BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAI‘I

In the Matter of the Application of

KAUA‘I ISLAND UTILITY COOPERATIVE

DOCKET NO. 2020-0218

For Approval of Power Purchase Agreement with AES West Kaua‘i Energy Project, LLC and to Include Costs in Kaua‘i Island Utility Cooperative’s Energy Rate Adjustment Clause, and Other Matters Related to the West Kaua‘i Energy Project.


THE HAWAII STATE ENERGY OFFICE’S DRAFT COMMENTS TO KIUC DEA;

AND

CERTIFICATE OF SERVICE

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THE HAWAI'I STATE ENERGY OFFICE’S REPLY TO PO‘AI WAI OLA/ WEST KAUA'I WATERSHED ALLIANCE MOTION FOR RECONSIDERATION OF THE COMMISSION’S DECISION AND ORDER NO. 38095

In accordance with Public Utilities Commission (“Commission”) Order 38130 issued on December 20, 2021, the Hawai‘i State Energy Office (“SEO”), by and through its Chief Energy Officer, through its Deputy Attorney General, hereby submits its Reply to the Po‘ai Wai Ola/West Kaua‘i Watershed Alliance’s (“Alliance”) Motion for Reconsideration of the Commission’s Decision and Order No. 38095 in the matter before the Commission in Docket No. 2020-0218, In the Matter of the Application of Kaua‘i Island Utility Cooperative (“KIUC”) for Approval of Power Purchase Agreement (“PPA”) with AES West Kaua‘i Energy Project, LLC (“AES”) and to Include Costs in KIUC’s Energy Rate Adjustment Clause (“ERAC”), and Other Matters Related to the West Kaua‘i Energy Project (“Project”), pursuant to Chapter 16-601, Hawai‘i Administrative Rules (“HAR”), Rules of Practice and Procedures Before the Public Utilities Commission.

I. SEO’s Scope of Participation

Order 37691 issued on March 22, 2021, states, “SEO’s participation in this docket is
limited to fulfilling its statutory purpose of “promot[ing] energy efficiency, renewable energy, and clean transportation to help achieve a resilient clean energy economy.”^1 Order 37691 also states SEO may: (1) issue information requests (“IRs”) to KIUC; (2) respond to IRs from KIUC and the Consumer Advocate; (3) file procedural motions; and, (4) file statements of position regarding the issues to which it is limited.^2

II. SEO’s Original Statement of Position (July 2, 2021)

Relevant to Order 38130, SEO’s Statement of Position (“SOP”) filed on July 2, 2021, states, “Based solely on the project’s cost of electricity and contributions to the State’s and the island of Kaua‘i’s renewable energy and energy security goals, SEO’s initial position supports approval of the power purchase agreement (“PPA”) for the project. However, SEO cannot provide its full support for the project before the project undergoes its environmental review requirements under Chapter 343, HRS; community outreach needs with respect to use of state-owned lands; and other regulatory and permitting requirements including use of the stream and surface waters.”^3

SEO’s SOP also states, “SEO has completed its review of the Application and recommends that the Commission approve the Application, subject to, as noted by the Commission, environmental review.”^4

Finally, SEO’s SOP states, “SEO notes that the PUC is waiting for further environmental review and “presently does not intend to issue a decision in this Docket before environmental review is complete (citing Order 37733).” Due to the nature of the project and the numerous

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^1 Order 37691, at 35.
^2 Id.
^3 SEO SOP, at 7.
^4 SEO SOP, at 5. In Order No. 37733, at 5-6, the Commission states (footnotes omitted), “Further, the Commission is closely monitoring the environmental review associated with the Project, and presently does not intend to issue a decision in this Docket before environmental review is complete.”

agencies involved in the planning and permitting of the project, SEO supports this decision, as environmental review will allow for community input, will identify potential significant impacts, and will ensure that environmental concerns are given appropriate consideration (in accordance with HRS §343-1).”

