BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of

MAUI ELECTRIC COMPANY, LIMITED

For Approval of Power Purchase Agreement for Renewable Dispatchable Generation with AES Kuihelani Solar, LLC.

DOCKET NO. 2018-0436

DECISION AND ORDER NO. 36235
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LLC.

Docket No. 2018-0436
Order No. 36235

DECISION AND ORDER

By this Decision and Order,¹ the commission, subject to conditions outlined herein: (A) approves the Power Purchase Agreement ("PPA") between MECO and AES Kuihelani, dated December 28, 2018, for a 60-megawatt ("MW") photovoltaic project ("PV System") coupled with a 60 MWac/240 MW-hour ("MWh") battery energy storage system ("BESS") to be located near Kuihelani Highway, on the island of Maui ("Project" or "Facility");

¹The Parties to this proceeding are MAUI ELECTRIC COMPANY, LIMITED ("MECO") and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party to this proceeding pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 16-601-62(a). In addition, the commission has granted AES Kuihelani Solar, LLC ("AES Kuihelani") participant status. See Order No. 36130, "Granting Participant Status to AES Kuihelani Solar, LLC and Amending Procedural Schedule," filed January 25, 2019 ("Order No. 36130").
and (B) approves MECO's request to include all non-energy payments under the PPA, including the Lump Sum Payments (as defined in the PPA) and related revenue taxes, through the Purchased Power Adjustment Clause ("PPAC"), to the extent such costs are not included in base rates.

I.

BACKGROUND

A.

Procedural History

On December 31, 2018, MECO filed its Application requesting approval of, among other things, the subject PPA.²

On January 14, 2019, consistent with its intent to review the PPAs resulting from the Hawaiian Electric Companies'³ Phase 1 competitive procurement on an accelerated timeline, the commission filed Order No. 36073, "(1) Approving [MECO's] Request to Bifurcate its [PPA]-Related Requests from its Above-ground 69 Kilovolt Line Extension-related Requests; and (2) Adopting a Procedural Order to Govern the PPA-Related Requests" ("Order No. 36073"), which set forth a statement of issues for this proceeding, as follows:

²Application at 1. "The Allowed Capacity for the Facility is limited to 60 MW." Application at 14.

³The "Hawaiian Electric Companies" or "HECO Companies" are Hawaiian Electric Company, Inc., MECO, and Hawaii Electric Light Company, Inc.
1. Whether MECO has met its burden of proof in support of its request for approval of the PPA between MECO and AES Kuihelani, dated December 28, 2018, for a 60-MW photovoltaic project, paired with a 60 MWac/240 MWh BESS, proposed to be located near Kuihelani Highway, on the island of Maui.

   a. Whether MECO's purchased power arrangements under the PPA, pursuant to which MECO will dispatch energy on an availability basis from AES Kuihelani and pay Lump Sum Payments to AES Kuihelani, are prudent and in the public interest with explicit consideration, if required by law under HRS § 269-6, of the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions.

2. Whether MECO has met its burden of proof in support of its request to include all non-energy payments under the PPA, including the Lump Sum Payments (as defined in the PPA), and related revenue taxes, through the PPAC, to the extent such costs are not included in base rates.

3. Whether it is in the public interest for the 69 kV line extension, required to interconnect MECO's system with the Project up to the point of delivery of electric energy and/or capacity by AES Kuihelani to MECO, to be constructed above the surface of the ground pursuant to HRS § 269-27.6(a).

Order No. 36073 also bifurcated MECO's PPA-related requests (Issues 1 and 2) from its above-ground 69 kilovolt ("kV")

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4Order No. 36073, "(1) Approving Maui Electric Company, Inc.'s Request to Bifurcate its Power Purchase Agreement-Related Requests from its Above-Ground 69 Kilovolt Line Extension-Related Requests; and (2) Adopting a Procedural Order to Govern the PPA-Related Requests," filed January 14, 2019 ("Order No. 36073").
line extension-related requests (Issue 3) and established a procedural schedule governing MECO’s PPA-related requests.5

On January 22, 2019, AES Kuihelani filed a Motion to Participate in this proceeding.6

On January 25, 2019, the commission issued Protective Order No. 36126 to govern the production and exchange of confidential information produced in this docket.7 Also on January 25, 2019, the commission issued Order No. 36130, granting AES Kuihelani’s motion to participate and amending the procedural schedule.8

Between January 25, 2019, and February 6, 2019, pursuant to Order 36130, the Consumer Advocate issued information requests ("IRs") to MECO and AES Kuihelani. The commission also

5Order No. 36073 at 6-7. As mentioned in Order No. 36073, the commission intends to issue a separate procedural order to govern MECO’s above-ground 69 kV line extension-related requests. Id. at 8.

6"AES Kuihelani Solar, LLC’s Motion to Participate; Affidavit of Woody Rubin; and Certificate of Service," filed January 22, 2019 ("AES Kuihelani’s Motion to Participate").

7Protective Order No. 36126, filed on January 25, 2019.

8See generally Order No. 36130, "GRANTING PARTICIPANT STATUS TO AES KUIHELANI SOLAR, LLC, AND AMENDING PROCEDURAL SCHEDULE," filed on January 25, 2019 ("Order No. 36130"). The procedural schedule was amended again by Order No. 36193, "(1) Granting, In Part, The Division of Consumer Advocacy Motion for Enlargement of Time, Filed on February 25, 2019, and (2) Amending Procedural Schedule," filed on February 28, 2019 ("Order No. 36193").
issued its own IRs to MECO and AES Kuihelani on February 12, 2019, and February 19, 2019.

On February 20, 2019, the commission issued Order No. 36170, compelling AES Kuihelani to respond to certain IRs issued by the Consumer Advocate to which AES Kuihelani had objected as irrelevant.⁹

On February 25, 2019, the Consumer Advocate submitted a Motion for Enlargement of Time, seeking an extension of time for it and AES Kuihelani to file their Statements of Position and for MECO to file its Reply Statement of Position.¹⁰ In support of its Motion, the Consumer Advocate referred to Order No. 36170 and noted that the deadline by which AES Kuihelani was required to respond to the Consumer Advocate's IRs was February 27, 2019, the same date the Consumer Advocate's Statement of Position was due, pursuant to the procedural schedule set forth in Order No. 36130, which would not allow the Consumer Advocate an opportunity to review the IR responses and incorporate them into its Statement of Position.¹¹

⁹Order No. 36170, “Compelling AES Kuihelani Solar, LLC to Respond to the Consumer Advocate’s Information Requests,” filed February 20, 2019 ("Order No. 36170").

¹⁰“Division of Consumer Advocacy’s Motion for Enlargement of Time; and Certificate of Service,” filed on February 25, 2019 ("CA Motion").

¹¹CA Motion at 2.
Also on February 25, 2019, AES Kuihelani submitted a letter requesting that it understood that the Consumer Advocate "has filed or intends to file" a request for extensions to the deadlines for the Consumer Advocate's Statement of Position and MECO's Reply Statement of Position. AES Kuihelani stated that it believed that its Statement of Position, "to the extent necessary, would be more useful to the Commission if filed after the Consumer Advocate's [Statement of Position]." Accordingly, AES Kuihelani requested that "if changes are made to the procedural schedule, the Commission adjust [the] deadline for [AES Kuihelani's Statement of Position] to [a] date[] midway between the deadlines for the Consumer Advocate's Statement of Position and the deadline[] for [MECO's Reply Statement of Position]."

On February 28, 2019, the commission issued Order No. 36193, in which the commission granted the Consumer Advocate's Motion and amended the procedural schedule.

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13AES Kuihelani Letter at 1.

14AES Kuihelani Letter at 1.

15Order No. 36193, "(1) Granting, In Part, the Division of Consumer Advocacy's Motion for Enlargement of Time, Filed on
On March 6, 2019, the Consumer Advocate filed its Statement of Position, consistent with Order No. 36193.\(^\text{16}\)

On March 8, 2019, AES Kuihelani filed its Statement of Position, consistent with Order No. 36193.\(^\text{17}\)

On March 13, 2019, MECO filed its Reply Statement of Position, consistent with Order No. 36193.\(^\text{18}\)

Pursuant to the amended deadlines set forth in Order No. 36193, no further briefing is contemplated and the PPA-Related Requests are ready for decision-making.\(^\text{19}\)

B.

Parties to the PPA

MECO is a corporation engaged in the production, purchase, transmission, distribution, and sale of electricity on the island of Maui; the production, transmission, distribution and

\(^\text{16}\)See Order No. 36193 at 10.


\(^\text{18}\)"AES Kuihelani Solar, LLC’s Statement of Position; Affidavit of Woody Rubin; and Certificate of Service," filed March 8, 2019 ("AES Kuihelani SOP").

sale of electricity on the island of Moloka'i; and the production, purchase, distribution and sale of electricity on the island of Lana'i.\textsuperscript{20}

AES Kuihelani is a wholly owned subsidiary of AES Distributed Energy, Inc., which in turn is a wholly owned subsidiary of The AES Corporation.\textsuperscript{21} The AES Corporation, which is a Fortune 500 Global Power Company, owns and manages $33 billion in total assets and, in 2017, had revenues of $11 billion.\textsuperscript{22}

C:

Proposed Project

The land secured for the Project is located in central Maui on approximately 500 acres of agricultural land classified with soil rating E at Waikapu and Wailuku, District of Wailuku and within Tax Map Key Nos. (2) 3-8-005-002 and (2) 3-8-006-003.\textsuperscript{23}

As described in the Application, the Project is comprised of a 60-megawatt ("MW") solar photovoltaic system ("PV System") paired with a 60 MWac/240 MW-hour ("MWh") battery energy storage system ("BESS"). The PV System and the BESS are

\textsuperscript{20}Application at 6.

\textsuperscript{21}Application at 12.

\textsuperscript{22}Application at 13.

\textsuperscript{23}Application at 14.
collectively referred to as the "Project" or the "Facility".\textsuperscript{24} The Facility will be "comprised of 90 MWdc of solar photovoltaic panels mounted on single axis trackers which will rotate along a fixed axis from east to west as the sun moves across the sky"\textsuperscript{25} and "will be capable of generating power used by an estimated 27,300 homes."\textsuperscript{26} The BESS will be charged "from energy collected by the photovoltaic system portion of the Facility."\textsuperscript{27}

The Facility will interconnect to MECO’s existing 69 kV Maalaea-Kuihelani transmission line running through the site.\textsuperscript{28} Electric energy produced by the Facility will be provided by AES Kuihelani to MECO and delivered to the Point of Interconnection in response to MECO’s dispatch of the Facility.\textsuperscript{29}

\textsuperscript{24}Application at 1. "The Allowed Capacity for the Facility is limited to 60 MW." Application at 14.

\textsuperscript{25}Application at 13.

\textsuperscript{26}Application at 13.

\textsuperscript{27}Application at 13.

\textsuperscript{28}Application at 14.

\textsuperscript{29}Application at 14.
D.

Material Terms of the PPA

The salient terms of the PPA are summarized below.\textsuperscript{30} In general, MECO states that "[t]he PPA contains commercial and technical terms that are fair to both parties while also serving to protect [MECO] and its customers from certain risks associated with the Seller's development, interconnection and operation of the [Project.]"\textsuperscript{31}

**Term:** The initial term of the PPA is twenty-five (25) years following the COD ("Term").\textsuperscript{32}

**Commission Approval and Termination Rights:** MECO and AES Kuihelani are required to use "good faith efforts to obtain, as soon as practicable," a satisfactory commission order approving the PPA within twelve (12) months of the execution date of the PPA.\textsuperscript{33} If a satisfactory commission order is not issued within twelve (12) months, or within a longer period as agreed to by

\begin{footnotesize}
\textsuperscript{30}The terms and conditions of the PPA are also summarized in Exhibit 4 to the Application. In addition, the complete PPA is attached as Exhibit 1 to the Application. Citations to the PPA will be by the Application's "Exhibit 1" numbers, rather than the PPA's internal page numbering.

