

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

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

ORDER NO. 37306

(1) DENYING HU HONUA BIOENERGY, LLC'S MOTION FOR RECONSIDERATION
OF ORDER NO. 37205, ISSUED JULY 9, 2020, FILED JULY 20, 2020;
AND (2) ADDRESSING RELATED PROCEDURAL MOTIONS

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By this Order,¹ the Public Utilities Commission
("Commission"), denies Hu Honua's Motion for Reconsideration,
filed July 20, 2020, including its request for a hearing on its
Motion for Reconsideration.² Relatedly, the Commission also

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

²"Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issue July 9, 2020; Memorandum in Support of Motion; Affidavit of Jon Miyata; Affidavit of Eli Katz; Exhibit 1; and Certificate of Service," filed July 20, 2020 ("Hu Honua Motion for Reconsideration").

addresses a number of procedural motions filed by various Parties and Participants as follows: (1) dismisses LOL's Motion for Leave to Oppose Hu Honua's Motion for Reconsideration of Order No. 37205 as moot;³ (2) grants, in part, Hu Honua's Motion for Leave to File a Response to the Parties' and Participants' Replies to Hu Honua's Motion for Reconsideration;⁴ (3) dismisses LOL's Motion for Leave to file a response to Hu Honua's Motion for Leave as moot;⁵ and (4) dismisses Tawhiri's Motion to Strike Hu Honua's Response and Supplemental Response to the Parties' and Participants' replies to Hu Honua's Motion for Reconsideration as moot.⁶

As a result, there are no remaining issues for resolution in this proceeding and this docket is considered closed.

³"Life of the Land's Motion for Leave to Oppose Hu Honua's Motion for Reconsideration of Order No. 37205; Memorandum in Support of Motion for Leave; Declaration; and Certificate of Service, filed July 22, 2020 ("LOL Motion for Leave").

⁴"Hu Honua Bioenergy, LLC's Motion for Leave to File a Response to the Parties' and Participants' Replies to Hu Honua's Motion for Reconsideration of Order No. 37205 and Supplemental Memorandum in Support of Same; and Certificate of Service," filed July 31, 2020 ("Hu Honua Motion for Leave").

⁵"Life of the Land's Motion for Leave; Memo Re Response to Hu Honua's 7/31/20 Request; and Certificate of Service," filed August 6, 2020 ("LOL Motion for Leave to File Response").

⁶"Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Response and Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy's Motion for Reconsideration of Order No. 37205, Filed on July 20, 2020; Memorandum in Support of Motion; and Certificate of Service," filed August 25, 2020 ("Tawhiri Motion to Strike").

I.

BACKGROUND

On July 9, 2020, the Commission issued Order No. 37205, which denied HELCO's request for a waiver from the Competitive Bidding Framework ("Framework") for the Amended and Restated Power Purchase Agreement, dated May 5, 2017, between HELCO and Hu Honua ("Amended PPA") under which HELCO would purchase energy and capacity from Hu Honua's biomass facility on Hawaii Island (the "Project").⁷ In pertinent part, the Commission found that HELCO had not demonstrated that a waiver from the Framework was necessary or justified, particularly in light of HELCO's recent competitive solicitations that were successful in cost-effectively procuring multiple large-scale renewable energy projects.⁸

As approval of the waiver from the Framework was a threshold issue prior to considering the Amended PPA in this docket, the Commission also dismissed the Amended PPA without prejudice.⁹

On July 20, 2020, Hu Honua filed its Motion for Reconsideration, requesting "that the Commission vacate [Order

⁷Order No. 37205, "Denying Hawaii Electric Light Company, Inc.'s Request for a Waiver and Dismissing Letter Request for Approval of Amended and Restated Power Purchase Agreement," filed July 20, 2020 ("Order No. 37205").

⁸See Order No. 37205 at 2.

⁹See Order No. 37205 at 43.

No. 37205] in its entirety.”¹⁰ Also on July 20, 2020, Hu Honua filed a “Supplemental Memorandum” to its Motion for Reconsideration, which contained additional arguments and evidence.¹¹

On July 22, 2020, LOL filed its Motion for Leave, requesting leave to file a memorandum responding to Hu Honua’s Motion for Reconsideration.¹²

On July 24, 2020, the Commission, on its own motion, issued Order No. 37233, which provided the other Parties and Participants an opportunity to file replies to Hu Honua’s Motion for Reconsideration, including Hu Honua’s Supplemental Memorandum.¹³ Any such, replies were due within fifteen (15) days of Order No. 37233.¹⁴

¹⁰Hu Honua Motion for Reconsideration at 1.

¹¹“Hu Honua Bioenergy, LLC’s Supplemental Memorandum in Support of Hu Honua Bioenergy LLC’s Motion for Reconsideration of Order No. 37205, Issued July 9, 2020; Affidavit of Jonathon Jacobs; Affidavit of Bruce Plasch; and Certificate of Service,” filed July 20, 2020 (“Hu Honua Supplemental Memorandum”).

¹²LOL attached its proposed response to its Motion for Leave.

¹³Order No. 37233, “Allowing Replies to Hu Honua Bioenergy, LLC’s Motion for Reconsideration of Order No. 37205, Issued July 9, 2020, Filed July 20, 2020,” filed July 24, 2020 (“Order No. 37233”).

¹⁴Order No. 37233 at 3.

On July 31, 2020, Hu Honua filed its Motion for Leave seeking permission to respond to the replies permitted by Order No. 37233.

Pursuant to Order No. 37233, on August 10, 2020, the Consumer Advocate, Tawhiri, and LOL all filed replies to Hu Honua's Motion for Reconsideration.¹⁵ HELCO submitted a "position statement" in support of Hu Honua's Motion for Reconsideration.¹⁶

On August 6, 2020, LOL filed its Motion for Leave to File Response.

On August 24, 2020, Hu Honua submitted a response to the Consumer Advocate's Reply, Tawhiri's Reply, and LOL's Reply.¹⁷ Also on August 24, 2020, Hu Honua submitted a "Supplemental

¹⁵Division of Consumer Advocacy's Response to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020," filed August 10, 2020 ("CA Reply"); "Tawhiri Power LLC's Reply to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Filed on July 9, 2020," filed August 10, 2020 ("Tawhiri Reply"); and "Life of the Land's Response to Order No. 37233; Declaration; and Certificate of Service," filed August 10, 2020 ("LOL Reply").

¹⁶Hawaii Electric Light Company, Inc's Position Statement in Response to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Issued July 9, 2020; and Certificate of Service," filed August 10, 2020 ("HELCO Position Statement").

¹⁷Hu Honua Bioenergy, LLC's Response to the Division of Consumer Advocacy's Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Filed July 20, 2020; Affidavit of Warren Lee; Affidavit of Jonathan Jacobs; Affidavit of Jon Miyata; Exhibits '1' to '2'; and Certificate of Service," filed August 24, 2020 ("Hu Honua Reply").

Response" to the Parties' replies, which contained additional arguments and evidence.¹⁸

On August 25, 2020, Tawhiri filed its Motion to Strike, seeking to strike Hu Honua's Reply and its Supplemental Reply.

Also on August 25, 2020, LOL filed a joinder to Tawhiri's Motion to Strike.¹⁹

On September 1, 2020, Hu Honua filed an opposition to Tawhiri's Motion to Strike and LOL's Joinder.²⁰

On September 2, 2020, HELCO filed a position statement in response to Tawhiri's Motion to Strike, in which HELCO noted Hu

¹⁸"Hu Honua Bioenergy, LLC's Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy, LLC's Motion for Reconsideration of Order No. 37205, Filed July 20, 2020; Affidavit of Jonathan Jacobs; and Certificate of Service," filed August 24, 2020 ("Hu Honua Supplemental Reply").

¹⁹"Life of the Land's Joinder to Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Response and Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy's Motion for Reconsideration of Order No. 37205, Filed on July 20, 2020; Memorandum in Support of Motion; and Certificate of Service," filed August 25, 2020 ("LOL Joinder to Tawhiri Motion to Strike").

²⁰"Hu Honua Bioenergy, LLC's Memorandum in Opposition to Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Response and Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power, LLC's, and Life of the Land's Replies to Hu Honua Bioenergy's Motion for Reconsideration of Order No. 37205, Filed July 20, 2020, Filed on August 25, 2020, and Life of the Land's Joinder to Tawhiri Power LLC's Motion to Strike; and Certificate of Service," filed September 1, 2020.

Honua's pending Motion for Leave and reiterated its non-opposition to said motion.²¹

II.

DISCUSSION

A.

Denying Hu Honua's Request For A Hearing On Its
Motion For Reconsideration

In its Motion for Reconsideration, Hu Honua requests a hearing on its Motion pursuant to HAR § 16-601-41.²² While acknowledging that HAR § 16-601-142 is the controlling authority for hearings on a motion for reconsideration, Hu Honua nonetheless seeks a hearing on its Motion pursuant to HAR § 16-601-41²³

As HAR § 16-601-142 is the more specific rule governing this situation, it is controlling, compared to HAR § 16-601-41.²⁴

²¹"Hawaii Electric Light Company, Inc.'s Statement of Position to Tawhiri Power LLC's Motion to Strike Hu Honua Bioenergy, LLC's Response and Supplemental Response to the Division of Consumer Advocacy's, Tawhiri Power LLC's, and Life of the Land's Replies to Hu Honua Bioenergy's Motion for Reconsideration of Order No. 37205, Filed on July 20, 2020; and Certificate of Service," filed September 2, 2020.

²²Hu Honua Motion for Reconsideration at 1.

²³Hu Honua Motion for Reconsideration at 2.

²⁴See County of Hawaii v. UNIDEV, LLC, 129 Hawaii 378, 390, 301 P.3d 588, 600 (2013) (citing State v. Hussein, 122 Hawaii 495, 525, 229 P.3d 313, 343 (2010)) ("It is well settled that 'where there is a plainly irreconcilable conflict between a general and

As Hu Honua acknowledges, HAR § 16-601-142 provides: "Oral argument shall not be allowed on a motion for reconsideration, rehearing, or stay, unless requested by the [C]ommission or a commissioner who concurred in the decision." No commissioner concurred in Order No. 37205, nor has the Commission requested a hearing on Hu Honua's Motion for Reconsideration. Thus, Hu Honua's request for a hearing on its Motion is denied.

Further, as discussed below, the Commission is granting, in part, Hu Honua's Motion for Leave and considering Hu Honua's Reply and Supplemental Reply. In addition to allowing Hu Honua to respond to the arguments raised in the other Parties' responses and replies, this permits Hu Honua to submit approximately 250 pages of briefing in support of its position. In addition, as discussed below, the Commission has denied LOL's request to submit a response to Hu Honua's Reply, thus allowing Hu Honua to have the "last word" in support of its Motion for Reconsideration. These provide Hu Honua with sufficient opportunity to make its case for reconsideration.

a specific statute concerning the same subject matter, the specific will be favored.'").