III. Order 38095 Approving the PPA for the Project (December 1, 2021)

Order 38095 issued by the Commission on December 1, 2021:

1. Approves the PPA between KIUC and AES dated December 30, 2020, for the Project which consists of, among other things, two hydropower electric generation facilities, a pumping station, a solar photovoltaic array with a battery energy storage system, a 69 kilovolt ("kV") rated/12.47 kV substation, approximately 1.5 miles of new transmission line ("New Overhead Circuit"), and reconductoring approximately 1.0 miles of existing transmission line and installing approximately 2.65 miles of single mode fiber optic line along KIUC's existing transmission system ("Conductor Work");

2. Approves KIUC's request to include costs to be incurred by KIUC under the PPA in KIUC's ERAC, to the extent that such costs are not recovered in KIUC's base rates, except for any costs related to curtailed energy;

3. Approves KIUC's request for the commitment of funds to effectuate the New Overhead Circuit and the Conductor Work;

4. Approves KIUC's request to place, construct, erect, and build the New Overhead Circuit above the surface of the ground pursuant to HRS §269-27.6; and

5. Approves KIUC's request to:

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5 SEO SOP, at 7-8.
a. Transfer certain development assets pertaining to the Project; and

b. Convey, sublet, sublicense, assign or otherwise transfer, in whole or in part, any rights that KIUC may have with respect to the Project under any lease, license, contract, easement, right of entry, permit, authorization and/or other agreement or document, including without limitation the Project Subleases and Subeasement(s), to AES in furtherance of AES' efforts toward the development and construction of the Project, under the terms set forth in the Development Agreement.®

IV. Alliance's Motion for Reconsideration of Order 38095 (December 13, 2021)

In response to Order 38095, on December 13, 2021, the Alliance filed a Motion for Reconsideration of the Commission's Order No. 38095, filed December 1, 2021 (“Alliance’s Motion”), stating, “To uphold HEPA’s mandate and purpose, Po‘ai Wai Ola requests the Commission to withdraw and defer its decision, particularly in light of the anticipated tax credit extensions in the pending Build Back Better Act—or to adopt further conditions to minimize any unproductive mixed signals and confusion or undue pressure and momentum while HEPA review is still pending. See Part III.D. These conditions should include, at minimum:

- The Commission’s decision shall not be cited as support or justification in the HEPA process or in the approval processes of any other agency; each of these processes should be decided on its own merits.

- AES shall take the sole risk for any financial commitments it decides to make for the project while the HEPA process and other agency processes necessary for such commitments are still pending, and any such commitments shall not be cited as support or justification in these processes, including any subsequent approval processes of the Commission for the project.

- The Commission should clarify the discrepancy regarding whether “preconstruction” activities are allowed pending completion of the HEPA process. On page 102 of its decision, the Commission states that “even the ‘normal and customary preconstruction activities to support permitting, project engineering and design efforts’ cannot commence

® Order No. 38130 at 1-3.
The Alliance’s Motion proposes two alternatives for Commission consideration:

1. Withdraw and defer its decision on KIUC’s PPA until HEPA review is complete; or,

2. Expressly order six (6) new conditions, in addition to the twelve (12) ordered by the Commission, to be enforced while HEPA review is pending.

V. Order 38130 Requesting SEO’s Reply to the Alliance’s Motion (December 20, 2021)

Order 38130 issued by the Commission on December 20, 2021, requests SEO and the Consumer Advocate to file responses to the Alliance’s Motion by January 10, 2022. It states, “The interplay of HEPA and the Commission’s dockets implicated thereby is relatively novel and the issues raised by the Alliance in its Motion may arise in subsequent or currently pending proceedings involving projects that require both HEPA review and Commission approval. Thus, under these conditions and pursuant to HAR § 16-601-140, the Commission finds it desirable

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7 Alliance Motion, at 2-3.
and/or necessary for the Parties and participants (excluding the Alliance) to file replies to the
Alliance’s Motion. 8

VI. SEO’s Reply to the Alliance’s Motion

SEO offers its reply to the Alliance’s Motion in accordance with Order 38130.

1. Background Narrative

SEO maintains it cannot fully support the Project until all environmental and
community engagement processes are complete; however, based on the information available
SEO presently supports the many benefits the Project offers the people of Kaua‘i and the State of
Hawai‘i including:

a. Lower cost of electricity for KIUC members at an estimated savings between $157
   million to $172 million over the first 25-years of the Project (25-year Solar Term). 9

b. Increased energy security and grid reliability for KIUC members.

c. Significant upgrades to the water supply infrastructure in West Kaua‘i.

d. Nearly 23% increase in KIUC’s renewable energy portfolio. 10

e. Reduction in fossil fuel consumption by approximately 8,500,000 gallons annually. 11

f. GHG reduction for the island of Kaua‘i of 2,508,877 tons of carbon dioxide
   equivalent per year. 12

g. Increased lease revenue to the Department of Land and Natural Resources,
   Department of Hawaiian Home Lands, and the Department of Agriculture
   Agribusiness Development Corporation.

