

APPENDIX E
MUTUAL CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT
Independent Power Producers – (“IPPs”)

This Mutual Confidentiality and Non-Disclosure Agreement (this “Agreement”) is effective as of _____, 20____ (the “Effective Date”) between [INSERT NAME OF IPP], a [State of incorporation/organization] [type of entity] (“IPP”) and Hawaiian Electric Company, Inc. and Hawaii Electric Light Company, Inc., each a Hawaii corporation (collectively, the “Companies”). In consideration of the mutual promises contained in this Agreement, including the provision of Confidential Information (as defined below) by either party to the other hereunder, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Background

The Companies have or intend to issue a Request for Proposals (“RFP”) for renewable energy generation and/or storage projects. The IPP has or intends to submit one or more proposals for a nominal [] MW [TYPE OF FACILITY] facility located at [LOCATION] on the island of Hawai‘i, State of Hawai‘i (“Proposal”).

In connection with the IPP’s proposed project, the Companies may conduct an interconnection requirements study (“IRS”) to establish the requirements for interconnection of the IPP’s proposed project to the Companies’ electric grid. The RFP process may also result in the award of a potential energy storage service agreement, the terms of which must be agreed upon by the parties (“ESSA Negotiations”). For purposes of this Agreement the term “Project” refers to the RFP, Proposal, potential IRS and ESSA Negotiations.

In order to evaluate the Project, either party may from time to time provide to the other party certain Confidential Information. The parties are willing to provide such Confidential Information to each other upon the terms and conditions of this Agreement.

2. Confidential Information

Except as set forth in Section 3 (Exclusions from Confidential Information) below, “Confidential Information” means all non-public, confidential or proprietary information disclosed by either party (the “Provider”) to the other party (a “Recipient”) its affiliates and its and their directors, officers, employees, agents, advisors, consultants, contractors, financing parties and investors (including, without limitation, financial advisors, counsel and accountants) and controlling entities or individuals (collectively, “Representatives”) whether disclosed orally or disclosed or accessed in written, electronic or other form of media, and whether or not marked or otherwise identified as “confidential,” including, without limitation:

(a) all information concerning the Provider and its affiliates’, and their customers’, contractors’, suppliers’, financing parties’, investors’ and other third parties’ past, present and future business affairs including, without limitation, finances, customer information, supplier

information, pricing and cost information, products, services, designs, processes, organizational structure and internal practices, forecasts, sales and other financial results, records and budgets, business, marketing, development, sales, other commercial information and strategies, and negotiating positions and drafts made or exchanged between IPP and the Companies during negotiations or other discussions prior to such negotiated documents or agreements becoming public;

(b) all “Personally Identifiable Information,” which shall include all information belonging to an individual that may be used to track, locate, or identify such individual, or which is otherwise protected by privacy laws, including but not limited to IP address, residential address, personal telephone number, social security number, date of birth, government-issued identification number, financial account number, personal email address, and username or password, all of which shall always be considered and deemed to be Confidential Information whether marked as “confidential” or not;

(c) all “Critical Infrastructure Confidential Information” concerning the Companies’ generation, transmission, and distribution systems or its information technology or security systems, including but not limited to all designs, specifications, components, source code, object code, images, icons, audiovisual components and objects, schematics, drawings, protocols, processes, and other visual depictions, in whole or in part, of any of the foregoing, all of which shall always be considered and deemed to be Confidential Information whether marked as “confidential” or not;

(d) the Provider’s unpatented inventions (whether or not they are patentable), ideas, methods and discoveries, techniques, formulations, development plans, trade secrets, know-how, unpublished patent applications and other confidential intellectual property;

(e) all previously disclosed information designated as or deemed to be “Confidential Information” under previous nondisclosure and confidentiality agreements executed between the parties, whether expired or still in effect, it being the understanding of the parties that any/all such agreement(s) be deemed superseded by this Agreement and that all Confidential Information exchanged between the parties to date shall be henceforth governed by this Agreement;

(f) any third-party confidential information included with, or incorporated in, any information provided by the Provider to the Recipient or its Representatives, including source code of any of Provider’s vendors or suppliers; and

(g) all notes, analyses, compilations, reports, forecasts, studies, samples, data, statistics, summaries, interpretations and other materials (“Notes”) prepared by or for the Recipient or its Representatives that contain, are based on, or otherwise reflect or are derived from, in whole or in part, any of the foregoing.