B.

Legal Standard

Motions for reconsideration are governed by HAR chapter 16-601, which include subchapter 14. HAR §§ 16-601-137, 16-601-139, 16-601-140, and 16-601-142 of subchapter 14 provide:

§6-61-137 Motion for reconsideration or rehearing. A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or in a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.

. . . .

§6-61-139 Additional evidence. When, in a motion filed under this subchapter, a request is made to introduce new evidence, the evidence adduced shall be stated briefly, that evidence must not be cumulative, and an explanation must be given why that evidence was not previously adduced.

§6-61-140 Replies to motions. The commission may allow replies to a motion for rehearing or reconsideration or a stay, if it deems those replies desirable or necessary.

. . . .

§6-61-142 Oral argument. Oral argument shall not be allowed on a motion for reconsideration, rehearing, or stay, unless requested by the commission or a commissioner who concurred in the decision.

"[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Tagupa v. Tagupa, 108 Hawai'i 459, 465, 121 P.2d 924, 930 (Haw. Ct. App. 2000). However, "[r]econsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." Id. (citing Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (Haw. 2002) and quoting Sousaris v. Miller, 92 Hawai'i at 513, 993 P.3d at 547).

C.

Denying Hu Honua's Motion For Reconsideration

Based on review of the record, including Hu Honua's Motion and related filings and responsive briefings from the other Parties and Participants, the Commission finds and concludes that Hu Honua has not met its burden to support reconsideration of Order No. 37205.

To facilitate the Commission's discussion and review of Hu Honua's Motion, the Commission addresses two major assumptions underlying Hu Honua's arguments first.

1.

The Hawaii Supreme Court's Decision To Vacate The 2017 D&O
Required The Commission To Re-Examine All Issues On Remand

Hu Honua's leading argument in its Motion for Reconsideration contends that the Hawaii Supreme Court's decision In re HELCO, 145 Hawaii 1, 445 P.3d 673 (2019), where the Court examined, and ultimately vacated and remanded, the Commission's original decision and order approving the Amended PPA (the "2017 D&O"),²⁵ did not address the waiver approval portion of the 2017 D&O and, thus, could not be re-examined by the Commission on remand.²⁶ This premise is mistaken and not supported by a plain reading of In re HELCO and the caselaw in Hawaii.

In In re HELCO, the Hawaii Supreme Court found that the Commission had not: (1) expressly considered the reduction of GHG emissions in determining whether the costs associated with the Amended PPA were reasonable; and (2) did not afford LOL an opportunity to be heard at a meaningful time and in a meaningful manner regarding the Amended PPA's impact on LOL's property interest in a clean and healthful environment, as defined by HRS Chapter 269.²⁷

²⁵Decision and Order No. 34726, filed July 28, 2017.

²⁶See Hu Honua Motion for Reconsideration at 17-25.

²⁷In re HELCO, 145 Hawaii at 28, 445 P.3d at 700.

The Court held, in relevant part (internal citations omitted):

Accordingly, LOL was entitled to an opportunity to be heard at a meaningful time and in a meaningful manner regarding the Amended PPA's impact on its right to a clean and healthful environment, as defined by HRS Chapter 269.

LOL was not afforded a sufficient opportunity to address the Amended PPA's impact on its constitutional right to a clean and healthful environment, as defined by HRS Chapter 269. The PUC allowed LOL to participate in the 2017 Docket with respect to sub-issues: (2.a.i) whether the energy price components in the Amended PPA properly reflect the cost of biomass fuel supply, and (2.b) whether HELCO's purchase power arrangements under the Amended PPA are prudent and in the public interest.

. . .

. . . HELCO refused to respond to LOL's IRs regarding environment impacts of the project and production of an environmental site assessment because those topics were outside the scope of LOL's participation. Hu Honua similarly objected to LOL's IRs regarding loss of stored carbon from tree harvesting, environmental impacts of the project, and production of an environmental assessment as outside the scope of LOL's restricted participation. . . .

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

Due to the PUC's failure to allow LOL to present evidence and argument concerning its right to a clean and healthful environment, this court must vacate the PUC's 2017 D&O and remand this case to the PUC for hearing

that complies with procedural due process. In order to comply with statutory and constitutional requirements, the PUC's post-remand hearing must afford LOL an opportunity to meaningfully address the impacts of approving the Amended PPA on LOL's members' right to a clean and healthful environment, as defined by HRS Chapter 269. The hearing must also include express consideration of GHG emissions that would result from approving the Amended PPA, whether the cost of energy under the Amended PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the Amended PPA are prudent and in the public interest in light of its potential hidden and long-term consequences.²⁸

While "[i]t is the duty of a trial court, on remand, to comply strictly with the mandate of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court[,] This is not to say that a trial court is bound to perform the mandate of an appellate court under subsequently changed circumstances or is not free to decide issues not covered in the mandate."²⁹

In light of the Court's ruling vacating the 2017 D&O in its entirety,³⁰ on remand, the Commission was required to "redo"

²⁸In re HELCO, 145 Hawaii at 25-26, 445 P.3d at 697-98.

²⁹State v. Lincoln, 72 Haw. 480, 485, 825 P.2d 64, 68 (1992). See also, Liberty Mut. Ins. Co. v. E.E.O.C., 691 F.2d 438, 441 (9th Cir. 1982) ("Lower courts are free to decide issues on remand so long as they were not decided on a prior appeal. [citations omitted] Thus, the law of the case would preclude the district court from reconsidering only issues decided explicitly or by necessary implication in this court's previous disposition." (citation omitted)).

³⁰See In re HELCO, 145 Hawaii at 28, 445 P.3d at 700.

the proceeding to ensure that LOL was provided a meaningful opportunity to be heard on the Project's impacts on its members' constitutional rights under HRS Chapter 269. This is consistent with the Court's findings that LOL's limited scope in the first proceeding was insufficient, the Court's instruction to the Commission to "afford LOL an opportunity to meaningfully address" the Project's impacts on its members' rights, and the Court's decision to vacate, without qualification and in its entirety, the 2017 D&O.

To do otherwise would risk depriving LOL of its meaningful opportunity, under the circumstances. The application of the constitutional right to a clean and healthful environment in Hawaii to Commission proceedings has only been recently recognized³¹ and is still being developed (as it was here in In re HELCO). In light of the evolving nature of this body of law, and the specific findings by the Court that LOL had not been provided a meaningful opportunity earlier and must be provided such an opportunity on remand, re-starting the proceeding and providing LOL (and the other Participants) with the ability to address all issues pertaining to the Amended PPA and the Project was the most prudent course of action to ensure LOL had a

³¹See In re Maui Elec. Co., Ltd., 141 Hawaii 249, 408 P.3d 1 (2017).

meaningful opportunity to address the impacts of the Amended PPA on LOL's members' constitutional rights under HRS Chapter 269.³²

Thus, contrary to Hu Honua's assertions that the Commission "exceeded its authority" in addressing the waiver issue on remand,³³ and that the waiver was "not at issue in In re HELCO and not impacted by that decision on remand,"³⁴ the Commission did not exceed the Court's instructions on remand.

Further, the fact that the Hawaii Supreme Court was silent on the issue of HELCO's waiver in In re HELCO and vacated the 2017 D&O in its entirety makes this case distinguishable from the caselaw cited by Hu Honua in its Motion for Reconsideration. In both Chun v. Brd. Of Trustees of Employers' Retirement System of State of Hawaii, 106 Hawaii 416, 106 P.3d 339 (2005) and

³²See e.g., In re Water Use Permit Applications, 130 Hawaii 346, 310 P.3d 1047, 2010 WL 4113179 (App. 2010) (unpublished disposition, referenced pursuant to Haw. R. App. Proc. 35(c)(2) (holding that Commission on Water Resource Management ('Water Commission') erred, on remand from the Hawaii Supreme Court, in not considering appellants' arguments related to the "reasonable-beneficial use of water standard"; though not addressed by the Supreme Court's remand, the Intermediate Court of Appeals held that the Water Commission should have considered appellants' arguments regarding the reasonable-beneficial use standard noting that a "tribunal on remand may reconsider [an] issue based on new evidence or changed circumstances," and emphasizing the importance of these considerations given the State's obligation to protect the public trust under Article XI, Section 7 of the State Constitution).

³³Hu Honua Motion for Reconsideration at 22.

³⁴Hu Honua Motion for Reconsideration at 17.

Standard Mngmt., Inc. v. Kekona, 99 Hawaii 125, 53 P.3d 264 (Haw. App. 2001),³⁵ the reviewing court's remands were explicit and narrowly tailored as to which portions of the appealed decision was affirmed and which portions were vacated and remanded.³⁶

Accordingly, Hu Honua's characterization of the denial of HELCO's request for a waiver in Order No. 37205 as a "revocation" of the waiver is incorrect. The issue of the waiver, along with all the other findings and conclusions in the 2017 D&O, were vacated by the Court's decision and then expressly re-opened for decision by the Commission. Indeed, Hu Honua's conduct in the remanded proceeding was consistent with this understanding, as Hu Honua never objected to or challenged the Commission's examination of the waiver issue and also submitted briefing and testimony on this issue leading up to Order No. 37205, as discussed below.

³⁵See Hu Honua Motion for Reconsideration at 22.

³⁶See Chun, 106 Hawaii at 441, 106 P.3d at 364 (affirming portion of October 18, 2000 order as to the granting of attorneys' fees, reversing portion of October 18, 2000 order granting post-judgment interest, and affirming February 14, 2001 order granting stay of proceedings); and Kekona, 99 Hawaii at 137, 53 P.3d at 276 (finding that prior remand order that only vacated portions of a judgment, but affirmed the judgment "in all other respects," precluded the circuit court, on remand, from addressing the issue of punitive damages, which was not one of the express issues designated on remand).

2.

The Commission Provided Hu Honua With Sufficient
Notice That HELCO's Request For A Waiver Was
Part Of The Re-Opened Proceeding On Remand

Consequently, in re-opening the docket on remand, the Commission, in relevant part:

(A) Directed HELCO and Hu Honua to supplement the Amended PPA with any updated information;

(B) Directed HELCO and Hu Honua to provide a status report on the Project, including progress toward achieving Project milestones and the status of outstanding government permits;

(C) Established a new Issue No. 4 to specifically address GHG emissions linked to the Project;

(D) Expanded the scope of LOL's (and all other Participants') participation to addressing all issues in the re-opened proceeding; and

(E) Instructed the Parties and Participants to submit supplemental briefing on Issue Nos. 1-3 (i.e., including the waiver issue), "taking into consideration events that have occurred in Hawaii Island's energy market and developments on HELCO's system, since the [C]ommission issued [the 2017 D&O.]"³⁷

As discussed above, this was consistent with the Court's decision to vacate the 2017 D&O in its entirety and instruct the

³⁷Order No. 36382, "Reopening Docket," filed June 20, 2019 ("Order No. 36382").

