of the benefits that could be realized from the Project, which would provide for the replacement of existing firm dispatchable fossil fuel generation and grid services with Hu Honua's firm dispatchable renewable energy and grid services.

DONE at Honolulu, Hawaii MAY 23, 2022.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By _____
Leodoloff R. Asuncion, Jr., Commissioner

2017-0122.ljk

CERTIFICATE OF SERVICE

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.

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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. 38443

(1) DENYING HAWAII ELECTRIC LIGHT COMPANY, INC.'S MOTION FOR RECONSIDERATION OF DECISION AND ORDER NO. 38395; AND (2) DENYING HU HONUA BIOENERGY, LLC'S MOTION FOR RECONSIDERATION, CLARIFICATION, AND FURTHER HEARING OF ORDER NO. 38395, ISSUED MAY 23, 2022

APPENDIX B

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 a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity.	)	DOCKET NO. 2017-0122 ORDER NO. 38443

(1) DENYING HAWAII ELECTRIC LIGHT COMPANY, INC.'S MOTION FOR RECONSIDERATION OF DECISION AND ORDER NO. 38395; AND (2) DENYING HU HONUA BIOENERGY, LLC'S MOTION FOR RECONSIDERATION, CLARIFICATION, AND FURTHER HEARING OF ORDER NO. 38395, ISSUED MAY 23, 2022

By this Order,[1] the Public Utilities Commission ("Commission"), denies: (1) HELCO's Motion for Reconsideration, filed on June 2, 2022; and (2) Hu Honua's Motion for Reconsideration, filed on June 2, 2022, including Hu Honua's request for a hearing on its Motion for Reconsideration.[2]

[1]The 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]"Hawaii Electric Light Company, Inc.'s Motion for Reconsideration of Decision and Order No. 38395; Memorandum in

As a result, there are no remaining issues for resolution in this proceeding and this docket is considered closed.

I.

BACKGROUND

On May 23, 2022, the Commission issued Decision and Order No. 38395, which denied HELCO's letter request for approval of the Amended and Restated Power Purchase Agreement, dated May 5, 2017, between HELCO and Hu Honua ("Amended PPA"[3]) under which HELCO would purchase energy and capacity from Hu Honua's biomass facility on Hawaii Island (the "Project").[4] In pertinent part, the Commission found that:

> (1) the Project will result in significant [greenhouse gas ("GHG")] emissions; and (2) Hu Honua's proposed "carbon commitment" ("Carbon Commitment") to sequester more GHG emissions than are produced by the Project relies on speculative assumptions and unsupported assertions. As a result, the Commission is not convinced that the Project will reduce

Support of Motion; and Certificate of Service," filed on June 2, 2022 ("HELCO Motion"); and "Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 38395, Issue May 23, 2022; Memorandum in Support of Motion; and Certificate of Service," filed on June 2, 2022 ("Hu Honua Motion").

[3]"Hawaii Electric Light Company, Inc.'s Amended and Restated Power Purchase Agreement dated May 5, 2017," filed on May 9, 2017. The Amended PPA is attached as Exhibit A 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.

[4]Decision and Order No. 38395, filed on May 23, 2022 ("D&O No. 38395").

> GHG emissions, and has concerns about the potentially significant long-term environmental and public health impacts of the Project if the Amended PPA is approved.
>
> In addition, the Commission finds that the Amended PPA is likely to result in high costs to ratepayers, both through its relatively high cost of electricity and through the potential displacement of other, lower cost, renewable resources. In comparison, the Project is not expected to deliver unique benefits to HELCO's system, nor [is it] urgently required at this time. Upon weighing these considerations, the Commission concludes, based on the record before it, that approving the Amended PPA is not prudent or in the public interest and denies HELCO's Letter Request.[5]

On June 2, 2022, both HELCO and Hu Honua filed their separate Motions for Reconsideration.

On June 3, 2022, the Commission, on its own motion, issued Order No. 38414, which provided the other Parties and Participants an opportunity to file replies to HELCO's and Hu Honua's Motions for Reconsideration.[6] Order No. 38414 also allowed for HELCO and Hu Honua to file responses to any replies. Replies by the Consumer Advocate, Tawhiri, and LOL were due by June 13, 2022; responses by HELCO and Hu Honua were due by June 17, 2022.[7]

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[5]D&O No. 38395 at 2.

[6]Order No. 38414, "Allowing Replies and Responses to Motions for Reconsideration of Decision and Order No. 38395, Filed On June 2, 2022," filed on June 3, 2022 ("Order No. 38414").

[7]Order No. 38414 at 3.

On June 13, 2022, the Consumer Advocate, Tawhiri, and LOL all filed replies to HELCO's and Hu Honua's Motions for Reconsideration.[8]

On June 17, 2022, HELCO and Hu Honua submitted respective responses to the Consumer Advocate's Reply, LOL's Reply, and Tawhiri's Replies.[9]

[8]"Division of Consumer Advocacy's Consolidated Response to Hu Honua Bioenergy, LLC's Motion for Reconsideration, Clarification, and Further Hearing of Order No. 38395, and Hawaii Electric Light, Inc.'s Motion for Reconsideration of Decision and Order No. 38395," filed on June 13, 2022 ("CA Reply"); "Life of the Land's Reply to Motions for Reconsideration of Decision and Order No. 38395, Filed on June 2, 2022; and Certificate of Service," filed on June 13, 2022 ("LOL Reply"); "Tawhiri Power LLC's Reply to HELCO's Motion for Reconsideration of Decision and Order No. 38395," filed on June 13, 2022 ("Tawhiri HELCO Reply"); and "Tawhiri Power LLC's Reply to Hu Honua Bioenergy, LLC's Motion for Reconsideration, Clarification, and Further Hearing of Order No. 38395, Filed on June 2, 2022," filed on June 13, 2022 ("Tawhiri Hu Honua Reply").

[9]"Hawaii Electric Light Company, Inc.'s Consolidated Response to the Consumer Advocate, Participant Life of the Land, and Participant Tawhiri Power LLC's Replies to Motion for Reconsideration of Decision and Order No. 38395; and Certificate of Service" filed on June 17, 2022 ("HELCO Response"); and "Hu Honua Bioenergy, LLC's Responses to the Division of Consumer Advocacy, Life of the Land, and Tawhiri Power LLC's Replies to Hu Honua Bioenergy, LLC's Motion for Reconsideration, Clarification, and Further Hearing of Order No. 38395, Filed May 23, 2022; and Certificate of Service," filed on June 17, 2022 ("Hu Honua Response").

II.

LEGAL STANDARD

Motions for reconsideration are governed by HAR chapter 16-601, which includes subchapter 14. HAR §§ 16-601-137, 16-601-139, 16-601-140, and 16-601-142 of subchapter 14 provide:

> §16-601-137 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.
>
> . . . .
>
> §16-601-139 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.
>
> §16-601-140 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.
>
> . . . .
>
> §16-601-142 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 Hawaii 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 Hawaii 97, 110, 58 P.3d 608, 621 (Haw. 2002) and quoting Sousaris v. Miller, 92 Hawaii at 513, 993 P.3d at 547).

III.

DISCUSSION

A.

Denying Hu Honua's Request For A Hearing On Its Motion For Reconsideration

In its Motion for Reconsideration, although 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 § 16-601-41.[10]

[10]Hu Honua Motion at 1-2.

As HAR § 16-601-142 is the more specific rule governing this situation, it is controlling, compared to HAR § 16-601-41.[11] 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 [C]ommissioner who concurred in the decision." No Commissioner concurred in D&O No. 38395, 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 for Reconsideration is denied.

Further, the Commission has provided an opportunity for Hu Honua to respond to the arguments raised in the other Party's and Participants' Replies, to which Hu Honua has taken advantage of to submit approximately 830 pages, collectively, of briefing and exhibits in support of its request for reconsideration of D&O No. 38395. These provide Hu Honua with sufficient opportunity to make its case for reconsideration.

[11]See 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 a specific statute concerning the same subject matter, the specific will be favored.'").

B.

Denying HELCO's And Hu Honua's Motions For Reconsideration

Based on review of the record, including HELCO's and Hu Honua's Motions and related filings and responsive briefings from the Parties and Participants, the Commission finds and concludes that neither HELCO nor Hu Honua has met its burden to support reconsideration of D&O No. 38395. As discussed, below, the Commission believes that the findings and conclusions in D&O No. 38395 are soundly grounded in the record developed in this proceeding. Furthermore, the Commission notes that many of the arguments raised in HELCO's and Hu Honua's Motions are arguments that were raised, or could have been raised, during the course of this proceeding. As a result, it is inappropriate to raise them now in the context of a motion for reconsideration.[12]

The Commission observes that HELCO's and Hu Honua's Motions for Reconsideration rely on similar arguments and addresses them concurrently in this Order. The Commission will not repeat each of the individual points raised in the Motions, but instead will address them categorically, as set forth below.

[12]See Tagupa, supra.

1.

The Commission Did Not Exceed The Scope Of Remand

The Commission is not persuaded that it exceeded the scope of the Hawaii Supreme Court's ("Court") remand by including for consideration the Amended PPA's total costs, including the pricing structure.[13] As noted in Order No. 37852, the Statement of Issues on remand are drawn directly from the Court's explicit language in HELCO I[14] and HELCO II.[15] In remanding this matter back to the Commission, the Court in HELCO II directly quoted HELCO I, in which it instructed the Commission to provide LOL with "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," which included "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

[13]See HELCO Motion at 3-4; and Hu Honua Motion at 9-14. See also D&O No. 38395 at 92-96.

[14]Matter of Hawaii Elec. Light Co., Inc., 145 Hawaii 1, 445 P.3d 673 (2019) ("HELCO I").

[15]See Order No. 37852 at 7-9. See also Matter of Hawaii Elec. Light Co., Inc., 149 Hawaii 239, 487 P.3d 708 (2021)("HELCO II").

long-term consequences."[16] This clearly contemplates a comparison and balancing of the costs of the Amended PPA against the potential GHG emissions associated with the Project.[17] This point is supported by the Court's ruling in HELCO II, where the Court clarified that "the PUC's 2017 approval of the Amended PPA remains vacated, and the 2017 waiver remains valid and in force[,]"[18] which provides context for interpreting HELCO I – i.e., while the waiver is still in effect, approval of the Amended PPA is vacated and must be re-examined, including, but not limited to, express consideration of the Project's GHG impact, pursuant to HRS § 269-6(b).

Further, as noted by the Consumer Advocate, the fact that the Court clearly vacated the 2017 Amended PPA approval undermines the arguments that other parts of the Amended PPA remained intact following HELCO I, or that the Commission's scope

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[16]HELCO II, 149 Hawaii at 242, 487 P.3d at 711 (citing HELCO I, 145 Hawaii at 25, 445 P.3d at 698)(emphasis added). See also HELCO I, 145 Hawaii at 24, 445 P.3d at 696 (stating that the Commission's findings regarding the "purchased power costs and arrangements set forth in the [Amended] PPA" require an analysis of the "long-term environmental and public health costs of reliance on energy produced at the proposed facility[.]").

[17]See HELCO I, 145 Hawaii at 28, 445 P.3d at 700 ("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.") (emphasis added).

[18]HELCO II, 149 Hawaii at 242, 487 P.3d at 711.

of review on remand was limited to solely considering the GHG impacts of the Project.[19]

Since the PPA approval was vacated and must be re-visited anew, the appropriate analysis is to consider GHG emissions from the Project in relation to the costs of the Amended PPA. This comports with considering GHG emissions as part of a holistic review of the Amended PPA, in which analysis of the Project's GHG impact cannot be reasonably divorced from consideration of other PPA factors (for example, net GHG emissions could be offset by other benefits to the Project, or vice versa).

2.

The Commission Applied The Appropriate Burden Of Proof

The Commission weighed the evidence using a preponderance of the evidence standard. In response to Hu Honua's arguments, the Commission does not agree that Hu Honua submitted the "only evidence" regarding GHG emissions, or that the Commission's review of Hu Honua's testimony and exhibits regarding

[19]See CA Reply at 8-10. See also id. at 12-13 ("Such an interpretation suggest that the remanded proceeding was merely an intellectual exercise and that, regardless of the GHG emissions analysis, since the other [Amended] PPA terms and conditions were already approved, the Commission should approve the [Amended] PPA as reasonable. Said differently, if the points of error sustained on appeal had no determinative impact on the Commission's decision, then this remand proceeding would serve as nothing more than a perfunctory rubber stamping and the matter should not have been remanded in the first place.").

GHG emissions somehow amounts to application of a de facto "clear and convincing" standard.[20] First, while Hu Honua did submit expert testimony and exhibits about the Project's GHG emissions, other Parties and Participants voiced concerns and submitted evidence regarding the assumptions and methodologies supporting the analysis, so the Commission does not agree with Hu Honua's characterization that it submitted the "only" evidence on this issue.[21]

Second, even in the theoretical absence of "responsive" expert testimony from another party or participant, simply vetting the assumptions, methodologies, and results of Hu Honua's exhibits does not mean that the Commission applied a higher "clear and convincing" standard.[22] Rather, the courts have recognized that

[20]See Hu Honua Motion at 87.

[21]Cf. LOL Reply at 10.

[22]See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993)(holding that under any standard of review, including preponderance of the evidence, "the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty."). See also Ortco Contractors, Inc. v. Charpentier, 332 F.2d 283, 292 (5th Cir. 2003)("An [Administrative Law Judge] 'is a factfinder and is entitled to consider all credibility inferences. He can accept any part of an expert's testimony; he may reject it completely.'")(citing Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1990)).

an agency, acting as a factfinder, has the discretion to determine the credibility of a witness and weigh the evidence before it.[23]

Furthermore, as reflected in D&O No. 38395, the Commission did not subject Hu Honua's Project GHG analysis to unreasonably rigorous scrutiny, but merely engaged in basic inquiries, such as the estimated Project emissions, the purported offsets or reductions from sequestration efforts, the evidence supporting these assumptions, and what preparation had gone into the ability to purchase carbon offsets if sequestration efforts were insufficient.[24] These are basic inquiries that go to the heart of determining whether it is more likely than not that Hu Honua will be able to support its Carbon Commitment and what

[23]Cf. LOL Reply at 10-11 (citing State v. Pioneer Mill Co., Ltd., 64 Haw. 168, 179, 637 P.2d 57, 65 (1996)(citing Territory v. Adelmeyer, 45 Haw. 144, 163, 363 P.2d 979, 989 (1961)); State v. Eastman, 81 Hawaii 131, 139, 913 P.2d 57, 65 (1996); Sierra Club v. D.R. Horton-Schuler Homes, LLC, 136 Hawaii 505, 52, 364 P.3d 213, 230 (2015); In re Gray Line Hawaii, Ltd., 93 Hawaii 45, 52-53, 995 P.2d 776, 783-784 (2000); and Brown-Hunter v. Colvin, 806 F.3d 487, 492 (9th Cir. 2015)).

[24]Cf. HELCO I, 145 Hawaii at 25, 445 P.3d at 697 (identifying the Commission's failure to make sufficient findings so as to allow the Court to determine the validity of its conclusions as a basis for remand). See also, id. at 11, 445 P.3d at 683 (reciting caselaw requiring an agency to make its findings "reasonably clear," "to allow the reviewing court to track the steps by which the agency reached its decision") (citations omitted); and Matter of Hawaii Gas, LLC, 147 Hawaii 186, 202, 456 P.3d 633, 649 (2020)(remanding rate case back to the Commission where the Commission failed to "substantiate [its] findings in a manner that would allow this court to track the steps by which it reached its decision.").

the GHG impact of the Project is likely to be. Thus, it was Hu Honua's unsatisfactory answers that compelled the Commission to find that there were too many concerns and uncertainties associated with the Project's GHG emissions to support Amended PPA approval, not the Commission's alleged application of a stricter "clear and convincing" standard.

3.

The Commission Did Not Apply
A New Standard To The Project's GHG Analysis

HELCO and Hu Honua argue at various points in their Motions that the Commission applied a new standard to the Amended PPA in D&O No. 38395 by "requiring" the Project to be carbon neutral.[25] In addition, in its Response, Hu Honua alleges that the Commission created a new standard by analyzing the temporal impacts of the Project's GHG emissions.[26] The Commission is not persuaded by these arguments and observes that they mischaracterize D&O No. 38395, as well as the record in this proceeding.

As a preliminary matter, the Commission notes that it has never said that the Project must be carbon neutral to receive approval. The Commission's analysis of the Project's GHG

[25]HELCO Motion at 2; and Hu Honua Motion at 8-9.

[26]See Hu Honua Response at 12-15.

impact was framed by Hu Honua's claim that the Project would be "carbon negative," as stated in its Direct Testimony, and purportedly supported by the Project GHG analysis prepared by its consultant, ERM.[27] Thus, any differences in the Commission's analysis of the Project's GHG emissions in this proceeding compared to other projects in other proceedings does not reflect a new "standard" for reviewing GHG analyses, but rather, that the Project GHG emissions are expected to be significant and that offsetting sequestration estimates are generally speculative and not well supported by the record.

Put another way, the Commission did not apply a carbon neutral (or negative) "standard" to the Project; rather, Hu Honua argued that the Project would be carbon negative, and the Commission's concerns regarding the Project's likelihood of achieving carbon neutrality (or negativity) are framed in that context. The GHG analysis submitted by Hu Honua concluded that the Project would be net negative approximately 30,000 MT CO_2e over the Project's lifetime. However, Hu Honua's GHG analysis also estimated that the Project would produce approximately 8,000,000 MT CO_2e during this same time period and relied on

[27]See "Hu Honua Bioenergy, LLC's Prehearing Testimonies; Exhibits 'Hu Honua-100' – 'Hu Honua 800'; and Certificate of Service," filed on September 16, 2021, at T-1, T-2, Exhibit Hu Honua-201, T-4, and Exhibit Hu Honua-401.

significant amounts of estimated carbon sequestration to produce the net negative result. Given carbon sequestration's vital role in offsetting the Project's significant stack emissions, the Commission reviewed Hu Honua's GHG analysis and determined that the sequestration estimates were based on speculative assumptions and were not sufficiently reliable. Thus, the Commission's identification of concerns and ultimate conclusions regarding Hu Honua's GHG analysis for the Project did not hold the Project to a new standard, but represented careful review of the assumptions, methodologies, and conclusions put forth by Hu Honua in its GHG analysis for the Project.

Similarly, the Commission's findings regarding the cumulative impact of the Project's GHG emissions were made in the context of examining Hu Honua's Carbon Commitment that the Project would be carbon negative on an annual basis by the end of 2035 and each year thereafter until the end of the PPA term (assuming operations begin in 2022).[28] The Commission did not apply a "new standard," but rather, reviewed the evidence presented by Hu Honua in support of this aspect of its Carbon Commitment. Although Hu Honua argues that the Commission's "independent analysis" somehow constitutes "self-created evidence," the points identified by Hu Honua support the conclusion that the Commission's

[28]See D&O No. 38395 at 76-79.

analysis of this issue was both grounded in the record and soundly within the bounds of a reviewing agency's discretion.[29]

Further, contrary to HELCO's and Hu Honua's arguments,[30] the Commission continued to apply the same standard for analyzing GHG emissions associated with the Project as was done in prior dockets – i.e., the Commission considered the net GHG impact of the Project by examining both the Project's estimated GHG emissions, as well as the estimated avoided GHG emissions associated with the Project.[31] To the extent the Commission's analysis is not identical to those in prior dockets, this reflects the different characteristics of this biomass Project from prior projects, as discussed below.[32]

HELCO's and Hu Honua's reliance on the Commission's review of GHG analyses in prior dockets[33] ignores the fundamental differences between this Project and those prior projects. Prior projects for which the Commission has required a

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[29]See Hu Honua Response at 24-25. See also D&O No. 38395 at 77-78, including n. 201. See also, HELCO I, 145 Hawaii at 11, 25, 445 P.3d at 683, 697; and Hawaii Gas, 147 Hawaii at 202, 456 P.3d at 649.

[30]See HELCO Motion at 6-7; and Hu Honua Motion at 27-28.

[31]See D&O No. 38395 at 70-72.

[32]Cf. CA Reply at 21-23; and LOL Reply at 15-16.

[33]See HELCO Motion at 6; and Hu Honua Motion at 8-9.

GHG analysis[34] have generally involved the production of GHG emissions during extraction of raw materials and construction of the project facility, but otherwise have limited amounts of emissions during operations and decommissioning.[35] In contrast, the Project here represents the first time the Commission has reviewed the GHG impacts of a biomass facility, which not only contemplates GHG emissions associated with Project construction, but also a significant amount of GHG emissions occurring during Project operations, owing to the nature of the biomass plant (i.e., combusting plant matter to produce electrical energy), and a significant amount of purported sequestration occurring during Project operations.

In conducting its standard review, the Commission observed that the overall "net" lifecycle GHG estimate was dependent on the Project's GHG impact, and thus the concerns and uncertainties with Hu Honua's Project GHG analysis necessarily impacted the overall "net" GHG impact performed by HELCO's consultant, Ramboll.[36] For example, the substantial amount of GHG emissions associated with Project operations, estimated at

[34]Review of a project's GHG impact was determined to be part of the Commission's statutory duties under HRS § 269-6(b) beginning with the Court's decision in In re Application of Maui Elec. Co., Ltd., 141 Hawaii 249, 408 P.3d 1 (2017).

[35]See e.g., Hu Honua Motion, Exhibits 1, 2, 3, 4, 5, and 6.

[36]See D&O 38395 at 70-72.

over 8,000,000 MT CO_2e, could easily outweigh the estimated 1,434,243 MT CO_2e of avoided emissions, which made it critical to scrutinize the sequestration estimates in ERM's GHG analysis.[37] In other words, even when taking avoided emissions into account, the Project's estimated GHG emissions are still substantial, and the reasonableness of Hu Honua's sequestration estimates are essential to support its claim that the Project's GHG impact will be minimal or negative.

4.

The Commission Did Not Violate Hu Honua's Right To Due Process

Hu Honua raises a number of arguments asserting that the Commission violated Hu Honua's right to due process by basing its findings and conclusions in D&O No. 38395 on "new evidence" and "expert opinion" outside of the record.[38] The Commission disagrees with these characterizations and affirms that its conclusions in D&O No. 38395 are all based on the evidentiary record developed in this proceeding.

