BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAI‘I

In the Matter of the Application of HAWAIIAN ELECTRIC COMPANY, INC. For Approval of Energy Storage Power Purchase Agreement for Energy Storage Services with Kapolei Energy Storage I, LLC.	Docket No. 2020-0136

HAWAIIAN ELECTRIC COMPANY, INC.’S MOTION FOR: (1) RECONSIDERATION; AND (2) STAY OF DECISION AND ORDER NO. 37754

MEMORANDUM IN SUPPORT OF MOTION

and

CERTIFICATE OF SERVICE

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(1) RECONSIDERATION; AND (2) STAY OF DECISION AND ORDER NO. 37754

Hawaiian Electric Company, Inc. ("Hawaiian Electric" or the "Company") respectfully moves for reconsideration and stay of Decision and Order No. 37754 ("D&O No. 37754" or "D&O") issued by the Public Utilities Commission of the State of Hawai‘i ("Commission") on April 29, 2021. In D&O No. 37754, the Commission imposed nine conditions on the Company as part of its approval of the energy storage power purchase agreement ("ESPPA") executed between Hawaiian Electric and Kapolei Energy Storage I, LLC ("KES").

The KES project ("KES Project" or "Project") is a critical and cost-effective resource that will facilitate Hawaiian Electric removing the last coal plant from its system, advancing the State's decarbonization policy while providing energy security and reliability and other benefits to customers. While the Company can accept some of the D&O conditions, at least four are highly problematic for reasons that go well beyond the Project and should be reconsidered and removed or modified. The Commission should also remove certain language from the D&O that appears to have predetermined culpability before the Company has been afforded due process, as previously promised by the Commission. The Company respectfully urges the Commission to remove or modify the problematic conditions from this D&O as soon as possible to allow the

Project to stay on track, and to avoid higher level damage to Hawai‘i's transformation efforts to create a clean, resilient, and affordable energy system.

As discussed more fully herein, several of the conditions are unrelated and have no essential nexus or rough proportionality to the approval of the KES Project or to the issues set forth by the Commission to be addressed in this docket. Conditions on that approval should relate to the Project and not impair the Company's ability to move forward with it. Rather, many of these conditions appear to be an assembly of directives on issues still being considered in other dockets, and, in their current form, serve as significant and unlawful penalties against Hawaiian Electric.

While the Commission approved the Project, the approval is in title only, as the problematic D&O conditions would impose serious limitations on the Company's ability to meaningfully utilize the KES Project and diminish its value to customers and the grid. Other conditions, if implemented, would pose significant risk to energy security and reliability of the electric grid or would impose unacceptable financial penalties or risk of such penalties on the Company. Those conditions, if left to stand, will potentially impact the viability of the KES Project and Hawaiian Electric may be forced to declare the ESPPA null and void. Hawaiian Electric desires greatly to avoid those results.

Hawaiian Electric still has much ground to cover to achieve a 100% renewable energy system in a cost-effective manner. To accomplish its goal, Hawaiian Electric will need to procure significant additional resources. Unless reconsidered, D&O No. 37754 will also send a chilling message to future developers that will likely have a profound and highly detrimental impact on Hawai‘i's renewable energy and energy storage market for years to come. Simply put, developers will be unable to rely on Commission-approved energy procurement processes

administered by the Company, given the Commission's imposition of arbitrary and capricious conditions that are unrelated to the project at issue or are unreasonably punitive in nature. They will either choose to stay away from the Hawai'i market and invest in other jurisdictions with more predictability or be compelled to propose pricing sufficiently high to justify the heightened process risk presented by D&O No. 37754. Either way, the State of Hawai'i and electric customers will lose.

The Company specifically requests reconsideration of the following conditions, discussed more fully in the attached memorandum in support of this Motion:

A. **Condition No. 1** – This condition requires the Company to forego recovery of the vested second allocation of its previously awarded Performance Incentive Mechanism ("PIM") awards for projects procured as part of its Stage 1 request for proposals ("RFP"). There is no rational basis or nexus for requiring Hawaiian Electric to forfeit up to $1.7M of *Stage 1* PIM awards as a condition to approve this *Stage 2* project. This would constitute a violation of the Company's due process rights, an improper penalty and an unconstitutional taking. This condition would also send a concerning message for the predictability and certainty essential for success under the new Performance-Based Regulation ("PBR") framework established by the Commission.

B. **Condition No. 2** – This condition requires Hawaiian Electric to remove certain grid constraints in its Community Based Renewable Energy ("CBRE") Phase 2 Program and its existing and future distributed energy resources ("DER") programs. While the Company supports removing programmatic constraints, this must be coupled with physical upgrades to the grid to preserve grid stability. As noted in the Company's Written Comments Addressing Commission Concerns and Proposed Mitigations, although the KES Project increases the system's hosting capacity, the increase in daytime exports under this condition must be commensurate with the capacity of the Project; the increase in system hosting capacity due to the Project is not unlimited.

As the Commission notes, unlocking physical grid constraints is not only a system issue but a local circuit issue as well. The Project itself has no bearing on unlocking local circuit constraints. DER also requires upgrades throughout the distribution system to increase circuit hosting capacity; however, necessary upgrades will depend on the timing, quantity, and location of increased daytime exports to ensure efficient deployment of upgrades that in fact unlock local grid constraints. Failure to properly plan for the timing and location of grid upgrades while broadly expanding daytime exports can impact the power quality and the

reliability of that circuit and adjacent circuits, with detrimental effect to customers with critical needs, such as Department of Defense facilities.

Additionally, the costs and recovery of costs to perform grid upgrades should be considered in the appropriate regulatory proceeding. As such circuit constraints currently are or have already been the subject of other dockets, this Condition No. 2 should be raised and fully reviewed in Commission Docket No. 2015-0389 related to CBRE and Docket No. 2019-0323, which is currently reviewing a number of DER issues and programs.

C. **Condition No. 3** – This condition requires the financial retirement of the Company's existing generating units, Waiau Units 3, 4, 5, and 6, and Kahe Units 5 and 6 by certain dates. While the Company had committed to operationally retire Waiau Units 3 and 4 in 2024 in order to support the long-term value of this Project, forced financial or operational retirement of multiple units of the Waiau and Kahe plants raises serious financial and reliability concerns. The financial retirements of the Waiau and Kahe plants were never part of the issues in this docket and have nothing to do with the approval of the KES Project. As noted repeatedly in this docket, the KES Project was selected as part of a portfolio of projects to address the retirement of the AES coal plant. It is needed for that.

First, under the regulatory compact, the Company is allowed to recover prudently incurred costs. Further with the group method of depreciation, the net book value of assets is accounted for in future depreciation rates and are not recognized at the time of retirement. Imposing a requirement to prematurely financially retire other plants is an unlawful financial penalty imposed by the Commission against the Company and raises due process and other constitutional issues.

Second, in its argument supporting the condition, the Commission has selectively focused on only certain planning assumptions submitted by the Company in support of the Project, but did not consider other planning assumptions that show the need for additional energy resources to be brought online before generating units can be retired. To be clear, the Company supports accelerating retirement of fossil fuel powered generating units; however, operationally retiring these six units without first adding replacement resources would result in the removal of 471 MW of firm capacity on the grid in the next seven years. This removes 3.5 times the amount of capacity from the O'ahu grid than what is being provided by the Project. As with Condition No. 2, acceptance of this condition would jeopardize the energy security of the O'ahu grid and the Company's ability to serve its customers and impact the operational capabilities of national security assets based on the island.

As such, decisions on unit retirements beyond what the Company has committed to in this docket should be discussed in the appropriate regulatory proceeding.

D. **Condition No. 5** – Condition No. 5 establishes aggressive minimum thresholds for renewable utilization of the Project. As the KES Project would be grid-

charged, by this condition, the Commission is essentially setting requirements for how much renewable energy must be used to charge the grid. Such minimum requirements, however, unlawfully exceed targets set by the Hawai‘i Legislature under the Renewable Portfolio Standard (“RPS”) law. This condition, if implemented, would also restrict the Company from charging the BESS at any time other than those times when the renewable energy on the system reaches the appropriate minimum threshold. The Project would be unusable at other times. Limiting charging to times of the day when there are high penetrations of renewables on the system virtually eliminates the Project’s ability to: (1) improve the efficiency of the system; and (2) assist with the reliability and resilience of the system. Until the entire O‘ahu grid reaches the level of renewable penetration directed in Condition No. 5, this order will render the KES Project largely unusable, diminishing the economic and reliability benefits of the Project to the Company’s customers. Meanwhile, the Company’s customers would be obligated to continue to pay for the Project’s capacity, but receive little benefit. This condition would have the practical effect of making the KES Project unviable.

E. **Condition Nos. 4 & 7** – Condition Nos. 4 and 7 set forth certain reporting requirements during the term of the ESPPA. While the Company can comply with aspects of the reporting requirements imposed in these conditions, there are some portions that would be very difficult and burdensome to comply with.

The Company notes that the subject matter of many of these conditions could and would be better suited to be examined in separate existing dockets. Further, the Company submits that to the extent the Commission wishes to address and rule on these matters, then these matters should be properly addressed with: (1) adequate notice of these issues and the Commission’s intent to rule on such issues, (2) an opportunity for the Company to submit testimony and other evidence, and (3) an actual hearing on the merits. The principles of due process demand no less. Failure to do so would also deprive stakeholders and other members of the community the opportunity to meaningfully participate in these proceedings if they choose to do so.

Importantly, as the record submitted clearly demonstrates, this Project represents a straight-forward, practicable, and effective response to assist the Company in addressing the impending shut down of the AES coal plant. Further, grid-scale standalone battery storage is widely recognized in other states as a critical resource to enhance power system flexibility and enable high levels of renewable energy integration. Only in Hawai‘i has the use of this

technology become controversial. In addition, the record plainly indicates that the Project would provide the following benefits:

- The BESS is a simple, cost-effective answer to the shutdown of the AES Plant.
- The Project will lower customers' utility bills.
- The Project will reduce the consumption of fossil fuel.
- The Project will reduce customers' exposure to fuel price volatility.
- The Project will reduce greenhouse gas ("GHG") emissions.
- The Project will enable interconnection of additional renewable energy resources without batteries.
- The Project site is an industrial area with straightforward interconnection, and no issues regarding permitting or the surrounding community.
- The Project will contribute to grid stabilization, grid resilience, and grid flexibility.
- The Project will be one of the largest of its kind in the world and another example of Hawaiʻi's clean energy leadership.

Simply put, this is a good project and one that is needed now. The Company requests that an amended approval order eliminating the conditions as described herein be issued expeditiously, as the timing of this Project is important and only prompt action by the Commission will allow this Project to remain on track.

Finally, the Company would like to address the specific language and conclusions contained in the D&O where the Commission unfairly and arbitrarily questions Hawaiian Electric's integrity, commitment to service, and efforts to meet the challenges in satisfying the energy needs of its customers. The Company is particularly troubled by the accusatory and derogatory statements from the Commission that have seemed to escalate of late, including statements made in recent status conferences and the Commission's threats of penalties in Order No. 37752 issued in Docket No. 2021-0024. Hawaiian Electric believes that there should be one thing that we can all agree on – that all parties have the best intentions in trying to lower costs,

improve Hawaiʻi's energy security, and prudently pursue the renewable targets set in the RPS law. While there may be disagreement as to how to reach the end state, that does not mean the Company or any other party is any less committed than the Commission to achieving our shared goals, and it is possible to work through these disagreements in a productive and effective manner. While the destination for Hawaiʻi is clear, the actual path to get there is complex and uncharted, and differences in opinion and approach, and at times, even mis-steps, may result. However, what is important is that we come together to work for Hawaiʻi's energy future.

Indeed, the Commission, the Company, and other stakeholders in the Hawaiʻi energy sector just demonstrated remarkable joint problem-solving in the Commission's groundbreaking PBR docket. In large part due to the Commission's leadership, this resulted in an outcome that strengthens the Company's alignment with our customers and advances the State's energy goals while also being fair and reasonable to all parties. This collaborative yet rigorous approach serves as a model for how to work effectively and stands in stark contrast to the combative approach being taken in this D&O and Docket No. 2021-0024, and ultimately serves Hawaiʻi and our electric customers in a far better manner. Such statements impugning Hawaiian Electric's intentions, integrity, competence, and efforts are not only false, but also damaging to the Company as they have real impacts on the Company's relationships with customers, developers, investors, and its own employees. They further create an environment of hostility that makes collaboration on critical issues especially difficult. As such, Hawaiian Electric respectfully requests that such phrases be stricken from the order as discussed in the attached memorandum in support of motion. The Company reiterates that it values its relationship with the Commission and believes that a constructive working relationship is necessary to best serve the interests of customers and all citizens of the State of Hawaii.

For the reasons set forth in this Motion and supporting memorandum, the Company respectfully requests reconsideration of D&O No. 37754, as it is unreasonable, unlawful, and erroneous. Further, the Company requests that the Commission stay the imposition of D&O No. 37754 until a decision is issued as to the Company's Motion for Reconsideration. Finally, the Company respectfully requests Commission action on this Motion expeditiously to allow the Project to remain on track.

This motion is made pursuant to Hawai'i Administrative Rules ("HAR") §§ 16-601-137 and 16-601-138, and is based on the attached memorandum in support of motion and citations set forth therein.

Dated: Honolulu, Hawai'i, May 10, 2021.

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Hawaiian Electric Company, Inc. ("Hawaiian Electric" or the "Company") requests reconsideration of D&O No. 37754 as set forth below.

II. RELEVANT PROCEDURAL BACKGROUND

A. In 2006, the Public Utilities Commission of the State of Hawaiʻi ("Commission") promulgated its Framework for Competitive Bidding ("Framework" or "Competitive Bidding Framework"). *See* Decision and Order No. 23121, Ex. A, Docket No. 03-0372 (Dec. 8, 2006). The Framework explicitly recognized that "[t]imely Commission review, approval, consent, or other action described in this Framework is essential to the efficient and effective execution of this competitive bidding process." *Id.* Part III.B.8, at 13.

B. By letter dated June 6, 2016, Hawaiian Electric requested that the Commission: (1) open a docket for the purpose of receiving filings, reviewing approval requests, and resolving disputes, if necessary, relating to the Company's plans to acquire renewable energy resources on Oʻahu through a Request for Proposals ("RFP"); and (2) appoint an Independent Observer ("IO"), consistent with the applicable provisions of the Framework, to enhance transparency in

the evaluation and selection process, and to ensure that the final selection of bids would be in the best interest of Hawaiian Electric's customers.

C. Approximately sixteen (16) months later, on October 6, 2017, the Commission opened Docket No. 2017-0352 related to the Company's request. *See* Order No. 34856, Docket No. 2017-0352 (Oct. 6, 2017).

D. On January 12, 2018, the Commission appointed an IO to oversee the competitive procurement process on O'ahu, and report to the Commission on the progress and results thereof. *See* Order No. 35224, Docket No. 2017-0352 (Jan. 12, 2018) at 30, 39.

E. Less than a month later, on February 2, 2018, after review by the IO, Hawaiian Electric filed its final draft RFPs with the Commission. On February 20, 2018, the Commission approved the Company's final draft RFPs. *See* Order No. 35286, Docket No. 2017-0352 (Feb. 20, 2018). In that order, the Commission highlighted the IO's role as ensuring that the competitive bidding process is fair and in the public interest:

> As general matter, the "primary role" of the commission in a competitive bidding process is to ensure that each competitive bidding process "is fair in its design and implementation so that selection is based on the merits;" that projects selected through competitive bidding process are consistent with the utility's Power Supply Improvement Plans ("PSIPs"); that the utility's actions represent prudent practices; and that throughout the process, the utility's interests are aligned with the public interest, even where the utility has dual roles as designer and participant.
>
> To assist the commission, the Framework contemplates the use of an IO in a variety of situations, as the commission deems beneficial and necessary. The IO has numerous obligations under the Framework, which include monitoring all steps in the competitive bidding process, including the communications between the utility and bidders; certifying to the commission at various stages of the competitive bidding process that the utility's judgment creates no unearned advantage for the utility; advising the utility on its decision-making during the various stages of the competitive bidding process; and reporting to the commission on its monitoring results during each stage of the process.

See id. at 8–9.

F. On December 31, 2018, the Hawaiian Electric Companies[1] filed with the Commission for approval, seven executed PPAs for projects selected through Stage 1 RFPs.[2] On February, 28, 2019, the Companies filed for Commission approval, the eighth and final PPA for projects selected through the Stage 1 RFPs.[3]

G. On April 1, 2019, the Hawaiian Electric Companies filed the Phase 2 Draft RFPs. *See* Docket No. 2017-0352.

H. On June 10, 2019, the Commission issued Order No. 36356 Providing Guidance on the Hawaiian Electric Companies' Phase 2 Draft Requests for Proposals for Dispatchable and Renewable Generation, which, *inter alia*, instructed the Company to modify the Phase 2 Draft RFPs as follows:

> Consistent with the commission's objectives for this procurement process, the Companies shall modify the Phase 2 Draft RFPs to ensure that (1) procurement targets are consistent with the needs of the grid, (2) a fair and transparent solicitation process is conducted, and (3) feedback provided by stakeholders is considered. The commission believes these modifications will increase the likelihood of a successful procurement process for Phase 2, and provides the following guidance to assist the Companies in achieving these outcomes.

See Order No. 36356, at 9, Docket No. 2017-0352 (June 10, 2019). The Commission further stated:

> [It] views the integrity of the evaluation and selection process as essential for the success of Phase 2. As such, the commission expects the Companies to work with the IOs to explicitly document the criteria utilized for selecting a portfolio during Phase 2, as well as the criteria for evaluating a given portfolio and selecting specific projects.

