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PUBLIC UTILITIES
COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
PUBLIC UTILITIES COMMISSION)
)
Instituting a Proceeding to Investigate)
Competitive Bidding for New Generating)
Capacity in Hawaii.)

DOCKET NO. 03-0372

**DIVISION OF CONSUMER ADVOCACY'S RESPONSES
TO COMMISSION'S POST-HEARING QUESTIONS**

Pursuant to the Modified Regulatory Schedule approved in Order No. 22459, the Division of Consumer Advocacy ("Consumer Advocate") files its **DIVISION OF CONSUMER ADVOCACY'S RESPONSES TO COMMISSION'S POST-HEARING QUESTIONS** in the above docketed matter.

DATED: Honolulu, Hawaii, June 6, 2006.

Respectfully submitted,

By Cheryl S. Kikuta
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DIVISION OF CONSUMER ADVOCACY

DOCKET NO. 03-0372

DIVISION OF CONSUMER ADVOCACY'S

RESPONSES TO COMMISSION'S POST-HEARING QUESTIONS

- I. Competitive Bidding: Mandatory or Voluntary?
 - A. Under what circumstances, if any, should the Commission require competitive bidding? Options:
 1. Require competitive bidding in all circumstances, without exception
 2. Require competitive bidding in all circumstances, with the exception of one of the HECO Utilities' three pending projects
 3. Require competitive bidding in all circumstances, with the exception of --
 - a. one or more of the HECO Utilities' three pending projects
 - b. any project for which the competitive bidding would be impractical, due to
 - (1) size
 - (2) emergency timing
 - (3) lack of developer interest
 - (4) utility expansion or repowering¹
 - (5) other factors
 - c. An exemption for impracticality is available only after a Commission finding based on a submission by the utility. A Commission finding of impracticality does not insulate the utility from a Commission finding that such impracticality was a result of utility imprudence.
 4. Do not require competitive bidding in any particular case, but
 - a. require utility to file explanation of each decision to use or not to use competitive bidding, and
 - b. reserve to the Commission the authority to require competitive bidding in particular cases.

RESPONSE: As noted in Section I.A.3. of the Proposed Competitive Bidding Framework,² (hereinafter referred to as "Parties' Proposed

¹ The exemption here is from competitive bidding to perform the actual expansion or repowering; it is not an exemption from an opportunity to compete to supply the amount of capacity that the utility is seeking to create through the repowering or expansion.

² The Competitive Bidding Framework that is being referred to as the "Parties' Proposed Framework" reflects the agreement of HAWAIIAN ELECTRIC COMPANY, INC. ("HECO"), HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), MAUI ELECTRIC COMPANY, LIMITED ("MECO"), KAUAI ISLAND UTILITY COOPERATIVE ("KIUC"), and the DIVISION OF

Framework”) competitive bidding is the preferred mechanism for acquiring a future generation resource or a block of generation resources. The Parties’ Proposed Framework recognizes, however, that competitive bidding should not be an immutable requirement because there will be circumstances in which competitive bidding may not be practical. Thus, conditions in which alternative approaches to resource acquisition may be appropriate are described in Sections I.A.3.a. through I.A.3.e. of the Parties’ Proposed Framework.³

Where a utility (or any party) can demonstrate that competitive bidding would be contrary to the public interest, the

CONSUMER ADVOCACY (“Consumer Advocate”). HAWAII RENEWABLE ENERGY ALLIANCE (“HREA”) submitted its own proposed Competitive Bidding Framework.

Initially, the Parties and Participants in this docket were: HECO, HELCO, MECO, KIUC, the Consumer Advocate, HREA, the Department of Business Economic Development and Tourism (“DBEDT”), The Gas Company (“TGC”), Pacific Machinery, Inc. (“PMI”), Johnson Controls, Inc. (“Johnson”), Hess Microgen (“Hess”), the COUNTY OF MAUI (“CoM”), and the COUNTY OF KAUAI (“CoK”). However, on September 22, 2004, the Hawaii Public Utilities Commission (“Commission”) issued Order No. 21357 approving the withdrawal of PMI and DBEDT from the docket. On June 20, 2005, the Commission issued Order No. 21880 approving TGC’s withdrawal from the docket. On July 8, 2005, the Commission issued Order No. 21908 approving CoM’s withdrawal from the docket. On November 2, 2005, the Commission issued Order No. 22090 approving Hess’ withdrawal from the docket and dismissed Johnson as a Party. On December 5, 2005, the Commission issued Order No. 22167 approving CoK’s withdrawal as a Participant in this docket.