The Commission's analysis of the material in the record does not constitute "new evidence" or "expert opinion." Upon review of Hu Honua's arguments, the Commission finds that

[37]Cf. LOL Reply at 16-18.

[38]See Hu Honua Motion at 99-100.

D&O No. 38395 does not feature "new evidence" or "expert opinion," but merely the Commission's review of the evidence submitted in the record.[39] Hu Honua's arguments revolve around the Commission's findings regarding the Hu Honua's Project GHG analysis; however, as is plainly documented in D&O No. 38395, the Commission merely reviewed the worksheets supporting the analysis provided by Hu Honua and identified discrepancies and concerns.[40] Simply questioning the reasonableness of the assumptions underlying the GHG analysis or applying basic arithmetic to the values provided in the GHG analysis do not constitute "manufacturing new evidence" or introducing "expert opinion," as alleged by Hu Honua. Review of D&O No. 38395 affirms that the Commission's findings and conclusions are squarely rooted in the record, with numerous citations placed throughout to direct the reader to the pertinent source(s) in the record.

D&O No. 38395 reflects compliance with the Court's instructions that the Commission substantiate its findings in a way that allows the Court to "determine the validity of

[39]Cf. CA Reply at 34 ("The Consumer Advocate notes that the development of findings is not a mere regurgitation of evidence put forth by parties and that the Commission's findings of fact and ultimate conclusions should not be somehow construed as either the introduction of new evidence or expert opinion."). See also HELCO I, 145 Hawaii at 11, 25, 445 P.3d at 683, 697; and Hawaii Gas, 147 Hawaii at 202, 456 P.3d at 649 (2020).

[40]See generally D&O No. 38395 at 54-79.

its conclusions[.]"[41] In this regard, D&O 38395 clearly explains the Commission's analysis and the steps taken to arrive at its conclusions and concerns with Hu Honua's Project GHG analysis. Simply because the Commission did not agree with Hu Honua and identified concerns with the reliability of Hu Honua's GHG analysis does not mean the Commission created new evidence.

For example, "Table 4," which Hu Honua cites as an example of "new evidence"[42] is based on values provided by Hu Honua, which are then added cumulatively throughout the lifetime of the Project. Table 4 provides a citation to the record identifying where the values are located in the record, down to the specific cells in the worksheets, with a clear explanation for how the values were determined.[43] Similarly, the Commission's discussion of the sensitivities of Hu Honua's GHG analysis are all drawn directly from the record and any conversions are noted and utilize the conversion factor provided by Hu Honua.[44]

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[41]HELCO I, 145 Hawaii at 11, 25, 445 P.3d at 683, 697. See also, Hawaii Gas, 147 Hawaii at 202, 456 P.3d at 649.

[42]See Hu Honua Motion at 35-38.

[43]D&O No. 38395 at 77 n. 201.

[44]See D&O No. 38395 at 65-66, including n. 183. In response to Hu Honua's argument that the record does not support the Commission's analysis of the sensitivity of even a 1% change in aboveground sequestration, Hu Honua Motion for Reconsideration at 27, the Commission observes that this is derived by the values

The Commission provided Hu Honua with sufficient due process to make its case to satisfy its burden of proof. Hu Honua argues that D&O No. 38395 relies on "new evidence" and "expert opinion" not presented in the record, which Hu Honua did not have an opportunity to address.[45] The Commission is not persuaded by these arguments. First, as discussed above, the Commission did not rely on any "new evidence" or "expert testimony" in reaching its finding and conclusions in D&O No. 38395. Rather, the points identified by Hu Honua reflect that the Commission conducted an independent review of the evidence submitted in the record by Hu Honua in support of its case.

Second, Hu Honua, along with HELCO, bears both the burden of proof and the burden of persuasion in this proceeding pursuant to HRS § 91-10(5).[46] Hu Honua's position that it was entitled to an opportunity to preview and rebut any and all of the Commission's questions, concerns, findings, and conclusions set forth in D&O No. 38395 inverts this relationship and instead presumes that the Commission was required to convince Hu Honua of the merits of

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provided in Table 3, which are based on Hu Honua's GHG analysis. See D&O No. 38395 at 66, including n. 183 and n. 184.

6,319,815 * 0.01 = 63,198.15.

[45]See Hu Honua Motion at 99-100.

[46]See Haw. Rev. Stat. § 91-10-(5).

its findings and conclusions, rather than Hu Honua needing to persuade the Commission of the merits of its case.

Third, the Commission provided Hu Honua with ample opportunities to make its case through this remanded proceeding, including the submittal of direct testimonies and exhibits, extensive discovery, an evidentiary hearing, and pre- and post-hearing briefing. In a number of instances, the Commission raised its concerns with various parts of Hu Honua's Carbon Commitment and Project GHG Analysis, and Hu Honua had the opportunity to address those concerns through the IR responses, through its pre- and post-hearing briefing, and during cross-examination at the evidentiary hearing.

5.

The Commission Did Not Clearly Err
In Making Its Factual Findings

The Commission carefully reviewed the record in this proceeding, and supported its findings and conclusions in D&O No. 38395 with references to the record. The Commission does not believe it necessary to re-visit all of its findings here,[47]

[47]Cf. LOL Reply at 10 (discussing the Commission's discretion in determining the credibility and weight of evidence in the record). See also Tagupa, supra (noting that a motion for reconsideration is not a device to relitigate old matters).

but, for illustrative purposes, highlights a few examples of areas contested by HELCO and Hu Honua.

Environmental impacts of the Project. While Hu Honua claims that the Project will reduce GHG emissions, Hu Honua has not substantiated its sequestration estimates with reliable or transparent underlying assumptions or calculations despite being given opportunities to do so in this proceeding.[48] As discussed above, these sequestration estimates are crucial to offsetting the Project's stack emissions so as to make the Project net carbon negative, as proffered by Hu Honua.

The Commission's findings regarding Hu Honua's GHG analysis are drawn from evidence that Hu Honua submitted into the record. D&O No. 38395 summarizes the emission and sequestration figures presented in Hu Honua's GHG analysis[49] before detailing the Commission's specific concerns with Hu Honua's GHG Analysis.[50] This ultimately contributed to a larger concern about the total net GHG impact of the Project, as the large amount of Project stack

[48]See e.g. Hu Honua Response to PUC-Hu Honua-IR-70.b, filed on January 10, 2022 (which asked for the underlying assumptions and calculations used to determine the "Net Aboveground Biomass Growth On Island" listed for each year in column G for "2- CO2 Simulation" and "3- CO2 Full" in the Updated Project GHG Analysis. Hu Honua did not provide the requested underlying assumptions and calculations in its response).

[49]See D&O No. 38395 at 54-57.

[50]See D&O No. 38395 at 58-69.

emissions, if not sequestered according to Hu Honua's estimates, could completely outweigh the avoided emissions estimated by HELCO.[51]

Much of Hu Honua's disagreement with the findings in D&O No. 38395 is rooted in its position that the Commission's independent review of Hu Honua's Project GHG analysis involves the creation of "new evidence" or "expert testimony" that is "outside the record;" however, as discussed above, the Commission disagrees with this characterization and is not persuaded by this argument.

Hu Honua's Carbon Commitment. Hu Honua takes issue with the Commission's findings regarding support for Hu Honua's Carbon Commitment. Aside from whether Hu Honua's GHG analysis for the Project supports its pledge for the Project to be carbon negative over its lifetime, Hu Honua maintains that its proposal to purchase carbon offsets and the Commission's inherent authority to enforce the Carbon Commitment satisfies Hu Honua's evidentiary burden.[52] As discussed in D&O No. 38395, the Commission does not find these arguments compelling.

First, as discussed above, pursuant to HRS § 91-10(5), the applicants carry the burden of proof and persuasion in this

[51]See D&O No. 38395 at 70-72.

[52]See Hu Honua Motion at 41-50. See also HELCO Motion at 10-13.

proceeding, and it is not incumbent on the Commission to fashion conditions to assist HELCO and Hu Honua in meeting their burden.[53]

Second, the concerns raised in D&O No. 38395 regarding Hu Honua's proposal to supplement its Carbon Commitment through the purchase of carbon offsets were based on identified gaps in the record. The Commission attempted to solicit additional information about this proposal from Hu Honua, but received vague responses, coupled with Hu Honua's opinion that purchasing carbon offsets would not be necessary.[54] As noted in D&O No. 38395, this is insufficient, particularly in light of the concerns with Hu Honua's Project GHG analysis, which cast doubt on Hu Honua's sequestration estimates.[55] Further, Hu Honua did not introduce the idea of a reserve fund to support the purchase of carbon offsets until explicitly prompted by the Commission during the evidentiary hearing.[56] This aspect of Hu Honua's proposal has rapidly evolved (after discovery opportunities by other Parties and Participants have closed) in a seemingly ad hoc manner.[57]

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[53]See D&O No. 38395 at 83. See also CA Reply at 26.

[54]See D&O No. 38395 at 79-82.

[55]See D&O No. 38395 at 82-83.

[56]See Testimony of Jon Miyata, Recording of Hearing, Hearing Day 3, March 3, 2022, at 00:26:08–00:28:24 and 00:35:40–00:38:40.

[57]See "Hu Honua Bioenergy, LLC's Post-Hearing Brief; Exhibits 'A'-'F'; and Certificate of Service," filed on March 29, 2022, at 28 (stating that Hu Honua agrees to place

Third, as noted in D&O No. 38395, if the Amended PPA were approved, the Commission would have limited options to enforce Hu Honua's Carbon Commitment.[58] While both HELCO and Hu Honua contend that the Commission possesses sufficient authority over Hu Honua to enforce Hu Honua's Carbon Commitment,[59] these arguments do not address the fundamental issues underlying the Commission's concerns.

D&O No. 38395 raised concerns with the Commission's practical ability to enforce the Carbon Commitment, not whether the Commission has the authority to do so. For example, D&O No. 38395 raised the concern of what options would be available to actually compel Hu Honua to meet its Carbon Commitment, and noted that there were only a handful of blunt tools available to the Commission, which could also potentially cause harm to ratepayers, such as preemptively voiding the Amended PPA before the full benefits of the Project are realized.[60]

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between $100,000 to $450,000 in a reserve fund to purchase carbon offsets, if necessary, and to place "additional funds" in the account, to cover any deficits); and Hu Honua Motion for Reconsideration at 45-46 (now stating that the $450,000 will serve as "additional available funds above Hu Honua's pledge to place funds into the account each year over the 30-year term to cover the deficit and purchase carbon offsets.").

[58]See D&O No. 38395 at 86-88.

[59]See HELCO Motion at 10-13; and Hu Honua Motion at 47-50.

[60]See D&O No. 38395 at 86-87.

The examples of conditions proposed by Hu Honua do not sufficiently address these concerns, as they merely suggest setting up reporting requirements which would notify the Commission if Hu Honua is not in compliance with the Carbon Commitment.[61] Hu Honua has not offered in the record any proposed condition that would provide for meaningful enforcement of the Carbon Commitment. Absent such a condition, ratepayers may experience a situation in which the purported benefits of the Project are not realized, and instead must attempt to be salvaged through legal investigations by the Commission and potentially other legal proceedings.

HELCO's and Hu Honua's references to other instances in which the Commission has imposed conditions on developers are distinguishable from this situation.[62] Pertinently, unlike other projects, Hu Honua's Carbon Commitment is fundamental to ensuring that the Project provides net benefits, without which the Project represents a high cost resource that is likely to produce a significant amount of GHG emissions (again, although Hu Honua maintains that its GHG analysis shows that the Project will be carbon negative over its lifetime, as discussed above and in D&O No. 38395, the Commission does not find this sufficiently

[61]See Hu Honua Motion at 48.

[62]See HELCO Motion n at 12-13; and Hu Honua Motion at 48.

supported by the record). Thus, the importance of enforcing the Carbon Commitment is a critical issue here, and is distinguishable from other projects, where the benefits of the project are reasonably assured, and conditions are imposed, for example, to simply monitor a project's development or determine a project's final costs.[63] In light of these circumstances, the Commission's concerns regarding the enforceability of the Carbon Commitment were well-founded and the Commission reasonably declined to develop conditions to assist the applicants in meeting their evidentiary burden.

Project dispatch and bill impacts. Another point of disagreement raised by Hu Honua is the weight given in D&O No. 38395 to modeling performed by HELCO, versus Hu Honua, regarding dispatch of the Project and estimated customer bill impacts.[64] The Commission is not convinced by these arguments. As discussed in D&O No. 38395, the Commission considered the modeling results submitted by all the Parties and Participants, including by HELCO, Hu Honua, and the Consumer Advocate, and found HELCO's analysis more credible.[65]

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[63]See LOL Reply at 30-31 (discussing Commission-imposed conditions in Docket Nos. 2018-0434, 2017-0108, and 2018-0053).

[64]See Hu Honua Motion at 56-60; and 62-72.

[65]See D&O No. 38395 at 100-107 and 111-117.

The Commission noted that HELCO's project dispatch analysis considered a wider variety of factors and reflected a more realistic assessment of the Project's impact to the grid, and was also corroborated by the Consumer Advocate's independent efforts.[66] The Commission considered Hu Honua's models and studies, but found them less credible due to a number of concerns with Hu Honua's assumptions. In particular, the Commission observed that Hu Honua's analysis assumed that the Project would exclusively displace HELCO's fossil fuel units, which ignored the presence of other renewable generating units on HELCO's system.[67] Further, HELCO stated that assuming that the Project would only displace fossil fuel units would be "contrary to the Company's practices and highly unlikely to represent the actual operational conditions," and that dispatching Hu Honua ahead of other fossil fuel units would violate HELCO's operating principles of economic dispatch.[68]

Hu Honua's alternative bill impact analysis also assumed that the Project would exclusively displace fossil fuel units.

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[66]See D&O No. 38395 at 105-107 and 112-113.

[67]See D&O No. 38395 at 111-112; see also, id. at 108 (citing HELCO Response to CA/HELCO-SIR-26.c.1, filed on November 18, 2021 (in which HELCO stated that "[t]he minimum dispatch of Hu Honua makes it impossible to ensure that no renewable resource energy output will be partially displaced by Hu Honua.").

[68]See D&O No. 38395 at 112 (citing HELCO Responses to CA/HELCO-SIR-28.a.1 and HHB-HELCO-SIR-1.a).

Moreover, even when the Commission considered an alternative scenario where all unapproved resources were removed from the bill impact analysis, benefits did not accrue to customers until late in the Project's lifetime (i.e., 2045-2051), reflecting that customers would experience significant bill impacts for the majority of the Amended PPA's term and placing the purported benefits far into the future, subjecting customers to greater risk.[69]

Urgent need for the Project. Another argument raised by HELCO and Hu Honua is that the Commission did not properly consider the benefits and grid services that could be provided by the Project.[70] The Commission does not find these arguments persuasive. As an initial matter, the Commission notes that these arguments mischaracterize D&O No. 38395. D&O No. 38395 did not state that the Project would not provide grid needs or services - rather, D&O No. 38395 concluded that the Project would not serve any urgent grid needs, nor did it offer any unique grid services.[71]

By taking this point out of context, HELCO's and Hu Honua's arguments miss the point being made in D&O No. 38395.

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[69]See D&O No. 38395 at 115-116.

[70]See HELCO Motion at 15-20; and Hu Honua Motion at 72-77.

[71]D&O No. 38395 at 108-109. Cf. Tawhiri HELCO Reply at 7.

After considering the potential for significant GHG emissions and the high costs of the Project, to both HELCO's system and customers, a pertinent question was whether, in exchange for these considerations, the Project was urgently needed or would provide grid services that could not otherwise be obtained from alternatives. Based on testimony provided by HELCO's witnesses, the Commission concluded that while the Project may be able to provide some grid services, the benefits of such services were not sufficient relative to the total costs of the Project, including the potential for GHG emissions and bill impacts to customers.

Ability to re-bid the Project. Hu Honua argues that the Commission's acknowledgment that Hu Honua may bid the Project in a future round of competitive bidding is not a legitimate option due to various administrative inefficiencies and because one of the conditions of HELCO's Request for Procurements ("RFP") is that a bidder cannot have an existing agreement with the utility.[72] The Commission observes that although Hu Honua maintains that it has an effective agreement with HELCO at this time,[73] the Court

[72]See Hu Honua Response at 30-32. See also D&O No. 38395 at 121.

[73]See Hu Honua Response at 31. See also HELCO Response to HHB-HELCO-SIR-15.f.

vacated the Commission's prior 2017 approval of the Amended PPA[74] and the Commission has since denied HELCO's Letter Request for Approval of the Amended PPA in D&O No. 38395. Thus, Hu Honua's claim that it is precluded from participating in HELCO's upcoming RFP based on its "existing Amended PPA with HELCO" is not convincing.[75] Further, as discussed, below, the Amended PPA does not appear to have achieved its "Effective Date" as defined by its own provisions.[76]

6.

The Commission Did Not Misinterpret
HRS § 269-6, As Amended By Act 82

Hu Honua argues that the Commission misinterpreted HRS § 269-6(b), as recently amended by Act 82, and that the Commission's review of the Project under that provision should be limited to comparing the Project to fossil fuel generation, but not

[74]See HELCO I, 145 Hawaii at 28, 445 P.3d at 700 ("The PUC's 2017 D&O is therefore vacated and this case is remanded to the PUC for proceedings consistent with this opinion."); and HELCO II, 149 Hawaii at 242, 487 P.3d at 711 ("As a result, the parties are fixed in the same position they were in following HELCO I: the PUC's 2017 approval of the Amended PPA remains vacated, the 2017 waiver remains valid and in force, and the PUC, in considering the Amended PPA, remains obligated to follow the instructions we provided in HELCO I.").

[75]Cf. HELCO Response to CA/HELCO-SIR-27, filed on November 18, 2021.

[76]See Section III.8, infra.

other resources on HELCO's system (such as other renewable resources).[77] Hu Honua has previously argued for this narrower interpretation of HRS § 269-6(b), which the Commission has found unpersuasive in the past.[78]

The Commission observes that Hu Honua rehashes these same arguments in favor of its narrower interpretation. As discussed above, a motion for reconsideration is not a tool to relitigate old matters. The Commission reiterated its position on this issue in D&O No. 38395,[79] and continues to hold that it does

[77]See Hu Honua Motion at 88-94.

[78]See "Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening Docket; Memorandum in Support of Motion; and Certificate of Service," filed on July 20, 2021; "Hu Honua Bioenergy, LLC's Motion to Confirm That Hawaii Revised Statutes Section 269-6(b), As Amended By Act 82 Applies To This Proceeding; Memorandum in Support of Motion; and Certificate of Service," filed on January 4, 2022; and "Hu Honua Bioenergy, LLC's Post-Hearing Brief; Exhibits 'A'-'F'; and Certificate of Service," filed on March 29, 2022 at 8-9. See also Order No. 37910, "(1) Denying Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 Filed July 12, 2021; (2) Denying Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed on June 30, 2021, Filed July 12, 2021; (3) Denying Hu Honua Bioenergy, LLC's Motion for the Commission To Consider Act 82 and Address Its Impact On Order No. 37852 Reopening the Docket Filed July 20, 2021; (4) Partially Granting the Division of Consumer Advocacy's Motion for Leave to Respond Filed July 23, 2021; and (5) Dismissing All Other Related Procedural Motions," filed on August 11, 2021 ("Order No. 37910"), at 23-32; and Order No. 38183, "Addressing Hu Honua Bioenergy, LLC's Motion Regarding Applicability of HRS Section 269-6," filed on January 13, 2022, at 8-9.

[79]See D&O No. 38395 at 92-95.

not believe that Act 82 narrows the scope of the Commission's review as argued by Hu Honua.

7.

The Commission Did Not Engage In Rulemaking Under Chapter 91

The Commission is also not persuaded that its interpretation of HRS § 269-6(b), as amended by Act 82, in this proceeding constitutes improper "rule-making" under HRS Chapter 91, as alleged by Hu Honua.[80]

As stated by the Court:

> [W]e reject Appellants' general contention that all statements of policy by the PUC require a rule-making procedure under [the Hawaii Administrative Procedures Act] prior to proceeding with the case. Rather, we recognize that rule-making is essentially legislative in nature because it operates in the future; whereas, adjudication is concerned with the determination of past and present rights and liabilities of individuals where "issues of fact often are sharply controverted."[81]

The Commission's application of HRS § 269-6(b) to this proceeding clearly has a present effect on the rights and liabilities of the Parties and Participants involved (e.g., HELCO's and Hu Honua's interests in the Amended PPA and

[80]See Hu Honua Motion at 95-96.

[81]Application of Hawaiian Elec. Co., Inc., 81 Hawaii 459, 467, 918 P.2d 561, 569 (1996)(citing Shoreline Transp., Inc. v. Robert's Tours & Transp., 70 Haw. 585, 591, 779 P.2d 868, 872 (1989)).

LOL's members' interest in the Amended PPA's impact on their right to a clean and healthful environment) and was applied specifically to the Project based on the record in this proceeding. Accordingly, the Commission finds that its actions constituted adjudication of the issues in this proceeding, and not rule-making, as alleged by Hu Honua.[82]

Further, the Court has recognized that even if a Commission decision by adjudication has a precedential effect, it does not constitute rule-making:

> [I]n exercising its quasi-judicial function[,] an agency must frequently decide controversies on the basis of new doctrines, not theretofore applied to a specific problem, though drawn to be sure from broader principles reflecting the purpose of the statutes involved and from the rules invoked in dealing with related problems. If the agency decision reached under the adjudicatory power becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rule-making power, and both an adjudicatory order and a formal "rule" are alike subject to judicial review.[83]

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[82]Cf. Hawaiian Elec., 81 Hawaii at 467, 918 P.2d at 569 ("Secondly, the choice between proceeding by 'general rule or by individual, ad hoc litigation is on that lies primarily in the informed discretion of the administrative agency.'") (citing Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed 1995 (1947)).

[83]Hawaiian Elec, 81 Hawaii at 467, 918 P.2d at 569 (citing Shoreline, 70 Haw. at 591-92, 779 P.2d at 872) (brackets in the original).

Thus, even if the Commission's interpretation of HRS § 269-6(b), as amended by Act 82, used in D&O No. 38395 is subsequently adopted in future Commission decisions, this is not evidence of improper rule-making.

