Hū Honua
BIOENERGY LLC
Pepe'ekeo, Hawai'i

April 1, 2024

Via Electronic Mail and Hand-Delivery

Honorable Chair Leodoloff R. Asuncion
Commissioner Naomi U. Kuwaye
Commissioner Colin A. Yost
Hawaiʻi Public Utilities Commission
465 South King Street
Kekuanaoʻa Building, First Floor
Honolulu, Hawaiʻi 96813

Re: Hu Honua Bioenergy Can Solve Hawaiʻi Island's Electric Power Crisis

Dear Honorable Commissioners,

Like all of the residents of our community, I have watched and read with frustration and anger about the unprecedented electric reliability problems plaguing our Island of Hawaiʻi. This electric power crisis never had to be and it does not have to continue one day longer.

For years, there has been a solution for Hawaiian Electric Company's (HECO) mismanagement of the Island's electric capacity and supply, but HECO has fought this solution in a determined effort to protect its monopoly over the Island's electric power supply and to maximize its monopoly profits. It is becoming blindingly obvious that HECO's monopolization of the firm power generation market on the Big Island has come at the intolerable cost to our residents and businesses of prohibitively high electric rates – the highest rates in the country – and now, literally, HECO's inability to provide even the basic electric power service needed by our Island community.

As the Commission knows, Hu Honua Bioenergy, LLC (HHB) owns a 30 MW firm renewable biomass electric generating facility (Hu Honua) on Hawaiʻi Island that has long been ready to provide a new, trustworthy, and dependable supply of electric power for the residents of the Big Island. Hu Honua can provide firm dispatchable electricity 24 hours a day, 365 days a year, night or day, rain or shine.

Hu Honua is a state-of-the-art, renewable biomass generating facility that uses natural feedstocks that are grown, harvested, and then regrown locally, in a virtuous cycle for the Island's economy. Hu Honua and its interconnection switchyard are fully constructed and available and ready to generate power to meet the needs of the Island's residents and businesses. Ninety-nine percent complete, Hu Honua needs only to finish final permitting and commissioning to begin commercial operation.

Biomass is precisely the firm renewable power source the Island needs at this moment to meet the electric power needs of the Island's residents. In fact, finally, under increasing public pressure for its failures and belatedly in recognition of its failure to bring biomass electric power sources online in particular, HECO recently announced it will be seeking supply from biomass suppliers exactly like Hu Honua in its upcoming Integrated Grid Planning Request for Proposals (IGP RFP).

It is now obvious to all of us that Hawaiʻi Island is in the grips of an unprecedented electric power reliability crisis that never should have happened. In January and February, the Island's residents and businesses faced unplanned rolling blackouts. Just last week, HECO announced that residents should expect more unplanned rolling blackouts at any time and that customers need to limit their use of electricity in the weeks and months ahead. The continuing crisis was reported by the Hawaiʻi Herald Tribune last Monday – "Tight Supply of Electricity" – and in a front-page article last Tuesday – "Utility Warns of Energy Deficit." (Attached).

Our Island's crisis is not the result of environmental conditions or an extreme weather event. This crisis was caused by HECO. It is the consequence of HECO's steadfast refusal for many years now to replace or transition from the Island's electric power supply that comes from HECO's own aging, unreliable, and now failing portfolio of oil-burning power plants. Indeed, HECO's own proven unreliable affiliate Hamakua is the poster child and root cause of the acute electric power reliability crisis on the Island of Hawaiʻi today.

HECO publicly refers to Hamakua as an "independent" supplier of electric power on the Island. But it is not. Hamakua is an affiliate of HECO itself. HECO has long sought to hide the fact that Hamakua is its affiliate, but HECO's ownership of Hamakua was reported last week in the Hawaiʻi Herald Tribune in an opinion piece entitled "HECO Failed to Disclose Ties to HEP." (Attached). HECO and its subsidiary HELCO originally were going to buy the Hamakua plant, but this

Commission denied their request as not being in the public interest. In an end-around of this Commission, HECO instead bought Hamakua through the backdoor, through another one of HECO's affiliates, Pacific Current.

Compounding the harm to the Big Island and its residents caused by HECO's end-around acquisition of Hamakua, while at the same time fortifying the impregnability of its monopoly over the Island's electric power supply, HECO, in a brazen act of self-dealing to protect its monopoly just recently selected the star-crossed Hamakua facility as the beneficiary of a decades-long power contract to commence almost seven years from now, in December 2030.

Notably, HECO's selection of the famously unreliable Hamakua brings zero new firm capacity to Hawaiʻi Island at the very moment when the Big Island desperately and urgently needs more electric generation capacity. Indeed, for the foreseeable future, HECO's choice of Hamakua has proven nothing short of disastrous for the residents of Hawaiʻi Island.

HHB has a case against HECO pending in the Federal District Court in Honolulu demonstrating that it is HECO's relentless pursuit of monopoly power – including the surreptitious acquisition of its then-main rival, Hamakua, and the foreclosure of Hu Honua and other independent power producers – that has caused the dire circumstances facing Hawaiʻi Island today. The story of HECO's anticompetitive conduct is set forth in HHB's proposed Third Amended and Supplemental Complaint, which HECO has sought to suppress. (Attached).

Ensuring that the residents and businesses of Hawaiʻi Island have the kind of reliable, dependable electric service that a competitive market would deliver is this Commission's highest responsibility. As of today, HECO's over a decade of mismanagement of the Island's electric power capacity and electric power supply for the purposes of protecting and extending its monopoly over firm electric power generation on the Big Island has prevented the Commission from achieving its animating purpose of promoting competition and ensuring reliable electric power services at a cost that is affordable for the Island's residents.

The Commission should act immediately to bring Hu Honua online, to ensure and assure the residents of the Island of Hawaiʻi that they will have reliable and competitive electric power service on the Island in the months and years ahead. <u>See</u> Integrated Grid Planning, Framework for Competitive Bidding, Sections II.A.2.c, II.A.2.d and VIII.A. To this end, the Commission should direct HECO to immediately enter into expedited negotiations with Hu Honua to forge a long-term contract for Commission approval that will quickly alleviate the electric power reliability crisis on the Island of Hawaiʻi. Hu Honua has already prepared a contract with fair pricing that will provide a just, reasonable, and competitive solution to the current crisis for HECO, the PUC, and most importantly, the residents of the Big Island. Hu Honua is prepared to enter into expedited negotiations with HECO immediately and accelerate commissioning of the Hu Honua plant so as to bring to an end the electric reliability crisis that besets our Island today and promises to beset our Island for years to come.

It would be our honor to serve the People of Hawaiʻi Island.

Sincerely,

Warren Lee
President
Hu Honua Bioenergy, LLC
(808) 964-1101
wlee@huhonua.com

Attachments:

1. HECO Notice to Customers of Potential Rolling Blackouts and Alerts to Immediately Reduce Power Use March 25, 2024.
2. Hawaiʻi Herald Tribune - "Tight Supply of Electricity" March 25, 2024.
3. Hawaiʻi Herald Tribune - "Utility Warns of Energy Deficit" March 26, 2024.
4. Hawaiʻi Herald Tribune - "HECO Failed to Disclose Ties to HEP" March 27, 2024.
5. Hu Honua's Proposed Third Amended and Supplemental Complaint in Case No. 16-00634 in the District of Hawaii.

Attachments

Attachment 1

NEWS RELEASE

FOR IMMEDIATE RELEASE

Tight supply of electricity on Hawai‘i Island drives need for conservation through April

HILO, March 25, 2024 – Hawaiian Electric is asking all Hawai‘i Island customers to reduce or shift their electricity use over the next month.

This is an unusual situation, driven mainly by the unavailability of several large generators that have experienced mechanical problems, are at reduced output, or are undergoing maintenance. The largest generator, an independent power producer that sells electricity to Hawaiian Electric, is offline with significant mechanical issues. The plant generates 60 megawatts or nearly one-third of the typical peak demand of 180 megawatts on the island.

Hawaiian Electric is using companywide resources and working with its independent power producers to return units to full service as soon as possible. At least through the middle of April, when one of the company’s larger generators is scheduled to return from an overhaul on the mainland, generation margin will be extremely tight, especially when wind, solar and hydroelectric output is lower than forecast.

Customers may see alerts asking them to conserve energy, especially on days when there isn’t much wind, which can generate up to 15% of the electricity on the grid. **When the alerts are issued, customers are asked to take immediate action to minimize the use of electricity.**

Even without an alert, customers – including hotels and large retailers – are urged to reduce their electricity use as much as possible, especially between 5 and 9 p.m. weekdays. Suggestions include turning off air conditioners and unneeded lighting, shutting off water heaters and pumps, and shifting activities like cooking, showering, laundry, and dishwashing. Shifting large appliance use to the daytime, when solar is abundant, is also recommended.

Without enough supply to meet electricity demand, the company may initiate rolling outages of up to an hour around the island. The impacted areas and the timing will be based on the amount of demand that needs to be reduced. Hawaiian Electric will post alerts on its X (formerly Twitter) @HIElectricLight and Facebook account. Customers also are encouraged to subscribe to Hawai‘i County Civil Defense’s emergency notification system, Everbridge, to receive alerts.

Customers may experience delays or busy signals on the Trouble Line (808) 969-6666 due to high call volume. Other options are calling Customer Care (808) 969-6999 or direct messaging on X or Facebook. For more information, visit hawaiianelectric.com/HawaiiIslandUpdate.

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Hawaiian Electric PO BOX 1027 / HILO, HI 96721-1027

Attachment 2

Hawaii Tribune-Herald

Hawaiian Electric: 'Tight supply of electricity' on the Big Island through April

Monday, 03/25/2024

Hawaiian Electric is asking all Hawaii Island customers to reduce or shift their electricity use over the next month.

"This is an unusual situation, driven mainly by the unavailability of several large generators that have experienced mechanical problems, are at reduced output, or are undergoing maintenance," the utility said today in a press release.
The largest generator — an independent power producer that sells electricity to Hawaiian Electric — is offline with significant mechanical issues. The plant generates 60 megawatts or nearly one-third of the typical peak demand of 180 megawatts on the island.

Hawaiian Electric did not name the independent power producer in its press release.

"At least through the middle of April, when one of the company's larger generators is scheduled to return from an overhaul on the mainland, generation margin will be extremely tight, especially when wind, solar and hydroelectric output is lower than forecast," according to the utility.

Hawaiian Electric customers "may see alerts asking them to conserve energy," especially on days when there isn't much wind, which can generate up to 15% of the electricity on the grid. When the alerts are issued, customers are asked to take immediate action to minimize the use of electricity.

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See Tuesday's Tribune-Herald for more.

Attachment 3

Hawaii Tribune Herald

Utility warns of energy deficit

Hawaiian Electric urges customers to conserve power through April

By MICHAEL BRESTOVANSKY

Hawaii Tribune-Herald

Hawaiian Electric is asking all Hawaii Island customers to reduce or shift their electricity use over the next month.

Company spokeswoman Kristin Okinaka said the energy provider's largest independent power producer, Hamakua Energy, has gone offline, leaving the power grid with a significant deficit of power.

Hamakua Energy generates 60 megawatts of power, about one-third of the Big Island's typical peak demand of roughly 180 megawatts.

A Hamakua Energy spokesperson attributed the plant's failure to "mechanical issues with our generators" and said the plant is working to identify the cause and will provide updates about service restoration as soon as possible.

In the interim, Hawaiian Electric has urged customers to conserve energy, because several other large generators are also offline for various reasons.

Most pertinently, Okinaka said the provider's Keahole generator — which, according to Hawaiian Electric's website, contributes 77 megawatts to the grid — currently is on the mainland being overhauled. While she said Hawaiian Electric is working to expedite that process so it can return to the Big Island as soon as possible, the grid will be operating with very tight margins through at least mid-April.

Customers are therefore asked to reduce energy consumption as much as possible over the next several weeks, particularly during the peak hours of 5 p.m. and 9 p.m. on weekdays. Hawaiian Electric recommends actions such as turning off air conditioners, unnecessary lighting and water heaters, and using large appliances during the daytime, when solar resources are more abundant.

“The challenging part for us is timing,” Okinaka said. “Because of how electricity works, it has to be generated based off demand. If demand exceeds what we can generate, we might need to initiate an outage.”

Rolling outages up to an hour long throughout the island might be necessary depending on the grid’s capacity. While Hawaiian Electric will send out alerts over social media — on X (formerly Twitter) and Facebook — Hawaii County Civil Defense has also partnered with the company to distribute alerts via its own emergency notification systems, including radio alerts and its Everbridge notification platform.

“Whenever the power goes out, people contact 911, Civil Defense, the county — they call everyone to find out what’s going on,” said Civil Defense Administrator Talmadge Magno. “We offered to put out (Hawaiian Electric’s) messages, like what we do during inclement weather.”

Although Okinaka said Hawaiian Electric will try to send out alerts warning about impending outages before they take place, she said they could happen without warning, depending on the situation. If another generator goes offline unexpectedly, for example, an outage might be necessary immediately.

That said, Okinaka said that alerts calling for power conservation should be sent around 3 p.m., because Hawaiian Electric should know by then whether the grid is in good shape — although, again, she said unexpected generator failures can change that.

“People have got to be prepared,” Magno said. “If you have medical needs, you ought to know what they are ahead of time.”

Magno said emergency response services should not be disrupted in the event of an outage, and that cellphone coverage should remain unaffected.

The situation comes at an unfortunate time, with the 2024 Merrie Monarch Festival to take place next week.

Okinaka said Hawaiian Electric is “doing everything” to make sure the festival maintains power — and implied that Hawaiian Electric might prioritize outages elsewhere to keep the lights on at the Afook-Chinen Civic Auditorium in Hilo.

Attachment 4

Hawaii Tribune Herald

HECO failed to disclose ties to HEP

By HUGH BAKER | Wednesday, March 27, 2024, 12:05 a.m.

Hawaiian Electric is asking its customers on the Big Island to conserve electricity usage due to generation supply shortages that the utility blames on an "independent" power producer. The power producer being blamed happens to be an affiliate of the utility itself.

According to an email message sent to Hawaii Island electricity customers on March 25, Hawaiian Electric's electricity supply problems on the Big Island are the result of "significant mechanical issues" at a power plant "operated by an independent power producer."

From the message sent to Hawaiian Electric's Big Island customers on April 25:

"… The island's largest generator, *operated by an independent power producer* that sells electricity to Hawaiian Electric, has significant mechanical issues and is offline. The plant generates 60 megawatts or nearly one-third of the typical peak demand of 180 megawatts on the island." (Emphasis provided.)

The plant referenced by Hawaiian Electric is the Hamakua Energy Partners (HEP) 60-megawatt oil-fired power plant located in Honokaa.

Since 2017, HEP has been owned and operated by a company called Pacific Current (pacificcurrenthawaii.com/project/hamakua/).

Pacific Current is a wholly-owned subsidiary of Hawaiian Electric Industries (HEI) and is therefore an affiliate of Hawaiian Electric Co. since the utility is also wholly-owned by HEI (www.hei.com/company-profile/about-pacific-current/).