\textsuperscript{31}Application at 17.

\textsuperscript{32}Application, Exhibit 4 at 2.

\textsuperscript{33}Application, Exhibit 4 at 2 (citing Exhibit 1 at 66-67, § 12.3).
\end{footnotesize}
MECO and AES Kuihelani, either MECO or AES Kuihelani may, within one hundred eighty (180) days of such date, issue written notice declaring the PPA null and void.\textsuperscript{34} Similarly, if a commission approval order is issued within twelve (12) months but is appealed and a non-appealable commission order approving the PPA is not obtained within twelve (12) months from the date the Application was filed, either MECO or AES Kuihelani may, within ninety (90) days of such date, by written notice declare the PPA null and void.\textsuperscript{35}

MECO clarifies that "[t]imeframes for [commission] approval were set based on the Project's need to move forward as expeditiously as possible to safe harbor the federal Business Energy Investment Tax Credit ('ITC') at 18% for 2019."\textsuperscript{36} However, MECO also clarifies that "in the event Seller is unable to safe harbor the ITC and the PPA is not declared null and void pursuant to the terms of the PPA, the contract price negotiated in the PPA will not be increased or subject to adjustment."\textsuperscript{37}

\textsuperscript{34}Application, Exhibit 4 at 2-3 (citing Exhibit 1 at 74, § 12.6(b))

\textsuperscript{35}Application, Exhibit 4 at 3 (citing Exhibit 1 at 74, § 12.6(b)).

\textsuperscript{36}Application, Exhibit 4 at 3.

\textsuperscript{37}Application, Exhibit 4 at 3.
Company Right to Declare PPA Null and Void Prior to Effective Date:  MECO may declare the PPA null and void prior to the Effective Date for the following reasons:

(A) Seller implements a material change to the Facility without following the PPA's requirements;

(B) Seller is in material breach of any of its representation, warranties and covenants under the PPA, including, but not limited to, Seller's responsibility to obtain certain Land Rights and Governmental Approvals and Seller's payment requirements to MECO for interconnection facilities;

(C) Seller, after making payment for the interconnection facilities, requests in writing that MECO stop or otherwise delay the performance of work for which MECO received such payment; and

(D) Seller notifies MECO in writing that it desires to modify the PPA and/or the Project, except as expressly provided for in sections 12.4 of the PPA and section 5(f) of Attachment A of the PPA.  

Pricing - Lump Sum Payment: In general, this PPA is "a new model PPA" that was developed in response to the HECO Companies' Stage 1 Request for Proposals for Various Renewable Dispatchable Generation ('RFP')."  This new PPA

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38Application, Exhibit 4 at 3-4.

model "provides a contractual vehicle to integrate more renewable energy, provide flexibility on the [MECO] Companies' grids, and address financing risks previously associated with curtailment[,]" particularly by "giv[ing] the Companies the contractual flexibility to dispatch renewable energy facilities, and in exchange developers are provided a monthly payment ("Lump Sum Payment") which is subject to potential offset for liquidated damages based on the availability and performance of the facility, i.e., photovoltaic ("PV") system and battery energy storage system." 40

Consequently, the PPA does not provide for any energy payment; rather, "the Lump Sum Payment is made in exchange for the right to dispatch the Facility's energy production." 41

The Project's energy projection is valued based on an estimated Net Energy Potential ("NEP") for the Project, which "represents the theoretical annual energy delivery of the Facility's PV System to the Point of Interconnection [with MECO] assuming 'typical' availability and 'representative' meteorological conditions at the site, with a probability of exceedance of 95%." 42

40Application, Exhibit 4 at 1.
41Application, Exhibit 4 at 6.
42Application, Exhibit 4 at 6.
Unit Price: The Lump Sum Payment amount will be adjusted "from time to time as the MWh value assigned to the Facility’s NEP is reassessed as provided in the PPA[,]" 43 but which will be "made on the basis of the 'Unit Price' of $0.077793515 per kilowatt-hour ("kWh") of NEP, as specified in the PPA." 44 In its RFP, AES Kuihelani projected that the Project would have a NEP of 163,939 MWh per year. 45

Pricing - Other Adjustments: The Lump Sum Payment may also be adjusted based on the report of the Project’s NEP by an independent engineer ("IE") at the close of Seller’s construction financing, but before commercial operation of the Facility. 46 If the IE finds that the Project’s NEP is equal or greater to the NEP estimate provided in Seller’s RFP Response, the Lump Sum Payment specified in the Application will apply for the first fifteen (15) months following commercial operation of the Project. 47 However, if the IE determines that the Project’s NEP

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43Application, Exhibit 4 at 6.

44Application, Exhibit 4 at 6. MECO states that the Unit Price was calculated based on the Lump Sum Payment and MWh value of the Project’s NEP as provided by AES Kuihelani in its RFP Response. Id.

45Application at 2, & Exhibit 1 at 335.

46Application, Exhibit 4 at 7.

47Application, Exhibit 4 at 7.
is less than the NEP estimate in Seller’s RFP Response, Seller may either: (1) declare the PPA null and void; or (2) use the IE’s NEP estimate to reduce the Lump Sum Payment used during the first fifteen (15) months following commercial operation of the Project, as well as pay a one-time liquidated damage calculated on the basis of $10/MWh of the differential between the two NEP estimates.  

Pricing - Liquidated Damages: Liquidated damages ("Liquidated Damages") are assessed when/if Seller fails to achieve certain Performance Metrics that indicate that MECO "is not receiving the benefit of its dispatch rights over the Facility's energy production." Liquidated damages are assessed against the full Lump Sum Payment amount and "have the potential to reduce the Lump Sum Payment down to zero if the Facility is completely unavailable or if the Facility is available but underperforming in other aspects as measured by the Performance Metrics."  

As stated in the PPA, to provide MECO with reasonable assurance that the Project will be available and perform as required, the following metrics are utilized:

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46 Application, Exhibit 4 at 7.  
49 Application, Exhibit 4 at 7.  
50 Application, Exhibit 4 at 4-5; see also Application at 15-16.
1. The Equivalent Availability Factor ("EAF") Performance Metric, which is used to evaluate the availability of the PV System for dispatch by MECO;

2. The Guaranteed Performance Ratio ("GPR") Performance Metric, which is used to evaluate the efficiency of the PV system;

3. The BESS Capacity Performance Metric, which is used to confirm the capability of the BESS to discharge as required by the terms of the PPA;

4. The BESS EAF Performance Metric, which is used to determine whether the BESS is meeting its expected availability; and

5. The BESS Equivalent Forced Outage Factor ("EFOF") Performance Metric, which is used to evaluate whether the BESS is experiencing excessive unplanned outages.\(^{51}\)

In the event that AES Kuihelani fails to achieve one or more of the Performance Metrics, there is a liquidated damage amount that is associated with such failure.\(^ {52}\) Liquidated damages relating to the PV system are calculated on the basis of the full Lump Sum Payment.\(^ {53}\) Liquidated damages relating to the BESS are

\(^{51}\)Application, Exhibit 4 at 5.

\(^{52}\)Application, Exhibit 4 at 5.

\(^{53}\)Application, Exhibit 4 at 5.
calculated on the basis of the BESS Allocated Portion of the Lump Sum Payment for an applicable three-month period (which is referred to in the PPA as a "BESS Measurement Period").

Company's Right of First Negotiation to Purchase the Project: In the event AES Kuliheleani wishes to assign its interest in the Project or effect a change of control, MECO has the first right to negotiate for purchase of the Project. Additionally, "if [MECO] is subject to consolidation treatment under FASB ASC 810 and/or lease treatment under FASB Accounting Standards Codification 842, Leases ("FASB ASC 842") . . . with respect to Seller and the Facility, . . . [MECO and Seller] may effectuate a sale of the Facility to [MECO]." MECO clarifies that any such purchase of the Project by MECO "shall be subject to application to the Commission for approval, and, prior to consummation, formal Commission approval of such purchase."

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54 Application, Exhibit 4 at 5.

55 Application, Exhibit 4 at 8 (citing Exhibit 1 at 105, § 19.1; and 296-310, Attachment P). The PPA also provides for limited instances of "exempt sales" to which MECO's right of first negotiation does not apply. See Exhibit 1 at 297, Attachment P, § 1(c).

56 Application, Exhibit 4 at 8 (citing Exhibit 1 at 124-125, § 24.5; and Exhibit 1 at 308-310, Attachment P, § 6).

57 Application, Exhibit 4 at 8.
Similarly, at the end of the PPA Term, MECO has the right of first negotiation to purchase the Project.\textsuperscript{58}

Compliance with Laws and Regulations: Under the PPA, AES Kuihelani is responsible for:

(A) obtaining any and all necessary permits, governmental approvals, and land rights for the construction and operation of the Project;

(B) installing, operating, and maintaining the Project safely and in compliance with all applicable laws; and

(C) Prior to commencement of construction of the Company-owned Interconnection Facilities, providing the necessary permits, governmental approvals, and land rights for construction, ownership, operation, and maintenance of the Company-Owned Interconnection Facilities.\textsuperscript{59}

Site Restoration: After termination of the PPA, or if the PPA is declared null and void, AES Kuihelani will, upon MECO’s request, remove all Company-Owned Interconnection Facilities and Seller-Owned Interconnection Facilities from the land and restore the land to its condition prior to construction (alternatively, MECO may elect to remove all or part of the Company-Owned

\textsuperscript{58}Application, Exhibit 4 at 10 (citing Exhibit 1 at 296-310, Attachment P).

\textsuperscript{59}Application, Exhibit 4 at 9 (citing Exhibit 1 at 67-69, §§ 11.1 - 11.3).
Interconnection Facilities and/or Seller-Owned Interconnection Facilities, in which case AES Kuihelani will reimburse MECO for the cost of removal).  

Company Dispatch: MECO will have discretion to dispatch the Project, including the PV system and BESS, in its preferred manner.

Credit Assurances and Security: AES Kuihelani is required to post and maintain Development Period Security and Operating Period Security.

Guaranteed Milestones and Commercial Operations: MECO and AES Kuihelani have agreed upon certain project milestones, including commercial operations.

If a Project milestone is not achieved by the applicable deadline, AES Kuihelani shall pay Daily Delay Damages ("Daily Delay Damages") to MECO in the amount of $16,666.67 per day following

\[\text{Application, Exhibit 4 at 9 (citing Exhibit 1 at 251-252, Attachment G, §7).}\]

\[\text{Application, Exhibit 4 at 10 (citing Exhibit 1 at 62-63, Article 8; and Exhibit 1 at 229-230, Attachment B, §9(d)).}\]

\[\text{Application, Exhibit 4 at 10 (citing Exhibit 1 at 84-88, Article 14).}\]

\[\text{Application, Exhibit 4 at 10 (citing Exhibit 1 at 72-77, Article 13). The "Guaranteed Commercial Operations Date" is identified as July 20, 2021 in the PPA. See Application, Exhibit 1 at 273, Attachment K.}\]
the 10th day after the applicable milestone deadline, not to exceed ninety (90) days for each missed milestone.64

II.

PARTIES AND PARTICIPANT’S POSITIONS

A.

MECO

In support of its Application, MECO asserts that approval of the Project and PPA is reasonable because:

The Project was selected as a result of a competitive procurement process,65 and “is advantageous” because MECO will be able to dispatch energy from the Facility as needed, offset night-time customer demand, and assist in grid stabilization,66 and it will decrease MECO’s future dispatch of oil-fueled units.67

MECO states that the PPA is the result of the Stage 1 RFP process established in Docket No. 2017-0352. Briefly, Docket No. 2017-0352 was established to “receive[] filings,

64Application, Exhibit 1 at 73-75, § 13.4). See also, MECO Response to CA-IR-1, Attachment 1 at 7, filed February 1, 2019.

65Application at 7; see also Application, Exhibit 2.

66Application at 7.

