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SCOT-22-0000024

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

HU HONUA BIOENERGY, LLC, a Delaware Limited Liability Company	)	SCOT-22-0000024
	)	
Appellant,	)	IN THE MATTER OF THE APPLICATION
	)	OF HAWAI‘I ELECTRIC LIGHT
	)	COMPANY, INC. FOR APPROVAL OF A
PUBLIC UTILITIES COMMISSION, State of Hawai‘i; HAWAII ELECTRIC LIGHT COMPANY, INC., a domestic profit corporation; DIVISION OF CONSUMER ADVOCACY, Department of Commerce and Consumer Affairs; LIFE OF THE LAND, a Hawai‘i non-profit corporation; TAWHIRI POWER, LLC, a domestic limited liability company; and HAMAKUA ENERGY, LLC, a domestic limited liability company.	)	POWER PURCHASE AGREEMENT FOR
	)	RENEWABLE DISPATCHABLE FIRM
	)	ENERGY AND CAPACITY
	)	
	)	APPEAL FROM THE PUBLIC UTILITIES
	)	COMMISSION [DKT. NO. 2017-0122]
	)	
	)	
Appellees.	)	
	)	

APPELLANT HU HONUA BIOENERGY, LLC’S EMERGENCY MOTION FOR STAY OF  
FURTHER PROCEEDINGS IN PUC DOCKET NO. 2017-0122 PENDING APPEAL

MEMORANDUM IN SUPPORT OF MOTION

DECLARATION OF BRUCE D. VOSS

EXHIBITS “A” – “B”

CERTIFICATE OF SERVICE

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HU HONUA BIOENERGY, LLC

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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	)	APPEAL FROM THE PUBLIC UTILITIES
	)	COMMISSION [DKT. NO. 2017-0122]
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Appellees.	)	
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APPELLANT HU HONUA BIOENERGY, LLC’S  
EMERGENCY MOTION FOR STAY OF PROCEEDINGS  
IN PUC DOCKET NO. 2017-0122 PENDING APPEAL

Appellant HU HONUA BIOENERGY, LLC (“Hu Honua”), by and through its attorneys Bays Lung Rose & Voss, respectfully requests that the Court enter an immediate stay of all further proceedings in Public Utilities Commission (“PUC”) Docket No. 2017-0122 (“2017 Docket”), pending resolution of Hu Honua’s appeal from the PUC’s: Order No. 38169, “Denying Hu Honua Bioenergy, LLC’s Motion to Continue Hearing, filed on January 6, 2022,” attached hereto as Exhibit “A” (“Order No. 38169”); and Order No. 38183, “Addressing Hu Honua Bioenergy, LLC’s Motion Regarding Applicability of HRS Section 269-6,” filed January 13, 2022, attached hereto as Exhibit “B” (“Order No. 38183”) (collectively, Order No. 38169 and Order No. 38183 are referred to as the “Orders.”).

Hu Honua requests that the Court enter the stay prior to January 31, 2022, when the PUC has scheduled an evidentiary hearing to determine the fate of Hu Honua’s renewable energy project (“Project”).

This motion is made pursuant to Sections 91-14 and 296-15.51 of the Hawaii Revised Statutes (“HRS”) and Rule 27 of the Hawaii Rules of Appellate Procedure (“HRAP”). It is supported by the attached memorandum, declarations and exhibits, and the records and files herein.

DATED: Honolulu, Hawai`i, January 26, 2022.

/s/ Bruce D. Voss \_\_\_\_\_

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SCOT-22-0000024

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

HU HONUA BIOENERGY, LLC, a ) SCOT-22-0000024  
Delaware Limited Liability Company )  
 )  
Appellant, ) MEMORANDUM IN SUPPORT OF  
 ) MOTION  
 )  
PUBLIC UTILITIES COMMISSION, State )  
of Hawai‘i; HAWAII ELECTRIC LIGHT )  
COMPANY, INC., a domestic profit )  
corporation; DIVISION OF CONSUMER )  
ADVOCACY, Department of Commerce )  
and Consumer Affairs; LIFE OF THE )  
LAND, a Hawaii non-profit corporation; )  
TAWHIRI POWER, LLC, a domestic )  
limited liability company; and HAMAKUA )  
ENERGY, LLC, a domestic limited liability )  
company. )  
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Appellees. )  
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## MEMORANDUM IN SUPPORT OF MOTION

### I. INTRODUCTION

The Court is familiar with the ongoing saga of PUC Docket No. 2017-0122 (“2017 Docket”), a contested case which has resulted in two appeals from the PUC’s final orders – and the Court’s reversals of those final orders – in less than three years. See In re Hawai’i Elec. Light Co., 145 Hawai’i 1, 445 P.3d 673 (2019) (“HELCO I”); see also In re Hawai’i Elec. Light Co., 149 Hawai’i 239, 487 P.3d 708 (2021) (“HELCO II”).

Following remand in HELCO II and the reopening of the 2017 Docket for an evidentiary hearing to comply with the Court’s instructions, the PUC has made clear what it intends to do, regardless of the applicable law and evidence. In Order No. 38183, the PUC stated that it would not apply HRS Section 269-6(b) pursuant to the statute’s plain language and purpose, despite the PUC’s obligation to do so. In Order No. 38169, the PUC insisted upon holding the evidentiary hearing remotely and as soon as possible, without exhibit lists or written transcripts, despite the debilitating impacts that it will have on Hu Honua’s ability to prepare and make its presentation at that hearing and in any further appeals which may become necessary.

As a result of these rulings, Hu Honua will have to clear a significantly higher burden of proof than HRS Section 269-6(b) actually requires, with its hands tied firmly behind its back. In short, taken together, the Orders confirm that, presented with another chance to follow the Court’s prior instructions, the PUC still fully intends to kill Hu Honua’s renewable energy project (“Project”) again, without a fair and meaningful opportunity to be heard, even though the half-billion dollar Project is 99% complete and ready to provide the State of Hawaii with myriad environmental and economic benefits.

The evidentiary hearing in the 2017 Docket is currently scheduled to go forward on January 31, 2022. Hu Honua requests that the Court stay further proceedings in the 2017 Docket until the Court resolves this appeal, reverses Order Nos. 38169 and 38183 (“Orders”), and remands again for further proceedings consistent with the Court’s instructions and applicable law. Otherwise, the evidentiary hearing will be nothing more than a sham, leading inexorably to a predetermined and erroneous result.



## II. RELEVANT BACKGROUND

Given the two previous appeals, the Court is familiar with most of the long factual background of the Project, the 2017 Docket, and prior related proceedings before the PUC. See, e.g., HELCO I, 145 Hawai‘i at 5-10, 445 P.3d at 677-82; see also HELCO II, 149 Hawai‘i at 240-42, 487 P.3d at 709-11. Therefore, only the facts most pertinent to this appeal will be set forth below.

### A. The Project

The Project is a state-of-the-art bioenergy facility that will provide renewable, firm, dispatchable energy; diversify renewable energy on Hawaii Electric Light Company, Inc.’s (“HELCO”) grid and support Hawaii’s clean energy goals; significantly reduce GHG emissions and be the first energy project in Hawaii to voluntarily commit to be carbon negative as a condition of approval; stabilize and reduce the cost of energy as compared to fossil generation; enable the creation of green hydrogen fuel and the use of woody invasive species; revitalize East Hawaii Island’s agricultural and forestry sector; and bring many new jobs to Hawaii Island and infuse millions of dollars into the local economy.

### B. The PUC Approves The Amended PPA In The 2017 Docket

On May 9, 2017, HELCO filed an Amended & Restated Power Purchase Agreement (“Amended PPA” or “A&R PPA”) between Hu Honua and HELCO in the 2017 Docket. On July 28, 2017, the PUC filed its Order No. 34726, in which the PUC granted the Project a waiver from the Competitive Bidding Framework (“2017 waiver”), and approved the Amended PPA. See HELCO II, 149 Hawai‘i at 240, 487 P.3d at 709.

### C. The Court Issues Its Opinion In HELCO I And Remands To The PUC For Further Proceedings

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Life of the Land (“LOL”) directly appealed Order No. 34726 to the Court on the basis that “the PUC failed to explicitly consider greenhouse gas (‘GHG’) emissions in determining whether to approve the Amended PPA, as required by state law [HRS § 269-6(b)].” HELCO I, 145 Hawai‘i at 2, 445 P.3d at 674 (bracketing added).

On May 10, 2019, the Court issued HELCO I holding, among other things, that “the PUC erred by failing to explicitly consider the reduction of GHG emissions in approving the Amended PPA” pursuant to HRS § 269-6(b) and that “the PUC denied LOL due process with respect to the opportunity to be heard regarding the impacts that the Amended PPA would have

on LOL’s right to a clean and healthful environment,” as defined by HRS Chapter 269. Id. at 2-3, 445 P.3d at 674-75. The Court vacated Order No. 34726, and ordered the PUC on remand to “give explicit consideration to the reduction of GHG emissions in determining whether to approve the Amended PPA, and make the findings necessary for the Court to determine whether the [PUC] satisfied its obligations under HRS § 269-6(b).” Id. at 25, 445 P.3d at 697 (emphasis in original). It also instructed the PUC to hold a “hearing that complies with procedural due process.” Id. at 26, 445 P.3d at 698.

D. The PUC Fails To Follow The Court’s Instructions On Remand

Following the Court’s issuance of HELCO I, the PUC reopened the 2017 Docket on June 20, 2019, but failed to follow the Court’s explicit instructions. After delaying the evidentiary hearing that the Court ordered it to hold for more than a year, due to purported (and unspecified) concerns over the impacts of COVID-19 and “confidential” details regarding a separate docket, the PUC created and then seized upon an opportunity to disregard the Court’s instructions altogether.

