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Hu Honua Bioenergy, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HU HONUA BIOENERGY, LLC,
a Delaware limited liability
company,

Plaintiff,

vs.

HAWAIIAN ELECTRIC
INDUSTRIES, INC., a Hawaii
corporation; HAWAIIAN
ELECTRIC COMPANY, a Hawaii
corporation; HAWAII ELECTRIC
LIGHT COMPANY, INC. a Hawaii
corporation; NEXTERA
ENERGY, INC., a Florida
corporation; HAMAKUA
ENERGY PARTNERS, L.P., a
Hawaii limited partnership,

Defendants.

CIVIL NO. 16-00634

**CIVIL COMPLAINT FOR
DAMAGES AND INJUNCTIVE
RELIEF FOR VIOLATIONS OF:**

- (1) SECTION 2 OF THE
SHERMAN ACT;**
- (2) SECTION 1 OF THE
SHERMAN ACT;**
- (3) BREACH OF CONTRACT;**
- (4) PROMISSORY ESTOPPEL;**
- (5) BREACH OF THE
COVENANT OF GOOD
FAITH AND FAIR
DEALING;**
- (6) BREACH OF FIDUCIARY
DUTY;**
- (7) TORTIOUS
INTERFERENCE WITH
CONTRACT;**
- (8) UNFAIR COMPETITION IN
VIOLATION OF HRS 480-2;
AND**
- (9) DECLARATORY RELIEF
[DEMAND FOR JURY TRIAL]**

TABLE OF CONTENTS

	Page
I. SUMMARY OF ACTION	1
II. THE PARTIES	2
III. JURISDICTION AND VENUE	5
IV. FACTS GIVING RISE TO THE COMPLAINT	6
A. The Power Purchase Agreement.....	6
B. Construction, Litigation and Resolution (2013-2014)....	11
C. NextEra and HEI Merger Agreement	12
D. Hu Honua’s Requests to HELCO to Extend Milestone Dates	15
E. HELCO’s Agreement to Purchase HEP’s 60 MW Power Plant.....	29
F. HELCO Purportedly Terminated Hu Honua’s PPA Effective January 18, 2016 and Again on March 1, 2016 On the Basis of the Missed “Pass Boiler Hydro Test” Milestone	34
G. Hu Honua’s Proposed Pricing Amendment Would Have Significantly Decreased the Price of Energy from the Facility at Dispatch Levels Over 10 MW	46
H. No Obstacles to the Completion of the Facility Other Than HELCO’s Unwillingness to Extend the PPA’s Milestones	48
I. HELCO Again Purportedly Terminated Hu Honua’s PPA On the Basis of a Missed COD Deadline	49
V. CLAIMS FOR RELIEF	50

Plaintiff Hu Honua Bioenergy, LLC files this Complaint against defendants and, demanding trial by jury, complains and alleges as follows:

I.

SUMMARY OF ACTION

1. Plaintiff Hu Honua Bioenergy, LLC brings this action to recover damages that it sustained as the direct and proximate result of defendants' anticompetitive and illegal conduct relating to the termination of Hu Honua's power purchase agreement that had been approved by the State of Hawaii's Public Utilities Commission in December 2013. At the time of the anticompetitive and illegal conduct, Hu Honua's power plant was 50% constructed at a cost of \$120 million, and an additional \$125 million in financing had been committed to complete the plant. Defendants' unlawful actions prevented Hu Honua from completing the facility that would have been in operation by 2017. As a result, Hu Honua has been damaged in the amount of its investment of \$120 million in the plant, plus lost profits of \$435 million. Defendants' actions caused injury to Hu Honua and injury to competition as set forth below.

II.

THE PARTIES

2. Plaintiff Hu Honua Bioenergy, LLC (“Hu Honua”) is a Delaware limited liability company who is the developer of a facility located at 28-283 Sugar Mill Road, Pepeekeo, Hawaii. Since 2012, Hu Honua has been engaged in the business of developing a renewable dispatchable firm energy biomass power plant on the Island of Hawaii. Hu Honua is approximately 87.4% owned by Island Bioenergy, LLC, a Delaware limited liability company. The Hu Honua biomass power plant project (“Hu Honua Facility” or “Facility”) is located at the site of a former coal fired sugar mill electric power generation facility on the Hamakua Coast in Pepeekeo, Hawaii. As the developer, Hu Honua was responsible for the design, construction, permitting and operation of the Facility. At the time of the unlawful events alleged herein, construction of the Hu Honua Facility was approximately 50% complete.

3. Defendant Hawaiian Electric Industries, Inc. (“HEI”), a holding company whose shares are listed on the NYSE under the symbol “HE,” is a Hawaii corporation whose principal place of

business is 1000 Bishop Street, Honolulu, HI. HEI participated in the acts alleged herein giving rise to the claims set forth below.

4. Defendant Hawaiian Electric Company, Inc. (“HECO”) is a subsidiary of HEI. HECO’s principal place of business is 900 Richards Street, Honolulu, Hawaii. HECO is a public utility holding company within the meaning of the Public Utility Holding Company Act of 2005 (“PURPA”). HECO and its operating utility subsidiaries, the Maui Electric Company, Ltd. (“Maui Electric”) and Hawaii Electric Light Company, Inc., provide electricity for 95% of the State of Hawaii’s 1.4 million residents on the islands of Oahu, Maui, Lanai and Hawaii. HECO participated in the acts alleged herein giving rise to the claims set forth below.

5. Defendant Hawaii Electric Light Company, Inc. (“HELCO”), whose principal place of business is 1200 Kilauea Ave, Hilo, Hawaii, is a subsidiary of Defendant HECO. HELCO is a vertically integrated public utility serving approximately 85,000 customers on the Island of Hawaii. HELCO’s power plants generate 65% of the Island’s firm electrical capacity.

6. Defendant NextEra Energy, Inc. (“NextEra”) is a Florida corporation headquartered in Juno Beach, Florida. NextEra

conducts its operations principally through two wholly owned subsidiaries, Florida Power & Light Company (“FPL”), a rate-regulated, integrated electric utility engaged primarily in the generation, transmission, distribution and sale of electric energy in Florida, and NextEra Energy Resources, LLC (“NEER”), with approximately 46,400 MW of generating capacity, is one of the largest wholesale generators of electric power in North America. NextEra provides retail and wholesale electric services to more than 5.3 million customers and owns generation, transmission and distribution facilities to support its services, and has investments in gas infrastructure assets.

7. Defendant Hamakua Energy Partners, L.P. (“HEP,” and together with HEI, HECO, HELCO, and NextEra, “Defendants”), a Hawaii limited partnership, owns a 60 MW fossil-fuel combined cycle power plant located in Honokaa, Hawaii. HELCO purchases from HEP firm generation capacity and electrical energy generated by the HEP power plant pursuant to a 1997 Power Purchase Agreement. HEP’s fossil fuel power plant is the Big Island’s largest independent power producer, with the capacity to provide approximately one-third of the Hawaiian Island’s peak power

demand. The HEP Power Plant is larger than any single HELCO generating unit and provides approximately 22% of the Hawaii Island's total firm generation capacity.

III.

JURISDICTION AND VENUE

8. This Complaint is filed and this action is instituted under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to recover the damages caused by past and continuing violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), and by NextEra's interference with Hu Honua's rights and HELCO's obligations under the power purchase agreement described below in violation of Hawaii state law.

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

10. Venue in this District is proper because all parties transact business on a continuous basis within this District, and may be found here, within the meaning of 15 U.S.C. §§ 15, 22 and

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

IV.

FACTS GIVING RISE TO THE COMPLAINT

A. The Power Purchase Agreement

11. In 2011 and 2012, prior to commencing the construction of the Facility, the former owners of Hu Honua negotiated with representatives of HECO and HELCO (collectively, “HECO/HELCO”) an agreement for the sale of electricity to be generated at the Facility for distribution to HELCO’s customers on the Island of Hawaii. The capacity payments and rates to be paid by HELCO for the electricity to be generated and sold by the Hu Honua Facility and other contract terms to which the parties agreed were subject to the approval of the Public Utilities Commission of the State of Hawaii (“Commission” or “PUC”).

12. On May 3, 2012 Hu Honua and HELCO entered into a Power Purchase Agreement For Renewable Dispatchable Firm Energy and Capacity, as amended (“PPA”), and an Interconnection Agreement, as amended (“Interconnection Agreement”).

13. The Hu Honua Facility is described in the PPA as having a contract “Committed Capacity” of 21.5 net MW, for which HELCO is obligated to pay Hu Honua an annual capacity payment. The capacity of the Facility is approximately 36 gross MW. The plant was to be fueled by locally-produced biomass feedstock from existing tree plantations on a sustainable, rotational basis. The Facility was designed to meet specific requirements: provide voltage and frequency stability to the electrical grid via a baseload, firm (steam), dispatchable plant that provides a variety of ancillary services. The renewable energy Facility had the further advantages of diversifying the fuel type of generation by (i) introducing biomass as a complement to fossil fuel to act as a natural hedge against the risk of rising fossil fuel prices by avoiding the consumption of imported oil; (ii) de-linking the cost of firm electricity generation from fossil fuel costs; (iii) providing a community solution to the disposal of invasive species biomass material that would otherwise be required landfill; (iv) providing a foundation for an innovative agricultural forestry industry that would create well over 150 jobs (direct and ancillary) in the greater Hilo community on the Island of Hawaii; (v) satisfying strict environmental emissions standards

associated with the U.S. Environmental Protection Agency's limits on emissions in proximity to U.S. National Parks (i.e., Volcano National Park); and (vi) improving the HELCO system's transmission and distribution capability by replacing an existing "substation" with a new "switching station."