IPP and the Companies understand that in the course of obtaining approval of the Project, any documents filed with the State of Hawai‘i Public Utilities Commission (“Commission”) may be considered government records subject to the Uniform Information Practices Act (“UIPA”), Hawai‘i Revised Statutes (“HRS”) Chapter 92F.

All written Confidential Information provided to the Companies by IPP and marked as “confidential” in response to a request by the Companies for purposes of filing such information with the Commission shall be accompanied in writing by (1) a clear statement of the basis for its confidential status, including the applicability of any UIPA exceptions under HRS § 92-13, (2) a description, with particularity, of the cognizable harm to IPP if such information were to be disclosed publicly, and (3) if applicable, any additional justification or harm to IPP were the Confidential Information to be disclosed to other parties or participants in the subject Commission proceeding (collectively, the “Justification”). IPP expressly allows the Companies to disclose or otherwise use the Justification in order to justify withholding the Confidential Information from public disclosure in accordance with this Agreement, including without limitation, filing of the information in a Commission proceeding pursuant to Section 4(e) below and, to the extent necessary, any required disclosure pursuant to Section 5 (Required Disclosure and Notice) below. The IPP will provide the Companies with such Justification within three (3) business days of the Companies’ written request for such Justification, provided that if the Companies are given less than five (5) business days by the Commission to produce the Justification, then the IPP will provide the Companies with the Justification not less than 24 hours before the Companies’ due date for such Justification, provided that (1) the Companies provides the IPP with the request as soon as reasonably practicable and (2) to the extent possible, IPP shall be given at least one full business day to provide the Justification.

A Provider shall be permitted to designate as “confidential” information previously provided to Recipient at which point such information shall become and be deemed to be Confidential Information under this Agreement, provided that such information is not specifically excluded under Section 3 (Exclusions from Confidential Information) below. Notwithstanding anything to the contrary stated herein, any “Confidential Information” previously provided by IPP under any previously executed nondisclosure and confidentiality agreement shall not require a Justification unless such is requested by the Companies in connection with a required or anticipated disclosure described herein.

3. Exclusions from Confidential Information

Except as required by applicable federal, state, or local law or regulation, the term “Confidential Information” as used in this Agreement shall not include information that:

(a) at the time of disclosure is, or thereafter becomes, generally available to and known by the public other than as a result of, directly or indirectly, any violation of this Agreement by the Recipient or any of its Representatives; provided, however, that Confidential Information shall not be disqualified as Confidential Information (i) merely because it is embraced by more general or generic information which is in the public domain or available from a third party, or (ii) if it can only be reconstructed from information taken from multiple sources, none of which individually shows the whole combination (with matching degrees of specificity);

(b) at the time of disclosure is, or thereafter becomes, available to the Recipient on a non-confidential basis from a third-party source, provided that such third party is not and was not

prohibited from disclosing such Confidential Information to the Recipient by a contractual or other obligation to the Provider;

(c) was known by or in the possession of the Recipient or its Representatives, as established by documentary evidence, prior to being disclosed by or on behalf of the Provider pursuant to this Agreement;

(d) was or is independently developed by the Recipient, as established by documentary evidence, without reference to or use of, in whole or in part, any of the Provider's Confidential Information; or

(e) was or is learned or established entirely from public sources, as established by documentary evidence, without reference to or use of, in whole or in part, any of the Provider's Confidential Information.

PROVIDED, however, that under no circumstance shall Critical Infrastructure Confidential Information ever be deemed to be excluded from being considered or deemed Confidential Information.