Commission to ensure that LOL had a meaningful opportunity to address the Project's impacts on its members' constitutional rights under HRS Chapter 269.

Further, in describing the supplemental briefing required for Issue Nos. 1-3 (including the waiver issue), the Commission explicitly instructed the Parties and Participants:

The supplemental briefs on Issue Nos. 1 to 3 (including sub-parts) should be filed within sixty (60) days after [HELCO and Hu Honua's] Status Report is filed. The briefing on Issue Nos. 1 to 3 may reference information previously filed in this record, and shall include consideration of changes in the Hawaii Island energy market since [the 2017 D&O] was filed on July 28, 2017, which include but are not limited to:

- Initiation of competitive bidding in Docket No. 2017-0352;
- The upcoming Phase 2 of competitive bidding in Docket No. 2017-0352; and
- The [Amended PPA] terms compared to competitive benchmarks established in the PPAs approved by the [C]ommission pursuant to Phase 1 of the competitive procurement in Docket No. 2017-0352.³⁸

This clearly placed all the Parties and Participants on notice that the waiver issue was part of the re-opened proceeding and that consideration of the waiver issue would necessarily include a comparison of the Project to the competitively bid large-scale renewable projects arising from Docket No. 2017-0352 (the Requests for Proposals or "RFP" proceeding).

³⁸Order No. 36382 at 14 (emphasis added).

Hu Honua did not file a motion seeking reconsideration or clarification of Order No. 36382. Further, at no time during the remainder of the re-opened proceeding did Hu Honua raise an objection to the consideration of the waiver issue, and instead complied by filing supplemental briefing and pre-hearing testimony that addressed the waiver issue.³⁹

3.

Hu Honua Fails To Meet Its Burden To Justify Reconsideration

Taking the above into account, upon reviewing Hu Honua's arguments in its Motion for Reconsideration, Supplemental Memorandum, Reply, and Supplemental Reply, the Commission does not find any of them persuasive. Critically, in light of the fact that Hu Honua did, in fact, receive adequate notice that the waiver issue was re-opened as part of the remanded Commission proceeding,

³⁹See "Hu Honua Bioenergy, LLC's Supplemental Briefing on Issue Nos. 1 to 3; and Certificate of Service," filed September 17, 2019 ("Hu Honua Pre-Hearing Supplemental Briefing"), at 2-5 (while noting that the Hawaii Supreme Court did not expressly instruct the Commission to reconsider its earlier approval of HELCO's waiver request, Hu Honua did not object to the examination of this issue); and "Hu Honua Bioenergy, LLC's Prehearing Testimonies; Attachment A; Exhibits 'Hu Honua-100' - 'Hu Honua-800'; and Certificate of Service," filed January 28, 2020 ("Hu Honua Prehearing Testimony"), Hu Honua Testimony T-3 (testimony of Jon Miyata on the waiver issue), Testimony T-5 (testimony of Jonathan Jacobs arguing, in part, that the Amended PPA's pricing is reasonable and favorable when compared to other renewable energy projects, including the two approved RFP Phase 1 projects for Hawaii Island).

much of its arguments and evidence fail to meet the standard of "new evidence and/or arguments that could not have been presented during the earlier adjudicated motion."⁴⁰ Rather, they attempt to belatedly raise arguments and introduce evidence that "could and should have been brought during the earlier proceeding."⁴¹

This includes Hu Honua's contention that the Commission should reconsider Order No. 37205 on the basis of HELCO's willingness to do another bill impact analysis. Hu Honua states that it disagreed with several of the assumptions and methodologies used by HELCO in its 2020 bill impact analysis.⁴² Yet, the fact that Hu Honua issued IRs on this issue⁴³ indicates that Hu Honua was clearly aware of it earlier and could have addressed this issue in its Prehearing Testimony. Hu Honua's proposal to reconsider Order No. 37205 based on a speculative result of proposed new analysis is improper, particularly given the length of this proceeding and the opportunities to address this issue earlier.

⁴⁰Tagupa, 108 Hawai'i at 465, 121 P.2d at 930.

⁴¹Tagupa, 108 Hawaii at 456, 121 P.2d at 930 (citing Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (Haw. 2002) and quoting Sousaris v. Miller, 92 Hawai'i at 513, 993 P.3d at 547).

⁴²Hu Honua Reply at 51.

⁴³See Hu Honua Reply at 51 (citing HELCO response to HHB-HELCO-SIR-1, filed March 6, 2020).

As a result, the Commission finds that Hu Honua's arguments fail for this threshold reason, alone. That being said, in light of the circumstances, the Commission will still address the specific arguments raised by Hu Honua in its Motion for Reconsideration and related briefing.⁴⁴

Hu Honua argument No. 1: The waiver issue was not disturbed by the In re HELCO decision.⁴⁵ As discussed above, this contention mischaracterizes the Hawaii Supreme Court's ruling and is not supported by the caselaw cited in Hu Honua's Motion for Reconsideration. The Court's ruling vacated the 2017 D&O in its entirety, without qualification, and remanded the proceeding back to the Commission with instructions to provide LOL with a meaningful opportunity to be heard regarding the Amended PPA's impact on LOL's members' constitutional rights under HRS Chapter 269.

In interpreting the Court's ruling, taking into account the history of this case and the recent rulings recognizing the right to a clean and healthful environment as applied to Commission proceedings, the Commission reasonably chose to re-open

⁴⁴The numbering for these arguments is based on the sequential order in which they are presented in Hu Honua's Motion for Reconsideration.

⁴⁵See Hu Honua Motion for Reconsideration at 17-25; and Hu Honua Reply at 9-14.

examination of all issues on remand and to expand the scope of LOL's participation (along with all other Participants) to ensure that a "meaningful opportunity" was provided. This interpretation is consistent with the Court's findings that LOL's earlier limited scope was insufficient to address its constitutional rights and consistent with Hawaii caselaw providing discretion to effectuate the Court's intent on remand.

Furthermore, the Commission clearly made its intent to re-open all issues known on remand, as set forth in Order No. 36382, which Hu Honua did not challenge or ask the Commission to reconsider. Hu Honua's acceptance of the scope of the Commission's proceeding on remand, as well as its compliance in submitting post-remand briefing, testimony, and evidence on the issue of HELCO's request for a waiver judicially estops Hu Honua from belatedly challenging this issue now.⁴⁶

Hu Honua's related arguments that the Order No. 37205 constitutes a "revocation" of HELCO's waiver approved in the

⁴⁶See Lee v. Puamana Community Ass'n, 109 Hawaii 561, 575-76, 128 P.3d 874, 888-89 (2006) ("Pursuant to the doctrine of judicial estoppel, '[a] party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action.'").

2017 D&O is similarly unconvincing.⁴⁷ As discussed above, the Court's ruling vacated the 2017 D&O in its entirety, including the approval of HELCO's waiver. Even if not expressly stated, the ruling to vacate, without exception, combined with the Court's direction to provide LOL with a meaningful opportunity to address its members' constitutional rights on remand, reasonably compelled a complete re-examination of all issues, which the Commission explicitly announced in Order No. 36382. Consequently, Hu Honua's related arguments that a "revocation" is not permitted under the Competitive Bidding Framework is not persuasive, as it relies on a mischaracterization of the Court's decision and is also at odds with Hu Honua's conduct on remand, where it never argued that re-examination of the waiver issue was improper or could constitute a "revocation."

Hu Honua argument No. 2: The Commission is equitably estopped from revoking HELCO's waiver for the Project.⁴⁸

Hu Honua's argument that it reasonably relied on the 2017 D&O to proceed with the Project is unpersuasive. Based on the language of the Amended PPA, Hu Honua did not have a reasonable basis for proceeding with the Project during LOL's appeal.

⁴⁷See Hu Honua Motion for Reconsideration at 25-26.

⁴⁸See Hu Honua Motion for Reconsideration at 28-33; and Hu Honua Reply at 23-29.

The 2017 D&O states: "The [Amended PPA] sets the Commercial Operations Date deadline at 18 months after PUC Approval of Amendment Date, as that term is defined in the [Amended PPA]. . . . Given these factors, the [C]ommission expects Hu Honua and HELCO to make all reasonable attempts to complete the [P]roject according to this schedule and does not expect future requests to extend the Commercial Operation Date deadline."⁴⁹

Accordingly, the Commission's directives to move forward with the Project were expressly placed within the context of meeting the Commercial Operations Date deadline as set forth in the Amended PPA. Amended PPA, Article I (Definitions) states: "'PUC Approval of Amendment Date' shall have the meaning set forth in Section 25.12(D) (PUC Approval of Amendment Date)."⁵⁰ In turn, Section 25.12(D) (2) of the Amended PPA, "PUC Approval," provides, in relevant part:

(a) If a PUC Approval of Amendment Order is issued and is not made subject to a motion for reconsideration filed with the PUC or an appeal, the PUC Approval of Amendment Order Date shall be the date one Day after the expiration of Appeal Period following the issuance of the PUC Approval of Amendment Order;

⁴⁹2017 D&O at 61 (emphasis added).

⁵⁰"Amended and Restated Power Purchase Agreement dated May 5, 2017," filed May 9, 2017, at 18 of 238. The Amended PPA is attached as "Exhibit" to this filing. For ease of reference, the Commission's references to the "Amended PPA" in this Order refer to pages number of "Exhibit A."

(b) If the PUC Approval of Amendment Order became subject to a motion for reconsideration, and the motion for reconsideration is denied or the PUC Approval of Amendment Order is affirmed after reconsideration, and such order is not made subject to an appeal, the PUC Approval of Amendment Date shall be deemed to be the date one Day after the expiration of the Appeal Period following the order denying reconsideration of or affirming the PUC Approval of Amendment Order; or

(c) If the PUC Approval of Amendment Order, or an order denying reconsideration of the PUC Approval of Amendment Order or affirming approval of the PUC Approval of Amendment Order after reconsideration, becomes subject to an appeal, then the PUC Approval of Amendment Date shall be the date upon which the PUC Approval of Amendment Order becomes a non-appealable order within the meaning of the definition of a Non-appealable PUC Approval of Amendment Order in Section 25.12(B) (Non-appealable PUC Approval of Amendment Order).⁵¹

Thus, Hu Honua's argument that it "had no choice" but to rush ahead with developing the Project⁵² after the 2017 D&O is inconsistent with the plain language of the 2017 D&O and the Amended PPA. The 2017 D&O states that the Hu Honua and HELCO

⁵¹Amended PPA at 125-26 of 238 (emphasis added). Amended PPA, Section 25.12(B) states, in relevant part: "The term 'Non-appealable PUC Approval of Amendment Order' means a PUC Approval of Amendment Order that is not subject to appeal to any Circuit Court of the State of Hawaii, Intermediate Court of Appeal of the State of Hawaii or the Supreme Court of the State of Hawaii, because the permitted period for such an appeal (the 'Appeal Period') has passed without the filing of a notice of such an appeal, or that was affirmed on appeal . . . or was affirmed upon further appeal or appellate process, and that is not subject to further appeal,"

⁵²See Hu Honua Motion for Reconsideration at 31.

should make their best efforts to meet the COD as defined in the Amended PPA. The Amended PPA states clearly, at Section 25.12, that an appeal will toll the "PUC Approval of Amendment Date", which in turn will toll the Commercial Operations Date.