14. HECO/HELCO submitted the PPA to the Commission for approval on August 30, 2012. The Commission reviewed it over a period of approximately 15 months. The PPA and Interconnection Agreement were approved by the PUC's Decision and Order ("Decision and Order") on December 20, 2013 ("Approval Date"). In its Decision and Order, the Commission determined that "[t]he capacity and energy purchase rates...appear reasonable," based on "factors such as the State's need to limit its dependence on fossil fuels and mitigate against volatility in oil pricing," as well as the value of providing "additional diversification in HELCO's renewable generation portfolio" and the value of "economic stimulation and the creation of jobs, including both jobs at the Hu Honua facility and supporting jobs in industries such as forestry, harvesting, and hauling." Following approval of the PPA, Hu Honua sought and obtained certification as a Qualified Facility under PURPA.

15. In the PPA approved by the Commission on December 20, 2013, HELCO was required to make an annual capacity payment of approximately \$1 million per year over the PPA's 20 year term, to dispatch no less than 10 MW at all times (except in very limited circumstances) and to pay 2011 electricity prices of 21.5 cents per KW at 10 MWs, plus annual inflation based escalation with a declining price scale for all electricity purchases in excess of 10 MW up to the contract capacity of 21.5 net MW. The PPA also has a feature that gives the utility the option to utilize the Facility's maximum "Available Capacity" of up to approximately 30 net MW on the same declining electricity price scale. In this scenario, up to an additional 8.5 net MW of "Available Capacity" would be offered at just its "electricity" price thus significantly benefiting ratepayers by not imposing any increase to the \$1 million per year capacity payment.

16. In its Decision and Order, the Commission recognized the importance of the Hu Honua Facility in advancing the State's policy to further the use of renewable energy and stated that it hoped that the Hu Honua Facility would "be dispatched similarly to HELCO's existing fossil fuel generating units and may allow for certain fossil

fuel generating units to be retired” The Commission further stated that the Hu Honua Facility will significantly benefit HELCO’s customers and bring the State closer to its 100% renewable portfolio standard:

Here, the Project will provide performance and operational features similar to HELCO’s existing steam generators with dispatchable capacity, inertial and primary frequency response, regulation and load following capabilities, and will add to the diversity of HELCO’s existing portfolio of renewable energy resources.

Stated succinctly, the Project will provide firm, dispatchable, renewable energy, and will provide ancillary services.

17. Also in its Decision and Order, the Commission noted that “[c]onsistent with HRS 269-27.2(c), the proposed pricing structure is delinked from fossil fuel pricing.”

18. Moreover, in its Decision and Order filed in Docket 2008-0143 on November 14, 2008 approving the waiver of the Hu Honua project from the Competitive Bidding Framework, the Commission stated that it

...agrees that a waiver for the Hu Honua Project is in the public interest because it could provide an opportunity to increase the amount of renewable energy on HELCO’s

system, without increasing the amount of as-available intermittent renewable energy resources on HELCO's system.

19. The Decision and Order also noted HELCO's agreement with these conclusions, as evidenced by the following discussion at pages 72-73 of the Decision and Order:

HELCO states that: "the Hu Honua project is not expected to create excess capacity on the HELCO system as the output can be dispatched by the utility based on economics and system balancing requirements between its minimum and maximum dispatch range." HELCO further states that: (1) the minimum dispatch is similar to existing fossil fuel generators; (2) the Facility will provide capabilities that are similar to fossil steam unit[s] and will provide dispatchable renewable firm capacity which will be determined based on energy pricing; (3) the energy from the Facility will ***generally displace fossil generation***; and (4) the addition of the Facility may allow for certain fossil generation to be decommitted."

B. Construction, Litigation and Resolution (2013-2014)

20. Hu Honua executed a construction contract for the Facility in late October 2012. During the construction, disputes arose with the Facility construction contractor that became insoluble. Breach of contract claims and counterclaims were filed by and among Hu Honua, the contractor and various vendors. In

addition, while the parties were attempting to resolve the contract disputes, Hu Honua learned of a labor union dispute in which a labor union jurisdiction panel had ruled that Hu Honua's contractor was utilizing the incorrect craft union for construction of the plant's boiler and ordered the contractor to cease such work. The labor union jurisdiction dispute was resolved after a substantial delay, and the contractor/vendor disputes were resolved in the last quarter of 2015. Although resolved, the construction contract and labor disputes, together with corresponding financing interruptions, caused an extended loss of time and delayed the completion of construction of the Hu Honua Facility, setting in motion the chain of events leading to this Complaint.

C. NextEra and HEI Merger Agreement

21. On December 3, 2014, NextEra and HEI entered into an Agreement and Plan of Merger (the "Merger Agreement") pursuant to which HECO, HEI's wholly owned electric utility subsidiary, would become a wholly owned subsidiary of NextEra. Completion of the

merger and the actual closing date remained subject to the satisfaction of certain conditions, including Commission approval.

22. Article V of the Merger Agreement addresses certain issues relating to HECO's conduct of its and its subsidiaries' business during the pendency of the merger. Among other things, Article V prohibited HECO from engaging in several activities without NextEra's prior consent. Specifically, Section 5.01(a)(xii) provides that HECO/HELCO shall not:

- (1) enter into, terminate or amend in any material respect any material Contract,
- (2) consent to any extension or continuation of any material Contract... or
- (3) waive any material right on any material Contract....

As set forth in Section 3.15(a)(iii) of the Merger Agreement, power purchase agreements are considered material contracts. In sum, although NextEra's merger with HECO had not yet been approved, it exercised total control over HECO's/HELCO's conduct of their important business actions, including the fate of Hu Honua's PPA.

23. Hu Honua is informed and believes, and on that basis alleges, that in early January 2016, HELCO submitted a request to NextEra for its consent to terminate Hu Honua's PPA. NextEra

approved the termination and HELCO's delivery of a letter to Hu Honua on January 15, 2016 notifying it that its PPA was terminated effective January 18, 2016, subject to a 30-day suspension of the termination on the terms provided in the letter.

24. Hu Honua is informed and believes, and on that basis alleges, that in February 2016, HELCO again submitted a request to NextEra for its consent to terminate Hu Honua's PPA upon the expiration of said suspension period. NextEra approved the termination and then approved the action taken by HELCO after the termination of the PPA on March 1, 2016.

25. NextEra's participation in the termination of Hu Honua's PPA, which had the purpose and effect of eliminating Hu Honua as a competitor in the electrical power generation, dispatch, and ancillary services markets on the Island of Hawaii, constituted its joinder and participation in a conspiracy to restrain trade in and monopolize the electrical power generation, dispatch, and ancillary services markets on the Island of Hawaii and other wrongs, all as set forth herein.

D. Hu Honua's Requests to HELCO to Extend Milestone Dates

26. Hu Honua's disputes with its former construction contractor and the labor union jurisdiction dispute caused an irretrievable loss of time in the construction of the Hu Honua Facility with the result that Hu Honua realized that it would not be able to achieve two milestones dates set forth in the PPA: the "pass boiler hydro test" milestone, which was set for 18 months after the PUC Approval Date of December 20, 2013 (the "PUC Approval Date"), and (ii) the Guaranteed Commercial Operations Date ("COD"), which was set for 24 months after the PUC Approval Date.

27. Section 2.4 of the PPA provides that a milestone date extension request is subject to HELCO's approval, which approval shall not be unreasonably withheld. Nothing in Section 2.4 or elsewhere in the PPA provides that (i) an approval of a milestone date extension is subject to review by or the approval of the Commission, or (ii) any such extension must be supported by a benefit to ratepayers in the form of a reduction in the PPA's approved pricing. As set forth below, HELCO unreasonably withheld its approval of an agreement to Hu Honua's repeated

requests for extensions of the PPA's milestone dates between January 2015 and its final termination of the PPA on March 1, 2016. This unreasonable conduct in itself delayed the completion of the Facility by approximately 20 months. Had HELCO agreed to the milestone extensions requested in the Spring of 2015 as it should have, the Facility, which was approximately 50% built, would have been completed and generating power in 2016.

28. Although the "pass boiler hydro test" milestone date was still several months away, soon after the settlement with its former contractor in November 2014, Hu Honua promptly raised with HELCO the need for extensions of the two milestones, and in January 2015 Hu Honua contacted HELCO to seek an amendment of the PPA extending the project milestone dates.

29. Beginning in January 2015, and over the next several months, HELCO and Hu Honua discussed the specifics of proposed PPA amendments to extend the milestone dates.