67Application at 8.
review[] approval requests, and resolv[e] disputes relating to the [HECO] Companies' plans to acquire new renewable energy generation." 68 MECO, along with the other HECO Companies, submitted a draft RFP for variable RDG, which was then reviewed and vetted by stakeholders and the commission and ultimately approved by the commission on February 20, 2018. 69 Stage 1 of the RFP required proposals with GCODs no later than December 31, 2022, in order to take advantage of the 2019 ITC, and "represents the largest energy procurement undertaking in Hawai'i's history." 70

MECO states that the RFP "was specifically designed to include the following characteristics: technology agnostic, not specifying a maximum size requirement, allowing projects to be sited at developer-defined sites, and allow for variations within proposals (including the option to pair storage with generation), which provided the benefits of encouraging broader developer participation as well as allowing the market to dictate technology and price." 71 "In order to maintain a competitive and fair process,

68 Application, Exhibit 2 at 1.
69 See Application, Exhibit 2 at 1-2.
70 Application, Exhibit 2 at 3.
71 Application, Exhibit 2 at 3.
the [HECO] Companies followed the Commission’s Framework for Competitive Bidding . . . with only minor modifications.”

MECO first divided the RFP proposals into separate technology “buckets” to ensure that proposals of “like” technology would be evaluated against each other. Proposals within each bucket were evaluated using both price-related and non-price related criteria. The highest-ranking proposals from each bucket were then placed on a “short list” and invited to update their proposals to reach their best and final offer (“BAFO”). The short-listed BAFOs were then evaluated by assessing the proposed costs of the delivered energy and operating characteristics of each proposed project to reach a Final Award Group of eight proposals, which were then allowed to proceed with contract negotiations with the HECO Companies. The subject PPA is one of the results of these negotiations.” In addition, Navigant served as the commission-appointed Independent Observer (“IO”) throughout the entire evaluation process.

According to MECO, “[the] key benefit of the [Project], contracted through the RDG PPA is that [MECO] will be able to

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72Application, Exhibit 2 at 4. The commission’s Framework for Competitive Bidding was established in Docket No. 03-0372 by Decision and Order 23121, filed December 8, 2006.

73Application, Exhibit 2 at 5-6.

74Application, Exhibit 2 at 4.
utilize attributes of the [Project] to best meet the needs of the system. Having the [PV] system paired with a [BESS] adds significant value to the [Project] by allowing the energy produced during the day that cannot be readily accepted by the Company to be stored and dispatched to the Company's system at future times of higher customer demand, which is more beneficial to the Company's system than past projects that required instantaneous use of energy produced. [MECO] anticipates that it will dispatch the [BESS's] stored energy to the [MECO] grid to, among other things, help with ramping towards [MECO's] periods of peak energy demand (rather than ramping up conventional generation), offset night time fossil fuel generation, and assist in grid stabilization subject to discharge limits.75

The PPA establishes a "Unit Price" of $0.077793515 per kWh.76 The Unit Price is then multiplied by the NEP to determine the monthly Lump Sum Payment.77 Additionally, as noted above, this amount may be subject to discount in the event

75Application at 15.

76Application, Exhibit 1 at 175.

77Application, Exhibit 1 at 267 (Attachment J, § 3) (calculating the Lump Sum Payment as 1/12th of the product of the Unit Price multiplied by the NEP Benchmark, subject to periodic adjustments to the NEP Benchmark throughout the term of the PPA).
Liquidated Damages are assessed. The Unit Price in the PPA "is fixed for the duration of the PPA and is anticipated to result in lower effective rates for customers."

MECO states that the Project is anticipated to provide bill savings over the PPA's term. According to MECO's bill impact analysis, the project will result in cost savings to a typical residential customer of the Company of $9.12 per month in 2022 and $12.22 per month in 2023, with continued cost savings throughout the term of the Project.

The Project is not expected to increase curtailment of existing as-available renewable resources or impede consideration of additional renewable resources to MECO's system.

MECO states that the Project will reduce MECO's fuel consumption and help reduce greenhouse gas ("GHG") emissions, and will help MECO achieve its goal of moving towards energy independence, as set forth in MECO's PSIP.

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78 See Application at 15.
79 Application at 8.
80 Application at 8.
81 Application, Exhibit 3, Attachment 4.
82 Application at 3.
83 Application at 9.
84 Application at 9.
MECO also asserts that the Project is consistent with Hawaii’s energy policy and goals because the Project will encourage the use and development of renewable energy and help reduce MECO’s reliance on fossil fuels.\textsuperscript{85} Specifically, MECO states that over the 25-year term of the PPA, the Project will help reduce MECO’s fuel consumption by 1,987,751 barrels of fuel\textsuperscript{86} and will also result in the avoidance of 931,400 tons of GHG emissions.\textsuperscript{87} In addition, MECO also estimates that the Project will help MECO contribute an average of 14.6% to its annual RPS contribution\textsuperscript{88} and an average of 1.9% to the HECO Companies’ annual consolidated RPS.\textsuperscript{89}

MECO asserts that these estimated results are consistent with objectives identified in HRS § 226-18(a), including: "(1) Dependable, efficient, and economical statewide energy systems capable of supporting the needs of the people; (2) Increased energy self-sufficiency where the ratio of indigenous to imported energy use is increased; (3) Greater energy security and diversification in the face of threats to Hawaii’s energy supplies and systems; and (4) Reduction, avoidance,

\textsuperscript{85}Application at 10.
\textsuperscript{86}Application at 10; Application, Exhibit 3.
\textsuperscript{87}Application at 11; Application, Exhibit 5.
\textsuperscript{88}Application at 12; Application, Exhibit 6.
\textsuperscript{89}Application at 12; Application, Exhibit 6.
or sequestration of greenhouse gas emissions from energy supply and use."

Similarly, MECO maintains that the PPA and Project are relevant to the considerations listed in HRS § 269-6(b), which require the commission to "explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions." 

MECO states that when considered in conjunction with another PPA being applied for on Maui, and "[c]onsidering the totality of these projects[,]" the Project and PPA are consistent with the public interest.

B.

The Consumer Advocate

On March 6, 2019, the Consumer Advocate filed its Statement of Position ("SOP"), recommending that the commission, subject to certain conditions: (1) approve the PPA between AES Kuihelani and MECO, dated December 28, 2018; (2) find that the

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90 Application at 10 (citing HRS § 226-18(a)).
91 Application at 11 (citing HRS § 269-6(b)).
92 Application at 8.
purchased power arrangements in the PPA are reasonable; and (3) authorize MECO to include all non-energy payments made under the PPA, including the Lump Sum Payments and related revenue taxes, in MECO’s PPAC to the extent such costs are not included in MECO’s base rates. The Consumer Advocate states that, in reaching its conclusion, it evaluated: (1) the procurement process, (2) the pricing associated with the proposed PPA, (3) the terms and conditions of the proposed PPA, and (4) community outreach. 

1. The Procurement Process

With respect to the procurement process leading up to MECO’s Application for approval of the PPA, the Consumer Advocate expresses concern that the same counsel, Yamamoto Caliboso, a Limited Liability Law Company ("Yamamoto Caliboso"), represents all four developers associated with the seven projects that were part of the final award group. The Consumer Advocate

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93 "Division of Consumer Advocacy’s Statement of Position," filed March 6, 2019 ("Consumer Advocate SOP"), at 1-2, 29-30.

94 Consumer Advocate SOP at 10.

95 Consumer Advocate SOP at 11-13 (citations omitted).
also notes that the HECO Companies each also indicated that they had similar concern.96

Specifically, the Consumer Advocate expresses concern "that having one attorney lead negotiations for all four developers' PPAs gives rise to, at a minimum, the appearance of impropriety"97 and questions whether the terms of the PPA would "have been more favorable to consumers (rather than developers) if information regarding utility concessions had not been shared[]."98

Regarding the instant proceeding, however, the Consumer Advocate "notes that there is no evidence of collusion thus far between developers, that developers were required to agree to a 'Certificate of Non-Collusion acknowledgement,' and that the IOs did not identify terms that appeared unreasonable resulting from the PPA negotiations."99

Although the Consumer Advocate states that additional time and information would be helpful in addressing "the possible appearance of impropriety" during the procurement process, the Consumer Advocate nonetheless "notes that the potential savings from the proposed PPA could yield benefits to consumers

96Consumer Advocate SOP at 13 (citations omitted).

97Consumer Advocate SOP at 16.

98Consumer Advocate SOP at 17.

99Consumer Advocate SOP at 16 (citations omitted).
and further certain State goals and will not object to the proposed PPA on the basis of the possible appearance of impropriety."\textsuperscript{100}

2.

Proposed PPA Pricing

With respect to pricing, the Consumer Advocate asserts that the information provided by AES Kuihelani "was inadequate to support a definitive determination as to whether the Lump Sum Payments appear reasonable \[\] based on project costs,"\textsuperscript{101} but nonetheless asserts that the commission "may still find the PPA pricing reasonable based on other measures such as projected system and bill savings, recent PV plus BESS project pricing, and national or regional cost studies."\textsuperscript{102}

\textsuperscript{100}Consumer Advocate SOP at 17.

\textsuperscript{101}Consumer Advocate SOP at 21-22. The Consumer Advocate notes that, at the time it filed its Statement of Position on March 6, 2019, instead of providing the native excel file of AES Kuihelani's pro forma, a PDF copy of the table was provided, which did not allow the Consumer Advocate to view the calculations behind cells. Consumer Advocate SOP at 19-20.


\textsuperscript{102}Consumer Advocate SOP at 21-22.
In particular, the Consumer Advocate notes that the levelized price associated with the proposed PPA "is somewhat higher than the Unit Price."\textsuperscript{103} The Consumer Advocate also asserts that AES Kuihelani "should have provided the native excel file of the pro forma as well as any further documentation and explanations supporting the pro forma cost estimates" in response to the commission's Order No. 36170 compelling production.\textsuperscript{104} The Consumer Advocate also reiterates its concern "that the same entity represented all of the Sellers" and its concern of "whether certain terms for one or any of the PPAs might have been different if they were negotiated by different entities[,]"\textsuperscript{105} and contends that "it is important to assess whether the selected projects reflect reasonable prices with reasonable returns instead of reflecting "sticky" prices."\textsuperscript{106}

Nonetheless, the Consumer Advocate acknowledges that the selection of the Project associated with the PPA, and the other

\textsuperscript{103}Consumer Advocate SOP at 17.

\textsuperscript{104}Consumer Advocate SOP at 20.

\textsuperscript{105}Consumer Advocate SOP at 18.

\textsuperscript{106}Consumer Advocate SOP at 21. "The term 'sticky' prices refer [sic] the general economic observation that there are certain situations when the price of a good or service does not readily change in a reasonable time frame in response to new market information or inputs and/or recent shifts in the demand and/or supply curves." Consumer Advocate SOP at 21 n.44.
projects associated with the PPAs before the commission, were the result of an RFP process and that "the prices do reflect a downward trend from PPA prices approved in the past[.]"\textsuperscript{107} With respect to the bill impact of the Project, the Consumer Advocate "notes that the estimated bill impact is consistent with the IO's analyses"\textsuperscript{108} and acknowledges that factors other than the levelized price should also be considered when determining the value of the Project to the grid.\textsuperscript{109}

3. Terms and Conditions of the Proposed PPA

The Consumer Advocate notes that it supports the proposed RDG PPA on which the subject PPA is based, to the extent that the proposed RDG PPA eliminates terms and conditions that were not in the public's best interest.\textsuperscript{110} The Consumer Advocate also notes that the fixed pricing in the PPA "significantly reduces price volatility, which can be detrimental to . . . those on a fixed income or with limited means to deal with volatility[.]"\textsuperscript{111}

\textsuperscript{107}Consumer Advocate SOP at 21.
\textsuperscript{108}Consumer Advocate SOP at 18.
\textsuperscript{109}Consumer Advocate SOP at 17.
\textsuperscript{110}Consumer Advocate SOP at 23.
\textsuperscript{111}Consumer Advocate SOP at 23.
On the other hand, the Consumer Advocate also notes that "the proposed contracts are for very long terms," which may "stifle innovation since, . . . as technology improves and prices decline, customers are not able to receive the benefits of such market improvements if the utility is locked into long-term contracts for available capacity."\textsuperscript{112}

The Consumer Advocate also expresses concern that the new RDG PPA "represents a significant transference of risk to customers" because "even if the utility is unable to take any energy" from the contracts, "the utility will be making payments to the seller[,]" making the new RDG PPA "essentially capacity contracts[]."\textsuperscript{113}

4.