The parties acknowledge and understand that the confidentiality obligations of this Agreement apply only to the Confidential Information shared in connection with the Project. The parties may share other information with each other under other agreements, provisions or understandings which are not related to the Project. Such information sharing shall be subject to the provisions of the agreements and confidentiality provisions associated thereto and this Agreement shall not be construed to infringe upon or apply to such agreements or provisions.

4. Non-Disclosure of Confidential Information

Unless otherwise agreed to in writing by the Provider, the Recipient agrees as follows:

(a) except as required by law, not to disclose or reveal any Confidential Information to any person or entity other than its Representatives who are actively and directly participating in or advising on the evaluation, consummation, approval, development, investment, financing, construction or operation of the Project, and where the Companies are the Recipient, Companies' operation as an electric utility (the "Acceptable Purposes"), or those Representatives who otherwise need to know the Confidential Information for such Acceptable Purposes.

(b) not to use Confidential Information for any purpose other than in connection with the Acceptable Purposes.

(c) except as required by law, not to disclose to any person or entity (other than those of its Representatives who are actively and directly participating in the Acceptable Purposes or those Representatives who otherwise need to know such Confidential Information for such Acceptable Purposes) any information about the Project, or the terms or conditions or any other facts relating thereto, including, without limitation, the fact that discussions are taking place with

respect thereto or the status thereof, or the fact that Critical Infrastructure Confidential Information has been made available to the Recipient or its Representatives.

(d) to use diligent efforts to safeguard and protect the confidentiality of the Confidential Information, including, at minimum, implementing the same commercial measures that the Recipient uses to protect its own confidential information. Before disclosing the Confidential Information to any Representative, the Recipient will inform such Representative of the confidential nature of such information, their duty to treat the Confidential Information in accordance with this Agreement and shall ensure that such Representative is legally bound by the terms and conditions of this Agreement or subject to confidentiality duties or obligations to the Recipient that are no less restrictive than the terms and conditions of this Agreement.

(e) Any provision herein to the contrary notwithstanding, the Companies and IPP may disclose Confidential Information to (i) the Commission's independent observer, provided that such disclosure is made pursuant to a non-disclosure agreement with the independent observer; and (ii) the Commission and/or the State of Hawai'i Division of Consumer Advocacy (including their respective staffs) provided that such disclosure is made under a protective order entered in the docket or proceeding with respect to which the disclosure will be made or any general protective order entered by the Commission. If IPP is a party or participant in the docket or proceeding under which disclosure of IPP's Confidential Information is being sought, IPP shall be solely responsible for providing the Justification associated with such Confidential Information.

5. Required Disclosure and Notice

If the parties or any of their Representatives become legally compelled (by deposition, interrogatory, request for documents, information request, subpoena, civil investigative demand, court order, or similar process) to disclose any of the Confidential Information (other than a situation covered by Section 4(e) above), the compelled party shall undertake reasonable efforts to provide the other party with notice within three (3) business days of such requirement or advice prior to disclosure so that the other party may (a) seek a protective order or other appropriate remedy, (b) consult with the other party with respect to the compelled party taking steps to resist or narrow the scope of such requirement or advice, and/or (c) waive compliance, in whole or in part, with the terms of this Agreement. If such protective order or other remedy is not obtained, or the other party waives compliance with the provisions hereof, the compelled party agrees to furnish only that portion of the Confidential Information which it is legally required to so furnish and, at the request of the other party, to use reasonable efforts to obtain assurance that confidential treatment will be accorded such Confidential Information, it being understood that such reasonable efforts shall be at the cost and expense of the party whose Confidential Information has been sought. In any event, neither the IPP nor any of its Representatives will oppose action by the Companies to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Confidential Information.