30. During the course of these discussions, HELCO claimed that in order to obtain the milestone extensions the PUC required HELCO to obtain as a quid pro quo a benefit to ratepayers in the form of reductions in the pricing approved in the PPA. HELCO

explained to Hu Honua that it was under pressure from the Commission to reduce rates to its customers and was looking for opportunities to achieve savings where available from purchased power suppliers.

31. In response to its discussions with HELCO and HELCO's requirement of price concessions before it would agree to extend the milestones, by letter dated February 27, 2015, Hu Honua proposed to HELCO (a) an extension of the milestone dates and (b) a reduction in the "Fuel Component" of Hu Honua's per-kWh electricity price by modifying the sliding scale price in Hu Honua's PUC approved PPA such that Hu Honua received electricity revenue based on the sliding scale for the first 10 MW plus (a) 16.2 cents per kWh for all dispatch above 10 MW. Had HELCO accepted HU Honua's proposed price reduction, the plant would have been completed by as early as the second quarter of 2016. HELCO rejected the proposed price reduction as "not low enough," despite that the price reduction would have—based on HELCO's own forecast dispatch in Hu Honua's PUC approved PPA—saved ratepayers over \$90 million during the 20-year term of the PPA. The price reduction would have reduced the rate contemplated in

Hu Honua's PUC approved PPA. In addition, based on HELCO's fuel forecasts, Hu Honua's Facility would have saved ratepayers over \$520 million in energy costs relative to HELCO's primary fossil fuel burning units, some of which are old, inefficient and dirty.

32. On April 2, 2015, at HELCO's request, Hu Honua submitted a proposed draft milestone amendment. In response, HELCO categorically claimed that any milestone date extension amendment to the PPA required Commission approval. Hu Honua objected to HELCO's claims, and disputed that Commission approval was necessary to approve an amendment related to a milestone date extension. HELCO also categorically claimed that a pricing reduction amendment would require Commission approval, and that the two amendments must be combined and approved together. Hu Honua acknowledged HELCO's claim that Commission approval was necessary for a price reduction, but objected to the need to pursue simultaneous PUC approval for both amendments.

33. On April 14, 2015 Hu Honua submitted to HELCO a proposed draft pricing amendment. In the April 14, 2015 version of the pricing amendment, the Fuel Component was further reduced

to 14 cents per kWh, but the capacity payment was increased by \$2 million per year from approximately \$1 million per year. HELCO again rejected Hu Honua's pricing proposal as "not low enough."

34. While Hu Honua disagreed with HELCO's claims that Commission approval of milestone date extensions was required and that reductions in the PPA's approved pricing were required in order to obtain milestone extensions, in order to avoid further delay in obtaining the critical milestone date extensions required to complete the Facility, Hu Honua proposed in multiple communications during the period from April to December 2015 to bifurcate the proposed milestone and pricing amendments into two amendments—a milestone extension amendment and a pricing reduction amendment. Hu Honua believed that bifurcation would allow Commission approval of the milestone amendment to become effective while Hu Honua negotiated the price concession that HELCO required. HELCO, however, refused to bifurcate the milestone date extension from the pricing amendment, insisting that both the milestone extension amendment and the pricing amendment be submitted for Commission approval at the same time.

35. On May 19, 2015, Hu Honua submitted its requested milestone extension amendment and a new version of its draft pricing amendment to HELCO. In this new version of Hu Honua's pricing proposal, the only substantive change made by the amendment to the PUC approved PPA was a reduction in the Fuel Component to a flat rate of 14 cents per kWh for dispatch levels over 10 MW, and the previously proposed increase in capacity payment was eliminated. As with Hu Honua's prior proposals, this latest proposal materially reduced the Commission's approved pricing in the PPA. In fact, Hu Honua's new proposal, as compared to the PUC approved pricing in the PPA, would have reduced the prices paid by HELCO's ratepayers, based on HELCO's Hu Honua dispatch forecasts, more than \$90 million over the course of 20 years. In addition, based on HELCO's fuel forecasts, Hu Honua's Facility would have saved ratepayers over \$520 million in energy costs relative to HELCO's primary fossil fuel burning units, which are old, inefficient and dirty.

36. On May 26, 2015, HELCO confirmed that the Hu Honua pricing proposal provided a benefit to its ratepayers. Despite acknowledging this benefit to HELCO's ratepayers, HELCO was

dismissive of Hu Honua's proposal, stating that the level of benefit did not outweigh the efforts HELCO would be required to undertake in order to acquire PUC approval. HELCO concluded that it would take Hu Honua's proposal under advisement and would discuss internally, but it refused to provide Hu Honua with any analysis that could be used to derive and duplicate HELCO's pricing claims.

37. Throughout the summer of 2015, there were active exchanges of communication between HELCO and Hu Honua. Hu Honua continued to press HELCO for status updates on the progress of the proposed PPA amendments, and continued to request a bifurcation of the amendments. Although HELCO repeatedly told Hu Honua that its pricing proposals were not low enough, it steadfastly refused to submit its own price reduction proposal and refused to tell Hu Honua how much lower the prices had to be in order to reach agreement on Hu Honua's requested milestone extensions. Additionally, HELCO never provided Hu Honua with the information, such as the basic assumptions used by their generation planning group, necessary to decipher and to confirm HELCO's repeated claim that Hu Honua's pricing proposals were not low enough.

38. On June 29, 2015, HELCO provided a status update to Hu Honua on its proposed PPA amendments. HELCO informed Hu Honua that it was reluctant to approach the PUC for approval of any amendment until Hu Honua resolved the dispute with its former contractor. HELCO also again stated that PUC approval of Hu Honua's pricing proposal—that HELCO earlier acknowledged provided a benefit to its ratepayers—would require too much effort from HELCO.

39. On July 10, 2015, HELCO stated to Hu Honua that it was prepared to move forward with a process to seek approval of just the milestone extension amendment.

40. On July 27, 2015, HELCO stated to Hu Honua that it was prepared to move forward with the milestone extension amendment as long as Hu Honua provided five assurances to confirm the following:

- (i) Availability of financing,
 - (ii) Resolution of dispute with a former contractor,
 - (iii) Plant and its equipment have been maintained,
 - (iv) Sponsors are committed to completion of construction,
- and

(v) Ownership would not “flip the Facility” as soon as HELCO agreed to the amendment.

41. On July 29, 2015, HELCO acknowledged to Hu Honua that Hu Honua’s proposed price reduction created significant value to HELCO over the course of 20 years. HELCO also acknowledged that the long term, rather than short term, benefit was more important to HELCO, which was how the value of the PPA was presented to the PUC initially for approval. HELCO also stated to Hu Honua that high level executives at HECO/HELCO and NextEra would need to approve any amendments to the PPA, i.e., the price reduction and milestone date extensions, and decide whether to approach the PUC with an informal request for approval of a milestone date extension. Further, HELCO stated that the PUC would need to approve any price reduction and milestone extension date.

42. On August 7, 2015, HEI filed its 10-Q for the period ending June 30, 2015, stating the following as part of its “Renewable energy strategy”:

Developments in the Utilities’ efforts to further their renewable energy strategy include the following:... In May 2012, Hawaii Electric

Light signed a PPA, which the PUC approved in December 2013, with Hu Honua Bioenergy for 21.5 MW of renewable, dispatchable firm capacity fueled by locally grown biomass from a facility on the island of Hawaii. Per the terms of the PPA, the Hu Honua Bioenergy, LLC plant is currently scheduled to be in service in 2016.

43. HECO's 10-Q went on to state that "[a]dditional generation from other renewable resources could be added in the 2020-2025 timeframe."

44. Beginning in January 2014, as provided by the PPA, Hu Honua had been submitting monthly status reports to HELCO. HELCO never objected to the numerous monthly project status reports.

45. On October 20, 2015, Hu Honua sent, per HELCO's request, an "assurance" letter describing the status of the Project, clarifying the milestone and pricing amendment proposals that remained on the table, and providing confirmation that Hu Honua had capital providers ready to fund the completion of the project in the event that HELCO and Hu Honua reached agreement on the milestone extensions.

46. On November 3, 2015, HELCO responded with a letter confirming that it “continues to support Hu Honua’s project as it plays an important part in reaching Hawai’i Electric Light’s renewable energy goals.” HELCO also requested that “Hu Honua submit a comprehensive proposed amendment to the PPA no later than Friday, November 20, 2015. The proposed amendment must clearly demonstrate a benefit to Hawai’i Electric Light’s customers and must resolve all outstanding issues required to bring Hu Honua’s performance into compliance with the terms of the PPA.”

47. As part of HELCO’s request to Hu Honua for a proposal, HELCO requested from Hu Honua “adequate assurances that the project would be successfully completed in a timely manner and would otherwise be in the best interest of our customers” and “assurances that the issues stemming from Hu Honua’s litigation and stipulated judgment with its former contractor have been resolved.”

48. On October 30, 2015, HELCO notified Hu Honua that it owed \$90,000 in Milestone Delay Damages and requested payment by November 16, 2015. HELCO also demanded as a condition to agreeing to the requested milestone date extensions that Hu Honua

settle its disputes with its construction contractor and other vendors. In reliance upon HELCO's assurances and actions that it would agree to Hu Honua's request to extend the PPA's milestone dates, Hu Honua's new investors committed \$20 million to pay the liquidated damages to HELCO on November 12, 2015, to fund settlements with its construction contractor and vendors, to acquire the rights to 1,000,000 tons of prime timber for fuel, and to fund its pre-construction ramp-up to commence full scale construction as soon as the extension agreement had been signed.