Id. at 13.

[1] Hereinafter Hawaiian Electric, Maui Electric Company, Limited, and Hawai'i Electric Light Company, Inc. are referred to jointly as the "Hawaiian Electric Companies" or "Companies."
[2] *See* Docket Nos. 2018-0430, -0431, -0432, -0433, -0434, -0435, -0436.
[3] *See* Docket No. 2019-0050.

I. On July 10, 2019, Hawaiian Electric filed its Proposed Final Stage 2 Renewable and Grid Services RFPs. *See* Docket No. 2017-0352.

J. On August 12, 2019, the IO submitted a Pre-Bid Report to the Commission on the Company's Proposed Final Phase 2 RFPs ("Pre-Bid Report"). *See* Pre-Bid Report, *attached to* Order No. 36474, *supra*. The Pre-Bid Report stated, in relevant part:

> As IO, we have worked with the Companies . . . throughout 2019, holding numerous conference calls (typically at least one per week), providing edits and comments on multiple drafts of RFP documents, and providing regular advice on ways to improve the RFPs and RFP process. . . . Throughout the process, the Companies were forthright in their discussions and made their subject matter experts available to discuss the relevant topics at issue.
>
> * * *
>
> **Overall, it is our assessment that the [Phase 2 Renewable RFPs], as filed and as a whole package, are reasonable.** There are no fatal flaws, in our view, that should prevent the Commission from going forward with the Renewable RFPs.

See Pre-Bid Report, at 4–5 (emphasis in original) (the IO also stressed the importance of vetting PSIP assumptions against up-to-date cost estimates for standalone storage).

K. On August 15, 2019, the Commission approved Hawaiian Electric's Proposed Final Stage 2 Renewable and Grid Services RFPs. *See* Order No. 36474, Docket No. 2017-0352 (Aug. 15, 2019).

L. On August 22, 2019, Hawaiian Electric filed and issued the Final Stage 2 RFPs. *See* Docket No. 2017-0352. On May 8, 2020, the Stage 2 Final Award Group was announced. On May 13, 2020, KES provided Final Award Acceptance and stated its intent to begin contract negotiations with the Company. From June 2, 2020 through September 4, 2020, the Company and Kapolei Energy Storage I, LLC ("KES") conducted eight rounds of formal energy storage power purchase agreement ("ESPPA") negotiations. On September 11, 2020, the ESPPA was executed between the Company and KES.

M. On September 15, 2020, Hawaiian Electric submitted an application for approval of the KES ESPPA. *See* Application, Docket No. 2020-0136 (Sept. 15, 2020) (the KES ESPPA was one of six Oʻahu PPAs submitted for approval).

N. On October 21, 2020, Hawaiian Electric filed the IO's Report Regarding the Hawaiian Electric Companies' Phase 2 RFPs for Variable Renewable Dispatchable Generation and Energy Storage on Oʻahu, dated October 20, 2020, in Docket No. 2017-0352 ("Oʻahu Stage 2 RFP IO Report"). As to the KES project ("KES Project" or "Project"), the IO recognized that the "standalone and contingency storage project – this was also clearly the best selection." *Id.* at 61. The IO concluded, *inter alia*, "[r]atepayers are likely to see significant benefits from the PPAs filed as a result of this RFP." *Id.* at 5. Ultimately, the IO recommended that the Commission approve the selection of the Final Award Group, based in part, on the conclusion that the bids provided the highest ratepayer benefits and the procurement process was fair and reasonable:

> We recommend that the Commission approve the selection of the Final Award Group. We base our recommendation on our participation in every phase of the RFP process, including: (a) design of the RFP; (b) issuance of the RFP; (c) bid receipt and qualification; (d) evaluation and selection of the Priority List; (e) evaluation and selection of the Final Award Group; and (f) contract negotiations. We also make this recommendation for the following reasons:
>
> (i) The selected bids met all eligibility and threshold requirements of the RFP.
>
> (ii) The bids provided the most ratepayer benefits, as demonstrated by Hawaiian Electric's production simulation modeling done as part of the Detailed Evaluation.
>
> (iii) All six bids conform to what was sought by Hawaiian Electric's RFP, and are consistent with the Commission's August 15, 2019 Order and Hawaiian Electric's PSIP.

(iv) The RFP rules were followed by Hawaiian Electric and by bidders, and we observed no violations of RFP rules, the Code of Conduct, or the Framework.

(v) The filed PPAs, which were the process of bilateral negotiations, reflect the value of the winning projects as bid.

See O‘ahu Stage 2 RFP IO Report, at 69.

O. On November 6, 2020, the Commission issued Order No. 37427, which identified the following issues to be addressed in this docket:

1. Whether Hawaiian Electric has met its burden of proof in support of its request for approval of the ESPPA between Hawaiian Electric and Kapolei Energy Storage I, dated September 11, 2020, for 185 MW/565 MWh lithium-ion BESS, proposed to be located in Kapolei, on the island of O‘ahu.

2. Whether Hawaiian Electric's purchased power arrangements under the ESPPA, pursuant to which Hawaiian Electric will dispatch energy on an availability basis from Kapolei Energy Storage I and pay fixed Lump Sum Payments to Kapolei Energy Storage I, are prudent and in the public interest, with explicit consideration under HRS [(Hawai‘i Revised Statutes)] § 269-6, of the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions;

3. Whether Hawaiian Electric has met its burden of proof in support of its request to include all other payments for energy and non-energy under the ESPPA, including the Lump Sum Payment (as defined in the ESPPA) and related revenue taxes, through the PPAC, to the extent such costs are not included in base rates;

4. Whether Hawaiian Electric has met its burden of proof in support of its request for its proposed accounting and ratemaking treatment for the purchased power expenses under the ESPPA; and

5. Whether it is in the public interest for the 138 [kilovolt ("kV")] line extension, required to interconnect the Project to Hawaiian Electric's system, to be constructed above the surface of the ground pursuant to HRS § 269-27.6(a) and (b).

P. On April 29, 2021, the Commission issued Decision and Order No. 37754, which stated that it was providing approval of the Application subject to a number of conditions imposed on Hawaiian Electric as discussed herein.

III. <u>LEGAL STANDARDS</u>

A. **Standard for Reconsideration**

"A motion seeking any change in a decision, order, or requirement of the commission should clearly specify whether the prayer is for reconsideration, rehearing, further hearing, or modification, suspension, vacation, or a combination thereof. The motion shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous." Hawai'i Administrative Rules ("HAR") § 16-601-137.

"[T]o succeed on a motion for reconsideration, the movant must demonstrate that the commission's decision or order was 'unreasonable, unlawful, or erroneous.'" *In re Hawaiian Elec. Co.*, Docket No. 05-0069, Order No. 22921, at 6, 2006 WL 3736077 (Oct. 4, 2006). In evaluating a motion for reconsideration, the Commission considers "whether matters have been overlooked or mistakenly conceived." *Id.* (citing *In re Gray Line Haw., Ltd.*, Docket No. 96-0217, Decision and Order No. 15380 (Feb. 25, 1997) and *In re Kauai Elec. Div. of Citizens Utils. Co.*, 61 Haw. 166, 195 (1978)).

Clarification and modification is proper where "[i]t was not the commission's intent" to cause or bring about a result or consequence through the language of an existing order, *see In re Hawaiian Elec. Co.*, Docket No. 03-0036, Order No. 21463, at 2, 2004 WL 3636444, at *1 (Nov. 17, 2004), or where it is necessary to correct "implications" or to ensure "consistency" with existing law, *see In re Hawaiian Elec. Co.*, Docket No. 05-0276, Order No. 22858, at 3, 2006 WL 3377660, at *2 (Sept. 15, 2006), or where a particular finding or statement constitutes an

"inadvertent error," *see In re Laie Water Co.*, Docket No. 00-0017, Order No. 18479, at 8, 2001 WL 469060 (Apr. 11, 2001), or where "there may be some confusion regarding" the applicability of an order, *see In re Waikoloa Water Co., Waikoloa Sanitary Sewer Co., Waikoloa Resort Utils., Inc. & Haw. Water Serv. Co.*, Docket No. 2008-0018, Order, at 4, 2009 WL 979688, at *1 (Mar. 12, 2009).

A motion for clarification should be granted, and the language of an order appropriately modified, where it is reasonable to do so. *See, e.g.*, *In re Hawaiian Elec. Co.*, Docket No. 05-0276, Order No. 22858, at 4, 2006 WL 3377660, at *2 (Sept. 15, 2006) ("Accordingly, the commission finds it reasonable to grant [Hawaiian Electric]'s Motion for Clarification and amend ordering paragraph no. 1[.]"); *In re Polynesian Adventure Tours, LLC, Roberts Tours & Transp., Inc. & Carry-All, Inc.*, Docket No. 2016-0160, Order No. 34101, at 5, 2016 WL 6920629, at *3 (Nov. 9, 2016) ("[T]he commission finds the requests for clarification, reconsideration, and/or modification . . . to be reasonable, and therefore orders the following . . . .").

B. Standard for Stay of Order Pending Resolution on Motion for Reconsideration

Although the HAR does not identify a specific standard governing the determination of a motion to stay, the Commission, in *In re GTE Hawaiian Telephone Company, Inc.*, adopted the following three-part test for motions for stay pending reconsideration:

1. Are movants likely to prevail on the merits of the motion for reconsideration;
2. Does the balance of irreparable damage favor the issuance of a stay; and
3. Does the public interest support granting the stay.

In re GTE Hawaiian Tel. Co., Order No. 11614, at 2, Docket No. 7062 (May 8, 1992).

IV. **DISCUSSION**

A. **Many of the Conditions Imposed are Outside the Scope of the Issues in this Docket.**

As noted above, as part of the opening of this docket, the Commission set forth a list of five discrete issues to be addressed as part of the approval of the ESPPA. *See* Section I.N, *supra*. By providing this list, the Commission gave specific notice to the parties and participants as to what would be at issue in this docket and what would not. It is important to note that each of the Commission's issues are limited solely to and flow from a potential approval of the KES Project. It is equally important to understand what is *not* present in the Commission's issues list—namely, the Company's rights to the Performance Incentive Mechanism ("PIM") credits established in Commission Docket No. 2017-0352, financial retirement of existing generating units, or the removal of grid constraints and other requirements for existing or new Community Based Renewable Energy ("CBRE") and distributed energy resources ("DER") programs.

The imposition of conditions which are unrelated to the issues propounded by the Commission in this docket is completely antithetical to the fundamental principles of due process. At the core of the due process clause is the right to notice and a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "Ordinarily, due process of law requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978); *see also Hodel v. Va. Surface Mining & Recl. Ass'n*, 452 U.S. 264, 299 (1981); *Fuentes v. Shevin*, 407 U.S. 67, 81–82 (1972); *Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 835 (9th Cir. 1987).

As discussed more fully below, D&O No. 37754 imposes a number of conditions which were not issues set forth in the Commission's defined issues to be addressed in this docket, as

discussed more fully herein. Further, a number of these conditions have the effect of depriving Hawaiian Electric of property rights and imposing penalties, all without due process required by law, as well as giving rise to other constitutional considerations.

B. The Commission's Stated Basis for Imposing Conditions is Contradicted by the Facts in this Docket.

As a stated basis for imposing the offending conditions that have no reasonable nexus to the KES Project, D&O No. 37754 articulates the Commission's reasoning as follows:

> However, in light of Hawaiian Electric's appalling failures to consider alternatives to the Project, take into account the customer impacts, and seize the opportunity to move away from reliance on fossil fuels, the Commission is imposing conditions to its approval to address these shortcomings, and ensure that the Project provides benefits to customers.

D&O No. 37754, at 58.

However, this unsupported and unnecessarily disparaging characterization is contradicted by the history of this procurement and the record in this and other related dockets, including the terms of the Commission's own order—which clearly establish that this Project was selected: (1) as part of a long-term planning process which was accepted by the Commission; (2) selected in an open procurement process which was approved by the Commission and supervised by an IO contracted by the Commission, and which provided the opportunity for DER and paired resources to compete against standalone storage; and (3) reviewed by both the IO and the Consumer Advocate, who independently concluded that the process was open and fair.

1. Planning for the End of Term of the AES Plant has been Ongoing for More than a Decade.

The Company's planning efforts to transition to renewables and to address the expiration of the PPA for the AES Hawaii coal fired power plant ("AES Plant") began long before the Stage 2 RFP was initiated and has been ongoing for more than a decade, as clearly demonstrated in the Commission's own dockets. Starting in early 2011, the Company requested:

> [T]hat the [C]ommission "open a new docket for the purposes of receiving filings, reviewing approval requests, and resolving disputes, if necessary, related to the Company's plan to proceed with a competitive bidding process to acquire up to approximately 300 [MW] of new, renewable firm dispatchable capacity generation resources on the island of O'ahu, with the initial increments coming on line in the 2016 time frame and the remainder over the following two years."

Order Opening Docket, at 5, Docket No. 2011-0039 (Feb. 24, 2011) (footnote omitted). However, on July 11, 2013, the Commission closed the proceeding determining that, "[g]iven HECO's AOS and IRP Report, which detail the utility's planning process for determining need for firm capacity, it appears that this RFP and proceeding governing such RFP process are premature." Order No. 31358, at 6, Docket No. 2011-0039 (Jul. 11, 2013).

Recognizing that despite the Commission closing Docket No. 2011-0039, there was a continued need to increase renewables and plan for the retirement of existing fossil fuel generation, in 2013, the Company requested waivers from the Competitive Bidding Framework for eleven low-cost renewable energy projects, which were procured through a competitive process. *See, e.g.*, Hawaiian Electric Application for Additional Waivers From the Framework for Competitive Bidding, at 1 and n.3, Docket No. 2013-0381 (filed Nov. 4, 2013). The Company expected these projects to add nearly 275 megawatts of clean power. *See, e.g.*, *id.* at 2; Hawaiian Electric Application for Waivers, at 2, Docket No. 2013-0156 (filed June 18, 2013). The Company ultimately submitted seven PPAs for approval by the Commission. The Commission chose to approve only four of the seven PPAs.[4] Around that time, the Commission also denied the Company's application for approval of a PPA and competitive bidding waiver for a proposed 20 MW PV project.[5]

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[4] *See* Docket Nos. 2014-0308, -0354, -0355, -0356, -0357, -0358, -0359.

[5] *See* Decision and Order No. 32870, Docket No. 2014-0077 (June 3, 2015).

In the meantime, the Company provided its Power Supply Improvement Plan ("PSIP") to the Commission for review. Hawaiian Electric Power Supply Improvement Plan, Docket No. 2014-0183 (filed Aug. 26, 2014). Its starting assumption was that the AES Plant PPA would be renegotiated at its 2022 term expiration and extended "at its full 180 MW capacity, but with a mix of 50% coal and 50% biomass for fuel." *Id.* at 4-5.

As a part of this 2014 PSIP, the Company also analyzed "potential effects on costs and contributions towards the RPS should some or all of the AES capacity be converted from coal to biomass," and anticipated limitations from "[n]ew rules and regulations at the state and federal levels." *Id.* at 5-16 to 5-18. The AES Plant had, for the past 22 years, "operated with high availability" and "provide[d] the lowest cost energy to the power system on Oahu." *Id.* At that time, the AES Plant was "expected to be a viable generator after the expiration of the existing PPA and would be a candidate for a new PPA . . . , provided the operating limitations, environmental limitations, fuel optionality, and pricing permit." *Id.* at 5-18.

A wide variety of public and private stakeholders reviewed the PSIP and provided "extensive comments." Decision and Order No. 33320, at 18, Docket No. 2014-0183 (Nov. 4, 2015). The Commission ordered the Company to revise and supplement the 2014 PSIP. *See, e.g.*, *id.* at 134. In this order, the Commission identified certain areas of improvement, including the maximization of the "lowest cost renewable energy sources" over "the higher-cost biomass conversion of the AES coal plant." *Id.* at 74; *see also id.* at 80–82, 110.

In 2016, the Company submitted its revised PSIP to the Commission. Hawaiian Electric Companies' PSIPs Update Report, Docket No. 2014-0183 (filed Dec. 23, 2016). In this revised PSIP, the Company explicitly planned for the AES Plant retirement in 2022. *See, e.g.*, *id.* at 3-8, Table 3-1, 4-2 to 4-4, Table 4-1, 4-5 to 4-7, Table 4-2. Among the near-term action plans to

move towards 100% renewable energy were "distributed photovoltaic generation," and "grid-connected microgrids on military installations" to "provide replacement capacity" for the AES Plant. *Id.* at 4-10, 6-6 to 6-7. Moreover, an integral part of these plans was the installation of several utility-scale battery storage facilities. *See id.* at 4-3 to 4-7, Tables 4-1 and 4-2.

After further rounds of information requests and public comments, this Commission ultimately accepted the Company's updated PSIP. *See* Decision and Order No. 34696, at 1, 4–5, 8–9, Docket No. 2014-0183 (July 14, 2017). The Commission was "confident that many of the Companies' proposed near-term actions pertaining to renewable energy development are supported by sound analysis and are consistent with State policy and prior [C]ommission orders," including "company-wide plans for competitive procurement of grid scale renewable resources; successful implementation of the [CBRE], demand response ('DR'), and [DER] programs." *Id.* at 3.

