

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----- In the Matter of -----)
)
PUBLIC UTILITIES COMMISSION) DOCKET NO. 2022-0212
)
Instituting a Proceeding Relating)
To an Innovative Pilot Process for)
The Hawaiian Electric Companies.)
_____)

PROTECTIVE ORDER NO. 38665

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OF THE STATE OF HAWAII

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PUBLIC UTILITIES COMMISSION) DOCKET NO. 2022-0212
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Instituting a Proceeding Relating) PROTECTIVE ORDER NO. **38665**
To an Innovative Pilot Process for)
The Hawaiian Electric Companies.)
_____)

PROTECTIVE ORDER

The Public Utilities Commission ("Commission"), on its own motion, issues this Protective Order to govern the classification, acquisition, and use of confidential information produced in this docket.¹

¹The Parties to this proceeding are HAWAIIAN ELECTRIC COMPANY, INC., HAWAII ELECTRIC LIGHT COMPANY, INC., MAUI ELECTRIC COMPANY, LTD. (collectively, "the Companies"), and the DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 16-601-62(a).

I.

BACKGROUND

On October 20, 2022, the Commission issued Order No. 38663² to “open[] this docket to receive filings and adjudicate requests related to [the Companies’] notices for innovative pilot proposals (‘Notice’ or ‘Notices’) submitted pursuant to the pilot process approved as part of the Performance-Based Regulation Framework in Docket No. 2018-0088 (‘Pilot Process’).”³

As stated in Order No. 38663, “[t]he Commission acknowledges that certain pilot proposals may involve proprietary or other confidential information.”⁴ Although the Commission has emphasized its desire for transparency in this docket,⁵ it understands that in certain, limited instances, the Companies may desire to incorporate confidential information into a Notice to support the Commission’s review. As the Commission desires to balance the desire for public transparency with providing the Companies with the ability to present their case for worthy,

²Order No. 38663, “Opening the Docket,” filed on October 20, 2022 (“Order No. 38663”).

³Order No. 38663 at 1 (citing Docket No. 2018-0088, Decision and Order No. 37507, filed December 23, 2020, at 166-181).

⁴Order No. 38663 at 7.

⁵See Order No. 38663 at 7.

innovative pilots, the Commission issues this Protective Order to provide the flexibility necessary to address certain Notices which may require the submission of confidential information. As a result, the Commission issues this Protective Order, as set forth below, to govern the classification, acquisition, and use of confidential information produced in this proceeding.

The Commission instructs that for each redaction, the Companies must demonstrate that its confidential filings may be withheld from disclosure under the Uniform Information Practices Act ("UIPA"), and individually comply with Paragraph No. 5, below, and "(1) identify, in reasonable detail, the information's source, character, and location; (2) state clearly the basis for the claim of confidentiality; and (3) describe, with particularity, the cognizable harm to [it], from any misuse or unpermitted disclosure of the information."⁶

II.

TERMS

A.

General Provisions

1. This Protective Order governs the classification, acquisition, and use of trade secrets, and other confidential

⁶See Order No. 34521 at 4 (footnote omitted).

information which may be produced by any party or participant in this docket. For purposes of this Protective Order, the term "party" refers to the Companies and the Consumer Advocate.

2. Consistent with the Commission's decision to not entertain intervenors or participants in this proceeding,⁷ appropriate information designated by the Companies as confidential will be redacted from public view. That being said, the Commission emphasizes its desire for transparency in this docket and instructs the Companies to limit the use of confidential information, if any, to a minimum.⁸ Further, the Companies have committed to a robust stakeholder engagement process both preceding and during review of its Pilot Notices. As part of this process, the Commission expects that the Companies will address any concerns regarding confidential information with the stakeholders, including, but not limited to, the reasons for designating specified information as confidential and how the designation is reasonably tailored.

⁷See Order No. 38663 at 5-7.

⁸See Order No. 38663 at 7-8.

B.

Application Of
The Uniform Information Practices Act

3. To the extent that any of the documents covered by this Protective Order consist of "government records," as defined in HRS § 92F-3, the provisions of HRS Chapter 92F, the UIPA, shall apply to the disclosure of information contained in such documents. In the event that any provision of this Protective Order conflicts with any provision of the UIPA, the UIPA shall control.

C.

Designation Of Confidential Information

4. Any information that a party or participant to this proceeding believes, in good faith, is confidential, including, but not limited to, trade secrets, research, development information, commercial information, customer usage, financial information, vendor information, bid information, cost support studies, service forecasts, or other information, may be designated as "confidential information" pursuant to the terms of this Protective Order. Such confidential information shall be protected against disclosure to a non-qualified person pursuant to the terms of this Protective Order, unless such information is declassified or permission to disclose the

information to such non-qualified person is granted by the party or participant claiming confidentiality, as provided in paragraph 15 below.