On July 9, 2020, the PUC issued Order No. 37205, in which it claimed for the first time that not only was the 2017 waiver at issue, it was the threshold issue to all others in the 2017 Docket. Therefore, after purporting to “deny” the 2017 waiver, the PUC concluded there was no need to hold the evidentiary hearing or make findings regarding the potential costs associated with the Project’s GHG emissions, as the Court previously ordered and HRS Section 269-6 requires. The PUC then declared the 2017 Docket closed, and denied Hu Honua’s motion for reconsideration. See HELCO II, 149 Hawai‘i at 240, 487 P.3d at 709.

E. The Court Remands To The PUC For The Further Proceedings Once Again

Hu Honua directly appealed Order No. 37205 (and the PUC’s order denying reconsideration, Order No. 37306) to the Court, arguing that the PUC had misread and failed to follow the Court’s prior instructions in HELCO I, and that the validity of the 2017 waiver was not at issue in HELCO I or on remand. See HELCO II, 149 Hawaii at 241, 487 P.3d at 710.

The Court agreed with Hu Honua that the PUC had erred again. See id., 149 Hawaii at 242, 487 P.3d at 711. Accordingly, on May 24, 2021, the Court vacated Order Nos. 37205 and 37306, and remanded to the PUC with a directive “to follow the instructions [the Court] provided in HELCO I.” See id. As a reminder to the PUC, those instructions were for the PUC to hold “a hearing on the Amended PPA that ‘complies with procedural due process’ as

well as the requirements of HRS Chapter 269.” See id. Furthermore, the Court reminded the PUC that the hearing

must afford LOL an opportunity to meaningfully address the impacts of approving the Amended PPA on LOL’s members’ right to a clean and healthful environment, as defined by HRS Chapter 269. The hearing must also include express consideration of GHG emissions that would result from approving the Amended PPA, whether the cost of energy under the Amended PPA is reasonable in light of the potential for GHG emissions, and whether the terms of the Amended PPA are prudent and in the public interest, in light of its potential hidden and long-term consequences.

Id. (quoting HELCO I at 26, 445 P.3d at 698).

F. The Legislature Amends HRS Section 269-6

During the pendency of HELCO II, the State legislature had been reviewing certain proposed amendments to HRS Section 269(b), which resulted in the passage of Act 82 on June 24, 2021. The amendments to HRS Section 269-6(b) contained in Act 82 were as follows:

(b) The public utilities commission shall consider the need to reduce the State’s reliance on fossil fuels through energy efficiency and increased renewable energy generation in exercising its authority and duties under this chapter. In making determinations of the reasonableness of the costs [~~of~~] pertaining to electric or gas utility system capital improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State’s reliance on fossil fuels on [~~price~~] :

- (1) Price volatility [~~, export~~] ;
- (2) Export of funds for fuel imports [~~, fuel~~] ;
- (3) Fuel supply reliability risk [~~, and greenhouse~~] ; and
- (4) Greenhouse gas emissions.

The commission may determine that short-term costs or direct costs of renewable energy generation that are higher than alternatives relying more heavily on fossil fuels are reasonable, considering the impacts resulting from the use of fossil fuels. The public utilities commission shall determine whether such analysis is necessary for proceedings involving water, wastewater, or telecommunications providers on an individual basis.

HRS § 269-6(b) (effective June 24, 2021); see also Gov. Msg. No. 1184 (June 24, 2021) available at [https://www.capitol.hawaii.gov/session2021/bills/GM1184\\_.pdf](https://www.capitol.hawaii.gov/session2021/bills/GM1184_.pdf) (attaching Act 82).<sup>1</sup>

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<sup>1</sup> Bracketed text denotes deletions from the prior version of HRS Section 269-6(b); underscored text denotes additions.

G. The PUC Reopens The 2017 Docket And Issues The Orders Giving Rise To This Appeal

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1. Statement of Issues

On June 30, 2021, following the amendment of HRS Section 269-6(b), the Commission reopened the Docket No. 2017-0122 and issued Order No. 37852, establishing the original statement of issues based on its interpretation of HELCO I and HELCO II (“Statement of Issues”). In establishing the Statement of Issues, the PUC recognized that Act 82 amended HRS Section 269-6(b), but stated in a footnote that it did “not believe that these amendments alter the basis for the Court’s interpretation of the [PUC]’s statutory obligations under HRS § 269-6(b), as previously set forth in MECO, HELCO I, and HELCO II.”<sup>2</sup>

The PUC “encouraged the Parties and Participants to take advantage of the opportunities provided in the procedural schedule to fully develop their position in the record to the best of their abilities,” and it additionally noted that “to the extent a Party or Participant believes that the amendments to HRS § 269-6 effectuated by Act 82 warrant consideration, this procedural schedule offers an opportunity to make this case.”<sup>3</sup> The PUC did not set a deadline for filing any motions or position statements as to how the parties believed that amendments to HRS Section 269-6 warranted further consideration by the PUC. See generally id.

2. The PUC denies Hu Honua’s Motion to Consider Act 82 and its impact on the issues in the 2017 Docket

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On July 20, 2021, Hu Honua filed its Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening the Docket (“Motion to Consider”). Among other things, Hu Honua argued that the plain language of the statute, as revised, clarifies and substantially narrows the type of GHG emissions that the PUC is required to consider pursuant to HRS Section 269-6(b). More specifically, Hu Honua argued that as amended, HRS Section 269-6(b) requires the PUC only to explicitly consider “the effect of the State’s reliance on fossil fuels on: ... (4) GHG emissions.” See HRS §269-6(b) (emphasis added). In other words, Hu Honua asserted that the plain language of the statute, as amended, requires explicit consideration of GHG emissions within the context of the State’s reliance on fossil fuels only, and not from non-fossil fuel sources such as renewable sources such as

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<sup>2</sup> Order No. 37852, p. 9 n.20.

<sup>3</sup> Id., p. 19, n.35.

biomass. Therefore, Hu Honua requested that the PUC amend the Statement of Issues to account for HRS Section 269-6(b), as amended. Hu Honua asked the PUC to amend the Statement of Issues as follows:

1. What are the long-term environmental and public health costs of reliance on fossil fuels ~~energy produced~~ at the proposed facility?
  - a. What is the potential for increased air pollution due to GHG emissions directly attributed [to] fossil fuels at the Project, as well as from earlier stages from the production process?
2. What are the GHG emissions from fossil fuels that would result from approving the Amended PPA?
3. Whether the cost of energy under the Amended PPA is reasonable in light of the potential for GHG emissions from fossil fuels.
4. Whether the terms of the Amended PPA are prudent and in the public interest, in light of the Amended PPA's hidden and long-term consequences of GHG emissions from fossil fuels.<sup>4</sup>

On August 11, 2021, the Commission issued Order No. 37910, which inter alia misconstrued the Motion to Consider as an untimely motion for reconsideration of Order No. 37852 and ruled, in pertinent part, that “the Commission does not believe this relatively minor amendment to the structure of HRS § 269-6 evidences a shift in the Commission’s statutory obligations as set forth in HELCO I and HELCO II, and related caselaw.”<sup>5</sup>

3. The PUC substantively broadens its Statement of Issues to address in the 2017 Docket

In the same Order No. 37910, the PUC partially granted the Consumer Advocate’s “Motion for Leave to Respond.” Despite the fact that the Consumer Advocate’s Motion for Leave to Respond was filed on July 23, 2021, three days after the Motion to Consider, and despite the PUC’s recognition that the Motion for Leave to Respond was “technically moot,” the PUC proceeded to broaden the Statement of Issues in accordance with the Consumer Advocate’s requests, which the PUC mischaracterized as “non-substantive.”<sup>6</sup>

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<sup>4</sup> The language that Hu Honua proposed to add to the Statement of Issues is underscored; the proposed deletions are struck through.

<sup>5</sup> Order No. 37910, pp. 25-26, 32.

<sup>6</sup> Id. at 32-33.

Those purportedly “non-substantive” changes to the Statement of Issues were as follows:

1. What are the long-term environmental and public health costs of reliance on energy produced at the proposed facility?
  - a. What is the potential for increased air pollution due to the lifecycle GHG emissions of directly attributed the Project, ~~as well as from earlier stages in the production process?~~
2. What are the GHG emissions that would result from approving the Amended PPA?
3. Whether the total costs of energy under the Amended PPA, including but not limited to the energy and capacity costs ~~is~~ are reasonable in light of the potential for GHG emissions.
4. Whether the terms of the Amended PPA are prudent and in the public interest, in light of the Amended PPA’s hidden and long-term consequences.<sup>7</sup>

On August 23, 2021, Hu Honua filed its Motion for Reconsideration of Order No. 37910, focusing on the PUC’s partial grant of the Consumer Advocate’s Motion for Leave to Respond, specifically its amendment of Issue No. 3. Among other things, Hu Honua argued that the PUC’s amendment of the Statement of Issues was procedurally improper, and its amended Issue No. 3 did not comport with the plain language of HRS Section 269-6(b) or the scope of remand and the Court’s instructions in HELCO I or HELCO II. Four days later, on August 27, 2021, the PUC issued Order No. 37936, denying Hu Honua’s Motion for Reconsideration.

4. The PUC unilaterally modifies the procedure for the evidentiary hearing

On December 22, 2021, a little more than a month before the evidentiary hearing was scheduled to begin on January 31, 2022, the PUC issued its Order No. 38143, “Modifying the Procedural Schedule.” In Order No. 38143, the PUC – sua sponte – did much more than just modify the procedural “schedule.” Under the guise of “assisting the hearing participants in their preparation” for the evidentiary hearing, the PUC fundamentally altered the nature of the proceedings themselves, and prevented Hu Honua from being able to adequately prepare for or

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<sup>7</sup> The language that the Consumer Advocate proposed to add to the Statement of Issues is underscored; the proposed deletions are struck through.

participate in those proceedings.<sup>8</sup> Providing no other rationale other than a vague reference to “the virtual nature of the hearing,” the PUC announced that

Parties and Participants will not be required to submit an exhibit list prior to the hearing. At the hearing, Parties may refer to documents that have been filed in the record when cross-examining a witness, provided that they give the witness an accurate reference and reasonable reference and a reasonable amount of time to locate the document.