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The Consumer Advocate has offered examples of the circumstances under which the Commission reasonably might conclude that competitive bidding might be contrary to the public interest. See, e.g., Initial SOP at 34-40; HECO/CA-IR-33. The Consumer Advocate has stated, for example, that an urgent need may necessitate procurement timelines that would render competitive bidding infeasible. It is conceivable, for example, that HECO’s burgeoning need for reserve capacity may require attention (at least as may pertain to capacity requirements during the upcoming summer months) that could not be met through competitive bidding by virtue of the timelines involved. It also is possible – depending on the utility and the specific circumstances of its resource requirements – that competitive bidding might be rendered impractical for reason of emergency timing, size, lack of developer interest, utility expansion or repowering, and other factors. See Response to HREA-CA-IR-7.

utility (or party) is expected to present the rationale for the utility's (or party's) recommended alternate approach to resource procurement to the Commission. Since the determination to use a competitive bidding process will generally be made in the Integrated Resource Planning ("IRP") process as noted in Sections I.A.2. and I.C.3. of the Parties' Proposed Framework, the recommendation and support for not using a competitive bidding process will be presented to the Commission in the IRP proceeding. The Commission's decision to proceed with competitive bidding versus other forms of resource acquisition would then be reflected in the Commission's Decision and Order for the IRP proceeding.

Further explanation of the nature of the recommended approach may be helpful. At present, the Consumer Advocate anticipates that the Commission may decide to implement competitive bidding by adopting a Competitive Bidding Framework that is similar in nature to the IRP Framework adopted in Decision and Order No. 11630 filed on May 22, 1992 in Docket No. 6617. Similar to the IRP Framework, the provisions of the Parties' Proposed Framework are meant to serve as guidelines to illustrate the Commission's expectations regarding how competitive bidding will be implemented in Hawaii. Exceptions to any provision set forth in the Parties' Proposed Framework must be supported by the

party requesting such exception through evidence that allows a reasonable person to conclude that a recommended alternative would better serve the public interest. See also the Consumer Advocate's response to PUC-IR-40.b.

The Commission should not, however, grant exceptions without considering the specific nature of the exception requested, and the circumstances and needs of the subject utility. The exceptions to the competitive bidding requirement must be considered on a case-by-case basis. It may be possible that over time, a precedent might develop (e.g., for resource needs below some minimum megawatt level), such that every request for an exception would not be a case of first impression. See Consumer Advocate response to HREA-CA-FIR-4.

5. The three pending projects: showing of interest
 - a. Should the Commission require the utility to issue a request for showing of interest (i.e., a document less formal than an RFP)?
 - b. Assume the Commission requires the utility to issue a request for showing of interest. Assume further that one or more apparently viable respondents indicate interest. Should the Commission require an abbreviated competitive process? What elements should the process contain?

RESPONSE: In responding to this request, the Consumer Advocate assumes that the "three pending projects" refer to HECO's Campbell Industrial Park generating unit which is the subject of Docket No. 05-0145, HELCO's ST-7, and MECO's Maalaea M-20. Based

on that assumption, the Consumer Advocate notes that the Parties to May 22, 2006 Stipulation agreed that these projects, as identified in Section I.A.3.d. of the Parties' Proposed Framework, should be provided an exemption from the competitive bidding process. Thus, there should be no requirement to issue a request for showing/statement of interest ("RFI") for generation that would address the need to be served by these units.