5. If a party or participant seeks to designate information, whether written, oral, electronic, or in some other form, as confidential information, it shall notify the Commission, the Consumer Advocate, and the other parties and participants, if any, that the information includes confidential information. The party or participant must: (1) identify, in reasonable detail, the information's source, character, and location; (2) state clearly the basis for the claim of confidentiality; and (3) describe, with particularity, the cognizable harm to the producing party or participant from any misuse or unpermitted disclosure of the information.

6. If a party or participant designates information as confidential information, it shall provide the confidential information to all parties or participants in this proceeding in accordance with the procedures described in paragraphs 13 through 15, as applicable (Section II.D, Disclosure To Qualified And Non-Qualified Persons) and paragraph 16 (Section II.E, Procedure For Obtaining Access) below. Notwithstanding the above, the party or participant shall immediately provide the confidential information in writing to the Commission and the Consumer Advocate, their counsel, any outside counsel they have

retained in this proceeding (including any persons employed by such counsel), and any consultants they have retained in this proceeding (including any persons employed by such consultants).

7. If any party or any participant challenges the claim of confidentiality for all or any of the information, the party or participant claiming confidentiality shall bear the burden of proof in supporting its claim that the information is confidential. The Commission shall determine whether the information shall continue to be designated as confidential pursuant to the terms of this Protective Order. Any challenge to a claim that certain information is confidential shall be made in accordance with paragraph 26 below. Any challenge to a claim of confidentiality asserted by the Commission will be made upon its own motion.

8. Confidential information provided to the Commission, a party, or a participant, orally, electronically, or in any form other than written form, shall be protected as fully as confidential information provided in written form.

9. All information claimed to be confidential information shall be subject to the terms of this Protective Order, and it shall be treated as confidential information by all qualified persons (as defined by this Protective Order). Unless a different treatment is warranted, any notes, summaries, abstracts, or analyses that are prepared by counsel, experts, or other

qualified persons, and that reflect the underlying confidential information, shall also be subject to the terms of this Protective Order.

10. Information that has been designated as confidential information pursuant to the terms of this Protective Order shall conspicuously display on each page, or communicate as otherwise appropriate, the following legend:

**CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER**

Whenever only a portion of the information is deemed to contain confidential information, the claim of confidentiality, to the extent reasonably practicable, shall be limited to only such portion. However, if such limitation is not reasonably practicable, the information in total may be designated as confidential information.

11. With respect to any confidential information that is not under the control of the party or participant claiming that the information is confidential, other persons shall, to the extent requested by the party or participant, cooperate to ensure that all copies of such confidential information bear the legend required in paragraph 10 above.

12. A party or a participant may request that the Commission designate as confidential any information previously produced but not designated as confidential, provided that the

party or participant, in the manner provided in paragraph 5 above, specifies the subject-matter of such confidential information, the basis for the claim of confidentiality, and the cognizable harm from any misuse or unpermitted disclosure of the information. In addition, the party or participant claiming confidentiality pursuant to this paragraph shall substitute the previously produced but not designated as confidential material with the identical material under designation as required in Paragraph 10 above.

D.

Disclosure To Qualified And Non-Qualified Persons

13. Except as provided in paragraph 15 below, confidential information shall not be made available or disclosed to any person who is not a "qualified person" as defined in paragraph 14 below.

14. "Qualified person," as used in this Protective Order, means any one of the following:

- (a) The author(s), addressee(s), or originator(s) of the confidential information;
- (b) The Commission, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this

proceeding (including any persons employed by such consultants);

(c) The Consumer Advocate, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants);

(d) Any party or participant to this proceeding, its officers and employees, its designated representative of record, its staff, its counsel (including both in-house counsel and any outside counsel it has retained in this proceeding, and including any persons employed by such counsel) and any consultants (including any persons employed by such consultants) retained by the party or participant for this proceeding, to the extent permitted by the Commission;

(e) Any other person approved by the party or participant asserting the claim of confidentiality; and

(f) Subject to the terms of this Protective Order, and to the extent allowed by the Commission,

any other person designated as a qualified person by order of the Commission.