The PUC concluded by stating that “[t]hese modifications are intended to allow the Parties, Participants, and Commission to more efficiently prepare for the evidentiary hearing.”<sup>9</sup> However, and as the PUC was (and is) well aware, the “documents that have been filed in the record” are voluminous, reach back to May 2017, and total tens of thousands of pages; Hu Honua’s witnesses alone have responded to a total of approximately 2,507 information requests<sup>10</sup> over the course of the 2017 Docket. As a result of Order No. 38143, Hu Honua’s witnesses will have to be prepared to answer any and all questions regarding each and every one of those 2,507 responses, as well as other parties’ responses, without the advanced notice that an exhibit list would provide Hu Honua and its witnesses.

5. The PUC issues Order No. 38169 and denies Hu Honua’s Motion to Continue the Evidentiary Hearing

On January 3, 2022, Hu Honua filed a Motion to Continue the Hearing, detailing the crushing burdens that the PUC’s belated, sua sponte “modifications” to the procedural “schedule,” coupled with COVID-19 restrictions, had placed on Hu Honua’s ability to prepare its witnesses (many of whom reside out of state) and its presentation at the evidentiary hearing. It therefore requested that the PUC continue the evidentiary hearing to ensure that Hu Honua and its witnesses were fully prepared to proceed with the evidentiary hearing, and the evidentiary hearing could be safely held in-person, rather than remotely, given Hu Honua’s concerns over its and its witnesses’ ability to present their testimony and other evidence through a remote platform.

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<sup>8</sup> See id., p. 2.

<sup>9</sup> Id. at pp. 3-4.

<sup>10</sup> The number of information requests include individual questions in the form of subparts (e.g., 1, 1.a., 1.b., 1.c., etc.).

Three days later, on January 6, 2022, the PUC filed Order No. 38169, denying the Motion to Continue the Hearing. The PUC stated that it did not find either Hu Honua’s concerns or due process rights sufficiently “compelling” to continue the hearing as Hu Honua requested. See Exhibit A, p. 7. The PUC expressed its urgency to proceed with the evidentiary hearing without any further delay or modification to alleviate Hu Honua’s concerns. See id., pp. 11-13. Of course, the PUC’s recently expressed urgency to proceed is in stark contrast to its conduct following remand in HELCO I, where the PUC was content to delay the evidentiary hearing indefinitely due to its unspecified concerns regarding COVID-19 and other matters, before it declined to hold the evidentiary hearing altogether, leading to HELCO II.

6. The PUC issues Order No. 38183 and affirms its refusal to apply HRS Section 269-6 pursuant to its plain language

On January 4, 2022, Hu Honua also filed its Motion to Confirm that Hawaii Revised Statutes Section 269(b), as Amended by Act 82, Applies to This Proceeding (“Motion to Confirm”). In the Motion to Confirm, Hu Honua noted that in denying Hu Honua’s Motion to Consider, see §II.G.2, supra, the PUC never specified whether it intended to apply in the remanded proceeding (1) HRS Section 269-6(b), as amended by Act 82, or (2) the prior version of HRS Section 269-6(b) that was in effect at the time the Court decided HELCO I and HELCO II. Hu Honua urged the PUC to apply HRS Section 269-6(b), as amended, in a manner that comported with the statute’s plain language.

On January 13, 2022, the PUC issued Order No. 38183, in which the PUC purported to “address” the Motion to Confirm, while actually denying it. See generally Exhibit A. The PUC stated that it would apply HRS Section 269-6(b), as amended, but dismissed the amendments to the statute’s language as nothing more than non-material, “grammatical changes,” which would not affect its analysis of the evidence presented at the evidentiary hearing. See id., pp. 2, 6.

H. Hu Honua Files Another Request To The PUC For A Continuance

Hu Honua noticed this appeal on January 24, 2022. On January 25, 2022, Hu Honua filed a letter with the PUC requesting a status conference to discuss postponement of the evidentiary hearing during the pendency of this appeal. As of the date of this filing, the PUC has yet to respond to Hu Honua’s request.



### III. LEGAL STANDARD

The 2017 Docket is a contested case. HRS Section 269-15.51 provides:

- (a) Chapter 91 shall apply to every contested case arising under this chapter except where chapter 91 conflicts with this chapter, in which case this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case under this chapter shall be appealed from a final decision and order or a preliminary ruling that is of the nature defined by section 91-14(a) upon the record directly to the supreme court for final decision. Only a person aggrieved in a contested case proceeding provided for in this chapter may appeal from the final decision and order or preliminary ruling. For the purposes of this section, the term “person aggrieved” includes an agency that is a party to a contested case proceeding before that agency or another agency.
- (b) The Court shall give priority to contested case appeals of significant statewide importance over all other civil or administrative appeals or matters and shall decide these appeals as expeditiously as possible.

(Emphasis added.)

In turn, HRS Section 91-14(a) allows for immediate appeal from “a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief.” For such appeals, the Court “may order a stay” of “enforcement of agency decisions” “if the following criteria have been met”:

- 1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;
- 2) Irreparable damage to the subject person will result if a stay is not ordered;
- 3) No irreparable damage to the public will result from the stay order; and
- 4) Public interest will be served by the stay order.

HRS § 91-14(c).

The criteria listed in HRS Section 91-14(c) are essentially the same as those courts use to determine whether to grant interlocutory injunctive relief. See Penn v. Transp. Lease Hawai‘i, Ltd., 2 Haw. App. 272, 276, 630 P.2d 646, 649-650 (1981) (“the modern test for interlocutory injunctive relief is threefold: (1) Is the party seeking the injunction likely to prevail on the merits? (2) Does the balance of irreparable damage favor issuance of an interlocutory injunction? (3) To the extent that the public interest is involved, does it support granting the injunction?”) (citing Life of the Land v. Ariyoshi, 59 Haw. 156, 577 P.2d 1116 (1978)). The

standard implicates a balancing test with regard to the first two factors, which should be considered together:

The more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of his success on the merits. Fox Valley Harvestore v. A. O. Smith Harvestore Prod., 545 F.2d 1096 (7th Cir. 1976); Benda v. Grand Lodge of Intern. Ass'n, Etc., 584 F.2d 308 (9th Cir. 1978). Likewise, the greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction.

Penn, 2 Haw. App. at 276, 630 P.2d at 650.

#### IV. THE STATUS QUO MUST BE PRESERVED PENDING RESOLUTION OF THIS APPEAL

##### A. Hu Honua Is Likely To Prevail On The Merits Of Its Appeal

1. The PUC's refusal to apply HRS Section 269-6(b) in accordance with its plain meaning and legislative purpose prejudices Hu Honua's substantial rights.

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- a. The proper interpretation and application of HRS Section 269-6(b), as amended by Act 82.

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A court or agency, such as the PUC, is obligated to “apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.”<sup>11</sup> Statutes must be interpreted and applied according to their unambiguous and plain meaning.<sup>12</sup> An agency's interpretation and application of a statute does not merit deference when it would contravene the purpose and effect of a clear and unambiguous statute.<sup>13</sup>

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<sup>11</sup> Jackson v. Jackson, 84 Hawai'i 319, 332, 933 P.2d 1353, 1366 (App. 1997) (citations and quotation omitted).

<sup>12</sup> See Dir. Dept. Labor & Indus. Relations v. Kiewit Pac. Co., 104 Hawaii 22, 29, 84 P.3d 530, 537 (App. 2004).

<sup>13</sup> See id. (judicial deference to agency interpretation of statute unwarranted where agency's interpretation contravenes legislature's manifest purpose); State v. Dillingham Corp., 60 Haw. 393, 409, 591 P.2d 1049, 1059 (1979) (“[N]either official construction or usage, no matter how long indulged in, can be successfully invoked to defeat the purpose and effect of a statute which is free from ambiguity...”); Government Employees Ins. Co. v. Dang, 89 Hawaii 8, 15, 967 P.2d 1066, 1073 (1998) (appellate courts “have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation”).

In Order No. 38183, the PUC made clear that is not going to abide its obligation to apply HRS Section 269-6(b) as currently written. See Exhibit B, pp. 9-10. Simply put, the PUC’s lip service to applying “the version of HRS § 269-6(b) that is in effect; i.e., the version amended by Act 82,” cannot be reconciled with the PUC’s assertion that Act 82’s amendment “does not materially affect the scope of HRS § 269-6(b) as applied to the Project, nor the applicability of HELCO I and HELCO II to [the] remanded proceeding.” Id., p. 9.

The legislature’s changes to HRS Section 269-6(b) were not merely “grammatical” in nature, as the PUC claims.<sup>14</sup> The amendments contained in Act 82 clarify the manner in which the PUC is to discharge its duties under HRS Section 269-6(b) and in the evidentiary hearing regarding the Project. Under the plain language of the statute, as revised, the placement of the “State’s reliance on fossil fuels” preceding the colon, together with the distinct numbered categories of what must be considered thereafter, shows that the statute unambiguously requires explicit consideration of GHG emissions within the context of “the State’s reliance on fossil fuels” only, and not from non-fossil fuel sources such as renewable sources (e.g., biomass).<sup>15</sup> Importantly, Act 82 also clarifies that the PUC may determine that the costs of renewable energy generation that are higher than alternatives relying more heavily on

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<sup>14</sup> “Because the constitution explicitly delegates to the legislature the responsibility of defining the right to a clean and healthful environment, the framers “len[t] flexibility to the definition of the right over time. . . . [It] can be reshaped and redefined through statute, ordinance and administrative rule-making procedures and [is] not inflexibly fixed.” State Org. of Police Officers v. City & Cty. of Honolulu, 149 Hawai‘i 492, 510 n.21, 494 P.3d 1225, 1243 (2021) (quoting In re Application of Maui Elec. Co., Ltd., 141 Hawai‘i 249, 261, 408 P.3d 1, 13 (2017) (alterations in original).