6. Return or Destruction of Confidential Information

At any time during or after the term of this Agreement, at the Provider's written request, and in any event, upon the termination of the Agreement, the Recipient shall certify within ten (10)

business days that it has destroyed all Confidential Information by using industry standard data elimination methods used to prevent unauthorized disclosure of information, and for Personally Identifiable Information, such methods shall be consistent with HRS Chapter 487-R; provided, however, that with respect to Confidential information in tangible form, the Recipient may return such Confidential Information to the Provider within ten (10) business days in lieu of destruction. The Recipient's sole obligation with respect to the disposition of any Notes shall be to redact or otherwise expunge all such Confidential Information from such Notes and certify to the Provider that it has so redacted or expunged the Confidential Information. Notwithstanding the foregoing, with respect to any Confidential Information stored in Recipient's disaster recovery backups or other electronic archives, Recipient is not required to destroy such Confidential Information if it would impose a material cost or burden; provided, however, such Confidential Information shall be destroyed when such archives are destroyed in accordance with Recipient's records retention policies.

7. Authority

Each party represents and warrants that it has full power and authority to enter into and perform this Agreement, and the person signing this Agreement on behalf of each has been properly authorized and empowered to enter into this Agreement, understands it and agrees to be bound by it.

8. No Representations or Warranties

Neither the Provider nor any of its Representatives make any express or implied representation or warranty as to the accuracy or completeness of any Confidential Information disclosed to the Recipient hereunder, and the Recipient agrees that it is not entitled to rely on the accuracy or completeness of any Confidential Information. Neither the Provider nor any of its Representatives shall be liable to the Recipient or any of its Representatives relating to or arising from the use of any Confidential Information or for any errors therein or omissions therefrom. Notwithstanding the foregoing, the Recipient shall be entitled to rely solely on such representations and warranties regarding Confidential Information as may be made to it in any final agreement relating to the Project, subject to the terms and conditions of such agreement.

9. No Other Obligations

Neither this Agreement nor the disclosure of the Confidential Information shall result in any obligation on the part of either party to enter into any further agreement with the other with respect to the subject matter hereof or otherwise, to purchase any products or services from the other, or to require either party to disclose any further information to the other. Nothing in this Agreement shall be deemed to constitute either party hereto as partner, agent or representative of the other party or to create any fiduciary relationship between the parties. Either party may offer products or services which are competitive with products or services now offered or which may be offered by the other. Subject to the express terms and conditions of this Agreement, neither this Agreement nor discussions and/or communications between the parties will impair the right of either party to develop, make, use, procure, and/or market any products or services, alone or with others, now or in the future, including those which may be competitive with those offered by

the other. Whether or not the Project is consummated, neither party shall issue a press release or release any information to the general public concerning such transaction or the absence thereof without the express prior written consent of the other, and the parties agree that neither party will use the other's name whether by including reference to the other in any press release, list of customers advertising that its services are used by Companies or otherwise, without written authorization by the respective party's authorized representative.

10. Property Rights in Confidential Information

All Confidential Information shall remain the sole and exclusive property of the Provider and nothing in this Agreement, or any course of conduct between the parties shall be deemed to grant to the Recipient any license or rights in or to the Confidential Information of the Provider, or any part thereof. Unless otherwise expressly agreed in a separate license agreement, the disclosure of Confidential Information to the Recipient will not be deemed to constitute a grant, by implication or otherwise, of a right or license to the Confidential Information or to any patents or patent applications of the Provider.

11. Publicly Traded Company

The IPP acknowledges that the Companies' holding company is a publicly traded company, and that Confidential Information of the Companies may constitute material, non-public information with respect to the Companies. The IPP understands, and will advise its Representatives to whom Confidential Information of the Companies is disclosed, of the restrictions imposed by the United States securities laws on (a) the purchase or sale of securities by any person in possession of material, non-public information with respect to such securities, and (b) the communication of material, non-public information with respect to securities to a person who may purchase or sell such securities in reliance upon such information.