Three months later, after waiting nearly one and a half years for the Commission to open a docket from the Company's initial June 2016 request, the Company filed its draft Stage 1 RFP for renewable dispatchable generation. *See* Hawaiian Electric Companies' Draft Requests for Proposals, Docket No. 2017-0352 (filed Oct. 23, 2017). In it, the Company again planned for commercial operations in 2022, coinciding with the AES Plant's decommissioning. *See, e.g.*, *id.* Ex. 2, at 6 ("This RFP targets projects that can satisfy the resource needs identified in the PSIP Update Report: December 2016. . . . The Company would consider projects that cannot reach a [GCOD] by December 31, 2022 in subsequent RFPs.").

As planned, the Company continued to diligently pursue these Stage 1 projects through the rest of 2017 and 2018, with the AES Plant PPA expiration in mind. *See, e.g.*, Hawaiian Electric Companies' Proposed Final Draft Variable Requests for Proposals, Ex. 2, at 5 n.1 ("The

resource need for the island of Oʻahu identified in the Companies' Power Supply Improvement Plans Update Report: December 2016 ('PSIP') identified 180 MW of grid-scale PV and 30 MW of grid-scale wind in 2020, and an additional 40 MW of grid-scale PV in 2022.").[6]

At a February 7, 2019 status conference, the Company presented its "proposed next steps for procurement of grid-scale energy resources." Hawaiian Electric Companies' Stage 2 Draft Requests for Proposals, at 2, Docket No. 2017-0352 (filed Apr. 1, 2019). The Company expressly noted that:

> [T]he power purchase agreement with AES Hawaii ("AES") for its coal-fired power plant expires in September 2022. The AES plant, at 180 MW, is the largest generator on the Hawaiian Electric system and accounts for 16% of Hawaiian Electric's system peak. The Companies expressed that the energy (MWh) and capacity (MW) supplied by AES must be replaced in order to meet customer energy requirements. Part of these needs will come from the projects selected in Stage 1, but more is needed. . . .
>
> The Companies indicated that this need could be met by standalone storage, generation paired with storage that allows for grid charging, and generation paired with storage without grid charging. The Companies estimated the need for storage at about 200 MW and 1,200 MWh per day (equivalent to 438,000 MWh/year). The Companies believe storage in these amounts can meet the replacement energy and capacity needed from the loss of the AES plant. Given the expiration of the AES power purchase agreement in September 2022, the Companies believe that a replacement must be in place in advance by March 2022. Accordingly, the Companies proposed two parallel RFPs for Oʻahu, one for 200 MW and 1,200 MWh of energy storage through stand-alone storage, and a separate Stage 2 RFP to fulfill the remaining 160,000 MWh of variable renewable energy through the procurement of variable renewables and variable renewables paired with storage. The standalone energy storage RFP would require projects to have a commercial operations date of March 2022, which while aggressive, the Companies believe could be met. For the Stage 2 RFPs, the Companies noted preference would be given to projects that could be placed into service by the end of 2022, but the Companies did not consider that date a must-have for commercial operations.

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[6] In addition to the Stage 1 projects, on November 11, 2018, the Company filed an application for approval of a PPA and competitive bidding waiver for a proposed 46.8 MW wind project. The developer of the project was the only entity that submitted a response to an expression of interest process that Company had conducted for potential wind projects on Oʻahu. On September 6, 2019, the Commission denied the Company's request for waiver and dismissed the application. *See* Order No. 36502, Docket No. 2018-0400 (Sept. 6, 2019).

Id. at 2–3; *see also* Hawaiian Electric Companies, *Next Steps for Procurement of Grid-Scale Energy Resources* at 7, Docket No. 2017-0352 (filed Feb. 7, 2019).

Later that month, the Commission issued an order that, while expressing some concern with the upcoming AES Plant retirement, still acknowledged that the Company was planning for the event, stating:

> [T]he Companies are currently undergoing procurement of grid services pursuant to RFPs in the Demand Response docket, Docket No. 2015-0412 (ex: RFP 061715-02), so including parallel expedited acquisition of grid services within Phase 2 is consistent and overlapping with the Companies' existing grid services procurement plans and mandates. Such services acquired strategically across select circuits on Maui and Oahu can provide grid services following the retirement of the AES and Kahului Plants.

Order No. 36187, at 12, Docket No. 2017-0352 (Feb. 27, 2019). Further, the Commission noted that it "anticipates that the central focus of the upcoming Phase 2 procurement process will be to replace the capacity, energy, and ancillary services from the AES Hawaii Power Plant ('AES Plant')." Order No. 36187, at 2.

In April, the Company filed its Stage 2 Draft RFPs. *See* Docket No. 2017-0352. The next month, in response to the Consumer Advocate's information requests based on the Stage 2 Draft RFPs, the Company discussed its plans for the AES shutdown, including explaining that:

> The March 2022 [in-service] date was established to ensure that reliable replacement capacity is fully available on the island prior to the expiration of the AES PPA. The March 2022 date provides time for potential delays and allows for seasoning of the new project prior to the expiration of the AES PPA. It is prudent to allow some cushion for possible delays in the selected project(s). Past experience demonstrates that it is not uncommon for projects to take longer than anticipated in Hawaiʻi with a variety of factors potentially causing or contributing to delays. . . . In addition, the Companies believe that a minimum seasoning period is reasonable and prudent, especially when planning for the loss of a major resource such as AES.
>
> Given feedback from developers in Stage 1, the Companies expect that developers may not be able to meet the full performance required for the AES replacement projects immediately upon commercial operations. A

> seasoning period is needed to determine how to best dispatch the portfolio of projects after the AES PPA expires and will involve testing that verifies that a project was built as proposed and that the various components are functioning properly.
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> * * *
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> However, to ensure that developers take seriously the need to provide reliable generation by September 1, 2022, the Companies would require such projects to meet the availability and performance metrics immediately and liquidated damages would be assessable beginning on September 1, 2022 for failure to meet such metrics instead of 12 months post COD as currently required under the RDG PPA.
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> * * *
>
> Hawaiian Electric is seeking energy storage to be in service in March 2022 to allow for sufficient testing and operational integration prior to the loss of 180 MW of capacity from AES, as described [above].
>
> * * *
>
> [Regarding combined PV/storage projects, t]he more immediate need, due to the expiration of the AES PPA, is for capacity. The energy provided by AES can be served by other resources that are either already on or will be on the grid by 2022 (e.g., Clearway's Lanikuhana Solar, Waipio PV and Kawailoa Solar projects). Therefore, the resources intended to replace the capacity for AES must be in place by March of 2022 (or alternatively June 2022) for the reasons noted above, but resources just seeking to meet the renewable energy requirement can have a later COD.
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> * * *
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> The Companies recognize that the proposed March 2022 GCOD for the projects intending to meet the MW needs on O'ahu requires an extremely compressed schedule. As noted in response [above], the seasoning period allowed for the Stage 1 projects is twelve months. Allowing for COD just six months, or 3 months as offered [above], before the expiration of the AES PPA does not allow for a sufficient contingency for any potential delays or a full seasoning period. The Companies would have provided a longer transition period on O'ahu if time permitted, but unfortunately circumstances do not.

Hawaiian Electric Companies' Responses to Consumer Advocate's Information Requests, CA/HECO-IR-1, at 1–5, CA/HECO-IR-2, at 2, Docket No. 2017-0352 (filed May 15, 2019).

More recently, in December 2020, the Company gave a presentation regarding its plans in anticipation of the AES Plant's retirement, at the Commission's request. *See* Company's Dec. 18, 2020 Status Conference Presentation, Docket No. 2017-0352 (filed Dec. 17, 2020). *See generally* Commission, Notice of Status Conference on Friday, December 18, 2020, Regarding Planning for Retirement of the AES Hawaii Power Plant, Docket No. 2017-0352 (Dec. 4, 2020). In this presentation, the Company explained that "[e]ven without Stage 1 and 2 projects online, there [would be] sufficient capacity following the AES shutdown until mid-2023." Company's Dec. 18, 2020 Status Conference Presentation, at 2, *supra*. Still, "[a]dditional options, such as a Grid Services RFP, are being developed as part of a contingency plan," and the Company further advised that it was "fixing the interconnection issues and [is] working closely with developers so that Stage 2 projects with 2023 GCODs are not delayed." *Id.* Finally, the Company explained that the "[p]roposed [KES] system is a critical and cost-effective part of the transition and is expected to be online July 1, 2022." *Id.*

As summarized herein, and established in various dockets, it is verifiably incorrect to say that there has been a lack of planning by the Company. The Company has spent incredible time and resources planning, and included the Commission at every step along the way.[7] While the

[7] Indeed, the Company updated drafts of its RFP on multiple occasions based on Commission guidance. For example, the Company's initial procurement approach for O'ahu was a parallel procurement for renewables and stand-alone storage. In Order No. 36187, issued on February 27, 2019 in Docket No. 2017-0352, the Commission provided guidance that it would be more beneficial for the Company to conduct in parallel: (1) a combined RFP, *i.e.*, renewables and stand-alone storage in the same procurement, and (2) an expedited grid services RFP. The Company followed this guidance in submitting its draft Stage 2 RFP on April 1, 2019. The Commission issued Order No. 36356 on June 10, 2019, *Providing Guidance on the Hawaiian Electric Companies' Phase 2 Draft Requests for Proposals for Dispatchable and Renewable Generation*. The Commission noted that "[t]he Commission appreciates the Companies' efforts to incorporate feedback provided by the commission and stakeholders, including the initial guidance provided in Order No. 36187 and at the April 18 and May 2 Status Conferences regarding the scope of the RFPs." Order No. 36356, at 9. The Commission expressed concern with the Companies' procurement targets and directed the Companies to work with the IOs to ensure the Stage 2 RFPs solicit renewable energy, capacity, and grid services commensurate with grid needs. Consistent with that guidance, and under the supervision of the IO, the Company filed its proposed final Stage 2 RFP. Notably, the Company increased its RFP procurement targets on O'ahu from (1) 160,000 MWh of energy and 200 MW (438,000 MWh) of energy

Commission may disagree with the outcome of the Company's planning efforts, such disagreement is not equivalent to a lack of planning on the Company's part, as both can be mutually inclusive of each other.

2. **The Company's Planning and Evaluation Considered Standalone Energy Storage as Part of the Most Beneficial Project Portfolio.**

The Company identified the need for energy storage resources, such as the KES Project, through the Company's long-term planning process as reflected in the Company's PSIP resource plans. *See, e.g.*, Hawaiian Electric Companies' PSIPs Update Report at 4-3 to 4-7, Tables 4-1 and 4-2, Docket No. 2014-0183 (filed Dec. 23, 2016). Resources were economically optimized using production simulation models and selected accordingly. If a resource is utilized (and not constrained) as assumed in the original resource selection, it is expected to deliver energy more efficiently (or at least as efficiently) as an alternate or constrained resource.

In the Stage 2 RFP analysis, the portfolios that met the needs of the system were evaluated and the least-cost portfolio was selected under the observation and confirmation of the IO. The Company included the flexibility in allowing an energy storage requirement in the Stage 2 RFP that allowed for grid charging (standalone or paired with PV).

The Commission further signaled in Order No. 36187 that:

> Following from the above working assumption that the goal is to solicit and acquire the best portfolio of clean energy projects and resources, and given the commission's stated concerns above and the overall desire to replace the capacity, energy, and ancillary services from the AES and Kahului Plants upon their timely retirement, the commission finds that it would be more beneficial to conduct Phase 2 RFPs for all islands that include Parallel (1) Combined RFPs + (2) Expedited Grid Services RFPs. These parallel procurement processes would allow the Companies to set targets for grid services' contributions to overall grid needs separately, rather than within an all-resource procurement, reducing any concerns about the potential

storage (April 1 draft RFP), to (2) 590,000 MWh of energy and 200 MW (438,000 MWh) of energy storage (May 2 status conference), and finally, to (3) 1,300,000 MWh of energy and 200 MW (438,000 MWh) of energy storage (proposed final Stage 2 Renewable and Grid Services RFPs filed on July 10, 2019).

complexity of wrapping aggregated demand-side resources into an all-resource procurement.

Order No. 36187, at 11–12 (footnote omitted).

The Company did in fact consider alternatives and portfolio diversity, and seized every opportunity to move away from fossil fuels, consistent with this guidance. In the Stage 2 RFP process, the Company considered both grid-scale resources and distributed energy resources ("DER") to replace the services provided by the AES Plant. The Company awarded Grid Services Purchase Agreements for DER aggregators to provide resources. However, there were insufficient cost-effective bids to meet the 110 MW target. Through the Stage 2 grid-scale procurement, the Company selected a portfolio of projects that, in comparison to other portfolios, showed the greatest amount of customer benefits. *See* O'ahu Stage 2 RFP IO Report, at 58 (stating that "Upon identification of the best portfolio, Hawaiian Electric conducted a sanity check on the constituent projects to ensure that the entire portfolio would be optimal for Hawaiian Electric ratepayers."). The Company maximized its pursuit to move away from fossil fuels based on what the market would bear.

3. The Selection of the KES Project was the Result of an Open Procurement that was Supervised by the Commission's IO and Supported by the Consumer Advocate.

The KES Project was selected from an open and fair procurement that was authorized and approved by the Commission, supervised by the IO, and reviewed and supported by the Consumer Advocate. To characterize this as an appalling lack of planning is simply not correct. As noted above, the Commission authorized the Stage 2 RFP process and selected the IO. The Commission highlighted the IO's role as ensuring that the competitive bidding process is fair and in the public interest. *See* Order No. 35286, at 8–9.

The IO's Pre-Bid Report concluded that the RFP development process was sound and opined that the RFP should proceed as planned. *See* Pre-Bid Report, at 4–5. Further, the IO's O'ahu Stage 2 RFP IO Report noted that, with respect to the KES Project, as a "standalone and contingency storage project – this was also clearly the best selection." *Id.* at 61. The IO concluded, *inter alia*, "[r]atepayers are likely to see significant benefits from the PPAs filed as a result of this RFP." *Id.* at 5. Ultimately, the IO recommended that the Commission approve the selection of the Final Award Group, based in part, on the conclusion that the bids provided the highest ratepayer benefits and the procurement process was fair and reasonable. *See* O'ahu Stage 2 RFP IO Report, at 69. The Company submits that the Commission's conclusion is simply not supported by the record as the Commission: approved the process; selected the IO; delegated to the IO the authority to review the fairness and thoroughness of the process; and received confirmation from the IO that the process was thorough and fair. The record also reflects that the Company did not have any predisposition towards standalone storage when conducting the Stage 2 RFP, nor did the Company ignore the Commission's preference against standalone storage. Rather, standalone storage was a permitted resource in the Stage 2 RFP, competed against paired resources, and was ultimately selected as the best option for customers in a portfolio analysis because the market did not produce any superior options. The process was fair and thorough, and the results were objective, fair and unbiased.

In addition, the Consumer Advocate reviewed the ESPPA between the Company and KES. In its Statement of Position filed in this proceeding, the Consumer Advocate recommended approval of the ESPPA for the Project, highlighting resource diversification among other specific benefits of it being a standalone storage system:

> It is important to note the significance of the proposed Project in its selection in the Phase 2 RFP to contribute to the capacity and contingency storage

> amounts solicited from that RFP. As noted above, the solicitation amounts were set by the Companies working with the IO to "ensure the Phase 2 RFPs solicit renewable energy, capacity, and grid services commensurate with grid needs," considering the retirement of the AES coal-fired power plant in 2022.
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> As noted in Attachment 1, the IO identified Plus Power's standalone and contingency storage project as "clearly the best selection." Furthermore, the Consumer Advocate notes that the capacity storage of the proposed Project will provide the following:
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> - Capacity to meet forecasted and planning reserve capacity and energy reserve margins identified in Hawaiian Electric's Adequacy of Supply reports. In the 2021 Adequacy of Supply report, filed on January 29, 2021 ("2021 Adequacy of Supply"), the Company provides that the estimated energy reserve margin can be met by the proposed Project.
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> - Other grid services such as fast frequency response, regulating reserves, grid-forming capabilities, and black start capabilities.
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> * * *
>
> - Resource diversification as the first standalone storage system.
>
> - Increased flexibility to dispatch renewable projects.
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> Furthermore, as noted in the presentation by Hawaii Natural Energy Institute ("HNEI") on December 18, 2020, in Docket No. 2017-0352 (i.e., Grid Planning for a Modern Power System in Hawaii), one of its key findings is that a standalone 135 MW battery, with even modest solar plus storage, will provide required reliability for the AES retirement.

See Consumer Advocate's Statement of Position, Docket No. 2020-0136, at 13–15 (Feb. 12, 2021) (brackets and footnotes omitted). In addition, the Consumer Advocate noted several other benefits of the KES Project, including its contribution to the State's renewable energy goals, contribution to the RPS under Hawai‘i Revised Statutes ("HRS") § 269-92(a), as well as its effect on lowering fossil fuel usage, reducing greenhouse gas ("GHG") emissions, and hedging fossil fuel prices. *Id.* at 38.

As shown above, the record in this docket and other dockets before this Commission clearly demonstrate that the Company and the various stakeholders have spent an incredible amount of consideration and effort into the possible alternatives that would be available to complete the Stage 2 portfolio of projects. As such, the Company respectfully submits that the Commission's characterization of the Company's efforts as an "appalling failure" to consider alternatives, is neither correct nor appropriate.

In view of this extensive record as set forth above, the Company respectfully submits that it has consistently made thorough plans and has acted diligently in pursuing the needed resources to replace the AES Plant upon its expected PPA expiration, to which the KES Project has long been identified as important part of this transition.

4. In Fact, the Company's Efforts were Delayed by a Number of Factors Outside its Control, Including Time Used by the Commission.