On August 7, 2017, the Consumer Advocate filed a Motion for Modification of the 2017 D&O; while this was not the basis for the subsequent appeal, pursuant to Amended PPA, Section 25.12, Hu Honua should have known that this would toll the Commercial Operations Date and could have sought clarification from the Commission as to how this affected the Commission's directives in the 2017 D&O. In any event, LOL filed a notice of appeal shortly after, which also notified Hu Honua that the "PUC Approval of Amendment Date" (and thus Commercial Operations Deadline deadline) were subject to change and would be tolled.⁵³ Indeed, on April 20, 2018, and February 12, 2019, Hu Honua and/or HELCO submitted letters to the Commission in which they acknowledged that LOL's (then) pending appeal of the 2017 D&O with the Hawaii Supreme Court was "preventing a Non-appealable PUC Approval of Amendment Order" ⁵⁴

⁵³LOL also filed a motion to stay the Project in its appeal of the 2017 D&O, which Hu Honua opposed, which provided Hu Honua with further notice that the Commercial Operations Date deadline would be tolled.

⁵⁴See Joint Letter From: D. Yamamoto and B. Bailey to Commission Re: Docket No. 2017-0122 - Hu Honua Bioenergy, LLC and

Consequently, Hu Honua's decision to proceed with the Project during the appeal period, allegedly incurring overtime and additional charges in the process,⁵⁵ was at its own risk given the plain language of the Amended PPA.

Furthermore, to the extent Hu Honua references the Commission's original order granting a waiver for the Project,⁵⁶ this is not a convincing basis for reliance, as Hu Honua itself concedes that re-examination of the waiver following this original order was reasonable after HELCO and Hu Honua amended the original PPA.⁵⁷

"The theory of equitable estoppel requires proof that one person willfully caused another person to erroneously believe a certain state of things, and that person reasonably relied on this erroneous believe to his or her detriment."⁵⁸ In this instance the Commission clearly qualified its instructions for Hu Honua to

Hawaii Electric Light Company, Inc.'s Joint Letter Regarding Paragraph No. 5 of Decision and Order No. 34726, Issued July 28, 2017, filed April 20, 2018; and Letter From: B. Bailey To: Commission Re: Docket No. 2017-0122 - Hawaii Electric Light Company Inc.'s Hu Honua Project Status Update, filed February 12, 2019.

⁵⁵See Hu Honua Motion for Reconsideration at 33.

⁵⁶See Hu Honua Motion for Reconsideration at 29-30.

⁵⁷See Hu Honua Motion for Reconsideration at 26-27.

⁵⁸María v. Freitas, 73 Haw. 266, 273, 832 P.3d 259, 264 (1992) (citations omitted) (emphasis added).

proceed with achieving the Commercial Operations Date within the context of the terms of the Amended PPA, which provided for a tolling period until a final, non-appealable order was issued. Hu Honua's decision to proceed, at an accelerated pace, notwithstanding LOL's appeal and the lack of a final, non-appealable order, places the responsibility for the associated Project costs with Hu Honua. None of the Project costs can be reasonably or fairly attributed to "reasonable reliance" on the Commission's decisions (either the original Waiver Order or the 2017 D&O).

Hu Honua argument No. 3: The Commission did not afford Hu Honua due process before revoking HELCO's waiver.⁵⁹

Hu Honua's argument regarding due process is premised on its belief that the 2017 D&O provided Hu Honua with a valid property interest. Hu Honua's assumption is unpersuasive for a number of reasons.

First, the waiver from the Competitive Bidding Framework for the Project was requested by, and granted to, HELCO, not Hu Honua. Indeed, under the Framework, only a public utility is capable of requesting a waiver.⁶⁰ This was reflected in the

⁵⁹See Hu Honua Motion for Reconsideration at 34-39; and Hu Honua Reply at 14-19.

⁶⁰See In re Public Util. Comm'n, Docket No. 03-0372, Decision and Order No. 23121, filed December 8, 2006, Exhibit A (Competitive

statement of issues, where the Commission clearly framed the waiver issue as “Whether HELCO has met its burden of proof in support of its request to waive Hu Honua’s Project from the [C]ommission’s Framework for Competitive Bidding.”⁶¹ Thus, even if, for the sake of argument, the granting of a waiver created a legally recognized property interest, this right would be enforceable by HELCO, not Hu Honua.

Second, a granting of a waiver from the Competitive Bidding Framework is not a vested property interest in that a waiver does not confer any right “essential to the viability of the Project.”⁶² The granting of a waiver is merely a mechanism to bypass a competitive bidding process and place a proposed power purchase agreement before the Commission; it does not guarantee or

Bidding Framework), Section II.A.3.b (“Under certain circumstances, to be considered by the Commission in the context of an electric utility’s request for waiver under Part II.A.4, below, competitive bidding may not be appropriate.”) (emphasis added). See also, id. Section II.A.4.a (describing procedure for seeking a waiver and identifying the applicant as the “electric utility.”); and Section I (defining “electric utility” as “a provider of electric utility service that is regulated by and subject to the Commission’s jurisdiction pursuant to Chapter 269, Hawaii Revised Statutes.”).

⁶¹See Order No. 36382 at 5.

⁶²See Hu Honua Motion for Reconsideration at 35.

otherwise ensure that a proposed power purchase agreement will be approved.⁶³

For example, earlier in the history of the Project, HELCO submitted a separate application for a waiver from the Competitive Bidding Framework for the Project, highlighting that the issue of determining whether a waiver should be granted is distinct from whether to approve the Amended PPA.⁶⁴ Consistent with this understanding, Order No. 37205 explicitly did not rule on the merits of the Amended PPA and clarified that Hu Honua could propose its Project to HELCO for selection via the competitive bidding process.⁶⁵

Third, as noted above, Hu Honua's characterization of Order No. 37205 as a "revocation" of the earlier granting of a waiver in the 2017 D&O is incorrect. The Hawaii Supreme Court's

⁶³See CA Reply at 6 ("Waivers from competitive bidding are not final approvals, disposing of all remaining issues related to a project so far as the Commission is concerned. They are preliminary. They allow a utility and a developer to proceed with negotiating and seeking Commission approval for a PPA for a proposed facility.").

⁶⁴See In re Public Util. Comm'n, Docket No. 2008-0143, Decision and Order, filed November 14, 2008, at 7 (explicitly stating that the Commission was only granting HELCO's request for a waiver from the Competitive Bidding Framework and was "not approving the Hu Honua Project per se[,] and that any subsequent power purchase agreement between HELCO and Hu Honua related to the Project would be reviewed separately by the Commission.).

⁶⁵See Order No. 37205 at 38 and 54 (noting that Order No. 37205 dismisses, without prejudice, the Amended PPA).

decision expressly vacated the 2017 D&O and its instructions to the Commission on remand reasonably contemplated a re-opening of all issues for further proceeding, to provide LOL with a meaningful opportunity to address its members' constitutional rights. Moreover, to the extent that Hu Honua is alleging that the 2017 D&O somehow created or vested Hu Honua with a legitimate property interest, this argument is contradicted by the language of the Competitive Bidding Framework, the language of the Amended PPA, which requires a non-appealable Commission order, as well as the letters filed with the Commission by Hu Honua and HELCO in which they both acknowledged that LOL's appeal was preventing a final Commission order under the PPA.

Fourth, Hu Honua's comparison of the waiver to real property variances and permits is unpersuasive.⁶⁶ As discussed above, unlike a variance or permit, the granting of a waiver is not a final discretionary act by the Commission authorizing a project to proceed; rather, it is one of the first, preliminary steps in seeking Commission approval for the Project and cannot reasonably be construed to form a "legitimate claim of entitlement" or support "reasonable reliance" to proceed with the Project.⁶⁷

⁶⁶See Hu Honua Motion for Reconsideration at 36.

⁶⁷Further, as the Commission has already discussed above, even assuming arguendo that it did create a claim of entitlement, that claim would belong to HELCO.

This understanding is consistent with the Project's history. As noted above, when a waiver for the Project was initially granted in Docket No. 2008-0143, the Commission emphasized that granting of a waiver to HELCO did not equate to approval of a power purchase agreement, which the Commission stated would be reviewed separately and on its own merits.

Fifth, contrary to Hu Honua's assertions, the Commission provided Hu Honua with sufficient notice of the waiver issue on remand, including the intention to compare the Project to the recently approved RFP projects, which Hu Honua took advantage of by submitting testimony and evidence.⁶⁸ The Commission clearly notified all the Parties and Participants that in the remanded proceeding the Commission would be examining all issues, including whether HELCO should be granted a waiver from competitive bidding.⁶⁹

Further, in considering the waiver issue, the Commission expressly directed the Parties and Participants to consider

⁶⁸See Hu Honua Motion for Reconsideration at 36-37. See also, Hu Honua Reply at 15 ("The Consumer Advocate misunderstands Hu Honua's actual argument in its Motion for Reconsideration. Hu Honua argues that the [Amended PPA's] waiver is a property interest that is protected by the due process clause, which means that the Commission cannot revoke the waiver, *sua sponte*, without providing Hu Honua adequate notice and a meaningful opportunity to be heard.").

⁶⁹See Order No. 36382.

"changes in the Hawaii Island energy market since [the 2017 D&O] was filed," and specifically identified the initiation of competitive bidding in Docket No. 2017-0352 (the RFP docket), the upcoming Phase 2 competitive bidding in Docket No. 2017-0352, and comparison of the Amended PPA to the competitive benchmarks established in the power purchase agreements in Phase 1 of Docket No. 2017-0352.⁷⁰ Notably, the "competitive benchmarks" established for the power purchase agreements in Phase 1 of Docket No. 2017-0352 were based on the effective pricing of the power purchase agreements, which plainly notified the Parties and Participants that the Commission intended to evaluate the reasonableness of granting a waiver from competitive bidding.⁷¹

Not only did Hu Honua not object or seek clarification to the Commission's directives in Order No. 36382, Hu Honua submitted briefing, testimony, and evidence addressing the waiver issue, including evidence comparing its Project to the two RFP Phase 1 projects recently approved for Hawaii Island.⁷²

⁷⁰Order No. 36382 at 14.

⁷¹See In re Hawaiian Elec. Co., Inc., Hawaii Elec. Light Co., Inc., and Maui Elec. Co. Ltd., Docket No. 2017-0352, Order No. 35405, "Establishing a Performance Incentive Mechanism for Procurement in Phase 1 of the Hawaiian Electric Companies' Final Variable Requests for Proposals," filed April 6, 2018.