12. Remedies

(a) Each party acknowledges and agrees that any breach or threatened breach of this Agreement may give rise to an irreparable injury to the Provider or its Representatives, for which compensation in damages is likely to be an inadequate remedy. Accordingly, in the event of any breach or threatened breach of this Agreement by the Recipient or its Representatives, the Provider shall be entitled to seek equitable relief, including in the form of injunctions and orders for specific performance, in addition to all other remedies available at law or in equity.

(b) In the event that the Recipient learns of dissemination, disclosure, or use of the Confidential Information which is not permitted by this Agreement, the Recipient shall notify the Provider immediately in writing and shall use reasonable efforts to assist the Provider in minimizing damages from such disclosure. Such remedy shall be in addition to and not in lieu of any other rights or remedies available to the Provider at law or in equity.

(c) Recipient shall indemnify, defend and hold harmless Provider and Provider's officers, directors and employees (and each of their heirs, successors and assigns) (the "Indemnified Parties") from and against all losses, damages, claims and actions, including, without

limitation, reasonable attorneys' fees and costs, and all expenses incidental to such losses, damages, claims or actions ("Losses"), based upon or arising out of, or to the extent caused or contributed to by the breach of Recipient's confidentiality obligations with respect to Critical Infrastructure Confidential Information or Personally Identifiable Information; such rights to indemnification shall apply regardless of whether any act, omission, misconduct, negligence or default on the part of the Indemnified Parties contributed to the Losses, unless such act, omission, misconduct, negligence or default by an Indemnified Party was the sole or primary cause of the Losses.

13. Cumulative Remedies

No rights or remedy herein conferred upon or reserved to either party hereunder is intended to be exclusive of any other right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy under this Agreement, or under applicable law, whether now or hereafter existing.

14. Notice

(a) By delivering written notice, either party may notify the other that it no longer wishes to receive or provide Confidential Information. Any further information received or provided by the party who received such notice following receipt of such notice, shall not be subject to the protection of this Agreement.

(b) All notices, consents and waivers under this Agreement shall be in writing and will be deemed to have been duly given when (i) delivered by hand, (ii) sent by electronic mail ("E-mail") (provided receipt thereof is confirmed via E-mail or in writing by recipient), (iii) sent by certified mail, return receipt requested, or (iv) when received by the addressee, if sent by a nationally recognized overnight delivery service (receipt requested), in each case to the appropriate addresses and E-mail Addresses set forth below (or to such other addresses and E-mail addresses as a party may designate by notice to the other party):

(1) Companies:

By Mail:

Hawaiian Electric Company, Inc.
P.O. Box 2750
Honolulu, Hawaii 96840
Attn: Manager of Procurement, Renewable Acquisition Division

Delivered By Hand or Overnight Delivery:

Hawaiian Electric Company, Inc.
Ward Receiving
Mail Code AL12-IU
799 S. King Street
Honolulu, Hawaii 96813
Attn: Manager of Procurement, Renewable Acquisition Division

By E-mail:

Hawaiian Electric Company, Inc.
Attn: Manager of Procurement, Renewable Acquisition Division
Email: renewableacquisition@hawaiianelectric.com

With a copy to:

By Mail:

Hawaiian Electric Company, Inc.
Legal Department
P.O. Box 2750
Honolulu, Hawaii 96840

Delivered By Hand or Overnight Delivery:

Hawaiian Electric Company, Inc.
American Savings Bank Tower
1001 Bishop Street, Suite 1100
Honolulu, Hawai'i 96813
Attn: Legal Department

By E-mail:

Hawaiian Electric Company, Inc.
Legal Department
Email: legalnotices@hawaiianelectric.com

(2) IPP

By Mail:

[INSERT ADDRESS/CONTACT]

Delivered By Hand or Overnight Delivery:

[INSERT ADDRESS/CONTACT]

By E-mail:

[INSERT ADDRESS/CONTACT]

With a copy to:

By Mail:

[INSERT ADDRESS/CONTACT]

Delivered By Hand or Overnight Delivery:

[INSERT ADDRESS/CONTACT]

By E-mail:

[INSERT ADDRESS/CONTACT]

15. No Waiver

Except as otherwise provided in this Agreement, no delay or forbearance of a party in the exercise of any remedy or right will constitute a waiver thereof, and the exercise or partial exercise of a remedy or right shall not preclude further exercise of the same or any other remedy or right.