The Commission has made the subject of procurement delays and delays in planning a central issue in D&O No. 37754 and has apparently predetermined the culpability of the Company. Therefore, the Company is compelled to point out that, as reflected in various Commission dockets, a number of delays in the procurement process are attributable to factors outside the Company's control, including inaction by the Commission in timely approving the Company's procurement efforts.

As noted above, on June 6, 2016, the Company requested that the Commission open a docket and appoint an IO "to allow the Company to solicit proposals for new renewable energy generation (to be in service by the end of 2020), consistent with the [2016 PSIP update report]." Letter from Joseph P. Viola, Vice Pres., Regulatory Affairs, Company to Commission (filed June 6, 2016), *attached to* Order No. 34856, Docket No. 2017-0352 (Oct. 6, 2017). The Company explained that, although "the PSIP [was] still under review by the Commission and other

stakeholders," it was "important to move forward in parallel to enable the procurement process of the near-term renewable generation identified to be launched quickly at the appropriate time as determined by the Commission." *Id.* at 2.

Yet, despite the Company's urgency, the Commission did not open Docket No. 2017-0352 until **sixteen months** after the Company's request. Order No. 34856, Docket No. 2017-0352 (Oct. 6, 2017). One of the results of this delay was that the Commission's approval of the Stage 1 RFPs did not occur until February 2018. *See* Order No. 35286, at 2–6, Docket No. 2017-0352 (Feb. 20, 2018). Of course, until the Commission took action to open the requested docket, the Company could not begin soliciting bids for Stage 1 projects, which it did a week after the Commission approved the Stage 1 RFPs, on February 27, 2018.

The Company respectfully submits that the Commission's unsupported and unnecessarily disparaging characterization of the Company's planning efforts is erroneous, not supported by fact, and belied by the long and extensive record leading up to this proceeding—and moreover, ignores the significant impacts of the aforementioned delays which were outside of the control of the Company. As the Commission's underlying reason for imposing these improper conditions is erroneous and contrary to fact, it should likewise undo the harm of its erroneous and unlawful decision and reconsider D&O No. 37754 as well as strike the offending language from the D&O.

C. D&O No. 37754 Should Be Reconsidered Because It Imposes Conditions on the Approval of the KES Project that Are Erroneous and Contrary to Law and Have Constitutional Implications.

As a further matter, any conditions imposed on a PPA approval should have a rational relationship to the approval sought. *Cf. Barnum v. Nat'l Transp. Safety Bd.*, 595 F.2d 869, 872 (D.C. Cir. 1979) ("[T]he sanction imposed [by a federal administrative agency under the Administrative Procedure Act] in a given case must bear a reasonable relationship to the goal that the governing legislation was intended to accomplish.").

For example, it is widely recognized that, when granting a Certificate of Public Convenience and Necessity, "any conditions imposed . . . by a public utilities commission must be lawful and reasonable." 64 Am. Jur. 2d Public Utilities § 160 (citing *Kan. Elec. Power Coop., Inc. v. State Corp. Comm'n*, 35. P.2d 1235, 1239 (Kan. 1984)); *see also* 73B C.J.S. Public Utilities § 190 (Mar. 2021 update) (stating that a public utilities commission "has no authority to annex unreasonable conditions").

Similarly, a commission cannot make the granting of regulatory approvals conditioned on unlawful and unreasonable requirements. In *Ozark Gas Transmission Sys. v. Fed. Energy Reg. Comm'n*, 897 F.2d 548 (D.C. Cir. 1990), the D.C. Circuit Court reversed and remanded a Federal Energy Regulatory Commission ("FERC") imposition of unreasonable conditions on its grant of an open-access regulations waiver. In that case, the FERC issued an order intended "to promote competition in gas markets." *Id.* at 550. The utility in question requested a waiver because complying with the order would have placed it into default on its financing loans. *Id.* at 550. The FERC granted the waiver, but required certain conditions that would have effectively forced the utility to charge more than double its only competitor just to break even. *Id.* at 551–52. The utility ultimately petitioned for judicial review, arguing that the conditions were "fundamentally unreasonable—and hence that FERC abused its discretion in imposing them—because they negate[d] and defeat[ed] the purpose of the waiver." *Id.* at 551. The D.C. circuit agreed, finding that the conditions had "patent unreasonableness[.]" *Id.* at 552.

Likewise, in an analogous situation, the Pennsylvania Public Utility Commission rejected a condition requested by the Office of Consumer Advocate ("OCA") when it was "so unrelated to the relief sought in the [utility]'s petition as to necessitate . . . consideration of the issue in a

separate proceeding." *In re Verizon Pa*., C-00881727, Final Order, 2007 WL 2011616, at *7 (Pa. P.U.C. June 29, 2007).

As discussed above, D&O No. 37754 imposes conditions on the Company that are unrelated to the issues the Commission itself articulated as the issues to be addressed in this docket. Should these conditions remain in the Commission's order, the Company respectfully submits that, in addition to D&O No. 37754 being subject to reversal for arbitrary and improper rulings, there are also bona fide constitutional implications that will inevitably flow from the Commission's decision.

It is well-settled that, under both the U.S. and Hawaiʻi Constitutions, a governmental agency is prohibited from taking private property for public use without just compensation. *See, e.g.*, U.S. Const. amend. V; Haw. Const. Art. 1, § 20; *Leone v. Cnty. of Maui*, 128 Hawaiʻi 183, 189, 284 P.3d 956, 962 (Ct. App. 2012). The taking need not be physical; the U.S. Supreme Court has long recognized that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *See, e.g.*, *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Thus, while a commission may impose reasonable conditions on the granting of a regulatory approval, the imposition of additional conditions that are unrelated to the matter in question may cause that order to contravene the constitution. *See Blackledge v. Farmer's Ind. Tel. Co.*, 105 Neb. 713, 181 N.W. 709 (1921). "The public interest is not a talisman in whose presence an unconstitutional taking fades away. While the public interest is necessary for a constitutional taking, it is not sufficient." *US W. Commc'ns, Inc. v. Pub. Utils. Comm'n of State of S.D.*, 505 N.W.2d 115, 126 (S.D. 1993) (citing *Pa. Coal Co.*, 260 U.S. 393, and *De. L. & W. R. Co. v. Morristown*, 276 U.S. 182 (1928)).

The United States Supreme Court set forth a two-pronged test to assess the propriety of government-imposed conditions. Under *Nollan v. Cal. Coast. Comm'n*, an "essential nexus" must exist "between the condition and the original purpose" for the condition. 483 U.S. 825, 837 (1987). Otherwise, the condition is not a valid regulation, "but 'an out-and-out plan of extortion.'" *Id.*

Even when there is an essential nexus, there must also be "rough proportionality." *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). While the Commission need not perform a "precise mathematical calculation," it still "must make some sort of individualized determination that the required [condition] is related both in nature and extent to the impact" to be mitigated. *Id.*

Specific to government conditions on utility approvals, the D.C. Circuit Court looked to the *Nollan* essential nexus test when commenting on the merits of interconnection and discounted-services conditions that the FCC placed on its approval of a merger between telecommunications providers. *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 388 (D.C. Cir. 2020). In setting them aside, the court stated that such "non-germane conditions," such as the "[non-]transaction specific benefit" of "providing discounted service to needy consumers," were impermissibly extortionate under *Nollan*. *Id.* In other words, "[o]nce delinked from the transaction itself, such conditions reside somewhere in the space between absurdity and corruption." *Id.*

In Hawai‘i, the state Supreme Court has applied the *Nollan* and *Dolan* analyses in determining whether permit conditions are acceptable. *See, e.g.*, *Pub. Access Shoreline Haw. by Rothstein v. Haw. Cnty. Planning Comm'n by Fuijmoto*, 79 Hawai‘i 425, 436–47, 903 P.2d 1246, 1257–58 (1995) ("In order for any conditions placed on a SMA [(Special Management Area)] permit . . . to be deemed 'reasonable,' they must bear an essential nexus to legitimate State

interests and must be 'roughly proportional' to the impact of the proposed development . . . . In other words, the [government] may require dedications appropriately tailored to the special and quantifiable burdens associated with granting discretionary benefits to [the applicant], through a SMA permit . . . .") (citing *Nollan* and *Dolan*).

Moreover, the Hawai'i Supreme Court also recognized that, under Hawai'i law, "a taking has occurred" for improper action taken by a state agency. *See Kemp v. State Child Supp. Enf't Agency*, 111 Hawai'i 367, 390, 141 P.3d 1014, 1037 (2006).

Here, by conditioning approval of the KES PPA on unrelated, unlawful, and detrimental conditions that have the effect of significantly damaging the Company – as more fully explained below – the Commission not only has acted improperly and unlawfully, but has created a cognizable basis for a constitutional claim of regulatory takings. Accordingly, D&O No. 37754 should be reconsidered.

D. The Following Specific Conditions Imposed by the Commission Should be Reconsidered.

1. CONDITION NO. 1 – The Commission's Requirement that Hawaiian Electric Forgo Any Potential Recovery of the Second Allocation of the PIM Awards for the Stage 1 O'ahu Projects as Part of the Approval of this Project has No Rational Relationship to the Approval of the KES Project.

Under Condition No. 1, the Commission ordered the Company to forgo the potential recovery of the second allocation of the PIM awards for the Stage 1 O'ahu projects. The Commission argues that perceived delays in the Company's Stage 1 O'ahu projects have conferred significant risk onto the Company's customers associated with potential generation and capacity shortfalls after the retirement of the AES Coal Plant. *See* D&O 37754, at 111–12. It seems evident that the Commission leveraged the Stage 1 PIM with approval of this Stage 2

project because the Company still has the opportunity to earn up to $1.7M for the Stage 1 PIM, whereas the Company will not earn any meaningful amount under the Stage 2 PIM.[8]

In Order No. 35405, issued in Docket No. 2017-0352, the Commission established a PIM for procurement of Hawaiian Electric's Stage 1 RFP projects. *See* Order No. 35405, Docket No. 2017-0352 (Apr. 6, 2018). The scope of the PIM covered "PPAs submitted by the end of 2018[.]" *Id.* at 12. Subsequently, the Commission established an additional PIM to cover "any [a]dditional PPAs submitted after December 31, 2018, until March 31, 2019[.]" *See* Order No. 35664, Docket No. 2017-0352, at 7 (Sept. 6, 2018) (noting that the new PIM "will function in a similar manner to the original PIM.").

The intent of establishing the PIM was to incentivize the Company's procurement of renewable energy projects based on a simple and objective measure: cost savings to customers. As the Commission explained, its intent in establishing the PIM was "to reward exceptional performance and encourage the Companies to successfully execute the procurement process, resulting in low-cost renewable energy project proposals submitted to the commission by the end of 2018." *See* Order No. 35405, at 2. Measuring the PIM in terms of cost savings was in line with the Consumer Advocate's desire to create metrics that were "objective and easy to measure[.]" *See id.* at 4. As such, the Consumer Advocate "urge[d] the commission to adopt clear standards to evaluate the Companies' performance." *Id.* at 5.

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[8] *See* Post-Hearing Brief of the Hawaiian Electric Companies, Docket No. 2018-0088, at 8-9, October 19, 2020 ("The Companies' response to PUC-HECO-IR-47 highlights the point. In that response, with respect to the Renewable Dispatchable Generation Procurement Stage 2 RFP PIM, the Companies noted that only two of the eleven independent power producer projects selected via that RFP were below the threshold pricing necessary to qualify for the PIM. Since that response was filed, the second PIM-eligible project has withdrawn from the procurement process, leaving only one PIM-eligible project remaining. The Stage 2 RFP PIM is very progressive, and with a potential $50 million maximum award over five years, a potentially very substantial shared savings incentive. However, because the Companies do not control market pricing or legislative tax credit availability, the pre-set PIM eligibility price threshold was a factor outside the Companies' reasonable control. Because of that factor, the Companies only have the potential to earn approximately $23,000 of the $50 million PIM potential over five years (.046% of the total potential PIM)." (citations omitted)).

In light of the above goals, the Commission established the PIM in the form of a "shared-savings performance incentive[.]" *Id.* at 11. Specifically, the PIM is "based on an 80% customer / 20% utility split of the **savings from each PPA**, compared to benchmarks established by considering recent low-cost renewable energy projects, up to a cap of $3,500,000." *Id.* at 11 (emphasis added). Importantly, entitlement to a PIM was not tied to the speed at which a given project obtained commercial operations. This is in stark contrast to the PIM established by the Commission for the Company's Stage 2 RFP, which did tie the award of the PIM to timing of when a project achieved commercial operations.

The total amount of a PIM payment, *i.e.*, the savings from each PPA, is calculated by "multiplying the forecasted first-year energy production (in kWh) of the project by the difference between the applicable benchmark price and the equivalent PPA price (in cents per kWh)." *Id.* at 12. The Commission provided the following example calculation:

> For example, if the Companies successfully procure the total amount of energy requested in all of the Variable RFPs, the forecasted first-year energy production could be as high as 850,000,000 kWh. If the equivalent PPA prices of these projects are, on average, 1 cent per kWh below the applicable benchmarks, then the first-year savings compared to the benchmarks would be $8,500,000. An 20% utility / 80% customer share of the savings would offer the Companies a $1,700,000 incentive. If the equivalent PPA prices are lower, the potential incentive could be greater, up to the $3,500,000 cap.

Id. at 13. As illustrated above, the PIM was "designed to establish a simple, yet meaningful, incentive to successfully execute the procurement process and bring additional value to customers." *Id.* at 14.

Importantly, the eligibility for, and amount of, a PIM payment is based on first-year savings to customers. Payment of the total PIM payment is staggered over two milestone periods. The first PIM payment, equal to 50% of the total PIM, is made "shortly after approval

of the PPAs." *Id.* at 14. The second PIM payment is made following the first year of commercial operations for each project. *Id.* The amount of the second PIM payment is equal to the remaining 50% of the total PIM, subject to a downward prorated adjustment according to the actual amount of energy utilized by the utility. As the Commission explained:

> To continue with the example provided above, if the Companies are eligible for a $1,700,000 incentive, then $850,000 (50%) would be awarded after the PPAs are approved. After the first year of commercial operations, if the Companies utilize 70% of forecasted first-year energy (i.e., 595,000,000 kWh out of the forecasted 850,000,000 kWh), then the second incentive allocation will be prorated by 70%, resulting in a second incentive award of $595,000.

Id. at 13–14. As such, the amount of the second PIM payment is intended to account for the Company's energy utilization rate during a project's first year, not to reward (or penalize) the Company based on other factors, such as the speed at which commercial operations might be achieved for a given project, and certainly not for scheduled operation of projects procured in a different process (*i.e.*, Stage 2). To be sure, the portion of the Commission's order setting forth the second PIM payment is entitled "Timing of Incentive Award," not "entitlement to incentive award."

In awarding an additional PIM for the Stage 1 projects, the Commission again did not institute a timing element to the eligibility for the PIM. The Commission's approval of the additional PIM reinforces the notion that the purpose of the PIM is to encourage the **selection** of additional renewable energy projects. In proposing the additional PIM, Hawaiian Electric submitted to the Commission that an additional PIM was necessary to "expand and accelerate the **selection** of new renewable projects." *See* Order No. 35664, at 4 (emphasis added). The Commission's order reinforces this notion that the purpose of the PIM was to incentivize the

Company to **select** more renewable energy projects for development. The Commission explained:

> The design of the proposed PIM provides an added incentive for the Companies to accelerate and increase **the number of renewable projects to be selected** during this procurement in a timely manner. . . . The Companies shall receive a performance incentive equivalent to 20% of the estimated first-year savings compared to the applicable benchmark, up to a cap of $3,000,000, for Additional PPAs **filed with the commission** by December 31, 2018. For any Additional PPAs submitted after December 31, 2018, until March 31, 2019, the Companies' share of the savings pursuant to the PIM will be reduced in accordance with the proposal in the Companies' June 20 Letter.

See Order No. 35664, at 6–7 (emphasis added). Nowhere in the orders establishing the original PIM or establishing the additional PIM did the Commission tie the eligibility for, or amount of, a PIM to the speed at which any given project would achieve commercial operations.

Based on the foregoing, it is clear that eligibility for a PIM is based on cost savings to customers. PIM eligibility is not conditioned upon the absence of any extension or delay in meeting a specific commercial operations date. Nor are PIM payments. PIM payments are based on (1) Commission approval of the PPA, and (2) the actual amount of energy utilized during the first year of commercial operations, compared to the forecasted first-year energy. In short, Hawaiian Electric's eligibility for, or amount of, a PIM is not conditioned upon any other variable, such as delays in commercial operations. In fact, Hawaiian Electric is already incentivized to minimize any potential delays with respect to the commercial operations date, as the Company does not receive the second PIM payment until after the first year of commercial operations. *See* Order No. 35405, at 13–14. Thus, the PIM already has a built-in incentive (and penalty) for project-specific delays in commercial operations.

For example, if the commercial operations date for a renewable energy project was delayed, the Company would be already penalized for said delay, as the clock would not begin to

run on the second PIM payment until the first year of commercial operations is completed. Thus, forcing the Company to forego PIM payment, due to delays in commercial operations on other projects in a separate procurement process (or due to any other circumstances of unrelated projects), is unnecessary, duplicative, and would frustrate the underlying goal of creating clear and objective metrics of the Company's performance.

It should be further noted that the Commission's attempt to take away the Company's rights to receive the PIM award for Stage 1, even if fully earned by the Company, also raises issues with substantive due process. Specifically, the due process clause "guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate." *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir.), *cert. denied*, 484 U.S. 935, 108 S. Ct. 311, 98 L.Ed.2d 269 (1987).