Community Outreach and Benefits

With respect to community outreach and benefits, the Consumer Advocate notes that Exhibit 8 to MECO's Application provides the overview and current status of AES Kuihelani's outreach efforts, and that the outreach efforts "included a community meeting which 29 individuals attended, \textsuperscript{112} Consumer Advocate SOP at 24. 

\textsuperscript{113} Consumer Advocate SOP at 24.
including Mayor Alan Arakawa and State Representatives Hashimoto and Woodson[,]" and contact with "several local officials and two community organizations." With respect to community benefits, the Consumer Advocate notes that AES Kuihelani has indicated that it has not committed to a specific package.115

5. Conditions

The Consumer Advocate recommends the following conditions to commission approval of the PPA:

1. Require MECO to file copies of all invoices relating to the engineering, procurement, construction, and maintenance associated with the proposed PPA no later than sixty (60) days after the Commercial Operations Date, as well as require MECO to file AES Kuihelani's income statements or results of operations related to the PPA, to allow the commission and Consumer Advocate "to evaluate the comparability of the Project's actual results to the pro forma information[,] consistent with prior [c]ommission decision and orders[.]"116

114Consumer Advocate SOP at 26.
115Consumer Advocate SOP at 26.
2. To the extent additional information is necessary, the Consumer Advocate be allowed to issue information requests to AES Kuihelani as a participant in this proceeding;\(^{117}\)

3. As it relates to future procurement processes, bidders be required to file the pro forma information related to their project in electronic format (i.e., Excel), in addition to copies of any supporting documentation to support their respective bid price;\(^{118}\)

4. The procurement process should be reviewed to examine and develop guidelines, as necessary, to mitigate concerns about sellers using the same representative(s) in negotiations; and

5. Further considerations and discussions should be made in Phase 2 of the competitive procurement process, as discussed on pages 15 to 17 of Attachment 1 to the Consumer Advocate's SOP; and\(^{119}\)

As to whether the non-energy payments under the PPA should be included in and through the PPAC, the Consumer Advocate "does not object . . . , as such costs are not included in another cost recovery mechanism" and notes that it "appears reasonable

\(^{117}\)Consumer Advocate SOP at 28.

\(^{118}\)Consumer Advocate SOP at 28.

\(^{119}\)Consumer Advocate SOP at 28.
that the PPAC be utilized to recover the costs associated with capacity payments of the proposed PPA[,] which [i]s its intended purpose.”

C.

AES Kuihelani

Overall, AES Kuihelani requests that the commission find that the purchased power arrangements under the PPA are prudent and in the public interest "especially when considering HRS § 269-6)." In support thereto, AES Kuihelani states:

1. The PPA was the result of arms-length negotiations between AES Kuihelani and MECO from September through December 2018;\(^\text{122}\)

2. Besides offering a structure that allows for lower pricing and ultimately cost savings to ratepayers, the PPA also ensures that the ratepayer is not paying for services or capacity that it is not receiving;\(^\text{123}\)

\(^{120}\)Consumer Advocate SOP at 29. The Consumer Advocate notes that the commission approved MECO’s PPAC, "which would recover non-energy payments (i.e., capacity) associated with purchase power agreements[,]" in Docket No. 2009-0163, Decision and Order No. 30365, filed on May 2, 2012. Consumer Advocate SOP at 29.

\(^{121}\)AES Kuihelani SOP at 2, 16.

\(^{122}\)AES Kuihelani SOP at 7.

\(^{123}\)AES Kuihelani SOP at 7.
3. The purchased energy charges that MECO will pay are "just and reasonable;" \(^{124}\)

4. The Unit Price of $0.08 per kWh is fixed for the duration of the PPA, is "well below" the commission's benchmark for solar plus battery storage projects, and is, according to MECO, among the lowest to date for renewable electricity in the state and significantly lower than the current cost of fossil fuel generation, which is about $0.15 per kWh; \(^{125}\)

5. The purchased energy charges were "prepared independently and without fraud or collusion with any other entity;" \(^{126}\)

6. The Project's BESS will allow the Project to store energy from the Project's PV System that cannot be readily accepted by MECO's grid during peak solar production and enable MECO to dispatch energy from the PV System or BESS as needed; \(^{127}\)

7. The Project will help contribute to a cleaner environment by reducing fuel consumption and reduce greenhouse gas emissions; \(^{128}\) and

\(^{124}\)AES Kuihelani SOP at 8.

\(^{125}\)AES Kuihelani SOP at 8.

\(^{126}\)AES Kuihelani SOP at 8.

\(^{127}\)AES Kuihelani SOP at 8.

\(^{128}\)AES Kuihelani SOP at 9-10.
8. The Project is well-supported by the local community.\textsuperscript{129}

With respect to the issues raised by the Consumer Advocate regarding the procurement process and the possibility of impropriety, AES Kuihelani objects to the Consumer Advocate’s recommended conditions for the following reasons:

1. Many of the Consumer Advocate’s conditions “relate to matters beyond the scope of this proceeding;”\textsuperscript{130}

2. Requiring MECO to file the requested information from AES Kuihelani would unreasonably compel AES Kuihelani to provide its confidential commercial and financial information to MECO;\textsuperscript{131} and

3. It is unclear for what purpose the Consumer Advocate seeks the requested information.\textsuperscript{132}

AES Kuihelani contends that, if the commission chooses to impose conditions requiring disclosure of the information sought by the Consumer Advocate in its recommended conditions, that AES Kuihelani be allowed to file information “directly to the

\textsuperscript{129}AES Kuihelani SOP at 10.
\textsuperscript{130}AES Kuihelani SOP at 11.
\textsuperscript{131}AES Kuihelani SOP at 11.
\textsuperscript{132}AES Kuihelani SOP at 12.
Consumer Advocate on a confidential basis, rather than to MECO.\textsuperscript{133}

D. MECO Reply

In its Reply SOP, MECO: (1) "generally agrees with the recommendations made by the Consumer Advocate in its SOP[;]" (2) "supports the SOP filed by [AES Kuihelani], to the extent [AES Kuihelani] recommends approval of the PPA[,]" and (3) "takes no position" on AES Kuihelani's other positions and arguments.\textsuperscript{134} MECO also reiterates its requests that the commission approve the PPA; find that MECO has met its burden of proof with respect to its requests for approval of the PPA and to include all non-energy payments under the PPA through MECO's PPAC, to the extent such costs are not included in base rates; and find that MECO's purchased power arrangements under the PPA are prudent and in the public interest.\textsuperscript{135}

With regard to the Consumer Advocate's recommended conditions, MECO responds as follows:

1. If the commission adopts the Consumer Advocate's recommended condition of approval by requiring MECO to provide

\textsuperscript{133}AES Kuihelani SOP at 13.

\textsuperscript{134}MECO Reply SOP at 1-2.

\textsuperscript{135}MECO Reply SOP at 8.
engineering, procurement, construction, maintenance, income, and results of operations information for the Project, AES Kuihelani — rather that MECO — should be required to submit such information directly to the Consumer Advocate, inasmuch as AES Kuihelani maintains the requested information, and can file such information as confidential pursuant to Protective Order No. 36126;\textsuperscript{136}

2. MECO agrees with the Consumer Advocate's recommendation that, for future procurement processes, bidders be required to file the pro forma information related to their project, in addition to copies of any supporting documentation to support its bid price;\textsuperscript{137}

3. With respect to the Consumer Advocate's concern about the potential appearance of impropriety during the procurement process, MECO: (1) agrees with the Consumer Advocate's recommendation to consider process improvements to the procurement process, (2) states that it "intends to specifically address these

\textsuperscript{136}MECO Reply SOP at 5-6; \textit{see} Docket No. 2018-0436, Protective Order No. 36126, filed on January 25, 2019.

\textsuperscript{137}MECO Reply SOP at 6. MECO states that the HECO Companies had initially planned to include such a requirement in their RFP in Docket No. 2017-0352, but removed the requirement in the final RFP because the requirement was perceived as overly burdensome. MECO represents, however, that "[a]fter completing Stage 1 of the RFPs, the [HECO Companies] believe that requiring a complete pro forma would have been beneficial to the process and allowed for a more informed evaluation of developers' proposed projects." MECO Reply SOP at 6.
concerns in Stage 2 of the RFPs,” and (3) does not see such a
recommendation to be a basis to deny approval of the instant
Application; and

4. In connection with pages 15 to 17 of Attachment 1
to the Consumer Advocate’s SOP, MECO states that it “will further
consider how different metrics are used in the evaluation process”
during “Stage 2 of the RFPs[.]”

With regard to AES Kuihelani’s SOP, MECO states that:

1. It “supports” AES Kuihelani’s position “[t]o the
extent [AES Kuihelani] recommends that the [c]ommission find the
purchased power arrangements under the PPA, including the Lump Sum
Payments, are prudent and in the public interest[;]” and

2. With respect to AES Kuihelani’s opposition to the
Consumer Advocate’s recommendation of filing project cost
information following commercial operations, MECO states that if
the commission adopts such recommendation as a condition to
approval, the condition should apply to AES Kuihelani, the seller,
who can then designate and file such information as confidential
pursuant to Protective Order No. 36126.

138MECO Reply SOP at 7.
139MECO Reply SOP at 7.
140MECO Reply SOP at 7.
141MECO Reply SOP at 7.
DISCUSSION

A. Legal Authorities

HRS § 269-27.2(c) states:

(c) The rate payable by the public utility to the producer for the nonfossil fuel generated electricity supplied to the public utility shall be as agreed between the public utility and the supplier and as approved by the public utilities commission; provided that in the event the public utility and the supplier fail to reach an agreement for a rate, the rate shall be as prescribed by the public utilities commission according to the powers and procedures provided in this chapter [269].

The commission's determination of the just and reasonable rate shall be accomplished by establishing a methodology that removes or significantly reduces any linkage between the price of fossil fuels and the rate for the nonfossil fuel generated electricity to potentially enable utility customers to share in the benefits of fuel cost savings resulting from the use of nonfossil fuel generated electricity. As the commission deems appropriate, the just and reasonable rate for nonfossil fuel generated electricity supplied to the public utility by the producer may include mechanisms for reasonable and appropriate incremental adjustments, such as adjustments linked to consumer price indices for inflation or other acceptable adjustment mechanisms.142

142HRS § 269-27.2(c).
Additionally, HAR § 6-74-22(a) states that rates for purchases of electric energy and/or capacity from a qualifying facility by an electric utility shall:

(1) Be just and reasonable to the electric consumer of the electric utility and in the public interest;

(2) Not discriminate against qualifying cogeneration and small power production facilities; and

(3) Be not less than one hundred per cent of avoided cost for energy and capacity purchases to be determined as provided in § 6-74-23 from qualifying facilities and not less than the minimum purchase rate.143

Concomitantly, HAR § 6-74-15(b)(1) provides that HAR § 6-74-22 does not prohibit an electric utility or any qualifying facility from agreeing to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by HAR § 6-74-22.

HRS § 269-6(b) further provides:

(b) The public utilities commission shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation in exercising its authority and duties under this chapter. In making determinations of the reasonableness of the costs of utility system capital improvements and operations, the commission shall

143HAR § 6-74-22(a).
explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions. The commission may determine that short-term costs or direct costs that are higher than alternatives relying more heavily on fossil fuels are reasonable, considering the impacts resulting from the use of fossil fuels.

With regard to MECO's request to include all non-energy payments under the PPA through the PPAC, HAR § 6-60-6(2) states:

No changes in fuel and purchased energy costs may be included in the fuel adjustment clause unless the contracts or prices for the purchase of such fuel or energy have been previously approved or filed with the commission.