<sup>15</sup> “Statutory construction ‘is a holistic endeavor,’ and, at a minimum, must account for a statute’s full text, language as well as punctuation, structure, and subject matter.” United States v. Nishiie, 996 F.3d 1013, 1020 (9th Cir. 2021) (citation and internal quotation marks omitted). In interpreting statutes in accord with the placement of colons, courts have explained that a colon preceding a list provides the contents and expands on the list following it. See Gayanich v. Gayanich, 69 V.I. 583, 590 (V.I. 2018) (“Basic English grammar dictates that a colon precedes a list, which expands upon and explains the content of the clause preceding it.” (citing John H. Ridge, Five Punctuation Mistakes We Commonly Make, Wyo. Law., Feb. 2017, at \*50)). Additionally, a colon that precedes an adverb—such as HRS § 269-6(b)’s requirement that “the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State’s reliance on fossil fuels on”—indicates that “the adverb was intended to modify everything that came after it.” See United States v. Nofziger, 878 F.2d 442, 457 (D.C. Cir. 1989) (providing as an example that “a colon or dash—after ‘knowingly’ would indicate that the adverb was intended to modify everything that came after it”).

fossil fuels are reasonable, considering the impacts resulting from the use of fossil fuels. Thus, the legislature clarified that the PUC’s obligation under HRS Section 269-6(b) is to consider the reasonableness of the cost of renewable energy generation, such as the Project, against fossil fuel generation (not against other renewable generation) given the impacts (i.e., price volatility, export of funds, fuel supply reliability risk, and GHG emissions) resulting from the use of fossil fuels.

These distinctions are critical, given the PUC’s years-long failure to formulate an objective standard for measuring GHG emissions<sup>16</sup> and its penchant for comparing the Project’s estimated GHG emissions and costs to other renewable energy projects – particularly the PUC’s favored solar projects – which the PUC has in the past (erroneously) predetermined to have lower GHG emissions and costs than the Project. This was one of the primary justifications the PUC improperly used to “deny” the 2017 waiver in 2020, which led to HELCO II. With its amendment to HRS Section 269-6(b), the legislature made clear that mode of comparison is no longer permissible: in considering the Amended PPA and the Project, the only comparison to draw is between the Project and fossil-fuel fired power plants. This is the only interpretation consistent with the legislature’s stated purpose of reducing the State’s reliance on fossil fuels while increasing the State’s use of renewable energy through a diverse and reliable portfolio. See HRS §§269-6(b), 269-92.

In summary, under HRS Section 269-6(b) as it is currently written, the PUC is neither obligated nor authorized to engage in the sort of broad and wide-ranging inquiry called for under the current Statement of Issues, which is based on the PUC’s misinterpretation of the law and its desire to kill the Project once and for all. See §II.G.3., supra. As the history of the 2017 Docket demonstrates, the PUC has devoted its efforts, time and time again, to finding ways to thwart the Project. Now that the legislature has clearly spoken on the scope of the PUC’s powers under HRS Section 269-6(b), the PUC has announced its own intention to simply ignore it. While this latest maneuver may serve the PUC’s agenda, it is a plainly improper action for a state agency to take. Order No. 38183 must be reversed.

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<sup>16</sup> See, e.g., In re Gas Co., LLC, 147 Hawai‘i 186, 202, 465 P.3d 633, 649 (2020) (noting that as of June 9, 2020, “there is [still] no rule, recently amended rule, or pending rule-making proceeding concerning how the PUC shall measure GHG emissions.”)

2. The PUC’s refusal to continue the evidentiary hearing prejudices Hu Honua’s substantial rights.

The 2017 Docket is littered with examples of the PUC’s disregard for Hu Honua’s due process right “to be heard at a meaningful time and in a meaningful manner.”<sup>17</sup> Order No. 38169 only provided further proof regarding the PUC’s intentions heading into the evidentiary hearing. Pursuant to HAR Section 16-601-23, all that Hu Honua needed to demonstrate in its request to continue the evidentiary hearing was “good cause.”<sup>18</sup> In its Motion to Continue the Hearing, Hu Honua undoubtedly made that showing; however, the PUC hurriedly refused Hu Honua’s request on the ground that it was not sufficiently “compelling” to grant the requested continuance. See Exhibit A, p. 7. There is no principled or practical basis for the PUC’s decision. The writing is on the wall: the PUC simply does not want Hu Honua to have any viable chance of succeeding on the merits at the evidentiary hearing.

As detailed in the Motion to Continue the Hearing, the PUC’s sua sponte “modification” to the procedural “schedule,” purportedly “to better facilitate preparation for the evidentiary hearing,”<sup>19</sup> severely disadvantaged Hu Honua’s ability to prepare for and present the merits of the Project at the evidentiary hearing. By removing the requirement to identify which exhibits parties and participants would be relying on to cross-examine Hu Honua’s witnesses, the PUC burdened Hu Honua with preparing its eight witnesses for cross-examination by familiarizing them with the entire 17,000+ page record, including all of Hu Honua’s 2,507 responses to information requests, instead of just the limited number of exhibits identified by the parties and participants. By Hu Honua’s calculations, with this broadened and uncertain scope of potential areas for cross-examination, even if its counsel and its witnesses were to review every single response to those 2,507 information requests together at a rate of 15 minutes per response,

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<sup>17</sup> In re GASCO, 147 Hawai’i at 203, 465 P.3d at 650 (quoting Matter of Haw. Elec. Light Co., 145 Hawai’i 25, 445 P.3d 697) (citations omitted).

<sup>18</sup> “[G]ood cause’ is a sufficient reason, depending upon the circumstances of the individual case, and that a finding of its existence lies largely in the discretion of the court.” Eckard Brandes, Inc. v. Dep’t of Labor & Indus. Rels., 146 Hawai’i 354, 363, 463 P.3d 1011, 1020 (2020) (quotations omitted). “Good cause” should be construed in a manner that advances “the policy of law that favors dispositions of litigation on the merits.” Id. (quotations omitted); see also Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1259 (9th Cir. 2010) (“‘Good cause’ is a non-rigorous standard that has been construed broadly across procedural and statutory contexts.”).

<sup>19</sup> Order No. 38143, p. 1.

it would require 37,605 minutes of review, or 627 hours, or 78 days (assuming eight (8) hours per business day), or 15 to 16 weeks (at five (5) days per week).

Nevertheless, in Order No. 38169, the PUC stated that it was “not convinced” that its late “modification” to the procedural “schedule” had “unreasonably burdened Hu Honua’s witness preparation,” since “each Party has submitted a Witness List, identifying the pertinent IR responses and testimony related to each witness.” See Exhibit A, p. 7. The PUC knew (and knows) that this is false. In their submitted witness lists, which were available to the PUC at the time it issued Order No. 38169, none of the parties identified which responses they deemed pertinent to Hu Honua’s witnesses. Given the breadth of the Statement of Issues, as amended, and the long history of the 2017 Docket, the PUC’s late “modification” of the procedural “schedule” turned what would have been a merely arduous process into a Herculean one, impossible to complete in less than one month.

That is particularly true here, given that six out of eight of Hu Honua’s witnesses reside out of state, and need to be prepared remotely. Hu Honua notified the PUC of the difficulties of preparing the majority of its witnesses in such a manner, with such a voluminous record, and of the fact that such difficulties are only compounded by the effect that COVID-19 had on its witnesses’ ability to travel and meet in person with its counsel. The PUC did not address those concerns at all. See generally Exhibit A. Instead, the PUC – after years of delay – is rushing the proceedings in the 2017 Docket forward to a foregone conclusion. Order No. 38169 must be reversed.

B. Hu Honua Will Suffer Irreparable Damage If A Stay Is Not Ordered

1. Hu Honua’s constitutional injuries amount to irreparable harm.

The constitutional injuries that the PUC has inflicted, and will continue to inflict, on Hu Honua amount to irreparable harm. Monterey Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir. 1997) (Generally, “an alleged constitutional infringement will often alone constitute irreparable harm.”) (citation and quotation marks omitted); Legal Aid Soc. of Hawaii v. Legal Services Corp., 961 F. Supp. 1402, 1417-19 (D. Haw. 1997) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary”).

a. The PUC's Orders violate Hu Honua's right to due process.

The Court has already determined, on multiple occasions, that the PUC is obligated to hold an evidentiary hearing in the 2017 Docket that complies with procedural due process and HRS Chapter 269 requirements. See, e.g., In re HELCO II, 149 Hawaii at 242, 487 P.3d at 711. To comply with its obligation to provide an evidentiary hearing that complied with due process, the PUC needs to provide Hu Honua with “an opportunity to be heard at a meaningful time and in a meaningful manner before” it deprives Hu Honua of any “significant property interest.”<sup>20</sup> The Orders demonstrate that the PUC has no intention of complying with that obligation.<sup>21</sup>

In Order No. 38183, the PUC made clear that it will not interpret or apply HRS Section 269-6(b) as the statute is currently written to the evidence adduced at the hearing. See generally Exhibit B. HRS Section 269-6(b)'s proper interpretation and application is central to the fair and lawful evaluation of the Amended PPA and the Project. The PUC's refusal to interpret and apply HRS Section 269-6(b) pursuant to its plain language and purpose has impermissibly broadened the scope of issues that Hu Honua must address, and raised

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<sup>20</sup> “The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” In re HELCO I, 145 Hawai'i at 25, 445 P.3d at 697.