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926). Substantive due process is violated where the government agency's actions were clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994), *cert. denied* 513 U.S. 870, 115 S. Ct. 193, 130 L.Ed.2d 125 (1994); *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994).

Here, the Commission is seeking to deprive the Company of a property right, *i.e.*, the entitlement to the Stage 1 PIM award as a condition of a Stage 2 project. There is no rational basis for such action, as the approval of the KES Project is wholly unrelated to the Stage 1 PIM. Moreover, in addition to imposing the condition in a manner that violates the Company's constitutional due process rights, as explained above in Section IV.C *supra.*, this deprivation of

the Company's property right also gives rise to a cognizable constitutional claim of regulatory takings.

Additionally, the Commission states that the need for this Project to support the retirement of the AES Plant "has been severely exacerbated by the delays in bringing the Stage 1 projects online." D&O at 75. However, as discussed more fully in the Hawaiian Electric Companies' Motion for (1) Reconsideration and/or Clarification; and (2) Stay of Order No. 37752 filed on May 7, 2021 in Docket No. 2021-0024, extensions of GCOD deadlines in the Stage 1 projects were specifically contemplated by the terms of the Stage 1 PPAs as approved by the Commission. The Stage 1 developers counted on such flexibility in reaching agreement on the pricing offered. The Stage 1 developers and Companies moved forward with the projects and have expended significant time and expense based on reasonable reliance that the PPAs would be honored by the parties to the PPA and this Commission. For these and other reasons set forth in the Companies' motion filed in Docket No. 2021-0024, the Company submits that the Commission's characterization of "delays" in the Stage 1 projects is not supported by the record.

Condition No. 1 is arbitrary and capricious. If not removed, it would also send a concerning message for the predictability and certainty essential for success under the new PBR framework established by the Commission. Removing (or conditioning approval of an unrelated project on forfeiture of) the opportunity to earn a PIM award after it has been established and during the performance measurement phase will significantly diminish incentives to make investments of resources to achieve the target performance. Here, the Commission is effectively changing the rules of the game after the game is in progress.

Accordingly, the Company requests reconsideration to remove Condition No. 1 in its entirety.

2. CONDITION NO. 2 – Imposing a Condition Requiring the Company to Radically Change the Fundamental Requirements of the CBRE and DER Programs is Clearly Erroneous.

Likewise, Condition No. 2 in D&O No. 37754, imposed for the Commission's stated purpose of "unlocking grid constraints and aligning demand-side programs with the project," further requires reconsideration because it improperly seeks to impact the Company's rights and obligations in other separate dockets before this Commission, and is also too vague and ambiguous for the Companies to reasonably accurately assess its potential impact. As such, the Company requests that this condition be removed and, to the extent that the Commission wishes to address these policy initiatives, that they be implemented only after being fully vetted in a more appropriate docket.

Sections 1 and 2 of Condition No. 2 add immediate confusion and uncertainty to an already complex proceeding in Docket No. 2015-0389, referred to as the CBRE docket.

As this Commission is aware, the CBRE docket is an extremely complex docket that has been ongoing for the last six years, as described below. In 2015, Act 100[9] took effect, which required the Companies to file proposed CBRE tariffs, with the goal of making the benefits of renewable energy accessible to a broader set of Hawai'i residents and businesses. In December 2017, the Commission adopted the CBRE Program Framework, which provided program guidelines for both Phase 1 and Phase 2 of the CBRE program. *See* Decision and Order No. 35137, Docket No. 2015-0389 (Dec. 22, 2017). On April 9, 2020, the Commission issued Order No. 37070 Commencing Phase 2 of the Community-Based Energy Program. Following this, the Companies filed their draft tariff, Low-and Moderate-Income ("LMI") CBRE RFPs, Moloka'i CBRE RFP and Lāna'i CBRE RFP on July 9, 2020. On September 8, 2020, the Companies filed

[9] 2015 Hawai'i Session Laws Act 100, §§ 1-2 at 249-251 ("Act 100"); signed into law on June 8, 2015.

their final CBRE Phase 2 Tariff and Appendices, and RFPs and Model Contracts for LMI Customers, Molokaʻi and Lānaʻi, which were revised and updated on October 6, 2020. On October 9, 2020, the Companies filed their CBRE Phase 2 Tranche 1 RFPs and Model Contracts. On December 1, 2020, the Companies filed their revised CBRE Tariff and Appendices, RFPs and Model Contracts for Phase 2, Tranche 1. After further stakeholder input and vetting, on March 30, 2021, the Companies filed their recommendations and updated final CBRE Phase 2 Tariff and Appendices, and RFPs and Model Contracts for LMI Subscribers, Tranche 1, Molokaʻi and Lānaʻi. Parties and participants filed comments and reservations on the recommendations on April 14, 2021. The Companies subsequently filed a letter on May 5, 2021, raising areas of concern with recommendations made by the parties. To date, the Commission has not issued an order finalizing the Companies' final CBRE Phase 2 Tariff and Appendices, and RFPs for Phase 2 of the CBRE Program, and the matters remain pending.

By way of Sections 1 and 2 of Condition No. 2, this Commission has now unilaterally and summarily made a determination in this docket – Docket No. 2020-0136 – that: (1) "it is no longer necessary to prioritize CBRE projects paired with storage on the island of Oahu" and that "the Company should align any ongoing or future CBRE RFPs on Oahu with this guidance by, for example, removing any requirements for storage or weighting criteria that may favor projects paired with storage[,]" and (2) "the Company should expand the available capacity for Phase 2 CBRE projects" and "[w]ith the additional capacity provided by the Project, there should be a corresponding ability to accommodate more CBRE projects." *See* D&O No. 37754 at 114–15.

As to Section 1 of Condition No. 2, the Company objects to and has significant concerns with the Commission's attempt to remove requirements and/or weighting criteria favoring projects with storage in the CBRE Phase 2 RFP process. In the Commission's Order No. 37070

issued on April 9, 2020 and entitled "COMMENCING PHASE 2 OF THE COMMUNITY-BASED RENEWABLE ENERGY PROGRAM," the Commission specifically found that a key "objective" for the CBRE program was that "Phase 2 should encourage CBRE facilities to participate in future programs for grid services and non-wires alternatives." Order No. 37070, at 26. Moreover, consistent with this key program objective, Order No. 37070 approved an "evaluation criteria" for the "RFP process to award certain portions of Phase 2 capacity" where the Commission specifically ordered that the "Companies should also encourage projects that can provide community resilience benefits through the evaluation criteria." *Id.* at 24, 26. In other words, grid services and non-wires alternatives, among other measures, were emphasized and encouraged as part of the evaluation criteria for selecting proposed projects in the RFP process.

As such, by following the Commission's order in Condition No. 2 to no longer prioritize projects paired with storage in the upcoming RFP process and removing any requirements for storage or weighting criteria that may favor projects with storage, the Company believes that this key program objective and evaluation criteria previously ordered by the Commission will be negatively impacted. Indeed, without projects with energy storage, it is uncertain to Hawaiian Electric what opportunities there will be for CBRE projects to provide grid services and non-wires alternatives for the Company's system. Certainly, removing the storage criteria reduces, rather than increases, the likely pool of projects that will be able to participate in the programs providing grid services and non-wires alternatives for the Companies.

The Commission's Condition No. 2 also appears to be inconsistent with the Commission's priority in the DER proceeding to develop an advanced long-term program that ensures a path for customers to participate in grid services, as well as the Commission's directive

for an Emergency Demand Response ("EDR") Program in the DER proceeding. As a result of the Commission's prioritization and guidance in the DER proceeding, the parties to that docket filed Final Program Track Proposals on May 3, 2021, all of which are focused at least in part on increasing customer adoption of storage to both existing and new DER customers. The Commission's direction in that docket and heavy prioritization of customer-sited storage conflicts with its simultaneous removal of the storage requirement for CBRE projects in this docket.

Moreover, as noted in the extensive and complex procedural history of the CBRE program to date – which still is ongoing – the Company fears that mandating unique rules exclusively for O‘ahu to remove energy storage requirements and weighting from the RFP evaluation process will necessitate a major re-writing of previously submitted program materials that have already gone through a myriad of approvals and revisions. These program materials have already been vetted in Docket No. 2015-0389 by this Commission and key stakeholders, and further revisions will necessitate another round of comment and amendments, adding complexity, and delaying the Phase 2 rollout for this program. The Companies have received numerous inquiries and feedback from interested developers in Phase 2, and this late change could impact plans that may already be in progress and impede developers from participating in a timely and cost effective manner in Phase 2, further adding to the unpredictability of the Hawai‘i market and making it more difficult to attract participants.

As to Section 2 of Condition No. 2 mandating that the Company "expand the available capacity for Phase 2 CBRE projects," based on the Commission's unilateral conclusion that "[w]ith the additional capacity provided by the Project, there should be a corresponding ability to accommodate more CBRE projects[,]" the Company has the following concerns.

From a programmatic standpoint, at least conceptually, the Company agrees with the Commission that increasing capacity in Phase 2 is a positive objective and result. However, under present factors, the Company highlights to this Commission that there is simply no guarantee that there will be a sufficient number of projects to be able to fill the Phase 2 existing capacity amount of 235 MW, which already was a substantial increase from the Phase 1 capacity of 8 MW. By increasing the capacity to potentially unattainable levels, the unintended consequence may be a reduced competitive market, higher pricing in the RFP and potentially less market interest in LMI projects which market participants have indicated is a more difficult endeavor with higher risk. Based upon the Companies' ongoing discussions with potential market participants, proposed developers have raised concerns over the economics of the CBRE program. The technical and regulatory measures and hurdles that will necessarily be involved in proposing, vetting, and obtaining regulatory approvals for establishing a new capacity limit for Phase 2, including the necessary revisions to the current Phase 2 RFP materials, will likely lead to further delays in the ultimate commencement of Phase 2 of the CBRE program.

Here, the Commission's decision to unilaterally change key objectives and elements of the CBRE program in an entirely separate docket – without the benefit of either key input from Docket No. 2015-0389 participants and stakeholders, or proposed revised technical standards to base these recommendations on – is arbitrary and unreasonable. The Company respectfully submits that to the extent the Commission wishes to impose changes to the CBRE program resulting from changed circumstances occurring from the present docket, any such proposed changes must be proposed, studied, and vetted in the CBRE docket itself – Docket No. 2015-0389, and potentially considered for implementation in Tranche 2, or future tranches.

As a further matter, Condition No. 2 also contains rulings that improperly and impermissibly impact other separate DER programs, including those under consideration in Docket Nos. 2019-0323 and 2018-0165. Under Section 3 of Condition No. 2, the Commission again unilaterally and arbitrarily comes to certain conclusions about how much the KES Project will increase the Company's ability to integrate DER at the system and local circuit level, and capriciously implements an order affecting key areas of ongoing study and modeling currently being undertaken in the above-referenced DER dockets in a way that is too vague and unclear to accurately gauge how the Company should substantively respond.

While the Company agrees that exporting DERs can be used as a resource to the grid, the complex technical, program and tariff design for these types of systems are, and should be, carefully evaluated in the DER proceeding. The Company has many questions regarding the Commission's intent and language behind Section 3 of Condition No. 2. To ensure that the Company has a basic understanding the Commission's rulings on this Section 3 of Condition No. 2, should this Commission decide not to reconsider D&O No. 37754, the Company respectfully requests clarification on the following points, and respectfully reserves the right to file supplemental material based upon the Commission's response:

1. Is the Commission referring to removing solely "daytime export restrictions" for existing and new DER programs under consideration in Docket No. 2019-0323, or all export restrictions?
2. Is it the Commission's intent for daytime export rates to be re-set? And if so, for said daytime export rates to be reviewed for all programs to ensure equity across all DER programs?

3. Is the Company correct in assuming that Net Energy Metering Plus will not be allowed to export during the day?

4. Does the Grid Needs Assessment referred to in Section 3 Condition No.2 only refer to defining the distribution hosting capacity needs?

5. As the amount of PV assumed in the Company's modeling is consistent with the Company's latest Integrated Grid Planning ("IGP") IGP DER forecast, the Commission will need to clarify how much PV the Company needs to plan for in identifying grid needs and associated upgrades.

In view of the confusion and ambiguity facing the Company from Condition No. 2, additional clarification is needed to determine which DER programs the Commission actually intends to lift the export restrictions from. Based upon the wording of Section 3 currently, the Company is not able to substantively assess the viability of what the Commission's intent appears to be by way of this Condition. The ambiguity and vagueness in and of itself justifies reconsideration on this point.

Moreover, as the Commission notes, unlocking physical grid constraints is not only a system issue but a local circuit issue as well since even with the improvements to system-level hosting capacity, localized, circuit-level constraints may exist. The KES Project can be charged with excess energy during certain times of the day which in turn can increase system-level hosting capacity. However, the Project itself has no bearing on unlocking local circuit constraints since "unlocking grid constraints" for DER and CBRE requires both system-level and circuit-level hosting capacity improvements. Grid upgrades, mostly on the distribution system, will depend on the timing, quantity, and location of increased daytime exports to ensure efficient deployment of upgrades that unlock local grid constraints. Determining the unique mitigations

required for each circuit upgrade to address voltage issues or thermal (power capacity) limits of the circuit will take time to design, permit and construct. These issues were expected to be addressed as part of the Integrated Grid Planning ("IGP") process (Docket No. 2018-0165) over the next couple of years. Failure to properly plan for the timing and location of grid upgrades while broadly expanding daytime exports can impact the power quality and the reliability of that circuit and adjacent circuits, with detrimental effect to both DER and non-DER customers, including critical customers such as Department of Defense facilities. The practical result of this condition may be to erase or at least confuse the substantial progress being made in Hawaiʻi to develop and implement innovative technical integration solutions for DER while still providing grid reliability and energy security.

However, even without the above-requested clarification, the Company can say that any future changes mandated to existing DER programs from Docket Nos. 2019-0323 and 2018-0165 would require revisions to tariffs, and further, customer bills will need to be modified as well. Moreover, while it is currently unclear to the Company whether Section 3 would apply to the NEM Plus program, if it is the Commission's intent to do so, this development would amount to the effective re-opening of the NEM program.[10] As this Commission is aware, current NEM customers are already in highly saturated areas, so understandably, hosting capacity concerns will be greatly exacerbated in these high-saturated areas should the Commission require the removal of export restrictions for NEM Plus customers.

As noted above, clarity is required to properly assess the impact to system hosting capacity. Under Condition No. 2, the broad expansion of daytime exports must be done commensurate with the increased system hosting capacity brought on by the Project. As the

[10] *See* Docket No. 2019-0323 Final Proposals filed on May 3, 2021 where the Company and Consumer Advocate filed their position on the challenges of re-opening NEM to existing customers.

Company noted in its Written Comments Addressing Commission Concerns and Proposed Mitigations,[11] the Project is expected to increase system hosting capacity by providing system reserves that allow lower minimum operating points of conventional generation. However, the expansion of daytime export in excess of the capacity the Project can provide to the system hosting capacity will lead to excess energy conditions that can destabilize the system frequency, among other issues, and/or lead to increased curtailment of other resources.

Moreover, besides the Commission's flawed decision to unilaterally make rulings in this docket that materially affect and impact independent issues and rights in other dockets, the Commission warns that "[i]f Hawaiian Electric is not making all reasonable efforts to facilitate and implement these actions by December 15, 2021, the Commission will review the progress and take action, as appropriate." D&O No. 37754, at 117. This warning and the arbitrary deadline the Commission has now imposed on the Companies to comply with these vague, ambiguous, and technically perilous edicts, further underscores the inequity of this situation. Here, notwithstanding the fact that KES has bid a proposed GCOD of June 2022, by this flawed Condition No. 2, the Commission has now attempted to require the Company to expend "all reasonable efforts to facilitate these actions" by an artificially early deadline of December 15, 2021. The selection of this date is plainly arbitrary and capricious in that it requires the Company to have to take action immediately on orders that are too vague and incomplete to fully understand, let alone implement, and to do so well in advance of the KES Project in-service date.

Finally, the Company notes that the Commission's imposition of the various changes set forth in Condition No. 2 are inconsistent with the Commission's recent Order No. 37730 issued on April 14, 2021 in Docket No. 2018-0165. In that order, the Commission noted that decision-

[11] Filed on April 16, 2021 in this docket.

making as to the IGP process cannot proceed at this time as the planning requires more stakeholder review. Order No. 37730, at 18–19. Specifically, the order provides:

> Therefore, the Commission directs Hawaiian Electric to re-file the Draft IGP Inputs and Assumptions only after: (1) implementing its own planned changes; (2) incorporating the directives in this Order; (3) the TAP has thoroughly reviewed the changes; (4) stakeholders have had ample opportunity to provide corrective feedback; and (5) any necessary corrective stakeholder feedback has been integrated into the Draft IGP Input and Assumptions. The Commission also directs Hawaiian Electric to provide an updated timeline and stakeholder engagement plan for completing these steps, including a projected date for filing revised Draft IGP Inputs and Assumptions, provided that the date for filing revised Draft IGP Inputs and Assumptions shall be no later than August 3, 2021.

Id. at 21. The Company submits that the terms of Condition No. 2 are completely inconsistent with the Commission's own recognized need for adequate planning and stakeholder input.

For the foregoing reasons, Condition No. 2 is unreasonable and erroneous, and should be removed from D&O No. 37754. To the extent that the Commission seeks to raise issues related to CBRE and DER, they should be addressed in existing Docket Nos. 2015-0389 and 2019-0323, respectively.