The Consumer Advocate's agreement to exclude these projects stems from the Consumer Advocate's recognition that requiring competitive bidding for the identified projects may not be in ratepayers' best interest. HELCO's ST-7 and MECO's Maalaea M-18 units are necessary to complete the installation of the dual trained combined cycle unit that was planned for each of the respective generating sites. HECO has claimed an impending need for the proposed Campbell Industrial Park CT-1 unit. The Consumer Advocate acknowledges that the need for the unit was previously identified in both HECO's IRP-1 and IRP-2. HECO's March 2006 Adequacy of Supply ("AOS") report appears to indicate a greater need for the unit to ensure the Company's ability to provide reliable electric service. If that need is independently confirmed, there may not be sufficient time to subject the response to the need for this unit in its entirety to competitive bidding. Thus, in the interest of caution while awaiting the conclusion in the

pending docket (i.e., Docket No. 05-0145), the Consumer Advocate was willing to include the Campbell Industrial Part unit in the list of utility projects that would be exempted from a competitive bidding process.

As further clarification on the matter, there may be times when it would be appropriate to issue a formal RFI in order to help determine whether it would make sense to proceed with a particular RFP.⁴ The Commission should not, however, require utilities to issue RFIs. The question of whether to issue an RFI should be addressed by each utility on a case-by-case basis taking into consideration the facts and circumstances of the specific need for generation.

An RFI occasionally could provide useful information when, for example, there is a question regarding whether market providers will respond with sufficient enthusiasm to a given solicitation (perhaps because there is a question regarding whether enough potential bidders have control of the sites that they would need to advance legitimate bids, or because a somewhat unusual technology type is to be solicited). Such approach can provide information that might enable the issuer better gauge the market's response to an RFP. This information might help a utility to decide whether undergoing the time and effort to prepare an RFP would be

⁴ See Hearing Transcript Vol. III, at 35 of 105.

warranted. However, there likely will be many solicitations where an RFI would not be necessary.⁵

Where an RFI is conducted, the implications of its results for a subsequent RFP also would have to be determined on a case-by-case basis. However, as a general matter, the Consumer Advocate does not anticipate that an RFI would have a substantial bearing on the form of RFP that subsequently might be issued. The RFP should solicit information necessary to permit a utility to fully and fairly evaluate competing bids. Important information obtained through an RFI could contribute to that process, but that information should be included in a formal RFP proposal rather than as a preceding supplement to it. As such, the Commission should not require that "abbreviated" RFPs follow RFIs.

6. Leave the determination for competitive bidding of resources to the IRP process.

RESPONSE: Yes, as stated in Sections I.A.2 and I.C.3. of the Parties' Proposed Framework, the determination of whether a competitive bidding process is to be used to acquire a generation resource or block of generation resources shall generally be made in a utility's IRP proceeding. Section I.C.4., however, provides for the use of a

⁵ Consider the hypothetical, for example, where an RFP for a small generating facility is to be issued under circumstances that are very similar to those of an RFP that was issued by the utility two years prior and received an enthusiastic response.

competitive bidding process by a utility outside of the IRP process, if circumstances justify such action.

Furthermore, the first determination as to whether a competitive bidding process should be used to acquire a generation resource or block of generation resources that is included in an IRP Plan should be made in conjunction with the next practical IRP process that commences following Commission approval of a Competitive Bidding Framework. (See Section I.C.3. of the Parties' Proposed Framework.)

B. KIUC Exemption

1. Which of the following actions should the Commission take?
2. exempt KIUC entirely from competitive bidding requirements
3. exempt KIUC from specific features of competitive bidding requirements
4. determine KIUC exemptions on a case by case basis
5. grant no exemption to KIUC

RESPONSE:

As stated in Section I.A.1., the Parties' Proposed Framework applies to Hawaii's electric utilities, which include KIUC. As such, KIUC should not be exempt from the competitive bidding requirements without a demonstrated showing in the IRP process that a competitive bidding process is not suitable as the preferred mechanism for acquiring a future generation resource or block of generation resources. An exception would be for the acquisition of as-available energy from non-fossil fuel generators that is under review by KIUC at the time a Competitive Bidding Framework is adopted (see Section I.A.3.e. of the Parties' Proposed Framework).

The Consumer Advocate's position is based on the following reasoning. First, as with consumers on the other islands, consumers on Kauai deserve access to power supplies whose costs are as low as they reasonably can be. Second, broader interests of the state of Hawaii are at issue. The Hawaiian Islands offer unique scenic and cultural attributes. Power generating resources have a substantial impact on the quality of life across the islands, not only from the standpoint of both environmental and cultural impacts but also for the economy as a whole, especially in

today's digital society which is so dependent on a reliable electric power supply. This is especially important because the electric delivery system is isolated to each of the islands and not inter-connected to allow for power to flow between islands.