⁷²See Hu Honua Prehearing Testimony, Hu Honua Testimony T-3 (Jon Miyata) (addressing waiver issue); Hu Honua Testimony T-5 (Jonathan Jacobs); and exhibit Hu Honua-501 ("Hu Honua Bioenergy

Sixth, in light of the above, Hu Honua's analysis of its right to due process is not convincing.⁷³ In support of its due process argument, Hu Honua refers to the following procedures utilized by Hawaii courts to analyze such due process claims:

(1) The private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.⁷⁴

Hu Honua's justification of its "private interest"⁷⁵ is undermined by the fact that its "reliance" on the 2017 D&O was not reasonable. As discussed above, under the plain language of the

- Comparison of the ratepayer cost of the Hu Honua Bioenergy contract with alternatives that may be available to HELCO." The Commission notes that Section 5 specifically compares the Project to the two RFP Phase 1 renewable projects approved for Hawaii Island).

The two Phase 1 RFP projects ("Phase 1 RFP Projects") approved for Hawaii Island are being developed by AES Waikoloa Solar, LLC and Hale Kuawehi Solar LLC. See Docket Nos. 2018-0430 and 2018-0432. Hu Honua's counsel, Yamamoto Caliboso, LLLC, is uniquely familiar with these projects as they currently represent both AES Waikoloa Solar, LLC and Hale Kuawehi Solar LLC in the above-referenced dockets, which are still pending before the Commission.

⁷³See Hu Honua Motion for Reconsideration at 36-39.

⁷⁴Hu Honua Motion for Reconsideration at 36 (citing In re Haw. Elec. Light Co., Inc., 145 Hawaii 1, 11, 445 P.3d 673, 689 (2019)(citing Sandy Beach Def. Fund v. City Council of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)).

⁷⁵Hu Honua Motion for Reconsideration at 37.

Amended PPA, all contractual milestones were tolled based on the pending appeal filed by LOL; Hu Honua's decision to proceed with the Project during the appeal at an accelerated pace and at significant cost was at its own risk.

Similarly, Hu Honua's "risk of erroneous deprivation"⁷⁶ is unconvincing. While Hu Honua contends "[n]either Hu Honua nor HELCO knew (or could have known) that the Commission was considering a revocation of the [Amended] PPA waiver[,]” and “was [not] given the opportunity to address this issue[,]”⁷⁷ the record clearly contradicts these assertions. As already discussed, the Commission clearly identified this issue for consideration on remand in Order No. 36392 and neither Hu Honua nor HELCO sought reconsideration or clarification of Order No. 36392 or otherwise objected to the scope of issues set by the Commission on remand until Hu Honua filed its Motion for Reconsideration. Moreover, the fact that Hu Honua affirmatively addressed the waiver issue⁷⁸ and submitted testimony and exhibits specifically addressing the

⁷⁶Hu Honua Motion for Reconsideration at 37-38.

⁷⁷Hu Honua Motion for Reconsideration at 37.

⁷⁸See Hu Honua Prehearing Testimony, Hu Honua T-3; and HELCO Prehearing Testimony,

two RFP projects approved for Hawaii Island⁷⁹ demonstrates that Hu Honua had a reasonable opportunity to address this issue.

Seventh, Hu Honua's claim that it did not have a chance to address "new" evidence is unconvincing.⁸⁰ Hu Honua claims that the Commission relied on the recent COVID-19 pandemic and the status of the Phase 2 RFPs in its decision, but this ignores the fact that in Order No. 37205, the Commission identified the changed circumstances resulting from the ongoing competitive bidding process in support of its decision to deny HELCO's request for a waiver, which were known and available to Hu Honua and which Hu Honua explicitly addressed in its Prehearing Testimony. The references to Phase 2 of the RFPs were primarily to illustrate the rapidly growing field of renewable energy options, but the Phase 2 RFP did not form the basis for the Commission's decision to deny HELCO's request for a waiver. Further, the Commission's reference to the COVID-19 pandemic was merely to illustrate the sensitivity of customer bill impacts during this time; however, the Commission notes that such considerations would be present even outside of a global pandemic.

⁷⁹See Hu Honua Prehearing Testimony, Hu Honua T-5, including Hu Honua-501.

⁸⁰See Hu Honua Reply at 5-6 and 20-21.

Taken as a whole, the Commission finds that Hu Honua has not articulated an enforceable property interest under the circumstances, and that the Commission provided Hu Honua with sufficient notice and opportunity to address the waiver issue prior to issuing Order No. 37205. Thus, the Commission is not persuaded that Hu Honua's due process arguments warrant reconsideration of Order No. 37205.

Hu Honua argument No. 4: A waiver for the Project is still justified under the Competitive Bidding Framework.⁸¹

Hu Honua's attempt to re-argue for a waiver for a Project in its Motion is clearly improper. As discussed above, a Motion for Reconsideration is not a vehicle to re-litigate old matters or raise arguments or evidence that could have been brought earlier in the proceeding. First, as noted above, Hu Honua submitted Prehearing Testimony that argued that HELCO's waiver request should be granted, which evidences that Hu Honua had an opportunity to litigate this issue. Further, upon reviewing Hu Honua's arguments that a waiver is still justified, the Commission finds that none of these are based on new evidence or could not have otherwise been raised during the re-opened proceeding prior to Order No. 37205.

⁸¹See Hu Honua Motion for Reconsideration at 39-45; and Hu Honua Reply at 29-39.

As discussed above, the Commission provided Hu Honua with ample notice that the waiver issue was part of the re-opened proceedings and Hu Honua took advantage of that by submitting briefing and testimony on this issue. Hu Honua cannot now support its request for reconsideration by repeating arguments already raised or by belatedly attempting to introduce new arguments or evidence that were available to it earlier.

Hu Honua argument No. 5: Order No. 37205 unreasonably characterizes Hu Honua's ability to obtain the Federal Investment Tax Credit.⁸²

Hu Honua's arguments contesting the Commission's findings regarding Hu Honua's ability to receive the Federal Investment Tax Credit ("Fed ITC") are unconvincing. As stated in Order No. 37295, the Commission's finding that Hu Honua's ability to receive the Fed ITC is speculative is based on Hu Honua's own witness' testimony.⁸³ Hu Honua attempts to dilute this as "transparent disclos[ure]" in its Motion for Reconsideration and then improperly shifts its burden of proof to

⁸²See Hu Honua Motion for Reconsideration at 45-48.

⁸³See Order No. 37205 at 23-24; see also, Hu Honua Prehearing Testimony, Hu Honua T-3 at 3-4 ("Hu Honua had previously sought to meet the safe harbor requirements for the Investment Tax Credit ('ITC') by being placed into service by the end of 2018. Given that the Hu Honua Project experienced unanticipated delays beyond 2018 which were outside of its control, obtaining the ITC is no longer guaranteed under applicable safe harbor provisions.").

the Commission by contending that the Commission should have further explored concerns about Hu Honua's ability to obtain the Fed ITC.⁸⁴

As applicants, it was HELCO and Hu Honua's burden to make an affirmative case to the Commission convincing it to grant their requested relief. For Hu Honua to claim that the Commission was somehow obligated to ask further questions of Hu Honua to help Hu Honua make its own case regarding the Fed ITC is clearly improper and not supported by the Commission's rules or the understood concepts of burden of proof and fair play.

Relatedly, Hu Honua now seeks to admit new evidence regarding its ability to obtain the Fed ITC, pursuant to HAR § 16-601-139.⁸⁵ The Commission observes that HAR § 16-601-139 requires such a request to admit additional evidence to be made by motion and supported by an explanation as to why it was not previously adduced.⁸⁶ In addition to not submitting this request by separate motion, Hu Honua does not explain why this evidence was not provided earlier. Mr. Katz's supplemental affidavit

⁸⁴Hu Honua Motion for Reconsideration at 45-46.

⁸⁵Hu Honua Motion for Reconsideration at 46; and Supplemental Affidavit of Eli Katz.

⁸⁶HAR § 16-601-139 states, in full: "**Additional evidence.** When, in a motion filed under this subchapter, a request is made to introduce new evidence, the evidence adduced shall be stated briefly, that evidence must not be cumulative, and an explanation must be given why that evidence was not previously adduced."

pertains to an extended deadline for the Fed ITC and states that it was "extended on December 20, 2019, as part of a bill signed into law by President Trump entitled the Fiscal Year 2020 Further Consolidated Appropriations Act."⁸⁷

Hu Honua submitted its Prehearing Testimony on remand on January 28, 2020, and Hu Honua does not explain why it did not include Mr. Katz's testimony at that time.⁸⁸ Rather, Hu Honua instead chose to submit the testimony of Jon Miyata, which provided a completely opposite representation regarding the Fed ITC; i.e., "[g]iven that the Hu Honua project experienced unanticipated delays beyond 2018 which were outside of its control, obtaining the ITC is no longer a guarantee under applicable safe harbor provisions."⁸⁹

Based on the above, the Commission finds that Hu Honua's request to admit Mr. Katz's supplemental affidavit as additional evidence under HAR § 16-601-139 is insufficiently supported,

⁸⁷Hu Honua Motion for Reconsideration, Supplemental Affidavit of Eli Katz at paragraph 6.

⁸⁸Mr. Katz confirms that he was "retained by Hu Honua Bioenergy, LLC . . . approximately 6 years ago to advise on tax credit qualification and related transactional matters pertaining to . . . [the Project]." Hu Honua Motion for Reconsideration, Supplemental Affidavit of Eli Katz at paragraph 5. Thus, it is clear that at the time Hu Honua submitted its Prehearing Testimony, it had the benefit of Mr. Katz's services and the Fed ITC extension had already been signed into law.

⁸⁹Hu Honua Prehearing Testimony, Hu Honua Testimony T-3 at 4.

and denies Hu Honua's request under HAR § 16-601-139. Further, the Commission observes that even if were admitted, it would not support Hu Honua's Motion for Reconsideration as it is evidence that could have been brought before the Commission during the earlier proceeding.

Hu Honua argument No. 6: Denial of HELCO's waiver for the Project puts other new market tax credits at risk.⁹⁰

The Commission does not find Hu Honua's reference to purported plans to apply for New Market Tax Credits ("NMTC") persuasive. First, as already discussed several times, Hu Honua cannot support its Motion for Reconsideration with arguments or evidence that it could have raised earlier in the proceeding. The NMTC are not new evidence, as indicated by Hu Honua's reference to them in response to an information request from LOL.⁹¹

Second, this argument is attenuated as it relates to this proceeding as it refers to a separate agreement Hu Honua (not HELCO) has with another entity, Punawai O Pu'uhonua, LLC ("Punawai"), that is not involved in this proceeding.⁹²

⁹⁰See Hu Honua Motion for Reconsideration at 48-51.