49. On November 20, 2015, per HELCO's previous request, Hu Honua sent HELCO a new draft of the milestone amendment as well as a written confirmation that it had satisfied all five "assurances" requested by HELCO on July 27, 2015, including that it resolved all disputes with the former contractor and secured all the capital necessary to complete construction of the Facility.

50. On December 7, 2015, HELCO advised Hu Honua that HELCO would be sending two letters; one confirming that HELCO had not made a decision to extend the schedule of milestone dates in the PPA and the second outlining specific information required in order for HELCO to decide whether to extend the milestone dates in

the PPA. HELCO also advised that any decision related to a schedule extension would be made by NextEra. Additionally, several post-extension items were discussed, including fuel supply; recognized benefits of Hu Honua's Facility to the HELCO electric distribution system; accelerating construction; a new turbine generator; and ancillary equipment.

51. On December 7, 2015, HELCO then sent Hu Honua a letter stating that HELCO was reviewing the proposed milestone amendment, and would provide a response. Instead of responding, however, on December 14, 2015, HELCO sent Hu Honua a letter requesting 22 separate, additional items of information. On December 22, 2015, Hu Honua responded promptly to HELCO's request, providing extensive and detailed information, including, *inter alia*, information about the new capital available for the project. HELCO never objected to Hu Honua's response, nor did it require more information.

52. As of December 22, 2015 the project was fully financed with over \$100 million already invested and \$125 million of committed capital to complete the project. Other than HELCO's resistance to a milestone extension, there were no significant

impediments to its completion as the facility was fully permitted, all design and engineering work had been completed, and virtually all equipment was procured and was on site or ready to be shipped to Hawaii from various locations around the world.

53. Hu Honua was not aware of any base-load asset plant planned or under construction, renewable or otherwise, that was capable of coming on line in a shorter time frame or for a lower cost per MW on an available capacity basis than the Hu Honua Facility. Its new investor had shown commitment to this Project by providing in excess of approximately \$28 million to Hu Honua in the last thirteen months. Moreover, substantial expense had been incurred to pay penalties to HECO/HELCO and maintain the site and all equipment in a state of readiness so that Hu Honua would be positioned to proceed with full-scale construction immediately following the milestone extensions Hu Honua requested.

54. Despite Hu Honua's repeated requests that HELCO submit the extension request to the PUC, during the 13 months leading up to HELCO's termination of the PPA it steadfastly refused to submit any of Hu Honua's proposed amendments to the Commission, thereby making it impossible for Hu Honua to obtain

Commission approval. Hu Honua could not directly submit a proposed PPA amendment to the Commission on its own; HELCO was required to submit such a request on Hu Honua's behalf. In other words, HELCO was Hu Honua's exclusive conduit to the PUC for the approval of any amendment to the PPA and as Hu Honua's representative to the Commission exercised total control over the submission thereof.

E. HELCO's Agreement to Purchase HEP's 60 MW Power Plant.

55. On December 23, 2015, HECO and HELCO publicly disclosed that HELCO had entered into an Asset Purchase Agreement with HEP to acquire HEP's 60 MW combined cycle fossil fuel power plant and other assets. The total purchase price for the HEP Power Plant and related assets is \$88,065,000. The base purchase price is \$84,500,000 (excluding transfer taxes), with an estimate of \$1,865,000 to cover a required 50,000-hour major overhaul to HEP generating unit CT-2 in early 2017. HECO/HELCO expect the HEP Power Plant to operate through 2040.

56. Currently, there are only two independent power producers (“IPP”) on the Big Island that provide firm capacity: HEP and Puna Geothermal Venture. HELCO’s acquisition of the HEP’s fossil fuel combined cycle 60 MW power plant would leave only one IPP providing firm capacity on the Big Island, crushing IPP competition for energy generation and deterring the development of renewable energy generation. The purchase of the HEP Power Plant will expand HELCO’s monopoly power in firm, dispatchable generation capacity by 33% from 182 MW (net) to 242 MW on the Island of Hawaii and increase its ownership of firm baseload dispatchable power generation capacity from approximately 66% of the market to 87%.

57. HELCO currently owns 65% of the firm dispatchable electric power generation in the relevant geographic market – the Island of Hawaii. Completion of its pending purchase of the HEP power plant, which has an approximately 22% share of the firm dispatchable power plant generation on the Island will give HELCO over 86% of the market.

58. HELCO is the monopoly retail seller of electricity on the Big Island, which means it is also the monopoly owner of electricity

transmission and distribution infrastructure and monopsony purchaser of wholesale electricity. This monopoly power gives it the ability to (1) refuse to do businesses with IPPs in the generation market and (2) dictate the terms and conditions pursuant to which IPPs can interconnect with its transmission and distribution system. HELCO's power allows it to pursue its goal of making generation investments and adding them to its rate base. HELCO's termination of Hu Honua's PPA and agreement to purchase HEP's power plant and other assets are in furtherance of HELCO's monolithic control of the firm, baseload power generation, the dispatch of that power, and the ancillary services markets on the Island of Hawaii and constitutes an abuse of its monopoly power in that market.

59. On February 12, 2016, HECO and HELCO filed their Application with the PUC for approval of its proposal to recover the \$88 million cost of the purchase through adjustments to the rates paid by its customers. The HEP Power Plant is the largest single plant on the Island of Hawaii. HELCO's proposal to acquire the HEP Power Plant and to recover the purchase price from its customers will increase HELCO's share of dispatchable generation

capacity from 182 MW (net) to 242 MW, an increase in HELCO-owned and controlled firm generation of almost 33%. In other words, HELCO is attempting to increase its monopoly power in firm baseload dispatchable power generation capacity from approximately 66% to 87%.

60. As an existing renewable IPP with an approved PPA, a modern biomass power plant that is approximately 50% complete, fully entitled, with sufficient committed funding for the completion of the Facility, and with the potential for future energy development opportunities on the Big Island, Hu Honua represented a material competitive threat to HELCO and HEP. HELCO's proposal to invest in and acquire at ratepayer expense the HEP Power Plant, as the largest single power plant on the Big Island, will have a direct anticompetitive effect on energy development opportunities for IPPs to compete with HELCO and HEP for new generation on the Big Island.

61. HEP had its own reasons for wanting the Hu Honua PPA to be terminated. As early as 2012, HEP recognized that the proposed Hu Honua Facility was a direct competitive threat. On September 19, 2012, it filed a motion to intervene in the

Commission's docket for HELCO's Application for Approval of the Hu Honua PPA which it vigorously opposed on the grounds that "[t]he introduction of the proposed Hu Honua plant would, according to [the] HELCO plan outlined in its application, reduce the HEP Plant's dispatch." In sum, HEP, as the operator of the largest power plant on the Island, attempted unsuccessfully to exclude Hu Honua as a competitor in the power generation, dispatch, and ancillary services markets. It was presented with another opportunity three years later to accomplish that objective. Hu Honua is informed and believes, and on that basis alleges, that HEP participated in and supported the termination of Hu Honua's PPA, as alleged below.

62. Less than a month after announcing its agreement to purchase HEP's power plant, on December 23, 2015, HELCO delivered its letter to Hu Honua purporting to terminate the PPA effective January 18, 2016.

F. HELCO Purportedly Terminated Hu Honua's PPA Effective January 18, 2016 and Again on March 1, 2016 On the Basis of the Missed "Pass Boiler Hydro Test" Milestone

63. In January, the HECO/HELCO and Hu Honua representatives agreed to meet to lay out a plan forward. Having resolved HELCO's doubts about its ability and \$125 million from new investors to finish its 50% complete, fully entitled, modern Facility in which \$125 million had already been invested, and after the expenditure of approximately \$20 million in November and December 2015 to settle Hu Honua's construction related litigation as HELCO had required, Hu Honua anticipated that the purpose of the meeting would be to finally discuss the substance of its proposed milestone amendment.

64. Late on Friday afternoon on January 15, 2016, HELCO and Hu Honua met at HELCO's offices.

65. In advance of the meeting, Hu Honua's lead investor spoke with HELCO's CFO and disclosed the source of the \$125 million required to complete the power plant and reaffirmed their commitment to complete the project in 2017.