Competitive bidding, if implemented effectively as an adjunct to IRP processes, holds promise as a mechanism that can reveal the best resource options (i.e., considering cost-effectiveness and other desirable resource attributes). Therefore, competitive bidding is an effective strategy for preserving the State's economy and the scenic and cultural attributes on each of the Hawaiian Islands.

It is possible that the competitive bidding processes of an investor-owned utility ("IOU") will differ from those of a cooperative utility ("co-op") like KIUC. However, the Consumer Advocate anticipates more similarities than differences between IOU and co-op RFPs, given that the objective of those designing competitive solicitations should be to develop effective, efficient processes for acquiring resources from competitive markets. This would be particularly true of entities (i.e., utilities and co-ops) of similar size. See Consumer Advocate's response to PUC IR-31.a.

Furthermore, there are examples of cooperative electric utilities that are required by state regulators to use competitive bidding processes to procure their power supplies. These include

two Maine electric cooperatives: the Eastern Maine Electric Cooperative and the Fox Island Electric Cooperative.

Finally, KIUC states that it intends to use a competitive bidding process for its next generation addition, and that it will follow the "proven" process that was used in 1995 to secure its 26.4 megawatt generating facility (see KIUC's Statement of Position at 3, 6).

- II. Establish the Type and Timing of New Generation
 - A. How should the Commission integrate competitive bidding with IRP?
 - 1. General questions
 - a. Which of the following options most efficiently integrates competitive bidding and IRP?
 - (1) The IRP process first identifies a preliminary preferred resource plan (including capacity, energy, timing, technologies, and other preferred attributes); then the utility or IE conducts a competitive bidding process (with the IRP-determined characteristics described in the RFP); then the selected resources become the final integrated resource plan.
 - (2) The IRP determines the need for capacity and the timing of need; the RFP is developed and issued during the IRP cycle; the bids received are evaluated within the IRP process (like any utility option is normally evaluated within the IRP process); the IRP process then selects bids to be part of a preferred plan and a contingency plan; contracts are negotiated with the winning bidders.

RESPONSE: The Consumer Advocate contends that both of the above options for integrating competitive bidding and IRP are problematic. Neither approach set forth in (1) or (2) above offers an efficient “integration” of competitive bidding and the utility’s IRP.

The first approach appears to assume that a Commission finding on the need to acquire a generation resource or block of generation resources would not occur until after an RFP had been conducted. This is problematic for a number of reasons, not the least of which is the “dampening” effect on the RFP process. Bidders may choose to not incur the time and expense of preparing proposals when there is no Commission finding to establish the existence of a need for a generation resource or block of resources, and the amount of such need. Moreover, suggesting that the

resources selected through the RFP process would become part of the IRP Plan implies that an IRP Plan cannot be developed and approved for a given planning horizon for perhaps many years (i.e., until after one or several RFPs had run their course). These and other related factors could contribute to uncertainties and inefficiencies that would undermine the competitive bidding processes.

The second approach appears somewhat better than the first, because the need issue would be resolved before the RFP is issued. However, as with the first approach, this approach also suffers from the fact that steps would need to be taken to incorporate the results of the RFP process into what will effectively be an IRP Plan that cannot be timely reviewed and approved. Again, this seems to imply that the IRP Plan submitted to the Commission on the three-year filing cycle might not be approved for many years after the filing is made because the utility will need to incorporate the results of the RFP process into the IRP Plan before submission for Commission review and approval. This situation would also bring uncertainties and inefficiencies to competitive bidding processes.

The problems with both of the proposed approaches can be most clearly seen in light of the approach that is being recommended in the Parties' Proposed Framework, which requires

a determination to be made in the IRP proceeding as to whether a competitive bidding process will or will not be used for the acquisition of a generation resource or block of generation resources. (See Sections I.A.2., I.B.1., I.B.5., I.C, I.E.3., II.B.1., III.A.1, III.A.2, III.E.1, V.A.2.c, and V.C.2.)