The Court has recognized policymaking may constitute an abuse of discretion by an agency in situations where: "(1) it is used to 'circumvent the requirements of the Administrative Procedures Act' by amending a recently amended rule or bypassing a pending rule-making proceeding; or (2) 'an agency's sudden change of direction leads to undue hardship for those who had relied on past policy.'"[84] Neither exception is applicable here. There is no recently amended rule or pending rule-making proceeding for HRS § 269-6(b) before the Commission, nor does D&O No. 38395 represent a "sudden change in direction" to "those who had relied on past policy" – if anything, it is the opposite, as D&O No. 38395 affirms that Act 82 has not changed the Commission's application of HRS § 269-6(b) to the Amended PPA and Project.

Hu Honua also alleges an abuse of discretion based on the Commission's reliance on "new evidence" and "expert opinion" outside of the record,[85] but, as discussed above, the Commission

[84]Hawaiian Elec., 81 Hawaii at 468, 918 P.2d at 570 (citing Union Flights, Inc. v. Administrator, FAA, 957 F.2d 685, 688-89 (9th Cir.1992)).

[85]See Hu Honua Motion at 96.

does not agree with these characterizations of its independent review of evidence submitted in the record.

8.

D&O No. 38395 Does Not Constitute A Regulatory Taking

As an initial matter, the Commission observes that this argument is similar to a prior equitable estoppel raised by Hu Honua, which the Commission did not find convincing.[86] For similar reasons, the Commission does not find Hu Honua's regulatory takings argument persuasive. Specifically, Hu Honua lacks a "vested interest" in the Amended PPA and therefore cannot allege a regulatory taking.[87]

The Amended PPA defines its "Effective Date" as the latter of: (1) HELCO and Hu Honua entering into a settlement agreement to mutually release claims between Hu Honua and the Hawaiian Electric Companies[88] in Civil No. 16-00634;

[86]See Order No. 37396, "(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," filed on September 9, 2020 ("Order No. 37306"), at 23-28.

[87]See Kepoo v. Kane, 106 Hawaii 270, 294, 103 P.3d 939, 963 (2005) ("To succeed on a takings claims, a claimant must first establish 'a vested protectable interest under the Fifth Amendment[.]'")(citing Sangre de Cristo Dev. Co., Inc. v. United States, 932 F.2d 891, 894 (10th Cir. 1991)).

[88]The "Hawaiian Electric Companies" refers to HELCO and Hawaiian Electric Company, Inc. and Maui Electric Company, Ltd.

or (2) the earlier of an agreement to waive the requirement for a non-appealable Commission order approving the Amended PPA or a Commission order approving the Amended PPA.[89] As alluded to in the Participants' post-hearing briefs, HELCO and Hu Honua have already entered into a settlement agreement in Civil No. 16-00634[90]; additionally, it does not appear that HELCO and Hu Honua have entered into an agreement to waive the Amended PPA's requirement of Commission approval, given their requests for the Commission to reconsider D&O No. 38395 and approve the Amended PPA. Thus, under these circumstances, the "Effective Date" of the Amended PPA appears to be the date of the Commission's approval of the Amended PPA.

The 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)."[91] In turn, Section 25.12(D)(2) of the Amended PPA, "PUC Approval," provides, in relevant part:

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[89]See Amended PPA at 11 of 238 (defining "Effective Date"), 18 of 238 (defining "PUC Approval of Amendment Date"), 20 of 238 (defining "Waiver Agreement Date"), 22-23 (Section 2.2(C)(2), defining the Waiver Agreement), 125 of 238 (Section 25.12(D), defining "PUC Approval of Amendment Date"), and 130-131 of 238 (Section 25.26, defining "Settlement Agreement").

[90]See LOL Reply at 14; and Tawhiri HELCO Reply at 3.

[91]Amended PPA at 18 of 238.

(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;

(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).[92]

[92]Amended 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, ..."

Consequently, LOL's appeal following Decision and Order No. 34726,[93] and the ensuing remand and subsequent appeal by Hu Honua following Order No. 37205,[94] has kept the Amended PPA in a constant state of review,[95] and there is no vested "right" to the Amended PPA that can form the basis for a claim of a regulatory taking under Fifth Amendment of the U.S. Constitution. Indeed, the only part of the Amended PPA that appears to be currently effective are provisions related to Hu Honua and HELCO making good faith efforts obtain a satisfactory PUC Approval of Amendment Order.[96] Put simply, while HELCO and Hu Honua may have executed the Amended PPA, the material provisions that could arguably form the basis for a vested interest (putting aside any consideration of whether a contracting party's interest in an approved PPA can ever be "vested") have not yet become effective,

[93]Decision and Order No. 34726, filed on July 28, 2017 (approving the Amended PPA); see also, HELCO I.

[94]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 on July 9, 2020; see also, HELCO II.

[95]See HELCO II, 149 Hawaii at 242, 487 P.3d at 711 ("As a result, the parties are fixed in the same position they were in following HELCO I: the PUC's 2017 approval of the Amended PPA remains vacated, the 2017 waiver remains valid and in force, and the PUC, in considering the Amended PPA, remains obligated to follow the instructions we provided in HELCO I.") (emphasis added).

[96]See Amended PPA at 22-23 of 238.

as there is no non-appealable Commission order approving the Amended PPA.

Moreover, Hu Honua cannot rely on the Commission's prior approval of the PPA as basis for reasonable expenditure of funds on the Project.[97] As previously discussed in addressing Hu Honua's equitable estoppel argument, Hu Honua did not have a reasonable basis for proceeding with the Project during the appeal period, given that the Commission's alleged "direction" to proceed with the Project was made within the context of the terms of the Amended PPA, which provided for a tolling period until a final, non-appealable order was issued, which Hu Honua acknowledged.[98]

[97]See Hu Honua Response at 29.

[98]See Order No. 37306 at 23-28. See also Joint Letter From: D. Yamamoto and B. Bailey to Commission Re: Docket No. 2017-0122 – Hu Honua Bioenergy, LLC and 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 (acknowledging LOL's Notice of Appeal and stating that "[t]his appeal is currently pending before the Hawaii Supreme Court, preventing a Non-appealable PUC Approval of Amendment Order until such time the Order is affirmed and not subject to further appeal."); 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 (noting, inter alia, that "under the terms of the [Amended] PPA, the [Amended] PPA is not effective unless the PUC's approval of the [Amended] PPA ('PUC Approval of Amendment Order') is final and non-appealable ('Final Approval Requirement'). Given that this matter is still on appeal with Hawaii Supreme Court [sic], the [Amended] PPA is not yet effective.").

C.

Declining To Adopt The Consumer Advocate's Suggestion

Upon review and consideration of the record and circumstances, the Commission declines to adopt the Consumer Advocate's request to make additional findings regarding Hu Honua's request for preferential rates.[99] The Commission believes that it sufficiently addressed this issue in D&O No. 38395 and, in light of this Order's denial of HELCO's and Hu Honua's Motions for Reconsideration, no further findings are warranted.

IV.

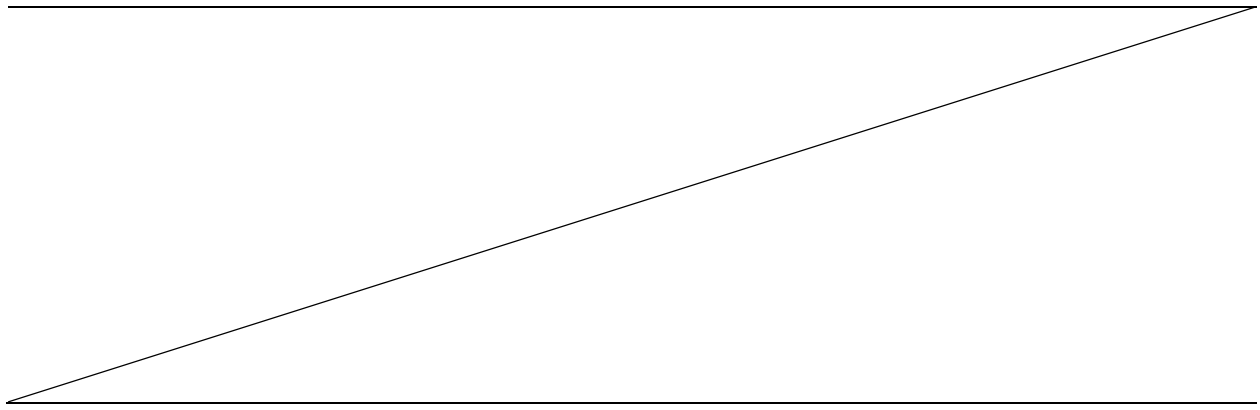
ORDERS

THE COMMISSION ORDERS:

1. Hu Honua's request for a hearing on its Motion for Reconsideration is denied.

2. HELCO's Motion for Reconsideration is denied.

3. Hu Honua's Motion for Reconsideration is denied.



[99]See CA Reply at 27-29.

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

DONE at Honolulu, Hawaii JUNE 24, 2022.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By _____
James P. Griffin, Chair

By _____
Jennifer M. Potter, Commissioner

By (ABSTAINED)
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:

_____
Mark Kaetsu
Commission Counsel

2017-0122.ljk

CERTIFICATE OF SERVICE

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.

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

SCOT-17-0000630

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

LIFE OF THE LAND, Appellant, v. PUBLIC UTILITIES COMMISSION; HU HONUA BIOENERGY, LLC; HAWAII ELECTRIC LIGHT COMPANY, INC.; HAWAIIAN ELECTRIC COMPANY, INC.; DIVISION OF CONSUMER ADVOCACY; TAWHIRI POWER, LLC; and HAMAKUA ENERGY PARTNERS, L.P., Appellees.	APPEAL FROM THE PUBLIC UTILITIES COMMISSION DOCKET NO. 2017-0122 (1) DECISION AND ORDER NO. 34726, FILED JULY 28, 2017 AND (2) ORDER NO. 34651 DENYING LIFE OF THE LAND’S MOTION TO UPGRADE STATUS, FILED JUNE 23, 2017 Comm’r Chair Randall Y. Iwase Comm’r Lorraine H. Akiba Comm’r James P. Griffin

APPELLEE PUBLIC UTILITIES COMMISSION’S ANSWERING BRIEF

CERTIFICATE OF SERVICE

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APPENDIX C

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Legislative History

APPELLEE PUBLIC UTILITIES COMMISSION'S ANSWERING BRIEF

I. INTRODUCTION

Appellant LIFE OF THE LAND ("LOL") asks this Court to vacate two orders issued by Appellee PUBLIC UTILITIES COMMISSION (the "Commission"). The first order – Decision and Order No. 34726 (the "D&O") – approved an Amended and Restated Power Purchase Agreement between Appellee HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO") and Appellee HU HONUA BIOENERGY, LLC ("Hu Honua"). The second order – Order No. 34651 (the "Status Order") – denied LOL's motion to upgrade its status in the Commission's proceeding from "participant" to "intervenor."

This Court lacks jurisdiction to consider either order. Hawai'i Revised Statutes ("HRS") § 269-15.51(a) expressly limits this Court's jurisdiction over direct appeals from the Commission to orders arising out of contested cases, and this appeal, despite LOL's protestations to the contrary, does not arise out of a contested case. LOL's appeal is fatally undermined by one essential fact: *it never requested a contested case hearing*. Ignoring that fact, LOL comes before this Court to fault the Commission for the lack of a contested case hearing. But surely a party must at least request a contested case hearing before contending that such a hearing was improperly denied.

The Commission, accordingly, respectfully requests that this Court dismiss LOL's appeal for lack of appellate jurisdiction.

II. STATEMENT OF THE CASE

On May 9, 2017, HELCO filed a request (the "Letter Request") with the Commission for approval of an Amended and Restated Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity (the "Amended PPA") between HELCO and Hu Honua. Dkt. 89 at PDF 7-14. Pursuant to the Amended PPA, HELCO, a public utility on Hawai'i island, was to purchase renewable dispatchable firm energy and capacity generated by a biomass power plant developed by Hu Honua in Pepe'ekeo, Hawai'i. *Id.* at 18, 35.

HELCO filed its Letter Request in the Commission's Docket No. 2012-0212 (the "2012 Docket"). Dkt. 89 at PDF 7. Back in August of 2012, HELCO had filed a request for the Commission's approval of an original Power Purchase Agreement (the "Original PPA") with Hu Honua that was adjudicated in the 2012 Docket. *Id.* at 9, 543. The Commission approved the Original PPA on December 20, 2013. *Id.* at 543-44. However, according to HELCO's Letter

Request, HELCO later terminated the Original PPA after Hu Honua failed to meet certain project milestones. *Id.* at 9. Hu Honua eventually filed an action in federal district court to challenge the termination of the Original PPA. *Id.* at 10. In advance of a settlement conference in that litigation, HELCO and Hu Honua negotiated the Amended PPA. *Id.* at 10.

In its 2017 Letter Request, HELCO asked the Commission to reopen the 2012 Docket, indicating that it would rescind its termination of the Original PPA and enter into the Amended PPA with Hu Honua if "the benefits to be provided to customers are sufficient and the Commission approves the preferential pricing sought by the Seller."[1] Dkt. 89 at PDF 7, 10.

According to HELCO, the Amended PPA made the following changes to the Original PPA: "[1] Incorporation of the terms of the previously approved Amendment No. 1 to the Original PPA (dated May 3, 2012); [2] Revisions to the Contract Price, i.e., Energy Charge and Capacity Charge; [3] Revision to Milestone Events, i.e. Guaranteed Milestones and Reporting Milestones; [4] Revisions to term of PPA from 20 to 30 years[;] [and] [5] Conforming revisions and other non-substantive miscellaneous changes." Dkt. 89 at PDF 11. No changes were made to the Hu Honua facility itself. Dkt. 130 at PDF 35.

On May 17, 2017, the Commission opened a new docket – Docket No. 2017-0122 (the "2017 Docket") – to review the Letter Request. Dkt. 89 at PDF 541. The Commission transferred the Letter Request into the 2017 Docket and declined HELCO's request to reopen the 2012 Docket. *Id.* at 546.

On the same date, the Commission determined that HELCO needed to seek a waiver from the Commission's Framework for Competitive Bidding,[2] and could not rely on a waiver that had been granted in 2008. Dkt. 89 at PDF 547-50. The Commission additionally noted that LOL, Tawhiri Power, LLC ("Tawhiri"), and Hamakua Energy Partners ("HEP") had been

[1] With its Letter Request, HELCO submitted a request by Hu Honua for Commission approval of preferential rates for the purchase of renewable energy in conjunction with agricultural activities pursuant to HRS § 269-27.3. Dkt. 89 at PDF 7, 253-73. That request is not itself at issue in this appeal.

[2] Unless exempted or waived by the Commission, the Framework for Competitive Bidding generally requires competitive bidding as the mechanism for acquiring a future generation resource or a block of generation resources. The Commission adopted the Framework for Competitive Bidding in Docket No. 03-0372 through Decision and Order No. 23121 in December 2006.

granted participant status[3] on certain issues in the 2012 Docket, and would be granted conditional participant status in the 2017 Docket. *Id.* at 554. The Commission stated that it would reevaluate LOL's, Tawhiri's, and HEP's participant status and, if necessary, establish the scope of each entity's participation following the filing of a proposed procedural order by the parties and the Commission's final determination of the issues to govern the 2017 Docket. *Id.*

On May 27, 2017, LOL filed "exhibits" that included confidentiality agreements and an explanation of the "agricultural expertise" of Henry Curtis, LOL's Vice President for Consumer Issues. Dkt. 91 at PDF 6-34.

On June 2, 2017, LOL filed a motion to upgrade status (the "Motion to Upgrade Status" or "Motion"), requesting that the Commission allow it to intervene in the proceeding as a party, rather than continuing as a participant. Dkt. 92 at PDF 62-71. LOL noted that it had been admitted into at least nine other Commission proceedings that dealt with bioenergy, biomass, biofuel and/or biodiesel. *Id.* at 64. It also stated its belief that "the efforts to protect our archipelago from the ravages of climate change, and the introduction of alien species has [sic] not been adequately protected and funded by legislative actions," and noted its concern with "social justice, environmental justice, climate justice, and greenhouse gas impacts." *Id.* at 67. LOL offered this as a basis for its request to intervene, and did not make any request for a contested case hearing.

On June 6, 2017, the Commission entered Order No. 34597 Establishing a Procedural Schedule, Statement of the Issues, and Scope of Participation for Participants (the "June 6 Order"). Dkt. 94 at PDF 12-28. The commission adopted the following Statement of the 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.

[3] Pursuant to Hawaii Administrative Rules ("HAR") § 6-61-56, the Commission may permit participation in its proceedings without intervention. A participant under § 6-61-56 is "not a party to the proceeding" and may participate in the proceeding as directed by the Commission. Haw. Admin. R. § 6-61-56(a).

> 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.

Id. at 17-18.

LOL was given participant status with respect to issue 2.a.i. – whether the energy price components in the Amended PPA properly reflect the cost of biomass fuel supply – and issue 2.b. – whether HELCO's purchase power arrangements under the Amended PPA are prudent and in the public interest. *Id.* at 19.

The June 6 Order also set out the procedural schedule to govern the proceeding, including deadlines for information requests and for statements of position. Dkt. 94 at PDF 16. Given that a hearing was not required by statute or rule and no hearing had been requested by any party, the procedural schedule made no mention of a hearing.

The Department of Commerce and Consumer Affairs, Division of Consumer Advocacy (the "Consumer Advocate")[4] took no position on LOL's pending Motion to Upgrade Status. Dkt. 94 at PDF 6. HELCO filed an opposition to the Motion on June 7, 2017, arguing that LOL failed to "demonstrate any additional interest or expertise to justify a change in its limited participant status," and that its intervention would "unreasonably broaden the pertinent issues raised in this docket and unduly delay this proceeding." Dkt. 95 at PDF 6-10. Hu Honua also filed an opposition, requesting that the Commission deny LOL's Motion for the reasons set forth in HELCO's opposition. *Id.* at 25-29. Hu Honua also noted that LOL should not be permitted to delay or extend the schedule established in the Commission's June 6 Order. *Id.* at 26.

On June 23, 2017, the Commission entered Order No. 34651, the Status Order, denying LOL's Motion to Upgrade Status. Dkt. 105 at PDF 6-18. The Commission noted that the

[4] The Consumer Advocate was a party to the 2017 Docket. *See* Haw. Rev. Stat. § 269-51 ("The consumer advocate shall have full rights to participate as a party in interest in all proceedings before the public utilities commission."); Haw. Admin. R. § 6-61-62(a) ("The consumer advocate is, ex officio, a party to any proceeding before the commission."). The Consumer Advocate "shall represent, protect, and advance the interests of all consumers, including small businesses, of utility services." Haw. Rev. Stat. § 269-51.

concerns LOL raised in its Motion were a restatement of the concerns LOL had raised with respect to the Original PPA in a motion to intervene it filed in the 2012 Docket. *Id.* at 10-11. The Commission concluded that, as with LOL's motion to intervene in the 2012 Docket, the concerns LOL raised "provide insufficient basis to justify full intervention in this proceeding." *Id.* at 15. The Commission also concluded that LOL "failed to demonstrate any additional interest or expertise sufficient to justify a change in its limited participant status." *Id.* LOL, therefore, was not permitted to intervene in the proceeding, but could continue to act as a participant, as established in Order No. 34597. *Id.*

On July 10, 2017, LOL filed its Statement of Position. Dkt. 121 at PDF 22-33. LOL argued that Hu Honua's proposal "fails to fully address issues of climate change and the environmental impact of their proposed operations," objecting, *inter alia*, to an alleged lack of detail regarding claims of carbon neutrality and to an alleged lack of discussion regarding the carbon costs of the harvesting and transportation of trees to be used at the Hu Honua facility. *Id.* at 23-28. LOL also contended that Hu Honua's pricing was not in the public interest. *Id.* at 29-31. LOL's Statement of Position made no mention of a contested case hearing. *Id.* at 22-33.

On the same date, the Consumer Advocate filed a Statement of Position, noting that it was "unable to offer a definitive position on the proposed project" due to "remaining questions and concerns." Dkt. 121 at PDF 53-89. The Consumer Advocate did not, however, request any additional time or seek any amendment to the procedural schedule in order to offer a definitive position. Dkt. 130 at PDF 64.

On July 17, 2017, Hu Honua filed its Reply Statement of Position. Dkt. 126 at PDF 6-67. Hu Honua argued, *inter alia*, 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 CO_2." *Id.* at 40. Hu Honua also stated that "the estimated emissions due to transportation of fuel to the plant pale in comparison to the emissions reductions that will result from the displacement of fossil fuel." *Id.* at 47. With respect to carbon neutrality, Hu Honua noted 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." *Id.* at 47-48.

HELCO also filed a Reply Statement of Position. Dkt. 127 at PDF 6-50. HELCO, like Hu Honua, noted in response to LOL's Statement of Position, that the Hu Honua project is "by statute, a renewable energy project that qualifies for inclusion in meeting [HELCO's] mandate to reach 100% RPS by 2045." *Id.* at 43. HELCO suggested that "[a]ny research or other study to review such determination would rightly be the purview of our State's legislative body." *Id.*

On July 28, 2017, the Commission issued the D&O – Decision and Order No. 34726 – granting HELCO's request for a waiver from the Framework for Competitive Bidding and approving the Amended PPA. Dkt. 130 at PDF 23-90. The Commission approved the Amended PPA under the "normal" criteria for PPAs,[5] 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. *Id.* at 26-27.

The Commission entered detailed findings and conclusions in support of its approval of the Amended PPA. The Commission found, among other things, 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." *Id.* at 81. The Commission concluded that the project will economically benefit HELCO's ratepayers, noting that based on HELCO's analysis "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" and "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." *Id.* at 83. The Commission also noted that the Amended PPA's levelized cost is less than the Original PPA's in 2017 dollars under most conditions, and that the proposed pricing structure is delinked from fossil fuel pricing. *Id.* at 83.

With respect to diversification, the Commission concluded that the project would diversify 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." *Id.* at 84. The Commission also concluded that the project, based on the Commission's review of the

[5] *See* Haw. Rev. Stat. § 269-27.2(c); Haw. Admin. R. § 6-60-6(2).

record, may primarily displace fossil fuel generation resources and is anticipated to accelerate the retirement of fossil fuel plants. *Id.* at 84-85. The Commission noted 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," and "provides an opportunity for improved vegetation management, like the removal and conversion of albizia trees into biomass feedstock." *Id.* at 85.