3. **CONDITION NO. 3 – The Commission's Advancement of the Retirement of Certain of the Company's Power Plant Units is Contrary to Law.**

The Commission's Condition No. 3, ordering early "financial" retirement of Waiau Units 3 through 6, and Kahe Units 5 and 6: (1) is inconsistent with Hawaiian Electric's planning as reflected in the PSIP; (2) is contrary to the intent of HRS § 269-6(d), which requires the Commission to consider the Company's recovery of stranded costs; and (3) would violate the regulatory compact by denying Hawaiian Electric's ability to earn a reasonable return on its capital investments.

Condition No. 3 states:

> 3. Condition No. 3: Financial Retirement of Waiau and Kahe Units. Hawaiian Electric shall financially retire the fossil units by the foregoing dates certain:
>
> a. Waiau Units 3 and 4 – no later than December 31, 2023;
> b. Waiau Units 5 and 6 – no later than December 31, 2026; and
> c. Kahe Units 5 and 6 – no later than December 31, 2028.

See D&O No. 37754, at 4. Condition No. 3 is inconsistent with the Hawaiian Electric's planning as reflected in the Company's PSIP. On April 28, 2014, the Commission issued various orders providing broad guidance on electric utility planning and operations, including instructions to the Companies to develop and file PSIPs. *See* D&O No. 34696, at 5. As stated by the Commission, "[t]he ultimate purpose of this proceeding is to determine a reasonable power supply plan for each of the Companies that can serve as a strategic basis and provide context to inform important pending and future resource acquisition and system operation decisions." *See id.* at 24 (citing Order No. 33320, at 2).

On August 7, 2014, the Commission opened Docket No. 2014-0183 to consolidate the review of the PSIPs filed by the Companies. One stated purpose of the PSIPs was "to include actionable strategies and implementation plans to expeditiously retire older, less-efficient fossil generation[.]" *See id.* at 6.

On December 23, 2016, Hawaiian Electric filed its PSIP Update Report. Appendix M to this filing set forth the Company's Fossil Generation Retirement Plan, among other things. Appendix M shows the Company's retirement plan for the facilities at issue as follows: Waiau Units 3 and 4 (2023), Waiau Units 5 and 6 (2030), and Kahe Units 5 and 6 (2028):

> Identifying dates also allows us planning for ramped-down maintenance on individual units, which typically starts six years prior to planned removal dates.
>
> Based on assumed asset additions in the various resource plans. Table M-1 shows the corresponding dates for which O'ahu's steam units can be considered for service removal.

Date	Post April PSIP Plan	E3 Plan with Generation Modernization	E3 Plan with LNG and Generation Modernization
2022	AES*	AES*	AES*
2023	Waiau 3 & 4	Waiau 3 & 4	Waiau 3 & 4
2024	–	–	–
2025	Kahe 6	–	–
2026	–	Waiau 5 & 6	Waiau 5 & 6
2027	Kahe 1 & 2	–	–
2028	–	Kahe 5 & 6	Kahe 5 & 6
2029	–	–	–
2030	Waiau 5 & 6 Kahe 5	–	–
2031	–	Waiau 7 & 8	Waiau 7 & 8
2032	Waiau 7 & 8	–	–
2033	–	–	–
2034	Kahe 3 & 4	–	–
2035	–	Kahe 1 & 2	Kahe 1 & 2
2036	–	–	–
2037	–	–	–
2038	–	–	–
2039	–	Kahe 3 & 4	Kahe 3 & 4

See Book 3, at M-6.

In its response to PUC-HECO-IR-118, Updated Attachment 1, the Company filed an updated retirement plan, which provided the following revised retirement dates: Waiau Units 3 and 4 (2024), Waiau Units 5 and 6 (2026), and did *not* include Kahe Units 5 and 6, as follows:

Year	With Stage 2 Portfolio, Include Kapolei Energy Storage
2024	Remove from service 94 MW Waiau 3&4
2025	Install 375 MW Standalone PV Install 150 MW CBRE Phase 2 RFP Install 20 MW CBRE Phase 2 Small Projects
2026	Remove from service 108 MW Waiau 5&6 Remove from service 15 MW Load Build for GS RFP 1+2 Remove from service 26 MW Load Reduce for GS RFP 1+2 Remove from service 37 MW FFR for GS RFP 1+2
2027	
2028	
2029	Install 160 MW Biomass Remove from service 165 MW Kahe 1&2
2030	
2031	Install 30 MW Onshore Wind Remove from service 30 MW Kahuku Wind
2032	Remove from service 1 MW KSEP
2033	Install 43 MW Paired 4 Hr PV Install 140 MW Biomass Remove from service 169 MW Waiau 7&8 Remove from service 5 MW Kalaeloa Solar 2 Remove from service 60 MW Load Build for GS RFP 3 Remove from service 60 MW Load Reduce for GS RFP 3 Remove from service 12 MW FFR for GS RFP 3
2034	Remove from service 5 MW KREP
2037	Remove from service 171 MW Kahe 3&4

Year	With Stage 2 Portfolio, Remove Kapolei Energy Storage
2024	Remove from service 94 MW Waiau 3&4
2025	Install 375 MW Standalone PV Install 124 MW 288 MWh Standalone BESS Install 150 MW CBRE Phase 2 RFP Install 20 MW CBRE Phase 2 Small Projects
2026	Remove from service 108 MW Waiau 5&6 Remove from service 15 MW Load Build for GS RFP 1+2 Remove from service 26 MW Load Reduce for GS RFP 1+2 Remove from service 37 MW FFR for GS RFP 1+2
2027	
2028	Install 200 MW Biomass
2029	Remove from service 165 MW Kahe 1&2
2030	
2031	Install 30 MW Onshore Wind Remove from service 30 MW Kahuku Wind
2032	Remove from service 1 MW KSEP
2033	Install 120 MW Biomass Remove from service 169 MW Waiau 7&8 Remove from service 5 MW Kalaeloa Solar 2 Remove from service 60 MW Load Build for GS RFP 3 Remove from service 60 MW Load Reduce for GS RFP 3 Remove from service 12 MW FFR for GS RFP 3
2034	Remove from service 5 MW KREP
2037	Remove from service 171 MW Kahe 3&4

However, while the PSIP as updated reflects the anticipated physical retirement dates of Waiau Units 3 through 6, and Kahe Units 5 and 6, Condition No. 3's mandate to "financially retire" said units is entirely inconsistent with the Company's plan and imposes an arguably punitive burden on the Company. While decommissioning these units from service by the Commission's deadlines may generally be consistent with the Company's PSIP, financially retiring them by those dates, as required by Condition No. 3, **could essentially force the Company to collectively write-off approximately $55 million[12] worth of scheduled depreciation for these six generating units.**

[12] Based on the estimated undepreciated amount of the six generating units at the retirement dates noted in D&O No. 37754, and excludes asset retirement obligations costs, which are not yet determinable.

As such, Condition No. 3 contravenes the intent of HRS § 269-6(d), which specifically requires the Commission to consider a utility's recovery of stranded costs arising from early retirement of fossil fuel plants:

> (d) The public utilities commission, in carrying out its responsibilities under this chapter, shall consider whether the implementation of one or more of the following economic incentives or cost recovery mechanisms would be in the public interest:
>
> * * *
>
> > (3) The establishment of a **stranded cost recovery mechanism** to encourage the accelerated retirement of an electric utility fossil fuel electric generation plant by **allowing an electric utility to recover the stranded costs created by early retirement of a fossil generation plant**[.]

See HRS § 269-6(d)(3) (emphasis added). The stranded cost recovery mechanism is a vital tool in realizing the State's goal of maximizing the utilization of renewable energy, accelerating the retirement of utility fossil generation, and modernizing the electrical grid. As noted by the Hawai'i State Legislature:

> The legislature additionally finds that the current electric ratemaking process employs a single authorized rate of return that is applied equally to all utility plant investments. This methodology does not differentiate between plant investments to modernize the electric grid, which should be encouraged, and investments to preserve old, inefficient fossil generation, which should be discouraged. Retiring old, inefficient utility fossil generation acts as a financial disincentive for electric utilities because the electric utilities can only earn a return on plant investment that is actually used and useful to provide utility service. **The early retirement of utility fossil generation may create costs that are stranded and cannot be recovered from ratepayers.** The continued operation of old, inefficient utility fossil generation therefore preserves existing utility financial returns.
>
> The legislature concludes that it is **necessary** for the public utilities commission to consider and implement **economic incentive mechanisms**, where appropriate, to induce electric utility actions to reduce energy cost and operating expenses and to enable the maximum integration of lower cost renewable energy resources.

> The purpose of this Act is to authorize the public utilities commission to establish a policy to **implement economic incentives and cost recovery regulatory mechanisms**, as necessary and appropriate, to induce and accelerate electric utilities' cost reduction efforts, encourage greater utilization of renewable energy, **accelerate the retirement of utility fossil generation**, and increase investments to modernize the State's electrical grids.

See 2013 Hawaiʻi Session Laws Act 37 (S.B. 120) (emphasis added).

Further, the Commission's unlawful directive encapsulated in this Condition No. 3 would violate the regulatory compact under which "in return for agreeing to commit capital necessary to allow the utilities to meet the obligation, utilities are assured a fair opportunity to earn a reasonable return on the capital prudently committed to the business." *In re Haw. Elec. Light Co.*, Docket No. 2015-0074, Decision and Order No. 34394, 2017 WL 747618, at *4 n.23 (Feb. 17, 2017) (citation omitted).

Simply put, Condition No. 3 is an unprecedented move by the Commission that not only flouts the legislature's clearly stated desire to incentivize utilities to retire fossil fuel facilities by addressing the stranded costs associated therefrom, but also violates the regulatory compact. For the Commission to deprive the Company of its opportunity to seek recovery of such stranded costs would not only disregard Hawaiʻi statutory law, but also violate the takings clause and due process clause of the Hawaiʻi State and United States constitutions.

It should also be emphasized that the Companies are required to continually assess the operations of the utilities, the results and impact of the PBR Framework, and decisions of the Commission to determine whether the criteria to apply Accounting Standards Codification ("ASC") 980, "Regulated Operations", continue to be satisfied. The requirement to financially retire the generating units could result in the criteria for applying ASC 980 to not be satisfied, and the Companies would then no longer be able to apply ASC 980. The Companies discussed

the impacts of not applying ASC 980 in the PBR Framework proceeding, including the Companies' earnings becoming more volatile and the Companies being viewed as riskier than other utilities that apply ASC 980, which in turn could impact the Companies' ability to raise capital. Refer to Exhibit C of the Companies' Phase 2 Reply Statement of Position filed on August 20, 2020 in Docket No. 2018-0088.

Again, the Company notes that this condition is directly contradictory to the Commission's Order No. 37730 issued in Docket No. 2018-0165 regarding the need for planning for unit retirement, including making the following statements:

> Hawaiian Electric must continue developing its proposed unit retirement plan for use in the base case and analyze how this affects the optimization of new renewable resources.
> . . .
> The Commission believes that the proposal of a unit retirement plan for use in the base case is appropriate and directs Hawaiian Electric to continue this development and file it as a part of its revised Draft IGP Inputs and Assumptions."
> . . .
> Hawaiian Electric must analyze how using a unit retirement plan in the base case changes the optimization of new renewable and storage resources outside of incremental RPS compliance needs for Oahu. Hawaiian Electric may also employ a "no retirement" sensitivity for comparison, if desired.

Order No. 37730, at 32. Following those statements, the Commission directed the Company to provide further qualitative and quantitative analysis to address these issues with the implication that this information would be needed to make informed decisions on unit retirements. However, the Commission then proceeded to order unit retirements in the present order without any substantive analysis whatsoever.

Further, retirement of these generating units raises serious reliability concerns that will impact the Company's ability to meet its obligation to serve customers. Operationally retiring these units that would result in the removal of 471 MW of firm capacity on the grid in the next

seven years. This removes 3.5 times the amount of capacity from the Oʻahu grid than what is being provided by the Project. The other projects in the Stage 1 and 2 portfolio that are solar paired with energy storage can provide contributions to capacity; however, those energy storage capacity contributions are limited by the availability of the solar resource to which it is paired. As such, those contributions are not equivalent on a one-for-one basis to the number of megawatts of capacity that would be removed from the system due to forced retirement.

As with Condition No. 2, acceptance of this condition would jeopardize the energy security of the Oʻahu grid, which would impact the operational capabilities of national security assets based on the island. At reflected in the Company's April 16, 2021 comments addressing Commission concerns, the Company committed to retiring Waiau units 3 and 4 in 2024, provided that anticipated replacement resources are online by that time.[13] Elements of the Company's resource plans should not be selectively cited apart from context to support the Commission's positions to retire units that were not the subject of this docket and which contradict the Commission's guidance in the IGP docket, Docket No. 2018-0165, requiring the Company to develop a holistic plan for the retirement of the Company's firm fossil generators. As removal from service of other generating units in addition to the AES coal plant was not part of the issues of this proceeding, the Company has not conducted detailed analysis to determine the specific capacity, energy and ancillary services that would be required to maintain system security and reliability that would facilitate retirement of additional generating units. Setting a retirement date now, without proper planning and assurances of replacement generation and grid services, jeopardizes the Company's ability to serve its customers, including customers with critical needs, such as the Department of Defense, hospitals, first responder facilities, and the

[13] *See* Hawaiian Electric's Written Comments Addressing Commission Concerns and Proposed Mitigations filed on April 16, 2021 in this proceeding, at 2.

state's economic infrastructure, among others. There are currently no open proceedings to procure replacement resources for these units, as those were expected to take place as part of the IGP proceedings over the next couple of years. Therefore, this condition as noted above, is better suited for discussion as part of Docket No. 2018-0165.

Finally, in addition to ensure adequate planning is in place for replacement generation and services, retirements of major Company facilities require a holistic and orderly transition plan for the numerous Company employees who would be affected. The Company is committed to working with its employees and the union on these issues, and redeploying resources, while also ensuring the facilities are staffed as needed until retirement will be a delicate balance. Requiring the retirement of such units without such a plan jeopardizes continuity and increases transition risk. The Company's plan for a thoughtful and well executed retirement of these resources contemplates these issues to ensure skilled resources are retained to meet the needs of the community.

Accordingly, the Company urges this Commission to remove Condition No. 3 from D&O No. 37754. The Company's right to recover costs for retired generating units can be addressed when the Company files applications for approval to do so or in a future rate case.

4. **CONDITION NO. 5 – The Commission's Limitation as to the Ability of Hawaiian Electric to use the KES Project Renders the Project Uneconomical and Would Force Hawaiian Electric to Declare the PPA Null and Void.**

Condition No. 5 of D&O No. 37754 implements a requirement that the KES Project be charged from renewable resources at certain minimum thresholds as follows:

Project Duration	Minimum Renewable Threshold

0 – 2 years	At least 50% renewable utilization[14]
2 – 5 years	At least 75% renewable utilization
5 years +	At least 90% renewable utilization

D&O No. 37754, at 121.

However, as discussed more fully below, this condition cannot be met by Hawaiian Electric. Without removal of this condition, Hawaiian Electric would likely not be able to fully utilize the Project for potentially the entire term of the ESPPA, while still obligating the Company's customers to pay for the unused capacity. Obviously, this would be an untenable situation. Therefore, unless the Commission reconsiders D&O No. 37754, and removes Condition No. 5 from this Order, it will mean that the KES Project will have been effectively terminated.

a. **As the KES Project is Charged from the Grid, it is Not Possible for Hawaiian Electric to Properly Quantify the Percentage of Renewable Energy Used to Charge the Project Apart From the General Percentage that All Energy is Sourced From Renewable Sources.**

As discussed above, the Commission is seeking to direct Hawaiian Electric to have a minimum threshold of renewable utilization in charging the KES Project. However, the KES Project has always been planned to be charged directly from the Company's grid.

As an initial point, the Company requests clarification as to exactly what "renewable utilization" means. The Company's initial interpretation is that it refers to the approximate percentage of "fuel" source charging the KES BESS that comes from renewable sources.

[14] The Company interprets the Commission's language to be read as utilization and not RPS percentages. If this is in fact the case, then the RPS percentage would need to be even higher to achieve the "renewable utilization" percentages listed in this table.

There is no technical or operational way to isolate, segregate or direct electrons from various generation resources on the grid. Therefore, there is no technical way to prevent electrons from a non-renewable generation resource from charging the KES Project. As such, the Company's ability to charge the KES Project from renewable resources will mirror the percentage of renewable generation on the grid at any point in time. As the Commission has previously been informed, that percentage of renewable generation on the grid is not expected to reach the arbitrary thresholds imposed in D&O No. 37754 for more than a decade.