The Consumer Advocate expects a utility's IRP proceedings to result in an approved IRP Plan that covers the 20-year planning horizon and includes the 5-year Action Plan within that 20-year planning horizon. As a consequence, a utility's need for a generation resource or block of resources within the 20-year planning horizon would be established in the utility's IRP Plan that is submitted on a three-year filing schedule as set forth in Section III.B.2 of the Commission's IRP Framework. The Decision and Order issued by the Commission approving, approving with modification, or rejecting the utility's IRP Plan will thus address the utility's planning objectives and preferred resource attributes, needs for capacity and energy, the nature (e.g., competitive solicitations), timing and technologies to be pursued over the 20-year planning horizon. The IRP Plan would establish, at the time of the Decision and Order's issuance, the plan that the utility would proceed to implement, including whether to use a competitive bidding process for the acquisition of a generation resource or block of resources whose need is identified in the 20-year plan. There also is full

recognition that changing circumstances would require modifications to the approved IRP. Such changes, however, would be addressed in the annual updates to the approved IRP Plan and in subsequent IRP Plans that are submitted in the future 3-year filing cycle.

A key to this recommended process is for the Commission to act quickly, clearly and with finality on each utility's proposed IRP Plan that is filed for Commission approval. Such action will establish a solid foundation for resultant resource acquisitions that may be identified for periods beyond the 5-year action plan, but within the 20-year planning horizon. Any approved competitive bidding processes would be spun off to become separate, parallel activities (i.e., relative to ongoing planning processes), similar to the current situation where a utility pursues a self-build generation resource, or enters into negotiation with an independent power producer for the identified generation resource. While such RFPs would remain separate from IRP proceedings, the results of these RFP processes should be incorporated into the subsequent IRP filings to be made every three years. In this process, one three-year IRP cycle would come on the heels of the prior cycle; a Commission Decision and Order at the end of each would "reset" the plan to be followed as circumstances evolve. Furthermore, and most importantly, the discussions and activities associated with

evaluating the Commission approved IRP and the development of the next three-year cycle filing would be on-going. This expectation is no different from the activities that the utility must perform on a regular basis to ensure its ability to provide service as needed. This should not be a “stop/start” process whereby efforts to implement, monitor, and evaluate a Commission approved IRP are done separately from the activities to develop the IRP for the next three-year cycle filing. In other words, efforts to develop the next three-year cycle filing should not be started one year before the filing is due to be made at the Commission, but should be done concurrently with the evaluation of the Commission approved IRP.

Importantly, the IRP Plan that is established by the Commission at the end of each cycle may take different forms. For example, the Commission may approve the pursuit of a specific type of resource in response to an identified need (e.g., a 50 MW peaking facility) in the utility’s IRP Plan. Alternately, the Commission might approve an IRP Plan where the need for a generation resource or block of resources is clear, but the type or types of resources that are appropriate to address the need have not been identified. The solicitation processes in this type of plan could reasonably be used to identify potential resource options to meet that need (e.g., 30 MWs is needed from some combination of DSM and supply-side resources). As noted in Sections I.C.5, and

I.C.6, of the Parties' Proposed Framework, an evaluation of bids in a competitive bidding process may reveal desirable projects that differ from those in an approved IRP Plan. These projects may be selected if it can be demonstrated that such action would be expected to benefit the utility and its ratepayers. In addition, an evaluation of bids in a competitive bidding process may reveal that the acquisition of any of the resources bid would not serve the interests of the utility or its ratepayers. In such case, the utility may determine not to acquire such resources.

The Consumer Advocate recommends that the Commission consider the approach that currently is being practiced by the public utility commission in Washington State. There, although the utilities are expected to file their IRPs every two years⁶ the IRP Plans filed by the utilities are timely reviewed and approved by the Commission. The Commission's approval of the utility's IRP thus provides the utility and interested stakeholders in the IRP process with knowledge of the various resource acquisition proposals (including those for competitive solicitations) that are approved (or not).

An RFP might be initiated that could run its course while the utility and interested stakeholders are considering the necessary

⁶ The Washington Utilities and Transportation Commission states that it is "the Commission's experience that a definite planning cycle [i.e., a "strict 2-year cycle" for IRP filings] will produce more filed plans that beneficially inform the Commission." See Washington Utilities Commission, General Order No. R-526, at 6 (January 4, 2006).

revisions to the next IRP Plan filing reflecting the major review to be conducted on a cycle basis. The process can become far less burdensome to all parties as utility IRP Plan filings, both the annual updates and the major review, become routine communications of on-going plans to regulators and interested stakeholder, rather than substantial planning documents that take years to prepare and may remain in place without replacement across extended periods.