The failure of Hawaiian Electric's message to customers to disclose its affiliate relationship with the owner of the HEP unfairly implies that power plants not owned by Hawaiian Electric are less reliable than those owned by the power company.

This is simply not the case.

In fact, prior to HEI taking ownership of HEP in 2017 (in other words, when HEP was a truly independently owned power plant), objective data shows that HEP was the most reliable power plant on the Big Island — more reliable in fact that any of the power plants owned by Hawaiian Electric.

Power plants are complex machines that sometimes break or need to be taken out of service for overhauls, regardless of who owns them. Whether or not HEI has been a good steward in maintaining HEP since assuming its ownership in 2017 is a different question. Since it is in their own best interest to maintain the plant, one must give HEI the benefit of any doubt in this regard.

What is not in question is the role that independent power producers are playing to provide clean and reliable electricity across the Hawaiian Islands. Given the uncertain financial future of Hawaiian Electric due to its potential liability in the devastating fires on Maui in August 2023, a healthy competitive market for new renewable energy power projects is vital if Hawaii is to meet its clean energy goals.

Hawaiian Electric, the Public Utilities Commission, and the state Legislature should be doing everything in their power to promote and embrace independent power producers. They certainly should not be blaming independent power producers for generation supply problems.

Hugh Baker is a Kailua-Kona based retired utility consultant with over 40 years of experience working in wholesale power markets across the United States.

Attachment 5

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HU HONUA BIOENERGY, LLC, a Delaware limited liability company, Plaintiff, v. HAWAIIAN ELECTRIC INDUSTRIES, INC., a Hawai‘i corporation; HAWAIIAN ELECTRIC COMPANY, INC. a Hawai‘i corporation; HAWAII ELECTRIC LIGHT COMPANY, INC. a Hawai‘i corporation; PACIFIC CURRENT, LLC, a Hawaii limited liability company; HAMAKUA HOLDINGS, LLC, a Hawaii limited liability company; HAMAKUA ENERGY, LLC, a Hawaii limited liability company, Defendants.	CIVIL NO. 16-00634 JMS-KJM **THIRD AMENDED AND SUPPLEMENTAL COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF FOR VIOLATIONS OF:** **(1) SECTION 2 OF THE SHERMAN ACT (15 U.S.C. § 2) AND THE HAWAII ANTITRUST ACT (H.R.S. § 480-9)** **(2) SECTION 7 OF THE CLAYTON ACT (15 U.S.C. § 18) AND THE HAWAII ANTITRUST ACT (H.R.S. § 480-7)** **(3) SECTION 1 OF THE SHERMAN ACT (15 U.S.C. § 1) AND THE HAWAII ANTITRUST ACT (H.R.S. § 480-4)** **(4) BREACH OF CONTRACT** **(5) BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING** **(6) UNFAIR METHODS OF COMPETITION UNDER H.R.S. § 480-2** **(7) CONVERSION** **DEMAND FOR JURY TRIAL**

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THIRD AMENDED AND SUPPLEMENTAL COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

Plaintiff Hu Honua Bioenergy, LLC ("Hu Honua") files this Third Amended and Supplemental Complaint against Defendants and, demanding trial by jury, complains and alleges as follows:

I. SUMMARY OF ACTION

1. This case arises from the unlawful efforts of Defendants Hawaiian Electric Industries, Inc.; Hawaiian Electric Company, Inc.; Hawaii Electric Light Company, Inc.; Pacific Current, LLC; Hamakua Holdings, LLC; and Hamakua Energy, LLC[1] to preserve and expand their monopoly in the wholesale firm power generation market on the Island of Hawaii ("Hawaii Island"). Through this Third Amended and Supplemental Complaint, Hu Honua seeks relief under the federal antitrust laws and under Hawaii state law from Defendants' anticompetitive and other unlawful conduct designed to foreclose competition and restrain trade in the wholesale market for firm power generation on Hawaii Island.

[1] Defendants are referred to collectively as "HECO" with respect to acts and conduct in the period around and after September 2017; with respect to acts and conduct in the prior time period, "HECO" refers collectively to Defendants Hawaiian Electric Industries, Inc., Hawaiian Electric Company, Inc., and Hawaii Electric Light Company, Inc.

2. This is an amended and supplemental complaint, which both updates and supersedes the allegations in the Second Amended Complaint, which was filed over five years ago. This case was administratively closed in June 2019, and the claims against HECO have effectively been paused since Hu Honua and certain HECO entities entered into a conditional settlement in May 2017, which is now null and void by its terms. Since Hu Honua last amended its pleading in early 2018, Defendants' anticompetitive scheme has not ceased, and the motivations underlying it, and the anticompetitive effects and antitrust injuries resulting from it, have been more fully revealed and clarified. Accordingly, now that the case has been re-opened and the conditional settlement is null and void, this complaint relies on those intervening events and revelations as the basis for amending and supplementing Hu Honua's claims. This pleading also focuses and streamlines the case.

3. HECO is a monopolist. On Hawaii Island, it currently controls a share of the wholesale market for firm energy generation in excess of 90%. Firm energy (also known as "firm power") means electricity that is generated constantly (*i.e.*, available 24/7), as opposed to intermittent energy, which is generated only part of the time (*e.g.*, wind and solar). HECO has expanded its monopoly power over the wholesale market for firm power generation by an anticompetitive acquisition and the exclusion of its rivals, including Hu Honua.

4. HECO also is a monopsonist.[2] It is the only purchaser of wholesale firm energy generated on Hawaii Island, including the energy HECO itself generates. HECO has exercised and leveraged its monopsony power over the purchase of wholesale firm energy to exclude its rivals, including Hu Honua, and maintain and extend its monopolistic dominance in that wholesale market.

5. HECO has used and abused its monopoly and monopsony power with shameless arrogance and disregard not just for competition but for the people, economy, and environment of Hawaii Island. For HECO, maintaining its monopoly is paramount over all other considerations.

6. Hu Honua owns a renewable, dispatchable firm energy biomass power plant on Hawaii Island (the "Hu Honua plant" or "Facility"). That plant sits idle today because of HECO's conduct, even though Hawaii Island has an acute need for independent generating capacity—and especially renewable firm energy capacity—given the rising risks of power interruptions, blackouts, and outages that have resulted from HECO's high-handed, monopolistic dominance of the market. Moreover, the Hu Honua Facility would consume biomass feedstock from, among other

[2] "Monopsony power is market power on the buy side of the market. . . . As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'" *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312, 320 (2007) (citation omitted). "In a monopsony, the buyers have market power to decrease market demand for a product and thereby lower prices." *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008).

things, woody invasive plant species on Hawaii Island. The Hawaii Department of Transportation has previously expressed a willingness to partner with Hu Honua to dispose of highway green waste and cut trees near powerlines "to ensure that our system is more resilient to the extreme weather events we have been experiencing more often." Analysis from an industry research group has concluded that overgrowth and invasive grasses were a critical factor in the wildfire that recently devastated Maui. Dan Frosch, et al., *Everybody Knew the Invasive Grass of Maui Posed a Deadly Fire Threat, but Few Acted*, Wall St. J. (Aug. 25, 2023), https://tinyurl.com/5n8839k4. A wildfire previously erupted on Hawaii Island in 2021, "burn[ing] more than 40,000 acres of mostly grassland" and prompting calls "for vegetation control." *Id*. HECO only recently disclosed a wildfire mitigation plan, which experts faulted as lacking a thorough examination of specific hazards that could cause wildfires, particularly vegetation risk. Dan Frosch & Katherine Blunt, *Hawaiian Electric's CEO Told Congress It Had A Wildfire Plan. That Was News to Regulators*, Wall St. J. (Oct. 5, 2023), https://tinyurl.com/bdmkefe7. HECO's mitigation plan claims that it is difficult to assess vegetation risk, but "[t]hat stands in contrast to virtually every analysis of Hawaii's wildfire problem for nearly a decade." *Id.*

7. HECO has used and abused its monopoly and monopsony power by seeking to foreclose or acquire existing independent rivals and exclude or delay new

competitive entry into the wholesale market for the generation of firm energy on Hawaii Island. It has done so, among numerous other acts, by anticompetitively terminating the Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity ("Power Purchase Agreement" or "PPA") that HECO had voluntarily entered into with Hu Honua and that was approved by the Hawaii Public Utilities Commission ("PUC") almost a decade ago.[3]

8. While HECO has claimed it terminated the Power Purchase Agreement because Hu Honua missed certain contractual milestones, that assertion is pretext. In fact, terminating the Power Purchase Agreement was a competitively irrational act that sacrificed short-run gains and endangered system reliability; HECO would not have taken that step but for the prospect of obtaining higher profits in the long run from the exclusion of competition as alleged in this complaint.

9. HECO's conduct with respect to Hu Honua is an integral part of an audacious course of conduct that has given HECO control of over 90% of the wholesale market over the last decade. By all rights, HECO's market share should have been trending down to 50% or less, as it should have retired (or, at a minimum, significantly reduced the use of) its outdated fossil fuel generating plants in favor of new—and renewable—sources of firm power. Indeed, HECO needed to shift to

[3] HELCO was the signatory to the PPA, executed May 3, 2012, which was approved by the PUC on December 20, 2013.

renewable sources over time to meet regulatory standards. But HECO foreclosed every option to substitute renewable (or any new non-HECO) firm capacity for its antiquated oil-fired plants. And it set its sights on not just delaying the retirement of its own plants but actually *increasing* its hold over the market's existing capacity.

10. HECO initially intended to offset the new renewable capacity that Hu Honua would bring to the market by using its purchasing (monopsony) control to reduce energy output from the independent power plant (the "Hamakua plant" or "Hamakua") owned by Hamakua Energy Partners, L.P. (owner of the plant) and Hamakua Land Partnership, L.L.P. (owner of the land, and together with Hamakua Energy Partners, L.P., "Hamakua Partners"), HECO's biggest rival in the generation of firm power. When HECO concluded that it could instead *buy* the Hamakua plant, it shifted strategy: just three weeks after signing a contract to purchase Hamakua, it moved to terminate the Hu Honua PPA on pretextual grounds. With Hu Honua and all other potential entrants foreclosed, and with Hamakua in its grip, HECO proceeded to cement near total control over the market. Today, HECO faces only one operating competitor in the market—and an enfeebled one at that. HECO has succeeded in delaying the retirement of all of its outdated plants, which continue to generate power (and a high level of emissions) by burning oil. And the energy produced by those plants has become painfully expensive as oil prices have spiked toward levels not seen in a decade or more.

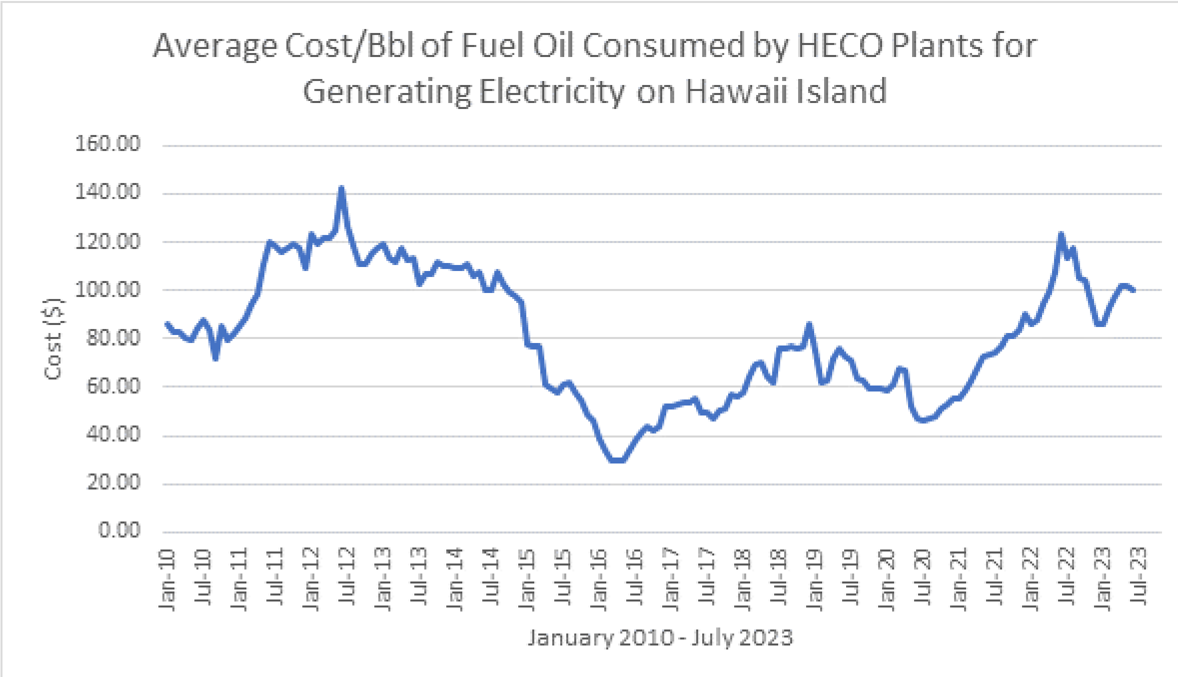

Figure 1

11. HECO's anticompetitive conduct has injured, and continues to injure, the people of Hawaii Island and HECO's actual and potential competitors alike by preventing a needed increase in renewable firm, dispatchable energy, foreclosing and delaying new competition from renewable sources, retaining inefficient firm power generation capacity, and reducing overall market capacity and grid reliability on Hawaii Island. As one result of HECO's anticompetitive and monopolistic conduct, HECO's energy reserve margin has deteriorated and fallen below safe and reliable target levels, leaving Hawaii Island beset with energy problems, including the risk of blackouts. HECO directed Hawaii Island residents to reduce consumption during peak hours at least nine times between August 2022 and March 2023—yet outages occurred earlier this year.

12. The failure of supply to meet customer demand is a hallmark of a monopolized market and is the avoidable and direct result here of HECO's elimination of competition and reduction of firm power output on Hawaii Island. Through its anticompetitive conduct, including the acquisition of Hamakua and the exclusion of Hu Honua, HECO has prevented the market for firm energy generation on Hawaii Island from functioning in a competitive manner.

13. But for HECO's conduct, the Hu Honua Facility would have been in service in 2017 or earlier. For all intents and purposes, the Hu Honua Facility stands ready today to generate firm energy for Hawaii Island. But it remains shuttered due to HECO's anticompetitive scheme. And HECO continues to take steps to disfavor and exclude Hu Honua from the wholesale market for generation of firm energy.

14. Hu Honua brings this action to stop HECO's anticompetitive conduct and return competition to the relevant market. Hu Honua seeks damages specific to each claim and appropriate equitable relief, including divestiture of the Hamakua plant.

II. THE PARTIES

15. Plaintiff Hu Honua is the developer of a renewable, dispatchable firm energy biomass power plant located at 28-283 Sugar Mill Road, Pepeekeo, Hawaii. Hu Honua is a Delaware limited liability company, approximately 87.4% of which is owned by Island Bioenergy, LLC.

16. Defendant Hawaiian Electric Industries, Inc. ("HEI"), a holding company whose shares are listed on the New York Stock Exchange under the symbol "HE," is a Hawaii corporation whose principal place of business is 1001 Bishop Street, Honolulu, Hawaii. HEI participated in the acts alleged in this complaint giving rise to the claims set forth below.