The Commission's approval of the Amended PPA was "not based solely on pricing, but include[d] other factors such as the State's need to limit its dependence on fossil fuels and mitigate against volatility in oil pricing." *Id.* at 85.

On August 26, 2017, LOL filed its Notice of Appeal with this Court, stating that it was appealing from the D&O, which approved the Amended PPA, and from the Status Order, which denied LOL's Motion to Upgrade Status. Dkt. 1 at PDF 1-2.

On October 13, 2017, Hu Honua filed a motion to dismiss LOL's appeal for lack of appellate jurisdiction, arguing that the appeal is an impermissible collateral attack on the Commission's decision approving the Original PPA in the 2012 Docket, and that the appeal does not arise out of a contested case. Dkt. 12. HELCO and Appellee HAWAIIAN ELECTRIC COMPANY, INC. (collectively referred to hereafter as "HELCO") joined Hu Honua's motion on October 18, 2017. Dkt. 33.

On November 20, 2017, LOL filed its Statement of Jurisdiction, Dkt. 150, and the Commission, HELCO, and Hu Honua filed their Statements Contesting Jurisdiction, Dkt. 142, 144, 148.

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether LOL is a "person aggrieved in a contested case proceeding" under HRS § 269-15.51 , such that this Court has jurisdiction over LOL's appeal.

IV. STANDARD OF REVIEW

Jurisdiction is "the base requirement for any court considering and resolving an appeal," *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 69 n.10, 881 P.2d 1210, 1215 n.10 (1994), and appellate courts have a well established and independent "obligation to insure they have jurisdiction to hear and determine each case," *Hui Kakoo Aina Hoopulapula v. Bd. of Land & Nat. Res.*, 112 Hawai'i 28, 38, 143 P.3d 1230, 1240 (2006) (quoting *In re Doe*, 102 Hawai'i 246, 249, 74 P.3d 998, 1001 (2003)). Because "the remedy of appeal is not a common law right

and [] exists only by authority of statutory or constitutional provisions . . . an appealing party's 'compliance with the methods and procedures prescribed by statute is obligatory.'" *Hui Kakoo*, 112 Hawai'i at 38-39, 143 P.3d at 1240-41 (quoting *In re Doe*, 102 Hawai'i at 249, 74 P.3d at 1001) (brackets omitted). "Appellate courts, upon determining that they lack jurisdiction – or that any other courts previously considering the case lacked jurisdiction – shall not require anything other than a dismissal of the appeal or action." *Pele Def. Fund*, 77 Hawai'i at 69 n.10, 881 P.2d at 1215 n.10. Absent jurisdiction, a court can "do nothing but dismiss the appeal." *Id.*

V. ARGUMENT

A. This Court Lacks Jurisdiction to Review LOL's Appeal.

LOL has directly appealed the Commission's D&O and Status Order to this Court. For this Court to have jurisdiction over LOL's appeal, the requirements of HRS § 269-15.51(a) must be met. That section expressly limits this Court's jurisdiction over direct appeals from the Commission to orders arising out of contested cases, stating as follows:

> Chapter 91 shall apply to every contested case arising under this chapter except where chapter 91 conflicts with this chapter, in which case this chapter shall apply. 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.*

Haw. Rev. Stat. § 269-15.51(a) (emphasis added).

A contested case is "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Haw. Rev. Stat. § 91-1; *see also Kilakila 'O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai'i 193, 200, 317 P.3d 27, 34 (2013) (describing a contested case hearing as "a hearing that was (1) required by law and (2) determined the rights, duties, and privileges of specific parties" (quoting *Kaleikini v. Thielen*, 124 Hawai'i 1, 16-17, 237 P.3d 1067, 1082-83 (2010))). For an agency hearing to be "required by law" it must be required by "(1) agency rule, (2) statute, or (3) constitutional due process." *Kaniakapupu v. Land Use Comm'n*, 111 Hawai'i 124, 132, 139 P.3d 712, 720 (2006).

LOL contends that it was entitled to a contested case hearing by constitutional due process,[6] but has failed to demonstrate, as a threshold matter, that it ever made a request for a contested case hearing. LOL, in fact, failed to request a contested case hearing at any time during the Commission's proceedings, fatally undermining its effort to obtain this Court's review.[7] *See Hui Kakoo*, 112 Hawai'i at 42, 143 P.3d at 1244 (concluding that the appellants' failure to properly request a contested case hearing precluded judicial review under HRS § 91-14(a)); *Kaniakapupu*, 111 Hawai'i at 137, 139 P.3d at 725 (noting, in response to the appellant's complaint regarding lack of judicial review, that the appellant had not requested a contested case hearing); *see also Simpson v. Dep't of Land & Nat. Res., State of Hawaii*, 8 Haw. App. 16, 24, 791 P.2d 1267, 1273 (1990), *overruled on other grounds by Kaniakapupu,* 111 Hawai'i 124, 139 P.3d 712 (concluding that there was "no contested case that [the appellant] could appeal from under HRS § 91–14(a)" because the appellant failed to request a contested case hearing). Having failed to ever request a contested case hearing before the Commission, LOL cannot belatedly come before this Court, claiming that the Commission improperly denied it such a hearing.

This 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. In *Maui Electric*, the Court noted that Sierra Club twice asserted "a due process right to participate in a contested case hearing." *Id.* at 255, 408 P.3d at 7. In *Mauna Kea Anaina Hou v. Board of*

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[6] LOL has contended that an agency hearing on the Amended PPA was required by statute, namely HRS §§ 269-27.2(d) and 269-16(b). *See* Dkt. 150 (Statement of Jurisdiction) at PDF 5-8; Dkt. 36 (LOL's Opposition to Hu Honua's Motion to Dismiss) at PDF 17-19. LOL appears to have abandoned these arguments; the opening brief does not discuss a hearing being required by either HRS § 269-27.2(d) or § 269-16(b). *See* Dkt. 167.

To the extent LOL continues to assert that a hearing on the Amended PPA was required by HRS §§ 269-27.2(d) and 269-16(b), *see* Dkt. 193 at PDF 7, that argument is foreclosed by this Court's decision in *In re Application of Maui Electric Company, Limited*, 141 Hawai'i 249, 408 P.3d 1 (2017). There, the Court rejected the argument that those same sections required a hearing on an application for approval of an amended power purchase agreement between Maui Electric and Hawaiian Commercial & Sugar Company. *Id.* at 259-60, 408 P.3d at 11-12.

The Commission, in its Statement Contesting Jurisdiction, also explained in detail why HRS §§ 269-27.2(d) and 269-16(b) did not apply to approval of the Amended PPA and did not require a hearing, contrary to LOL's contentions. *See* Dkt. 142 at PDF 4-6. The Commission incorporates its arguments on those points herein by reference.

[7] In its recently filed reply to Hu Honua's answering brief (Dkt. 193), LOL effectively concedes that it never requested a contested case hearing. *See* Reply Brief ("RB") at 5.

Land & Natural Resources, 136 Hawai‘i 376, 363 P.3d 224 (2015), this Court explained that the appellants had "unequivocally requested" a contested case hearing. *Id.* at 380, 363 P.3d at 228. In *Kilakila*, this Court stated that the petitioner "requested and formally petitioned DLNR for a contested case hearing" and had done "all it could" to properly request a contested case hearing. *Id.* at 195, 204, 317 P.3d at 29, 38. The list goes on. *See, e.g.*, *Kaleikini*, 124 Hawai‘i at 4, 237 P.3d at 1070 (noting that the petitioner requested a contested case hearing); *Pele Def. Fund*, 77 Hawai‘i at 66, 881 P.2d at 1212 (noting that various individuals requested contested case hearings). Each of these cases indicates 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.

This, in fact, is a matter of common sense. There are three distinct arguments an appellant can make in cases related to contested case hearings where jurisdiction is challenged: The first is that there was a contested case hearing and the appellant participated, permitting an appeal from an adverse final decision. The second is that there was a contested case hearing, but the appellant was improperly barred from participating. The third is that a contested case hearing should have been held, and the appellant's request for a contested case hearing was improperly denied. The argument LOL advances is the last of the three,[8] and the obvious predicate to that

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[8] The first two arguments are, in any event, unavailable to LOL because no hearing was held in connection with approval of the Amended PPA.

Despite this, in its reply to Hu Honua's answering brief, LOL attempts to fit this case under the first argument, contending that "Hu Honua cites no authority that a participant in a contested case is required to request another contested case on the same subject matter engaged in the first contested case." RB at 3. This contention reveals a serious misunderstanding as to when and how contested case hearings are required.

Contrary to LOL's contention, there was no "first" contested case. LOL cites the statutory definition of a "contested case" in an effort to paint the Commission's proceedings as having been a contested case all along, even without a request from LOL, but this Court's case law clearly explains that a contested case is "a proceeding in which the legal rights, duties, or privileges of specific parties <u>*are required by law*</u> to be determined after an opportunity for agency hearing." HRS § 91-1 (emphasis added); *see Kilakila*, 131 Hawai‘i at 200, 317 P.3d at 34. That a proceeding may have affected rights, duties, or privileges is not, on its own, enough. The "required by law" element cannot be written out of HRS § 91-1, and it is well established that an agency hearing is "required by law" only where a hearing is mandated by "(1) agency rule, (2) statute, or (3) constitutional due process." *Kaniakapupu*, 111 Hawai‘i at 132, 139 P.3d at 720. The central problem with LOL's argument – one that it fails to recognize – is that it has not demonstrated that an agency hearing was required by rule or statute, as noted *supra* at n.6, no contested case hearing had otherwise been provided for in the Commission's docket, *see* Dkt. 94 at PDF 16, and LOL cannot, therefore, plausibly contend that the Commission's proceedings

argument is a *request* for a contested case hearing. Logically, a party cannot complain that a request it never made was improperly denied.

To hold otherwise would require an agency to predict, in each case, whether a contested case hearing could possibly be claimed by a party before it, or even parties not before it, leaving the parties themselves without any burden to assert or develop their own rights. Such an arrangement is contrary to the structure of our legal system, which generally requires parties to advance their own rights and provides for consequences should they fail to do so. To ignore that fundamental principle would place agencies in an untenable position: If X and Y, for example, come before the Commission seeking approval of an agreement, can Z appeal the Commission's decision despite saying absolutely nothing to the Commission, on the theory that it would have been entitled to a contested case hearing by due process had it made such a request? In that scenario, the Commission would have no reason to believe Z was interested in the matter and wanted a contested case hearing, and to fault the Commission for failing to afford it that hearing would be patently unreasonable. At the very least, a party claiming entitlement to a contested case hearing must have asserted that entitlement before the agency, and not for the first time on appeal.

This Court has long recognized that judicial review over an agency appeal requires that a claimant "have followed the applicable agency rules and, therefore, have been involved in the contested case." *Kilakila*, 131 Hawai'i at 200, 317 P.3d at 34 (quoting *Kaleikini*, 124 Hawai'i at 16-17, 237 P.3d at 1082-83).[9] In *Hui Kakoo*, for example, the Court noted that the appellants,

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already involved a contested case, such that LOL need not have asserted the claim it makes now: that it was entitled to a contested case hearing by due process.

[9] In the recent *Maui Electric* decision, this Court reiterated that requirement, noting that judicial review over an agency appeal may be obtained only where the following requirements are met:

> first, 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 case*; and finally, the claimant's legal interests must have been injured—i.e., the claimant must have standing to appeal.

141 Hawai'i at 258, 408 P.3d at 10 (emphasis added) (quoting *Kilakila*, 131 Hawai'i at 200, 317 P.3d at 34).

despite orally requesting a contested case hearing, failed to subsequently file a written petition for a hearing with the Board of Land and Natural Resources, as required by regulation. 112 Hawai‘i at 40, 143 P.3d at 1242. The appellants' failure to comply with the applicable agency procedure meant that there was no contested case from which the appellants could appeal. *Id.* at 41, 143 P.3d at 1243.

The principle that a party must have at least requested a contested case hearing in order to maintain an appeal from a contested case is embedded in this Court's recognition that an appeal requires compliance with applicable agency rules. It would make little sense to allow judicial review in a case like this, where a party has failed to even request a contested case hearing, but disallow judicial review in a case like *Hui Kakoo*, where a party actually requested a contested case hearing, but did not follow the agency's procedures for perfecting the request. How can a party, in other words, not be required to request a contested case hearing, but be required to follow agency rules as to how to request a contested case hearing? The principle that a party at least request a contested case hearing is logically and necessarily at the core of this Court's case law regarding compliance with applicable agency rules.

LOL, in an effort to avoid its failure to request a contested case hearing, cannot point to its Motion to Upgrade Status as such a request. That argument, should it be made, is without merit. At no point in the Motion did LOL request a contested case hearing; the Motion is totally devoid of any assertion of entitlement to a contested case, as LOL appears to acknowledge. *See* Dkt. 92 at PDF 62-71; RB at 4 n.4.[10] In the Motion, LOL sought to upgrade its status to a party—from "participant" to "intervenor."[11] It was not seeking a contested case hearing.

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[10] In fact, LOL stated that it was *not* requesting a *public* hearing on its Motion to Upgrade Status, Dkt. 92 at PDF 67, suggesting that had it been intending to seek a contested case hearing in its Motion, it would have said so.

[11] Pursuant to HAR § 6-61-55, "[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." Haw. Admin. R. § 6-61-55(a).

Intervention affords full party status, meaning that a person would not be limited to a particular scope – e.g., participation on only certain of the issues presented – as are "participants" before the Commission. *See* Haw. Admin. R. § 6-61-56(a) (providing that a participant "may participate in the proceeding only to the degree ordered by the commission").

There is only one mention of "contested case hearing" in the entire Motion, in a section discussing tariffs that cites a variety of statutory provisions wholly unrelated to the request for approval of the Amended PPA. *See* Dkt. 92 at PDF 65-66. "Contested case hearing" is referenced only by way of LOL's recitation of HRS § 269-16(b), a provision irrelevant to the Commission's consideration of the Amended PPA – as explained in the Commission's Statement Contesting Jurisdiction, *see* Dkt. 142 at PDF 6, and *supra* at n.6 – because HRS § 269-16(b) requires a contested case hearing "in connection with any increase in rates," and there was no request for an increase in rates in connection with the Amended PPA (and none was approved). Therefore, LOL would not have been entitled to a contested case hearing based on HRS § 269-16(b), even had it actually made that request, instead of merely quoting HRS § 269-16(b) amongst references to a variety of unrelated provisions. Certainly, LOL's quotation of HRS § 269-16(b) cannot constitute a request for a contested case hearing based on constitutional due process, the argument LOL is pressing on appeal.

LOL's Motion to Upgrade Status, in fact, *never* mentions constitutional due process. There is no reference to due process in the entire Motion, distinguishing this case from *Maui Electric*, where the Court noted that in its motion to intervene or to participate, "Sierra Club asserted a fundamental due process right to participate in a hearing on the grounds that the Agreement would impact Sierra Club's members' health, aesthetic, and recreational interests." 141 Hawai'i at 254, 408 P.3d at 6. Sierra Club explicitly and repeatedly asserted that it was entitled to a contested case hearing by due process.[12] LOL, on the other hand, said nothing.

In support of its due process argument, Sierra Club also attached affidavits from two of its members who described being personally affected by the power plant at issue. *Id.* Those members expressed concerns regarding the effect of the plant's coal burning on their long-term health, and noted that they close their windows and run air filters in their houses in response to their concerns regarding pollution from the plant. *Id.* at 254-55, 408 P.3d at 6-7.[13] LOL, on the

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[12] *See* Docket 2015-0094, Sierra Club's Motion to Intervene or to Participate Without Intervention, filed April 17, 2015, at 6; Docket 2015-0094, Sierra Club's Motion to Reconsider the Order Denying Motion to Intervene or to Participate Without Intervention, filed June 22, 2015, at 2, 5-7. Both documents are available on the Commission's online database at: https://dms.puc.hawaii.gov/dms/.

[13] This Court quoted the following language from one of the affidavits Sierra Club submitted:

other hand, failed to present any basis for a due process right to a contested case hearing in its Motion to Upgrade Status (even assuming it had made the necessary request for a contested case hearing). In the Motion, LOL merely stated that its "members are very deeply concerned about climate change, biodiversity, and the spread of invasive species" and that "the efforts to protect our archipelago from the ravages of climate change, and the introduction of alien species has [sic] not been adequately protected and funded by legislative actions." Dkt. 92 at PDF 67. That its members are generally "concerned" about "climate change, biodiversity, and the spread of invasive species," and that LOL believes *legislative* actions have been insufficient, says nothing about how LOL and its members would be affected by approval of the Amended PPA. There is no description of how the Amended PPA would affect LOL and no discussion of any adverse impact of the project at issue on LOL's members. This is illustrative of the gulf between this case and *Maui Electric*.[14] Simply put, even if one could somehow overlook LOL's clear failure

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> 4. I have concerns about the coal burning at Pu'unene. I understand that burning coal results in emissions of dangerous air pollutants such as particulate matter, sulfur dioxide, nitrogen oxides, mercury, and other toxic pollutants. I know that these pollutants can cause or contribute to a wide range of health problems, including asthma, and respiratory and cardiovascular disease.
> 5. I have concerns about the impacts of the pollution from the plant on my health and the health of my family. On some days, because the pollution in the area causes hazy conditions, I cannot see the mountains from my house. On these days, I will turn on my air filters and close my windows to limit my exposure.
> 6. I understand that the Pu'unene plant supplies power to the Maui Electric Company . . . , and that the Commission is considering approving a new power purchase agreement with the plant. I am concerned that the plant burns more coal and produces more air pollution in order to meet its obligations to supply power [to Maui Electric].
> 7. If the Commission decided not to approve the new power purchase agreement, it might decrease coal-burning at Pu'unene, and therefore decrease some of my concerns about the pollution from the plant. I would feel more comfortable about seeing the plume from the plant if I knew that they were not burning coal, or if they were burning less coal at the plant. It would increase my enjoyment of the area and produce other benefits to my long-term health and well-being.

Maui Elec., 141 Hawai'i at 254-55, 408 P.3d at 6-7.

[14] For the same reasons, LOL has failed to establish that it has standing to maintain this appeal. The Commission recognizes that this Court applies a "lower standard . . . when environmental rights are asserted," *Maui Elec.*, 141 Hawai'i at 270, 408 P.3d at 22, but this Court's precedent also makes clear that an environmental plaintiff must still meet the three-part standing test, *see id.* ("Environmental plaintiffs must meet this three-part standing test but need

to request a contested case hearing, nothing within the Motion to Upgrade Status demonstrated a due process right to such a hearing.

LOL also cannot argue that a request to intervene *is* a request for a contested case hearing. Intervention itself provides party status, not a contested case hearing.[15] Individuals and organizations, in fact, often intervene in Commission dockets where no contested case hearing occurs.[16] Individuals and organizations also take part in contested case hearings regardless of

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not assert an injury that is different in kind from an injury to the public generally."); *Pele Def. Fund*, 77 Hawai'i at 69, 881 P.2d at 1215 ("Notwithstanding the liberalization of rules regarding a litigant's standing to assert claims based on alleged environmental harms, the fundamental standing requirements must still be applied. Specifically, the Appellees must 'demonstrate [that] *their interests were injured* and [that] they were *involved* in the administrative proceeding that culminated in the unfavorable decision.'" (quoting *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 514-15, 654 P.2d 874, 879-80 (1982))).

Here, LOL has failed to demonstrate that it "suffered an actual or threatened injury; the injury [is] fairly traceable to the defendant's actions; and a favorable decision would likely provide relief for the . . . injury." *Maui Elec.*, 141 Hawai'i at 270, 408 P.3d at 22. LOL has nowhere articulated an injury to any of its members that is fairly traceable to the Commission's approval of the Amended PPA. Instead, all it has articulated is general "concern." LOL's vague allegations stand in stark contrast to the affidavits this Court relied upon in *Maui Electric* to conclude that Sierra Club had standing. *See id.* at 270-71, 408 P.3d at 22-23.

[15] A motion to intervene could effectively operate as a request to participate in a contested case hearing if there is a preexisting contested case. *See, e.g.*, *Kilakila*, 131 Hawai'i at 195, 317 P.3d at 29 ("[A] denial of a request for a contested case hearing (*or a request to intervene and participate in one*) also constitutes a "final decision and order" of an administrative agency from which the aggrieved party may appeal pursuant to HRS § 91–14." (emphasis added)). The motion, in other words, would be to intervene in a contested case which had *already* been established. Here, no contested case hearing was established because none was required by statute or agency rule, and no party had otherwise requested and shown entitlement to one. LOL, by simply requesting to intervene in the Commission's proceedings on the Amended PPA, without requesting a contested case hearing, was simply requesting to take part in the *existing* proceedings as a party, and those existing proceedings did not involve a contested case hearing. To obtain a contested case hearing, LOL needed to at least ask for one.

[16] In Docket Nos. 2014-0192 and 2015-0412, for example, parties intervened without a contested case hearing ever being held.

The Commission maintains a public database of its dockets, *see* https://dms.puc.hawaii.gov/dms/, and the Commission respectfully requests that the Court take judicial notice of the dockets cited above, *see* Haw. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); *see also Kaho'ohanohano*

their status as "participant" or "intervenor."[17] This Court has previously recognized that participants can appeal agency decisions and that intervention is not a prerequisite. *See Mahuiki*, 65 Haw. at 515, 654 P.2d at 880 ("We have not . . . conditioned standing to appeal from an administrative decision 'upon formal intervention in the agency proceeding.' . . . 'Participation in a hearing as an adversary . . . has been held sufficient to give rise to appeal rights.'" (quoting *Jordan v. Hamada*, 62 Haw. 444, 449, 616 P.2d 1368, 1371-72 (1980))); *Application of Hawaiian Elec. Co., Inc.*, 56 Haw. 260, 265, 535 P.2d 1102, 1106 (1975) (concluding that participants in hearings before the Public Utilities Commission could challenge the Commission's final decision under HRS Chapter 91). LOL itself acknowledges this, arguing in its Statement of Jurisdiction that it is "permitted to appeal, notwithstanding 'participant' status." Dkt. 150 at PDF 5. This recognition – that participants can take part in contested case hearings and potentially appeal from the agency's decision, such that party or intervenor status is unnecessary – undercuts any potential argument that intervention and contested case hearings before the Commission are inherently linked.