Additionally, HRS § 269-16.22 provides:

All power purchase costs, including costs related to capacity, operations and maintenance, and other costs that are incurred by an electric utility company, arising out of power purchase agreements that have been approved by the public utilities commission and are binding obligations on the electric utility company, shall be allowed to be recovered by the utility from the customer base of the electric utility company through one or more adjustable surcharges, which shall be established by the public utilities commission. The costs shall be allowed to be recovered if incurred as a result of such agreements unless, after review by the public utilities commission, any such costs are determined by the commission to have been incurred in bad faith, out of waste, out of an abuse of discretion, or in violation of law. For purposes of this section, an "electric utility company" means a public utility as
defined under section 269-1, for the production, conveyance, transmission, delivery, or furnishing of electric power.

B.

Procurement of the PPA

1. The PPA filed in this docket is the result of Phase 1 of the Hawaiian Electric Companies' competitive procurement process to acquire new, dispatchable and renewable energy resources for Oahu, Maui, and Hawaii Island, which was the subject of Docket No. 2017-0352. The commission stated its intent:

[T]o ensure that each competitive bidding process "is fair in its design and implementation so that selection is based on the merits;" that projects selected through a competitive bidding process are consistent with the utility's [Power Supply Improvement Plans]; that the utility's actions represent prudent practices; and that throughout the process, the utility's interests are aligned with the public interest . . . .

2. Moreover, the commission stated it "believes the overall RFPs timeline should be accelerated to enable finalized

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PPAs to be submitted to the commission for approval by the end of 2018[,]" and that this "accelerated timeline will allow the commission to review and approve PPAs in early 2019, providing the maximum amount of time for developers to safe harbor materials and receive available tax credits." 146

3. Notwithstanding the foregoing, the commission also said that, "[w]hile the existence of a competitive bidding process helps to provide assurances that a bid is selected 'fairly,' this does not act as a substitute for the commission's, or the Consumer Advocate's, independent review of the evidence in determining whether to approve, or recommend approval of, a proposed PPA." 147

4. In this proceeding, the Consumer Advocate expressed concern "that all four developers associated with the seven projects with PPAs currently before the Commission are represented by the same counsel: Yamamoto Caliboso, a Limited Liability Law


147 Order No. 36170, "Compelling AES Kuihelani Solar, LLC to Respond to the Consumer Advocate's Information Requests," filed on February 20, 2019 ("Order No. 36170"), at 11.
Company ("Yamamoto Caliboso").  The Consumer Advocate is concerned that "having one attorney lead negotiations for all four developers' PPAs gives rise to, at a minimum, the appearance of impropriety." The Consumer Advocate "believes having one attorney or set of attorneys handling all developers' negotiations raises the question, 'Would the terms have been more favorable to consumers (rather than developers) if information regarding utility concessions had not been shared?'"  

5. However, the Consumer Advocate notes that "there is no evidence of collusion thus far between developers, that developers were required to agree to a 'Certificate of Non-Collusion acknowledgement,' and that the IOs did not identify terms that appeared unreasonable resulting from the PPA negotiations." The Consumer Advocate also states it "will not object to the proposed PPA on the basis of the possible appearance of impropriety[]" due to the "potential savings from the proposed PPA [that] could yield benefits to consumers and further certain State goals[]."

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148 Consumer Advocate SOP at 11 (citations omitted).
149 Consumer Advocate SOP at 16.
150 Consumer Advocate SOP at 16-17.
151 Consumer Advocate SOP at 16 (citations omitted).
152 Consumer Advocate SOP at 17.
"should be addressed in future competitive procurements to mitigate the possibility of similar circumstances."\(^{153}\)

6. In response to the Consumer Advocate's concerns, AES Kuihelani asserts that the Consumer Advocate's suggestion of a possible appearance of impropriety is unsupported and unjustified.\(^{154}\) AES Kuihelani represents that it:

did not engage any outside counsel in the preparation of its initial response to the RFP (including the submission of proposed contract terms, storage durations, and commercial operations dates), in its review of the form PPA during its initial evaluation of the RFP documents, in its preparation of the pricing it included in its initial response to the RFP response and best and final offer (BAFO), nor in any other aspect of its response to the RFP.

It was only after Seller had been notified that it was in the Final Award Group by the Company did Seller engage outside counsel for the purpose of assisting Seller in negotiating the PPA with the Company to ensure that the commercial terms were fair, financeable, and would allow for a successful Project. Any concerns that [sic] Company has with respect to multiple bidders possibly utilizing the same legal counsel during their bid preparation are entirely unfounded and inaccurate with respect to Seller, given that Seller did not engage outside counsel until well after Seller's initial response to the RFP and BAFO were submitted to the Company and after Seller was notified by the Company,

\(^{153}\)Consumer Advocate SOP at 17.

\(^{154}\)AES Kuihelani SOP at 15.
in accordance with the RFP procedures, that it had been selected for the Final Award Group.\textsuperscript{155}

7. With regard to the negotiations of the PPA, AES Kuihelani states it is "not aware of any concessions gained because other developers received such concessions" and, to the extent that other developers received similar guidance from outside counsel related to negotiation of the PPA, "such guidance was not the result of information sharing by [AES Kuihelani] or its counsel but rather the result of experienced counsel providing legal advice of the kind that should be expected by any developer counsel from an experienced law firm with respect to the negotiation of a power purchase agreement."\textsuperscript{156} AES Kuihelani further states that, although it retained outside counsel, AES Kuihelani "was very active in the negotiation process and corresponded directly with [MECO's] counsel and the business team on many of the outstanding issues."\textsuperscript{157}

8. In addition, attached to AES Kuihelani's SOP is a signed affidavit from Woody Rubin, President of AES Distributed Energy, Inc., that attests that, among other things, AES Distributed Energy, Inc. is the "parent" of AES Kuihelani,

\textsuperscript{155}AES Kuihelani SOP at 14.
\textsuperscript{156}AES Kuihelani SOP at 14.
\textsuperscript{157}AES Kuihelani SOP at 14.
and "the factual statements and representations made [in its SOP] with respect to [AES Kuihelani] are true and accurate based on [his] present knowledge, information, and belief."\textsuperscript{158}

9. MECO represents that it and the Independent Observer "did not discuss concerns during the evaluation and selection process that multiple projects were represented by the same legal counsel."\textsuperscript{159}

10. In its Reply SOP, MECO states it "takes no position" as to AES Kuihelani's "other positions and arguments," including those regarding the Consumer Advocate's suggestion of a possible appearance of impropriety in the procurement process.\textsuperscript{160} In response to the Consumer Advocate's suggested recommendation that the procurement process be reviewed to examine and develop guidelines, as necessary, to mitigate concerns about sellers using the same representative(s) in negotiations, MECO responds:

\begin{quote}
The Consumer Advocate does not contend that the stated concerns actually affected the integrity of this current procurement process. As such, this appears to be a recommendation for prospective action and not any basis to deny approval of the present Application. Nevertheless, [MECO] agrees with the recommendation to consider process
\end{quote}

\textsuperscript{158}See AES Kuihelani SOP, Affidavit of Woody Rubin, ¶¶ 1-3.

\textsuperscript{159}MECO's Response to CA/MECO-IR-25-a, filed on March 1, 2019.

\textsuperscript{160}MECO Reply SOP at 2.
improvements and intends to specifically address these concerns in Stage 2 of the RFPs.\textsuperscript{161}

11. The commission appreciates the Consumer Advocate’s concern and acknowledges the accelerated procedural timeline established for this proceeding. For purposes of Phase 1 of the competitive procurement process and in light of the accelerated timeline established for this proceeding, the commission finds that the statements made by AES Kuihelani in its SOP, which were attested to by Woody Rubin, President of AES Distributed Energy, Inc., through his signed affidavit attached to AES Kuihelani’s SOP, provide sufficient assurance to the commission that the subject PPA was negotiated in good faith and without collusion.

12. Moreover, based on this record as reflected by the discussion below, the commission finds it does not appear that AES Kuihelani’s choice of outside counsel had any adverse impact on the pricing terms of the PPA.

13. However, to the extent necessary, the commission may address issues relating to the appearance of impropriety during Phase 2 of the competitive procurement process in Docket No. 2017-0352.

\textsuperscript{162}MECO Reply SOP at 7.
C.

Approving the PPA

1.

Material PPA Terms and Conditions

a.

Pricing Provisions

14. **Lump Sum Payment.** The Lump Sum Payment is paid to AES Kuihelani on a monthly basis\(^{162}\) and calculated by multiplying the Unit Price, $0.077793515, by the NEP,\(^{163}\) which may then be offset by any liquidated damages that AES Kuihelani is required to pay to MECO for failing to meet certain metrics.\(^{164}\) The commission has recently reviewed and approved several power purchase agreements for PV paired with BESS systems and notices a declining trend in contract pricing.\(^{165}\) In Docket No. 2017-0018, the commission approved a PV plus BESS power purchase agreement between

\(^{162}\)Application at 2.

\(^{163}\)Application, Exhibit 4 at 6.

\(^{164}\)Application, Exhibit 4 at 4-5.

\(^{165}\)See In re Kauai Island Util. Coop., Docket No. 2017-0443, Decision and Order No. 35538, filed June 20, 2018 (approving contract price of $0.10850/kWh); In re Kauai Island Util. Coop., Docket No. 2017-0018, Decision and Order No. 34723, filed July 28, 2017 (approving contract price of $0.1108/kWh); and In re Kauai Island Util. Coop., Docket No. 2015-0331, Decision and Order No. 33557, filed February 26, 2016 (approving contract price of $0.145/kWh).
Kauai Island Utility Cooperative ("KIUC") and AES Kekaha Solar, LLC with a contract price of $0.10850/kWh.\(^{166}\) The commission observes that, at approximately $0.08/kWh, the Unit Price is below the commission's most recent PV plus BESS PPA, and continues the declining trend in procurement of utility-scale renewable generation.

15. **Unit Price.** The Unit Price is fixed over the entire term at $0.07793515 per kWh,\(^{167}\) or approximately $0.08 per kWh.

16. The commission finds that a fixed Unit Price throughout the PPA term is reasonable and in the public interest because a fixed price provides more certainty and stability, in light of the fluctuation of fossil fuel prices over the past ten years.\(^{168}\)

17. **NEP.** The NEP is defined by the PPA as:

The estimated single number with a P-Value of 95 for the annual Net Energy that could be produced by the Facility based on the

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\(^{166}\)See Decision and Order No. 35538 at 9. The commission recognizes that the material terms of the PPA in this proceeding are not identical to those in Docket No. 2017-0443, or any of the other identified KIUC docket. Nevertheless, the contract pricing in those docket is demonstrative of the declining costs of utility-scale PV plus BESS technology and provides general market context for the PPA's Unit Price of $0.08/kWh.

\(^{167}\)Application, Exhibit 4 at 6; Application, Exhibit 1 (PPA) at 175.

\(^{168}\)See HRS § 269-6(b); MECO Response to PUC-MECO-IR-8-a, filed February 26, 2019 (describing the fluctuations in diesel fuel prices over the past ten years).
estimated long-term monthly and annual total of such production over a ten-year period. The Net Energy Potential is subject to adjustment as provided in Attachment U (Calculation and Adjustment of Net Energy Potential) to this Agreement, but in no circumstances shall the Net Energy Potential exceed the NEP RFP Projection.\textsuperscript{169}

18. In its RFP Proposal, AES Kuihelani projected that the Facility would have a NEP of 163,939 MWh per year.\textsuperscript{170}

19. Based on the above, the commission finds that, although the NEP will be adjusted at certain intervals specified by the PPA, the NEP is reasonable and in the public interest because the PPA caps the NEP at the amount specified by the AES Kuihelani RFP, or at 163,939 MWh per year.\textsuperscript{171}

20. As such, based on the publicly-available information in the Application, the commission finds that the maximum Lump Sum Payment under the PPA is $12,753,391 per year, or $1,062,782.59 per month.\textsuperscript{172}

\textsuperscript{169}Application at Exhibit 1 at 161 (underline added). “Net Energy” is further defined as the “total quantity of energy (measured in kilowatt hours) produced by the Facility over a given time period and delivered to the Point of Interconnection, as measured by the revenue meter. ‘Net Energy’ [is] the equivalent of ‘Actual Output.’” Id.