17. Defendant Hawaiian Electric Company, Inc. ("Hawaiian Electric"), a subsidiary of HEI, is a Hawaii corporation whose principal place of business is 1099 Alakea Street, Honolulu, Hawaii. Hawaiian Electric participated in the acts alleged in this complaint giving rise to the claims set forth below.

18. Defendant Hawaii Electric Light Company, Inc. ("HELCO"), a subsidiary of Hawaiian Electric Company, Inc., is a Hawaii corporation whose principal place of business is 1200 Kilauea Ave, Hilo, Hawaii. HELCO participated in the acts alleged in this complaint giving rise to the claims set forth below.

19. Defendant Pacific Current, LLC ("Pacific Current"), a subsidiary of HEI, is a Hawaii limited liability company whose principal place of business is 733 Bishop St., Honolulu, Hawaii. Pacific Current was formed as part of the scheme alleged in this complaint and has participated in the alleged acts giving rise to the claims set forth below. Pacific Current has also benefitted from the anticompetitive conduct alleged in this complaint that occurred before Pacific Current was formed.

20. Defendant Hamakua Holdings, LLC ("Hamakua Holdings"), a direct

subsidiary of Pacific Current and an indirect subsidiary of HEI, is a Hawaii limited liability company whose principal place of business is 733 Bishop St., Honolulu, Hawaii. Hamakua Holdings was formed as part of the scheme alleged in this complaint and has participated in the alleged acts giving rise to the claims set forth below. Hamakua Holdings has also benefitted from the anticompetitive conduct alleged in this complaint that occurred before Hamakua Holdings was formed.

21. Defendant Hamakua Energy, LLC ("Hamakua Energy"), a direct subsidiary of Hamakua Holdings and an indirect subsidiary of Pacific Current and HEI, is a Hawaii limited liability company whose principal place of business is 733 Bishop St., Honolulu, Hawaii. Hamakua Energy was formed as part of the scheme alleged in this complaint and has participated in the alleged acts giving rise to the claims set forth below. Hamakua Energy has also benefitted from the anticompetitive conduct alleged in this complaint that occurred before Hamakua Energy was formed.

22. Defendants form a single economic enterprise under the antitrust laws. HEI is the 100% owner, directly or indirectly, of Hawaiian Electric, HELCO, Pacific Current, Hamakua Holdings, and Hamakua Energy. Hawaiian Electric, HELCO, Pacific Current, Hamakua Holdings, and Hamakua Energy are organized and controlled by HEI, and their decisions, affairs, and business are conducted so as to make them instrumentalities, agents, conduits, and/or adjuncts of HEI. For

example, the anticompetitive acts of HELCO set forth in this complaint were undertaken with the knowledge and approval of HEI and Hawaiian Electric. During part or all of the relevant time period:

(1) HEI has had control and authority to appoint board directors for Hawaiian Electric and HELCO, and officers and managers for Hawaiian Electric, HELCO, Pacific Current, Hamakua Holdings, and Hamakua Energy;

(2) Multiple Defendants—including at a minimum HEI, Hawaiian Electric, and HELCO—have shared directors, officers and/or managers, including, for example:

- Alan Oshima served as chairman of the board of HELCO while also serving as president, chief executive officer, and a director of Hawaiian Electric;
- Constance Lau, while serving as president, chief executive officer, and a director of HEI, served as a director of HELCO and chairman of the board of Hawaiian Electric;
- Scott Seu served as president and a director of HELCO while also serving as president and chief executive officer and a director of Hawaiian Electric;
- Shelee Kimura served as president and a director of HELCO

while also serving as president and chief executive officer and a director of Hawaiian Electric;

(3) Hawaiian Electric and HELCO have represented to the PUC that the "directors of HEI have fiduciary duties to HEI and its shareholders to . . . act on an informed basis . . . in making decisions on behalf of HEI, and to oversee the operations of HEI's [direct and indirect] subsidiaries" and "that HEI must oversee the entire corporate organization and therefore must be provided information from all of its subsidiaries;"

(4) "Consolidated" sessions of board directors and senior executives of multiple Defendants—including, at a minimum, HEI and Hawaiian Electric—have occurred at which "discussions pertain[ing] to broader topics that impact all [HEI] companies" occur and "broad information flows to all [HEI] companies;"

(5) HEI, Hawaiian Electric and HELCO have longstanding intercompany billing arrangements;

(6) Pacific Current, a limited liability company, has described itself "[a]s a tier-one subsidiary of [HEI]," and is overseen by HEI as its sole LLC member, with material matters overseen by the HEI board of directors; and

(7) Hamakua Holdings, a limited liability company, has had Pacific Current as its sole member, and Hamakua Energy, also a limited liability company, has had Hamakua Holdings as its sole member.

23. Defendants pursued the anticompetitive scheme alleged in this complaint with a common anticompetitive purpose and rolled up the profits and benefits from the scheme through the enterprise. Further, the anticompetitive purpose and knowledge of each Defendant is properly imputed to all other Defendants.

III. JURISDICTION AND VENUE

24. This Third Amended and Supplemental Complaint is filed and this action is instituted under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to recover the damages caused by past and continuing violations of the Sherman Act (15 U.S.C. §§ 1–2), the Clayton Act (15 U.S.C. § 18), and the Hawaii Antitrust Act and to obtain a permanent injunction and other equitable relief—including divestiture—to stop HECO's anticompetitive conduct and restore competition to the wholesale firm power generation market on Hawaii Island.

25. This Court has original and exclusive jurisdiction over the subject matter of this civil action under 28 U.S.C. §§ 1331 and 1337. This Court may exercise supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

26. Venue in this District is proper because all parties transact business on a continuous basis within this District, and may be found here within the meaning

of 15 U.S.C. §§ 15, 22 and 28 U.S.C. § 1391. Further, the unlawful acts alleged in this complaint were performed and occurred in material part within this District.

IV. FACTS GIVING RISE TO THE COMPLAINT

A. Electricity Markets in the State of Hawaii

27. Hawaii's islands face unique challenges generating electricity due to their isolated location and lack of traditional electricity-generating resources. The bulk of Hawaii's electricity has been and continues to be generated by petroleum, making the State's utility the most oil-dependent in the country. All of the petroleum consumed by fossil fuel plants in the State derives from costly crude oil imported from Libya, Argentina, and other off-shore locations, resulting in the highest average electricity prices in the United States by far—nearly triple the U.S. average. Hu Honua itself is a direct customer of HECO and has seen its electric rates increase sharply over the period of time relevant to this complaint.

28. To mitigate the risk of dependence on fossil fuel sources, the State of Hawaii has, through policies and legislation, emphasized the development of renewable energy resources. *See, e.g.*, Hawaii Revised Statutes (H.R.S.) § 269-92. Renewable energy includes energy resources that are naturally replenishing, and can be either firm or intermittent in nature. Renewable energy resources include biomass, hydro, geothermal, solar, wind, ocean thermal, wave action, and tidal action. *See, e.g.*, H.R.S. § 269-91.

29. The State of Hawaii has acted to further the development of renewable energy through, among other things, the Hawaii Clean Energy Initiative, the stated goal of which is to increase Hawaii's reliance on and use of renewable resources, which include biomass, to supply 40% or more of Hawaii's energy needs by 2030. Similarly, in June 2015, the Hawaii Legislature amended Hawaii's Renewable Portfolio Standard statute to require Hawaii to achieve 100% renewable energy by 2045. *See* H.R.S. § 269-92.

30. Achieving this standard is particularly challenging because the State of Hawaii has no interconnection with other utility grids. There are no undersea power lines between Hawaii's islands, nor with the mainland or other utilities. Thus, each of Hawaii's islands must have a fully functional power generation system with the ability to reliably generate the island's entire power supply in isolation from all other island grids.

31. Each island is therefore a separate geographic market. Electricity generated on other islands is not a substitute for electricity generated on Hawaii Island.

32. The retail distribution and sale of electricity to consumers and other retail customers is distinct from the wholesale generation and sale of electricity. Wholesale electricity generation is divided into two distinct categories: firm energy and intermittent energy. Firm energy, which is provided by biomass, fossil fuel,

and geothermal facilities, is energy or energy-producing capacity that is intended to be available at all times, even under adverse conditions, during the period covered by a guaranteed commitment to deliver. Intermittent energy is energy or energy-producing capacity that comes from an electric generating plant with output controlled by the natural variability of the energy resource (*e.g.*, wind or sunshine) rather than energy dispatched based on system requirements. Intermittent output usually results from the direct, non-stored conversion of naturally occurring energy fluxes such as solar energy (only produced during daylight hours), wind energy, or the energy of free-flowing rivers (that is, run-of-river hydroelectricity).

33. Because intermittent energy capacity is (by its nature and definition) not always available, it is not a substitute for firm energy capacity. Accordingly, the market for the generation and sale of firm energy is separate from the product market for the generation and sale of intermittent energy.

34. Firm energy is also often “dispatchable energy.” Dispatchable energy can be released in the amount requested by the system operator (in this case, HECO) and increased or decreased as necessary to ensure that the grid can support the requested load. To preserve the stability of its transmission and distribution grid, HECO must have available firm, dispatchable energy to support the grid when other sources of energy are inadequate.

35. Only some renewable energy is firm. The biomass (*i.e.*, organic

matter used as fuel) that the Hu Honua Facility would use to generate electricity produces firm renewable energy. In contrast, wind and solar renewable energy are not firm. As a result, in order to deliver reliable energy to consumers, utilities must backstop wind, solar, and other intermittent energy by certain levels of firm power or face blackouts and other periods of power interruptions and unavailability.

36. The State of Hawaii has a policy in favor of promoting, rather than curtailing, competition in wholesale electricity markets. Notably, acting under its statutory authority, the PUC has adopted the "Competitive Bidding Framework" in which, *inter alia*, firm energy generators compete against each other to supply wholesale power. The PUC adopted the Competitive Bidding Framework in 2006 to assure the use of competitive bidding or its equivalent as a mechanism for acquiring new energy generation in the State.

B. HECO's Possession of Monopsony and Monopoly Power in the Wholesale Market for Firm Power on Hawaii Island

37. HECO is a public utility serving over 88,000 customers on Hawaii Island. It generates power itself, and also purchases wholesale power from independent power producers ("IPPs"), all for sale or resale at retail rates to Island residents and other direct customers. At the wholesale level, HECO competes with the IPPs from which it purchases power.

38. HECO possesses monopoly power in the wholesale market for firm electricity generation on Hawaii Island. HECO has held that power since at least

2012, and since that time has substantially increased it. As of 2012, HECO reported a market total of 287.1 MW (net) of firm capacity, of which HECO accounted for 197.1 MW, representing a monopoly market share of almost 69%. Since that time, as the result of HECO's actions as alleged in this complaint, HECO's market share has risen dramatically while the market's total firm capacity has dropped. Of a reported market total of 259.65 MW (net) of firm generation capacity as of early 2023, HECO owns 235.65 MW, representing more than 90% of Hawaii Island's wholesale firm energy generating capacity. HECO achieved this substantial expansion of its monopoly power through various acts described below, including the acquisition of the oil-powered Hamakua plant, accounting for 58 MW (net) of firm energy capacity. By this acquisition, HECO extinguished competition from its largest independent rival. Only one remaining independent producer of firm power, Puna Geothermal Venture ("PGV"), today competes with HECO, with a current firm power capacity of 24 MW. In fact, PGV's plant went offline in May 2018 because of a lava flow, at which point HECO effectively held a 100% share of the relevant market. In late 2020, PGV gradually began to return to service, albeit at a limited available capacity well below its contracted full capacity.

39. Every relevant market has a buying side and a selling side. As noted above, HECO has a monopoly on the selling side of the relevant wholesale market for firm power generation. On the buying side of that market, HECO has monopsony

power. That is, HECO has monopsony purchasing power over wholesale firm energy. In Hawaii, IPPs have no choice but to sell their power to HECO to reach retail consumers at scale. As the retail monopoly supplier on Hawaii Island, HECO is the sole purchaser of wholesale power and as such holds an effective 100% share of the buyer's side of the relevant market. HECO has not permitted the use of its grid for the "wheeling" or transmission of power from IPPs to retail power purchasers, and it would be economically impractical for those smaller independent producers to build their own transmission and distribution system for retail consumers. As a result, in order to participate in wholesale firm energy generation on Hawaii Island, an IPP must deal with HECO's monopsony (*i.e.*, buyer's monopoly).

40. HECO purchases wholesale power from IPPs via forward contracts referred to as power purchase agreements. Typically, a power purchase agreement must be executed before the construction of a power plant by an IPP; otherwise, the IPP would not have sufficient confidence in its ability to sell the output of the plant. Once a power purchase agreement has been executed, HECO requests that the PUC approve certain terms of that agreement.

41. HECO's monopsony power gives it the ability to delay or refuse power purchase agreements to IPPs in the wholesale power generation market on Hawaii Island—which forecloses or impedes those IPPs from entering the market and allows HECO to maintain its monopoly power as a supplier of firm power.

Moreover, even when HECO enters into a power purchase agreement with an IPP, HECO retains control over when and how much energy to dispatch from that IPP. That is, HECO typically retains the ability to exercise its monopsony power by reducing its wholesale power purchases down to the minimum allowed.

C. <u>The Power Purchase Agreement Between HECO and Hu Honua</u>

42. On May 3, 2012, HELCO[4] and Hu Honua entered into a Power Purchase Agreement for the generation and sale of electricity from a renewable, dispatchable firm energy biomass power plant (the Hu Honua Facility) on Hawaii Island. That power plant would, among other things, consume, and therefore create a demand for, a renewable and sustainable source of locally produced biomass feedstock from eucalyptus crops and invasive species (creating well over 150 direct and ancillary jobs in the greater Hilo community). It was designed to operate on that renewable fuel, which can be used in perpetuity. The biomass feedstock was to be 100% locally grown and harvested on a sustainable rotational basis and would have provided an important means to reduce Hawaii's dependence on imported fossil fuels while providing a community solution to the disposal of invasive species biomass material (*e.g.*, albizia and gorse) that would otherwise become landfill or present a risk of fueling wildfires. As the developer, Hu Honua was responsible for

[4] HELCO and Hu Honua were the only parties to the agreement. *See* PPA § 1 (definition of "party" and "parties").

the design, construction, and operation of the Hu Honua Facility.

43. The Power Purchase Agreement includes terms and conditions that were negotiated at arms-length. The Power Purchase Agreement is not a mandatory purchase contract at avoided cost rates under Public Utility Regulatory Policies Act of 1978.