This Court has also previously recognized that "[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*." *Hawaiian Elec.*, 56 Haw. at 262, 535 P.2d at 1104 (emphasis added). This Court would not have characterized intervention as discretionary and "not a matter of right" if intervention were equivalent to entitlement to a contested case hearing. Intervention, again, confers party status, not a contested case hearing.

LOL, as an entity that by its own admission has participated in over 40 regulatory proceedings before the Commission over the past 21 years, *see* Opening Brief ("OB") at 27; Dkt. 91 at PDF 7, is presumably intimately familiar with these principles and the Commission's operations. Certainly, LOL should have been aware that it had to actually request a contested case hearing if it wanted such a hearing to occur. The procedural order issued at the outset of the proceedings made no mention of a hearing, putting LOL on notice that no hearing was scheduled

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v. State, 114 Hawai'i 302, 328, 162 P.3d 696, 722 (2007) (taking judicial notice of matters of public record).

[17] For example, participants (including LOL) were included in the scheduled contested case hearing in Docket No. 2016-0328. This docket is publicly available through the Commission's online database and is subject to judicial notice. *See supra* at n.16.

as part of the Commission's decision making on the Amended PPA. *See* Dkt. 94 at PDF 16. Notably, LOL did not thereafter request a contested case hearing, or seek modification of the procedural order to include a contested case hearing, despite being fully aware of the distinction between inclusion and exclusion of an evidentiary hearing in a procedural schedule, and the responsibility of a party or participant to request a hearing if it desires such a hearing and none is otherwise scheduled or required.[18] The fact that LOL did not request a contested case hearing in this case should be read as a significant (and fatal) decision.

For these reasons, LOL's appeal does not arise out of a contested case. LOL certainly did not do "all it could" to seek a contested case hearing. *Kilakila*, 131 Hawai'i at 204, 206, 317 P.3d at 38, 40. Instead, it did nothing. As a result, this Court lacks jurisdiction to consider LOL's appeal.

B. LOL's Merits Arguments May Not Be Considered.

This Court has made clear that dismissal of an appeal is required where, like here, a court lacks jurisdiction. *See, e.g.*, *Pele Def. Fund*, 77 Hawai'i at 69 n.10, 881 P.2d at 1215 n.10 ("Appellate courts, upon determining that they lack jurisdiction . . . shall not require anything other than a dismissal of the appeal or action."). Jurisdiction is not, as LOL appears to believe, *see* OB at 1, 13-25, a secondary issue that can take a backseat to merits-based arguments, *see Pele Def. Fund*, 77 Hawai'i at 69 n.10, 881 P.2d at 1215 n.10 ("Jurisdiction is the base requirement for any court considering and resolving an appeal or original action."). Jurisdiction is a threshold issue, and the absence of jurisdiction precludes consideration of the merits. The *Pele Defense Fund* Court, for example, was critical of the ICA's *Simpson* decision which found jurisdiction lacking, but nevertheless reversed the circuit court's dismissal and remanded the case with instructions to provide a contested case hearing. *Id.* (discussing *Simpson v. Dep't of Land & Nat. Res., State of Hawaii*, 8 Haw. App. 16, 791 P.2d 1267 (1990)). The *Pele Defense Fund* Court made clear that without jurisdiction, an appellate court must dismiss the appeal and "is not in a position to consider the case further." *Id.* Later, in *Kaniakapupu*, this Court explicitly overruled the ICA's *Simpson* decision to the extent it "required a remand to the DLNR with instructions to provide a contested case hearing when it lacked jurisdiction to do so." 111

[18] For example, in Docket No. 2012-0185, LOL sought to modify the procedural schedule and expressly requested an evidentiary hearing. Judicial notice of this docket is appropriate on the same basis articulated *supra* at n.16.

Hawai‘i at 136, 139 P.3d at 724. LOL, therefore, is mistaken to the extent it contends that this Court can ignore jurisdictional deficiencies in favor of its merits arguments.

LOL's merits arguments, in fact, cannot properly be considered no matter how this Court determines the threshold jurisdictional question. Even if this Court were to reject the Commission's arguments and find, despite LOL's failure to request a contested case hearing, that LOL was entitled to a hearing by due process, the proper procedural course would be to remand for a contested case hearing. *See, e.g.*, *Maui Elec.*, 141 Hawai‘i at 253-71, 408 P.3d at 5-23 (concluding that a contested case hearing was required by due process and remanding without considering the merits of the Commission's Decision and Order issued without conducting a contested case hearing); *Alejado v. City & Cty. of Honolulu*, 89 Hawai‘i 221, 231, 971 P.2d 310, 320 (App. 1998), *as amended on denial of reconsideration* (Jan. 15, 1999) (declining, after concluding that the appellant was entitled to a contested case hearing, to address a merits argument in the parties' briefs because the "matter is to be properly presented, argued, and decided pursuant to an HRS chapter 91 contested case hearing").

Under no circumstances, in other words, would this Court consider the merits of the D&O. The merits of the agency's decision could be considered if LOL argued, and this Court accepted, that there *was* a contested case hearing that LOL participated in and was aggrieved by, but that is not, and cannot, be LOL's argument. There was no hearing conducted in connection with approval of the Amended PPA, meaning that LOL's only argument can be that its request for a contested case hearing was improperly denied. In that case, the proper remedy, if the argument is accepted (which it should not be), is to remand for a contested case, not to consider the agency's decision undertaken *without* the contested case hearing.

The same applies to review of the denial of the Motion to Upgrade Status. This court cannot review that decision absent jurisdiction under HRS § 269-15.51(a), which is dependent upon this appeal arising out of a contested case. For the reasons already articulated, this case does not so arise. And even if this Court were to find that it has jurisdiction and that LOL was entitled to a contested case hearing, the proper remedy would be to remand for a contested case, not to consider the agency's proceedings undertaken without the contested case.

For these reasons, LOL's merits arguments cannot, in any event, be considered.

C. Even if this Court Were to Consider the D&O on the Merits, LOL's Arguments Fail.

Even if this Court were to somehow reach the merits of the D&O,[19] LOL has failed to establish that the Commission did not comply with HRS § 269-6(b).[20] Contrary to LOL's contentions, the Commission fulfilled HRS § 269-6(b)'s mandate by explicitly considering "the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation" and "the effect of the State's reliance on fossil fuels on . . . greenhouse gas emissions." Haw. Rev. Stat. § 269-6(b).

Review of the D&O demonstrates this to be true. Early in the decision, the Commission acknowledged that it had received many comments from the public, with some expressing concern about a potential increase in greenhouse gas emissions. Dkt. 130 at PDF 32. The Commission noted, however, that HELCO had represented that "[t]he renewable energy provided by the Project could potentially save approximately 15,700 barrels of fuel per year, which over the term of the A&R PPA amounts to approximately 329,000 barrels of fuel oil saved." *Id.* at 34. According to the analyses provided, the Project would lead to "significant renewable energy-related benefits, primarily through its firm capacity and contribution to the State's [Renewable Energy Portfolio Standards ("RPS")] goals." *Id.* at 41. The Commission continued, "For the island of Hawaii, with the Project, the RPS goal levels increase by approximately 11% over the 30-year life of the Project." *Id.*

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[19] As outlined in section V.B., *supra*, the proper procedural course in this case does not, in any event, involve consideration of the merits of the D&O. The Commission, however, addresses the merits in an abundance of caution, and because it believes that the decision fully complied with HRS § 269-6(b).

[20] 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 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.

It is worth pausing here to note the basic and fundamental principle underlying the Commission's decision: that there is a direct relationship between fossil fuels and greenhouse gas emissions. It is well known and widely accepted that the use of renewable energy sources is directly tied to the reduction of fossil fuels and greenhouse gas emissions. The Legislature itself has recognized this. *See, e.g.* Haw. Rev. Stat. § 226-18 (setting forth, as one of the State's objectives, the "[r]eduction, avoidance, or sequestration of greenhouse gas emissions from energy supply and use," and providing that the development and promotion of "the use of renewable energy sources" and the priority handling and processing for permitting of renewable energy projects are means of furthering that, and other, State objectives); 1982 Haw. Sess. Laws Act 266, § 1 at 693 ("The legislature finds that maximization of the use of locally available nonfossil fuels is in the best interest of the State, but that such maximization will not be achieved until the value of such fuels to the public is recognized to be at least equal to the cost of fossil fuels to be displaced. Accordingly, such use should be encouraged to the greatest practicable extent."); 2012 Haw. Sess. Laws Act 99, § 1 at 215 ("The legislature finds that in trying to transition to a clean energy economy by 2030, much focus is being placed on meeting the renewable portfolio standards mandate. However, unless there are major technological breakthroughs, it is anticipated that in 2030, sixty per cent of electricity generation will come from fossil fuels. During the past year, the high cost of oil has severely impacted electricity ratepayers. Achieving a clean energy economy requires a multi-pronged approach, being aggressive in the development of renewable energy resources, promoting energy efficiency, and minimizing the use and cost of energy generated from fossil fuels."). As a result, consideration of renewable energy and fossil fuels is inherently a consideration of greenhouse gas emissions. A Commission determination, in other words, that a project will add renewable energy and displace fossil fuel resources is, in part, a corresponding determination that a project will lead to a reduction in greenhouse gas emissions.

The D&O follows this straightforward approach. In granting a waiver from the Framework for Competitive Bidding, the Commission found 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." Dkt. 130 at PDF 55 (internal quotation marks and brackets omitted). The Commission

noted that "the Project provides the most viable opportunity to add firm, dispatchable, renewable generation in the near term." *Id.* at 56.

Later, in its analysis of whether, among other things, the purchase power arrangements under the Amended PPA are "prudent and in the public interest," the Commission concluded 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." *Id.* at 81. "Stated succinctly, the Project will provide firm, dispatchable, renewable energy, and will provide ancillary services." *Id.* at 81.

The Commission also noted 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." *Id.* at 84.

Importantly, based on its review of the record, the Commission concluded that "the addition of the Project may primarily displace fossil fuel generation resources." *Id.* (emphasis added). The Commission anticipated that the project would "accelerate the retirement of fossil fuel plants, including Hill 5 and 6, and Puna Steam." *Id.* (emphasis added).

Finally, in noting that HELCO had met its burden of proof in support of its request for approval of the Amended PPA, the Commission noted that:

> 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.

Id. at 85 (emphasis added).

In light of the above, the Commission clearly and explicitly considered "the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation" and "the effect of the State's reliance on fossil fuels on . . . greenhouse gas emissions." Haw. Rev. Stat. § 269-6(b). In the D&O, the Commission repeatedly discussed the

benefits of the project's renewable energy generation, and concluded that the project would add firm, dispatchable renewable energy to HELCO's system and result in the displacement of fossil fuel generation resources. If a renewable energy project accelerates the retirement of fossil fuel plants, as the Commission concluded Hu Honua's project may, reliance on fossil fuels and, accordingly, greenhouse gas emissions, will be reduced.

LOL, for its part, does not appear to dispute this. In fact, LOL states that HRS § 269-6(b) "required [the Commission] to 'explicitly consider' the effect of the State's reliance on fossil fuels and *consequent GHG emissions*." Dkt 167 at PDF 20 (emphasis added). Despite its recognition of the connection between fossil fuels and greenhouse gas emissions, LOL never satisfactorily explains how the Commission's conclusion, for example, that the project will "displace fossil fuel generation resources" and "accelerate the retirement of fossil fuel plants" fails to consider greenhouse gases. Dkt. 130 at PDF 84. Certainly, the Commission's decision makes clear that it viewed the project as decreasing the State's reliance on fossil fuels, and therefore reducing greenhouse gas emissions and contributing to the state's renewable energy goals. LOL cannot plausibly claim that it was "left to guess" the Commission's position or that the Commission's determination was not "reasonably clear." OB at 17.

The most LOL offers in response is its theory that HRS § 269-6(b) actually requires the Commission to consider a project's incidental activities, in this case the greenhouse gas emissions "of all stages of fossil fuel use in the growing, harvesting, and transporting of the Hu Honua Project." OB at 15. LOL's alleged requirement has no basis in the text of HRS § 269-6(b) itself. Instead, LOL apparently derives its proposed interpretation of HRS § 269-6(b) from the Consumer Advocate's response to one of LOL's information requests, namely "(a) Does the Consumer Advocate believe that 'a non-cost benefit of the Project is avoiding greenhouse gas emissions'? (b) If so, how should it be factored into the analysis." Dkt. 14 at PDF 108. The Consumer Advocate replied:

> The Consumer Advocate has not completed an analysis of the net impact that the Project will have on greenhouse gas emissions. To the extent that the Project will facilitate the option of decreasing the dispatch of fossil fuel generation, it could be a benefit. On the other hand, if the nature of the Project may result in an adverse impact on the dispatch of renewable generation resources, it may not be reasonable to conclude that a non-cost benefit results. To that end, if greenhouse gas emission impact is going to be analyzed, it should be a comprehensive analysis, including the greenhouse gases resulting from the harvesting of the biomass feedstock, the emissions from the transportation used to deliver the

> feedstock, and all other possible greenhouse gas sources for the alternatives being considered.

Dkt. 103 at PDF 108-09.

It is clear from the Consumer Advocate's statement that it was not offering an interpretation of HRS § 269-6(b) and the Commission's obligations thereunder. Nowhere in the response did the Consumer Advocate even mention HRS § 269-6(b). And even had HRS § 269-6(b) been the subject of the Consumer Advocate's statement, an interpretation from another party to the proceeding is certainly not definitive or binding on the Commission.[21] In relying on this statement, LOL's opening brief also omitted the rest of the Consumer Advocate's response, which specifically stated that "[t]he Consumer Advocate has not developed a final position on this matter." *Id.* at 109.

LOL's interpretation of HRS § 269-6(b) also ignores that the text of that provision explicitly connects the requirement for the Commission to consider greenhouse gas emissions to "determinations of the reasonableness of the costs of utility system capital improvements and operations." Haw. Rev. Stat. § 269-6(b). That reflects the Legislature's purpose – as already laid out in Hu Honua's answering brief, *see* Dkt. 179 at PDF 34-36 – to prevent renewable projects that may come with higher short-term costs from being passed over in favor of cheaper, fossil fuel projects.[22] That purpose is reflected in other language in HRS § 269-6(b) itself, which

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[21] Instead, it is well established that "an agency's interpretation of its own governing statute requires this court to defer to the agency's expertise and to follow the agency's construction of the statute unless that construction is palpably erroneous." *Gillan v. Gov't Employees Ins. Co.*, 119 Hawai'i 109, 118, 194 P.3d 1071, 1080 (2008) (quoting *Vail v. Employees' Ret. Sys. of State*, 75 Haw. 42, 66, 856 P.2d 1227, 1240 (1993)).

[22] The Conference Committee Report on Act 109 (2011), which amended HRS § 269-6(b), stated:

> The purpose of this measure is to require the Public Utilities Commission, when making determinations of the reasonableness of the costs of utility system capital improvements and operations, to consider the need to reduce the State's reliance on fossil fuels and to consider the benefits of capital improvements for renewable energy generation and energy efficiency despite the short-term expense.
>
> Your Committee on Conference finds that in order to help reduce the State's dependence on fossil fuels the Public Utilities Commission needs to give consideration to the long-term benefits of projects that may incur larger short-term costs than fossil fuel-dependent or less energy-efficient alternatives. This

provides that "[t]he 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." Haw. Rev. Stat. § 269-6(b). Nowhere in HRS § 269-6(b) did the Legislature instruct the Commission to assess "all stages of fossil fuel use" as to all activities potentially associated with a project. OB at 15.

For these reasons, LOL's novel and expansive interpretation of HRS § 269-6(b) should be rejected. In the D&O, the Commission complied with HRS § 269-6(b)'s mandate by discussing the opportunity to increase renewable energy based on local biomass, displace and reduce the use of imported fossil fuels, accelerate the retirement of fossil fuel plants, and, in turn, reduce greenhouse gas emissions, add to the diversity of the utility's existing portfolio of renewable energy resources, and contribute to achieving the state's renewable energy goals. This analysis is consistent with the Court's interpretation of HRS § 269-6(b) in *Maui Electric*, which stated:

> HRS § 269–6 pertains to the general powers and duties of the Commission and prescribes that the Commission "shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation." . . . This statutory provision also provides that in its decision-making, the Commission "shall explicitly consider" the effect of the State's reliance on fossil fuels on the level of "greenhouse gas emissions." Indeed, dating back as far as 1977, when the legislature adopted HRS § 269–27.2 concerning the utilization of electricity generated from nonfossil fuels, the legislature has repeatedly communicated its intent that the Commission is to reduce the State's dependence on fossil fuels and utilize renewable energy sources. This intent is manifest in the legislative history of Chapter 269, which unequivocally demonstrates an established State policy of prioritizing the utilization of renewable energy sources to reduce pollution in addition to securing the potential economic benefits and enhanced reliability of the State's energy supply. . . . Thus, a primary purpose of the amended law 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 greenhouse gases."

> measure gives the Public Utilities Commission specific direction to make those considerations during the performance of its duties.

Conf. Com. Rep. No. 134, in 2011 Senate Journal, at 760 (emphasis added).

141 Hawai‘i at 261-63, 408 P.3d at 13-15 (emphasis added and citations omitted). Reducing the State's dependence on fossil fuels and prioritizing the utilization of renewable energy sources was precisely what the Commission considered in the D&O.

For these reasons, even if this Court were to somehow reach the merits of the D&O, LOL's arguments should be rejected.

D. Even if this Court Were to Consider the Denial of LOL's Motion to Upgrade Status, LOL's Arguments Fail.

As with the D&O, the proper procedural course in this case does not, in any event, involve consideration of whether the denial of LOL's Motion to Upgrade Status was an abuse of discretion. *See supra* at n.19. But in an abundance of caution, the Commission explains why LOL's arguments regarding the denial of its Motion to Upgrade Status lack merit.

LOL's first argument regarding the Motion to Upgrade Status appears to confuse entitlement to a contested case hearing by due process with entitlement to intervene in a Commission proceeding. *See* OB at 26-27. These are separate inquiries,[23] and nowhere has LOL established that due process required that it be a party to the proceeding.

As LOL appears to recognize through its second argument, *see* OB at 27, this Court has already concluded that "[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*." *Hawaiian Elec.*, 56 Haw. at 262, 535 P.2d at 1104 (emphasis added). To succeed on its claim regarding the denial of its Motion to Upgrade Status, then, LOL must show that the Commission abused its discretion. *Id.* at 263, 535 P.2d at 1104. LOL has plainly failed to make that showing.

The Commission correctly concluded that LOL's Motion to Upgrade Status provided insufficient basis to justify full intervention in the proceeding under HAR § 6-61-55.[24] Dkt. 105

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[23] Through its Motion to Upgrade Status, LOL sought to intervene in the Commission's proceedings and as noted *supra* at 15, intervention provides party status.

[24] That provision states:

> (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;

at PDF 15. In support of its request to intervene, LOL noted that: (1) its Board of Directors "approved continuing to intervene in energy dockets as a means of promoting sustainable policies" and that Henry Curtis, LOL's Vice-President for Consumer Affairs, "is authorized by the LOL Board of Directors to represent LOL before the [Commission]"; (2) LOL's members "are very deeply concerned about climate change, biodiversity, and the spread of invasive species"; (3) LOL "believes that the efforts to protect our archipelago from the ravages of climate change, and the introduction of alien species has [sic] not been adequately protected and funded by legislative actions"; (4) the "only way" for LOL to protects its interest is "by accessing [classified] documents"; (5) "no other avenue" exists for "LOL to impact the decisions made in this Docket"; (6) the Consumer Advocate is "slow to analyze non-financial factors"; (7) LOL "intend[s] to present a proactive case, supported by expert witnesses and exhibits, as needed or required"; (8) Henry Curtis's "agricultural expertise" was filed with the Commission; and (9) even though the Consumer Advocate "is bound by the law to represent the interests of the general public," LOL's interests differ from those of the general public because it is "concerned with a wider lens that encompasses externalities including social justice, environmental justice, climate justice, and greenhouse gas impacts." Dkt. 92 at PDF 67-69. None of that information demonstrates why LOL would be entitled to upgrade its status from

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> (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
> (3) The effect of the pending order as to the applicant's interest;
> (4) The other means available whereby the applicant's interest may be protected;
> (5) The extent to which the applicant's interest will not be represented by existing parties;
> (6) The extent to which the applicant's participation can assist in the development of a sound record;
> (7) The extent to which the applicant's participation will broaden the issues 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.

participant to intervenor. LOL nowhere demonstrated, for example, "[t]he effect of the pending order as to the applicant's interest," that its intervention would not "broaden the issues or delay the proceeding," or that its "interest in the proceeding differs from that of the general public." Haw. Admin. R. § 6-61-55(b). At the very most, LOL presented vague, generalized arguments on those elements, and the Commission was within its discretion to find those arguments unpersuasive.

In its opening brief, LOL contends that it "described 'additional interest or expertise' in agricultural operations, climate change, biodiversity, and the spread of invasive species that other parties did not claim." OB at 27. But for multiple reasons, that argument does not establish that the Commission abused its discretion in denying LOL intervention. First, that an individual or entity is interested in or concerned about general, broad-based issues raised in a docket does not, in and of itself, entitle that individual or entity to intervention. *See id.* (LOL citing Dkt. 92 at PDF 67, which merely states that LOL's members "are very deeply concerned about climate change, biodiversity, and the spread of invasive species"). LOL cites no authority to the contrary. Second, the mere fact that LOL participated in other Commission proceedings by "submit[ing] expert testimony" does not establish any particular expertise that would assist and be relevant to the Commission in the docket at issue. *See* OB at 27 (LOL citing Dkt. 92 at PDF 64, which describes prior involvement in Commission proceedings without any demonstration of LOL's relevant expertise). In its opening brief, LOL attempts to belatedly supplement the Motion to Upgrade Status by pointing to other filings and other Commission dockets, *see* OB at 27, but that cannot possibly demonstrate that the Commission abused its discretion in denying the Motion. It was incumbent on LOL to show in the Motion itself that intervention should be granted.