\textsuperscript{170}Application at 2; Application, Exhibit 1 (PPA) at 335.

\textsuperscript{171}Application at 2.

\textsuperscript{172}Expressed as a mathematical equation: ($0.077793515 per kWh \times 1,000) \times 163,939 \text{ MWh per year} = 12,753,391 \text{ per year.} \quad $12,753,391 \text{ per year/12 months} = $1,062,782.59 \text{ per month.}
21. Together with the fixed Unit Price, the commission further finds that the Lump Sum Payment is reasonable and in the public interest because placing a maximum amount payable on the Lump Sum Payment provides more certainty and comparatively less price volatility to fossil fuel prices.\textsuperscript{173}

22. Moreover, it is anticipated that a typical MECO residential ratepayer using 500 kWh per month will save an estimated $9.12 on electricity payments in year 2022, $12.22 in year 2023, and experience continued savings through 2046.\textsuperscript{174} In addition, according to MECO, the total net present value of the savings for the Project is $298,416,609.\textsuperscript{175}

23. Liquidated damages. As stated above, AES Kuihelani is required to pay liquidated damages to MECO if AES Kuihelani fails to hit certain metrics defined in the PPA. MECO has the option to apply any liquidated damages owed as an offset to the developer's lump sum payments. The liquidated damages have the potential to reduce the Lump Sum Payment down to zero if the Facility is completely unavailable or if the Facility is available

\textsuperscript{173}See HRS § 269-6(b).
\textsuperscript{174}Application, Exhibit 3, Attachment 4 at 1.
\textsuperscript{175}Application, Exhibit 3, attachment 2 at 1.
but underperforming in other aspects as measured by the Performance Metrics in the PPA. ¹⁷⁶

24. These Performance Metrics include: (a) the Equivalent Availability Factor ("EAF") Performance Metric, which is used to evaluate the availability of the PV System for dispatch by MECO; (b) the Guaranteed Performance Ratio ("GPR") Performance Metric, which is used to evaluate the efficiency of the PV System; (c) the BESS Capacity Performance Metric, which is used to confirm the capability of the BESS to discharge as required by the terms of the PPA; (d) the BESS EAF Performance Metric, which is used to determine whether the BESS is meeting its expected availability; and (e) BESS EFOF Performance Metric, which used to evaluate whether the BESS is experiencing excessive unplanned outages." ¹⁷⁷

A. The commission finds that the liquidated damages provision appears to be reasonable in that it will ensure that the Project will deliver the value it purports to deliver to ratepayers.

¹⁷⁶Application at Exhibit 4 at 4-5.

¹⁷⁷Application, Exhibit 4 at 5.
b. Nature of the PPA

25. Again, pursuant to the terms of the PPA, MECO is agreeing to pay AES Kuihelani a monthly Lump Sum Payment in exchange for "the right to dispatch, subject to Renewable Resource Variability, the [Project's NEP]."\(^{178}\)

26. As such, although subject to Force Majeure adjustments\(^{179}\) and offset by liquidated damages, the monthly Lump Sum Payment must be paid to AES Kuihelani regardless if the Project is dispatched at all or in part due to excess capacity.\(^{180}\)

27. However, the commission finds that having additional capacity is beneficial because the additional capacity increases MECO's system reliability and grid stability in the event, for example, of an unforeseen shutdown of one or more other units on MECO's system.

28. Nonetheless, the commission agrees with the Consumer Advocate that the nature of the PPA places risk on MECO's ratepayers because MECO's ratepayers may be paying for unused

\(^{178}\)Application, Exhibit 1 at 334; see Exhibit 4 at 6 (emphasis added).

\(^{179}\)Force Majeure is discussed in Article 21 of the PPA, which begins at Application, Exhibit 1, at 103.

\(^{180}\)See Application at 2, & Exhibit 1 at 335.
capacity during periods of time throughout the PPA's term. To that end, the commission agrees with the Consumer Advocate's suggestion that MECO should be "ready to show that resources are being used to maximize the customers' benefit and not result in adverse impacts including, but not limited to, underutilized or excess capacity resources."\textsuperscript{181}

29. As such, although the commission finds that the nature of the PPA is reasonable and in the public interest when balanced against other pricing terms of the PPA, as discussed above, and considerations of grid stability and increased system reliability, the commission finds it reasonable and in the public interest to require MECO to report on Project operations for purposes of accountability, to inform other projects, and to inform related dockets.\textsuperscript{182} The reporting requirements are as follows:

(a) **Monthly reporting.** Beginning with the first full calendar month following the in-service date of the Project, MECO shall file hourly commitment, dispatch, and curtailment data for the Project and all other MECO and IPP units on the system.

\textsuperscript{181}Consumer Advocate SOP at 27.

\textsuperscript{182}See In re Hawaiian Elec. Co., Inc., Docket No. 2017-0213, Decision and Order No. 35556, filed June 27, 2018, at 63-64.
(b) The above-described monthly report shall be filed in Docket No. 2011-0206, and may be consolidated with other curtailment reports therein.\(^{183}\)

30. The commission finds that the above-reporting requirements represent a step toward increasing transparency in the use of MECO's renewable resources for the benefit of its customers. Additional reporting requirements may be required in other dockets to the extent the commission finds them to be reasonable and in the public interest.

c. PPA Term

31. As discussed above, the subject PPA is for a duration of twenty-five (25) years following the "Commercial Operations Date."\(^{184}\)

32. On one hand, the Consumer Advocate notes that the PPA is for a "very long term[]" and, "during times of declining price trends and improvements in technology, such long terms arguably stifle innovation" because, if MECO's system capacity is

\(^{183}\)MECO shall work with commission staff to ensure the content of the monthly reports is consistent with this Decision and Order and adequately provides the transparency required herein.

\(^{184}\)Application, Exhibit 1 at 66.
already met with "long-term contracts," MECO's ratepayers will not be able to receive the benefits of "such market improvements[.]"\(^{185}\)

33. However, as the Consumer Advocate also notes, the IOs in Docket No. 2017-0352 concluded that the non-price terms of the PPA are "reasonable" and the negotiation of the PPAs was "performed on a fair and consistent basis among the Finalists."\(^{186}\)

34. Moreover, the PPA duration should not be viewed in isolation from the rest of the terms of the PPA. Most notably, as discussed above, the Lump Sum Payment is capped pursuant to the terms of the PPA, the Performance Metrics could offset the amount of the Lump Sum Payment, a MECO ratepayer using 500 kWh per month is projected to save money on electric bills over the Project's duration, and the net present value of the savings resulting from the Project is positive.

35. The commission notes that in their respective SOPs, neither AES Kuihelani nor MECO raised issue with the duration of the PPA.

36. The commission thus finds that the subject PPA overall represents a significant step not only towards Hawaii's renewable energy goals consistent with HRS §§ 269-6 and 269-92 (RPS), but also towards lower energy prices.

\(^{185}\)Consumer Advocate SOP at 24.

\(^{186}\)Consumer Advocate SOP at 24-25.
37. As such, subject to the reporting requirements set forth above, in Section III.C.1.b, the commission finds that the term of the PPA is reasonable and in the public interest.

d.

Curtailment

38. MECO states that the project is not expected to increase curtailment of existing as-available renewable resources or impede consideration of additional renewable resources.187

39. Likewise, AES Kuihelani states that the proposed PPA is extremely thorough in allocating operational risk to AES Kuihelani, while also making sure the investor does not bear the risk of curtailment; the current contract incentivizes MECO to manage the grid appropriately to maximize utilization of the contracted energy and capacity.188

40. MECO states that the PPA provides operating provisions to dispatch the project’s capacity and energy, with flexibility for the facility to be used by MECO to benefit the system as a whole.189 According to MECO, Companies would only

187Application at 3.

188AES Kuihelani Response to CA/KUIHELANI-IR-8(a), filed February 8, 2019.

189MECO Response to CA/MECO-IR-17, filed on February 13, 2019.
dispatch RDG projects when there is a system need for the energy after considering energy contributions from existing IPP facilities.\textsuperscript{190}

41. In its Statement of Position, the Consumer Advocate acknowledges that the PPA eliminates "seniority curtailment," which it asserts was not in customers' interests because it "place[d] ever increasing curtailment risk to new projects" and "stifle[d] innovation and new projects even while there was declining price trends and improvements in renewable energy technology since developers would be hesitant to enter into a contract with uncertainty surrounding the amount of energy that would be purchased on a regular basis."\textsuperscript{191}

42. Nonetheless, the Consumer Advocate "urges [MECO] to utilize the lower cost energy provided by the proposed PPA, as much as it can to operate its system in a cost-effective, safe, and reliable manner" and "contends that [MECO] should always strive to ensure that any utility resource or third-party resource utilized by the utility is cost-effective and supportive of affordable and reliable services that do not adversely impact the

\textsuperscript{190} MECO Response to CA/MECO-IR-17, filed on February 13, 2019.

\textsuperscript{191} Consumer Advocate SOP at 23.
utility customers." Furthermore, the Consumer Advocate states that "the utilities should stand ready to show that resources are being used to maximize the customers' benefit . . . ."  

43. In light of the positions above, the commission finds it reasonable and in the public interest to require MECO to report on Project operations for purposes of accountability, to inform other projects, and to inform related dockets, as set forth in Section III.C.1.b. If the commission determines that renewable facilities are experiencing significant curtailments as a result of the Project, the commission may investigate this issue as warranted.

e.

Land Use

44. According to MECO, the Project will be located in central Maui, at Waikapu and Wailuku, and be built on approximately 500 acres of agricultural land classified with soil rating E.  

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192 Consumer Advocate SOP at 27.

193 Consumer Advocate SOP at 27.

194 See Docket No. 2017-0213, Decision and: Order 35556, at 63-64.

195 Application at 14; see also Application, Exhibit 7 (location of Project site).
45. AES Kuihelani represents that is "in the beginning stages" of obtaining the required governmental approvals and has conducted the following site studies to support the governmental approval process: (1) Archaeological Literature Review and Field Inspection, (2) Biological Survey, and (3) Phase I ESA.\(^{196}\) Permits that are not yet approved primarily include: (1) County Special Use Permit, (2) National Pollutant Discharge Elimination System (NPDES) Permit, (3) Noise Permit, (4) Building Permit, and the (5) Grading and Grubbing Permit.\(^ {197}\) Those approvals are expected to be granted in 2020 or 2021 and are all required to start construction and support Seller's PPA obligations.\(^ {198}\)

46. Although AES Kuihelani has not yet obtained any permits or approvals, the commission is encouraged by AES Kuihelani's efforts in identifying those government permits or approvals it needs to construct the Project, and the timeline by which it expects these permits or approvals to be completed (i.e., in 2020 or 2021).\(^ {199}\)

\(^{196}\)AES Kuihelani's Response to CA-IR-3, filed on February 8, 2019.

\(^{197}\)AES Kuihelani's Response to CA-IR-3, filed on February 8, 2019.

\(^{198}\)AES Kuihelani's Response to CA-IR-3, filed on February 8, 2019.