15. When a qualified person wishes to disclose confidential information to a non-qualified person, the qualified person must request permission from the party or participant claiming confidentiality. The request shall: (a) identify the non-qualified person to whom disclosure is desired; (b) disclose any past, present, or anticipated affiliation between the qualified person and the non-qualified person; (c) specify the exact information to be disclosed; and (d) state the reasons for disclosure. If permission is granted by the party or participant claiming confidentiality, disclosure of the confidential information shall be limited strictly to confidential information covered by the permission granted and shall be made to such non-qualified person in the same manner as provided for qualified persons in paragraph 16 below.⁹

⁹The requirements set forth in paragraph 15 shall not apply to: (a) the Commission, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants); or (b) the Consumer Advocate, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants).

E.

Procedure For Obtaining Access

16. Prior to disclosing confidential information to a qualified person, the qualified person shall read a copy of this Protective Order, complete a copy of the "Protective Agreement" attached as "Exhibit A" to this Protective Order, and sign the completed copy of the Protective Agreement. A copy of the executed Protective Agreement shall be filed with the Commission and served on the Consumer Advocate and all parties and participants, if any.

F.

Use Of Confidential Information

17. Any confidential information obtained under this Protective Order shall be used solely in connection with this proceeding and any related administrative and judicial proceedings (at which time the information shall continue to be treated as confidential), and shall not be used for any other purpose, including business, governmental or commercial purposes, or in any other administrative or judicial proceeding, except as provided in paragraphs 18 and 19, and except as may be directed by: (a) an order of any court, agency, or other entity having jurisdiction; (b) an order of the Commission; or (c) the UIPA, including any ruling of the Office of Information Practices.

18. Notwithstanding paragraph 17 above, any confidential information obtained under this Protective Order may be used by the Commission, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants), in any proceeding pending before the Commission involving the Consumer Advocate, producing party, or producing participant, or where the intended use of such confidential information is for the purpose of assisting the Commission in fulfilling its statutory duties and responsibilities. The confidential information shall continue to be treated as confidential until the protection conferred by this Protective Order (or any other applicable Protective Order) is terminated by the party or participant, or by further order of the Commission.

19. Any confidential information obtained under this Protective Order may be used by the Consumer Advocate, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants), in any proceeding pending before the Commission involving the producing party or producing participant, or where the intended use of such confidential

information is for the purpose of assisting the Consumer Advocate in fulfilling its statutory duties and responsibilities. The confidential information shall continue to be treated as confidential until the protection conferred by this Protective Order (or any other applicable Protective Order) is terminated by the producing party or participant, or by further order of the Commission.

20. Unless otherwise ordered by the Commission, with respect to any written testimony, exhibits, or pleadings that contain or reflect the confidential information, only that part of the written testimony, exhibits, or pleadings containing or reflecting such information shall be treated as confidential, and the part of a hearing, if any, at which such confidential information is discussed shall be held in camera or under other conditions imposed by the Commission to prevent unnecessary public disclosure of such confidential information. A copy of any such written testimony, exhibits, or pleadings, with any such confidential information deleted therefrom, shall be included in the public record, and shall contain the following designation in the upper left-hand corner of the page or conspicuously placed as otherwise appropriate:

**Confidential Information
Deleted Pursuant To
Protective Order No. _____**

G.

Retention Of Confidential Information

21. Confidential information shall be retained in a locked cabinet dedicated to the storage of confidential information, or otherwise secured to ensure that access to and disclosure of the confidential information is limited to a qualified person.

22. Confidential information that is provided to or filed with the Commission, its staff, its counsel, any outside counsel it has retained in this proceeding (including any persons employed by such counsel), and any consultants it has retained in this proceeding (including any persons employed by such consultants) shall be separately bound and placed in a sealed envelope or other appropriate sealed container on which the following legend shall be conspicuously displayed:

THIS ENVELOPE IS SEALED PURSUANT TO PROTECTIVE ORDER NO. _____ AND CONTAINS DOCUMENTS WITH CONFIDENTIAL INFORMATION. IT IS NOT TO BE OPENED OR THE CONTENTS OF THIS ENVELOPE DISPLAYED OR REVEALED EXCEPT TO QUALIFIED PERSONS AUTHORIZED TO INSPECT THE ENCLOSED DOCUMENTS.

23. Confidential information shall not be reproduced or duplicated, except to make working copies and copies to be filed with the Commission under seal. If a document contains information so sensitive that it should not be copied by anyone, it shall bear the following legend: "Copying Prohibited."

24. If a court, administrative agency, or other entity having jurisdiction requests, subpoenas, or orders production of confidential information that has been obtained under this Protective Order, the party or participant claiming confidentiality shall immediately be notified of the request, subpoena, or order. In addition, both the Commission and the Consumer Advocate shall be immediately notified of the request, subpoena, or order.

H.

Duration Of Confidentiality

25. The confidentiality of the information produced pursuant to this Protective Order shall be preserved until termination pursuant to an appropriate stipulation or by further order of the Commission.