To summarize, the Consumer Advocate suggests the following steps. In order to illustrate the two parallel paths, IRP activities are labeled "Track 1," while RFP activities are labeled "Track 2."

- The following are to be considered Track 1 activities:
 - In preparing its IRP filing, an electric utility company should identify its planning objectives, provide quantitative and qualitative measures to be attained for each objection, and identify the resource needs that derive from those objectives. These determinations would be documented in the IRP Plan filing made pursuant to Section III.B.2. of the Commission's IRP Framework. The Commission should review the Company's identified needs to ensure that they are valid, and to signal the Commission's intent to support resource procurements in keeping with those needs (i.e., assuming the IRP Plan is approved and absent changed circumstances);
 - As part of its IRP Plan filing, the utility should identify whether a competitive bidding approach will not be used for acquiring needed resources and the reasons for such recommendation. Its IRP Plan (and the associated Implementation Plan) should include information on existing and future capacity and energy requirements, the timing of resource

acquisitions, preferred resource technologies (e.g., reflecting attributes that are consistent with identified planning objectives) that were considered, the impact of each resource on the qualitative and quantitative measures for each of the stated objectives. Alternatively, a utility's resource plan may simply identify basic needs to be resolved through various resource acquisition processes; and

- After an appropriate review process which takes into consideration comments/concerns of interested stakeholders to the IRP process, the Commission would issue a final Decision and Order on a utility's IRP Plan (including approved acquisitions to be made through competitive processes);
- The results of that RFP would inform subsequent IRP processes. In keeping with the Commission's IRP Framework, the utility should file an annual update to its approved, 5-year Implementation Plan in which it would describe any notable modifications to the IRP (perhaps as a consequence of information obtained through, or presenting the results of, RFP processes). See Response to HECO/CA-IR-56.

- The following activities are to be considered Track 2 activities:

- The utility would design its RFP at any time during a three-year IRP filing cycle, for issuance during the IRP cycle or perhaps later. The RFP should be designed sufficiently in advance of the time at which foreseeable needs would dictate that an RFP must be issued (note that, as a theoretical matter, an RFP developed in the fourth year of a five-year action plan for one 20-year planning horizon will be issued during the next IRP Plan's Action Plan for a new 20-year planning horizon, consistent with Section III.B.2. of the Commission's IRP Framework;
- The utility would issue its RFP in compliance with the approved IRP Plan;
- Bids would be received and evaluated as appropriate (perhaps after expiration of the three-year IRP cycle

from which the RFP originated). The solicitation process would run its course, potentially leading to a PPA or other contract submitted to the Commission for approval in a separate docket from the IRP docket.

- b. Should the Commission require the utility to establish a separate competitive procurement process for as-available renewable energy generation?

RESPONSE:

No, as designed, the Parties' Proposed Framework does not distinguish a competitive process for firm versus as-available generation resources. The Parties' Proposed Framework indicates that the scope of a solicitation process would be established in an IRP proceeding (see Section I.B.1). Furthermore, as noted in Section III.B.2. of the Parties' Proposed Framework, the RFP should identify any unique system requirements and provide information regarding the requirements of the utility, important resource attributes, and criteria used for evaluation. Thus, utilities should design RFPs to meet their needs.

For example, a utility's only need (e.g., as identified in an IRP Plan) may be to acquire generation resources to comply with the RPS statutes. In this case, a competitive bidding process that has as-available renewable energy generation as its focus may be entirely appropriate. Here, the RFP could be unique to as-available, renewable resources. As such, there would not be any "separate" competitive procurement process.

In addition, a utility may have a need that could be met by a range of resources that would include renewable resources. In this situation, the utility may design and issue a single RFP that would solicit the needed resources, while: (1) allowing as-available, renewable resources to bid, and (2) recognizing the benefits that such resources might offer (e.g., in the form of contribution to the RPS, as-available generation, etc.) in the evaluation process.