66. At the meeting, HELCO's President, Jay Ignacio, delivered a letter dated January 15, 2016 informing Hu Honua that HECO/HELCO had decided to terminate the PPA, effective Monday, January 18, 2016, because Hu Honua had failed to meet the "pass boiler hydro test" milestone in July, 2015, unless Hu Honua agreed to a list of conditions. HELCO stated that it could not provide more time beyond January 18, 2016 because it was required to terminate the PPA by that date. At no time prior to January 2016 did HELCO declare its intention to terminate the PPA. HELCO set forth in the letter the conditions on which event it would negotiate an agreement on the extension of the milestone dates Hu Honua first requested back in January 2015, including:

1. Seller agrees that Company has the immediate right to terminate due to Seller's failure to meet the subject Guaranteed Milestone and failure to cure.
2. Seller agrees to waive any right to contest or dispute the fact that Company's termination is proper and consistent with the terms of the PPA and that such right remains valid and effective through January 18, 2016.
- ...
4. Seller agrees that during the Extension Period, Company has the sole and absolute discretion to immediately terminate the PPA,

with no additional opportunity to cure by Seller, if Company determines that sufficient progress is not being made toward a possible amendment to the PPA that is in the best interest of its customers; in such event. Company is entitled to the \$500,000 in Pre-COD Termination Damages and is permitted to immediately draw down such amounts from the Development Period Security and that Seller shall not contest the draw down.

...

6. Seller agrees to reimburse Company for any expenses incurred by Company during the Extension Period and that such funds may be drawn from the Development Period Security.

...

8. Seller acknowledges that NEE [Next Era Energy] has the right [under the NextEra – HEI merger agreements] to consent to any amendment to the PPA and that Seller agrees to waive any claims in the event consent is not obtained and to defend and indemnify Company from any such claims.

Despite being required to give Hu Honua 30 days' notice of any termination, HELCO stated that the PPA would terminate unless Hu Honua agreed to these conditions by Monday, January 18, 2016, a Federal holiday.

67. Hu Honua was shocked by HELCO's about-face, as well as the onerous nature of the letter's conditions. Because resolving

the five criteria that HELCO had identified were necessary to move forward in July of 2015, Hu Honua's new investors had committed \$20 million in financing, in part, to satisfy (i) HELCO's need for "assurances," including the settlement of its construction related litigation, and (ii) the payment of \$90,000 in liquidated damages demanded by HELCO on October 30, 2015. Hu Honua was given just three days over a holiday weekend (Martin Luther King Day) to either agree to these unconscionable letter conditions or to destroying the value of its 50% complete Facility, on which it had been working with HELCO for more than four years, in which it had invested over \$125 million and in which it had demonstrated its ability to fund the \$125 million to complete the Facility. Put simply, the letter was a "loaded gun to the head."

68. Hu Honua had no option but to prepare its own qualifying response letter and in conjunction sign HELCO's January 15 letter. As Hu Honua explained in its qualifying response letter on January 18, 2016:

Based on what Hu Honua heard at the meeting, Hu Honua has no choice but to countersign the Negotiation Conditions Letter. Despite the extraordinary and onerous conditions that HELCO demands and its

refusal to discuss any of them, Hu Honua can only hope that HELCO will act in good faith to negotiate a mutually beneficial Amendment during the next thirty (30) days. Moreover, in regard to HELCO's disclosure for the first time at our Friday meeting that NextEra is reviewing our project despite Hu Honua's confidentiality agreement with HELCO and must approve any Amendment[,] Hu Honua must assume that NextEra will act in good faith in approving the Amendment.

69. HELCO's January 15, 2016 termination letter was a nullity because any right HELCO may have had to terminate the PPA based on the Boiler Hydro Milestone had already expired in December, 2015. Furthermore, the letter is unenforceable as an independent agreement granting to HELCO a right to terminate, for numerous reasons. As Hu Honua indicated in its January 18, 2016 cover letter, Hu Honua's countersignature on HELCO's January 15, 2016 letter was procured by duress and misrepresentation. Moreover, the "promises" and conditions set forth in HELCO's letter were unconscionable, and were unsupported by any legal consideration running from HELCO to Hu Honua, other than the illusory promise of an "Extension Period" that was in fact terminable by HELCO in HELCO's "sole and absolute discretion." Neither HELCO's shockingly unreasonable letter nor Hu Honua's

countersignature on that letter can amend the plain language of the PPA or resurrect HELCO's expired right of termination, which HELCO was in any case wrongfully asserting as a pretext for its unlawful termination of the PPA for the purpose and with the effect of restraining competition and monopolizing the power generation, dispatch, and ancillary services markets.

70. HELCO's offer of the 30-day window for further negotiations was a charade. Initially, HELCO stated that it was too busy to meet during the 30 day negotiation window stipulated in the January 15 letter. Before the end of the 30 day period, Hu Honua and HELCO met only two times to discuss Hu Honua's requested milestone amendment and pricing offer. During this period HELCO requested financial pro forma and other information, which Hu Honua promptly delivered. At HELCO's request, Hu Honua also reiterated in correspondence its recent versions of its proposed milestone amendment and its proposed pricing amendment. Hu Honua again asked for a bifurcated process. Hu Honua even went so far as to (i) propose starting full-scale construction immediately upon receiving PUC approval that HELCO said was required in order to establish valid milestone extensions,

and (ii) to guarantee that the price reduction amendment would at least equal the 14 cent per kWh proposal already on the table. HELCO rejected this proposal, which would have enabled Hu Honua to ramp up full-scale construction in January and February of 2016 and deprived HELCO of a basis on which to terminate the PPA as it did on March 1, 2016. HELCO rejected Hu Honua's reduced price proposal, but again offered no counter proposal.

71. Notably, at approximately the same time that HECO/HELCO terminated the Hu Honua PPA, HECO also terminated three PUC approved power purchase agreements with IPPs of solar power facilities on Oahu. HECO's termination of these agreements also was based on the theory that the solar power facilities missed milestones, which HECO refused to extend, just as HELCO (and HECO), together with the approval of NextEra, refused to extend the Hu Honua PPA milestones.

72. On February 12, 2016, during this supposed 30 day negotiating window Hu Honua's new investor provided a commitment letter confirming that he was "ready, willing and able, and hereby commit[ed], to provid[ing] HHB with approximately \$125,000,000 in funds for the purpose of completing construction

of the Facility, provided that HELCO agrees to amend [Hu Honua]'s power purchase agreement with HELCO (the "PPA") by extending the "Pass boiler hydro test milestone date and the Commercial Operation ' Date Deadline to April 30, 2017 and August 30, 2017." The investor also reaffirmed that "[o]ver \$100 million has been invested in the project," and that "[m]ore than \$20 million has been contributed by members of the new capital group since November 2015." As a further demonstration of Hu Honua's commitment to the project, the completion of the Facility, it committed to continue funding through March 31, 2016, as necessary to preserve schedule, rather than curtailing funding while waiting for approval of the extended milestone dates. Attached to the letter was a statement from PricewaterhouseCoopers LLP confirming that the investor is the owner of shares in a public company valued at over \$4.5 billion.

73. At the end of February 2016, HELCO again issued a notice to Hu Honua of its intention to terminate the PPA and then wrongfully terminated the PPA on March 1, 2016. In so doing, HELCO breached the PPA.

74. Section 9.2(A) of the PPA provides for the payment by Hu Honua to HELCO of \$500,000 in liquidated damages in the event that the PPA is terminated by HELCO prior to the COD milestone. Following its purported termination of the PPA, HELCO drew the \$500,000 in Pre-COD damages directly from the Development Period Security, which was posted by Hu Honua pursuant to Section 7.1 of the PPA. However, because HELCO did not have a right to terminate the PPA and breached the PPA by terminating it, HELCO did not have a right to draw the \$500,000 in Pre-COD Termination Damages.

75. If the PPA had not been terminated, Hu Honua would have completed it by the first or second quarter of 2017 and provided all of the benefits recognized by the Commission when it approved the PPA.

76. As described above, the Hu Honua plant would have provided a host of advantages to HELCO's customers, which HELCO inexplicably ignored entirely when it terminated the PPA. When the PPA was approved on December 20, 2013, both HELCO and the Commission recognized these advantages, as summarized in the PPA Approval Order:

HELCO states that there are many ways to accommodate renewable resources, and that the Hu Honua Facility is “an excellent way to bring additional renewable energy onto the systems.” In support of this conclusion, HELCO states: (1) the Hu Honua Facility will provide performance and operations similar to HELCO’s existing steam generators with dispatchable capacity, inertial and primary frequency response, regulation and load following capabilities; (2) Hu Honua will make a significant contribution to the RPS; and (3) the pricing is attractive and delinked from fossil fuels.

[T]he Project will provide performance and operational features similar to HELCO’s existing steam generators with dispatchable capacity, inertial and primary frequency response, regulation and load following capabilities, and will add to the diversity of HELCO’s existing portfolio of renewable energy resources.

Stated succinctly, the Project will provide firm, dispatchable, renewable energy, and will provide ancillary services.

The Project is anticipated to provide community benefits including economic stimulation and the creation of jobs, including both jobs at the Hu Honua facility and supporting jobs in industries such as forestry, harvesting, and hauling.

The capacity and energy purchase rates set forth in the PPA appear reasonable, are consistent with and satisfy HRS chapter 269 in general, and HRS 269-27.2(c), in particular.