<sup>21</sup> There should be no question that Hu Honua has a “significant property interest” at stake in the 2017 Docket, where it seeks the PUC's final approval of the Amended PPA in accordance with HRS Chapter 269. See County of Kauai v. Pacific Standard Life Insurance Co., 65 Haw. 318, 327-28, 653 P.2d 766, 774 (1982) (government's approval of “a variance or exemption” from a moratorium ordinance constituted a “final discretionary action” and “official assurance” upon which “[t]here was no question that the developers had a right to rely.”) (citing Life of the Land, Inc. v. City Council of City & County of Honolulu, 61 Haw. 390, 606 P.2d 866 (1980)); Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 244, 953 P.2d 1315, 1342 (1998) (for due process purposes, “it is clear that the Temple has an important property interest at stake in its variance application.”); Brown v. Thompson, 91 Hawai'i 1, 11, 979 P.2d 586, 596 (1999), as amended (July 13, 1999) (an issued permit is considered a “property interest” for due process purposes). As the PUC is well aware, during the pendency of HELCO I, HELCO II, and to this day, Hu Honua has incurred and continues to incur significant costs to provide the State of Hawaii with environmental and economic benefits in the near future and for decades to come. To date, Hu Honua has invested approximately \$500 million into developing the Project, which is now 99% complete. It has contracts and partnerships at stake. Hu Honua has incurred these costs, and taken these actions, in reliance on the PUC's prior rulings, representations, and directions, as well as Hu Honua's reasonable expectation that the PUC would evaluate the Amended PPA and Project fairly and in accordance with the law.

Hu Honua’s burden of proof regarding those issues. The PUC’s refusal to interpret or apply HRS Section 269-6(b) pursuant to its plain language or legislative purpose ensures that Hu Honua will not receive a fair hearing or evaluation of the Amended PPA in accordance with the law.

And in Order No. 38169, the PUC made Hu Honua’s burden even heavier. It unnecessarily rushed the proceedings forward despite Hu Honua’s legitimate concerns over the impact the PUC’s late “modification” to the “procedural schedule” would have on Hu Honua’s ability to prepare for and participate in the evidentiary hearing. See Exhibit A. The PUC’s refusal to reimplement the exhibit list requirement, or grant the continuance necessary to overcome the burden the PUC’s untimely “modification” imposed, further ensures that Hu Honua will not receive a fair hearing or evaluation of the Amended PPA in accordance with the law.

b. The PUC’s conduct violates Hu Honua’s right to equal protection.

In addition to due process violations, the PUC’s treatment of Hu Honua in the 2017 Docket – and its determination to kill the Project by any means – also violates Hu Honua’s constitutional right to equal protection. In comparison to other renewable energy projects, the PUC’s years-long campaign against the Project appears to be unprecedented in nature.<sup>22</sup> As a class of one, the PUC has repeatedly subjected Hu Honua to arbitrary– if not malicious – action, without any rational or lawful basis for the difference in treatment. The Orders are but the latest example.<sup>23</sup>

2. The threatened injuries to Hu Honua’s Project and goodwill amount to irreparable harm.

Hu Honua acknowledges the general rule that “[m]ere financial injury [...] will not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation.” Goldie’s Bookstore, Inc. v. Superior Court of Cal., 739 F.2d 466, 471 (9th Cir. 1984). Here, however, the 2017 Docket is not “litigation” through which Hu Honua has claims

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<sup>22</sup> See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (plaintiff may proceed on the class-of-one theory, where a “plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”).

<sup>23</sup> See Squaw Valley Development Co. v. Goldberg, 375 F.3d 936, 944-48 (9th Cir. 2004); see also Valley Outdoor, Inc. v. City of Riverside, 446 F.3d 948, 955 (9th Cir. 2006) (applying class-of-one theory to city’s denial of billboard permits).



for or could obtain “adequate compensatory relief.” The 2017 Docket is a proceeding before a state agency, which is determined to deprive Hu Honua of any fair and meaningful opportunity to be heard on the merits, deny the Amended PPA, and kill the Project. The sort of injury that the PUC seeks to inflict on Hu Honua, which has invested approximately \$500 million and years of effort into the Project, is cognizable as irreparable harm.<sup>24</sup>

Even if the threat that the PUC’s conduct posed to the Project did not constitute irreparable harm (which it does), the PUC’s erroneous decision will cause damage to Hu Honua’s goodwill, which is also cognizable irreparable harm.<sup>25</sup> Over the course of developing the Project, Hu Honua has developed commitments and close ties to its employees and community stakeholders who share Hu Honua’s goals of providing the State of Hawaii, and East Hawaii Island in particular, with a cleaner and healthier environment and a more robust and sustainable economy.

In short, facing an imminent threat to the Project and the loss of goodwill posed by the PUC’s conduct, Hu Honua should not be forced to go through the motions of an evidentiary hearing that does not comply with the law or the Court’s prior instructions, receive a predetermined and erroneous ruling from the PUC, wait another two years for its subsequent appeal to be resolved, and then wait another year or so for the PUC to hold another evidentiary hearing. Hu Honua has already waited years for an evidentiary hearing compliant with requirements of due process and HRS Chapter 269, which the PUC has refused to provide; it should not have to wait another three years to find out what the PUC can conjure following HELCO III. Nor should anyone else.

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<sup>24</sup> “[T]he threat of being driven out of business is sufficient to establish irreparable harm.” HiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 993 (9th Cir. 2019) (quoting Am. Passage Media Corp. v. Cass Commc’ns, Inc., 750 F.2d 1470, 1474 (9th Cir. 1985) (brackets omitted)). “[T]he loss of an ongoing business representing many years of effort and the livelihood of its owners [] constitutes irreparable harm.” Id. (quoting Roso-Lino Beverage Distrib., Inc. v. Coca-Cola Bottling Co. of New York, Inc., 749 F.2d 124, 125-26 (2d Cir. 1984)) (internal editorial marks omitted). “Thus, showing a threat of ‘extinction’ is enough to establish irreparable harm, even when damages may be available and the amount of direct financial harm is ascertainable.” Id. (citing Am. Passage Media Corp., 750 F.2d at 1474).

<sup>25</sup> See, e.g., Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991) (“[W]e have also recognized that intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm.”).

3. The PUC's Orders will have a negative and irreparable impact on the environment.

The State's legislature has recognized the importance of reducing the State's reliance on fossil fuels and building and diversifying its renewable energy portfolio. See, e.g., HRS §§269-6(b), 269-27.2, 269-92. If approved through a fair and lawful evidentiary hearing, the Project would help the State achieve both of those goals. The PUC's dogged refusal to provide for such a hearing, as evidenced by the Orders, necessarily frustrates the State's ability to achieve its goals under HRS Chapter 269. Under the circumstances, irreparable harm should be presumed. See Save Our Ecosystems v. Clark, 747 F.2d 747, 750 (9th Cir. 1984) ("Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action"); Village of Gambell v. Hodel, 774 F.2d 1414 (9th Cir. 1985) (injunction is appropriate remedy for substantive procedural violation of environmental statute).

C. The Stay Would Not Cause Any Damage To The Public

A stay of further proceedings in the 2017 Docket pending the Court's review and resolution of this appeal would not cause any damage to the public. To the contrary, as explained in further detail below, the public interest weighs heavily in favor of such a stay.

D. A Stay Is In The Public Interest

Here, the legislature has clearly stated the public's interest in lowering the State's reliance on fossil fuels and increasing and diversifying its renewable energy portfolio. See HRS §§269-6(b), 269-27.2, 269-92.<sup>26</sup> It also has stated a policy for promoting long-term agricultural activities. See HRS §269-27.3. Undoubtedly, improving the economic health of the State, and East Hawaii Island in particular, is also in the public interest. The Project is poised to serve all of those interests. If the stay does not issue so that the Orders can be reversed, and the evidentiary hearing proceeds without adhering to the requirements of due process and HRS Chapter 269, the Project will be lost, and the public interest will suffer. Finally, there is a standalone public interest in having the PUC proceed in accordance with HRS Chapter 269 and

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<sup>26</sup> "'The public interest may be declared in the form of a statute.'" Golden Gate Rest. Ass'n v. City of S.F., 512 F.3d 1112, 1127 (9th Cir. 2008) (quoting 1A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.4, at 207 (2d ed. 1995)).

other applicable law.<sup>27</sup> In summary, entering an order immediately staying further proceedings in Docket No. 2017 pending review and reversal of the Orders is necessary to protect these vital public interests.

V. CONCLUSION

Based on the foregoing, Hu Honua respectfully requests that the Court grant the Emergency Motion for Stay of Proceedings in PUC Docket No. 2017-0122 Pending Appeal.

DATED: Honolulu, Hawaii, January 26, 2022.

/s/ Bruce D. Voss

BRUCE D. VOSS

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HU HONUA BIOENERGY, LLC

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<sup>27</sup> See Seattle Audobon Society v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) (An administrative agency’s failure to comply with the law “invokes a public interest of the highest order: the interest in having government officials act in accordance with the law.”), aff’d, 952 F.2d 297 (9th Cir. 1991) (citations omitted).

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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

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DECLARATION OF BRUCE D. VOSS

I, BRUCE D. VOSS, declare as follows:

1. I am an attorney duly licensed to practice in the State of Hawaii.
2. I am a partner at the law firm Bays Lung Rose & Voss, attorneys for Hu Honua Bioenergy, LLC (“Hu Honua”), in State of Hawaii Public Utilities Commission (“PUC”) Docket No. 2017-0122 (“2017 Docket”) and in this appeal.
3. I make this Declaration based upon my personal knowledge.
4. Attached hereto as Exhibit A is a true and correct copy of the PUC’s Order No. 38169, “Denying Hu Honua Bioenergy, LLC’s Motion to Continue Hearing, filed on January 6, 2022” (“Order No. 38169”).

5. Attached hereto as Exhibit B is a true and correct copy of the PUC’s Order No. 38183, “Addressing Hu Honua Bioenergy, LLC’s Motion Regarding Applicability of HRS Section 269-6,” filed January 13, 2022 (“Order No. 38183”) (collectively, Order No. 38169 and Order No. 38183 are referred to as the “Orders.”).

6. The Orders are the subject of the instant appeal.

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

DATED: Honolulu, Hawaii, January 26, 2022.