The record, moreover, demonstrates that LOL was actively and meaningfully involved in the proceeding through its participant status. It issued no less than 103 information requests to HELCO, the Consumer Advocate, and Hu Honua, *see* Dkt. 96 at PDF 24-39; Dkt. 108 at PDF 6-28, and filed a written statement of position that presented its substantive analysis on the merits and objections to the Amended PPA, *see* Dkt. 121 at PDF 22-33.

LOL complains that its participant status "affected [its] ability to obtain access to documents," OB at 26, but LOL is mistaken. LOL had access to voluminous filings in the docket record, and its ability to access documents would not have changed, or been enhanced,

had it obtained party status. Pursuant to the Commission's Protective Order, parties and participants were afforded access to information designated "confidential." Dkt. 89 at PDF 567-66. "Confidential" information, in other words, was equally available to both parties and participants. The only information LOL may not have had access to was "restricted" information, which could be withheld from other parties and participants under certain circumstances. *See* Dkt. 107 at PDF 48 ("'Confidential' information may only be disclosed to 'qualified persons;' i.e., the author(s) of the information, the commission and its staff, and the other Parties and/or Participants to this docket, if any. The 'restricted' designation offers an additional layer of protection, and 'restricted' information may be withheld from other Parties and Participants, but not from the commission and the Consumer Advocate." (footnotes omitted)).[25] No greater access to "restricted" information was afforded to parties than participants.[26]

For these reasons, even if the Court were to somehow consider the denial of the Motion to Upgrade Status, LOL has not established any abuse of discretion.

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[25] LOL's opening brief suggests that it may not understand this distinction, and that it has inaccurately portrayed its level of access to information by claiming to have been deprived of documents that it actually was provided. LOL argues, for example, that it was denied access to Exhibit 11 to Hu Honua's Request for Preferential Rates because it was marked "confidential," OB at 23, but the record indicates that LOL was, in fact, provided this document, *see* Dkt. 103 at PDF 76 ("Exhibit 11 to Hu Honua's Request for Preferential Rates comprehensively compares Hu Honua to several relevant baselines and benchmarks, including a business as usual baseline. *This exhibit is designated as confidential with respect to the public, but has been provided to life of the Land.*" (emphasis added)). LOL, therefore, may be able to resolve its complaint regarding access to information by reviewing its own records.

[26] If LOL believed that any party or participant erroneously restricted its access to information, LOL's remedy was to file a motion to compel, as set forth in the Commission's Protective Order and Procedural Order. *See* Dkt. 89 at PDF 581-82; Dkt. 94 at PDF 23-24. LOL did file a motion to compel that was limited to three documents (i.e., the Pinnacle Lease, Pahala Lease, and Mason Bruce & Gerard Report), *see* Dkt. 117 at PDF 50, but LOL has not appealed the determination of that motion. LOL also did not seek relief from the Commission in connection with any other documents or responses to information requests. As with any tribunal, in the absence of an objection on the record, the Commission would not *sua sponte* intervene in the course of discovery among parties and participants. LOL's motion to compel, moreover, acknowledged that LOL had successfully conferred with parties to obtain access to materials, further demonstrating that LOL had various means at its disposal to seek access to even "restricted" material. *See id.* at 49 n.6 ("After email and phone discussions, HECO gave a full unredacted copy of Customer Bill Impact, Project Economic and Bill Impact Analysis, Exhibit A, Attachment 13, dated May 24, 2017, to Life of the Land.").

VI. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court dismiss LOL's appeal.

DATED: Honolulu, Hawai‘i, March 28, 2018.

/s/ Kaliko‘onalani D. Fernandes
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SCOT-17-0000630

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LIFE OF THE LAND,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION; HU HONUA BIOENERGY, LLC; HAWAII ELECTRIC LIGHT COMPANY, INC.; HAWAIIAN ELECTRIC COMPANY, INC.; DIVISION OF CONSUMER ADVOCACY; TAWHIRI POWER, LLC; and HAMAKUA ENERGY PARTNERS, L.P.

Appellees.

APPEAL FROM THE PUBLIC UTILITIES COMMISSION DOCKET NO. 2017-0122 (1) DECISION AND ORDER NO. 34726, FILED JULY 28, 2017 AND (2) ORDER NO. 34651 DENYING LIFE OF THE LAND'S MOTION TO UPGRADE STATUS, FILED JUNE 23, 2017

Comm'r Chair Randall Y. Iwase
Comm'r Lorraine H. Akiba
Comm'r James P. Griffin

APPELLEE HU HONUA BIOENERGY, LLC'S ANSWERING BRIEF

CERTIFICATE OF SERVICE

APPENDIX D

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS – Cont'd

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Hawai‘i Revised Statutes

Hawai‘i Administrative Rules

Hawai‘i State Constitution

Legislative

Court Rules

APPELLEE HU HONUA BIOENERGY, LLC'S ANSWERING BRIEF

Appellee HU HONUA BIOENERGY, LLC ("Hu Honua") submits this Answering Brief to Appellant LIFE OF THE LAND's ("LOL") Opening Brief, filed January 17, 2018, pursuant to Rule 28(c) of the Hawai'i Rules of Appellate Procedure.

I. INTRODUCTION

Hu Honua is the developer of a renewable energy power plant fueled by locally grown and sustainable biomass located in Pepeekeo on Hawai'i island (the "Hu Honua Project" or "Project"). Appellee HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO") is a public utility that generates, purchases, and/or distributes electricity on Hawai'i island. On December 20, 2013, Appellee PUBLIC UTILITIES COMMISSION ("PUC" or "Commission") approved a Power Purchase Agreement for renewable dispatchable firm energy and capacity between Hu Honua and HELCO ("Original PPA") in PUC Docket No. 2012-0212 ("2012 Docket"). LOL participated in this process and, prior to approval of the Original PPA, asked the PUC to consider how the Original PPA would affect the State of Hawai'i's reliance on fossil fuels, climate change impacts, and greenhouse gas emissions. When the PUC approved the Original PPA in December 2013, LOL did not appeal the PUC's final decision.

Four years after the PUC approved the Original PPA, HELCO submitted amendments to the Original PPA for approval by the PUC in 2017. Again, LOL actively participated in the review of the Amended and Restated PPA ("Amended PPA" or "A&R PPA") by raising environmental concerns. However, LOL never followed the PUC's administrative rules and procedures to request a contested case hearing. Nor did LOL submit declarations attesting to any injury that would be suffered by its members if the Amended PPA were approved. The PUC ultimately approved the Amended PPA in July 2017 in a Decision and Order which explicitly referenced the impact of the Hu Honua renewable energy project on existing fossil fuel plants on

Hawai‘i island.

LOL now attempts to take advantage of the approval of the Amended PPA to try to cure its failure to challenge the PUC's approval of the Original PPA. But this Court lacks jurisdiction to consider this appeal. LOL's appeal is an improper collateral attack on the PUC's earlier Decision and Order. Moreover, the approval of the Amended PPA did not require the PUC to hold a contested case hearing where (1) LOL never requested a hearing; (2) LOL did not allege a cognizable injury; (3) LOL was granted participant status by the PUC; and (4) LOL fully participated in the review of the Amended PPA by filing submissions with the Commission and engaging in information requests.

LOL's belated attack is not only improper and untimely, but also lacks merit because the PUC complied with HRS § 269-6(b) by "expressly considering, quantitatively and qualitatively" the costs of the State's reliance on fossil fuel resources, including the effect of greenhouse gas emissions. Further, the PUC did not violate LOL's due process rights by exercising its discretion (after careful review) to deny LOL's motion to upgrade status from participant to intervenor. Thus, the Court should affirm: (1) the PUC's Decision and Order No. 34726, issued July 28, 2017 ("2017 D&O"), which approved Hu Honua's Amended PPA, and (2) the PUC's Order No. 34651, issued June 23, 2017 ("Order Denying Upgraded Status").

II. CONCISE STATEMENT OF THE CASE.

1. 2012 Docket.

On May 3, 2012, Hu Honua and HELCO entered into the Original PPA, which provided that Hu Honua would develop and operate a biomass power plant to generate renewable energy that HELCO would distribute to its customers on Hawai‘i island. On August 30, 2012, HELCO applied to the PUC for approval of the Original PPA in the 2012 Docket. *See generally* Application, filed August 30, 2012 (attached as Exhibit "1" [Dkt. 13] to Hu Honua's Motion to

Dismiss for Lack of Appellate Jurisdiction, filed October 13, 2017 [Dkt. 12] ("Motion to Dismiss")).[1]

In the 2012 Docket, LOL filed a Motion to Intervene as a party intervenor seeking to raise concerns regarding greenhouse gas emissions. *See* Exhibit "2" to Motion to Dismiss at 7 [Dkt. 14]. LOL did not request a contested case hearing, or a hearing of any type. *See id*. LOL was also silent as to any actual or threatened injury or harm specific to LOL that its members would suffer as a result of not being able to intervene. *Id.* LOL only asserted that:

> [LOL's] members live, work and recreate in Hawai'i and are concerned about their future.
>
> Biofuels CAN be very harmful to Life of the Land's interests.
>
> Biofuels CAN have an enormous range of impacts that cut across multiple fields of concern. These include climate change, energy policy, agricultural policy, air pollution, water pollution, energy costs, energy rates, biofuels, opportunity costs, monocropping, social justice, environmental justice, and environmental externalities.

Id. at 9.

The PUC denied LOL's intervention as a party under HAR § 6-61-55. Instead, the PUC exercised its discretion under HAR § 6-61-56 to allow LOL's "participation without intervention" with respect to (1) "whether the purchased power costs to be paid by HELCO pursuant to the PPA are reasonable" and "whether the energy price components properly reflect the cost of biomass fuel supply"; and (2) "whether HELCO's purchase power arrangements under the PPA … are prudent and in the public interest." Order No. 30739, filed October 24, 2012, at 14-15, 24 (Exhibit "3" to Motion to Dismiss [Dkt. 15]).

On December 20, 2013, the PUC approved the Original PPA in Order No. 31758 ("2013

[1] Hu Honua is making a separate request for the Court to take judicial notice of the 2012 Docket and Federal Lawsuit, including the Exhibits "1" – "5" [Dkts. 13-17] attached to the Motion to Dismiss. The motion requesting judicial notice was filed on February 26, 2018 as Dkt. 177.

D&O"). Exhibit "4" to Motion to Dismiss [Dkt. 16]. The PUC found that the Hu Honua project "will provide firm, dispatchable, renewable energy" and observed that the project "will generally displace fossil generation" and "allow for certain fossil fuel generation to be decommitted." *Id.* at 48, 106-107. The PUC determined that the record was complete and the proceeding was ready for decision-making; therefore, the Commission found that an evidentiary hearing was unnecessary. *Id*. at 24-25. LOL did not object to the PUC's decision not to hold an evidentiary hearing, and **did not challenge or appeal the PUC's 2013 D&O.**

2. <u>The Amended PPA</u>.

After the Original PPA was approved, HELCO alleged that Hu Honua failed to meet certain project milestones contained in the Original PPA, which Hu Honua disputed. Based on those alleged failures, HELCO purported to terminate the Original PPA. By that time, Hu Honua had expended more than $100 million and its plant was approximately 50% completed.

On November 30, 2016, Hu Honua filed suit in *Hu Honua Bioenergy, LLC v. Hawaiian Electric Industries, Inc. et al*., Civil No. 16-00634 JSM-KJM, in the United States District Court for the District of Hawai'i, challenging the purported termination and other wrongful conduct of HELCO and others through various antitrust and tort claims. As part of a settlement, Hu Honua and HELCO agreed that HELCO would (1) rescind its termination of the Original PPA, (2) enter into the Amended PPA with Hu Honua, and (3) seek PUC approval of the Amended PPA. *See* ROA 1 [Dkt. 89] at 6-537.

Accordingly, HELCO filed a Letter Request for Approval of the Amended PPA with the PUC on May 9, 2017 ("Letter Request"). *See id.* at 7-14. The primary amendments extended the project term, lowered Hu Honua's energy rates, and renewed certain project milestones in the Original PPA. All other terms of the Original PPA remained the same, including Hu Honua's changing the existing power plant into a renewable biomass power plant. *See id.* The Letter

Request also highlighted the importance of completing the Hu Honua project by December 31, 2018 to qualify for a substantial federal Investment Tax Credit ("ITC"), without which the biomass power plant project would not have been financially viable. ROA 1 [Dkt. 89] at 9.

3. 2017 Docket.

Initially, HELCO filed the Letter Request in the 2012 Docket. *See* ROA 1 [Dkt. 89] at 545-547. The PUC chose "to transfer HELCO's Letter Request into a new proceeding," stating that "[t]he specific facts and circumstances surrounding the Original PPA and the [Amended] PPA warrant a transfer in lieu of the filing of a new application" because, among other things, "[t]he majority of the provisions contained in the Original PPA have not been materially changed in the [Amended] PPA." *See id.* at 541-554. The PUC initiated Docket No. 2017-0122 ("2017 Docket") to review the Amended PPA. *Id*. at 554. The "significant changes in the [Amended] PPA are generally focused on revisions to the Contract Price, Milestone Events, and increasing the term of the Original PPA from 20 to 30 years." *Id.* at 546. Therefore, as described below, the PUC limited the issues to be reviewed in the 2017 Docket. *See id.* at 541-554.

a. LOL's Motion to Upgrade Status.

On May 24, 2017, LOL filed certain exhibits with the PUC, including the credentials supporting the alleged agricultural expertise of LOL's executive director, Henry Curtis. ROA 3 [Dkt. 91] at 6-34. The Exhibits did not allege how the approval of the Amended PPA would harm or injure LOL, or otherwise justify LOL's standing. *Id.*

On June 2, 2017, LOL filed its Motion to Upgrade Status, which was substantially similar to its Motion to Intervene filed in the 2012 Docket. ROA 4 [Dkt. 92] at 62-71. In describing the "nature and extent of the applicant's property, financial, and other interest in the pending matter," LOL stated that, "Our members are very deeply concerned about climate change, biodiversity, and the spread of invasive species." *Id.* at 67. LOL further stated that it "believes

that the efforts to protect our archipelago from the raves of climate change, and the introduction of alien species has not been adequately protected and funded by legislative actions." *Id.* In describing how LOL's interests would be affected, LOL said the Amended PPA "involves a lot of classified documents dealing with externalities. The only way of protecting our interests is by accessing the documents." *Id.*

LOL also argued that other parties did not represent LOL's interests because "the Consumer Advocate has been slow to analyze non-financial factors," and LOL was concerned that the Consumer Advocate lacked the expertise "to understand externalities." ROA 4 [Dkt. 92] at 68. LOL distinguished its interests from those of the general public claiming "LOL is concerned with a wider lens that encompasses externalities including social justice, environmental justice, climate justice, and greenhouse gas impacts." *Id.* at 69. LOL claimed that the Hu Honua "project could only make sense if non-financial factors overwhelmed the financial factors." *Id*. at 63. Amongst the non-financial factors singled out by LOL were "reductions in fossil fuel consumption and related emissions." *Id.*

HELCO and Hu Honua opposed LOL's Motion to Upgrade Status. ROA 7 [Dkt. 95] at 6-10, 25-29; ROA 15 [Dkt. 105] at 10. HELCO objected to LOL's intervention because LOL failed to demonstrate any additional interests or expertise to justify a change in its limited participant status granted in the 2012 Docket. ROA 7 [Dkt. 95] at 8. HELCO further argued that LOL's purported concern about a wide range of externalities would unreasonably broaden the limited issues raised in the docket and unduly delay the proceeding. *Id.* Hu Honua joined HELCO's objection. *Id*. at 25-29.

On June 6, 2017, the PUC issued Order No. 34597 establishing a procedural schedule, statement of the issues, and scope of participation for participants. ROA 6 [Dkt. 94] at 12-28. The PUC adopted the Consumer Advocate's proposed issues, and limited the 2017 Docket to (1)

whether HELCO met its burden of proof in support of its request to waive Hu Honua's project from the PUC's Framework for Competitive Bidding; (2) whether the power purchase costs to be paid by HELCO under the Amended PPA are reasonable, prudent, and in the public interest; and (3) whether Hu Honua met its burden of proof to support its request for preferential rates for purchase of renewable energy under Haw. Rev. Stat. § 269-27.3. *Id.* at 17-18. The PUC also preliminarily permitted LOL to participate on a limited basis on "whether HELCO's purchase power arrangements under the Amended and Restated PPA are prudent and in the public interest" and "on the specific sub-issue of whether the energy price components properly reflect the cost of biomass fuel supply[.]" *Id.* at 19 (emphasis omitted).

On June 23, 2017, the PUC issued Order No. 34561 Denying LOL's Motion to Upgrade Status ("Order Denying Upgraded Status"), finding that:

> As was the case in Docket No. 2012-0212, 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 Docket No. 2012-0212, 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 No. 34597.

ROA 16 [Dkt. 105] at 15; *see also id.* at 11. The PUC allowed LOL continued limited participation status based on LOL's concerns regarding the supply and pricing analysis of the biomass resources under the Amended PPA. *Id.* at 15. Thus, LOL was permitted to participate "on the specific sub-issue of whether the energy price components properly reflect the cost of biomass fuel supply[.]" ROA 6 [Dkt. 94] at 19 (emphasis omitted).

In the 2017 Docket, LOL propounded two sets of information requests ("IR"). *See* ROA 8 [Dkt. 96] at 14-39 (LOL's June 13, 2017 IRs to HELCO, Hu Honua and Consumer Advocate); ROA 19 [Dkt. 108] at 6-28 (LOL's June 29, 2017 Second Set of IRs to Hu Honua and HELCO). Hu Honua and the Consumer Advocate responded to LOL's first set of IRs on June 20, 2017.

See ROA 14 [Dkt. 103] at 37-106, 107-114. Hu Honua responded to LOL's second set of IRs on July 7, 2017. *See* ROA 26 [Dkt. 118] at 6-74.

b. Hu Honua Presented Information Regarding the Project's Greenhouse Gas Emissions for the PUC's Consideration.

Despite the limited scope of the 2017 Docket, **the PUC did consider greenhouse gas emissions and climate change issues**. On June 16, 2017, Hu Honua filed its Economic Impacts and Benefits Report ("EIB Report"), which identified and quantified the economic impacts and benefits of the Project. ROA 12 [Dkt. 101] at 6-9. The benefits included the fact that the Project will **reduce carbon dioxide emissions by 130,000 tons per year**, that the Project will result in 280,000 fewer barrels of fuel oil being imported each year, and electricity supplied will cost less than fossil fuel units. *Id.* at 10, 12, 19.

Additionally, in a filing on July 17, 2017, Hu Honua also included various statements relating to greenhouse gas emissions. ROA 33 [Dkt. 126] at 6-106. For example, in response to public comments regarding greenhouse gas emissions, Hu Honua explained that biomass is a renewable, emissions-reducing technology and that the transportation of logs and crops, which form the biomass fuel source, would have a negligible effect on greenhouse gas emissions. *Id.* at 44 n. 85, 47. Hu Honua also explained that biomass is carbon neutral and is deemed fully renewable under applicable state law. *Id.* at 47-48.

c. The 2017 D&O Approving the Amended PPA.

On July 28, 2017, the PUC issued its 2017 D&O approving the Amended PPA. ROA 37 [Dkt. 130] at 23-90. In the 2017 D&O, the Commission noted that the

> docket process has elicited extensive interest from the public. Since HELCO's filing of its Letter Request, more than 700 public comments have been submitted to the commission. . . Comments in opposition to the Project tended to focus on **potential adverse environmental impacts, an expected rise in greenhouse gas emissions**, an expected increase in HELCO customers' bills, noise and nuisance in the delivery process, and general objections to biomass as a fuel resource.

Id. at 32 (emphasis added).

The Commission acknowledged HELCO's assertion that "[t]he 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 329,000 barrels of fuel oil saved[.]" ROA 37 [Dkt. 130] at 34. The Commission acknowledged HELCO's key finding that the Project would increase the State's Renewable Portfolio Standard by approximately 11% over the 30-year life of the Project. *Id.* at 41. Finally, the Commission concluded:

> 14. 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.

Id. at 85 (emphasis added). The PUC expressly based its approval of the Amended PPA on HRS § 269-27.2(c), and HAR § 6-60-6(2). *Id.* at 26, 85.

LOL did <u>not</u> request a hearing on any of the issues in the 2017 Docket, and thus no hearing was provided for or held.

III. <u>STANDARD OF REVIEW</u>

A. <u>Administrative Agency's Interpretation of Its Own Governing Statute</u>.

An administrative agency's statutory interpretation is "a question of law reviewable *de novo*." *Diamond v. State, Bd. of Land & Nat'l Res.*, 112 Hawai'i 161, 172, 145 P.3d 704, 715 (2006) (citation omitted). However, "persuasive weight" is accorded to "the construction of statutes by administrative agencies charged with overseeing and implementing a particular statutory scheme[.]" *Sam Teague, Ltd. v. Haw. Civil Rights Comm'n*, 89 Hawai'i 269, 276 n. 2,

971 P.2d 1104, 1111 n. 2 (1999) (citing *Aio v. Hamada,* 66 Haw. 401, 406-07, 664 P.2d 727, 731 (1983)). If the statutory language is broad or ambiguous, "the applicable standard of review regarding an agency's interpretation of its own governing statute requires this court to defer to the agency's expertise and to follow the agency's construction of the statute unless that construction is palpably erroneous." *Gilian v. Gov't Employees Ins. Co.*, 119 Hawai'i 109, 117-18, 194 P.3d 1071, 1079-80 (2008).

B. Administrative Agency's Interpretation of its Own Rules.

"An agency's interpretation of its own rules is generally entitled to deference" unless it is "plainly erroneous or inconsistent with the underlying legislative purpose." *Kaleikini v. Yoshioka*, 128 Hawai'i 53, 67, 283 P.3d 60, 74 (2012) (citations omitted).

C. Administrative Agency's Conclusions of Law and Findings of Fact.

Pursuant to HRS § 91-14(g), an agency's conclusions of law are reviewed *de novo,* while an agency's factual findings are reviewed for clear error. *Camara v. Agsalud*, 67 Haw. 212, 216,685 P.2d 794, 797 (1984). The same standard applies whether or not the review is from an agency contested or noncontested case. *See In re Robert's Tours & Transp., Inc.*, 104 Hawai'i 98, 102, 85 P.3d 623, 627 (2004) (stating "we see no reason why the standards of review for an agency decision should differ depending on whether the appeal arises from a contested or a noncontested case—assuming that the court has jurisdiction to hear the appeal.").