77. These advantages were no less valuable when the PPA was terminated in 2016 than in December 2013 when the Commission approved its PPA. In fact, certain events that have occurred since December 2013 have increased the value of the Hu Honua Facility. Last year, the Hawaii Legislature amended Hawaii's RPS statute to require Hawaii to move towards achievement of a 100% RPS. The new Hu Honua turbine/generator is approximately 30% more efficient and has over 50% more capability than the original design at the time of the PUC approval in December 2013. Indeed, these design changes provided tangible value as in order to achieve high penetrations of intermittent renewables such as solar and wind, HELCO will require firm, dispatchable renewable power plants that offer the ancillary services such as grid stabilization that cannot be provided by intermittent sources such as solar and wind. These are exactly the services that Hu Honua was designed to provide and the reason why a dispatchable plant such as Hu Honua is both complementary and critical to a modern, reliable grid with high renewable penetration.

78. Hu Honua's 50% complete Facility would have been a critical piece of the Big Island's and the State's renewable energy

strategy and overall capacity planning strategy, with no real, permitted and fully designed replacement able to deploy in its stead at any point in the foreseeable future. Terminating such a Facility, especially one that delivers a 40% boost in available capacity with no additional capacity charges was clearly not in the interest of, indeed caused injury to, HELCO's customers.

79. In sum, on March 1, 2016, there was no lawful reason for HELCO to terminate the PPA. When completed in 14-18 months: (i) Hu Honua would provide all of the benefits recognized by the Commission in its approval of the PPA; (ii) the price reduction Hu Honua offered would have been beneficial to HELCO's Customers, and made the Hu Honua project even more valuable to HELCO's customers than it was when the Commission approved the PPA in December 2013; (iii) Hu Honua had full, committed financing (\$125 million) in place, and there were no obstacles to completion, other than HELCO's unwillingness to extend project milestones dates.

80. On April 1, 2016, HECO/HELCO filed their Power Supply Improvement Plan Update ("PSIP UPDATE") in which, because of its termination of Hu Honua, HELCO has proposed to deploy a similar 20 net MW biomass power plant on Hawaii Island with an estimated

completion date in either 2024 or 2027, approximately 6-9 years later than the Hu Honua plant would be completed. According to HELCO, that power plant would be procured “via competitive bidding under applicable procurement rules,” and so could be owned by either the utility or an independent power producer. Until the new hypothetical plant is procured and completed, HELCO would replace Hu Honua’s renewable electricity and capacity with HELCO’s fossil fuel-fired plants, which are among the dirtiest plants in the state, or with the fossil fuel-fired HEP fossil fuel plant.

G. Hu Honua’s Proposed Pricing Amendment Would Have Significantly Decreased the Price of Energy from the Facility at Dispatch Levels Over 10 MW.

81. The proposed pricing amendment Hu Honua offered to HELCO together with the milestone date amendment that HELCO rejected would have preserved all of the above-described advantages of the Hu Honua PPA, but at a lower energy price. Specifically, the pricing amendment would have reduced the Fuel Component (which is the primary component of the Energy Charge set forth in the PPA) to \$0.14 per kilowatt-hour for quantities of dispatch above the minimum operating level of 10 MW for economic dispatch.

82. If accepted by HELCO, this proposed price reduction would have provided a significant benefit to ratepayers, because it was lower or equal to Hu Honua's Commission-approved pricing at every level of dispatch above the 10 MW minimum economic dispatch level in the PPA. As a biomass plant whose rates were totally delinked from the cost of the fossil fuels used to generate power in HELCO's and HEP's fossil fuel plants, the Hu Honua Facility would have further benefited the rate payer by providing protection against the enormous increase in fossil fuel prices over the 20 year term of Hu Honua's terminated PPA as forecasted by HELCO in its PSIP. HELCO forecasts conclude that fossil fuel costs on the Island of Hawaii could exceed \$250 per barrel by 2037. Hu Honua's proposed pricing, therefore, would have provided over \$520 million in energy cost savings to HELCO's customers over the next 20 years relative to its fossil fuel plants, some of which are old, inefficient and dirty. Finally, and no less important, completion of the Hu Honua Facility furthered Hawaii's mandate for 100% renewable power generation by 2045.

H. No Obstacles to the Completion of the Facility Other Than HELCO's Unwillingness to Extend the PPA's Milestones.

83. When the PPA was terminated there were no obstacles to the completion of the remaining 50% of Hu Honua's facility other than HELCO's unwillingness to extend the milestones. Notably, Hu Honua was ready, willing and able to proceed with the original pricing structure to which the parties agreed in the PPA and the Commission approved. In fact, as HELCO had required as a condition to its promises and assurances that it would agree to extend the milestone dates and thereby allow completion of the Facility, by December 2015 Hu Honua (1) had resolved virtually all of its material construction claims and disputes, (2) had fully committed from new investors the \$125 million funds required to complete the 50% built Facility, and (3) had its project team, including its new construction contractor, standing by, ready and able to ramp up construction and complete the Project in 2017. All that was required was HELCO's agreement to the necessary milestone extensions Hu Honua repeatedly requested.

84. Had HELCO granted the requested milestone extensions in the Spring of 2015 as it was required to do, the Hu Honua Facility would have been completed and fully operational within 14-18 months—by October 2016 at the latest.

85. The termination of Hu Honua's PPA created a substantial risk of serious competitive and consumer harm in the form of higher utility bills linked to HECO's/HELCO's projected increases in fossil fuel prices over the length of the 20-year PPA, delay in the achievement of the State's statutory mandate of 100% renewable power energy by 2045, higher prices for HELCO's ratepayers, damage to the economy in the form of job losses, and increased reliance on the utility as the dominant source of the Island's power as its monopoly of firm baseload power generation, dispatch, and ancillary services markets on the Island increases.

I. HELCO Again Purportedly Terminated Hu Honua's PPA On the Basis of a Missed COD Deadline

86. In August 25, 2016, HELCO again purported to terminate Hu Honua's PPA, this time on the basis of a missed COD deadline. This second termination is significant in three respects: (1) By issuing it, HELCO tacitly acknowledged that its March 1, 2016

termination on the basis of the missed “pass boiler hydro test” was, as Hu Honua claimed, invalid and as such was a breach of the PPA; (2) HELCO’s termination of the PPA on March 1, 2016, which was a breach of the PPA, excused Hu Honua’s performance of its obligations thereunder and the PPA, thereafter, could not again be terminated on the basis that Hu Honua missed the COD milestone; and (3) HELCO’s assertion of its right to and the collection of the \$360,000 balance of the security deposit letter of credit described above, and its collection of that sum, was itself a further breach of the PPA, indeed, a conversion.

V.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

**(Monopolization In Violation of Section 2 of the Sherman Act)
(15 U.S.C. § 2)**

87. Plaintiff incorporates by reference the allegations of paragraphs 1 through 86, as though fully set forth herein.

88. Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits, *inter alia*, the willful monopolization of any part of the trade or

commerce among the States. HELCO's conduct and practices are anticompetitive, predatory, and/or exclusionary.

89. Plaintiff Hu Honua has the requisite standing to assert antitrust claims against HELCO because it is a participant and competitor in the relevant markets of firm baseload power generation, dispatch, and ancillary services and would generate power in Hawaii if not for HELCO's unlawful conduct.

90. HELCO is engaged in an anticompetitive and exclusionary scheme, including by eliminating competition in the generation and dispatch of power in Hawaii by precluding competition in the relevant market. As discussed above, HELCO willfully acquired and has maintained its power to exclude competition in the relevant market.

91. HELCO has a monopoly on firm baseload power generation, dispatch, and ancillary services as it already controls 66% of that market on the Island of Hawaii.

92. HELCO has undertaken its anticompetitive and exclusionary conduct with the purpose of monopolizing, with the deliberate and specific intent to monopolize power generation, dispatch, and ancillary services on the island of Hawaii, and

specifically to eliminate, destroy, or foreclose meaningful competition in the relevant market.

93. Privately-owned businesses on the island of Hawaii which compete against HELCO in the relevant market face a competitive disadvantage.

94. Residents of Hawaii have been deprived of the choice between power generation facilities on the basis of price, quality, reliability, or any other criteria. Competition in the markets for power generation, dispatch, and ancillary services would lower the price of power and provide additional reliable sources of power. Moreover, the Hu Honua Facility advances the State's policy to further the use of renewable energy, thereby potentially allowing for certain fossil fuel generating units to be retired. The Hu Honua Facility would have further accomplished the State's 100% renewable portfolio standard.

95. In addition, unlike other solar and wind projects, Hu Honua would have jumpstarted a new forestry industry on Hawaii, thereby creating hundreds of jobs and bringing hundreds of millions of dollars into the local economy.

96. Significant and high barriers to market entry exist in the form of regulations, high capital investment, and HELCO's monopoly. These barriers discourage new entry into the relevant market.

97. HELCO possesses and has wielded the power in the relevant market to control prices, exclude competition, and thwart Hawaii's state mandate regarding the creation of renewable energy sources.

98. HELCO's monopoly position in the relevant market has been acquired and maintained through intentional exclusionary and predatory conduct, as opposed to business acumen, accident, or by virtue of offering a superior product or service, greater efficiency, or lower prices.

99. There is no legitimate business justification for HELCO's refusal to conduct business with Hu Honua, and ultimately HELCO's efforts to destroy Hu Honua's business in an effort to expand HELCO's control over the relevant market. Any justifications asserted by HELCO are merely pretextual and the anticompetitive effects of these restraints outweigh any purported beneficial effects on competition.