/s/ Bruce D. Voss  
BRUCE D. VOSS

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. 38169

DENYING HU HONUA BIOENERGY, LLC'S MOTION TO CONTINUE HEARING

EXHIBIT A

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
 )  
HAWAII ELECTRIC LIGHT COMPANY, INC. ) DOCKET NO. 2017-0122  
 )  
For Approval of a Power Purchase ) ORDER NO. **38169**  
Agreement for Renewable Dispatchable )  
Firm Energy and Capacity. )  
\_\_\_\_\_ )

DENYING HU HONUA BIOENERGY, LLC'S MOTION TO CONTINUE HEARING

By this Order,<sup>1</sup> the Public Utilities Commission ("Commission") denies Hu Honua's Motion to Continue Hearing, filed on January 3, 2022 ("Motion"). However, in so doing, the Commission clarifies that during the hearing, the scope of cross-examination for each witness will be reasonably limited to information in responses to information requests ("IRs") that a witness has sponsored and/or information in testimony that a

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

witness has submitted. Further, if requested, examiners will be required to provide the witness with the opportunity to locate any document used for questioning or provide a virtual copy of the particular document.

I.

BACKGROUND

On June 30, 2021, following the Hawaii Supreme Court's Judgment on Appeal for SCOT-20-0000569, which vacated the Commission's prior order dismissing HELCO's application for a waiver from the competitive bidding framework for the amended power purchase agreement ("PPA") between HELCO and Hu Honua, the Commission issued Order No. 37852, which reopened this docket and established a statement of issues and a procedural schedule.<sup>2</sup> Order No. 37852 tentatively scheduled the evidentiary hearing for this proceeding for the week of January 10, 2022.<sup>3</sup>

Throughout the summer and fall of 2021, discovery and the submission of testimony proceeded according to the schedule.

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<sup>2</sup>Order No. 37852, "Reopening the Docket," filed on June 30, 2021 ("Order No. 37852").

<sup>3</sup>Order No. 37852 at 13 (the procedural schedule inadvertently refers to "the week of January 10, 2021"; however, it is clear from the context of the schedule that January 10, 2022 was intended).



On December 3, 2021, the Consumer Advocate submitted a motion seeking to modify the remaining procedural deadlines, including a slight move of the evidentiary hearing to the week of January 24, 2022.<sup>4</sup> In addition, the Consumer Advocate also sought clarification as to whether the hearing would be held virtually or in-person.<sup>5</sup>

On December 6, 2021, Hu Honua filed its response to the Consumer Advocate's Motion.<sup>6</sup> In its response, Hu Honua stated that it "has confirmed that all of its witnesses are available during the week of January 24, 2022, and, therefore, has no objection to the Consumer Advocate's Motion for Enlargement of Time."<sup>7</sup>

On December 7, 2021, the Commission issued Order No. 38104, which granted, with modifications, the Consumer Advocate's Motion.<sup>8</sup> In so doing, the Commission

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<sup>4</sup>"Division of Consumer Advocacy's Motion for Enlargement of Time," filed on December 3, 2021 ("Consumer Advocate Motion"), at 2 (the Consumer Advocate's motion refers to the week of "January 24, 2021," but, as with Order No. 37852, context indicates that "January 24, 2022" was intended).

<sup>5</sup>Consumer Advocate Motion at 4 n.3.

<sup>6</sup>"Hu Honua Bioenergy LLC's Memorandum in Response to Division of Consumer Advocacy's Motion for Enlargement of Time; and Certificate of Service," filed on December 6, 2021 ("Hu Honua Response to Consumer Advocate Motion").

<sup>7</sup>Hu Honua Response to Consumer Advocate Motion at 1.

<sup>8</sup>Order No. 38104, "Granting, with Modifications, the Division of Consumer Advocacy's Motion for Enlargement of Time Filed on December 3, 2021," filed on December 7, 2021 ("Order No. 38104").

modified the procedural schedule according to the Consumer Advocate's Motion, with the exception of the evidentiary hearing; due to a pre-existing conflict, the Commission moved the evidentiary hearing to the week of January 31, 2022, rather than the week of January 24, 2022, as requested by the Consumer Advocate.<sup>9</sup>

The Commission further clarified that the hearing would be held remotely, in light of the ongoing health and safety concerns arising from the COVID-19 pandemic.<sup>10</sup> In addition, the Commission observed that utilizing a virtual format would help relieve some of the logistical considerations regarding witness travel during this time.<sup>11</sup> Lastly, the Commission stated that given that discovery had ended, it intended to proceed with the hearing and would not be inclined to consider further procedural modifications.<sup>12</sup>

No party moved to reconsider or clarify Order No. 38104.<sup>13</sup>

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<sup>9</sup>See Order No. 38104 at 6-7.

<sup>10</sup>Order No. 38104 at 8.

<sup>11</sup>Order No. 38104 at 9.

<sup>12</sup>Order No. 38104 at 9.

<sup>13</sup>See HAR § 16-601-137 (motion for reconsideration of a Commission order must be filed within ten days after the order is served on a party).

On December 21, 2021, the Parties and Participants, including Hu Honua, filed their Prehearing Statements of Position, consistent with the modified schedule established in Order No. 38104.

On December 23, 2021, the Commission issued its Notice of Evidentiary Hearing, which set the hearing for January 31 through February 3, 2022, consistent with Order No. 38104.

On December 28, 2021, the Parties and Participants, including Hu Honua, submitted their lists of witnesses, pursuant to the modified schedule in Order No. 38104.

On January 3, 2022, Hu Honua filed its Motion, seeking to indefinitely continue the evidentiary hearing until "a time when in-person hearings can safely be accomplished so that Hu Honua will be able to effectively present and defend its application for approval at the Hearing - for example, when the City and County of Honolulu is no longer in a state of emergency or disaster period (or when there are no restrictions to holding the Hearing in-person)."<sup>14</sup>

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<sup>14</sup>Motion at 7.

II.

DISCUSSION

The Commission is not persuaded that a continuation of the evidentiary hearing is justified at this time.

First, Hu Honua did not challenge or object to the procedural schedule modification in Order No. 38104. In response to the Consumer Advocate's Motion, Hu Honua voiced support for the schedule modification and clarified that its witnesses would be available on those dates (i.e., the week of January 24, 2022).<sup>15</sup> Hu Honua did not comment on the Consumer Advocate's request for clarification as to whether the hearing would be held virtually or in-person, nor offer any preference on the matter.

Thereafter, the Commission modified the procedural schedule in Order No. 38104, in which it adopted all of the Consumer Advocate's requested deadlines, save moving the evidentiary hearing one week, from the week of January 24, 2022, to the week of January 31, 2022. Further, Order No. 38104 clarified that the evidentiary hearing would be held remotely via Webex, in light of health and safety concerns arising from the ongoing COVID-19 pandemic.

Hu Honua did not timely seek to reconsider or clarify the modified procedural schedule, including either the week of

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<sup>15</sup>Hu Honua Response to CA Motion at 1.

the evidentiary hearing or the hearing's virtual nature. Rather, Hu Honua proceeded to comply with the modified prehearing deadlines.

Second, in its Motion, Hu Honua does not provide any explanation or justification for why it waited to raise these issues until January 3, 2022, after the relevant reconsideration deadlines had passed, and after having just represented to the Commission that its witnesses were all available the week of January 24, 2022. Rather, Hu Honua relies on two points: (1) the removal of the requirement for Parties and Participants to submit an exhibit list has impacted its witness preparations; and (2) the hearing must be held in-person to satisfy Hu Honua's due process rights. However, the Commission does not find either of these reasons compelling.

Regarding the exhibit list requirement, the Commission is not convinced that this has unreasonably burdened Hu Honua's witness preparation.<sup>16</sup> While this docket has a lengthy history, this remanded proceeding is limited to the Statement of Issues established in Order No. 37852. Further, each Party has submitted a Witness List, identifying the pertinent IR responses and testimony related to each witness. This naturally limits the scope of relevant cross-examination for a particular witness, who should

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<sup>16</sup>See Motion at 2-3.

already be familiar with the IR responses and testimony they have sponsored in this proceeding.

The intent of the removal of the exhibit list requirement was to recognize some of the practical opportunities afforded by a virtual hearing. Unlike an in-person hearing, where exhibits would have been physically transported by the Commission, Parties, and Participants and stored at the hearing venue, a virtual hearing allows for easier access to the docket record for both examiner and examinee. Thus, rather than requiring Parties and Participants to list all possible documents they may wish to "bring" to a virtual setting, the Commission recognized that as both examiner and examinee have equal access to the record via the Commission's electronic Document Management System, it would be more efficient to acknowledge the reality of the Parties' and Participant's ability to access the entire record.

This does not mean that the entire record may be utilized in a haphazard fashion. Questions must still fall within the scope of the Statement of Issues and be relevant to the subject matter expertise of each respective witness. In addition, when cross-examining a witness, if an examiner wishes to rely on a document from the record, it must provide a reasonable reference to that document and allow the witness an opportunity to

locate it;<sup>17</sup> alternatively, the examiner may produce a virtual copy for the witness to reference.

Regarding utilizing a virtual hearing, Hu Honua has not justified how this is necessary to protect its due process rights. Hu Honua argues that due process requires an opportunity to be heard at a meaningful time in a meaningful manner, which includes an "opportunity to effectively present and defend on cross-examination . . . ."<sup>18</sup> However, aside from referring to the lengthy nature of the record, Hu Honua does not proffer any credible reason why it cannot effectively present and defend on cross-examination in a virtual hearing.<sup>19</sup> As discussed above, the virtual nature of the hearing is expected to facilitate easier access to the record, as electronic documents can be organized and stored in a much more efficient and accessible fashion than printed documents.

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<sup>17</sup>See Order No. 38143, "Modifying the Procedural Schedule," filed on December 22, 2021, at 3.

<sup>18</sup>Motion at 6-7.