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8 Order 38130, at 4.
9 Order 38095, at 41. Citing analysis done by the Hawai‘i Consumer Advocate.
10 Order 38095, at 119.
11 Order 38095, at 118.
12 Order 38095, at 118.
The proposed use of pumped hydropower storage in lieu of batteries for most of its energy storage would reduce Project costs and the Project’s reliance on imported battery components subject to manufacturer and global supply chain interruptions now being experienced by battery customers globally. Pumped hydropower would also last longer than lithium-ion or other utility-scale batteries.

The 2017 Waimea Watershed Agreement ("Agreement") provides a foundation for key stakeholders to collaborate on collective priorities with the understanding things can change as additional information and public input are provided. At the time, all Agreement participants saw potential value in the Project for the West Side community and beyond. As stated by the Alliance quoting page 4, the Agreement states with respect to HEPA, “compliance with the requirements of HRS Chapter 343 will be necessary prior to agency action.”\(^{13}\) SEO is not a party to the Agreement but acknowledges its importance in continuing the productive partnership and commitments of the participants.

While the present Project design is what is important for environmental review and community participation, KIUC has been working on some type of hydropower project on the West Side of Kaua‘i for over 10 years. During this time, both voluntary and required public input opportunities have occurred. This historic outreach is exclusive of the HEPA process but decreases the number of Kaua‘i residents who are unaware of KIUC’s intentions for that area.

SEO acknowledges the value of the federal Investment Tax Credit (ITC) and its deadlines. Meeting this deadline is necessary for the Project to sell power to KIUC at a price most advantageous to KIUC ratepayers. However, according to the Consumer Advocate, the PPA places responsibility for the Project on AES and protects KIUC members from the impacts

\(^{13}\) Alliance Motion, at 5.
of not achieving the ITC. Notwithstanding, should the Project miss this deadline, KIUC and AES could ask the Commission for increased electricity rates that would be passed onto KIUC ratepayers. SEO notes the ITC was already extended once under the 2020 Taxpayer Certainty and Disaster Tax Relief Act of 2020. While SEO cannot predict the future of the ITC, SEO does not take lightly the Commission’s observation that AES may decide to terminate the PPA if it is unable to capture the full ITC.

Regarding KIUC’s Reply to the Alliance’s Motion, SEO believes it is within the Commission’s powers to consider the Alliance’s Motion and the proposed conditions therein under HRS 269-27.2 which mandates the Commission to ensure PPAs are, “In the overall best interest of the general public.”

Finally, AES has published a Draft Environmental Assessment (“DEA”) for the Project which identified environmental impacts anticipated from the Project. SEO would like to introduce into the docket record its comment letter on the DEA which reiterates SEO’s support for the benefits of the Project while raising issues warranting further HRS Chapter 343 review and Commission awareness. In particular, SEO observed discrepancies in information provided in the docket and the DEA. Notably, the DEA states “The Proposed Action does not involve any new overhead lines” (DEA, at 27) in contrast to the Commission’s approval of KIUC’s request to “place, construct, erect, and build” the New Overhead Circuit so that all electrical output from the Project can be delivered to the KIUC system in a dispatchable manner. Further, since the scope of the Proposed Action in the DEA did not include an overhead line, its impact on natural

\[14\] CA SOP, at 23 (from Order 38095, at 40-41).
\[15\] Order 38095, at 62.
\[16\] HRS §269-27.2 (d)(5).
\[17\] Order 38095, at 2.
resources, specifically endangered birds, was not disclosed or analyzed within the DEA. While the Commission in its decision expressly noted the Consumer Advocate’s consideration of the potential risk the New Overhead circuit may have on endangered birds, the DEA is silent on the topic – an important matter for the public and agencies’ awareness. SEO’s comment letter on the DEA recommended that the document discuss the New Overhead Circuit, and moreover, that information be consistent and, where a discrepancy exists, the EA should clearly explain the discrepancy and which information is more accurate.