100. HELCO's anticompetitive acts have caused substantial economic injury to Hu Honua and have also injured competition in the relevant markets by, *inter alia*, foreclosing, lessening, and eliminating potential competition and depriving consumers from securing lower rates paid for power.

101. The aforesaid conduct of HELCO has produced antitrust injury to Hu Honua, competition, and consumers, and unless enjoined by this Court, will continue to produce at least the following anticompetitive, exclusionary and injurious effects upon competition in interstate commerce:

(a) Competition for the generation and dispatch of power in the relevant market has been substantially and unreasonably restricted, lessened, foreclosed, and eliminated, and consumers will be forced to pay supra-competitive prices for power as a result;

(b) Hawaii's efforts to accomplish its 100% renewable portfolio standard have been thwarted; and

(c) the creation and maintenance of significant and insurmountable barriers to entry, thereby ensuring continued unlawful maintenance of HELCO's monopoly.

102. By reason of, and as a direct and proximate result of HELCO's anticompetitive and exclusionary practices and conduct, Hu Honua has suffered, and will continue to suffer, financial injury to its business and property.

103. Specifically, as a direct and proximate result of HELCO's continued and willful monopolization and misuse of monopoly power, Hu Honua is being and will continue to be irreparably injured by and through the following: (a) the loss of revenue and profits that would otherwise have been earned from power generation, dispatch, and ancillary services on the island of Hawaii; (b) the loss of market share that would otherwise have been achieved by Hu Honua in a freely-competitive market; (c) the loss of good will and value as a going concern.

104. Pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, Hu Honua is entitled to treble its actual damages as well as its attorneys' fees and costs set forth below. Specifically, Hu Honua has suffered damages in the form of its invested capital in its 50% complete Facility, the value of which has been destroyed by HELCO's actions, in the amount of \$120 million. In addition, based on the PPA's approved pricing and HELCO's

forecasted dispatch of the Facility, as set forth in its application for the approval of the Hu Honua PPA, Hu Honua has suffered lost profits in the amount of \$435 million over the 20 year term of the PPA.

SECOND CAUSE OF ACTION
(Conspiracy To Restrain Trade In Violation of
Section 1 of the Sherman Act)
(15 U.S.C. § 1)

105. Plaintiff incorporates by reference the allegations of paragraphs 1 through 104, as though fully set forth herein.

106. Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits, *inter alia*, agreements or arrangements that unreasonably restrain competition to the detriment of consumers.

107. As set forth above, Defendants HELCO, HECO, HEI, NextEra, and HEP entered into and engaged in an unlawful contract, combination, or conspiracy in restraint of trade and commerce. Defendants' arrangements constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

108. The coordinated and collective actions of Defendants HELCO, HECO, HEI, NextEra, and HEP have the purpose and effect of eliminating or substantially restricting competition in the

markets for power generation, dispatch, and ancillary services and raising the price of power above competitive levels. Defendants' arrangements have the purpose, effect, tendency, and capacity to, among other things, significantly foreclose competition in the markets for power generation, dispatch, and ancillary services and maintain the HELCO monopoly.

109. The actual and probable effect of Defendants HELCO's, HECO's, HEI's, NextEra's, and HEP's illegal arrangements has been to raise prices above the competitive level and substantially lessen, if not completely foreclose, competition in the markets for power generation, dispatch, and ancillary services on the island of Hawaii while maintaining HELCO's monopoly of this market. HELCO possesses monopoly power in this defined relevant market and has used, and, continues to use, arrangements to raise barriers to entry and foreclose actual and potential competition. These arrangements have had, and continue to have, the effect of unreasonably restraining competition in the markets for power generation, dispatch, and ancillary services on the island of Hawaii.

110. There is no legitimate business justification for Defendants HELCO's, HECO's, HEI's, NextEra's, and HEP's illegal

arrangements. The anticompetitive effects of these restraints outweigh any purported beneficial effects on competition.

111. Defendants' conduct has produced antitrust injury to Hu Honua, competition, and consumers including a substantial foreclosure or elimination of competition in the relevant market, the creation and maintenance of significant barriers to entry, inflated prices for power, and consumers have been forced to pay supra-competitive prices for power.

112. By reason of, and as a direct and proximate result of, Defendants HELCO's, HECO's, HEI's, NextEra's, and HEP's illegal arrangements in restraint of trade, Hu Honua has been injured in its business and property, including but not limited to the loss of profits, goodwill, value, and market share. Consumers have also been harmed by the unreasonable and substantial restriction of competition for the generation and dispatch of power on the island of Hawaii.

113. As a direct and proximate result of Defendants HELCO's, HECO's, HEI's, NextEra's, and HEP's illegal arrangements in restraint of trade, consumers have been deprived of the full benefits of competition in the relevant market.

114. Pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, Hu Honua is entitled to treble its actual damages as well as its attorneys' fees and costs set forth below. Specifically, Hu Honua has suffered damages in the form of its invested capital in its 50% complete Facility, the value of which has been destroyed by Defendants' actions, in the amount of \$120 million. In addition, based on the PPA's approved pricing and HELCO's forecasted dispatch of the Facility, as set forth in its application for the approval of the Hu Honua PPA, Hu Honua has suffered lost profits in the amount of \$435 million over the 20 year term of the PPA.

THIRD CAUSE OF ACTION
(Breach of Contract)

115. Plaintiff incorporates by reference the allegations of paragraphs 1 through 114, as though fully set forth herein.

116. As set forth above, on May 3, 2012, Hu Honua and HELCO entered into the PPA. On August 30, 2012, HECO/HELCO submitted the PPA to the Commission. On December 20, 2013, after approximately 15 months, the Commission approved the PPA in its Decision and Order.

117. HELCO breached the PPA by failing to comply with its terms. Specifically, HELCO unreasonably refused to extend the “pass boiler hydro test” milestone date that was set for 18 months after the PUC Approval Date of December 20, 2013. The milestone date, therefore, was June 20, 2015. As set forth above, Hu Honua contacted HELCO approximately 6 months before the milestone date in order to request an extension of that date by amending the PPA milestones. In compliance with the terms of the PPA, Hu Honua submitted to HELCO a detailed plan which described the reasons why the “pass boiler hydro test” milestone date was not achieved, Hu Honua’s measures for achieving the “pass boiler hydro test” milestone date, and Hu Honua’s proposed measures for meeting the Commercial Operation Date Deadline. Additionally, Hu Honua discussed at length with HELCO specifics of proposed PPA amendments to the milestone dates whereby Hu Honua agreed, *inter alia*, to significant price concessions that would produce significant savings to HELCO’s customers, which HELCO unreasonably required in order to extend the milestone dates. Ultimately, HELCO unreasonably refused to extend the milestone

date despite Hu Honua's many concessions in the proposed PPA amendments.

118. HELCO also breached the PPA by terminating it despite that HELCO had waived its termination right under the PPA. The PPA requires that, in the event HELCO decides to exercise its termination right upon the expiration of the "pass boiler hydro test" milestone date, it may exercise its termination right upon the expiration of the Milestone Date Delay LD Period, which is 90 days from the "pass boiler hydro test" milestone date of June 20, 2015, or September 18, 2015. Additionally, the termination right may only be exercised for 90 days under the terms of the PPA. To the extent HELCO even had the right to terminate, it was required to exercise that termination right before the expiration date of December 17, 2015. It failed to timely exercise its right, instead choosing to send a termination letter on January 15, 2016, well after its right to terminate had expired. Additionally, HELCO continued to breach the terms of the PPA when it misappropriated \$500,000 as liquidated damages based on its unlawful termination letter. Notably, HELCO later tacitly acknowledged the infirmity of the purported termination letter when HELCO sought to terminate

the PPA and unlawfully collect additional liquidated damages a second time on or about September 1, 2016.

119. Even if HELCO had not waived its termination right, HELCO also breached the PPA by failing to give the required 30-day notice of HELCO's purported termination of the PPA. Under the terms of the PPA, HELCO was required to deliver a written notice of termination which would become effective thirty (30) days from the date the notice was delivered. HELCO chose to send a termination letter to Hu Honua on January 15, 2016 and considered that date as the effective date of the purported termination in violation of the terms of the PPA.

120. Hu Honua performed all conditions, covenants, and promises required on its part to be performed in accordance with the terms and conditions of the PPA, except those promises from which Hu Honua was excused from performing as a result of HELCO's breach on January 15, 2016, when it sought to terminate the PPA despite that it had waived this right.

121. As a result of HELCO's breaches of the PPA, including its unreasonable refusal to extend the "pass boiler hydro test" milestone date, its unlawful termination of the PPA, and its failure

to give 30-day notice of termination, Hu Honua has been damaged in an amount as set forth above, but in no event less than \$555 million. These damages are of the nature and extent reasonably foreseeable by HELCO at the time the PPA was entered into.