<sup>19</sup>C.f., Act 168 (S.B. 873), which took effect on October 1, 2021, and amends HRS § 91-9 to "authorize contested case hearings to be conducted through the use of interactive conference technology." "Interactive conference technology" is defined as "any form of audio or audio and visual conference technology, including teleconference, videoconference, and voice over internet protocol, that facilitates interaction between the agency, any party, and counsel if retained by the party." HRS § 91-9 (as amended).

Further, Hu Honua's asserted concerns regarding using screen-sharing technology are speculative. While technology may not be perfect, it offers a reasonable substitute under these unique situations, as evidenced by the widespread adoption of virtual hearings for legislative, judicial, and executive agency hearings during the pandemic, none of which has evidenced a loss of procedural due process due to the virtual format of the hearing.<sup>20</sup> The Commission itself has held a number of hearings virtually during the pandemic, including an evidentiary hearing for a power purchase agreement, similar to the Amended PPA.<sup>21</sup> Weighed against Hu Honua's proffered alternative of indefinitely delaying the evidentiary hearing until it is safe to resume in-person gatherings (a situation which has been further cast into uncertainty in light of the rapid spread and transmissibility of the Omicron variant), the Commission believes that proceeding with

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<sup>20</sup>For example, the Supreme Court has regularly been holding its hearings virtually, including the oral argument which decided SCOT-20-0000569 that remanded this matter back to the Commission.

<sup>21</sup>See Docket No. 2020-0142, during which the Commission used Webex to virtually hold an evidentiary hearing from September 14-15, 2021, on Maui Electric Company, Limited's power purchase agreement with Kahana Solar, LLC (an exhibit list was not required for this hearing and did not produce issues with witness preparation or cross-examination). See also, Docket Nos. 2018-0088 and 2019-0117, both of which involved the Commission using Webex to host virtual hearings during the pandemic.



a virtual hearing is not only demonstrably reasonable under the circumstances, but also supported by statute.<sup>22</sup>

Third, indefinitely delaying the hearing is not consistent with the public interest. Given the long history of this docket, it should be resolved without undue delay. The Court has given specific instructions to the Commission on remand and the Commission's schedule seeks to accomplish this in an organized, just, speedy, and inexpensive manner. Moreover, the uncertainty surrounding approval of the Amended PPA affects a broad range of interests, such as those of HELCO and its customers and other Parties and Participants in this docket, including Hu Honua. Indefinitely delaying resolution of this issue would only expose these interests to prolonged uncertainty. Comparatively, as discussed above, the Commission does not find Hu Honua's competing desire to hold an in-person hearing compelling enough to justify such prolonged uncertainty.

Fourth, Hu Honua's sudden request is inconsistent with the sense of urgency it has cultivated throughout this proceeding.<sup>23</sup> Hu Honua's Motion, inexplicably, seeks to

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<sup>22</sup>See HRS § 91-9 (as amended by Act 168).

<sup>23</sup>See "Hu Honua Bioenergy, LLC's Prehearing Testimonies; Exhibits 'Hu Honua-100' - 'Hu Honua-800'; and Certificate of Service," filed on September 16, 2021, Hu Honua Testimony T-1 (Warren Lee) at page 6 of 33; and "Hu Honua Bioenergy, LLC's

indefinitely continue the evidentiary hearing, which would result in an open-ended delay of reviewing the Amended PPA. Given Hu Honua's prior representations about the status of the Project, it is incongruous that Hu Honua now seeks to indefinitely postpone this proceeding, which would expose Hu Honua to an extended period of uncertainty.

In sum, the Commission denies Hu Honua's Motion and affirms its prior statement that it is not inclined to consider further schedule modifications. That being said, the Commission clarifies that hearing participants will have a reasonable opportunity to familiarize themselves with Webex ahead of the hearing, and that the virtual nature of the hearing should not impede the ability to cross-examine any witness. Further details about the hearing will be discussed at the Prehearing Conference, scheduled for January 14, 2022.

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Prehearing Statement of Position; Exhibits '1' - '4'; and Certificate of Service," filed on December 21, 2021, at 55.

III.

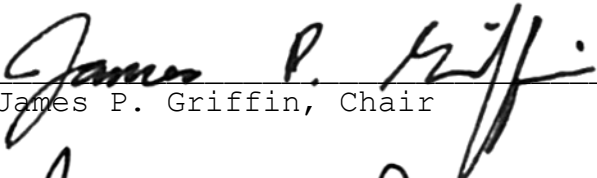
ORDERS

THE COMMISSION ORDERS:


Hu Honua's Motion to Continue Hearing is denied.

DONE at Honolulu, Hawaii JANUARY 6, 2022.

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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PUBLIC UTILITIES  
COMMISSION

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

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

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

ORDER NO. **38183**

ADDRESSING HU HONUA BIOENERGY, LLC'S MOTION  
REGARDING APPLICABILITY OF HRS SECTION 269-6

**EXHIBIT B**

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
)  
HAWAII ELECTRIC LIGHT COMPANY, INC. ) DOCKET NO. 2017-0122  
)  
For Approval of a Power Purchase ) ORDER NO. **38183**  
Agreement for Renewable Dispatchable )  
Firm Energy and Capacity. )  
\_\_\_\_\_)

ADDRESSING HU HONUA BIOENERGY, LLC'S MOTION  
REGARDING APPLICABILITY OF HRS SECTION 269-6

By this Order,<sup>1</sup> the Public Utilities Commission ("Commission"), addresses Hu Honua's Motion to Confirm that Hawaii Revised Statute Section 269-6(b), as Amended by Act 82, Applies to this Proceeding ("Motion"), filed on January 4, 2022,<sup>2</sup>

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<sup>1</sup>The Parties to this docket are HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), HU HONUA BIOENERGY, LLC ("Hu Honua") (collectively, HELCO and Hu Honua are referred to as "Applicants"), and the DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"). The Commission has also granted Participant status to LIFE OF THE LAND ("LOL") and TAWHIRI POWER, LLC ("Tawhiri"). See Order No. 34554, "Opening a Docket to Review and Adjudicate Hawaii Electric Light Company, Inc.'s Letter Request for Approval of Amended and Restated Power Purchase Agreement, Filed in Docket No. 2012-0212 on May 9, 2017," filed May 17, 2017 ("Order No. 34554"). By letter filed January 12, 2022, Hamakua Energy, LLC, notified the Commission that it was withdrawing from this proceeding.

<sup>2</sup>"Hu Honua Bioenergy, LLC's Motion to Confirm that Hawaii Revised Statutes Section 269-6(b), as Amended by Act 82,

by clarifying that it intends to apply the version of HRS § 269-6(b) currently in effect (i.e., the amended version), but, as previously stated in Order Nos. 37852 and 37910, does not find that Act 82 materially changes the Commission's review of the Project under HRS § 269-6(b) or otherwise alter the applicability and holdings in HELCO I and HELCO II<sup>3</sup> to this remanded proceeding.<sup>4</sup>

I.

BACKGROUND

On June 30, 2021, following the Hawaii Supreme Court's Judgment on Appeal for HELCO II, which vacated the Commission's prior order dismissing HELCO's application for a waiver from the

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Applies to this Proceeding; Memorandum in Support of Motion; and Certificate of Service," filed January 4, 2022.

<sup>3</sup>HELCO I and HELCO II refer to the Hawaii Supreme Court decisions addressing prior appeals that have arisen from this docket. See Matter of Hawai'i Electric Light Company, Inc., 145 Hawaii 1, 445 P.3d 673 (2019) ("HELCO I"); and Matter of Hawai'i Electric Light Company, Inc., 149 Hawaii 239, 487 P.3d 708 (2021) ("HELCO II").

<sup>4</sup>See Order No. 37910, "(1) Denying Life of the Land's Motion for Reconsideration/Clarification of Order No. 37852 Filed July 12, 2021; (2) Denying Tawhiri Power LLC's Motion for Reconsideration of Order No. 37852, Filed on June 30, 2021, Filed July 12, 2021; (3) Denying Hu Honua Bioenergy, LLC's Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening the Docket Filed July 20, 2021; (4) Partially Granting the Division of Consumer Advocacy's Motion for Leave to Respond Filed July 23, 2021; and (5) Dismissing All Other Related Procedural Motions," filed on August 11, 2021 ("Order No. 37910"), at 23-32.



competitive bidding framework for the amended power purchase agreement ("PPA") between HELCO and Hu Honua, the Commission issued Order No. 37852, which reopened this docket and established a statement of issues and a procedural schedule.<sup>5</sup>

In relevant part, Order No. 37852 established the following Statement of Issues:

1. What are the long-term environmental and public health costs of reliance on energy produced at the proposed facility?
  - a. What is the potential for increased air pollution due to GHG emissions directly attributed the Project, as well as from earlier stages in the production process?
2. What are the GHG emissions that would result from approving the Amended PPA?
3. Whether the cost of energy under the Amended PPA is reasonable in light of the potential for GHG emissions.
4. Whether the terms of the Amended PPA are prudent and in the public interest, in light of the Amended PPA's hidden and long-term consequences.<sup>6</sup>

In doing so, the Commission relied heavily on HELCO I, and the caselaw cited therein, and "focused on the consideration of GHG emissions as they related to the Amended PPA and the Project, as this was the focus of the Court's holding in HELCO I."<sup>7</sup>

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<sup>5</sup>Order No. 37852, "Reopening the Docket," filed on June 30, 2021 ("Order No. 37852").

<sup>6</sup>Order No. 37852 at 7-8.

<sup>7</sup>Order No. 37852 at 8-10 (citation omitted).