IV. ARGUMENT

A. The Court Lacks Appellate Jurisdiction Over LOL's Appeal Because It Is An Improper Collateral Attack On The PUC's 2013 Final Order.

To reach the merits of an appeal, this Court must have jurisdiction. As set forth in Hu Honua's Motion to Dismiss for Lack of Appellate Jurisdiction filed October 13, 2017 ("Motion

to Dismiss") and its Statement Contesting Jurisdiction filed November 20, 2017,[2] the Court does not have appellate jurisdiction because the appeal is an impermissible collateral attack on the PUC's 2013 D&O. As Hu Honua explained in the Motion to Dismiss, the instant appeal is an untimely collateral attack on the Commission's approval of the Hu Honua Project in 2013. Thus, the Court should dismiss the appeal.

The elements of an improper collateral attack are present. *See Smallwood v. City and County of Honolulu*, 118 Hawai'i 139, 150, 185 P.3d 887, 898 (App. 2008) (describing elements). The 2013 D&O, which approved the Original PPA, constitutes a final judgment on the merits from a prior PUC proceeding, the 2012 Docket. *Id.* LOL participated in the prior 2012 Docket, and now "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[.]" *Id*. (emphasis removed). LOL seeks to deny the force and effect of the 2013 D&O to block Hu Honua's ability to construct and operate its biomass facility where LOL failed to appeal the 2013 D&O. Lastly, "the present action has an independent purpose and contemplates some other relief or result than the prior adjudication," *id.*, where the 2012 Docket related to approval of the Original PPA and the 2017 Docket sought approval for the Amended PPA.

B. LOL's Appeal Should Be Dismissed For Lack of Jurisdiction Because It Does Not Arise From A Contested Case, A Contested Case Hearing Was Never Requested By LOL, and LOL Lacks Standing to Appeal In the Absence of a Cognizable Injury.

In addition to dismissal based on collateral attack, the Court lacks appellate jurisdiction under HRS § 269-15.51 because (1) LOL's appeal does not arise from a contested case, (2) LOL never requested a contested case hearing by the Commission pursuant to agency rules and (3)

[2] Hu Honua incorporates by reference its Motion to Dismiss and Reply Memorandum filed December 14, 2017, the exhibits attached thereto, and Statement Contesting Jurisdiction. *See* Dkts. 12-21, 148, 158. The PUC agreed that this Court lacks appellate jurisdiction because the appeal does not arise from a contested case. Dkt. 142 at 2-3.

LOL cannot show a cognizable injury to bestow standing. The Court has jurisdiction to hear an agency appeal under HRS § 91-14(a) only if the following jurisdictional requirements are met:

> first, the proceeding that resulted in the unfavorable agency action must have been a "contested case" hearing—i.e., a hearing that was (1) "required by law" and (2) determined the "rights, duties, and privileges of specific parties"; second, the agency's action must represent "a final decision and 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.

Kaleikini v. Thielen, 124 Hawai'i 1, 16–17, 237 P.3d 1067, 1082–83 (2010) (citation & internal brackets omitted; emphasis in original).

LOL fails to satisfy at least three of the *Kaleikini* factors. As described in the Motion to Dismiss, the appeal does not arise from a contested case, as required by HRS § 269-15.51, for a direct appeal to this Court. Second, LOL failed to follow the agency's applicable rules to timely request a contested case where it had every opportunity to do so, even as a participant without intervention. *See Simpson v. Dep't of Land & Nat'l Res.*, 8 Haw. App. 16, 24-25, 791 P.2d 1267, 1273 (1990) (holding hearing was not contested case where party failed to follow agency rules to request contested case), *overruled on other grounds*, *Kaniakapupu v. Land Use Comm'n*, 111 Hawai'i 124, 136, 139 P.3d 712, 724 (2006). Third, LOL lacks standing to appeal.

1. LOL's Appeal is Not From a Contested Case.

To be a "contested case," it must be shown that (1) the agency was required by law to hold a hearing and (2) the resulting decision determined the rights, duties, or privileges of specific parties. *Kaniakapupu v. Land Use Comm'n*, 111 Hawai'i at 132, 139 P.3d at 721. Generally, a hearing is "required by law" when it is required by "(1) agency rule, (2) statute, or (3) constitutional due process." *Id.*

In the Opening Brief, LOL bases its entitlement to a contested case hearing **solely** on

constitutional due process. *See* Opening Brief at 18-25.[3] In doing so, LOL heavily relies on the Court's recent recognition of an enforceable property interest in a "clean and healthful environment" under article XI, § 9 of the Hawai'i Constitution. *Id*. at 18-21 (citing *In Re Application Of Maui Electric Co., Ltd.*, 141 Hawai'i 249, 408 P.3d 1 (2017) ("*Maui Electric*")). While the *Maui Electric* case appears remarkably similar to this appeal, upon closer inspection the significant factual distinctions show how *Maui Electric* does **not** support LOL's entitlement to a contested case. Specifically, *Maui Electric* does not support reversal of the PUC in this case where (1) LOL did not follow agency rules and procedure to request a contested case; (2) the PUC allowed LOL to substantively participate as a participant; (3) LOL did not allege a cognizable injury; and (4) the power plant at issue here is fueled by a renewable resource, biomass, and not by fossil fuels.

a. ***Maui Electric* Requires that Agency Rules for Requesting a Contested Case Hearing Must be Followed to Obtain A Due Process Entitlement.**

In *Maui Electric*, an environmental organization, Sierra Club, appealed the PUC's decision to deny Sierra Club's motion to intervene or to participate in a proceeding to approve a power purchase agreement involving a fossil fuel energy plant. The power purchase agreement provided for the utility, Maui Electric, to continue to purchase energy from Hawaiian Commercial & Sugar Co.'s ("HC&S") Pu'unene Plant, "an internal bagasse-fired power plant that also burned a number of other fuels, including coal and petroleum." *Maui Electric*, 141 Hawai'i at 253, 408 P.3d at 5.

Sierra Club, on behalf of itself and "its members who live in close proximity to the

[3] As shown in the Motion to Dismiss briefing, neither agency rule nor statutory authority required the PUC to hold a contested case in approving the Amended PPA, and LOL does not argue otherwise in the Opening Brief. *See* Memorandum in Support of Motion to Dismiss at 13-15 [Dkt. 12] (demonstrating that neither HRS § 269-27.2(c) nor HAR § 6-60-6(2), upon which the PUC approved the Amended PPA, required a contested case hearing); Reply at 6 (showing HRS §§ 269-16(b) & 269-27.2(d) do not require contested case hearing).

Pu‘unene Plant," timely filed a motion to intervene or to participate without intervention in the PUC proceedings. *Id*. at 254, 408 P.3d at 6. Sierra Club argued that "the Pu‘unene Plant relied too heavily on coal in order to meet its power obligations under the existing agreement and also that its members were concerned about the public health and visibility impacts of burning coal." *Id.* (internal quotation marks omitted). Sierra Club submitted declarations that, due to the plant's operations, its members "were forced to close windows of their homes and run air filters to protect against harmful pollution," and that the state Department of Health sought to impose "a fine of over one million dollars on HC&S in the previous year as a result of more than four hundred violations of the Clean Air Act." *Id*. (footnote omitted).

The PUC denied Sierra Club's motion to intervene or to participate without intervention, therefore completely barring Sierra Club from participating in the proceeding to review the power purchase agreement. *Maui Electric*, 141 Hawai‘i at 254, 408 P.3d at 6. Ultimately, the Commission approved the power purchase agreement. *Id*. at 256, 408 P.3d at 8.

On appeal, the Supreme Court concluded that, "under the circumstances of this case," Sierra Club asserted a protectable property interest in a clean and healthful environment as recognized by article XI, § 9 of the Hawai‘i Constitution and as defined by HRS Chapter 269. *Maui Electric*, 141 Hawai‘i at 253, 408 P.3d at 5. Because the approval of the power purchase agreement affected Sierra Club's environmental quality rights, Sierra Club's due process right to a hearing was denied by the PUC's refusal to allow Sierra Club to intervene in the proceeding either as a party-intervenor or as a participant.

The Court next turned to whether the procedures undertaken by the PUC accorded with Sierra Club's due process rights. The Court reasoned that a contested case hearing would be required "when the requirements of standing were met and the agency's rules were followed":

> We have held that, "as a matter of constitutional due process, an agency hearing is ... required where the issuance of a permit implicating an applicant's property

> rights adversely affects the constitutionally protected rights of other interested persons **who have followed the agency's rules governing participation in contested cases**." Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994). In other words, the court in Pele Defense Fund concluded that **when the requirements of standing were met and the agency's rules were followed**, an agency hearing was required when the challenged State action "adversely affects the constitutionally protected rights" of others. Id. (citing other subsections of the opinion addressing the requirements of standing and compliance with agency rules).

Maui Electric, 141 Hawai'i at 265, 408 P.3d at 17 (underlining in original; bold added). The Court noted that Sierra Club had asserted "a fundamental due process right to participate in a hearing" in multiple PUC filings. *Id.* at 254, 408 P.3d at 6 (emphasis added). In that instance, Sierra Club's right to a clean and healthful environment was "directly affected" by the PUC's "approval of a power purchase agreement with an energy producer **that relies on the burning of coal and petroleum in its operations** and has been charged with violation of the State's visible emissions standards." *Id.* at 265-66, 408 P.3d at 17-18 (emphasis added).

b. *Maui Electric* Does Not Support LOL's Claimed Entitlement to a Contested Case Hearing Where LOL Never Requested a Hearing.

Compared to the specific facts of the *Maui Electric* case, LOL cannot claim a due process right to a contested case hearing even if, in general, a cognizable property interest in a clean and healthful environment exists and HRS Chapter 269 is one of the "laws relating to environmental quality" enacted to protect such an interest. This is because LOL's undisputed failure to demand a contested case hearing under established PUC administrative rules negates any entitlement to a hearing that LOL would have otherwise had. Under the Court's guiding due process precedent, the existence of a property interest is simply not enough to trigger a contested case right where the person failed to "follow[] the agency's rules governing participation in contested cases." *Maui Electric*, 141 Hawai'i at 265, 408 P.3d at 17 (quoting *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994)).

The Court applies "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." *Maui Electric*, 141 Hawai'i at 260, 408 P.3d at 12 (quoting *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989)) (internal quotation marks omitted). If the first element is satisfied, the Court must still consider "what specific procedures are required to protect" a recognized property right. *Id.* In determining whether the specific required procedure is a contested case, the Court has long insisted that "the agency's rules governing participation in contested cases" were complied with. *Id.* at 265, 408 P.3d at 17.

At no time during the review of the Amended PPA did LOL request or petition for a contested case pursuant to PUC rules. HAR § 6-61-74 *et seq*. sets forth the PUC's administrative rules generally for filing applications or petitions with the Commission. A petitioner must "[s]tate clearly and concisely the … relief sought" and "[c]ite the appropriate statutory provision or other authority" under which the relief is sought. HAR § 6-61-74. In the rule for applications for intervention, the rule also affords the opportunity to request a contested case, where it specifically directs the applicant to identify the nature of the entitlement to participate "in the hearing[.]" HAR § 6-61-55.

LOL failed to follow or take advantage of any of these agency procedures to request a contested case hearing. LOL therefore is not entitled at this stage to demand such a hearing. *Compare Kilakila 'O Haleakala v. Bd. of Land & Natural Res.*, 131 Hawai'i 193, 204-05, 317 P.3d 27, 38-39 (2013) (holding contested case hearing should have been held where petitioner "did all it could" in agency to seek hearing) *with Kaniakapupu v. Land Use Comm'n*, 111 Hawai'i 124, 137, 139 P.3d 712, 725 (2006) (dismissing cultural hui's appeal for lack of subject

matter jurisdiction where hui "did not request a contested case hearing"); *see also Hui Kakoo Aina Hoopulapula v. Bd. of Land & Natural Res.*, 112 Hawai'i 28, 42, 143 P.3d 1230, 1244 (2006) (dismissing appeal of agency approval of water lease where organization failed to request a contested case hearing).

Unlike Sierra Club which was barred from any participation in the approval of the PPA in *Maui Electric*, the PUC granted LOL participant status in the review of the Amended PPA in this case. Thus, LOL was permitted by the PUC to examine whether the Amended PPA was prudent and in the public interest, did submit a separate statement of position for consideration by the Commission, did issue multiple information requests to the parties, did receive pertinent informational responses from the parties, and was involved overall in the process of review. LOL's actual participation in the approval process in this case is a far cry from the complete bar that Sierra Club—which did request a hearing—suffered in *Maui Electric*. *See Maui Electric*, 141 Hawai'i at 266, 408 P.3d at 18 (observing "[t]he risks of an erroneous deprivation are high in this case absent the protections provided by a contested case hearing, particularly in light of the potential long-term impact on the air quality in the area, the denial of Sierra Club's motion for intervention or participation in the proceeding, and the absence of other proceedings in which Sierra Club could have a meaningful opportunity to be heard concerning HC & S's performance of the Agreement.") (emphasis added).

A "contested case hearing is not essential to the guarantee of due process." *In re Application of Herrick*, 82 Hawai'i 329, 345, 922 P.2d 942, 958 (1996), *quoting Medeiros v. Hawai'i County Planning Comm'n*, 8 Haw. App. 183, 195, 797 P.2d 59, 65 (1990).[4] Given its

[4] Thus, in *Medeiros*, the ICA held that the approval of a geothermal resource permit application that was not statutorily subject to a contested case hearing did not violate constitutional due process where the procedures actually employed by the agency provided neighboring property owners with an opportunity to be heard in a meaningful manner. *Medeiros*, 8 Haw. App. at 196-99, 797 P.2d at 66-68.

actual participation in the PUC proceeding, LOL was given "an opportunity to be heard at a meaningful time and in a meaningful manner" sufficient to satisfy any constitutional due process concerns without a contested case hearing. *Id.* at 269, 408 P.3d at 21 (quoting *Freitas v. Admin. Dir. of Courts*, 108 Hawai'i 31, 44, 116 P.3d 673, 686 (2005)). LOL exercised its "right to submit evidence and argument on the issues" relevant to the impact the Hu Honua renewable energy plant would have on displacing the existing fossil fuel plants on the Big Island. *Id.* Although LOL takes umbrage with the limitations that the PUC, in its discretion, placed on LOL's participation, the Court has correctly recognized that "the Commission 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" to LOL. *Id.* at 270, 408 P.3d at 22.

2. <u>LOL Lacks Standing to Appeal Because It Has Not Alleged a Judicially-Cognizable Injury</u>.

Jurisdiction is also absent here because LOL lacks standing to maintain this appeal. LOL's Opening Brief mainly focuses on the necessity of a contested case hearing under *Maui Electric* to justify this appeal. LOL simply concludes that because the *Maui Electric* Court found that the proposed intervenor in that case had standing to require a hearing, LOL likewise has standing to demand a contested case in this appeal. However, as the *Maui Electric* Court itself said, establishing that a contested case was required does not end the Court's inquiry into justiciability. "[T]he standing requirement to challenge an agency action is distinct from the procedural right to do so." *Maui Electric*, 141 Hawai'i at 258 n.12, 408 P.3d at 10 n.12 (observing "[t]he private right of action inquiry focuses on the question of whether <u>any</u> private party can sue ... while the standing inquiry focuses on whether <u>a particular</u> private party is an appropriate plaintiff.") (quoting *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 406 n. 20, 235 P.3d 1103, 1118 n. 20 (2010)) (emphasis in original). LOL must have standing.

Here, it does not.

a. <u>LOL Only Alleges a General "Concern" About Climate Change, Greenhouse Gas, and Environmental Justice, Not An Actual or Threatened Injury to LOL or Its Members</u>.

To establish standing, LOL must show that (1) it suffered an actual or threatened injury, (2) that injury is fairly traceable to the PUC's approval of the Amended PPA, and (3) a favorable decision would likely provide relief for LOL's injury. *See Sierra Club v. Dep't of Transportation*, 115 Hawai'i 299, 319, 167 P.3d 292, 312 (2007). LOL fails to meet these criteria because it has not suffered an actual or threatened injury. Thus, LOL has no standing to appeal the 2017 D&O.

"[T]he appellate courts of this state have generally recognized public interest concerns that warrant the lowering of standing barriers in ... cases ... pertaining to environmental concerns." *Sierra Club*, 115 Hawai'i at 320, 167 P.3d at 313 (citing *Mottl v. Miyahira*, 95 Hawai'i 381, 393, 23 P.3d 716, 728 (2001)). However, LOL must still assert "a judicially-cognizable injury, that is, **a harm to some legally-protected interest**." *Id.* at 321, 167 P.3d at 314 (emphasis added); *see also McDermott v. Ige*, 135 Hawai'i 275, 286, 349 P.3d 382, 393 (2015) (noting "while the basis for standing has expanded in cases implicating environmental concerns …, <u>plaintiffs must still satisfy the injury-in-fact test.</u>") (citation omitted; emphasis in original).

Here, LOL's Motion to Upgrade Status only raised a general "concern" about climate change, greenhouse gas, and environmental justice. LOL did **<u>not</u>** assert any actual or threatened injuries to any of its members. LOL stated: "Our members are very deeply concerned about climate change, biodiversity, and the spread of invasive species." ROA 4 [Dkt. 92] at 67. LOL also stated: "LOL is concerned with a wider lens that encompasses externalities including social justice, environmental justice, climate justice, and greenhouse gas impacts." *Id.* at 69.

These allegations do not confer standing to LOL and are nearly identical to the generalized aesthetic and environmental interests that the Court rejected as conferring a protectable property interest in *Sandy Beach Def. Fund v. City Council of City & County of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 261 (1989). While Hawai‘i island residents *in the abstract* may have a protectable interest in a clean and healthful environment, LOL must still show that its members' rights are subject to "an actual or threatened injury." *Sierra Club*, 115 Hawai‘i at 319, 167 P.3d at 312. Here, there is simply no judicially cognizable injury.

LOL's apparent lack of injury contrasts with Sierra Club's in *Maui Electric*. In that case, Sierra Club submitted two affidavits from its members to its motion to intervene, asserting the specific harms the members suffered to their legally protected interests in a clean and healthful environment. *Maui Electric*, 141 Hawai‘i at 270, 408 P.3d at 22. The Court concluded that the affidavits met that standard because they "explain the potential health effects of burning coal and potential impacts of the operation of the Pu‘unene Plant" on the member's health. *Id.* (emphasis added). Specifically, the affidavits explained that in 2014, the Department of Health issued the HC&S Pu‘unene Plant a Notice of Violation and a million dollar fine regarding its emissions. *Id.* Because of this air pollution, one of the affiants stated that "she closes the windows at her home and runs air filters inside her house when emissions levels are high." *Id.* The affiant also "expressed concern that HC&S burns more coal and produced more air pollution in order to meet its obligations to Maui Electric and that the Commission's decision with regard to the Application could impact her long-term health and well-being." *Id.* (internal quotation marks omitted). Thus, the Court found that Sierra Club suffered from a threatened injury that was fairly traceable to the operations of the HC&S plant to satisfy standing. *Id.; see also, Application of Hawaiian Elec. Co., Inc.*, 56 Haw. 260, 264, 535 P.2d 1102, 1105 (1975) (noting "two members of appellant Life of The Land, in opposing the rate increase, testified that they would be paying

the higher utility rates. A ratepayer who is compelled to pay higher utility rates by agency action is a person specially, personally and adversely affected.").

In contrast, **LOL did not make <u>any</u> specific allegations of actual or threatened harm or injury to its members** in its Motion to Upgrade Status. *See generally* ROA 4 [Dkt. 92] at 62-71; *see also* Opening Brief at 18-19. Indeed, the generalized concerns expressed by LOL differ from, and do not rise to, the type and character of the threatened harms or injuries claimed by Sierra Club in *Maui Electric*. *See Maui Electric*, 141 Hawai'i at 270-71, 408 P.3d at 22-23. Hu Honua's renewable biomass plant is intended to <u>displace</u> other existing imported fossil-fuel based generation on Hawai'i island, thus significantly lowering overall greenhouse gas emissions. Accordingly, LOL has not established the requisite harm or injury. *See Sierra Club*, 115 Hawai'i at 322, 167 P.3d at 315.[5]

b. <u>LOL Did Not Suffer a Procedural Injury Because it Never Requested a Contested Case Hearing</u>.

This Court has also acknowledged that procedural injury may give rise to standing, but that will not save LOL's appeal either. In order to establish a procedural injury, LOL must show that (1) it has been accorded a procedural right, which was violated in some way; (2) the procedural right protects LOL's concrete interests; and (3) the procedural violation threatens LOL's concrete interests, thus affecting it "personally," which may be demonstrated by showing (a) a "geographic nexus" to the site in question and (b) that the procedural violation increases the risk of harm to LOL's concrete interests" *Sierra Club*, 115 Hawai'i at 329, 167 P.3d at 322 (citations and footnote omitted). LOL cannot show a procedural injury under this test.

The first element requires that LOL suffered a violation of a procedural right. *Id.* LOL

[5] Furthermore, LOL also claimed the review of the Amended PPA "involves a lot of classified documents dealing with externalities. The only way of protecting our interests is by accessing the documents." ROA 4 [Dkt. 92] at 67. However, LOL received detailed responses from Hu Honua in complying with two sets of information requests from LOL. *See* ROA 14 [Dkt. 103] at 37-106, 107-114; ROA 26 [Dkt. 118] at 6-74.

fails to make this showing. Unlike HRS Chapter 343, the statute at issue in both *Sierra Club v. Dep't of Transp*. and *Sierra Club v. Hawaii Tourism Authority*, HRS Chapter 269 is not "procedural in nature." *Sierra Club*, 115 Hawai'i at 326, 167 P.3d at 319. In contrast, Chapter 269, and HRS § 269-6 in particular, are substantive in nature.

LOL also cannot show it has been accorded a procedural right because it failed to avail itself of the right to request a contested case hearing in the Commission. Instead, LOL alleges that it suffered a procedural injury because it was denied due process to protect its rights under article XI, § 9 of the Hawai'i Constitution to a clean and healthful environment. *See* Opening Brief at 18-20, 24. However, LOL does not actually meet this element of procedural injury because it was not denied a *procedural right* given that LOL did not request a contested case hearing per the PUC's administrative rules. Any *substantive* rights Sierra Club may have under article XI, § 9 of the Hawai'i Constitution (and HRS Chapter 269) do not automatically translate to *procedural* rights under a statutory procedural injury framework.