⁹¹Hu Honua Motion for Reconsideration at 48 (referring to its response to LOL/HHB-IR-12, filed 12/9/19) (while Hu Honua's Motion states that its IR response was filed on "12/19/19," the Commission believes it intended to refer to its IR responses filed on 12/9/19).

⁹²See Hu Honua Motion for Reconsideration at 48-50.

According to Hu Honua, Punawai is a Community Development Entity ("CDE"), formed by American Savings Bank and the Oahu Economic Development Board, which is able to access capital from investors who can claim NMTC for investing in CDEs.⁹³ Funds for NMTC are allocated to CDEs by the U.S. Treasury Department's Community Development Financial Institutions Fund ("CDFI Fund") through a competitive, annual application process under which recipient CDEs must agree to deploy the NMTC pursuant to certain terms and conditions set by the CDFI Fund.⁹⁴ Apparently, in order to help meet the terms of Punawai's agreement with the CDFI Fund, Punawai entered into a separate NMTC loan agreement with Hu Honua to help finance the Project, which is conditioned on approval of the Amended PPA.⁹⁵

Hu Honua states that this "essentially results in \$10.6 million of net benefit to Hu Honua with the additional community benefits of \$3.3 million to Punawai and its economic

⁹³Hu Honua Motion for Reconsideration at 48-49.

⁹⁴Hu Honua Motion for Reconsideration at 49.

⁹⁵See Hu Honua Motion for Reconsideration at 49-50. Hu Honua states that it entered into an NMTC loan agreement with "\$28.9 million of NMTC financing provided to Hu Honua in compliance with the 2017 Allocation Agreement requirements and another \$19.4 million, which closed in January 2020, relating to Punawai's 2018 allocation." Id. at 50.

development efforts in the state.”⁹⁶ Hu Honua also notes that Punawai’s future ability to receive NMTC funds for community and economic development in the State of Hawaii hinges on the Project’s approval: “[i]f Hu Honua does not receive approval for its PPA with HELCO and the NMTC funds are unable to be disbursed, it could have significant negative impacts for the State of Hawaii.”⁹⁷

The Commission observes that this discussion in Hu Honua’s Motion for Reconsideration about its contract with Punawai is the first time Punawai’s relationship to Hu Honua has been raised in the record.⁹⁸ This is somewhat surprising given Punawai’s relationship with American Savings Bank, which is

⁹⁶Hu Honua Motion for Reconsideration at 50 (also stating that “Punawai and Hu Honua entered into an NMTC loan agreement with \$28.9 million of NMTC financing provided to Hu Honua in compliance with the 2017 Allocation Agreement requirements and another \$19.4 million, which closed in January 2020, relating to Punawai’s 2018 Allocation.”).

⁹⁷These negative impacts include Punawai’s “ability to receive future NMTC allocations and may also result in the termination of Punawai’s Allocation Agreements, thereby removing at least \$70 million of NMTC allocation in Hawaii currently committed to Punawai. This could also jeopardize Hawaii’s ability to access millions of dollars of additional private capital for community and economic development in Hawaii.” Hu Honua Motion for Reconsideration at 51.

⁹⁸The Commission further notes that in response to an information request regarding “What state and federal tax credits, rebates, grants, or other financial assistance is [Hu Honua] seeking, has or is acquiring, and/or expects to get?”, Hu Honua states only that it “plans to apply for federal investment tax credits and new market tax credits, to the extent available.” See Hu Honua Response to LOL/HHB-IR-12, filed on December 9, 2019.

affiliated with HELCO (HELCO's parent company, Hawaiian Electric Company, Inc., is owned by Hawaiian Electric Industries, Inc., which also owns American Savings Bank).⁹⁹ As this information was not made available in any of the Parties' filings prior to the Motion for Reconsideration, the Commission was unable to acquire more details about this relationship in this proceeding.

While beyond the scope of this Motion, the Commission is interested in this relationship given: (1) the issuance of the Commission's Affiliate Transaction Requirements on December 19, 2018, which are intended to mitigate the potential for market-power abuses and cross-subsidizations amongst regulated and un-regulated activities between Hawaiian Electric¹⁰⁰ and its affiliates;¹⁰¹ and (2) the fact that the agreement between Punawai and Hu Honua closed in January of 2020, which is near to or

⁹⁹See In re Public Util. Comm'n, Docket No. 2018-0065, Hawaiian Electric "2020 Compliance Plan Submission," filed on January 31, 2020, at 8 (including American Savings Bank as an affiliate for purposes of the Compliance Plan).

The State of Hawaii Business Registration Division's website lists American Savings Bank as a "Member/MGR" of Punawai 'O Pu'uhoonua, LLC.

¹⁰⁰"Hawaiian Electric" refers collectively to HELCO, its sibling utility Maui Electric Company, Limited, and their joint parent company, Hawaiian Electric Company, Inc.

¹⁰¹See, Docket No. 2018-0065, Decision and Order No. 35962, filed December 19, 2018, as modified by Order No. 36112, filed January 24, 2019 (approving Affiliate Transaction Requirements to govern Hawaiian Electric).

contemporaneous with the filing of Hu Honua's and HELCO's Prehearing Testimony, and neither mentioned Punawai or the mechanics of the NMTC arrangement. Situations such as this emphasize the transparency and disclosure benefits of competitive bidding, to avoid even the potential for appearance of self-dealing, unfair advantage, and anti-competitive bias.

Lastly, the Commission notes that the arrangement between Hu Honua and Punawai is premised on approval of the Amended PPA. In light of LOL's appeal filed in 2017, as well as the Hawaii Supreme Court's order vacating the 2017 D&O and remanding the proceeding back to the Commission in May of 2019 and the Commission's order re-opening the proceeding on June 20, 2019, it was incumbent on Hu Honua to reasonably consider the risks that approval of the Amended PPA may not occur in time to claim the NMTC and either work with Punawai and/or other applicable entities to address this, or timely raise this issue with the Commission earlier in the proceeding.

Hu Honua argument No. 7: Order No. 37205 does not take into account the Project's contributions to other State objectives.¹⁰²

Hu Honua asserts that the Project "would help decrease the State's exposure [to] fossil fuel volatility, support the

¹⁰²See Hu Honua Motion for Reconsideration at 51-54.

State's public policy of promoting agriculture, contribute significantly to the economy of Hawaii and support employment, and help the State achieve its RPS goals."¹⁰³ The Commission does not find these arguments persuasive.

As discussed in Order No. 37205, the pertinent issue is not whether the Project can or is likely to provide such benefits, but rather, whether it should be granted a waiver from the Framework. Order No. 37205 noted that while the Project may be able to provide such benefits, a competitive bidding process allows HELCO to comprehensively evaluate such benefits compared to the benefits offered by other renewable energy projects.¹⁰⁴

The purpose of the Competitive Bidding Framework is to mandate competitive bidding "as the required mechanism for acquiring a future generation resource or a block of generation resources"¹⁰⁵ Waivers represent an exception to this rule and are only justified in instances where the Commission finds competitive bidding "unsuitable," based on a number of considerations. When the issue of HELCO's requested waiver for the Project was reviewed in 2008 and 2017,¹⁰⁶ the Project offered

¹⁰³Hu Honua Motion for Reconsideration at 51.

¹⁰⁴See Order No. 37205 at 28-36.

¹⁰⁵Competitive Bidding Framework, Section II.A.3.

¹⁰⁶See Waiver D&O, issued November 14, 2008; and D&O 34726, filed July 28, 2017.

particular benefits that, based on the circumstances at the time, supported the granting of a waiver.

However, as noted in Order No. 37205, since then, the renewable energy field has advanced such that many of the stated benefits of the Project could potentially be obtained from other projects at lower cost, and thus the balance of project costs and benefits are more appropriately addressed and evaluated in the context of competitive bidding.

To the extent that Hu Honua believes that the Project can provide these stated benefits in a superior manner, these are arguments that should be made as part of a competitive bid.

Hu Honua argument No. 8: Order No. 37205 does not consider the "inherent inefficiencies" of requiring Hu Honua to competitively bid the Project.¹⁰⁷

The Commission is not persuaded by the "inefficiencies" to having to competitively bid the Project asserted by Hu Honua. Hu Honua argues that there are currently no open solicitations for competitive bidding and that it does not believe that HELCO plans to issue any for Hawaii island. First, the Commission observes that the absence of an open or scheduled RFP is not, by itself, a strong basis for justifying a waiver, as a developer could simply

¹⁰⁷See Hu Honua Motion for Reconsideration at 54-57; and Hu Honua Reply at 39-44.

wait until a solicitation is concluded before asking the utility to request a waiver from the Competitive Bidding Framework.

Second, now that Phase 2 of Hawaiian Electric's renewable procurement is nearing its latter stages (see Docket No. 2017-0352), the Commission will direct HELCO to begin another round of competitive solicitations for an all-source procurement, which will provide Hu Honua with an opportunity to advance its Project for consideration. Subsequent direction regarding Phase 3 will be provided in Docket No. 2017-0352. In this regard, to the extent that Hu Honua contends that such a solicitation must be for "24/7 firm renewable resources" or otherwise narrowly-tailored to apply exclusively or near exclusively to the Project, the Commission clarifies that this is not required to give Hu Honua a reasonable opportunity to bid the Project. As noted above, the Commission intends for the competitive solicitation to be an all-source procurement. Indeed, given Hu Honua's assertions regarding the benefits of the Project when compared to other renewable projects,¹⁰⁸ it is for Hu Honua to determine whether these benefits will allow it to put forth a competitive proposal in this Phase 3 bidding process.

¹⁰⁸See Hu Honua Supplemental Memorandum; and Hu Honua Supplemental Reply.

Hu Honua also makes the assertion here that the timing of the RFPs is somehow indicative of an intention on the part of the Commission to negatively impact the Project. As is clear from the orders initiating the various phases of Phase 1 and Phase 2 of the RFPs, the docket was opened to provide "an opportunity for creative, competitive procurement to increase renewable energy in Hawaii, reduce costs to customers, address the planned retirement of existing fossil fuel generation, and further progress towards Hawaii's renewable energy goals."¹⁰⁹ The Commission appointed independent observers and, in addition, for Phase 2, a technical advisor, to provide oversight and protect the integrity of the process.¹¹⁰ These competitive procurements were not about any individual developer or project - they were about the need to solicit and acquire the best portfolio of clean energy projects and resources, which was best achieved through a robust, competitive process.

In addition, if anything, the history of this docket reflects the Commission's patience and understanding of Hu Honua's situation, as it allowed Hu Honua time to renegotiate and resubmit

¹⁰⁹In re Haw. Elec. Co., Inc., Haw. Elec. Light Co., Inc., and Maui Elec. Co., Ltd., Docket No. 2017-0352, Order No. 36474, "Approving the Hawaiian Electric Companies' Proposed Final Phase 2 Requests for Proposals, with Modifications," filed on August 15, 2019 ("Order No. 36474"), at 11-12.