I.

Appeal To The Commission

26. If a party or a participant disagrees with the designation of information as confidential, the party or participant claiming confidentiality shall first make a good faith attempt to resolve the dispute on an informal basis. If the dispute cannot be resolved, the party or participant contesting the confidentiality of the information shall file a motion to

compel disclosure or other appropriate motion with the Commission. The party or participant claiming confidentiality shall bear the burden of proof in supporting its claim, and the Commission shall determine whether the information shall continue to be designated as confidential under this Protective Order. The Commission may, on its own motion, require a party or participant claiming confidentiality to support its claim. Pending disposition of any such motion made by the Commission, party, or participant, the information in question shall be treated as confidential information and shall not be disclosed except as permitted by this Protective Order.

J.

Non-Waiver Of Objections And Rights

27. The parties and participants retain the right to contest any assertion or finding of confidentiality or of non-confidentiality. Nothing in this Protective Order shall prevent any party or participant from objecting to requests for production of information or other discovery request.

28. Any party or participant has the right to question, challenge, and object to the admissibility of confidential information on the grounds of relevancy or materiality.

K.

Modification Of The Protective Order

29. The Commission may modify this Protective Order on the motion of any party or participant, or on its own motion, upon reasonable notice and an opportunity to respond to such motion. The Commission may also modify this Protective Order upon receipt and approval of a written stipulation filed by the parties and if applicable, any participants.

L.

Disposal Of Confidential Information

30. Except as provided in paragraphs 31 and 32 below, within ninety (90) days after the conclusion of this proceeding, persons in possession of confidential information shall, at the option of the party or participant producing the confidential information, return or destroy all such materials and all copies, notes, tapes, papers, or other medium containing, summarizing, excerpting, or otherwise embodying any confidential information. If the party or participant producing the confidential information requests destruction, the person destroying the information shall certify its destruction to the producing party or participant, indicating the name of the person destroying the documents, the method of destruction, and the identity of the specific documents destroyed. If the Consumer Advocate has designated

information as confidential, it shall also follow these procedures as applicable.

31. Counsel and representatives of record for a party or participant shall be entitled to retain memoranda, pleadings, exhibits of record, written testimony, and transcripts embodying information derived from or incorporating confidential information to the extent reasonably necessary to preserve files associated with this proceeding. The files shall not be disclosed to any other person.

32. Confidential information produced in this proceeding shall remain in the possession of the Commission and the Consumer Advocate for the period required by applicable statutes, rules, and administrative directives, or as designated by the Commission, whichever is longer.

M.

Sanctions

33. Any person violating this Protective Order shall be subject to such sanctions as are consistent with applicable law and other authority.

III.


ORDERS

THE COMMISSION ORDERS:

The Terms set forth in Section II of this Protective Order shall govern the classification, acquisition, and use of trade secrets, and other confidential information, including commercial and financial information or other non-public information to be filed by any party or participant in this proceeding.

DONE at Honolulu, Hawaii OCTOBER 20, 2022.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Leodoloff R. Asuncion, Jr., Chair

By 
Jennifer M. Potter, Commissioner

By 
Naomi U. Kuwaye, Commissioner

APPROVED AS TO FORM:


Mark Kaetsu
Commission Counsel

EXHIBIT A

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

PROTECTIVE AGREEMENT

1. I, _____, have been presented with a copy of Protective Order No. _____ issued by the Hawaii Public Utilities Commission on the _____ day of _____, 2022 ("Protective Order").

2. I am employed, retained or assisting _____ and have requested review of the confidential information covered by the Protective Order.

3. I understand the confidential information covered by the Protective Order is to be used solely to assist _____ and that unless otherwise permitted by the Protective Order, I am to make no other use of the confidential information, nor am I to disclose the confidential information to any other person.

4. I further understand that at the conclusion of my assistance to _____, I shall account for each copy, extract, note and summary of, or other document containing any part of such confidential information to the party claiming confidentiality and I shall abide by the provisions in paragraph 30 of the Protective Order, unless otherwise permitted by paragraph 31 of the Protective Order.

5. I hereby certify that I have read the above-mentioned Protective Order and agree to abide by its terms and conditions.

DATED at: _____, _____, this _____, _____.
(City) (State) (Date)

Signature

Address

() _____
Telephone Number

CERTIFICATE OF SERVICE

The foregoing order was served on the date it was uploaded to the Public Utilities Commission's Document Management System and served through the Document Management System's electronic Distribution List.

FILED

2022 Oct 20 PM 14:38

PUBLIC UTILITIES
COMMISSION

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