\(^{199}\)See AES Kuihelani's Response to PUC-AES KUIHELANI-IR-4, filed February 25, 2019.
47. However, AES Kuihelani states that, if it is “unable to procure the required permits within the anticipated timeline,” this “may push out the start of construction” and may affect AES Kuihelani’s ability to meet certain Guaranteed Project Milestones under the PPA.200

48. Indeed, the PPA requires AES Kuihelani to “obtain all Governmental Approvals necessary for construction of the Facility prior to commencement of the construction activity for which such Governmental Approval [is] required[,]” and “[n]o later than the Commercial Operations Date, [AES Kuihelani] shall obtain all other Governmental Approvals necessary for the ownership, operation and maintenance of the Facility and shall satisfy any condition or requirement set forth in any such Governmental Approvals for the ownership, operation and maintenance of the Facility (excluding on-going reporting or monitoring requirements that may continue beyond the Commercial Operations Date in accordance with such Governmental Approval).”201

200AES Kuihelani’s Response to PUC-AES Kuihelani-IR-4-d, filed February 25, 2019.

201Application, Exhibit 1 at 64.
49. The Guaranteed Commercial Operations Date is July 20, 2021.\(^2\)

50. Pursuant to the PPA, AES Kuihelani will be required to pay "Daily Delay Damages" to MECO if a Guaranteed Project Milestone has not been timely achieved by AES Kuihelani.\(^3\)

51. Furthermore, if AES Kuihelani is unable to achieve a Guaranteed Project Milestone by the Guaranteed Commercial Operations Date as extended by the PPA, "in addition to any delay damages collected pursuant to Section 13.4(a)(1) [of the PPA] AES Kuihelani "shall pay daily delay damages following the Guaranteed Commercial Operations Date, as such date may be extended in accordance with Section 13.3[.]"\(^4\)

52. Based on the above, the commission finds that the PPA contemplates situations where "Daily Delay Damages" will be paid from AES Kuihelani to MECO prior to the Commercial Operations Date and the beginning of payment of the associated Lump Sum Payment.\(^5\)

\(^2\)Application at Attachment K-1 ("Dates in Attachment K will be revised to reflect the results of the IRS." Id.).

\(^3\)Application, Exhibit 1, at 73-74; AES Kuihelani’s Response to PUC-AES Kuihelani-IR-4-d, filed on February 25, 2019.

\(^4\)AES Kuihelani’s Response to PUC-AES Kuihelani-IR-4-d, filed on February 25, 2019 (emphases added).

\(^5\)See Application, Exhibit 1, at 73-75; AES Kuihelani’s Response to PUC-AES Kuihelani-IR-4, filed February 25, 2019. MECO states that, in Phase 1 of the RFP process, "Proposals were
53. In particular, according to the PPA, the Lump Sum Payment commences on the “Commercial Operations Date,” and further states that MECO “shall not, and shall not be obligated to, make any payment for the availability of the Facility prior to the Commercial Operations Date.”

54. Based on AES Kuihelani's response to PUC-AES KUIHELANI-IR-4, filed February 25, 2019, and the PPA, the commission finds it possible that “Daily Delay Damages” could be paid from AES Kuihelani to MECO prior to the commencement of the Lump Sum Payment.

55. Because the Lump Sum Payment will not be made prior to the Commercial Operations Date, the commission finds that the

required to have Guaranteed Commercial Operations Dates no later than December 31, 2022, with the intent that selected Projects would take advantage of the 2019 Investment Tax Credit[.]

206 Application, Exhibit 1 (PPA) at 8, ¶ 3. The “Commercial Operations Date” is defined by the PPA as the “date on which [the] Facility first achieves Commercial Operations.” Application, Exhibit 1 (PPA) at 145. “Commercial Operations” is further defined by the PPA as MECO’s “satisfaction” of certain “conditions,” which includes passage of the “Acceptance Test[.]” Application, Exhibit 1 (PPA) at 144. The “Acceptance Test” is defined in part as a “test” conducted by AES Kuihelani and witnessed by MECO "within thirty (30) Days of completion of all Interconnection Facilities[.]” Application, Exhibit 1 (PPA) at 141.

207 Application, Exhibit 1 at 38.

208 See Application, Exhibit 1 at 73-75; AES Kuihelani’s Response to PUC-AES KUIHELANI-IR-4, filed on February 25, 2019.
"Daily Delay Damages" will not be offset by MECO's Lump Sum Payment to AES Kuihelani prior to the Commercial Operations Date.209

56. Under the PPA, "Daily Delay Damages" are payable on a monthly basis from the "Development Period Security."210 If the "Development Period Security" is at any time insufficient to pay the amount of "Daily Delay Damages" owed, then AES Kuihelani is required to "pay any such deficiency to [MECO] promptly upon demand."211

57. The "Development Period Security" is intended to "guarantee undertaking of [AES Kuihelani's] obligations under the [PPA] for the period prior to the Commercial Operations Date (including but not limited to [AES Kuihelani's] obligation to meet the Guaranteed Commercial Operations Date)]."212

58. As such, to the extent that "Daily Delay Damages" are paid to MECO prior to commencement of the Lump Sum Payment, MECO shall credit the amount of the "Daily Delay Damages" received to its ratepayers through the PPAC.

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209See Application, Exhibit 1 at 73-75; AES Kuihelani's Response to PUC-AES KUIHELANI-IR-4, filed on February 25, 2019.

210Application, Exhibit 1 (PPA) at 75, ¶ 13.5.

211Application, Exhibit 1 (PPA) at 75, ¶ 13.5.

212Application, Exhibit 1 (PPA) at 78.
2.

Community Outreach

59. Pursuant to the requirements set forth in the RFP, AES Kuihelani was required to conduct a public meeting in the community where the Project is to be located, with the intent of the meeting to gather stakeholders and other interested parties to inform the community about the Project and to allow for community concerns and questions to be raised. Exhibit 8 of the Application contains a summary of AES Kuihelani’s community outreach efforts and public comments it received as of the time the Application was filed.

60. According to the Application, notice of the meeting was published in the Maui News on November 2, 2018, for the meeting to take place November 15, 2018, at Pomaikai Elementary School; 29 attendees, including Maui’s mayor Alan Arakawa and State Representatives Hashimoto and Woodson, attended the meeting; and AES Kuihelani has established a dedicated email address to capture comments and feedback from the community.

61. The Community Meeting and Outreach Summary Report provided in Exhibit 8 of the Application states: "If the project

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213Application at 18.

214Application at 18; see also Application, Exhibit 8.

215Application, Exhibit 8 at 3 and 7-9.
receives preliminary approval from the Public Utilities Commission, AES has indicated a strong commitment to continuing outreach efforts to address potential concerns and raise awareness about the benefits of the project.”\textsuperscript{216}

62. To that end, in response to PUC-AES Kuihelani-IR-3, filed February 19, 2019, AES Kuihelani stated that, although it “does not have anything concrete planned yet,” it “anticipates additional community outreach efforts with some or all of the following:” Waikapu Community Association, Maui Lani Community Association, Central Maui Hawaiian Civic Club, Maui Economic Development Board (MEDB), Maui Chamber of Commerce, Maui Economic Opportunity (MEO), Sustainable Living Institute of Maui (SLIM), Kahului Town Association, and Maui Tomorrow.

63. Based on the above and upon review of Exhibit 8 of the Application, the commission finds that AES Kuihelani has complied with all Community Outreach requirements under the PPA and that the project is not opposed by the community in which it will be located.

\textsuperscript{216}Application, Exhibit 8 at 9.
3. Conditions

64. To reiterate, the commission finds it reasonable and in the public interest to require MECO to report on Project operations for purposes of accountability, to inform other projects, and to inform related dockets. As set forth above, MECO shall comply with the following reporting requirement:

   A. Monthly reporting. Beginning with the first full calendar month following the in-service date of the Facility, MECO shall file hourly commitment, dispatch, and curtailment data for the Project and all other MECO and IPP units on the system.

   B. The monthly report shall be filed in Docket No. 2011-0206 and may be consolidated with other curtailment reports therein.

65. Regarding the Consumer Advocate’s proposed conditions, the commission finds as follows:

   66. Requiring MECO to file invoices related to the Project and AES Kuihelani’s income statements or results of operations related to the PPA. The Consumer Advocate has proposed a similar condition in prior proceedings involving

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217See Docket No. 2017-0213, Decision and Order 35556, at 63-64.
renewable PPAs. In support of its proposal in this proceeding, the Consumer Advocate states that it will allow the Consumer Advocate "to evaluate the comparability of the Project's actual results to the pro forma information consistent with prior Commission decision and orders (e.g., Decision and Order No. 33541, filed on February 19, 2016, in Docket No. 2015-0224)."^219

67. While recognizing the Consumer Advocate's concerns, the commission also observes that the circumstances present in this, and the other related RDG PPA proceedings, are distinguishable from Docket No. 2015-0224 and similar dockets. First, in Docket No. 2015-0224, in support of its recommended condition, the Consumer Advocate referenced its concerns regarding the PPA's potential curtailment of renewable resources, such as the seniority curtailment provision.^220 To the extent this underlies the Consumer Advocate's proposal in this docket, the commission notes that the new RDG PPA model does not contain


^219Consumer Advocate SOP at 28.

a curtailment seniority provision, nor is it expected to impact curtailment of existing renewable IPPs.221

68. Second, to the extent the Consumer Advocate desires such information to retroactively evaluate the reasonableness of AES Kuihelani's pro forma estimates, the commission observes that the nature of this procurement process has provided a number of safeguards that were not present in prior renewable PPA proceedings. For example, unlike Docket No. 2015-0224, in which a single IPP, Kuia Solar, LLC, negotiated a PPA with MECO in isolation, the PPA with AES Kuihelani is the result of the RFP process. The RFP process itself was the subject of Docket No. 2017-0352, and was carefully reviewed and vetted by the commission and stakeholders. Additionally, unlike prior PPA negotiations that occurred in isolation, the RFP process evaluated multiple bidders concurrently, which added a competitive element to the process, providing further reassurance as to the reasonableness of bid amounts. Furthermore, the RFP process was

221 In this regard, the Consumer Advocate has acknowledged that this RDG PPA "represents an evolution from earlier contracts, such as those that contained seniority curtailment provisions, evergreen terms, and RAP pricing, . . . . [and] supports the underlying reasons why the proposed RDG PPA is being used for these contracts as it eliminates some of the terms and conditions that were not in the best interest of the public." Consumer Advocate SOP at 23.
overseen by an IO, which concluded that there was no evidence of collusion and that the PPA terms appeared reasonable.222

69. Finally, the Project's costs are not the only consideration in evaluating the reasonableness of the PPA. As discussed above, the Project is expected to provide numerous benefits to MECO's customers, including monthly bill savings, less fossil fuel consumption, reduced GHG emissions, and grid stabilizing services. Upon considering the record as a whole, the commission is not persuaded that the disclosure of the Project invoices and AES Kuihelani's income statements is warranted under these circumstances and, therefore, declines to adopt the Consumer Advocate's proposed condition.

Requiring bidders to file pro forma information in future procurement processes. AES Kuihelani does not appear to oppose this condition, and MECO agrees that such information would “be[] beneficial to the [procurement] process and allow[] for a more informed evaluation of developers' proposed projects.”223

70. The commission observes that this proposal is prospective in nature and does not pertain to the Consumer Advocate's finding of overall reasonableness regarding the subject PPA. Accordingly, the commission declines to adopt

222See Consumer Advocate SOP at 16-17.

223MECO Reply SOP at 6.
this as a specific condition of approval to the PPA. However, to the extent the Consumer Advocate wishes to raise this issue further in Phase 2 of the RFP docket, the Consumer Advocate may do so in Docket No. 2017-0352.

71. Relatedly, on the issue of submitting pro forma information, the commission notes that in this proceeding, AES Kuihelani was reluctant to provide its pro forma information when requested by the Consumer Advocate and required an order to compel from the commission to produce this information to the Consumer Advocate.\(^\text{224}\) Furthermore, even after being compelled to produce this information, AES Kuihelani provided it in an inaccessible, .pdf format, which limited the Consumer Advocate's ability to utilize this information.\(^\text{225}\) While the reasons for AES Kuihelani's conduct are unknown, they appear inconsistent with AES Kuihelani's earlier representations that it would provide "specialized, historical knowledge of the Project," and "not broaden the issues or delay the proceeding."\(^\text{226}\) Going forward, the commission emphasizes that such information should be timely provided so as to avoid the need for commission intervention and delays in proceedings.

\begin{footnotes}
\item[224] See Order No. 36170.
\item[225] See Consumer Advocate SOP at 19-20.
\item[226] AES Kuihelani Motion to Participate at 6-7.
\end{footnotes}
Development of guidelines for the procurement process to mitigate concerns related to potential unaffiliated sellers using the same representative(s) in negotiations. MECO agrees with this proposal,\(^{227}\) and AES Kuihelani does not raise any objection. The commission observes that this appears to be a generalized proposal to improve the procurement process, rather than a specific proposed condition. The commission is open to suggestions to improve the procurement process and agrees, in principle, to review this issue in Phase 2 of the RFP docket.