16. Governing Law

This Agreement is made under, governed by, construed and enforced in accordance with, the laws of the State of Hawai‘i. Any action brought with respect to the matters contained in this Agreement shall be brought in the federal or state courts located in the State of Hawai‘i. Each party agrees and irrevocably consents to the exercise of personal jurisdiction over each of the parties by such courts and waives any right to plead, claim or allege that the State of Hawai‘i is an inconvenient forum or improper venue.

17. Attorneys’ Fees and Costs

If there is a dispute between the parties and either party institutes a lawsuit, arbitration, mediation or other proceeding to enforce, declare, or interpret the terms of this Agreement, then the prevailing party in such proceeding shall be awarded its reasonable attorneys’ fees and costs.

18. Assignment Prohibited

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, legal representatives, and permitted assigns. Neither party shall have the right to assign any of its rights, duties or obligations under this Agreement, by operation of law or otherwise, without the prior written consent of the other party. Any purported assignment in violation of this section shall be null and void.

19. No Third Party Beneficiaries

Nothing expressed or referred to in this Agreement will be construed to give any person or entity other than the parties any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement. This Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the parties and their successors and permitted assigns.

20. Entire Agreement

This Agreement constitutes the entire agreement between the parties relating to the subject matter hereof, superseding all prior and contemporaneous agreements, understandings or undertakings, oral or written with respect to the subject matter. Any amendment or modification of this Agreement or any part hereof shall not be valid unless in writing and signed by the Parties. Any waiver hereunder shall not be valid unless in writing and signed via by the party against whom waiver is asserted.

21. Term and Survival

This Agreement shall remain in full force and effect for a period of five (5) years from the Effective Date. All confidentiality obligations of this Agreement with respect to Confidential Information provided to Recipient during the term of this Agreement shall survive following expiration or termination of this Agreement until such Confidential Information is returned to Provider or destroyed in accordance with Section 6 hereinabove.

22. Severability

If any term or provision of this Agreement, or the application thereof to any person, entity or circumstances is to any extent invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons, entities or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law, and the parties will take all commercially reasonable steps, including modification of the Agreement, to preserve the economic “benefit of the bargain” to both parties notwithstanding any such aforesaid invalidity or unenforceability.

23. Negotiated Terms

The parties agree that the terms and conditions of this Agreement are the result of negotiations between the parties and that this Agreement shall not be construed in favor of or against any party by reason of the extent to which any party or its professional advisors participated in the preparation of this Agreement.

24. Counterparts and Electronic Signatures

This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which shall together constitute one and the same instrument binding all parties notwithstanding that all of the parties are not signatories to the same counterparts. For all purposes, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document. The parties agree that this Agreement and any subsequent writings, including amendments, may be executed and delivered by exchange of executed copies via E-mail or other acceptable electronic means, and in electronic formats such as Adobe PDF or other formats mutually agreeable the parties which preserve the final terms of this Agreement or such writing. A party’s signature transmitted by E-mail or other acceptable electronic means shall be considered an “original” signature which is binding and effective for all purposes of this Agreement.

[Signature Page Follows]

IN WITNESS WHEREOF, each party has caused this Agreement to be executed on its behalf by a duly authorized representative, all as of the Effective Date.

HAWAIIAN ELECTRIC COMPANY, INC.

By: _____
Print Name: _____
Its: _____

HAWAII ELECTRIC LIGHT COMPANY, INC,

By: _____
Print Name: _____
Its: _____

“Companies”

[Insert Name of IPP]

By: _____
Print Name: _____
Its: _____

“IPP”