44. Biomass is a desirable form of energy generation for Hawaii because it can be sourced locally and is both renewable and firm, which means that it is capable of producing energy on demand on a 24/7 basis. As a result, biomass competes with—and because of its lower costs, displaces—fossil fuel plants such as those owned by HECO. The Hu Honua Facility satisfies strict environmental emissions standards and has implemented state-of-the-art carbon emissions control technology. Biomass is favored in Hawaii—indeed, it is a statutorily approved renewable generation method. *See*, *e.g.*, H.R.S. § 269-91. As the U.S. Energy Information Administration has explained, "[b]urning either fossil fuels or biomass releases carbon dioxide (CO2), a greenhouse gas," but "the plants that are the source of biomass for energy capture almost the same amount of CO2 through photosynthesis while growing as is released when biomass is burned, which can make biomass a carbon-neutral energy source."[5] And using biomass to generate renewable firm power displaces

[5] U.S. Energy Info. Admin., Biomass Explained: Biomass and the Environment (last updated Nov. 7, 2022), https://tinyurl.com/2um75vx4.

fossil fuel units that are not carbon-neutral.

45. The Hu Honua Facility was and is intended to provide renewable firm, dispatchable energy. Without a reliable source of dispatchable energy, HECO cannot ensure the stability of the grid and avoid blackouts from inadequate energy production. In this regard, the Hu Honua Facility was designed to provide a broad range of "ancillary services" such as voltage and frequency regulation to HECO's electrical grid. "Ancillary services" are services that ensure reliability and support the transmission of electricity from generation sites to customer loads. Dispatchable firm power generators, including traditional fossil fuel units, provide such services. Critically, Hu Honua is able to displace fossil fuel units because the Facility is able to provide these essential system security capabilities. Ancillary services include vital components of a stable system such as load regulation, spinning reserve, non-spinning reserve, replacement reserve, and voltage support. Because these services have to be consistently available, they cannot be provided by intermittent producers such as wind and solar. That is, intermittent generation resources do not provide the level of ancillary services required for the system's security. The Hu Honua Facility would thus help to facilitate entry by other renewable, albeit intermittent, energy sources (such as solar) because the Hu Honua Facility's renewable, firm energy could help support the grid when those intermittent energy sources were offline.

46. The Power Purchase Agreement described the Hu Honua Facility as having a "Committed Capacity" of 21.5 net MW. The PPA involved both fixed and variable monthly charges. The fixed charges comprise those that Hu Honua would charge regardless of the Facility's output (*e.g.*, fixed payments for capacity). The PPA imposed variable charges based on factors such as the dispatch of the Facility, the amount of fuel burned, and variable operations costs. Notably, there was a declining fuel price scale for all electricity purchases in excess of 10 MW up to the Committed Capacity of 21.5 net MW, which meant that the price effectively decreased for electricity purchases in excess of 10 MW. The Power Purchase Agreement's prices were "delinked" from oil prices and tied to a more stable and less volatile U.S. GDP-based national index.

47. HECO submitted a detailed Application to the PUC for approval of the Power Purchase Agreement on August 30, 2012.

48. In its Application to approve the Power Purchase Agreement, HECO emphasized that the Hu Honua project would help "reduc[e] HELCO's reliance on fossil fuels" and "increase its overall renewable energy portfolio," consistent with State policy. HECO also acknowledged that the "Hu Honua Project is projected to provide an economic benefit to HELCO ratepayers and is cost effective over the 20 year contract term." HECO further advised the PUC that the renewable energy would "significantly contribute to the Hawaiian Electric Companies' RPS

[renewable portfolio standard]," *i.e.*, the standard specifying the percent of electricity that must be generated by renewable resources. And HECO told the PUC that "the operational performance requirements of the Hu Honua Facility will be supportive of [HECO's] grid power quality and system reliability due to the dispatchable and automatic response capabilities of the Facility." In support of its Application, HECO represented that the energy generated by Hu Honua would generally displace fossil-fuel-generated power and could allow for certain fossil fuel units to be decommissioned.

49. The PUC reviewed the Application over the following 15 months, and then approved the Power Purchase Agreement.

D. The Hawaii PUC's Approval of the Power Purchase Agreement

50. The PUC approved the Power Purchase Agreement in its Decision and Order on December 20, 2013. The PUC noted that "[c]onsistent with HRS [section] 269-27.2(c), the proposed pricing structure is delinked from fossil fuel pricing." (Dec. 20, 2013 Order No. 31758 at 50 (Dkt. 2012-0212).) The PUC stated that "[t]he capacity and energy purchase rates . . . appear reasonable," based on "factors such as the State's need to limit its dependence on fossil fuels and mitigate against volatility in oil pricing," the value of providing "additional diversification in [HECO's] renewable generation portfolio," and the value of "economic stimulation and the creation of jobs, including both jobs at the Hu Honua facility and supporting

jobs in industries such as forestry, harvesting, and hauling." (*Id.* at 51–52.) The PUC also noted the PPA's "economic benefits" to ratepayers, including "cost savings of $40 million" and other benefits. (*Id.* at 50.)

51. The PUC expressly recognized the importance of the Hu Honua Facility in advancing the State's policy to further the use of renewable energy: "The terms and conditions of the PPA are consistent with the State's overall energy policy of reducing the State's dependence on fossil fuel." (Dec. 20, 2013 Order No. 31758 at 50 (Dkt. 2012-0212).) "Stated succinctly, the Project will provide firm, dispatchable, renewable energy, and will provide ancillary services." (*Id.* at 48.)

E. <u>The PUC Directs HECO to Plan for Retiring its Fossil Fuel Plants</u>

52. HECO's monopoly over wholesale firm power generation depended on maintaining control over IPPs, such as Hu Honua. At the time the PUC approved the PPA with Hu Honua, HECO faced competition from just two IPPs—PGV and Hamakua. To avoid diluting its monopoly position while achieving the benefits of adding Hu Honua's renewable energy capacity, HECO needed to find a way to foreclose or curtail existing competition from other IPPs. HECO had just such a strategy: when Hu Honua came online, HECO would maintain its own fossil fuel plants in operation while throttling back the independent Hamakua fossil fuel plant. As the PUC found when it approved the PPA, "[i]t appears that [HECO's] strategy is to continue operation of its steam fossil generation plants even though they are

apparently less fuel efficient and more expensive than IPP base load generation."[6] (Dec. 20, 2013 Order No. 31758 at 109 (Dkt. 2012-0212).) HECO's anticompetitive plan was to significantly change "the operation of IPP fossil generation . . . when Hu Honua is placed into service." (*Id.* at 107.) In particular, "when Hu Honua is placed into service" (*id.*), HECO intended to curtail operation by the Hamakua fossil fuel plant "in an uneconomic manner." (*Id.* at 109.)

53. The PUC was concerned by HECO's plan to displace "[Hamakua]'s existing combined cycle fossil generating unit(s) . . . when Hu Honua is placed into service." (Dec. 20, 2013 Order No. 31758 at 107 (Dkt. 2012-0212).) HECO had "failed to consider the potential displacement of its [own] steam fossil units." (*Id.*) In fact, "the commission [found] that the total annual costs associated with [HECO's] existing Hill and Puna steam fossil generating plants are substantially higher than the total annual costs of purchased power from [Hamakua]'s combined cycle IPP generating plant." (*Id.* at 108.) The PUC recognized that this smacked of "preferential treatment to utility-owned generation resources versus IPPs where the IPPs are more fuel-efficient and economic than utility generation." (*Id.* at 110.)

54. The PUC concluded "that further analysis of [HECO's] power supply planning and operations is necessary, independent of the addition of Hu Honua to

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[6] HECO planned to retire capacity at just one of its antiquated fossil fuel plants (the Shipman plant), which eventually occurred in 2015.

[HECO's] generation portfolio" and "order[ed] [HECO] to file a Power Supply Improvement Plan ('PSIP') with the commission." (Dec. 20, 2013 Order No. 31758 at 112 (Dkt. 2012-0212).) In particular, HECO was ordered to prepare a "Fossil Generation Retirement Plan which shall include an analysis of which existing fossil fuel plants (beyond the Shipman units) can be retired." (*Id.* at 113.)

55. HECO thus faced a threat to the maintenance of its monopoly over the wholesale market for the sale of firm electric power on Hawaii Island. The PUC expected HECO to commence planning for the retirement of its own fossil fuel plants while expanding capacity from renewable sources of firm power, such as Hu Honua. If HECO proceeded to do this, its current high market share would drop down toward—and even below—the 50% mark. In other words, HECO would face the potential dilution or loss of its wholesale monopoly power.

F. <u>HECO Pursues a Monopolistic Strategy</u>

56. Over the ensuing years, HECO adopted a multi-pronged strategy not just to preserve its wholesale monopoly power, but to extend it. First, HECO delayed the retirement of its own fossil fuel plants. Although the PUC had directed it to plan for such retirement, HECO repeatedly delayed doing so (thereby repeatedly postponing the ever more distant plant retirement dates) by making inadequate and misleading Power Supply submissions with the PUC on a serial basis. Second, while professing to view firm renewable projects with IPPs as valuable and ostensibly

moving forward with such proposals from IPPs, HECO ensured that none came to fruition. Third, HECO explored options to neuter the Hamakua plant as an independent competitor, initially continuing the strategy of reducing purchases from Hamakua but ultimately seizing the opportunity to buy the Hamakua plant outright. Fourth, once HECO struck its deal to buy the Hamakua plant, it moved swiftly in early 2016 to end its PPA with Hu Honua on pretextual terms.

57. *HECO Delays Retiring Its Own Fossil Fuel Plants*. As noted above, in December 2013, the PUC ordered HECO to prepare a PSIP, including an analysis of which of its existing fossil fuel plants could be retired (beyond the already-scheduled Shipman plant) to make way for more efficient renewable capacity. Several months later, in its initial PSIP submission on April 21, 2014, HECO professed to be "provid[ing] a detailed plan to remove from service, and from customer rates, an amount of excess steam generation capacity . . . equal to at least the net demonstrated capacity of the Hu Honua generating plant in order to ensure that ratepayers receive some of the benefits that Hu Honua is designed to provide after the unit is placed into commercial operation." (April 21, 2014 Power Supply Plan, Exhibit 10 at 1 (Dkt. 2012-0212).) Yet HECO's "base plan" accounted only for decommissioning the Shipman plant and once again sought to use Hu Honua as a basis to displace the Hamakua plant at least in part. (*Id*. at 37.)

58. In HECO's August 2014 PSIP, it represented to the PUC that HECO's

Puna, Hill 5, and Hill 6 facilities (fossil fuel plants) would be deactivated in 2018, 2020, and 2022, and decommissioned in 2020, 2022, and 2024, respectively.[7] (Aug. 26, 2014 PSIP at K-7 (Dkt. 2014-0183).) These dates were years after the Hu Honua Facility would have been online.[8]

59. HECO's PSIP did not satisfy the PUC. Almost two years after the Hu Honua PPA was approved, in November 2015, the PUC found the August PSIP to be unjustified on a number of grounds related to fossil fuel retirement and renewable energy generation. The PUC found it "necessary to remind the HECO Companies that as a result of their numerous, repeated failures to properly plan for an affordable, high renewable future, the commission has had to take appropriate actions to address the Companies' poor performance." (Nov. 4, 2015 Order No. 33320 at 137 (Dkt. No. 2014-0183).) HECO's August 2014 PSIP was found "not acceptable without supplementation and amendment." (*Id.* at 134.) In general, "the commission [was] concerned that the implicit 'deal' in the HECO Companies' Preferred Plans appears

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[7] These were the plants that the PUC had singled out for potential decommissioning when it approved the Hu Honua PPA in December 2013. (Dec. 20, 2013 Order No. 31758 at 108 (Dkt. 2012-0212).) When a plant is decommissioned (retired), it is removed from the utility's rate base and thus ceases to earn a profit for HECO. When HECO merely deactivates a plant, however, the plant remains in its rate base, and HECO continues to obtain a return on the asset.

[8] The August 2014 PSIP accounted for Hamakua's potential conversion to liquified natural gas ("LNG") as fuel, which HECO planned on supplying to Hamakua. Put another way, HECO planned to profit from supplying Hamakua with LNG in the future. Hamakua, however, never converted to LNG.

to favor the financial interests of the [HECO] Companies." (*Id.* at 4.) Indeed, "[s]everal commenters argue that the [HECO] PSIP prioritizes fossil fuel and biofuel generation so that the utility may continue operating its old fossil fuel plants to optimize its profit margin." (*Id.* at 36.)

60. But HECO continued to delay retirements. Immediately after purportedly terminating the Hu Honua Power Purchase Agreement, HECO's April 2016 PSIP update stated that HECO's preferred plan was to deactivate Puna *in 2022*, deactivate Hill 5 from service *in 2027*, and deactivate Hill 6 from service *in 2030*. This was years after the August 2014 PSIP's already delayed deactivations. HECO's Puna, Hill 5, and Hill 6 facilities are still in service today.

61. *HECO Sabotages Negotiations for Needed Renewable Capacity*. Even after entering into the Hu Honua PPA, HECO publicly professed that it needed—and was actively seeking—additional firm renewable capacity, including by issuing in 2013 a Request for Proposals ("RFP") for 50 MW of renewable, dispatchable geothermal energy and firm capacity resources. While the need was real, HECO's professions of intent to negotiate new PPAs were false.

62. In 2015, under the geothermal RFP, HECO selected Ormat Technologies ("Ormat"), the owner of the independent PGV plant, to provide 25 MW of additional firm geothermal capacity for Hawaii Island. In a media release at the time, HECO stated that "[t]he next step in the process is to begin contract negotiations

with Ormat." Yet HECO effectively sabotaged those negotiations. According to the independent consultant that observed the bid process for the project, the "assumptions underlying the RFP were not transparent, did not support the type of resource being sought in the RFP and did not support the threshold price." And indeed, HECO's dealings with Ormat were effectively a charade, forcing Ormat to walk away from negotiations. Negotiations ended on December 23, 2015. As the independent consultant observed, the project seemed "doomed before it even began." And as the PUC had previously observed, members of the public had "expressed suspicion that [HECO] used the PSIP and the RFP process to deliberately delay geothermal development." (Nov. 4, 2015 Order No. 33320 at 37 (Dkt. 2014-0183).) Indeed, HECO's own PSIP "fail[ed] to indicate when the utility will take its fossil fuel plants offline to accommodate geothermal energy as a replacement for firm power." (*Id.* at 36.)

63. *HECO Agrees to Acquire the Hamakua Plant*. The third part of HECO's anticompetitive strategy was to foreclose independent competition from the Hamakua plant. In or about early 2015, if not earlier, HECO began to negotiate with the owners of the plant to acquire it. Hamakua's owners could not simply sell to a third party because, years before, HECO had secured a right of first refusal binding Hamakua's owners to first attempt to negotiate a sale of their interest in the Hamakua plant to HECO (and, if agreement was not reached, to nonetheless sell the plant to

HECO at a lower price in the event any such offer was made to a third party within a year). Negotiations continued over an extended time and were protracted. Finally, on December 23, 2015—the same day that negotiations ended between Ormat and HECO to supply geothermal capacity—HECO announced it had signed an $84.5-million contract to purchase the Hamakua plant. Acquisition of the Hamakua plant would provide HECO with near-total market control and insulate it from competition from the largest independent firm power provider on Hawaii Island. It would also remove Hamakua's critical voice in regulatory proceedings—one that had urged the PUC to require HECO to decommission its older and less efficient fossil fuel generating units as independent renewable plants like Hu Honua came online. (Dec. 20, 2013 Order No. 31758 at 77–79 (Dkt. 2012-0212).) On February 12, 2016, HECO filed its application with the PUC to approve its purchase of Hamakua.