2. **SEO’s Reply to the Alliance’s Motion**

The purpose of HRS Chapter 343 is to “integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions.”\(^{18}\)

For utility-scale renewable energy projects being proposed in Hawai‘i, execution of a PPA with the utility is an initial point to secure project financing. Commission approval of the project’s PPA is also a notable benchmark for project financing, as is the approval of other discretionary permits and determinations. Such approvals give investors and developers a level of confidence to finance the next stage of project development, which could include additional permitting, design and engineering, procurement of equipment or service contracts, and pre-development costs for environmental review and supporting natural, cultural, technical, and other studies.

As noted above, the timeline for projects requiring both Commission approval and HRS Chapter 343 environmental review is novel. SEO supported the Commission’s initial position to wait until completion of environmental review prior to issuing a decision and order.

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\(^{18}\) HRS §343-1.
Based on the record, SEO shares the Commission’s concern that waiting to issue a decision and order until HEPA review is complete risks that the PPA will be terminated, which would deprive KIUC and its members the opportunity to benefit from the Project. Without comment on the Commission’s analysis of HRS Chapter 343 to the instant docket, SEO believes the Commission’s decision and conditions are reasonable.

In response to the Commission’s request for SEO to opine on the Alliance’s motion, SEO believes several of the conditions as proposed by the Alliance, with input from KIUC’s proposed modifications, and further modified by SEO below, can strengthen the effectiveness of the Commission’s initial conditions in a way that best balances the requirement under HRS Chapter 343 to “ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations”\(^{19}\) and the need for the Project to have some regulatory assurance to proceed with further investments that would also inform the public and HEPA review process.

Specifically, SEO supports conditions that uphold HEPA’s purpose “to ensure that environmental concerns are given appropriate consideration in decision making.”\(^{20}\) SEO supports conditions that protect the intent of HEPA to ensure that environmental concerns are identified and addressed before decisions that enable the commitment of substantive resources, including public resources, environmental resources, and the financial resources of the public including KIUC ratepayers.

SEO recognizes this resolution is not ideal and its comments are narrowly tailored to this specific Project, given conditions that would empower the Commission to consider the potential

\(^{19}\) HRS §343-1.
\(^{20}\) HRS §343-1.
impacts of the Project more fully upon completion of environmental review. SEO believes these conditions would allow the Project to proceed with additional investments that would also inform the public and environmental review.

3. SEO’s Recommendations on the Alliance’s Proposed Conditions

SEO takes no position on the twelve (12) Conditions required by the Commission as part of its approval for the Project PPA, but offers its recommendations on the six (6) conditions proposed by the Alliance.

1. The Commission’s decision shall not be cited as support or justification in the HEPA process or in the approval processes of any other agency; each of these processes should be decided on its own merits.

SEO supports the Alliance’s Condition #1 with suggested amendments as proposed by KIUC further amended by SEO. As Condition #1 is meant to inform other agencies and the general public of the status of the Commission’s decision, SEO recommends Condition #1 be amended to require the environmental review document(s) for the Project to identify Commission approval as a discretionary approval required for the Project, list the Commission’s conditions, describe how to access KIUC’s quarterly reports pursuant to the Commission’s Condition #5, and attach the decision and order as an appendix to the environmental review document(s). This would help address the inconsistency in information presented to the Commission compared to the general public and other agencies.

2. AES shall take the sole risk for any financial commitments it decides to make for the project while the HEPA process and other agency processes necessary for such commitments are still pending, and any such commitments shall not be cited as support or justification in these processes, including any subsequent approval processes of the Commission for the project.

SEO believes the Alliance’s Condition #2 can be addressed through the Commission’s
authority to require KIUC to request prior approval of financial commitments for the Project. According to the Consumer Advocate, the PPA places responsibility for the Project on AES and protects KIUC members from the impacts of not achieving the ITC.21