¹¹⁰See Order No. 36474 at 12.

its Amended PPA with the Commission in 2017 and then provided a full opportunity for Hu Honua to address all issues on remand in the re-opened proceeding in 2019, specifically directing Hu Honua to consider the recent developments in the RFP docket.

Moreover, Hu Honua's argument implies that the Commission should have deprioritized or frozen all other initiatives to increase renewable energy generation until its Project was finalized. This premise ignores the fact that the State's RPS goals, pursuant to HRS § 269-92, require consistent, identifiable progress towards increasing renewable energy, and the Commission could not forego the opportunity to bring more renewable energy onto the system. The Commission is routinely faced with multiple proposals for renewable energy projects, and must balance the needs of the system, the utility, and the customer in making determinations regarding the reasonableness of any individual project. This leads back to the benefits of competitive bidding - it allows the utility to evaluate the costs and benefits of proposed projects against each other, including evaluation of established price and non-price criteria, such that the projects that best meet the identified needs of the utility's system as a whole (as determined by the established criteria) are selected and advanced to the Commission for review.

Hu Honua argument No. 9: In Order No. 37205, the Commission failed to make findings regarding GHGs, as instructed by the Hawaii Supreme Court.¹¹¹

The Commission does not find Hu Honua's arguments regarding GHG emissions convincing. As discussed above, on appeal, the Hawaii Supreme Court vacated the 2017 D&O in its entirety and remanded the matter back to the Commission for further proceedings. On remand, the Commission proceeded to re-establish all issues for examination, including the waiver issue. Upon re-examining the issues, consistent with the principle of administrative efficiency, the Commission began with the waiver issue, which is a threshold determination that comes before considering the merits of the underlying Amended PPA, for the obvious reason that if a project does not justify issuance of a waiver to the applicable utility, there is no need to proceed further with the inquiry.¹¹²

Consequently, the issue of the considering the Project's GHG emissions was not addressed because the Commission's finding on the waiver issue mooted consideration of the Amended PPA. As the Commission determined that HELCO was not entitled to a waiver

¹¹¹See Hu Honua Motion for Reconsideration at 57-68; and Hu Honua Reply at 54-57.

¹¹²See Order No. 37205 at 43 (citing In re Hawaiian Elec. Co., Inc., Docket No. 2018-0400, Order No. 36502, "Dismissing Application Without Prejudice," filed September 6, 2019).

for the Project, the Project could not be considered, procedurally, until it was vetted through competitive bidding.

In light of the Commission's denial of HELCO's request for a waiver, proceeding with findings regarding the Project's GHG emissions would have been inconsistent with the principle of administrative efficiency, delayed the proceeding, and could also interfere with Hu Honua's ability to subsequently competitively bid the Project. For example, if the Commission expressly found that the Project would or would not reduce GHG emissions after determining it was ineligible for a waiver, this could unfairly benefit or prejudice Hu Honua during competitive bidding, as other bidders would not have similar Commission findings regarding GHGs for their respective projects. Furthermore, as the relevant language of HRS § 269-6(b) contemplates a "determination of the reasonableness of the costs of utility system capital improvements and operations," making findings on GHG emissions would have been premature, as the Amended PPA was dismissed without prejudice and no new costs of system capital improvements or operations would occur as a result of Order No. 37205.¹¹³ Hu Honua's arguments

¹¹³See Order No. 37205 at 44 ("As the Commission's decision today renders moot consideration of the Project itself based on the waiver issue, the separate issue of LOL's due process right to be heard on the Project's impact on LOL's property interest in a clean and healthful environment is no longer germane, in that the Project will not proceed as a result of this docket.").

regarding the Commission's lack of findings regarding GHG emissions require an assumption that the Commission intended to approve the Amended PPA.

To the extent Hu Honua's Motion takes issue with the specific points raised in the Commission's discussion on GHG emissions in Order No. 37205, it is unclear how this supports Hu Honua's request for reconsideration. Order No. 37205 explicitly stated: "In light of the Commission's ruling above, the Commission does not make any express findings or conclusions regarding Issue No. 4, regarding estimated impacts of GHG emissions associated with the Hu Honua Project."¹¹⁴ Accordingly, this discussion did not support the Commission's decision to deny HELCO's request for a waiver and does not support a request for reconsidering Order No. 37205.

Furthermore, the premise of the Hawaii Supreme Court's instructions to explicitly consider GHG emissions on remand arose from the need to protect LOL's members' constitutional right to a clean and healthful environment that might have been impacted by approving the Project - not any right asserted by Hu Honua.¹¹⁵

¹¹⁴Order No. 37205 at 44.

¹¹⁵See In re HELCO, 145 Hawaii at 17, 445 P.3d at 689 ("First, the private interest to be affected is LOL's right to a clean and healthful environment, which 'includes the right that explicit consideration be given to reduction of [GHG] emissions in

Pursuant to the Commission's denial of HELCO's request for a waiver, and the dismissal, without prejudice, of the Amended PPA, Order No. 37205 does not impact LOL's members' right to a clean and healthful environment, as defined by HRS Chapter 269. Pertinently, LOL has not asserted that Order No. 37205 has violated its members' rights, as defined by HRS Chapter 269, and has not sought reconsideration of Order No. 37205. Rather, LOL has opposed Hu Honua's Motion for Reconsideration,¹¹⁶ indicating that LOL does not find Order No. 37205 violative of its members' constitutional rights. To the extent Hu Honua now attempts to contort the Court's ruling into a decision about Hu Honua's due process rights, this clearly ignores the nature of the underlying appeal to the Hawaii Supreme Court and the plain language of the Court's decision.

As a result, Hu Honua's reliance on the Court's GHG emissions instructions is unpersuasive, as it is based on the rights of another entity who has not challenged Order No. 37205.

Hu Honua argument No. 10: The Commission's comparison of the Project to the recent competitively procured large-scale renewable energy projects is erroneous.

Commission decision-making, as provided for in HRS Chapter 269.'") (brackets in the original).

¹¹⁶See LOL Reply at 19 ("The Motion for Reconsideration should be rejected with prejudice.").

In addition to its Motion for Reconsideration and Reply, Hu Honua also submitted a Supplemental Memorandum and Supplemental Reply, which contain specific arguments regarding the comparison of the Project to the Phase 1 RFP Projects in Order No. 37205.¹¹⁷ The Commission again notes that these materials are repetitive of testimony and evidence that Hu Honua submitted earlier and, thus, cannot form the basis for reconsideration. As stated by Hu Honua, the purpose of the Supplemental Memorandum is to address the Commission's comparison of the Project to the Phase 1 RFP Projects approved for Hawaii Island.¹¹⁸ Hu Honua then proceeds to raise a number of arguments objecting to the Commission's comparison of the Project to the Phase 1 RFP Projects, including the submission of supplemental affidavits from its experts, Dr. Jonathan Jacobs and Dr. Bruce Plasch.

The Commission does not find these arguments convincing. As stated above, Hu Honua had adequate notice and opportunity to address the issue of comparing the Project to the Phase 1 RFP Projects earlier. Order No. 36382 clearly stated that the waiver issue was subject to re-examination on remand and, in ordering supplemental briefing on this issue, specifically directed the Parties to "include consideration of changes in the Hawaii Island

¹¹⁷See Order No. 37205 at 27-36.

¹¹⁸Hu Honua Supplemental Memorandum at 1.

energy market since [the 2017 D&O] was filed on July 28, 2017," making explicit reference to:

- Initiation of competitive bidding in Docket No. 2017-0352;
- The upcoming Phase 2 of competitive bidding in Docket No. 2017-0352; and
- The [Amended PPA] terms compared to competitive benchmarks established in PPAs approved by the [C]ommission pursuant to Phase 1 of the competitive procurement in Docket No. 2017-0352.¹¹⁹

In its Prehearing Testimony, Hu Honua submitted testimony and exhibits directly addressing the comparison of the Project to the Phase 1 RFP Projects, including testimony from Dr. Jacobs and a study on this very issue.¹²⁰ Consequently, Hu Honua's arguments on this topic do not provide a valid basis for reconsideration as they could have been (and were) raised by Hu Honua earlier.

Relatedly, this undermines Hu Honua's requests to add the supplemental affidavits of Dr. Jacobs and Dr. Plasch, as Hu Honua does not provide an explanation of why this information

¹¹⁹Order No. 36382 at 14.

¹²⁰See Hu Honua Prehearing Testimony, Hu Honua Testimony T-5 at 16-19 and Hu Honua-501. Section 5 of Exhibit Hu Honua-501 is exclusively dedicated to comparing the Project to the Phase 1 RFP Projects.

was not provided earlier in Hu Honua's briefing or Prehearing Testimony.¹²¹ Consistent with the ruling above regarding Mr. Katz's supplemental affidavit, the Commission finds Hu Honua's request to admit Dr. Jacobs' and Dr. Plasch's supplemental affidavits as additional evidence under HAR § 16-601-139 to be insufficiently supported, and denies them as such. Further, the Commission observes that even if they were admitted, they would not support Hu Honua's Motion for Reconsideration as they are evidence that could have been brought before the Commission during the earlier proceeding.

Further, Hu Honua mischaracterizes the nature of the Phase 1 RFP Projects in comparing them to the Project. Hu Honua presumes that the Phase 1 RFP Projects must be capable of providing identical services and benefits to the Project to be comparable, and then hypothetically modifies the Phase 1 RFP Projects to argue in favor of the Project.¹²² However, Order No. 37205 did not state that the Phase 1 RFP Projects would provide identical benefits. Rather, it noted that the recently approved Phase 1 RFP Projects could provide similar benefits as the Project at a significantly lower cost to ratepayers.¹²³ A critical point made in Order

¹²¹See HAR § 16-601-139.

¹²²See Hu Honua Supplemental Memorandum at 8-15.

¹²³See Order No. 37205 at 27-36.

No. 37205 is the notable difference in cost (and resulting bill impact to ratepayers) between the Project and the Phase 1 RFP Projects.¹²⁴ From a ratepayer perspective, the Phase 1 RFP Projects are projected to decrease customer bills throughout the entire life of their 20+-year contracts; conversely, based on the information in the record, the Hu Honua Project's costs are projected to increase customer bills throughout much of the contract term, with bill decreases not anticipated until near the end of the contract term.¹²⁵

Here, due in part to the significantly higher costs, the Commission concluded that HELCO's request for a waiver from competitive bidding is not appropriate and Hu Honua should be required to competitively bid its Project against other renewable projects, where all these factors can be considered comprehensively.

¹²⁴See Order No. 302705 at 30 (providing chart illustrating price comparison of Project and Phase 1 RFP Projects).

¹²⁵See Order No. 37205 at 30-31 (citing Docket Nos. 2018-0430 (AES Waikoloa Solar LLC), Application, Exhibit 3, Attachment 4 at 1; HELCO Prehearing Testimonies, HELCO-305 at 1-3; CA Prehearing Testimony, CA-T-1 at 16; and Tawhiri Prehearing Testimony, Exhibit 1 at 7).