FOURTH CAUSE OF ACTION
(Promissory Estoppel)

122. Plaintiff incorporates by reference the allegations of paragraphs 1 through 121, as though fully set forth herein.

123. As set forth above, HELCO manifested its intention to reach a deal with Hu Honua to extend milestone dates. During the course of meetings, conversations, and correspondence, HELCO repeatedly confirmed its commitment to completion of the project by promising that HELCO would reach a deal with Hu Honua to extend the milestone dates. At no point during these communications, which occurred from late 2014, when the milestone extension was first raised by Hu Honua, through January 2016, did HELCO threaten any termination of the PPA. In fact, HELCO did just the opposite when it provided Hu Honua with a clear roadmap to obtaining the milestone date extensions and the amendments to the PPA as set forth above. HELCO also provided numerous

affirmations to Hu Honua ranging from public filings and written correspondence to extensive verbal representations from HECO/HELCO executives and managers. In reliance on HELCO's conduct, Hu Honua continued to fund the significant costs required to continue construction of the Facility.

124. A reasonable person in HELCO's position would have expected that HELCO's actions would induce action and/or reliance by Hu Honua.

125. HELCO manifested its intention to extend milestone dates in such a way that Hu Honua justifiably understood that HELCO was committed to extending the milestone dates, which was necessary to allow the construction of the Facility to proceed.

126. As a result of Hu Honua's reasonable reliance on HELCO's promise, Hu Honua has been damaged in an amount as set forth above, but in no event less than \$555 million.

FIFTH CAUSE OF ACTION
(Breach of the Covenant of Good Faith and Fair Dealing)

127. Plaintiff incorporates by reference the allegations of paragraphs 1 through 126, as though fully set forth herein.

128. Implied in every contract is a covenant of good faith and fair dealing whereby each party covenants that it shall not do anything which will have the effect of interfering, destroying, or injuring the right of the other party to receive the benefit of the agreement.

129. Pursuant to the PPA between Hu Honua and HELCO, HELCO agreed to purchase power from Hu Honua's Facility for distribution to HELCO's customers on the Island of Hawaii.

130. At all relevant times, Hu Honua either had performed or was ready, willing, and able to perform all conditions, covenants, and promises required of it in accordance with the terms of the PPA, other than those excused by HELCO's breach.

131. Pursuant to the covenant of good faith and fair dealing, HELCO had an obligation to Hu Honua not to interfere with its ability to construct the Facility and produce the power that HELCO had promised to purchase pursuant to the terms of the PPA.

132. HELCO's acts and/or omissions breached the implied covenant to deal fairly and in good faith.

133. As a direct and proximate result of HELCO's breach of the covenant of good faith and fair dealing, Hu Honua has

sustained damages in an amount as set forth above, but in no event less than \$555 million.

SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

134. Plaintiff incorporates by reference the allegations of paragraphs 1 through 133, as though fully set forth herein.

135. As set forth above, HELCO enjoyed a direct relationship with the PUC and was responsible for submitting the PPA to the PUC, on behalf of Hu Honua, for approval and, ultimately, subsequently seeking performance of its provisions or approval of amendments, if necessary. HELCO had superior knowledge, expertise, and experience regarding the submission of applications to the PUC. Under the terms of the PPA, HELCO was obligated to use that knowledge, expertise, and experience for the benefit of Hu Honua in seeking approval of the PPA and its ultimate performance. Hu Honua did not have the authority to submit the PPA or any subsequent amendments or documentation with respect to the PPA's performance to the PUC and relied on and reposed trust in the good faith and integrity of HELCO for these submissions. In connection with the application process whereby the PPA was

submitted to the PUC, Hu Honua confided in HELCO and shared significant trade secrets and other confidential materials with HELCO, including, *inter alia*, internal operating/return models, detailed cost to complete estimates, and highly sensitive fuel supply information, thereby confirming the confidential relationship among the parties. In short, with respect to communications with the PUC and the performance of the PPA, HELCO assumed a fiduciary obligation to represent Hu Honua's best interests.

136. As set forth above, while Hu Honua was performing its obligations under the terms of the PPA, Hu Honua timely proposed to HELCO certain milestone date extensions in the form of amendments to the PPA, as required by the PPA. HELCO responded on multiple occasions that any milestone date extensions required PUC approval. Despite HELCO's obligation to use its superior knowledge, expertise, and experience to seek PUC approval of Hu Honua's proposed amendments to the PPA and to advance the positions and interests of Hu Honua with the PUC, HELCO refused, thereby breaching its fiduciary duty to Hu Honua under the PPA and otherwise under law.

137. As a result of HELCO's breach of its fiduciary duty, Hu Honua has been damaged in an amount as set forth above, but in no event less than \$555 million.

SEVENTH CAUSE OF ACTION
(Tortious Interference with Contract)

138. Plaintiff incorporates by reference the allegations of paragraphs 1 through 137, as though fully set forth herein.

139. As set forth above, on May 3, 2012, Hu Honua and HELCO entered into the PPA. On August 30, 2012, the HECO/HELCO submitted the PPA to the Commission. On December 20, 2013, after approximately 15 months, the Commission approved the PPA in its Decision and Order.

140. NextEra had knowledge of the existence of the PPA and the contractual relationship among HELCO and Hu Honua.

141. NextEra's conduct, as set forth above, prevented performance of the PPA.

142. NextEra purposefully intended to interfere with and disrupt the contractual relationship among HELCO and Hu Honua, thereby preventing performance of the PPA, and NextEra knew that its conduct was certain to disrupt performance of the PPA.

143. As a result of NextEra's conduct, Hu Honua has been damaged in an amount as set forth above, but in no event less than \$555 million.

EIGHTH CAUSE OF ACTION
(Unfair Competition in Violation of HRS 480-2)

144. Plaintiff incorporates by reference the allegations of paragraphs 1 through 143, as though fully set forth herein.

145. Haw. Rev. Stat. Chapter 480 prohibits entities from, *inter alia*, engaging in unfair methods of competition (Haw. Rev. Stat. § 480-2), restraints of trade (Haw. Rev. Stat. § 480-4), and monopolization (Haw. Rev. Stat. § 480-9).

146. Defendants have engaged in practices that offend established public policy, are immoral, unethical, oppressive, unscrupulous and/or substantially injurious to consumers by, *inter alia*, engaging in an anticompetitive and exclusionary scheme. This scheme includes eliminating competition in the dispatch of power in Hawaii by precluding competition in the relevant market.

147. Defendants have also, *inter alia*, engaged in an unlawful contract, combination, or conspiracy in restraint of trade or commerce. Defendants' coordinated and collective actions have the

purpose and effect of eliminating or substantially restricting competition in the markets for power generation, dispatch, and ancillary services. Defendants' actions also have the purpose and effect of raising the price of power above competitive levels.

148. Due to Defendants' actions, Hawaii residents have been deprived of the choice between power generation facilities on the basis of price, quality, reliability, or other criteria.

149. Defendants' actions have also caused substantial economic injury to Hu Honua.

150. As a result of Defendants' conduct, Hu Honua has been damaged in an amount as set forth above, but in no event less than \$555 million.

NINTH CAUSE OF ACTION
(Declaratory Relief)

151. Plaintiff incorporates by reference the allegations of paragraphs 1 through 150, as though fully set forth herein.

152. As set forth above, an actual controversy has arisen and now exists between Hu Honua and HELCO concerning their respective rights and duties in that Hu Honua contends that HELCO's purported second termination of the PPA on August 25,

2016 was invalid because HELCO did not have the contractual right to terminate the PPA. HELCO contends otherwise.

153. HELCO's rights, if any, in the underlying dispute are contractual in nature, and HELCO's sole and exclusive remedy, if any, is for money damages. Hu Honua denies that HELCO is entitled to any relief whatsoever.

154. Hu Honua desires and is entitled to a judicial determination of its rights and duties under the PPA, including but not limited to a judicial determination that HELCO's purported second termination of the PPA on August 25, 2016 was invalid.

155. A judicial declaration is necessary and appropriate at this time under the circumstances in order that Hu Honua may ascertain its rights and duties under the PPA. A judicial declaration will inform the parties' future conduct and will lessen the financial burden faced by Hu Honua by the unsettled state of affairs.

156. Hu Honua has no plain, adequate, or speedy remedy at law for the injuries that it has sustained and will sustain while the controversy persists. Consequently, unless and until this Court enjoins HELCO (and all those acting for or in concert with it) from taking action in any manner inconsistent with the PPA, HELCO's

conduct is causing and will continue to cause great and irreparable injury to Hu Honua.

RELIEF REQUESTED

WHEREFORE, plaintiff Curtin Maritime requests the entry of judgment against Defendants as follows:

1. That the conduct of Defendants be adjudged to violate Section 2 of the Sherman Act (15 U.S.C. § 2);
2. That the conduct of Defendants be adjudged to violate Section 1 of the Sherman Act (15 U.S.C. § 1);
3. That Defendant HELCO breached the Power Purchase Agreement;
4. That plaintiff Hu Honua recover treble the amount of its actual damages sustained from Defendants by reason of the foregoing violations of federal antitrust laws (15 U.S.C. § 15);
5. That HELCO be enjoined from taking action in any manner inconsistent with the PPA;
6. That plaintiff be awarded its reasonable attorneys' fees and costs of litigation; and

7. That this Court provide such other and further relief as may be just and proper.

DATED: Honolulu, Hawai'i, November 30, 2016.

/s/ Rex Y. Fujichaku
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