This condition is also devoid of any support in the record. Specifically, the Company points to Hawaiian Electric's response to PUC-HECO-IR-102, wherein the Company attempted to quantify the approximate percentage of renewable-based energy that would be stored by the KES Project, stating: "[B]ased on the production simulation analysis prepared for the Project application, for the years 2022-2041, the Company forecasts that the Project will be charged on average about 60% from fossil fuel resources and 40% from renewable resources from the modeled resources on the system." *Id.* These are average numbers. As the O'ahu grid transitions to 100% renewable energy, the amount of renewable energy used to charge the Project will correspondingly increase. At the request of the Commission, the Company conducted additional analysis based on updated conditions, which was provided in Hawaiian Electric's response to PUC-HECO-IR-118 (April 23, 2021 supplement), in which the Company estimated the KES Project being charged on average by 63% renewable energy. Included in this additional analysis is the chart presented below, which shows the projected amount of renewable sources that will charge the KES Project over the lifetime of the Project based on the different assumptions that have been analyzed throughout this proceeding:

	N/A	PUC-IR-102	PUC-IR-118
	Portfolio wKES	NoStg2wKES	Portfolio wKES

	From Application Analysis	From Application Analysis	Updated Optimized Resource Plan
Year	Renewable Energy Charging (%)	Renewable Energy Charging (%)	Renewable Energy Charging (%)
2022	27%	24%	18%
2023	27%	24%	25%
2024	33%	24%	33%
2025	39%	29%	49%
2026	39%	29%	48%
2027	40%	30%	48%
2028	40%	30%	48%
2029	41%	30%	66%
2030	57%	47%	65%
2031	57%	47%	66%
2032	58%	47%	65%
2033	57%	47%	79%
2034	57%	47%	79%
2035	57%	47%	78%
2036	57%	46%	77%
2037	46%	46%	77%
2038	56%	46%	75%
2039	55%	45%	75%
2040	63%	53%	96%
2041	63%	53%	93%
Avg	48%	40%	63%

The above production simulation results provide a comparison of Renewable Energy Charging percentages for the system net generation by year. It should be noted that this does not include DER contributions embedded in the sales and peak forecast used for modeling. These were forecasts, not unconditional commitments.

As demonstrated, the Commission's unilaterally developed, mandatory renewable thresholds are arbitrary. The thresholds for Years 2–5 of the KES Project will likely not be able

to be met for more than a decade. Moreover, the required thresholds for Year 5 and on will likely not be met until the last few years of the term of the KES ESPPA.

b. **The Commission's Restriction as to Charging the KES Project From Renewable Sources Effectively Limits Hawaiian Electric's Ability to Utilize the Project to the Intended Capacity and Denies Customers the Calculated Benefit From the Project.**

As noted in the Application filed for the KES Project, the KES ESPPA provides that the Project will provide the specified capacity to the Company in exchange for a lump sum payment. Specifically, under the ESPPA, the Company is given the contractual flexibility to dispatch energy storage facilities, and, in exchange, developers are provided a monthly payment based on the availability and performance of the Project.

The Lump Sum Payment specified in this Application was proposed by KES. This ESPPA does not provide for any energy payment; rather, "the Lump Sum Payment is made in exchange for the right to dispatch the [Project's] energy storage." Put simply, the pricing structure of the KES Project essentially provides that KES collects the capacity payment regardless of how much the Company chooses to use the KES Project. As discussed above, D&O No. 37754 would effectively preclude the Company's use of the KES Project for potentially more than a decade. Meanwhile the capacity payments would need to be made to KES by the customers. The Company submits that this would create an untenable situation as it would be financially irresponsible and contrary to the Company's obligations to its customers. The only other option would be for the Company to declare the ESPPA null and void pursuant to the terms of Article 24 of the ESPPA. As discussed herein, this would deprive customers of any benefit from this Project and would force the Company to start back from scratch in trying to procure new projects to replace this Project.

c. **Imposition of Renewable Limitations is Inconsistent With the Timeline of the RPS and Would Effectively Eliminate the Purpose for Procurement of the Storage.**

There are two distinct ways to meet the minimum renewable thresholds imposed by the Commission to increase the renewable utilization on the entire grid: (1) the Company would have to acquire sufficient renewable energy resources to increase Oahu's RPS to at least 90% within five years, which is unreasonable and disregards legislative intent of the RPS law, or (2) the Company could limit when it charges the battery to only times in the day when renewable generation meets these utilization requirements, which even if such periods of utilization existed, would effectively limit the ability of the KES BESS to improve the efficiency of the system and meet the reliability and resilience needs it was procured for.

With regards to increasing the amount of renewable generation on the system, the imposition of this condition essentially constitutes an improper acceleration of the RPS goals established by the legislature. Specifically, the legislature has set forth the State's RPS goals, which require each of the State's electric utility companies to establish a RPS of: (a) 30% of its net electricity sales by December 31, 2020; (b) 40% of its net electricity sales by December 31, 2030; (c) 70% of its net electricity sales by December 31, 2040, and (d) 100% of its net electricity sales by December 31, 2045. HRS § 269-92(a). However, by essentially requiring that the KES Project must be charged from 75% renewable sources by 2024, the Commission is imposing a new and unrealistic RPS on the Company and substituting its own opinions in place of those that were legislatively-enacted by the Hawaiʻi State Legislature.

Imposing duplicative penalties tied to the Company's renewable generation percentage would be contrary to the already established targets for renewable energy in Hawaiʻi under HRS § 269-92(a). The legislature also contemplated that the utility shall be subject to penalties for failure to meet those targets, which the Commission established in the RPS Penalty Order. *See*

Docket No. 2007-0008. The Hawaiian Electric Companies are exceeding those targets. Condition No. 5 would unlawfully, unreasonably, and unnecessarily penalize Hawaiian Electric in excess of the statutory milestones contrary to the legislature's intent to integrate such targets over time.

Under Hawai'i law, "[i]t is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement." *Lales v. Wholesale Motors Co.*, 133 Hawai'i 332, 354, 328 P.3d 341, 363 (2014) (quoting *Agsalud v. Blalack*, 64 Haw. 588, 591, 699 P.2d 17, 19 (1985)). "Furthermore, an agency's authority to promulgate rules 'is limited to enacting rules which carry out and further the purposes of the legislation and do not enlarge, alter, or restrict the provisions of the act being administered.'" *Id.* (quoting *Puana v. Sunn*, 69 Haw. 187, 189, 737 P.2d 867, 870 (1987)).

Here, the Hawai'i State Legislature carefully crafted (in 2001) and updated (in 2004, 2006, 2009, and 2015) the precise RPS requirements and deadlines. *See, e.g.*, *id.* § 269-92. When enacting its most recent update, the legislature sought to move the State to 100% renewable energy, while balancing the transition "in a manner that benefits Hawaii's economy and all electric customers, maintains customer affordability, and does not induce renewable energy developers to artificially increase the price of renewable energy in Hawaii." Act 79 § 1, 2015 Leg., Reg. Sess. (Haw. 2015). The scope of authority delegated to the Commission was narrowly tailored and does not include the authority to disregard the statutory mandates and substitute its own subjective requirements. Condition No. 5's new renewable generation requirements are contrary to the terms of and intent of the Hawai'i State Legislature's enacted RPS standards.

Under similar circumstances, the courts have recognized that such laws should be preempted by the State statute where the legislature has demonstrated the clear intent to fully occupy the area of law. *See, e.g.*, 56 Am. Jur. 2d Municipal Corporations, Etc. § 306 ("A conflict between state law and a local ordinance exists if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Where the state has wholly occupied the field of a subject, to the exclusion of any local regulation, it is of no consequence that a municipality's regulation coincides with or is complementary to the state law; a municipality is precluded from enacting any regulation related to the subject preempted.").

With regards to the second way the Company could meet these utilization targets – limiting the times of day in which the storage is charged – this would effectively eliminate the benefits customers would be expected to receive from the Project. As noted above, while the ESPPA provides the Company the flexibility to use the Project (charge and discharge) wholly consistent with the needs of the system, including on cloudy or windless days to ensure customers are reliably served, or for example, to charge the Project in anticipation of a natural disaster for resiliency purposes, the restrictions of this condition would not allow the Company to use the Project in that manner.

Limiting charging to times of the day when there are high penetrations of renewables on the system virtually eliminates the Project's ability to: (1) improve the efficiency of the system; and (2) assist with the reliability and resilience of the system. The Project's ability to improve efficiency of the system as well as the reliability and resilience of the system comes from the Project's ability to provide regulation services, capacity, contingency response and other services in lieu of or in addition to running thermal generation when it is most cost-efficient to do so. For

example, dispatching the Project to charge during the day and/or overnight and discharge to reduce the morning "ramp-up" and peak may be the most efficient use of the Project and allowed under the terms of the ESPPA, but doing so may not align with the minimum charging thresholds under the terms of this condition. Providing these services to the grid requires the Project to discharge at varying levels. As a storage resource, limiting charging times will mean a reduction in the amount and availability of power and energy that the Project's battery can discharge. Several of these grid services, especially capacity, may be most needed from this Project when the solar plus storage projects are not able to provide rated power and energy in periods of cloudy weather.

d. Condition No. 5 Requires Additional Clarification as to the Nature of the Penalties to be Assessed Which Demand Further Consideration in a Separate Docket.

D&O No. 37754 states that a prudence review will occur if the KES Project falls below the established renewable threshold. Further, the Commission reserves the discretion to disallow fossil fuel costs incurred to supply the Project. No standard for the Commission's review is stated other than its "full discretion." However, the Company requests clarification as to what would be involved in this process, including addressing the following questions:

(1) Would the Company have an opportunity to present evidence of mitigating factors, such as prolonged bad weather that reduces the output from renewable generation sources, or potential force majeure type events which substantially damage significant portions of the Company's renewable generation portfolio?

(2) In the event of such a scenario, is it the Commission's direction to still not charge the KES Project from fossil generation?

(3) In the event that the Commission directs additional acquisition of renewable generation to assure the Company meets these minimum thresholds and the

results of the procurement are not sufficient – such as in the Stage 2 RFP, where the market was unable to meet the 1,300 gigawatt renewable energy target – what would be the next step?

These are just some of the significant issues/questions raised from this Condition No. 5. As these are complicated issues, the Company submits that the specifics of this directive need to be more fully vetted with testimony and more specific direction. As such, the Company requests reconsideration to remove this condition from the KES Project approval order.

E. CONDITION NOS. 4 & 7 – The Company Requests Reconsideration and/or Clarification as to Portions of the Reporting Requirements Described in These Two Conditions.

By way of Condition Nos. 4 and 7, the Commission is requiring additional reporting requirements. As explained below, while the Company is able to comply with some of the reporting requirements as proposed, other conditions are impossible to comply with, and further, there are certain other requirements that need clarification from the Commission before the Company is properly able to substantively respond. Addressing each requirement separately, the Company states as follows:

Under Condition No. 4, the Company is being required to file a monthly report detailing the Project's renewable energy utilization for the month, to include, at a minimum: "(1) the percentage of the energy stored in the Project that was generated by fossil fuels, compared to the percentage generated by renewable resources; (2) the average daily energy capacity (expressed as a percentage of maximum capacity) by which the BESS was charged; and (3) the average daily energy capacity (expressed as a percentage of maximum capacity) by which the BESS was dispatched and/or utilized." D&O No. 37754, at 120–21.

Hawaiian Electric would first note that some of the requested information is already being provided by the Companies to the Commission in its Reliability Standards Working Group

monthly reports (Docket No. 2011-0206). The Company would also note that in the ongoing PBR docket (Docket No. 2018-0088), there has been robust discussion concerning the Companies' reporting requirements and what information is necessary and appropriate. As mandatory reporting requires significant time and resources to comply, the Company is justifiably concerned with the amount of overlap and duplication the Commission is asking for by way of these conditions.

That said, should D&O No. 37754 not be reconsidered, Hawaiian Electric is able to comply with reporting requirements (2) and (3) as currently articulated above. However, as to reporting requirement (1), the Company respectfully advises this Commission that it cannot comply with this requirement because it is impossible to track electrons to differentiate between the origin source. However, the Company believes that as an alternative, it can provide data showing what the resource mix is on the Company's system when charging the BESS, and believes that this would be representative of the same mix of energy stored in the BESS.

By way of Condition No. 7, the Commission imposes further reporting requirements. As to the Reporting of Missed Guaranteed Project Milestones, should D&O No. 37754 not be reconsidered, Hawaiian Electric advises that it is able to comply with said reporting requirement. This particular information is not currently being reported in any other docket, and the Company will be able to meet this requirement.

As to the specific reporting requests relating to the proposed Annual Utilization Report, the Company responds to each element separately as follows:

With respect to the request to provide "(1) quantification of the generation source charging the Project in each hour of the year[,]" the Company advises that this is duplicative of

the request in Condition No. 4(1), is unnecessary, and unduly burdensome. The Company objects to the imposition of this requirement.

As to the request to demonstrate "(2) co-optimization of the Project with other capacity resources, such as solar plus storage projects and grid services from DERs[,]" the Company advises that this requirement is unnecessary, as economic dispatch in the operation of the BESS will already accomplish this objective. Hawaiian Electric questions the value of this requirement to customers. It is very difficult to prove a particular measure is optimized because the only way to do so reliably is to exhaustively show that any other combination is not the most efficient. The Company requests that this measure be removed, as it would be nearly impossible, extremely time consuming, and would unreasonably divert a substantial amount of resources that could be better used serving customers.

Regarding the request to report "(3) the number of events triggering the FFR resource, including description of each event (generation trip, etc.) and system frequency response after each event[,]" should D&O No. 37754 not be reconsidered, Hawaiian Electric will be able to comply with this reporting requirement.

As to the request to provide a "(4) summary of actual curtailment data[,]" the Company notes that it already reports on curtailment in the Reliability Standards Working Group docket (Docket No. 2011-0206), and proposes that this data should be referenced in lieu of creating a duplicative report. If the Commission is looking for different type of curtailment information, then the Company requests clarification as to what particular type of curtailment information the Commission is referring to in this request.

With respect to the request to provide "(5) reporting on metrics identified by the Commission to review performance in Condition No. 2, which requires Hawaiian Electric to

unlock grid constraint and align demand-side programs with the Project[,]" the Company incorporates by reference its comments and objections as to Condition No. 2 set forth above, and further requests clarification as to exactly what type of information the Commission is referring to in this request.

In view of all of the above, Hawaiian Electric continues to believe that much of the information contained in these reporting requirements is already being covered by other mandatory reporting requirements in other separate dockets and is therefore unnecessary.

Accordingly, Hawaiian Electric submits that these Conditions are erroneous, unreasonable, and unnecessary and respectfully asks that these conditions be reconsidered and addressed in the appropriate dockets as set forth above.

F. A Number of Other Statements in D&O No. 37754 are Inconsistent With and Unsupported by the Record Before the Commission.

1. D&O No. 37754 Does Not Accurately Characterize the KES Project's Planned Impact on Fossil Fuel Consumption.

The statements in D&O No. 37754 regarding the KES Project's impact on fossil fuel consumption are inconsistent with the record before the Commission. For example, the Commission states: "[h]owever, despite the Commission's multiple admonitions to utilize standalone storage fueled by fossil fuels as a last resort, Hawaiian Electric appears to continue ignoring the high costs of this Project and attendant risks of further dependence on fossil fuel by their representations throughout this docket, including the responses to the Commission's concerns raised in recent status conferences and orders in this docket." *See* D&O No. 37754, at 2. This statement is incorrect, and contrary to the facts on the record in this and other proceedings.

First, as discussed more fully herein, and contrary to the Commission's contention, the inclusion of the KES Project as one of six projects in the Final Award Group was not the result

of Hawaiian Electric ignoring the costs of the Project or the risks of further dependence on fossil fuel. The IO's report dispels any such notions. Further, as discussed above standalone storage was permitted by the Commission-approved RFP process to compete against paired resources and a separate procurement was held for grid services. The Company did not have a predetermined plan to select standalone storage against Commission guidance. Instead the Company utilized a fair and robust, Commission-approved procurement process to select the best portfolio of projects for customers.

The IO, which participated "in every phase of the RFP process," concluded, *inter alia*, that "[t]he bids provided the most ratepayer benefits, as demonstrated by Hawaiian Electric's production simulation modeling done as part of the Detailed Evaluation," and that "[a]ll six bids conform to what was sought by Hawaiian Electric's RFP, and are consistent with the Commission's August 15, 2019 Order and Hawaiian Electric's PSIP." *See* O'ahu Stage 2 RFP IO Report, at 69. Project costs and effects on fossil fuel consumption were clearly considered by both Hawaiian Electric and the IO. As the IO reported, it "[r]eviewed the models for the selection of the Priority List and Final Award Group, requested additional analysis by Hawaiian Electric, and confirmed Hawaiian Electric's selection of the Priority List and Final Award Group." *Id.* at 6.

As to cost, the IO "independently verified the rankings in two ways. First, we verified Hawaiian Electric's levelized cost calculation independently using our own annuity cost model; our rankings matched Hawaiian Electric's, which meant that our price scores also matched Hawaiian Electric's." *Id.* at 28. The IO detailed the cost metric used as follows:

> The economic metric Hawaiian Electric would use to assess projects (and portfolios of projects) was the "Total Net Cost" metric, which represented the **net impact** of incorporating a project (or portfolio of projects) onto the system. The Total Net Cost metric considered: (1) the cost to dispatch the

> combination of projects and the energy and storage purchased; (2) the fuel cost savings and any other direct savings resulting from the displacement of generation by the project(s) including consideration of round-trip efficiencies for facilities with storage; (3) the estimated increase (or decrease) in operating cost, if any, incurred by Hawaiian Electric to maintain system reliability; and (4) the cost of imputed debt, if applicable. Generally speaking, if the total system costs **decrease** with the addition of the project(s), then that project (or portfolio of projects) would be shown to have **net benefits** for customers, **and thus would be eligible for consideration in the Final Award Group**, subject to competition with other projects and portfolios of projects.

See id. at 35 (emphasis added).

The IO concluded that "Hawaiian Electric's portfolio modeling demonstrates that the selection of the [Final Award Group] projects was the **most optimal selection** from the available bids. The portfolio of projects selected for the Final Award Group **outperformed** the portfolios modeled from Priority List." *Id.* at 61 (emphasis added). The IO also highlighted that the KES Project "was also clearly the best selection." *Id.* at 61; *see also* Application, at 11 ("The ESPPA establishes a fixed lump sum payment that is not tied to the price of fossil fuels, which Hawaiian Electric anticipates will result in lower rates for customers.").