64. At the same time that HECO was negotiating the takeover of its largest independent rival, it was setting the table for what became the fourth part of its monopolistic scheme: the pretextual termination of its PPA with Hu Honua.

G. HECO Purports to Terminate the Hu Honua Power Purchase Agreement

65. While HECO was negotiating its acquisition of Hamakua, it began to contemplate a pretextual termination of Hu Honua's PPA. As long as the Hamakua plant was in independent hands, HECO could use its monopsony power to dispatch less energy from Hamakua to offset new firm energy sources like Hu Honua, while

leaving its own share of the wholesale firm power market unaffected. Indeed, HECO had long been controlling Hamakua's output, having decreased Hamakua's dispatch from roughly 253,000 MWH in 2009 to approximately 161,000 MWH in 2013. But the prospect that Hamakua could end up in HECO's hands changed HECO's calculus with respect to Hu Honua. The transfer of Hamakua to HECO would mean that there would no longer be an independent Hamakua for HECO to use as a target to offset Hu Honua's energy. And since HECO would then own more than 90% of the wholesale firm energy market, Hu Honua's firm renewable energy would unavoidably jeopardize the need for HECO's own fossil fuel plants. HECO did not terminate the Hu Honua PPA in 2015, however, because the outcome of the negotiations with Hamakua's owners was uncertain. Moreover, terminating the Hu Honua PPA would actually endanger HECO's negotiations to purchase the Hamakua plant.

66. Specifically, terminating the Hu Honua PPA would have endangered HECO's plan in 2015 because the pendency of Hu Honua's project in that period placed substantial pressure on Hamakua Partners and its investors to sell the Hamakua plant to HECO—and to do so at a more favorable price.[9] HECO had been decreasing Hamakua's dispatch for years, and it was public knowledge that HECO

[9] HECO's publicly announced selection of Ormat to negotiate a firm energy power purchase agreement in 2015 also placed pressure on Hamakua's owners, who were unaware that HECO had no intention to complete the Ormat negotiations (which ended on December 23, 2015, the same day that the deal to buy Hamakua was announced).

intended to further curtail Hamakua's dispatch to offset production from Hu Honua once that facility came online. Indeed, not only had HECO targeted Hamakua for throttling, it had threatened to do so in a way that—according to the PUC—could "result in violations of [Hamakua]'s existing air permit." (Dec. 20, 2013 Order No. 31758 at 83 (Dkt. 2012-0212).) At the time, HECO asserted an unfettered right to "dispatch [Hamakua] as the system may require." "[I]f this is not consistent with how [Hamakua] originally planned to operate, that is, essentially, [Hamakua's] problem." (*Id.* at 83.) While the PUC had counseled HECO in 2013 not to discriminate against Hamakua, HECO's April 2014 PSIP filing contained a base plan "show[ing] the displacement of . . . [Hamakua] to accommodate increasing distributed PV [photovoltaic] and Hu Honua." (April 21, 2014 Power Supply Plan, Exhibit 10 at 1 (Dkt. 2012-0212).) "Hu Honua is able to displace fossil generation because . . . the resource is able to provide essential system security capabilities." (*Id.*) As such, it served HECO's purpose of maintaining pressure on Hamakua to not terminate the Hu Honua PPA while still in negotiation with Hamakua's owners.

67. Success in the Hamakua negotiations was imperative to HECO because obtaining control of Hamakua would entrench HECO's dominance and vault it to near-total control of the wholesale firm power market. Of course, once a deal for control of Hamakua was done, HECO would have strong monopolistic incentives to terminate the Hu Honua PPA.

68. HECO executed the contract to acquire Hamakua on December 21, 2015. At that point, HECO turned its attention to the Hu Honua Facility—one of only two remaining competitors in the wholesale firm power generation market. Although HECO knew the result it wanted to achieve—termination of the Hu Honua PPA—it needed a pretext to escape the PPA it had entered and which the PUC had approved. The pretext that HECO seized on involved labor and construction disruptions that Hu Honua experienced at the Facility.[10] The disruptions were resolved, and by the end of 2015 construction was cleared for resumption. But the lost time meant that the project would not be able to achieve two "milestones" set forth in the PPA: (i) the "pass boiler hydro test" milestone, which was set for 18 months after the PUC Approval Date, and (ii) the "Commercial Operation Date Deadline," which was set for 24 months after the PUC Approval Date. Because the PUC Approval Date was "the date of the issuance of the PUC Approval Order," PPA § 25.12(D)(2)—here, December 20, 2013—the "pass boiler hydro test" milestone

[10] Hu Honua executed a construction contract for the Facility in late October 2012 and commenced construction by 2013. During the construction, disputes arose with the Facility construction contractor that became insoluble. Breach of contract claims and counterclaims were filed by and among Hu Honua, the contractor and various vendors. In addition, while the parties were attempting to resolve the contract disputes, Hu Honua learned of a labor union dispute in which a labor union jurisdiction panel had ruled that Hu Honua's contractor was utilizing the incorrect craft union for construction of the plant's boiler and ordered the contractor to cease using incorrect craft labor for such work. In June 2013, the labor union dispute was resolved, but Hu Honua's dispute with the contractor remained unresolved. The contractor/vendor payment disputes were resolved in the last quarter of 2015.

date was June 20, 2015, and the "Commercial Operation Date Deadline" was December 20, 2015.

69. Extensions of milestone dates are frequently requested in the power industry, and consent is commonplace.[11] Section 2.4 of the Power Purchase Agreement expressly provided that Hu Honua could request an extension of any Guaranteed Milestone (other than the Commercial Operation Date Deadline), and that HECO's approval of any such extension "shall not be unreasonably withheld." PPA § 2.4(A)(1)(a). And Section 25.8 of the PPA contemplates that other terms of the PPA, including other deadlines, could be amended as well, including the Commercial Operation Date Deadline. But for its anticompetitive scheme, HECO would have negotiated and approved milestone extensions for Hu Honua.

70. Starting in January 2015, Hu Honua approached HECO about resolving the milestone issues, offering to pay liquidated damages for the delay (as provided in the PPA, but for a longer time period) and providing ample assurances that the delay would be brief and that Hu Honua had obtained guaranteed funding to complete the Facility. Hu Honua made a series of offers to keep the project on track, but HECO dragged out negotiations without accepting or rejecting an extension of

[11] Similarly, when HECO itself participates as a project proposer in competitive bidding framework RFPs, the RFP provides that milestone dates are "subject to reasonable adjustment agreeable to [HECO] consistent with [HECO's] negotiation of such milestones that would be completed with an independent power producer under similar circumstances."

the milestone dates. Had HECO agreed to milestone extensions in early 2015, the Hu Honua Facility would have been completed and generating power in 2016.

71. HECO continued its strategy of delay throughout 2015, raising issues that would postpone resolution without creating an immediate impasse, as HECO pushed to negotiate its acquisition of Hamakua. For example, in early 2015, HECO linked the possibility of milestone extensions to a reduction in the PPA's energy charge. HECO sought to leverage the fact that Ormat was compelled to offer power at 12 cents per kWh to induce Hu Honua to accept a similar charge, even though the independent observer of those (fruitless) negotiations had informed HECO in 2014 that there was "no quantitative support . . . to justify the amount." HECO further noted that price reductions would require PUC approval and must be packaged together with milestone relief, even though Hu Honua repeatedly (and correctly) explained that the latter did not require PUC approval. Moreover, when Hu Honua offered a price reduction that HECO agreed would produce customer savings, HECO complained of the effort that would be involved in seeking PUC approval.

72. HECO was still engaged in protracted negotiations over Hamakua and, consequently, continuously deferred resolving the milestone extensions proposed in writing by Hu Honua.

73. In August 2015, HECO advised Hu Honua that it had failed to achieve the "Pass boiler Hydro test" milestone deadline (which HECO calculated as

falling on July 22, 2015) and it later advised Hu Honua that the contractual 60-day grace period had expired on September 21. In October 2015, HECO advised Hu Honua that it had failed to cure the problem within the 90-day Milestone Delay Damages Period, which HECO calculated as expiring on October 20.[12] Yet HECO neither terminated the PPA nor informed Hu Honua that it would not extend the milestone dates. On the contrary, in November 2015, HECO represented that it "continues to support Hu Honua's project as it plays an important part in reaching [HECO]'s renewable energy goals."

74. By the end of 2015, the Hu Honua Facility was fully financed, with over $120 million already invested and sufficient committed capital to complete the project. Design and engineering work for the Hu Honua Facility had been completed, and virtually all equipment was procured and on site or ready to be shipped to Hawaii. Yet HECO had not approved or rejected the milestone extensions requested by Hu Honua, professing to be reviewing them while it secretly pursued the Hamakua plant. On December 14, 2015, HECO sent Hu Honua a letter requesting information about Hu Honua's resources to complete the project. Hu Honua

[12] As detailed above, the "pass boiler hydro test" milestone date was June 20, 2015. *See supra* ¶ 68. Thus, the 60-day grace period, PPA § 2.4(A)(1)(b), actually expired on August 19, 2015, and the 90-day Milestone Date Delay LD Period, *id.*, expired on September 18, 2015. HECO calculated its erroneous dates based on the "Effective Date" of the PPA, which was January 22, 2014, rather than the PUC Approval Date, which was December 20, 2013.

responded on December 22. But the response was for naught, because one day earlier, on December 21, 2015, HECO executed the Asset Purchase Agreement for the Hamakua plant, and on December 23—the same day on which the Ormat negotiations ended—HECO publicly disclosed the deal. Going forward, the Hu Honua Facility threatened not just HECO's antiquated fossil fuel facilities, but also its contracted-for Hamakua plant.

75. On **January 15, 2016**, with the ink barely dry on the Hamakua deal, HECO issued a **Notice of Event of Default and Termination** purporting to terminate the Hu Honua PPA "with immediate effect" by declaring an Event of Default under Section 8.1(A)(3) of the PPA (the **"January 15 Notice"**). HECO claimed entitlement to $500,000 in liquidated damages in addition to Milestone Delay Damages under the PPA. HECO asserted that termination was based on Hu Honua's failure "to meet the 'Pass boiler hydro test' and . . . to cure this failure within the time permitted by the PPA." But this was pretense. It was also invalid, and thus a breach of the PPA, because HECO had waived its right to terminate the PPA on this basis. Section 8.2(B)(1) of the PPA provides that "if such notice of termination is not given within ninety (90) Days of the date such right to terminate is triggered, such termination shall not be effective." Moreover, that same section of the PPA provided that a notice of termination "shall be effective thirty (30) Days from the date such notice is delivered," yet HECO's Notice purported to take "immediate

effect." HECO offered a 30-day "Extension Period"—something to which Hu Honua was already contractually entitled (if HECO's termination notice had been valid)—only on the condition that Hu Honua agree to waive valuable competitive rights and accept onerous and uneconomic conditions.[13] HECO purported to offer the Extension Period "to allow the parties to discuss material terms of a possible amendment to the PPA," including "a significant reduction in PPA pricing," but this was a sham. Hu Honua had already offered a significant reduction in pricing in April and May 2015, which HECO knew reflected the limit of what Hu Honua could offer.[14] Knowing the project could not economically support further price reductions and knowing that Hu Honua therefore could not rationally offer any, HECO nonetheless used the Extension Period to make such monopsonistic demands. HECO had no intention of amending the PPA.

76. The real purpose of the Extension Period was to avoid complicating HECO's application to the PUC for approval of the Hamakua purchase. On January 15, 2016, HECO knew that it needed another month to prepare this application, yet

[13] The conditions were null and void for lack of lawful consideration, even aside from the fact that they were in bad faith, oppressive, and anticompetitive.

[14] HECO reviewed financial information from Hu Honua and informed the PUC in February 2016 of its conclusion that, under proposed pricing terms offered by Hu Honua in 2015, Hu Honua would not likely be able to earn a reasonable return on the project and that "the project would incur further financial losses if it was to proceed to completion." (Feb. 16, 2016 Letter from HECO to PUC at 5 (Dkt. 2012-0212).)

it wanted to avoid drawing attention to the nexus between the Hamakua acquisition and the purported termination of the Hu Honua PPA. Consistent with this objective, on January 29, 2016—just two weeks after issuing its January 15 Notice of Termination—HECO reported to the PUC in its annual Adequacy of Supply submission that "Hu Honua may be in service in 2017." In fact, HECO affirmatively counted Hu Honua as *being in service* in 2017 for purposes of certifying that "generation capacity for the next three years (2016–2018) will be sufficient to meet reasonably expected demands for service and provide reasonable reserves for emergencies."

77. Two weeks later, on February 12, 2016, HECO filed its 435-page application for approval of the approximately $85 million Hamakua purchase. The application made no mention of the decision to purportedly terminate Hu Honua's PPA "with immediate effect." Incredibly, HECO sought to justify the Hamakua purchase and associated terms based on HECO's August 26, 2014 PSIP, which *included* Hu Honua's Facility as a source of renewable firm power. HECO asserted that: "The plan shows the types and estimated sizes of resources that are envisioned to be added, as well as a general timetable of when those resources would be added in order to realize the long-term vision." (Feb. 12, 2016 Application, Exhibit K at 1 (Dkt. 2016-0033).) Hu Honua's plant was one of those resources. No doubt mindful of the fact that it was now seeking to control virtually all of the wholesale market, HECO added that "the plan is agnostic as to the ownership of the resource additions."

Had HECO disclosed the nexus between the Hamakua deal and its decision to purportedly terminate Hu Honua—the only IPP capable of adding renewable power capacity in the foreseeable future—HECO would not have been able to represent to the PUC on February 12, 2016 that the "Purchase of [Hamakua] Will Not Negatively Impact [HECO's] Ability to Meet Renewable Portfolio Standards."

78. Also on February 12, 2016, HECO extended the sham "Extension Period" by another two weeks, from February 18 to March 1.

79. It was not until February 16, four days *after* the Hamakua application was filed, that HECO admitted to the PUC that it intended to terminate Hu Honua's PPA as of March 1. That same day, HECO filed with the PUC a PSIP Update Interim Status Report, which acknowledged that "Hu Honua is the next planned renewable energy resource addition," but asserted that "Hu Honua has missed major project milestones under the terms of its PPA" and that "[a]s a contingency plan and in order to evaluate resource options, the interim PSIP update analysis does not assume Hu Honua as being available." But HECO had not disclosed that "contingency plan" when it sought PUC approval of its Hamakua purchase just four days earlier.

80. On **March 1, 2016**, HECO sent a **Notice of Event of Default and Termination** to Hu Honua (**the "March 1 Notice"**). The March 1 Notice purported to incorporate the terms of a "*Notice of Event of Default and Termination* dated February 12, 2016 ('Notice') issued by [HECO] ('Company') to Hu Honua," and

professed to "hereby exercise its right to terminate the PPA with immediate effect for the reasons set forth in Company's Notice." But this was a fabrication. It is true that on February 12, 2016, HECO sent a letter to Hu Honua extending to March 1 the Extension Period for the *January 15* Notice. But there was no *Notice of Event of Default and Termination* dated February 12, 2016. As previously noted, the only "reason set forth" in the January 15 Notice for the termination of the PPA was Hu Honua's purported failure "to meet the 'Pass boiler hydro test' and . . . to cure this failure within the time permitted by the PPA," which HECO waived by failing to timely object. The March 1 Notice recited that Hu Honua had "also failed to meet the Commercial Operations Date Deadline," but it did not assign this as a reason for termination, nor could it have contractually done so.