On July 20, 2021, Hu Honua filed a motion requesting the Commission to “consider” Act 82 and “address its impact on the statement of issues set forth in Order No. 37852.”<sup>8</sup> In particular, Hu Honua’s Act 82 Motion sought clarification regarding footnote 35 of Order No. 37852, which provided that “to the extent a Party or Participant believes that the amendments to HRS § 269-6 effectuated by Act 82 warrant consideration, this procedural schedule offers an opportunity to make this case.”<sup>9</sup> More specifically, Order No. 37852 acknowledged that “HRS § 269-6(b) was amended by Act 82, which was signed by Governor Ige on June 24, 2021[,]” but “[f]or purposes of this docket, the Commission does not believe that these amendments alter the basis for the [Hawaii Supreme] Court’s interpretation of the Commission’s statutory obligations under HRS §269-6(b), as previously set forth in In re MECO, HELCO I, and HELCO II.”<sup>10</sup>

Hu Honua contended that the amendments to HRS § 269-6(b) effectuated by Act 82 “substantially narrow[ed] the type of GHG emissions that the Commission must consider pursuant to

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<sup>8</sup>“Hu Honua Bioenergy, LLC’s Motion for the Commission to Consider Act 82 and Address Its Impact on Order No. 37852 Reopening the Docket; Memorandum in Support of Motion; and Certificate of Service,” filed July 20 2021 (“Hu Honua Act 82 Motion”).

<sup>9</sup>Hu Honua Act 82 Motion at 1; see also, Order No. 37852 at 19 n.35.

<sup>10</sup>Order No. 37852 at 9 n. 20.

HRS § 269-6(b) [,,]" limiting it to GHG emissions associated solely with fossil fuels, rather than the entire Project (including GHG emissions associated with biomass, as was previously required under HELCO I.<sup>11</sup> As a result, Hu Honua requested that the Commission "fully consider and address the impact of Act 82 on each of the issues in the Statement of Issues set forth in the Commission's Order Reopening Docket . . . [and] [t]o the extent the Commission disagrees with Hu Honua's interpretation of the plain language of Act 82, . . . request[ed] an explanation of the Commission's basis and reasoning . . . ." <sup>12</sup>

On August 11, 2021, the Commission issued Order No. 37910, which, in relevant part, denied Hu Honua's Act 82 Motion. In so doing, the Commission first observed that Hu Honua's Act 82 Motion was, in substance, an untimely motion for reconsideration of Order No. 37852.<sup>13</sup>

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<sup>11</sup>See Hu Honua Motion Act 82 Motion, Memorandum in Support at 1-2. C.f., HELCO I, 145 Hawaii at 23-24, 445 P.3d at 695-696 (holding that the Commission failed to comply with HRS § 269-6(b), in part, by "ma[king] no express findings or conclusions regarding the biomass facility's GHG emissions," and failing to address "the potential for increased air pollution as a result of GHG emissions' directly attributed to energy generation at the facility, as well as GHG emissions produced at earlier stages in the production process, such as fuel production and transportation.").

<sup>12</sup>Hu Honua Act 82 Motion, Memorandum in Support at 3-4.

<sup>13</sup>Order No. 37910 at 24-26.

Further, the Commission found that even if the merits of Hu Honua's Act 82 Motion were considered, they did not persuasively demonstrate legislative intent to exempt biomass projects (and their associated emissions) from the Commission's review under HRS § 269-6(b), nor did the grammatical changes to HRS § 269-6(b) clearly evidence an intent to materially alter the applicability and holdings of HELCO I and HELCO II to this remanded proceeding.<sup>14</sup>

On January 4, 2022, Hu Honua filed its Motion, in which Hu Honua again raises the amendments to HRS § 269-6(b) arising from Act 82, and seeks a finding by the Commission that HRS § 269-6(b), as amended by Act 82, "applies to this remand proceeding involving the Commission's approval of the [Amended PPA]." <sup>15</sup> Although acknowledging that the Commission had previously held that "Act 82 does not materially alter the Commission's statutory obligations under HRS § 269-6(b)," Hu Honua contends that "the Commission has never made a determination whether it intends to apply [this amended version] to this remand proceeding[.]" <sup>16</sup> Arguing that "[s]uch determination will impact the evidence and witness testimony presented at the hearing as well as the post-hearing briefs[.]" Hu Honua seeks an explicit

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<sup>14</sup>See Order No. 37910 at 26-32.

<sup>15</sup>Hu Honua Motion, Memorandum in Support at 1.

<sup>16</sup>Hu Honua Motion, Memorandum in Support at 1-2.

determination as to whether HRS § 269-6(b), as amended by Act 82, applies to this remanded proceeding.<sup>17</sup>

Further, in its Motion, Hu Honua again asserts its interpretation that Act 82 has amended HRS § 269-6(b) such that the Commission's consideration of GHG emissions is limited to GHG impacts associated with fossil fuels, and not other aspects (e.g., emissions associated with biomass) of the Project.<sup>18</sup>

On January 6, 2022, LOL filed a response which addressed, inter alia, Hu Honua's Motion, disagreeing with Hu Honua's interpretation of the Act 82 amendments.<sup>19</sup>

On January 10, 2022, Tawhiri filed a response to Hu Honua's Motion, in which Tawhiri argues that the Commission had already addressed the impact of Act 82 in Order No. 37910.<sup>20</sup> As a result Tawhiri contends that Hu Honua's Motion is, in fact,

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<sup>17</sup>Hu Honua Motion, Memorandum in Support at 1.

<sup>18</sup>See Hu Honua Motion, Memorandum in Support at 7-8.

<sup>19</sup>See "Life of the Land's Motion for Leave; Memorandum in Support of Motion Objecting to Hu Honua Bioenergy LLC's (1) Motion to Continue Hearing, Memorandum in Support of Motion" [sic] Filed January 3, 2022, and (2) Motion to Confirm that Hawaii Revised Statutes Section 269-6(B), as Amended by Act 82, Applies to this Proceeding, Filed January 24, 2022; Verification; and Certificate of Service," filed January 6, 2022, Memorandum in Support at 4-5.

<sup>20</sup>"Tawhiri Power LLC's Response to Hu Honua Bioenergy, LLC's Motion to Confirm that Hawaii Revised Statutes 269-6(b), as Amended by Act 82, Applies to this Proceeding; and Certificate of Service," filed January 10, 2022 ("Tawhiri Response"), at 1-2.

an untimely motion for reconsideration of Order No. 37910, and should be struck as such.<sup>21</sup>

On January 11, 2022, the Consumer Advocate filed a response to Hu Honua's Motion, in which it also recommended denying Hu Honua's Motion as an untimely motion for reconsideration of either Order No. 37852 or 37910.<sup>22</sup> In addition, the Consumer Advocate argued that Hu Honua's Motion was barred by HAR § 16-601-141, which prohibits successive motions for reconsideration.<sup>23</sup>

## II.

### DISCUSSION

The Commission observes that it has addressed the substance of Hu Honua's request in Order No. 37910, in that it has previously found that the changes to HRS § 269-6(b) as a result of Act 82 do not alter the Commission's statutory duties to examine the GHG emissions impacts of the Project, as a whole, versus the Commission being limited to examining impacts from only fossil fuels. Thus, the Commission agrees that Hu Honua's Motion could

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<sup>21</sup>Tawhiri Response at 3.

<sup>22</sup>"Division of Consumer Advocacy's Response to Hu Honua Bioenergy, LLC's Motion to Confirm that Hawaii Revised Statutes Section 269-6(b), as Amended by Act 82, Applies to this Proceeding," filed January 11, 2022 ("CA Response").

<sup>23</sup>CA Response at 3.

be construed as an untimely motion for reconsideration of Order No. 37852 and/or Order No. 37910, as well as being prohibited by HAR § 16-601-141.

Notwithstanding the above, to the extent this was unclear in Order No. 37910, the Commission expressly clarifies that it will apply the version of HRS § 269-6(b) that is in effect; i.e., the version amended by Act 82.

With that clarification, the Commission does not see the need to further address the merits of Hu Honua's Motion. As noted above, Hu Honua's interpretation of the amendment to HRS § 269-6(b) as a result from Act 82 have already been addressed in Order Nos. 37852 and 37910; to wit, it does not materially affect the scope of HRS § 269-6(b) as applied to the Project, nor the applicability of HELCO I and HELCO II to this remanded proceeding.

### III.

#### ORDERS

##### THE COMMISSION ORDERS:

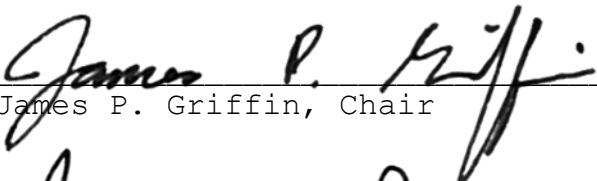
1. Hu Honua's Motion is addressed as follows:

A. The Commission clarifies that it will apply the version of HRS § 269-6(b) that is currently in effect to this remanded proceeding.


B. In all other respects, Hu Honua's Motion is denied, to the extent it asserts arguments or seeks relief that has already been addressed by the Commission's prior orders.

DONE at Honolulu, Hawaii JANUARY 13, 2022.

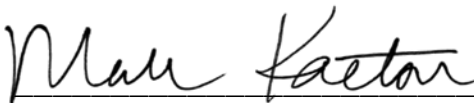
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

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

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PUBLIC UTILITIES  
COMMISSION

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

SCOT-22-0000024

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

HU HONUA BIOENERGY, LLC, a	)	SCOT-22-0000024
Delaware Limited Liability Company	)	
	)	CERTIFICATE OF SERVICE
Appellant,	)	
	)	
PUBLIC UTILITIES COMMISSION, State	)	
of Hawai'i; HAWAII ELECTRIC LIGHT	)	
COMPANY, INC., a domestic profit	)	
corporation; DIVISION OF CONSUMER	)	
ADVOCACY, Department of Commerce	)	
and Consumer Affairs; LIFE OF THE	)	
LAND, a Hawai'i non-profit corporation;	)	
TAWHIRI POWER, LLC, a domestic	)	
limited liability company; and HAMAKUA	)	
ENERGY, LLC, a domestic limited liability	)	
company.	)	
	)	
Appellees.	)	
	)	

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was duly served as set forth below on the following parties on January 26, 2022:

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465 S. King Street, #103	
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<u>caroline.ishida@hawaii.gov</u>	
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