Based on the foregoing, Hawaiian Electric respectfully submits that the record before the Commission clearly demonstrates that the Company did not ignore the costs of the project in its selection. In fact, just the opposite is true – as independently verified by the IO, the Company's modeling specifically included the costs of integrating the KES Project into the system and show that the KES Project's inclusion in the Final Award Group represents the most optimal selection of projects. In approving the Competitive Bidding Framework, the Commission "reiterate[d] its interest in seeking independent input at the critical request for proposal stage, in the form of the independent observer's comments and recommendations . . . ." Decision and Order No. 23121, at 17-18, Docket No. 03-0372 (Dec. 8, 2006). Indeed, the Commission has heavily relied upon

the IO's findings throughout the procurement process. By ignoring the IO's findings and coming to a contrary conclusion without any support or analysis, the Commission has acted arbitrarily and capriciously.

Second, the Company did not ignore "attendant risks of further dependence on fossil fuel." The record clearly shows that the Project's effect of fossil fuel consumption was a key consideration of Hawaiian Electric. For example:

- "Hawaiian Electric contends the Project will . . . provide grid services to alleviate reliance on fossil fuel firm conventional generation units . . . and facilitate system reliability as fossil-fuel synchronous units are reduced or eliminated." *See* D&O No. 37754, at 33–34 (citing Application at 10).

- "Hawaiian Electric expects the Project to reduce fossil-fuel consumption by decreasing the need to dispatch oil-fueled units, 'due to [the Project's] ability to provide the capacity and other grid services typically received from these oil-fueled units.'" *See* D&O No. 37754, at 35 (quoting Application at 11–12).

- "Hawaiian Electric asserts that the ESPPA will reduce customer exposure to such volatility by reducing fossil fuel consumption. Hawaiian Electric maintains that the Project will allow for the storage of excess renewable energy that can be used at times when renewable generation resources are unavailable, thereby displacing fossil fuel that would otherwise need to be burned, decreased fuel consumption." *See* D&O No. 37754, at 38 (quoting Application at 4 and 13).

- In recommending approving the ESPPA, the CA considered "the Project's effect on the State's reliance on fossil fuels, GHG emissions, and contribution to renewable portfolio goals." *See* D&O No. 37754, at 39 (citing CA SOP at 11–12).

- "The Commission appreciates the Parties' and Participant's comments on this issue, and agrees that a critical benefit of the Project is providing near-term capacity to support the retirement of the AES Hawaii coal plant and future retirement of older fossil-fueled generation units." *See* D&O No. 37754, at 75.

- "Hawaiian Electric submits that the Project will help reduce overall fossil fuel usage in a variety of ways. First, as previously mentioned, Hawaiian Electric states that the Project will facilitate the retirement of Waiau Units 3 and 4 and Honolulu Units 8 and 9. Hawaiian Electric also states that '[s]caling back fossil fuel use after the addition of the Stage 1 and 2 projects, including the subject Project, along with increased additions from [DER] and demand response programs, will allow fossil fueled units to be progressively removed from daily

service, and be deactivated or eventually retired from service.'" *See* D&O No. 37754, at 80 (citing Hawaiian Electric Comments at 8).

- Kapolei Energy Storage I also notes the Project's potential to enable procurement of more renewable energy and greater integration of DERs, both of which will enable the retirement of existing fossil fuel plants." *See* D&O No. 37754, at 81 (citing Kapolei Energy Storage I Comments & Mitigation at 11–13).

- "In the Application, Hawaiian Electric estimates that 'the [Project] has the potential to displace about 6,599,495 barrels of fossil fuel over the term of the ESPPA . . . . Hawaiian Electric explains that the ESPPA reduces customer exposure to volatility in fuel prices by reducing fossil fuel consumption. As discussed above, the Project can be used to meet grid needs during times of high demand or when renewable generation is unavailable, thereby displacing the need to dispatch fossil fuel units, with optimized economic dispatch of available generating resources.'" *See* D&O No. 37754, at 85–86.

Furthermore, at the request of the Commission, the Company conducted additional analysis based on updated conditions, which was provided in Hawaiian Electric's response to PUC-HECO-IR-118 (April 23, 2021 supplement). The analysis found:

- **Lower bills over the near-term and long-term.** When comparing the two portfolios [with and without the KES Project], which assume approval of all other Stage 2 projects and reflect the latest schedules of Stage 1 and Stage 2 projects, estimated monthly bill savings between 2022–2027 is $0.09 on average. Over the term of the Project's Energy Storage PPA ("ESPPA") from 2022–2041, estimated monthly bill savings is $0.28 on average.

- **Lower fuel consumption.** Between 2022–2027, total fossil fuel consumption is expected to decline by nearly 6%. Over the term of the ESPPA, fossil fuel consumption may increase by 1%; however, this small increase is due in part to the differences in the timing and size of future resources and the impact of those differences in fossil fuel use.

- **Insulate customers from fuel price spikes.** Between 2022–2027, the total cost of fuel consumption declines by 9% when the KES Project is added to the system. If oil prices

were to rise by 5% between 2022–2027, the customer bill savings between 2022–2027 is expected to increase with the addition of KES due to increased savings from additional avoided fuel costs. On average, under a 5% fuel price increase scenario, customer monthly bills would decrease $0.17 over the case without KES.

The foregoing portions of the record clearly illustrate that the Company specifically considered the KES Project's effect on reducing the State's dependence on fossil fuel as part of the selection process.[15]

2. **The Commission's GHG Statements are Not Consistent with the Record in this Docket.**

The Commission states that it:

> has significant concerns with projected lifecycle and avoided emissions that are based on the average mix of energy on the Oahu electric grid. This assumption is inconsistent with principles of least-cost economic dispatch of an electric power system. This concern speaks more fundamentally to Hawaiian Electric's current plans to primarily utilize fossil fuels to charge the Project, which are not directly reflected in the GHG Analysis. Moreover, Hawaiian Electric's estimate of significant 'avoided' GHG emissions is contradicted by the Company's updated fuel consumption analysis provided in response to PUC-HECO-IR-121.

See D&O No. 37754, at 90–91.

The Company's existing mix of energy resources that currently fuels O'ahu's energy grid is not fixed and does not necessarily mean that the KES BESS will always be charged in such proportion. Generally stated, system operations uses economic dispatch in making dispatch decisions. Economic dispatch, by its nature, varies. For example, there may be periods where the KES BESS would be strictly charged during the day and discharged at night. Yet, there may be other times where it is economical to discharge the KES BESS during the early morning in

[15] It should be further noted that, to the extent that the Commission has an objection to the relative weight provided to price and non-price criteria, the Company used the formula approved by the Commission in the selection of the Stage 2 RFP portfolio.

addition to during the evening. It is also entirely possible that the KES BESS might need to be charged during overnight periods. The mix of resources needed to charge the KES BESS will necessarily need to be adjusted to best utilize the resource in light of each specific circumstance. The mix will also change over time as more renewable resource projects are brought online. Therefore, contrary to the Commission's statement, the fact that the KES BESS will be charged with Hawaiian Electric's mix of energy resources on the O'ahu electric grid is *not* inconsistent with principles of least-cost economic dispatch.

The overall quantity of avoided fossil fuels in the Company's updated fuel consumption analysis (as discussed in the Company's response to PUC-HECO-IR-121) is less than what was estimated in the updated resource plan (2016 PSIP Update Report) because there are less fossil fuel fired units being added in the Company's long-term resource plan. Specifically, Hawaiian Electric's resource plan anticipates that in the 2028–2029 timeframe, a biomass resource will replace an existing oil-fired unit. As a result, the amount of fossil fuel consumption that is potentially displaceable is less than what would have been had the Company replaced the outgoing unit with a new oil-fired unit. This does not constitute any change in the nature of the KES Project, but rather reflects an updated plan as to the avoided scenario. Even at the updated quantity of avoided fossil fuels displaced, the KES Project avoids the same amount of fossil fuels as a 190 MW PV plant in its first three years of operation.

3. D&O No. 37754's Conclusions Regarding the RPS Impact of the Project are Erroneous.

The conclusory statements regarding the Project's impact on the RPS set forth in D&O No. 37754 are not supported by the record. The Order states that while the "Project's average estimated RPS impact over the 20-year Term is 0.11%, the projections reflect a declining rate of contributions over the Term. The Commission finds that the minimal contribution with declining

trend of supporting the State's RPS goals to be disappointing in light of the significant Project costs." *See* D&O No. 37754, at 58.

The Commission's characterization of the KES Project's average estimated RPS impact of 0.11% per year as being a "minimal contribution" is misleading and out of context. Hawaiian Electric's 0.11% estimate considers the KES Project in isolation. Yet, as the IO observed, "[t]he RFP was clear that the Final Award Group was to be based on the output of the portfolio modeling results." *See* O'ahu Stage 2 RFP IO Report, at 38. The IO explained that the portfolio analysis was necessary to "determine the optimal *portfolio* of projects that would produce the largest net benefits for customers. Assessing projects on their own is certainly useful, but fails to capture portfolio effects[.]" *Id.* (emphasis in original). Further, the portfolio analysis assembled groups of projects that met the minimum "quantity targets of renewable energy and storage." *Id.*; *see also id.* at 45 ("the portfolios all meet the energy storage targets in MW (200) and MWh (1,200), as well as the contingency storage target in MW (50)"). For this reason, the Company submits that this characterization is misleading.

In addition, the Commission has misconstrued the information submitted in the record in forming its opinion that the Project's declining projected rate of fossil fuel displacement over the next 20 years is "disappointing". In response to PUC-HECO-IR-121, using updated inputs and assumptions, and a re-optimization of the resource mix at the Commission's direction, between 2022–2027, the Companies' RPS is expected to increase on average by 2.1% when the KES Project is added to the portfolio of Stage 1 and Stage 2 projects. *See* Supplemental Responses to Commission Information Request, April 23, 2021. This shows a near term significant contribution to RPS. As noted above, as the Company progresses further towards the State's 100% renewable goals in the future, the KES Project will displace less fossil fuel because there

is less fossil fuel on the grid. Therefore, a decline in RPS percentage throughout the term of the ESPPA, actually shows that the Company is moving significantly towards its goals with the help of this Project. Further, not only do the projections account for the KES Project in isolation (as discussed above), but importantly, the 20-year term ignores one of the key benefits of the portfolio at issue: "the portfolio of projects selected by Hawaiian Electric will be used to replace the capacity provided by the AES Hawaii generating station, a 180 MW, coal-fired unit that is the single largest generator on Hawaiian Electric's collective system and which provides 16 percent of the peak demand on O'ahu." *See* O'ahu Stage 2 RFP IO Report, at 62. As the Commission acknowledged, "the continuation of reliable service following the scheduled retirement of the AES coal plant is of paramount concern and represents a significant public interest." *See* D&O No. 37754, at 3. As such, there exists a "critical urgency of ensuring that reliable service for customers is provided following the scheduled retirement of the AES coal plant." *See id.* at 58; *see also id.* at 61 ("the Consumer Advocate also recognizes that other factors should be considered in evaluating the Project, including but not limited to the significant role the Project plays in the AES Hawaii coal plant retirement and the anticipated reduction in GHG emissions.").

For these reasons, the Company submits that the Commission's characterization does not recognize the full value of the KES Project as part of the entire portfolio and such a characterization fails to accurately reflect the true record of this case.

G. The Nature of the KES Project and the Benefits it Will Provide Merit a Clean Approval Without the Problematic Conditions Discussed Above.

The benefits of the KES Project merit a clean, unconditional approval without any further unnecessary delay. The challenge presented to Hawaiian Electric was to ensure continued reliable service following the scheduled retirement of the AES Plant, the single largest generator

on Hawaiian Electric's system. This challenge, as the Commission described, is of "paramount concern," one of "significant public interest," and of "critical urgency." *See* D&O No. 37754, at 3, 58.

Approval of the KES Project Application would have been a direct step towards solving this problem. As established throughout the record, the KES Project is an integral component of the "optimal portfolio of projects that would produce the largest net benefits for customers." *See* O'ahu Stage 2 RFP IO Report, at 38. The benefits of the KES Project include:

- The BESS is a simple, cost-effective answer to the shutdown of the AES Plant.
- The Project site is an industrial area with straightforward interconnection, and no concerns regarding permitting or the surrounding community.
- The Project will lower customers' utility bills.
- The Project will reduce the consumption of fossil fuel.
- The Project will reduce customers' exposure to fuel price volatility.
- The Project will reduce GHG emissions.
- The Project will enable interconnection of additional renewable energy resources without batteries.
- The Project will contribute to grid stabilization, grid resilience, and grid flexibility.
- The Project will be one of the largest of its kind in the world and another example of Hawai'i's clean energy leadership.

As summarized herein, while the KES Project lacks generation capability,[16] it would clearly assist the State in reaching its RPS goals, as well as meeting PSIP objectives by decreasing dependence on foreign oil.

Despite these benefits, D&O No. 37754 essentially constitutes a *de facto* denial of the KES Project application. The majority of the onerous conditions have no reasonable relation to

[16] This resource was specifically included in the all-resource Stage 2 RFP approved by the Commission, and approved by both the IO and the Consumer Advocate.

the KES Project and all but ensure that the Project will not happen. The D&O, if left to stand in its present form, arguably converts a workable Oʻahu energy resource plan into a much greater challenge. The Commission's concerns, unrelated to the KES Project, can and should be addressed in separate and more relevant dockets, as discussed above. Beyond this Project, the consequences of the Commission's actions jeopardize the entire Final Award Group portfolio. Any further delay to the KES Project is not in the public interest, and should be avoided at all costs.

KES has expended significant amounts of money and time in order to ensure the project remains on track. However, there is only so much risk a party can take. Therefore, it is likely that any significant delay in responding to this Motion will significantly jeopardize the ability of this project to continue to move forward.

Beyond jeopardizing the KES Project and subverting the Final Award Group portfolio, the conditions will (if not already) signal unpredictable, eleventh-hour agency decision-making in the very market in which the Hawaiian Electric Companies, and the Commission, are trying to attract development.

In order for the State to successfully meet the RPS set forth by the legislature, there needs to be a minimum level of certainty and predictability in the development and approval process that stakeholders can rely on. Burdensome and arbitrary conditions, like those imposed in D&O No. 37754, will cripple this Project and stunt the progress that Hawaiʻi, the Commission, the Company, and the renewable energy market have achieved to date, while also increasing the perceived risk for future procurements.

H. **D&O No. 37754's Repeated Characterizations Regarding the Integrity of Hawaiian Electric are Not Appropriate and Should be Stricken.**

As part of D&O No. 37754, the Commission makes numerous statements which serve to impugn Hawaiian Electric's integrity. As discussed herein, the Company submits that these allegations are completely unsupported, and are in fact contradicted by the record in the Commission's own dockets. However, equally troubling to the Company is the Commission's decision to include these statements in an order that ostensibly seeks to approve the Project. As an example, the Commission makes the following statements:

1) The Commission alleges that Hawaiian Electric has made "*appalling failures* to consider alternatives to the Project, take into account the customer impacts, and seize the opportunity to move away from reliance on fossil fuels . . . ." D&O No. 37754, at 56 (emphasis added).

2) The Commission asserts "Hawaiian Electric's *willful disregard* of the Commission's guidance . . . ." *Id.* at 3 (emphasis added).

3) The Commission alleges that Hawaiian Electric "appears to *continue ignoring* the high costs of this Project and attendant risks of further dependence on fossil fuel by their representations throughout this docket, including the responses to the Commission's concerns raised in recent status conferences and orders in this docket." *Id.* at 2 (emphasis added).

4) The Commission alleges that, "[a]s a result of Hawaiian Electric's *negligence* in preparing for the retirement of the AES coal plant, including contingency plans, the Commission must undertake consequential action by imposing Condition No. 1, to address this transfer of risk to ratepayers." *Id.* at 111–12 (emphasis added).

Simply put, these type of statements are not appropriate for an agency of the State of Hawai'i to include in such an order, especially when they are patently false and disparaging. These types of statements detract from the efforts of the Company and KES, and demean the Company and impact its relationships with customers, developers, shareholders, creditors, and employees. For this reason, the Company respectfully requests that these statements be stricken from the text of D&O No. 37754.

I. A Stay of D&O No. 37754 Pending Resolution of this Motion for Reconsideration is Appropriate.

As noted above, a stay of a Commission order is appropriate where there is a likelihood of prevailing on the merits of a reconsideration motion, a party would suffer irreparable damage if a stay is not granted, and the public interest supports granting the stay. *See In re GTE Hawaiian Telephone Company, Inc*., Docket No. 7062, Order No. 11614, at 2 (May 8, 1992).

Here, in view of the immediate and significant negative consequences that the Company and its customers will face should D&O No. 37754 be forced to be put into effect, Hawaiian Electric respectfully submits that a stay should be granted pending this Commission's consideration and resolution of the present Motion.

V. CONCLUSION

For the reasons set forth above, Hawaiian Electric respectfully submits that reconsideration of Decision and Order No. 37754 is appropriate. Further, the Company requests a stay of Decision and Order No. 37754 pending the Commission's decision on this Motion.

Dated: Honolulu, Hawaiʻi, May 10, 2021.

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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAIʻI

In the Matter of the Application of HAWAIIAN ELECTRIC COMPANY, INC. For Approval of Energy Storage Power Purchase Agreement for Energy Storage Services with Kapolei Energy Storage I, LLC.	Docket No. 2020-0136

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of the foregoing document was duly served upon the following parties and at their last known addresses by the method indicated below:

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Sent: Monday, May 10, 2021 4:15 PM
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