81. After sending its March 1 Notice, HECO opposed Hu Honua's intervention in the PUC proceeding regarding HECO's acquisition of Hamakua, arguing that termination of Hu Honua's PPA stripped it of any valid interest in the acquisition.

82. On **August 25, 2016**, HECO for the first time purported to **terminate the Power Purchase Agreement** on the claimed basis of the missed milestone for the "Commercial Operation Date Deadline" (**the "August 25 Notice"**). But because HECO had already repudiated the Power Purchase Agreement nearly six months earlier in the March 1 Notice, Hu Honua was excused from performing its further

obligations.

83. HECO's complaints about the missed milestone dates were mere pretext for a decision that HECO had reached for monopolistic reasons after signing the agreement to purchase the Hamakua plant, and which was irrational—regardless of any contractual termination rights—but for HECO's desire to expand its monopoly power in the wholesale market for firm energy generation. HECO professed (in its February letter to the PUC) to be following the PUC's guidance that, "[g]enerally speaking, termination for failure to meet significant milestones is an important PPA provision, since it allows HECO to move to other developers with projects that are shovel ready." But HECO later admitted to the PUC that "there was no immediate urgency to have a project 'step into the shoes' of Hu Honua." HECO had *no shovel-ready projects* that could come into service in the foreseeable future—much less by 2016 or 2017, when Hu Honua would have been in service (as HECO itself assumed in its January 29, 2016 Adequacy of Supply submission to the PUC). HECO had monopolistically *shut down all competing projects*. The predictable result of purported "termination for failure to meet significant milestones" was a lack of *any* new firm energy projects (renewable or otherwise) to this day—and the associated preservation and expansion of HECO's wholesale market dominance. Had HECO truly been motivated to attain the timely availability of renewable capacity, and to safeguard system reliability, the rational (non-monopolistic) choice would have been to

extend Hu Honua's milestones in 2015 rather than terminate the agreement.

84. That HECO was acting pretextually is confirmed by additional evidence, including:

(1) The abruptness of the termination immediately following the conclusion of the Hamakua negotiations (echoed in the December 23, 2015 termination of sham RFP negotiations between HECO and Ormat).

(2) HECO's reliance on missed milestones as a pretext for the abrupt termination of three other energy projects on Oahu at the same time in early 2016. A PUC staff report criticized HECO for terminating the three Oahu solar projects based on purported milestone failures because "many of [HECO's] claims concerning missed milestones are in the nature of the 'give and take' of all construction projects." The report observed that "HECO appeared to focus its efforts on ways to rationalize a decision to terminate the Projects, rather than focusing on ways to ensure that construction of the Projects would be completed timely by negotiating a final agreement." PUC staff concluded that HECO should have reached a negotiated solution to extend the milestones, but instead "appeared to devote the majority of its efforts to pursuing termination." "Presented with an opportunity to get the Projects 'back on track,' HECO instead concentrated on terminating

the Projects. HECO does not, as of the date of this report, have any 'shovel ready' replacement projects." PUC staff found "HECO's decision to terminate particularly puzzling" and concluded that "the actions taken by HECO cannot be viewed as serving the best interests of the State or the people of Hawaii." Of course, while the Oahu conduct involved a different market, HECO's motive was similarly anticompetitive: delaying competition from the independent Oahu solar projects that "would, to some degree, displace the use of electricity generated from . . . fossil fuels such as oil."

(3) The fact that the purported termination of Hu Honua's Power Purchase Agreement was contrary to the other (ostensible but also pretextual) excuses HECO offered for termination, reasons which in any event belie the premise that milestone delay was a genuine concern to HECO:

- HECO told the PUC that Hu Honua had "failed to justify an extension of the subject Guaranteed Milestones under conditions that are advantageous to Company's customers." But Hu Honua had already offered a price reduction that HECO, in the same PUC submission, told the PUC was financially loss-making for Hu Honua. HECO was sacrificing profits by turning down such a deal.

- As for customer advantages, as recently as November 2015, HECO had represented that it "continues to support Hu Honua's project as it *plays an important part in reaching [HECO]'s renewable energy goals*." And HECO had earlier represented to the PUC that "Hu Honua is able to displace fossil generation because . . . *the resource is able to provide essential system security capabilities*."
- HECO told the PUC that Hu Honua "failed to provide adequate assurances that Seller can perform or has the financial means to perform in the future." But that was patently false and has been decisively refuted by subsequent events.[15]

85. Absent HECO's anticompetitive conduct, the Hu Honua Facility would have been in service and generating renewable firm power in 2017 or earlier, providing the benefits recognized by the PUC when it approved the Power Purchase Agreement in 2013.

[15] The PUC staff report regarding HECO's Oahu PPA terminations discloses that HECO's invocation of similar concerns in that case was "particularly puzzling in light of the fact that [the developer], through its subsidiaries, appears to be well qualified to finance, construct, and operate the Projects."

H. HECO Achieves Near Total Control of the Relevant Market

86. In the wake of its pretextual decision to terminate Hu Honua's PPA, HECO was able to materially enhance its monopoly power and entrench its dominance for the foreseeable future.

87. In October 2016, HECO told the PUC, in response to an information request, that it had "made efforts to procure geothermal and biomass energy, [but] there are no concrete plans for firm renewable projects to be implemented and online in the next five years."[16] (May 4, 2017 Order No. 34536 at 70 (Dkt. 2016-0033).) The PUC noted that "[t]his statement alludes to projects that were progressing towards implementation but have been terminated. For example, [HECO] entered into an agreement with Hu Honua for a 21.5 MW biomass project in 2012, and selected ORMAT to provide 25 MW of geothermal power in response to an RFP in 2015. Unfortunately, the agreement with Hu Honua was terminated by [HECO] in March 2016, and negotiations with ORMAT failed to reach agreement." (*Id.*) These "unfortunate" actions of HECO foreclosed competition from independent suppliers of firm renewable power that would have reduced HECO's monopoly power. More than seven years later, it remains the case that no new firm renewable projects have been implemented by HECO.

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[16] By this response, HECO was seeking to convince the PUC that HECO's deal with Hamakua was not displacing available renewable alternatives.

88. It also remains the case that no HECO fossil fuel plants have been retired since HECO walked away from Hu Honua's PPA. HECO took advantage of Hu Honua's exclusion to delay the planned retirement of its own antiquated fossil fuel plants—delay that preserved HECO's high market share for the foreseeable future. *See supra* § IV.F. Not only are those plants still in service and generating emissions, but HECO is expending capital, and thereby driving up rates, to repair and keep these units running, which is particularly problematic given that these plants are old and unreliable. For example, in August 2022, HECO asked Hawaii Island customers to reduce energy use when HECO's Hill 5 plant and Puna plant were undergoing maintenance and repairs (and the Hamakua plant was shut down). Later, in October 2022, HECO again asked Hawaii Island customers to reduce energy use when its Hill 5 plant unexpectedly went offline and another HECO fossil fuel plant, the Keahole Power Plant, was undergoing maintenance.

89. In November 2017, HECO consummated its acquisition of the Hamakua plant, obtaining a more than 90% share of the relevant wholesale market. On information and belief, this acquisition was made pursuant to understandings reached in 2015 between HECO and Hamakua Partners that HECO would acquire the plant by alternative means if necessary and even if the PUC rejected its initial application. The PUC indeed did reject the application in May 2017. HECO unsuccessfully sought to convince the PUC to reconsider that rejection on the basis that it

was negotiating a lower price for the Hamakua plant and that there was a "competing offer for the Facility." (May 31, 2017 Hawaiian Electric Company, Inc.'s and Hawaii Electric Light Company, Inc.'s Motion for Reconsideration and Clarification of Decision and Order No. 34536 at 2 (Dkt. 2016-0033).)

90. In September 2017, having failed to convince the PUC to reconsider its rejection, HECO caused the formation of what it has described as "unregulated" subsidiaries—Pacific Current, Pacific Current's direct subsidiary Hamakua Holdings, and Hamakua Holding's direct subsidiary Hamakua Energy—for the anticompetitive purpose of acquiring the Hamakua plant notwithstanding the PUC's disapproval. HEI is the 100% owner of Pacific Current, LLC, and thus, also the ultimate 100% owner of Hamakua Holdings and Hamakua Energy. Pacific Current is a limited liability company, has no board of directors and is overseen by HEI as its sole LLC member. Pacific Current describes itself "[a]s a tier-one subsidiary of [HEI]" and as investing in energy projects "as part of HEI's strategy." HEI, acting with Hawaiian Electric and HELCO, created and enlisted Pacific Current and its subsidiaries to acquire the Hamakua plant using transferred funds. When Hamakua Energy executed a Notice of Acknowledgment after acquiring the Hamakua plant, Hamakua Energy's "authorized signatory" was Kurt Murao, who was at that time also serving as HEI's Vice President - Legal & Administration and Corporate Secretary.

91. Thus, on or around November 24, 2017, pursuant to the prior

understanding with Hamakua Partners, HECO carried out the acquisition for $76,323,000. The acquisition was funded by an intercompany loan from HEI. On information and belief, HECO transferred rights and assets to Pacific Current and its subsidiaries in connection with the Hamakua transaction, including funding for the Hamakua transaction. The Hamakua plant was transferred directly to Pacific Current's subsidiaries, with control acquired indirectly by the other members of HECO's anticompetitive enterprise.

92. HECO consummated the acquisition even though the PUC had found that it could inflate customer prices and in any event "appears detrimental to [HECO's] customers." (May 4, 2017 Order No. 34536 at 53 (Dkt. 2016-0033).) And even though the acquisition was orchestrated with the full involvement of HEI, Hawaiian Electric, and HELCO, and even though the Hamakua plant has been 100% owned and overseen by HEI since then, Defendants to this day try to maintain the charade that Hamakua remains an "independent" power producer. To the contrary, it is not independent and the profits from the Hamakua plant enrich the coffers of the common enterprise of which all Defendants are a part.

I. <u>HECO Again Frustrates Hu Honua's Efforts to Compete</u>

93. Hu Honua filed this lawsuit in November 2016, seeking to stop HECO's unlawful conduct. In May 2017, HEI, Hawaiian Electric, and HELCO, for themselves and on behalf of their subsidiaries, agreed to a conditional settlement

of this lawsuit and, as part of that conditional settlement, an Amended and Restated Power Purchase Agreement. This conditional settlement was entered into on the heels of the PUC's denial of HECO's application to acquire the Hamakua plant on May 4. 2017. Hu Honua sought to mitigate its damages by entering a settlement that would at least allow it to operate its Facility, albeit on less favorable terms (including price terms) than it was entitled to under the original Power Purchase Agreement, and with extensive delay and loss of profits compared to the original Power Purchase Agreement. Further, Hu Honua took reassurance from the fact that HECO had been prevented from acquiring the Hamakua plant, which (Hu Honua reasonably thought) would place some limits on HECO's monopolistic behavior. Unbeknownst to Hu Honua, however, HECO fully intended to acquire and did acquire the Hamakua plant despite the PUC's rejection.

94. The terms of the settlement agreement were "conditioned on the PUC's timely, non-appealable, final approval of the Amended and Restated PPA on terms satisfactory to Hu Honua and Hawaiian Electric Parties." If such approval was not received, the "Agreement shall be null and void and of no further effect." HECO submitted the Amended and Restated PPA to the PUC for approval, and told the PUC that the revised agreement would reduce average electric rates for consumers. As HECO stated, "[i]n the aggregate, the customer bill impact from the project . . . is approximately -$1.21/month." (July 17, 2017 HECO's Reply Statement

of Position at 24-25 (Dkt. 2017-0122).) Based on HECO's representations, the PUC approved the Amended and Restated PPA in July 2017.

95. In May 2019, at the behest of a third-party challenger, the Hawaii Supreme Court ordered the PUC to reconsider its approval of the Amended and Restated PPA. By then, HECO had successfully closed the deal to acquire the Hamakua plant. HECO had absolute control over the relevant market at that time because its sole remaining independent rival, PGV, had shut down shortly after the May 2018 lower Puna volcanic eruption and would be out of commission or under repair for years.

96. After the Hu Honua matter returned to the PUC (including on a second remand[17]), while nominally supporting approval, HECO took steps to frustrate Hu Honua's success. For example, Defendant Hamakua Energy participated in the PUC proceedings and claimed to take no position, but actually intentionally undermined the case for PUC approval of the Amended Power Purchase Agreement. On January 14, 2020, for example, Hamakua Energy made a submission to the PUC noting that "HELCO continues to dispatch the [Hamakua] Facility at rates higher than ever" and that Hamakua Energy's ability to burn biofuel from cooking oil contradicted prior assertions to the PUC that "the Hu Honua facility will provide diversification to

[17] In 2021, the Hawaii Supreme Court vacated and remanded the PUC's 2020 decision to deny a competitive bidding waiver for Hu Honua.

[HECO's] renewable energy portfolio since it will be the only biomass facility on Hawaiʻi Island." In fact, the Hamakua plant was continuing to use fossil fuels to generate the vast bulk of the power it supplied.

97. HECO's efforts to frustrate approval ultimately succeeded and the PUC rejected the amended PPA and, in March 2023, the Hawaii Supreme Court affirmed that rejection, thereby rendering the settlement agreement null and void and of no further effect.

98. The Supreme Court's decision reflects the extent to which HECO was able to play a material role in the denial of approval despite ostensibly supporting Hu Honua. For example, the Court noted that the PUC "credited HELCO's testimony that the Hu Honua project filled no pressing need in its power grid." Yet that testimony—which was intended to preserve HECO's output-suppressing monopoly—was shown by events to be untrue. Indeed, in January 2022, shortly before the testimony in question, HECO informed the PUC that its "target Energy Reserve Margin of 30% is not met in 2022," which "indicates the system is at higher risk of unserved energy." That is exactly what happened. Starting in or around August 2022, power shortfalls led HECO to direct customers to reduce energy usage. In January 2023, HECO again informed the PUC that "Hawaiʻi Electric Light's generation capacity, using the Energy Reserve Margin, will be below its 30% target at several times in early 2023," such that at various times "the system will be at higher

risk of insufficient resources to meet peak demands if generation contingencies occur and variable resource production is low." In light of these circumstances, HECO very much had a pressing need for the Hu Honua project.

99. The Supreme Court's decision also noted that the PUC "had another big time concern" that Hu Honua would "fail to accelerate the retirement of fossil-fuel" and would displace "other, more environmentally friendly renewable resources." But this was based on the say-so of HECO, a monopolist and monopsonist that had long schemed anticompetitively to *delay* the deactivation and retirement of its own fossil fuel fleet and to *choose* to offset Hu Honua's output against that of independent power producers. HECO controls how energy is dispatched, and HECO's testimony and submissions underscored its favoritism toward its own fossil fuel plants and its monopsony control over energy dispatch.