The Consumer Advocate's conditions proposed in pages 15 and 17 of Attachment 1 to its Statement of Position. With regard to the Consumer Advocate's suggested condition on pages 15 through 17 of Attachment 1 to its Statement of Position, the commission observes that MECO does not object to the condition, instead stating: "In Stage 2 of the RFPs, [MECO] will further consider how different metrics are utilized in the evaluation process."\(^{228}\) Likewise, AES Kuihelani does not lodge any objections. As stated above, the commission is supportive of efforts to improve the procurement process and will be open to suggestions in Phase 2 of the RFP docket.

\(^{227}\)MECO Reply SOP at 7.

\(^{228}\)MECO Reply SOP at 7.
D.

Recovery of PPA-Related Non-Energy Payments Through the PPAC

73. Given the commission's overall approval of the PPA, the commission likewise approves MECO's request to recover the non-energy payments under the PPA, including the Lump Sum Payments (as defined in the PPA), and related revenue taxes, through the PPAC, to the extent such costs are not included in base rates. Such decision is consistent with HAR § 6-60-6(2), which authorizes the pass through of purchased energy charges through an electric utility's PPAC; and with HRS § 269-16.22, which states that a utility "shall be allowed to [] recover[] . . . from [its] customer base" and "through one or more adjustable surcharges . . . established by the . . . commission[,]" "[a]ll power purchase costs . . . . arising out of [PPAs] that have been approved by the . . . commission and are binding obligations on the electric utility company[]."^{229}

74. However, the commission conditions approval of recovery of the non-energy payments under the PPA through the PPAC, as follows:

A. As discussed above, in Section III.C.1.b (Nature of the PPA), to the extent "Daily Delay Damages,"

^{229}HRS § 269-16.22. The PPAC was approved by the commission in In re Maui Elec. Co., Ltd., Docket No. 2009-0163, Decision and Order No. 30365, filed on May 2, 2012.
“Termination Damages,” or other revenues or benefits are paid to MECO, such revenues or benefits paid to MECO shall be returned to MECO’s ratepayers through the PPAC.

B. Recovery of the Lump Sum Payment through the PPAC shall be limited to the Lump Sum Payment net of Force Majeure adjustments or any offset due to liquidated damages.

E. Hawaii’s Energy Policy Statutes

75. The State of Hawaii has expressed several energy policies requiring and/or encouraging reduction in the utilization of fossil fuels in statutes that directly pertain to the regulation of public utilities. These statutes include standards requiring minimum reductions in electric energy consumption through energy efficiency measures by specific dates;230 standards requiring minimum percentages of renewable energy generation by specific dates;231 provisions requiring preference for utility utilization and dispatch of renewable generation resources;232 provisions requiring consideration of factors related to impacts

230 See e.g., HRS § 269-96.
231 See e.g., HRS §§ 269-91 to -95.
232 See e.g., HRS § 269-27.2.
of fossil fuel use in the regulation of public utilities;\textsuperscript{233} and provisions that require consideration of specific resources and/or regulatory mechanisms.\textsuperscript{234}

76. In particular, HRS § 269-6(b) provides, in relevant part:

The public utilities commission shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation in exercising its authority and duties under this chapter. In making determinations of the reasonableness of the costs of utility system capital improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions.

77. The commission recognizes the importance of considering the effects that Hawaii's reliance on fossil fuels have on the State's economy and general welfare in making utility resource planning, investment, and operation decisions. In performing the duties specified in HRS Chapter 269, the commission has been diligent in implementing the State's energy policies and statutes, giving deliberate weight to these

\textsuperscript{233}See e.g., HRS § 269-6(b).

\textsuperscript{234}See e.g., HRS §§ 269-16.1 269-146, 269-147, 269-148, and 269-149.
provisions in the broader context of the many other statutes and considerations necessary to regulate and provide universal, reliable, and affordable access to essential electric utility services.235

78. As discussed above, the subject PPA is the result of Phase 1 of the Hawaiian Electric Companies' competitive procurement process to acquire new, dispatchable and renewable energy resources for Oahu, Maui, and Hawaii Island. According to MECO, the Project will provide a hedge against the volatility of fossil fuel prices volatility (which have fluctuated over the past ten years from about $51 per barrel to approximately $177 per barrel236) inasmuch as "the fixed pricing structure attributable to the Project ... isolates customers from being impacted by future fuel price fluctuations."237

79. MECO further states that, with regard to export of funds for fuel imports, as described in HRS § 269-6(b),

235Some of these broader considerations (such as monetary costs) are obvious, while others are explicitly stated or implied elsewhere in statutes, and/or specified in case law in which the courts have set forth standards and interpretations regarding the determination of just and reasonable rates, which collectively include: reliability, affordability, fairness, provision of just and reasonable compensation for utility investment, and provision of just and reasonable rates to utility customers.

236MECO Response to PUC-MECO-IR-8, filed on February 26, 2019.

237MECO Response to PUC-MECO-IR-8-a, filed February 26, 2019.
"the quantity of fuel consumed is forecasted to be lower with the addition of the Project."238 As such, the amount of funds that would have been spent on fuel imports will correspondingly decrease,239 and fuel supply reliability risk will be reduced due to the "likely decline" of overall fuel supply requirements as a result of the "transition to a 100% renewable future."240

80. More specifically, MECO anticipates that, over the course of the Project's twenty-five year term, the Project will result in a total avoided fuel consumption of 1,987,751 barrels of medium sulfur fuel oil, diesel fuel, ultra-low sulfur diesel, and biodiesel,241 as well as a reduction of a total of 931,400 short tons of greenhouse gas emissions.242

81. Moreover, MECO states that the Project has the potential to contribute up to 14.7% of MECO's 2022 RPS, with an average RPS impact of 14.6% between 2022 and 2045.243

82. The Consumer Advocate does not dispute MECO's statements about the Project's impact on fuel price volatility.

238MECO Response to PUC-MECO-IR-8-b, filed February 26, 2019.
239MECO Response to PUC-MECO-IR-8-b, filed February 26, 2019.
240MECO Response to PUC-MECO-IR-8-c, filed February 26, 2019.
241Application, Exhibit 3 at 3-4.
242Application, Exhibit 5.
243Application, Exhibit 6 at 1; see HRS § 269-92.
fuel supply reliability risk, export of funds for fuel imports, and reducing greenhouse gas emissions. Specifically, the Consumer Advocate notes that the fixed pricing under the PPA "significantly reduces price volatility, which can be detrimental to customers, especially those on a fixed income or with limited means to deal with volatility that [] has been observed with fossil fuel prices."  

83. Upon explicit consideration, weighing, and balancing of the four specified criteria in HRS § 269-6(b) (price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions), the commission finds MECO's PPA to be reasonable and in the public interest because the PPA overall advances Hawaii's goal of reducing reliance on fossil fuels through energy efficiency and increased renewable energy generation through clean energy resources, and does so at a price that is estimated to result in savings for MECO's

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244See Consumer Advocate SOP at 26 ("recogniz[ing] the proposed PPA will also provide other benefits by contributing to the State's goals of renewable energy, providing a contribution to the [RPS] as set forth by HRS § 269-92(a), lower fossil fuel usage, reduction in [GHG] emissions and a hedge to fossil fuel prices") and Attachment 2 thereto (summarizing, among other data, the impact of the Project's impact on GHG emissions).

245See Consumer Advocate SOP at 23.
ratepayers between 2022 and 2046. The commission finds that the amount of fuel that the Project is projected to displace will result in a decreased reliance on imported oil, thereby reducing the potential negative economic impacts of oil price volatility, and also decrease the funds exported for fuel imports.

84. Going forward, the commission reiterates that it sees Phase 2 of the competitive procurement process "as an opportunity to use creative, competitive procurement to retire existing fossil generation and to take a further step towards meeting Hawaii's renewable energy goals." The commission thus anticipates that the MECO PPAs resulting from Phase 2 of the competitive procurement process will continue to advance Hawaii's goal of reducing reliance on fossil fuels through energy efficiency and increased renewable energy generation through clean energy resources.

See HRS § 269-6(b); Consumer Advocate SOP, Attachment 2 at 5, Tables 2.4 & 2.5 (summarizing Project's estimated bill impact and system savings, respectively).

F.

Remainder of Proceeding

As noted above, MECO requested that the commission issue two separate decisions and orders in this docket: (1) the first decision approving requests relating to the PPA, which is the subject of the commission’s discussion, above, and (2) the second decision approving requests related to the proposed above-ground 69 kv line extension.248 Pursuant to Order No. 36073, the commission bifurcated MECO’s PPA-related requests from its above-ground 69 kv line extension-related requests.249

Regarding its above-ground 69 kv line extension-related requests, MECO explained that an “[Interconnection Requirements Study ("IRS")] will be conducted to evaluate the effects of the proposed interconnection of the Facility to the Company system.”250 As of the filing of the Application, the IRS was not completed;251 however, in order to take advantage of federal investment tax

248See Application at 4-6.


250Application at 16.

251See Application at 16.
credits, "the Parties agreed to execute the PPA prior to the completion of the IRS for the Project."\textsuperscript{252} MECO has stated that it will file an amendment to the PPA based on the IRS results.\textsuperscript{253}

As such, upon MECO's filing of an amendment to the PPA based on the IRS results, the commission will issue a procedural schedule in this docket to govern its review of MECO's above-ground 69 kV line extension-related requests (Issue 3).\textsuperscript{254}

IV.

SUMMARY OF FINDINGS AND CONCLUSIONS

Based on the foregoing, subject to the conditions set forth in Sections III.C.3 and III.D, the commission finds:

1. MECO has met its burden of proof in support of its request for approval of the subject PPA between MECO and AES Kuihelani, dated December 28, 2018.

A. In finding as such, and having considered the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions, the commission further finds that

\textsuperscript{252}Application at 16.

\textsuperscript{253}Application at 16.

\textsuperscript{254}See Order No. 36073 at 8 n.18 (stating that the commission intends to issue a separate procedural order to govern MECO's above-ground 69 kV line extension-related requests).
the purchased power arrangements under the PPA, pursuant to which MECO will dispatch energy on an availability basis from AES Kuihelani, including the Lump Sum Payments to be paid to AES Kuihelani, are prudent and in the public interest.

2. MECO has met its burden of proof in support of its request to include all non-energy payments under the PPA, including the Lump Sum Payment and related revenue taxes, through the PPAC, to the extent such costs are not included in base rates.

V.

ORDERS

THE COMMISSION ORDERS:

1. Subject to the conditions set forth in Sections III.C.3 and III.D, the commission approves:

   A. The subject PPA between MECO and AES Kuihelani, dated December 28, 2018; and

   B. MECO's request to include all non-energy payments under the PPA, including the Lump Sum Payments (as defined in the PPA) and related revenue taxes, through the PPAC, to the extent such costs are not included in base rates.

2. Upon MECO's filing of an amendment to the PPA based on the IRS results, the commission will issue a procedural schedule 2018-0436
in this docket to govern its review of MECO's above-ground 69 kV line extension-related requests (Issue 3).

DONE at Honolulu, Hawaii _______ MAR 25 2019 _______.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By James P. Griffin, Chair

By Jennifer M. Potter, Commissioner

APPROVED AS TO FORM:

Ashley C. V. Labasan
Commission Counsel
CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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