3. The Commission should clarify the discrepancy regarding whether “preconstruction” activities are allowed pending completion of the HEPA process. On page 102 of its decision, the Commission states that “even the ‘normal and customary preconstruction activities to support permitting, project engineering and design efforts’ cannot commence until the HEPA review process has been completed,” which comports with the law. (Emphasis added; footnote omitted.) However, on page 122 of the decision, the Commission states “construction at the Project site shall not commence {other than normal and customary preconstruction activities to support permitting, project engineering and design efforts}.” (Emphasis added.) SEO does not believe a Commission decision and order is the appropriate venue to define what qualifies as “preconstruction activities” for the purposes of HEPA; however, given the potentially conflicting statements in the decision, SEO believes it is helpful to clarify what is permissible relative to HEPA review. SEO recommends the Commission clarify the Alliance’s Condition #3 to ensure that any “preconstruction activities” permitted to be commenced by KIUC or AES in support of the Project contribute to the support of environmental review and shall be conducted in accordance with applicable regulations. SEO agrees with KIUC that due diligence activities such as geotechnical or archeological investigations may require ground disturbance and access to the site and are likely necessary for adequate and comprehensive completion of environmental review.

4. Automatically require KIUC to come back to the Commission once the HEPA review process is completed: KIUC shall file the final approved review document in this docket, and the Commission shall reconvene the docket so it can make findings on environmental, cultural, and public trust issues.

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21 CA SOP, at 23 (from Order 38095, at 40-41).
SEO believes the Commission should require KIUC to file all environmental review documents and determinations in this docket as they are published.

Commission Condition #12 requires KIUC to seek Commission approval for material PPA amendments that result from HEPA review, including changes to the PPA term, pricing (including to the energy rate and capacity charge amounts discussed above), ownership and operation of the Project, dispatch or curtailment of the project, result in declaration of force majeure, or otherwise affect these identified provisions of the PPA. In its Reply to the Alliance’s Motion, KIUC states other types of changes must be submitted to the Commission for review and possible approval including material changes to the New Overhead Circuit or Conductor Work and any change to the agreement between KIUC and AES regarding the transfer of Development Assets from KIUC to AES. The Alliance’s Condition #4 could expressly include the activities or changes that warrant review by the Commission.

5. Require KIUC to file a community engagement plan for the Commission’s review and approval.

SEO supports Condition #5 with KIUC’s amendment. As noted earlier, SEO observes that public participation is being sought in other service territories. Increased public participation in the pre-decisional planning and procurement of new renewable energy projects increases public confidence in Commission proceedings and the projects resulting from them. Recently, communities on Moloka‘i and O‘ahu requested increased participation in the procurement and development of Community-Based Renewable Energy projects on those islands. Hawaiian Electric’s latest Draft Request for Proposal for new renewable energy on Hawai‘i Island includes a new non-price evaluation criterion for community engagement to

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22 Order 38095, at 104.
23 KIUC Reply, at 9.
apply more weight to this category and Hawaiian Electric has sought public input on the Draft RFP. 24

6. In reporting on community engagement, in addition to the “status of KIUC’s work to provide and/or support venues for community feedback and compile past outreach efforts into a single living’ document reflecting all community engagement,” D&O No. 38095 at 120, KIUC shall include all community feedback received and responses to the feedback, and explain how project details, including community benefits, can be adjusted or enhanced based on community input and collaboration.

SEO believes Condition #6 can be addressed through the Commission’s existing conditions and further supported if the Commission were to adopt SEO’s above recommendations.

4. SEO’s Requested Clarifications

In addition to the conditions recommended by the Alliance, SEO requests the following clarifications:

1. The Commission should clarify that the approval of KIUC’s request to place, construct, erect, and build the New Overhead Circuit above the surface of the ground pursuant to HRS §269-27.6 cannot occur without the completion of environmental review which shall be inclusive of the planned 1.5-mile New Overhead Circuit.

2. The Commission can reserve the right to withdraw its approval if the conditions to PPA approval are not satisfactorily met at the Commission’s discretion.

VII. SEO’s Final Suggestion to Ensure Effective Community Outreach

To improve the efficacy of community engagement, the SEO’s final suggestion is for the Commission to host its own regular meetings for the project with the community, such as following the filing of quarterly updates from KIUC.

24 Docket 2017-0352.
DATED: Honolulu, Hawai‘i, January 10, 2022

/s/ Scott J. Glenn
SCOTT J. GLENN
Chief Energy Officer
Hawai‘i State Energy Office

Attachment:
CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Statement of Position by the Hawaii State Energy Office in PUC Docket Number 2020-0218, upon the PUC and the following parties, by electronic mail service.  

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