100. HECO's testimony and submissions also infected the issues related to carbon neutrality and cost. The Supreme Court discussed the PUC's evaluation of Hu Honua's assertion that the project would be carbon neutral. HECO's testimony and submissions relating to the dispatch of Hu Honua and its effect on HECO's fossil fuel plants had a direct impact on the calculations for net carbon savings. If the projected displacement of HECO's fossil fuel plants were increased, the projected net carbon savings of the Hu Honua PPA would also have increased.

101. The Supreme Court also noted the PUC's determination that "the

Amended PPA would significantly increase costs for rate-payers," crediting HECO's statement "that there were no realistic modeling assumptions under which the project 'could produce a net savings to the system or customer.'" But again, this too was a consequence of HECO's *monopsony* assumptions that favored its own fossil fuel plants to preserve its *monopoly*.[18]

102. But for HECO's anticompetitive and exclusionary termination of the Power Purchase Agreement in 2016, no further review or approval from the PUC would have been needed, and the Hu Honua Facility would have been completed and in service by 2017 or earlier. HECO's anticompetitive conduct created the situation in which the Hu Honua Facility required further approval. The denial of that approval does not relieve HECO from liability for its own misconduct in any way, particularly given HECO's ongoing monopoly and monopsony conduct as alleged above after entering into the conditional settlement.

103. Hu Honua continued to invest significant funds to complete the Hu Honua Facility in a reasonable effort to mitigate its losses. But the uncertainty caused by PUC and court proceedings, including HECO's own role in those proceedings, slowed the construction process. Nonetheless, the construction process is now at a conclusion and the Facility is ready to operate without material additional

[18] HECO's testimony was also contrary to its representation to the PUC during the initial approval process in 2017 that Hu Honua would reduce customer bills. That representation was made before HECO acquired the Hamakua plant.

investment. To date, Hu Honua has invested more than $500 million into the construction and development of the Hu Honua Facility.[19] Hu Honua's losses are unabated and mounting but Hu Honua will seek leave to further amend and supplement this pleading if circumstances change materially and if Hu Honua is realistically able to pursue mitigation of any of those losses.

V. ANTITRUST INJURY

104. HECO's anticompetitive, exclusionary, monopolistic, and monopsonistic course of conduct has caused substantial injury to competition in the relevant wholesale market.

105. First, HECO has actually expanded and strengthened its monopoly. In 2012, HECO was already a monopolist in the relevant market with a market share of nearly 69%, but there was a realistic prospect that its share would drop through new entry that would displace HECO's existing capacity. Since then, however, HECO's monopolistic scheme has served to significantly expand and strengthen its market share, which since November 2017 has varied between 90 and 100%, thereby

[19] Hu Honua has taken care to invest in infrastructure that will protect Hawaii Island air quality. For example, the Facility has multiple emissions control features, including a mechanical dust collector, an electrostatic precipitator, selective catalytic reduction, and a baghouse filter where carbon ash will be collected for recycling. Hu Honua has committed to planting a minimum of 10 million trees through the National Forest Foundation in the first five years of operations to accelerate decarbonization.

deeply entrenching HECO's monopoly power.

106. Second, HECO has excluded actual and potential competitors from the relevant market, including Hu Honua and Ormat. The Hu Honua Facility would have been in service in 2017 or earlier but for HECO's anticompetitive scheme and course of conduct.

107. Third, HECO has eliminated its largest independent competitor by acquiring the Hamakua plant. Once HECO and Hamakua Partners became business partners through the agreement signed in December 2015, Hamakua ceased acting as an independent competitor and ceased providing any constraints on HECO in the market or before the PUC (where Hamakua had previously played a maverick role as an active and independent voice urging competitive outcomes). And at all relevant times, HECO had a broad contractual right of first refusal that bound Hamakua Partners and constrained its independence.

108. Fourth, only one single IPP (PGV) remains in the relevant market. And that competitor has been hobbled by the consequences of a natural disaster (a risk to the market of a sort that was foreseeable to HECO). Independent competition and all its benefits have been virtually or entirely extinguished in the market, which is all the more detrimental in a market dominated by an unchecked monopolist.

109. Fifth, HECO's conduct has reinforced and raised barriers to entry in the relevant market. For example, the risks for independent power producers

associated with entering into monopsonistic contracts with HECO, including the risks of subcompetitive compensation and stranded investments, have mushroomed. As the PUC staff reported in connection with HECO's termination of PPAs for renewable energy in Oahu, "actions such as those taken by HECO here may discourage developers from participating in future RFPs, which may ultimately redound to the detriment of ratepayers, potentially in the form of fewer responses and higher prices, among other things."

110. Sixth, the facilities and plants serving the relevant market have become increasingly outdated, and of diminished quality and reliability. This is because HECO has been able to avoid replacing the antiquated and expensive fossil fuel plants that it owns and controls with newer, renewable power plants, thereby artificially extending the service of those outdated plants.

111. Seventh, output in the relevant market has been restrained and reduced. The amount of net firm generating capacity in the relevant market has declined over the last decade, from 287.1 MW in 2012 to 259.65 MW today, a decline of almost 10%.[20] HECO's energy reserve margin has deteriorated over that time as well and has fallen below safe and reliable levels in recent years, as even HECO has

[20] To the extent that some of the reduction was a consequence of the 2018 lava flow that affected PGV, HECO was well aware of such risks and had informed the PUC in its January 29, 2016 Adequacy of Supply Submission that it was "prudent" to maintain an "increased capacity margin for the known potential for capacity loss during storms and lava impacts."

been compelled belatedly to admit. That deterioration was created by HECO's anticompetitive acts, including the exclusion of Hu Honua, and as a result Hawaii Island has faced the risk of significant energy shortages, including power interruptions and blackouts. For example, in late August 2022, HECO directed Hawaii Island residents and businesses to conserve power to avoid the possibility of rolling blackouts because of problems with the Hamakua plant. HECO instructed Hawaii Island residents to reduce consumption during peak hours at least nine times between August 2022 and March 2023. But despite these actions, power outages have occurred and there are risks of more to come.

112. Eighth, the cost of generating wholesale firm power has increased in the relevant market. Soon after HECO acquired Hamakua, the vast majority of wholesale firm energy generation costs in the relevant market have been due to HECO itself. HECO's large fleet of outdated fossil fuel generation units have driven up costs for generating firm energy through both rate base charges, fuel costs, and excessive operating and maintenance costs. For example, HECO has had to make costly repairs to its oil-fueled plants on Hawaii Island. HELCO reports that its 2017 annual operating and maintenance expenses were approximately $66 million. In 2018, HELCO's annual operating and maintenance expenses jumped to approximately $71 million. In 2019, they rose to $76 million. After a slight decline in 2020—likely due to the COVID pandemic and resulting economic slowdown—

HELCO's annual operating and maintenance expenses spiked to approximately $78 million in 2021 and $84 million in 2022.

113. Lastly, although antitrust injury in the relevant wholesale market suffices to violate the law without regard to whether such injuries have been passed on to consumers and businesses in the retail electricity market,[21] HECO's anticompetitive conduct has also caused harm to such end users—including Hu Honua itself—who have faced rising rates, power interruptions, diminished reliability, and other injuries resulting from HECO's suppression of competition in the wholesale market for firm energy generation. Hawaii consistently has had the highest electricity prices in the United States, and rates have increased by 50–100% or more since HECO foreclosed Hu Honua from the market in 2016. In 2016, residential electricity prices on the Island of Hawaii averaged 32 cents per kWh. But residential electricity prices rose to 34 cents per kWh in 2017 and 2018, and then 37 cents per kWh in 2019. After a small decrease in 2020—likely due to reduced demand during the COVID pandemic—residential electricity prices jumped to 38 cents per kWh in 2021 and then skyrocketed to 48 cents per kWh in 2022. Similarly, Schedule P rates—the electricity prices for large power customers, like Hu Honua—more than doubled from 2016 to 2023. In January 2016, the effective Schedule P energy charge was

[21] *See, e.g.*, *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1134 (10th Cir. 2002).

15.5674 cents per kWh. In the following years, that rate rose to 16.8507 cents per kWh (January 2017), 18.5087 cents per kWh (January 2018), 20.9573 cents per kWh (January 2019), 20.2065 cents per kWh (February 2020), 18.0423 cents per kWh (January 2021), 24.2759 cents per kWh (January 2022), and 33.9771 cents per kWh (January 2023). Meanwhile, HELCO's rate base (which contributes to HELCO's profits) rose from $484 million in 2016 to $572 million in 2022.

114. All of these injuries to competition are continuing, and unless HECO's conduct is remedied and competition is restored, harm to competition will accumulate and mount ever higher in the relevant market.

VI. MARKET DEFINITION AND POWER

115. Due to the distance and lack of power lines between Hawaii's islands, each island is a separate geographic market for antitrust purposes for the wholesale generation of electricity. The geographic market in this case is therefore Hawaii Island.

116. As set forth above, intermittent energy capacity is not a substitute for firm power capacity. A distinct product market for firm power generation is supported by such practical indicia as industry and governmental recognition of the market as a separate economic entity, firm power's peculiar characteristics and uses, unique firm power production facilities, distinct customers, distinct prices, and specialized vendors. Accordingly, the wholesale generation and sale of energy from

firm generating capacity is a separate antitrust market from the wholesale generation and sale of power from intermittent capacity.

117. At no time relevant to the claims alleged in this complaint has HECO held materially less than a 69% share of the relevant wholesale market for firm energy generation on Hawaii Island. Since late 2017, HECO has had a market share of approximately 90–100%. At all relevant times, HECO has possessed monopoly power in the relevant market.

118. On the buyer's side of the relevant market, HECO has had a 100% share for more than a decade and thus also possesses monopsony power. HECO is the owner of the only electricity transmission and distribution infrastructure and is the only purchaser of wholesale firm energy generated on Hawaii Island.

119. The barriers to entry into the purchase or sale at wholesale of firm energy on Hawaii Island are high. By law, HECO is the only purchaser of such energy at scale. Although competition is legally permitted for the wholesale generation and sale of firm energy, there are substantial entry barriers as set forth in this complaint.

VII. CAUSES OF ACTION

COUNT I
Monopolization and Attempted Monopolization Under Section 2 of the Sherman Act (15 U.S.C. § 2) and the Hawaii Antitrust Act (H.R.S. § 480-9) (Against All Defendants)

120. Hu Honua incorporates by reference the allegations of paragraphs 1

through 119 above.

121. HECO's conduct violates Section 2 of the Sherman Act (15 U.S.C. § 2), and the Hawaii Antitrust Act (H.R.S. § 480-9) which prohibit, *inter alia*, the willful monopolization (whether as a seller or buyer) or attempted monopolization of any part of the trade or commerce among the States (under Section 2) or in any section of the State of Hawaii (under H.R.S. § 480-9). Trade or commerce in firm electric power involves a "commodity" business within the meaning of H.R.S. § 480-1.

122. The relevant market in which to assess the conduct of HECO is the market for wholesale firm energy generation on Hawaii Island. On the seller's side of the market, HECO holds, and has at all relevant time possessed, monopoly power. On the buyer's side of the market, HECO holds, and has at all relevant times possessed, monopsony power.

123. HECO willfully and unlawfully maintained and expanded its monopoly power in the relevant market or attempted to do so with a dangerous probability of success and maintained, abused, and leveraged its monopsony power in the same market through the anticompetitive acts and course of conduct described in this complaint, including by: (1) foreclosing and excluding Hu Honua and other actual or potential competitors from the relevant market; (2) attempting to acquire, acquiring, and holding the Hamakua plant, HECO's largest independent competitor—and a

maverick force—in the relevant market; (3) imposing de facto exclusivity in favor of its own firm power generation facilities; (4) imposing anticompetitive constraints on actual and potential independent power producers and otherwise raising barriers to entry and expansion; (5) engaging in sham negotiations with independent power suppliers; (6) depriving the market of the quality, innovation, sustainability, and reliability associated with independent competition; (7) impeding and preventing the timely retirement and replacement of HECO's outdated and inefficient fossil fuel plants; (8) restricting market output and reducing market capacity and energy reserve margins; and (9) making objectively and subjectively false or baseless regulatory filings for the purpose of directly injuring actual and potential competitors. HECO's actions are individually anticompetitive and violative of the law but also have a cumulative and synergistic anticompetitive effect. HECO's actions were and are anticompetitive regardless of whether HELCO had a contractual basis to terminate the PPA with Hu Honua.

124. HECO's conduct affects a substantial volume of interstate commerce.

125. HECO's conduct has substantial anticompetitive effects, including increased prices and costs, reduced innovation, reduced quality and reliability of service, and reduced capacity and output.

126. As an actual or potential competitor (and supplier) of HECO in the relevant wholesale market, and as a direct purchaser of electricity from HECO, Hu

Honua has been harmed by and faces a continued threat of harm from HECO's anticompetitive acts and course of conduct in a manner and of a sort that the antitrust laws were intended to prevent.

127. By reason of HECO's anticompetitive and exclusionary practices and conduct, Hu Honua has suffered, and will continue to suffer, injury to its business and property in an amount to be proved at trial. The Hu Honua Facility is now materially complete and has an additional 8.5 MW of capacity for a total of 30 MW (net) and has a useful life well beyond the 20-year term of the PPA. Given that oil prices have recently skyrocketed and are at levels not seen for a decade or more, the value and economic attractiveness of the Hu Honua Facility to the market is extremely high. *See* Figure 1, *supra* ¶ 10. Hu Honua's damages include at least 30 years of lost profits and are in no event less than $600 million or $1.8 billion after trebling.

128. Hu Honua has suffered and continues to suffer harm an irreparable injury, and such harm and injury will not abate until an injunction is issued ending HECO's continuing anticompetitive conduct and restoring competition to the relevant market. To prevent these ongoing and threatened future harms, the Court should enjoin the anticompetitive conduct complained of herein, including but not limited to ordering the divestiture of the Hamakua plant, which HECO asserts is an "independent" organization, to a truly independent power operator.

COUNT II
Section 7 of the Clayton Act (15 U.S.C. § 18) and the Hawaii Antitrust Act (H.R.S. § 480-7) (Against All Defendants)

129. Plaintiff Hu Honua incorporates by reference the allegations in Paragraphs 1 through 128 above.

130. HECO's anticompetitive conduct set forth in this complaint has violated and continues to violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and the Hawaii Antitrust Act (H.R.S. § 480-7) which prohibit, *inter alia*, the acquisition and holding of any assets of another person, where the effect of such acquisition and holding may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce or in any activity affecting commerce in any section of the country (under Section 7) or in any line of commerce in any section of the State of Hawaii (under H.R.S. § 480-7).

131. HECO's agreement to acquire and its acquisition and holding of the Hamakua plant and related assets from one or more persons engaged in interstate commerce and activities affecting interstate commerce had and continues to have the effect of substantially lessening competition and creating a monopoly in the relevant wholesale market for firm power on Hawaii Island.