D.

Addressing Related Procedural Motions

The Commission observes that there are a number of pending procedural motions related to Hu Honua's Motion for Reconsideration, including LOL's Motion for Leave, Hu Honua's Motion for Leave, LOL's Motion for Leave to File a Response, and Tawhiri's Motion to Strike.

1.

LOL's Motion For Leave

LOL's Motion for Leave sought Commission permission to file a response to Hu Honua's Motion for Reconsideration. On July 27, 2020, the Commission issued Order No. 37233, in which the Commission, on its own motion, provided LOL (along with the other Party and Participants) an opportunity to submit a reply to Hu Honua's Motion for Reconsideration. Pursuant to Order No. 37233, LOL filed its Reply on August 10, 2020. Based on the above, the Commission dismisses LOL's Motion for Leave as moot.

2.

Hu Honua's Motion For Leave

Hu Honua's Motion for Leave sought Commission permission to file a response to the other Party and Participants' replies to Hu Honua's Motion for Reconsideration. As a preliminary matter, the Commission observes that Hu Honua filed its Reply and Supplemental Reply before waiting for a ruling on its Motion for Leave, which led Tawhiri to file its Motion to Strike. The Commission disfavors such presumptive action as it may cause confusion in the record, lead to unnecessary motions practice, and reflects a disregard for the Commission's rules of practice and procedure.

However, under these circumstances, the Commission will grant Hu Honua's Motion for Leave, in part. However, while the Commission will consider the additional arguments raised in Hu Honua's Reply and Supplemental Reply, as noted above, it denies Hu Honua's request to admit the supplemental affidavits of Mr. Katz, Dr. Jacobs, and Dr. Plasch, pursuant to HAR § 16-601-139.

3.

LOL's Motion For Leave To File A Response

LOL's Motion for Leave to File a Response sought Commission permission to file a response to Hu Honua's Reply. In

light of the Commission's ruling in this Order denying Hu Honua's Motion for Reconsideration, LOL's request, which would have provided further opposition to Hu Honua's Motion for Reconsideration, is moot. As a result, the Commission dismisses LOL's Motion for Leave to File a Response.

4.

Tawhiri's Motion to Strike

Tawhiri's Motion to Strike sought to strike Hu Honua's Reply and Supplemental Reply as improperly filed. As noted above, the Commission has decided, under the circumstances, to grant Hu Honua's Motion for Leave. In addition, it appears that Tawhiri's Motion to Strike was intended to prevent Hu Honua from submitting additional evidence in support of its Motion for Reconsideration. In light of the Commission's ruling in this Order denying Hu Honua's Motion for Reconsideration, Tawhiri's request is moot. As a result, the Commission dismisses Tawhiri's Motion to Strike.

E.

Community Considerations

The Commission is aware that this Project has generated a significant amount of interest, with many in the local community passionately advocating for or against the Project. The Commission has received a voluminous number of public comments, filed in the docket record in the Commission's document management system ("DMS"),¹²⁶ in recent days and appreciates that many people have

¹²⁶Available at: <https://dms.puc.hawaii.gov/>, enter 2017-0122 into the "Docket Quick Link" field on the left side of the page.

The Commission also notes that beginning on September 1, 2020, the Commission started to receive notifications from email account holders clarifying that prior public comments filed in support of the Project that were attributed to their email accounts were not authorized by the account holders. See Letter from the Commission to the Service List in Docket No. 2017-0122, filed on September 2, 2020. These emails were received in response to the Commission's email noting that the Commission had received their public comment, providing some basic information about how to access the docket record, and noting that the public comment would be included in that record. In light of the significant breach-of-privacy concerns implicated by this situation and the difficulty of ascertaining which comments may have been filed without permission, the Commission has redacted from public view public comments filed in this proceeding beginning with those brought to the Commission's notice on September 1, 2020. However, these public comments remain part of this docket record – they, and any responses received, have merely been filed under seal to protect the privacy of those who may have had unauthorized comments filed using their email address.

The Commission reiterates here that its focus is the protection of the privacy of the email account holders who have had comments filed with the Commission without their authorization. Following the Commission's September 2, 2020 letter regarding this situation, the Commission received several communications from Hu Honua and LOL regarding the unauthorized

strong opinions and feelings about this Project. The Commission is cognizant that its rulings will impact many in the local community in a personal way, and does not take such considerations

emails. See "Hu Honua Bioenergy, LLC's Response to the State of Hawaii Public Utilities Commission's ('PUC') Letter Dated September 2, 2020," filed on September 3, 2020; "Hu Honua Bioenergy, LLC Follow Up Response to the State of Hawaii Public Utilities Commission's ('PUC') Letter Dated September 2, 2020," filed on September 8, 2020; "Notice of Litigation/Litigation Hold Demand" Letter from Bruce Voss of Bays Lung Rose Holma on behalf of Hu Honua to Henry Curtis as representative of Life of the Land, dated September 4, 2020, filed on September 8, 2020; PDF of email from Melissa J. Chun of Yamamoto Caliboso LLLC regarding confidential pages to the "Hu Honua Bioenergy, LLC Follow Up Response to the State of Hawaii Public Utilities Commission's ('PUC') Letter Dated September 2, 2020," dated September 4, 2020, and filed on September 8, 2020; "Notice of Litigation/Litigation Hold Demand" Letter from Lance Collins, attorney for Life of the Land, to Bruce Voss of Bays Lung Rose Holma; "Life of the Land's Consultant Senior Cyber Adversary Threat Hunter Kent Backman, Confidentiality Agreement, Time-Sensitive Information Requests, Electronic Case Files, Violation of Commission Rules, Declaration of Henry Q. Curtis & Certificate of Service," filed on September 8, 2020; Curriculum Vitae for Kent Backman, filed on September 8, 2020; PDF of excerpt of Kent Backman's public LinkedIn profile, filed on September 8, 2020; and PUC Protective Agreement (Exhibit A), signed by Kent Backman, filed on September 8, 2020.

The Commission notes that both Hu Honua and LOL have stated that they may be pursuing legal action against the other regarding claims related to the unauthorized emails. Potential civil actions arising from this incident based upon claims of tortious interference, fraud, abuse of process, malicious prosecution, false light, invasion of privacy, defamation and/or others would be pursued in court (i.e., outside of this docket), and while the Commission reviews all public comments that are filed in the docket, as noted above, it is the evidence and argument that has been entered into this record via the Parties' and Participants' filings that form the basis for the Commission's decision here regarding Hu Honua's Motion for Reconsideration.

lightly. However, in this instance, the Commission affirms its belief that the public interest will be best served by requiring HELCO to evaluate Hu Honua's project through competitive bidding.

III.

ORDERS

THE COMMISSION ORDERS:

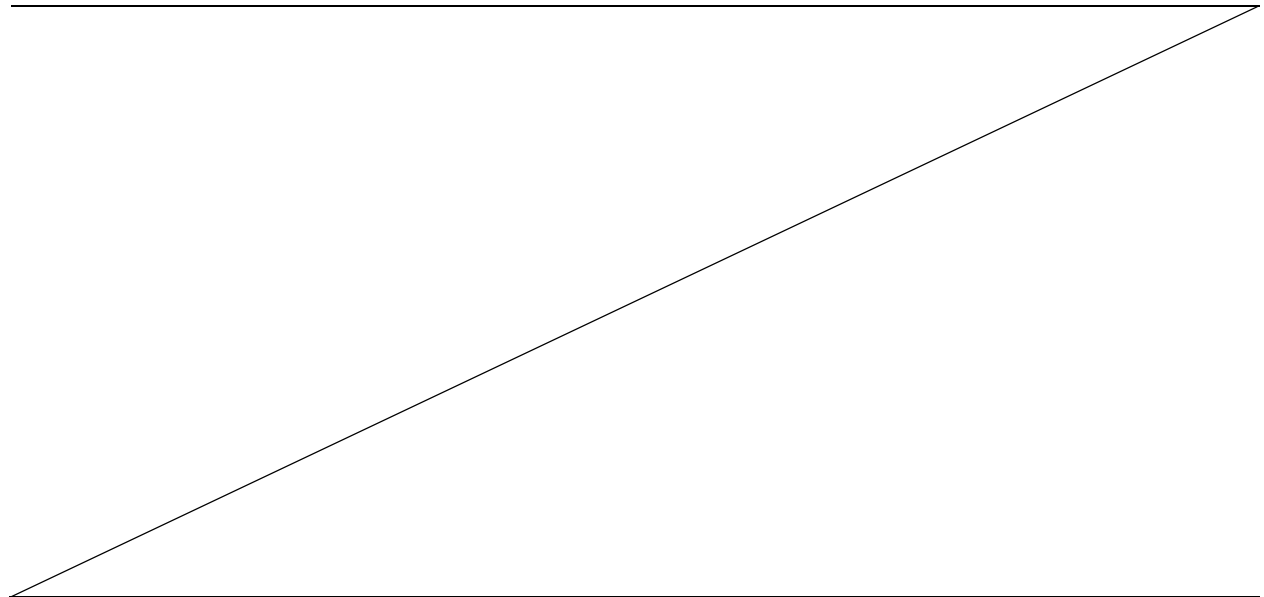
1. Hu Honua's request for a hearing on its Motion for Reconsideration is denied.

2. Hu Honua's Motion for Reconsideration is denied.

3. LOL's Motion for Leave is dismissed as moot.

4. Hu Honua's Motion for Leave is granted in part, as set forth above.

5. LOL's Motion for Leave to File a Response is dismissed as moot.

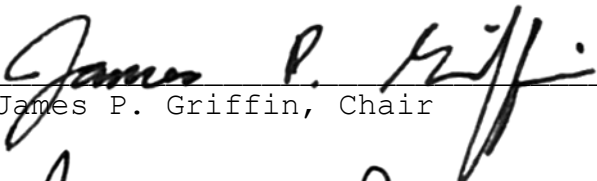


6. Tawhiri's Motion to Strike is dismissed as moot.

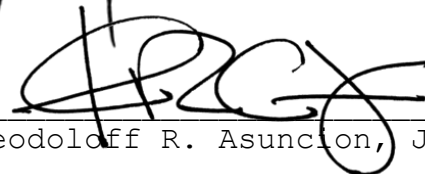
7. This docket is closed, unless ordered otherwise by the Commission.

DONE at Honolulu, Hawaii SEPTEMBER 9, 2020.

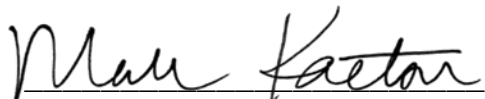
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
James P. Griffin, Chair

By 
Jennifer M. Potter, Commissioner

By 
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:


Mark Kaetsu
Commission Counsel

2017-0122.ljk

CERTIFICATE OF SERVICE

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

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