In addition, LOL cannot show a procedural violation that threatens LOL's concrete interests "personally," which is required under the third element of procedural injury. The concrete interest requirement "is essentially encompassed in the injury-in-fact test." *Haw. Tourism Auth.*, 100 Hawai'i at 251 n. 14, 59 P.3d at 866 n. 14 (plurality opinion). For the same reasons LOL cannot satisfy the injury-in-fact requirements, LOL fails to prove a concrete injury that "personally" affects LOL. For example, LOL did not show "a concrete interest based on a geographic nexus" to the Hu Honua plant, as Sierra Club demonstrated by affidavit of its members' geographic proximity to Kahului Harbor in *Sierra Club*, 115 Hawai'i at 330, 167 P.3d at 323, or to the Pu'unene Plant in *Maui Electric*, 141 Hawai'i at 270-71, 408 P.3d at 22-2.

C. The PUC Satisfied Its Statutory Obligation to Consider the State's Reliance on Fossil Fuels, Including the Impact of Greenhouse Gas Emissions, In Approving the Amended PPA.

Even if this Court were to address LOL's appeal on the merits, LOL has failed to demonstrate that the PUC erred in approving the Amended PPA. LOL's argument that the Commission did not comply with HRS § 269-6(b) because the 2017 D&O lacked specific findings of fact relating to greenhouse gas emissions is misplaced because there is no such burden imposed on the Commission. The plain and unambiguous language of Section 269-6(b) only requires the Commission to "explicitly consider, quantitatively or qualitatively, **the effect of the State's reliance on fossil fuels** on … [*inter alia*,] greenhouse gas emissions" when determining "**the reasonableness of the costs** of utility systems capital improvements and operations[.]" HRS § 269-6(b) (emphasis added). As the words of Section 269-6(b) make clear, the PUC's duty is to explicitly consider ***the State's reliance on fossil fuels*** in determining whether the maintenance of fossil fuel plants is reasonable; the impact of greenhouse gas emissions is but one aspect of the analysis.

As Hu Honua demonstrates below, the Legislature intended the Commission to take into account **hidden costs or externalities when evaluating fossil fuel energy sources** compared to renewable resources in order to ween the State's historical dependency on climate-hazardous fossil fuels. Contrary to LOL's arguments, the statute is not a mandate to the PUC to engage in a free-ranging accounting of greenhouse gas emission effects related to renewable energy projects which are intended to ***mitigate*** the State's reliance on fossil fuels.

The Legislature has found a direct relationship between increasing the use of renewable energy generation and reducing greenhouse gas emissions. *See, e.g.*, HRS § 226-18 (associating the use of renewable energy sources with reducing greenhouse gas emissions in utility applications and through agriculture initiatives). Any effort by the PUC to approve and

implement more renewable energy that would replace fossil fuel generation ultimately reduces greenhouse gas emissions. Thus, the question before the PUC was whether to approve the Hu Honua Project, which would reduce greenhouse gas emissions by virtue of Hu Honua's renewable energy generation, or whether the price offered by Hu Honua for renewable energy generation and reduction of greenhouse gas emissions were too high. Therefore, the PUC's consideration of the Hu Honua renewable energy project is tantamount to the consideration of greenhouse gas emissions, irrespective of whether or not the PUC specifically referenced the words "greenhouse gas" in the 2017 D&O.

Nonetheless, even if Section 269-6(b) were deemed to require the PUC to explicitly consider the effects of greenhouse gas emissions in approving renewable energy projects, the Commission in this case did consider multiple submissions relating to potential greenhouse gas emissions and climate change effects and did acknowledge that review in the 2017 D&O. *See, e.g.*, ROA 12 [Dkt. 101] at 6-9; ROA 33 [Dkt. 126] at 6-106. While the PUC did not make specific findings or conclusions on the impact of greenhouse gas emissions as a result of the Hu Honua project, the Commission met its obligations by explicitly recognizing in findings of fact and conclusions of law that, due to the energy capacity generation and electricity cost savings resulting from the Amended PPA, the Hu Honua biomass plant would ultimately displace HELCO's existing fossil fuel plants and accelerate the State's transition to 100% renewable energy resources. Thus, LOL's arguments that the PUC neglected its duties under Section 269-6(b) lack merit.

1. The PUC May Satisfy Its Duty Under HRS Section 269-6(b) to "Explicitly Consider" Greenhouse Gas Emissions by Analyzing the Displacement of Fossil Fuel Plants by the Hu Honua Biomass Plant.

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 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.

HRS § 269-6(b) (emphasis added).

In its appeal, LOL argues that Section 269-6(b) requires the PUC to explicitly consider the greenhouse gas emission generated by various incidental activities that would occur in the operation of the Hu Honua biomass plant. LOL argues the Commission failed to address "the GHG emissions of all stages of fossil fuel use in the growing, harvesting, and transporting of the Hu Honua Project." Opening Brief at 15 (emphasis added). However, LOL does not cite any statutory or administrative authority requiring the PUC to consider these issues, but instead relies on the legislative purpose of HRS § 269-6(b) to impose this requirement. *See id.* But neither the broad language of the statute nor its legislative history support LOL's erroneous position.

The statutory "mandate" in HRS § 269-6(b) is not as comprehensive as LOL contends. First, the duty of the PUC to consider greenhouse gas emissions is explicitly in connection with the PUC's "determinations of the reasonableness of the costs of utility system capital improvements and operations." HRS § 269-6(b) (emphasis added). Therefore, the considerations of greenhouse gas emissions must be tied to the costs of utility system capital improvements or operations being reviewed by the PUC. The legislature did not direct the PUC to undertake a free-ranging analysis of the impact of greenhouse gas emissions of all aspects of a proposed power purchase agreement.

Second, the PUC in fact satisfied the statutory mandate to "explicitly consider,

quantitatively or qualitatively" the State's reliance on fossil fuels by reviewing submissions relating to greenhouse gas emissions and subsequently including findings of fact and conclusion of law based on that review in the 2017 D&O. Because the statutory language is "broad and indefinite," the Court must give effect to the PUC's interpretation of that meaning, and cannot require the Commission to do more than what was required by HRS § 269-6(b).

> [It is] a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which **contains words of broad and indefinite meaning**, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous.

Aio, 66 Haw. at 407, 644 P.2d at 731 (emphasis added). To the extent that the Legislature directed the PUC to "explicitly consider, quantitatively or qualitatively" fossil fuel reliance in determining the "reasonableness" of power plant infrastructure costs, the Commission's construction of this broad language was not palpably erroneous. *See id*.

Third, the legislative history supports the PUC's construction of its statutory duty. The legislative history of Act 109, 2011 Session Laws of Hawai‘i, which added the greenhouse gas emission language to HRS § 269-6(b), shows that the Legislature amended the statute to compel the PUC to consider the costs of an energy project powered by fossil fuels, not renewable resources. The Legislature intended that the PUC explicitly take into account the hidden costs or externalities in operating a fossil fuel-powered energy plant in relation to the higher operational costs of a renewable energy plant. That is, the Legislature intended to direct the PUC to properly account for the hidden costs of greenhouse gas emissions generated by a fossil fuel plant. That way, a project that used a clean renewable resource such as biomass would not be disadvantaged, by a cost perspective, by a fossil fuel project which was powered by a less-expensive fossil fuel source but incurred hidden costs, such as air pollution created as a result of burning fossil fuels, that may have not been previously factored in by the Commission's analysis.

The conference committee report on the senate bill that was enacted as Act 109 stated:

> The purpose of this measure is to require the Public Utilities Commission, when making determinations of the reasonableness of the costs of utility system capital improvements and operations, to consider the need to reduce the State's reliance on fossil fuels and to consider the benefits of capital improvements for renewable energy generation and energy efficiency despite the short-term expense.
>
> Your Committee on Conference finds that in order to help reduce the State's dependence on fossil fuels the Public Utilities Commission needs to give consideration to the long-term benefits of projects that may incur larger short-term costs than fossil fuel dependent or less energy-efficient alternatives. This measure gives the Public Utilities Commission specific direction to make those considerations during the performance of its duties.

Conf. Com. Rep. No. 134 (Apr. 20, 2011) (emphasis added); *see* H. Stand. Com. Rep. No. 1420 (Apr. 5, 2011) ("The bill also allows PUC to determine that short-term costs or direct costs that are higher than alternatives relying more heavily on fossil fuels are reasonable.") (emphasis added); *see also* H. Stand. Com. Rep. No. 1004 (Mar. 21, 2011) ("The purpose of this measure is to require the Public Utilities Commission to consider the need to reduce the State's reliance on fossil fuels when exercising its authority under chapter 269, Hawaii Revised Statutes.") (emphasis added).

Based on the legislative history, it is apparent that the Legislature intended that the PUC's review must consider the true or effective costs of fossil fuel energy sources vis-a-vis renewable resources "that may incur larger short-term costs than fossil fuel dependent" sources. Conf. Com. Rep. No. 134. Act 109 was enacted to remedy a perceived imbalance in the PUC's previous reviews which may not have fully taken into account the environmental externalities inherent in fossil fuel powered projects. *See* H. Stand. Comm. Rep. No. 1004, in 2011 House Journal at 1332 ("Your Committee further finds that these adverse conditions carry with them hidden costs that are not always considered by the Public Utilities Commission when the Commission makes decisions regarding utility system capital improvements and operations.").

The Legislature's intent is also reflected in the provision contained in Section 269-6(b), which was also added by Act 109, that follows immediately after the directive to consider 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." HRS § 269-6(b). Here, the legislature was explicitly informing the PUC that approval of renewable energy projects may be considered reasonable, despite higher short-term costs, given the artificially lower costs of fossil fuel resources which do not take into account "the impacts resulting from the use of fossil fuels." *Id*.

Accordingly, the text and legislative history of Act 109 refutes LOL's argument that HRS § 269-6(b) demands that the PUC explicitly consider greenhouse gas emissions from *every discrete activity* that may relate to a project's operation, especially where the project is one exclusively powered by a renewable resource. The statute does not require the PUC to expressly consider, as LOL demands, the potential greenhouse gas emissions of every component of a renewable energy project. Instead, as the legislative history shows, the PUC must consider the cost of greenhouse gas emissions from a fossil fuel-based "utility system capital improvements and operations" and its effect on the State's reliance of fossil fuel-based energy. HRS § 269-6(b).

The Court's *Maui Electric* decision is not to the contrary. In *Maui Electric*, the Court examined the history of amendments to Section 269-6(b), which "pertains to the general powers and duties of the Commission and prescribes that the Commission 'shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation.'" *Maui Electric*, 141 Hawai'i at 261, 408 P.3d at 13 (quoting HRS § 269-6(b) (Supp. 2013)). The Court said,

> This statutory provision also provides that in its decision-making, **the Commission "shall explicitly consider" the effect of the State's reliance on fossil fuels on the level of "greenhouse gas emissions."** Id. Indeed, dating back as far as 1977, when the legislature adopted HRS § 269–27.2 concerning the

> utilization of electricity generated from nonfossil fuels, **the legislature has repeatedly communicated its intent that the Commission is to reduce the State's dependence on fossil fuels and utilize renewable energy sources**. This intent is manifest in the legislative history of Chapter 269, which unequivocally demonstrates an established State policy of prioritizing the utilization of renewable energy sources to reduce pollution in addition to securing the potential economic benefits and enhanced reliability of the State's energy supply.

Id. at 261-62, 408 P.3d at 13-14 (emphasis added). This Court correctly interpreted the legislature's intent in amending Section 269-6(b) to direct the PUC to consider the effect of the State's historic reliance on **fossil fuels** on the level of greenhouse gas emissions, and not on greenhouse gas effects incidental to the utilization of **renewable energy sources**.

The Court concluded, "Thus, a primary purpose of the amended law 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 greenhouse gases.'" *Maui Electric*, 141 Hawai'i at 263, 408 P.3d at 15 (quoting H. Stand. Comm. Rep. No. 1004) (emphasis added). As recognized by this Court, Section 269-6(b)'s requirement to consider greenhouse gas emissions in connection with "the effect of the State's reliance of fossil fuels" is to accelerate the transition from fossil fuel energy plants to renewable energy plants. "[T]he legislative history of HRS Chapter 269 overwhelmingly demonstrates an established State policy of prioritizing the utilization of renewable energy sources to reduce greenhouse gas emissions in addition to the potential economic benefits and enhanced reliability of the State's energy supply." *Id.* at 269 n. 37, 408 P.3d at 21 n. 37.

2. <u>The PUC Explicitly Considered the Effect of State's Fossil Fuel Reliance By Analyzing the Impact on Displacing Existing Fossil Fuel Plants in Approving the Amended PPA.</u>

In this case, the PUC satisfied its statutory duty under Section 269-6(b). As the Record on Appeal confirms, the Commission reviewed Hu Honua's EIB Report that stated one of the

project benefits would be a reduction of carbon dioxide emissions by 130,000 tons per year. ROA 12 [Dkt. 101] at 10, 12, 19. Hu Honua also addressed concerns from the public comments regarding greenhouse gas emissions by stating that biomass is a renewable, emissions-reducing technology. ROA 33 [Dkt. 126] at 44 n. 85. Hu Honua also explained that the transportation of logs to the Facility would have a negligible effect on greenhouse gas emissions. *Id.* at 47.

The Commission explicitly reduced this review to writing in the 2017 D&O by making clear and unequivocal references to greenhouse gas emissions.[6] For example, the Commission:

- acknowledged that there were public comments relating to concerns about an increase in greenhouse gas emissions. ROA 37 [Dkt. 130] at 32.
- included its consideration of HELCO's representation that "the renewable energy provided by the Project could potentially save approximately 15,700 barrels of fuel per year, which over the term of the A&R PPA amounts to approximately 329,000 barrels of fuel oil saved." *Id.* at 34.
- accepted HELCO's statements that the Project would increase Hawaii's Renewable Portfolio Standard goal levels by approximately 11% over the 30 year life of the Project. *Id.* at 41.

Even if Section 269-6(b) were to mandate the PUC to explicitly consider the impact of greenhouse gas emissions on the Hu Honua project, this is exactly what the PUC did in approving the Amended PPA. Under the clearly erroneous standard, an agency's conclusions must be upheld if it is supported by "reliable, probative and substantial evidence" on the whole record. *Hawai'i Electric Light*, 60 Haw. at 630, 594 P.2d at 617.

As conceded by LOL, the 2017 D&O itself reflects that the PUC reviewed submitted comments that focused on "an expected rise in greenhouse gas emissions[.]" Opening Brief at 16 (citing ROA 37 [Dkt. 130] at 32). LOL argues that the PUC's "bare" consideration of greenhouse gas emissions does not suffice under Section 269-6(b). Instead, LOL argues that the

[6] LOL concedes that the Commission referenced greenhouse gas emissions in the 2017 D&O. Opening Brief at 16 ("PUC's Final Order only once referenced GHG emissions[.]").

PUC was required to make specific findings of fact. *Id*. at 17 (citing *Application of Hawaii Elec. Light Co, Inc*., 60 Haw. 625, 642, 594 P.2d 612, 623 (1979)). LOL's reliance on these cases is misplaced. As the *Hawaii Electric Light* Court explained, specific findings of fact are required of "Ultimate facts [which] must be supported by findings of Basic facts which in turn are required to be supported by the evidence in the record." *Id.* (citations and footnote omitted). Here, the PUC included in the 2017 D&O several references to submissions which pertained to greenhouse gas emissions, climate change and the overall effect of the Hu Honua renewable energy plant in displacing existing fossil fuel plants, thereby satisfying the statutory standard.

Lastly, even if the statutory standard under HRS § 269-6(b) obligated the PUC to make specific findings in "explicitly consider[ing]" the impact of fossil fuel reliance in approving the Amended PPA, the Commission in fact satisfied such a requirement. The 2017 D&O contains sufficient findings of fact on "the effect of the State's reliance on fossil fuels," including greenhouse gas emissions, in approving the Amended PPA.

First, the PUC found that a waiver of the Competitive Bidding Framework for the Amended PPA was warranted, just as the PUC had originally granted a waiver for the Original PPA. A waiver was merited because "The commission finds 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." ROA 37 [Dkt. 130] at 55 (internal quotation marks and brackets omitted). The PUC found that "the Project provides the most viable opportunity to add firm, dispatchable, renewable generation in the near term[.]" *Id.* at 56.

Next, the PUC found that "the Project will provide performance and operational features similar to HELCO's existing [fossil fuel] 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." ROA 37 [Dkt. 130] at 81. Thus, "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." *Id.* at 84.

Consequently, the PUC found that "[b]ased 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**." ROA 37 [Dkt. 130] at 84-85 (emphasis added).

The PUC concluded,

> 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**."

ROA 37 [Dkt. 130] at 85 (emphasis added). As the PUC's own words make clear, in approving the Amended PPA, the PUC expressly considered the impact of "the State's reliance on fossil fuels" including the effects of greenhouse gas emissions and climate change impacts resulting from such dependency on fossil fuel-powered energy. The PUC specifically found that the approval of the Amended PPA would enable the Hu Honua renewable energy power plant to reduce the detrimental climatic effects of fossil fuels by displacing existing fossil fuel plants.

"A presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable." *Hawaii Elec. Light*, 60 Haw. at 630, 594 P.2d at 617 (citations and internal quotation marks omitted). Because the PUC's 2017 D&O complies with Section 269-6(b), it must be given deference by the Court. *See Camara*, 67 Haw. at 216, 685 P.2d at 797 ("To be granted deference, however, the agency's decision must be consistent with the legislative purpose.").

D. The Commission Did Not Deny LOL Its Due Process Rights Nor Did It Clearly Err In Rejecting LOL's Request To Upgrade Its Status To Intervenor.

LOL argues that the Commission clearly erred in rejecting LOL's Motion to Upgrade Status to Intervenor because that denial violated its due process rights and the Commission's findings relating to LOL were clearly erroneous. However, those arguments lack merit.

The PUC properly exercised its discretion to limit LOL's status as a participant without intervention. *See* HAR § 6-61-56 (granting PUC discretion to give a person participation status in lieu of intervention). The general rule concerning the granting of intervention is that, *even in a contested case*, intervention is not a guaranteed right of the movant, but is "a matter resting within the sound discretion of the commission" so long as that discretion is not exercised arbitrarily or capriciously. *In re Application of Hawaiian Elec. Co., Inc*., 56 Haw. 260, 262-63, 535 P.2d 1102, 1104 (1975). In *Hawaiian Electric*, this Court affirmed the PUC's decision to grant LOL (the same appellant here) participant, and not intervenor, status in a contested case, noting that LOL was "represented at practically all of the hearings; met with PUC staff members to discuss the case; submitted proposed cross-examination questions for HECO's witnesses …; and presented limited testimony on the environmental control clause" as well as "submit[ed] proposed findings of fact and conclusions of law." *Id*. Then as now, the PUC's decision to grant

LOL the status of a participant fit squarely in the Commission's discretion and did not materially abridge LOL's actual involvement in the review of the Amended PPA.

The agency's rule on intervention, HAR § 6-61-55, does not require the Commission to unconditionally grant a motion to intervene as a party-intervenor. Instead, it provides the Commission discretion to consider nine factors, including "[t]he extent to which the applicant's participation can assist in the development of a sound record" and "[t]he extent to which the applicant's interest in the proceeding differs from that of the general public[.]" HAR §§ 6-61-55(b)(6), (8). The PUC properly evaluated these criteria in maintaining LOL's participant status in the 2017 Docket.

LOL complains that the Commission clearly erred by ignoring the purported agricultural expertise of its executive director, Henry Curtis, relating to greenhouse gas emissions. *See* Opening Brief at 27. However, in its Motion to Upgrade Status, LOL made no specific arguments tying together Mr. Curtis' agricultural expertise and the specific issues in the 2017 Docket. LOL simply regurgitated the generalized claims it had met the factors from the 2012 Docket. LOL also only articulated generalized interests when it argued that its interests differed from those of the general public. ROA 4 [Dkt. 92] at 69. Instead of providing specific examples of LOL's interests, LOL only stated that it is "concerned with a wider lens that encompasses externalities including social justice, environmental justice, climate justice, and greenhouse gas impacts." *Id.* LOL requested to participate so it could protect these generalized interests by offering Mr. Curtis's purported agricultural expertise. *Id.* at 68. These reasons hardly satisfy one, let alone all nine, of the factors under HAR § 6-61-55(b) for intervenor-party status.

In denying LOL's Motion to Upgrade Status, the Commission twice acknowledged that LOL presented no new arguments from the 2012 Docket. *See* ROA 16 [Dkt. 105] at 11, 15. Specifically, the Commission concluded:

> As was the case in Docket No. 2012-0212, 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 Docket No. 2012-0212, 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 No. 34597.

Id. at 15; *see also id.* at 11.

The issues in the 2017 Docket were limited. *See* ROA 6 [Dkt. 94] at 17-18. Because LOL failed to provide any specific arguments as to why it should have been a party based on those limited issues, the PUC did not clearly err in denying LOL's request to upgrade status.

V. CONCLUSION

Based on the foregoing reasons, the 2017 D&O and Order Denying Upgraded Status should be affirmed.

DATED: Honolulu, Hawai'i, February 26, 2018.

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SCOT-17-0000630

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

LIFE OF THE LAND,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION; HU HONUA BIOENERGY, LLC; HAWAII ELECTRIC LIGHT COMPANY, INC.; HAWAIIAN ELECTRIC COMPANY, INC.; DIVISION OF CONSUMER ADVOCACY; TAWHIRI POWER, LLC; and HAMAKUA ENERGY PARTNERS, L.P.

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APPEAL FROM THE PUBLIC UTILITIES COMMISSION DOCKET NO. 2017-0122 (1) DECISION AND ORDER NO. 34726, FILED JULY 28, 2017 AND (2) ORDER NO. 34651 DENYING LIFE OF THE LAND’S MOTION TO UPGRADE STATUS, FILED JUNE 23, 2017

Comm’r Chair Randall Y. Iwase
Comm’r Lorraine H. Akiba
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SCOT-22-0000418

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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