132. The acquisition and holding of the Hamakua assets, which raised HECO's market share from nearly 69% to a level above 90% and at times virtually 100%, was and is manifestly anticompetitive and a prima facie continuing violation

of the law. The acquisition created no material efficiencies. The acquisition also created enhanced incentives for HECO to use and abuse its monopsony power in the relevant market to foreclose and impede competition by existing and potential independent power producers in the relevant market.

133. HECO's unlawful holding of the Hamakua assets threatens continued injury to Hu Honua and its now-completed Facility in a manner and of a sort that the antitrust laws were intended to prevent. Hu Honua faces an ongoing and future threat of harm and irreparable injury, and such threat of harm and injury will not abate until an injunction is issued restoring competition and ending HECO's continuing anti-competitive conduct. To prevent these ongoing and future harms, and as a necessary step in the public interest to eliminate the lessening of competition and monopoly dominance, the Court should enjoin the anticompetitive holding and use of assets complained of herein, including but not limited to ordering the divestiture or other appropriate disposition of the Hamakua assets to an independent power operator.

COUNT III
Restraint of Trade Under Section 1 of the Sherman Act (15 U.S.C. § 1) and the Hawaii Antitrust Act (H.R.S. § 480-4) (Against All Defendants)

134. Plaintiff Hu Honua incorporates by reference the allegations in Paragraphs 1 through 133 above.

135. Hamakua Partners, as owner of the Hamakua plant, agreed with HECO to an ongoing right of first refusal and to the anticompetitive transactions

involving the Hamakua plant described herein.

136. HECO's anticompetitive agreement with Hamakua Partners involving the acquisition of the Hamakua plant as set forth herein constituted an unlawful restraint of trade in the wholesale firm power generation market in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and the Hawaii Antitrust Act (H.R.S. § 480-4), which both prohibit any agreement (contract, combination or conspiracy) in restraint of trade or commerce among the States (under Section 1) or in the State of Hawaii or any section of the State (under H.R.S. § 480-4).

137. On information and belief, the anticompetitive acquisition of the Hamakua plant occurred pursuant to an anticompetitive overarching agreement between HECO and Hamakua Partners commencing in 2015—pursuant to an anticompetitive ongoing agreed right of first refusal—and continuing at least until November 2017 (the "Overarching Agreement"). In the alternative, HECO entered into: (i) an anticompetitive agreement pursuant to a preexisting agreed right of first refusal with Hamakua Partners in or about December 2015 (the "2015 Agreement") which continued until at least May 2017; and (ii) an anticompetitive agreement with Hamakua Partners in or about April–May 2017 (the "2017 Agreement"), which continued until at least November 2017.

138. The Overarching Agreement, and in the alternative, the 2015 Agreement and the 2017 Agreement, had the purpose and effect of restraining competition

in the relevant wholesale market for firm power. The Overarching Agreement, and in the alternative, the 2015 Agreement and the 2017 Agreement, had no procompetitive justifications and had substantial anticompetitive effects, including a reduction in competition, increased prices and costs, reduced innovation, reduced quality and reliability of service, and reduced capacity and output. HECO's efforts to terminate Hu Honua's Power Purchase Agreement were in furtherance of the Overarching Agreement or, in the alternative, the 2015 Agreement. Those actions were and are anticompetitive regardless of whether HELCO had a contractual basis to terminate the PPA with Hu Honua.

139. HECO's unlawful restraint of trade injured and threatens injury to Hu Honua in a manner that the antitrust laws were intended to prevent both (i) as an actual and potential competitor in the relevant market and (ii) as a direct purchaser of electricity from HECO.

140. By reason of HECO's unlawful restraint of trade, Hu Honua has suffered, and will continue to suffer, injury to its business and property. Hu Honua has incurred damages in an amount to be proven at trial.

141. Hu Honua has suffered and faces a future threat of harm and irreparable injury, and such threat of harm and injury will not abate until an injunction is issued restoring competition. To prevent these ongoing and future harms, the Court should award appropriate equitable relief, including but not limited to ordering the

divestiture of the Hamakua assets to an independent power operator.

COUNT IV
Breach of Contract (against HELCO)

142. Hu Honua incorporates by reference the allegations of paragraphs 1 through 141 above.

143. The Power Purchase Agreement constituted a binding contract between Hu Honua and HELCO, which the parties entered on May 3, 2012. On December 20, 2013, the PUC approved the Power Purchase Agreement.

144. Hu Honua substantially performed all of its obligations under the Power Purchase Agreement, including timely requesting an extension of milestone dates and paying all penalties associated with missed milestone dates, except those obligations which Hu Honua was excused from performing as a result of HELCO's breaches of the Power Purchase Agreement, including HELCO's purported terminations of the Power Purchase Agreement.

145. HELCO breached the Power Purchase Agreement by the following acts, among other things:

a. HELCO breached Section 2.4(A)(1)(a) of the Power Purchase Agreement, which provides that "[i]f [Hu Honua] fails to achieve any Guaranteed Milestone other than the Commercial Operation Date Deadline within three (3) Months after its Milestone Date . . . , then [Hu Honua] shall within fifteen (15) Business Days thereafter submit for [HECO]'s review and approval, ***which shall not be unreasonably withheld***, a detailed plan which describes" the reason for the missed deadline and measures for achieving them. Although Hu Honua provided the requisite plan well before the "Pass Boiler Hydro Test" deadline elapsed on June 20, 2015, HELCO unreasonably withheld consent to that plan.

b. HELCO breached the Power Purchase Agreement, by purporting to issue one or more notices of termination that were contractually ineffective under Section 8.2(B)(1), which provides that "[i]f an Event of Default under Section 8.1 (Events of Default) shall have occurred and not been cured within the cure periods provided in Section 8.1(C) (Cure Periods and Force Majeure Exceptions) . . . , the non-defaulting Party shall have the right to terminate this Agreement by delivering a written notice of termination which shall be effective thirty (30) Days from the date such notice is delivered, ***provided that if such notice of termination is not given within ninety (90) Days of the date such right to terminate is triggered, such termination shall not be effective***." HELCO's right, if any, to terminate the Power Purchase Agreement for Hu Honua's failure to meet the "Pass Boiler Hydro Test" milestone date was triggered on September 18, 2015 (90 days after the June 20, 2015 milestone date). As a result, even if HELCO had possessed the right to terminate the Power Purchase Agreement, HELCO had to exercise that right no later than December 17, 2015. But HELCO did not purport to exercise that right until January 15, 2016. As such, HELCO's purported termination then or thereafter was "not . . . effective" by the terms of the PPA.

c. Even if HELCO's notice of termination were otherwise timely (it was not), HELCO further breached Section 8.2(B)(1) by purporting to terminate the PPA with immediate effect and failing to provide the contractually-required 30-day notice of termination. Again, Section 8.2(B)(1) provides "the non-defaulting Party . . . the right to terminate this Agreement by delivering a written notice of termination which shall be effective ***thirty (30) Days from the date such notice is delivered***." HELCO delivered its purported notice terminating the Power Purchase Agreement on January 15, 2016. But that notice averred that it would take effect the very same day.

d. HELCO breached the Power Purchase Agreement again when it issued the August 15 Notice purporting to terminate the agreement for failure to meet the Commercial Operation Date Deadline. Because HELCO had already repudiated the PPA through its prior conduct, Hu Honua was under no obligation to satisfy the Commercial Operation Date Deadline that HELCO was attempting to enforce through the August 15 Notice.

146. As a result of HELCO's breaches of the Power Purchase Agreement, Hu Honua has incurred damages in an amount to be proven at trial. Hu Honua's lost profits are no less than $435 million over the 20-year term of the Power Purchase Agreement. Hu Honua's losses, including incidental amounts and losses reasonably incurred in an effort to mitigate damages, are of a nature and extent reasonably foreseeable by HELCO at the time it entered into the Power Purchase Agreement.

COUNT V
Breach of the Covenant of Good Faith and Fair Dealing (against HELCO)

147. Hu Honua incorporates by reference the allegations of paragraphs 1 through 146 above.

148. Implied in every contract is a covenant of good faith and fair dealing whereby each party covenants that it will not do anything that will deprive the other of the benefits of the agreement.

149. The parties entered into the Power Purchase Agreement with the purpose of allowing Hu Honua to sell to HELCO electric energy and capacity from the Facility and to permit a flow of electric energy between the Facility and the HELCO System.

150. Hu Honua substantially performed all of its obligations under the Power Purchase Agreement, including timely requesting extensions of milestone dates and paying all penalties associated with missed milestone dates, except those obligations which Hu Honua was excused from performing as a result of HELCO's breaches and repudiations of the Power Purchase Agreement, including HELCO's purported terminations of the Power Purchase Agreement.

151. Under the covenant of good faith and fair dealing, HELCO therefore had an obligation not to interfere with Hu Honua's ability to construct the Facility and produce the power that HELCO had promised to purchase under the Power Purchase Agreement.

152. HELCO's acts and/or omissions as alleged in this complaint breached the covenant of good faith and fair dealing. Among other things, and without limitation, HELCO purported to negotiate with Hu Honua to extend the milestone dates without any intention of agreeing to an extension. During these bad-faith negotiations, HELCO induced Hu Honua to incur substantial expenses on the false premise that doing so would increase HELCO's willingness to agree to an extension of the milestone dates.

153. As a result of HELCO's breaches of the covenant of good faith and fair dealing, Hu Honua has incurred damages in an amount to be proven at trial. These damages are of a nature and extent reasonably foreseeable by HELCO at the

time it entered into the Power Purchase Agreement.

COUNT VI
Unfair Methods of Competition Under H.R.S. § 480-2 (Against All Defendants)

154. Hu Honua incorporates by reference the allegations of paragraphs 1 through 153 above.

155. HECO has engaged in unfair methods of competition in the conduct of trade or commerce in violation of H.R.S. § 480-2.

156. HECO has engaged in practices that offend established public policy and are immoral, unethical, oppressive, unscrupulous, and/or substantially injurious to consumers. This scheme includes eliminating competition in the wholesale market for firm power on Hawaii Island by, among other practices and methods alleged in this complaint, precluding Hu Honua from selling firm power. HECO's methods of competition were unfair regardless of whether HELCO had a contractual basis to terminate the PPA with Hu Honua.

157. HECO's unfair competition injured and threatens to injure Hu Honua in a manner that H.R.S. § 480-2 was intended to prevent.

158. By reason of HECO's unfair competition, Hu Honua has suffered, and will continue to suffer, injury to its business and property. Hu Honua has incurred damages in an amount to be proven at trial.

159. Hu Honua has suffered and faces a future threat of harm and

irreparable injury, and such threat of harm and injury will not abate until an injunction is issued restoring competition and ending HECO's unfair competition. To prevent these ongoing and future harms, the Court should enjoin the unfair conduct complained of herein, including but not limited to ordering the divestiture or other disposition of the Hamakua assets to an independent power operator.

COUNT VII
Conversion (against HELCO)

160. Hu Honua incorporates by reference the allegations of paragraphs 1 through 159 above.

161. Section 9.3(A) of the Power Purchase Agreement provides that Hu Honua will pay HELCO $500,000 in liquidated damages if the Power Purchase Agreement is terminated by HELCO prior to the Guaranteed Commercial Operation Date Deadline milestone. Following its purported termination of the Power Purchase Agreement, HELCO drew the $500,000 directly from a security deposit Hu Honua had posted under Section 7.1 of the Power Purchase Agreement. However, because HELCO did not have a right to terminate the Power Purchase Agreement and breached the Power Purchase Agreement by terminating it, HELCO did not have a right to draw the $500,000.

162. Additionally, following its purported termination of the Power Purchase Agreement, HELCO drew $360,000 directly from the security deposit Hu

Honua had posted under Section 7.1 of the Power Purchase Agreement. However, because HELCO did not have a right to terminate the Power Purchase Agreement and breached the Power Purchase Agreement by terminating it, HELCO did not have a right to draw the $360,000.

163. Hu Honua has an ownership interest in, and a right to possession of, the $860,000 that served as a security deposit letter of credit.

164. HELCO drew upon the letter of credit in the security deposit account and kept the $860,000 for its own personal use.

165. In doing so, HELCO took possession of, and assumed ownership over, those funds.

166. Hu Honua did not consent to HELCO drawing upon the letter of credit, and HELCO had no lawful right to do so under the Power Purchase Agreement or otherwise.

167. As a direct and proximate result of HELCO's conversion, Hu Honua has sustained damages as set forth herein.

VIII. PRAYER FOR RELIEF

Wherefore, Plaintiff Hu Honua prays:

1. For judgment that:

(i) Defendants' conduct as stated in this Third Amended and Supplemental Complaint violates Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 and the Hawaii Antitrust Act, H.R.S. § 480-9.

(ii) Defendants' conduct as stated in this Third Amended and Supplemental Complaint violates Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, and the Hawaii Antitrust Act, H.R.S. § 480-7.

(iii) Defendants' conduct as stated in this Third Amended and Supplemental Complaint violates Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 2, and the Hawaii Antitrust Act, H.R.S. § 480-4.

(iv) Defendants' conduct as stated in this Third Amended and Supplemental Complaint constitutes unfair methods of competition in violation of H.R.S. § 480-2.

(v) HELCO's conduct as stated in this Complaint breached the terms of the Power Purchase Agreement, breached the covenant of good faith and fair dealing, and converted Hu Honua's funds.

2. For injunctive relief restraining and enjoining Defendants, and each of them, from continuing their unlawful conduct, and restoring competition in the relevant market, including by ordering the divestiture or other appropriate disposition of the Hamakua Plant to a truly independent power producer;

3. For judgment that:

(i) Defendants be required to pay to Hu Honua three times the damages sustained by Hu Honua by reason of Defendants' respective Sherman Act violations, Clayton Act violations, and their violations of H.R.S. § 480-2, -4, -7, and -9 as set forth herein;

(ii) HELCO be required to pay to Hu Honua compensatory damages for breach of contract, breach of the covenant of good faith and fair dealing, and conversion;

(iii) Defendants be required to pay to Hu Honua costs, disbursements, expenses, and reasonable attorneys' fees in bringing this action.

4. For any such other or further relief that this Court deems just and proper.

DATED: Honolulu, Hawaii, November 16, 2023.

____

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HU HONUA BIOENERGY, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HU HONUA BIOENERGY, LLC, a Delaware limited liability company, Plaintiff, v. HAWAIIAN ELECTRIC INDUSTRIES, INC., a Hawai‘i corporation; HAWAIIAN ELECTRIC COMPANY, INC. a Hawai‘i corporation; HAWAII ELECTRIC LIGHT COMPANY, INC. a Hawai‘i corporation; PACIFIC CURRENT, LLC, a Hawaii limited liability company; HAMAKUA HOLDINGS, LLC, a Hawaii limited liability company; HAMAKUA ENERGY, LLC, a Hawaii limited liability company, Defendants.	CIVIL NO. 16-00634 JMS-KJM DEMAND FOR JURY TRIAL

DEMAND FOR JURY TRIAL

Plaintiff Hu Honua Bioenergy, LLC hereby demands trial by jury pursuant to the Federal Rules of Civil Procedure, Rule 38(b) for all issues so triable.

DATED: Honolulu, Hawaii, November 16, 2023.

REX Y. FUJICHAKU
Attorney for Plaintiff