A third situation is a variation on the second case above, wherein the utility's need is such that it could be met with as-available, renewable resources in part, but (1) such renewable resources may not be able to address the 100% of the identified need, and (2) that a single resource (such as a large, base load facility) should be the focal point of the utility's proposal evaluation scheme. In such instance, ensuring as-available renewable energy generation some reasonable chance to compete by introducing a separate procurement process (or at least a separate evaluation process) may be necessary.

Fourth, a utility may have a resource need that is unlikely to be met by renewable resources. In such case, no "separate" solicitation of this nature would be required.

- c. What if a resource not identified in the IRP preferred plan seeks to compete for a slot?

RESPONSE:

The Parties' Proposed Framework allows resources not identified in an IRP to compete to fill an identified need (see Section I.C.5 and 6; Section V.C.2 of the Parties' Proposed Framework). In agreeing to this provision, the Parties recognized that a utility with a specific type of resource (e.g., a fossil fuel-fired combustion turbine) in mind (as a component in its approved IRP Plan) may issue an RFP for resources of the anticipated type, but receive a proposal from an unanticipated resource type (e.g., a provider of demand-side resources) that could better satisfy the utility's need for generation. Sections III.E. III.F. of the Parties' Proposed Framework set forth the parameters for evaluating and selecting the responses to the RFP.

In the situation contemplated by the question posed by the Commission, the Consumer Advocate sees three possible scenarios. First, if there is nothing in the RFP to bar the unanticipated proposal from being evaluated relative to the utility's identified needs, then all proposals should be evaluated. Second, if the unanticipated proposal is reasonably precluded from participating in the RFP and does not appear to be a well-suited response to the utility's identified needs, then there should be little problem in rejecting the proposal from further consideration. Third, if the unanticipated proposal is barred from participation in the RFP,

but may constitute an effective response to the utility's needs, then the utility should reevaluate its plan and should conduct a thorough examination of its options and should pursue the approach that best serves its needs and ratepayer interests more broadly.

As explained in the Consumer Advocate's Initial SOP at 53, procurements outside of an approved IRP Plan should go forward if a utility can demonstrate that the procurement will (1) yield substantial benefits relative to alternate resource options and (2) cannot be delayed to the next IRP cycle. See also the Consumer Advocate's response to HECO/CA-FIR-3. If these conditions are met, it may be appropriate for the unanticipated proposal to displace others in the competition for "the slot."

d. What specific amendments are necessary to the IRP framework to achieve the integration?

RESPONSE:

No amendments to the Commission's established IRP Framework are necessary to integrate competitive bidding processes. As stated in Section I.C.2. of the Parties' Proposed Framework, the competitive bidding process is intended to complement the Commission's IRP Framework, which always anticipated that resources would be procured in response to identified needs. See, e.g., the Commission's IRP Framework, Section III.A. As the Consumer Advocate has emphasized on many occasions, competitive bidding is simply one of several mechanisms by which

resources identified as needed (e.g., through IRP processes) can be acquired.⁷

2. Self-Build Option
 - a. Does the utility have a legal obligation to prepare a self-build option for each competitive bid?

RESPONSE: Section V.A. of the Parties' Proposed Framework establishes that the electric utilities generally will develop a self-build option. Section V.B. also describes the conditions under which a utility may decline to advance a self-build option. There is, however, no legal obligation to prepare a self-build option for each competitive bid.

The decision to pursue a self-build option will depend on the underlying need for the resource. In this regard, the Consumer Advocate anticipates that from time to time RFPs may be issued when there is no pressing need for incremental resources to preserve system reliability or to address a statutory requirement. Consider, for example, a utility that is debating whether to retire a given generating facility for reason of economics, but wishes to "test the market" in order to determine whether an attractive replacement can be acquired through competitive bidding processes. Here, there would be no immediate reliability or

⁷ The Consumer Advocate does identify a number of potential improvements to the IRP Framework, which are intended to improve the IRP process and thus lay a better foundation for resource procurement, by improving the information available to stakeholders participating in IRP processes. See, e.g., the Consumer Advocate's Preliminary SOP at 44.

statutory need for a self-build option to be developed. See Consumer Advocate's Final SOP at 33.

However, the situation should be quite different when the resource is needed to address a clear reliability need or statutory requirement. Setting aside those situations in which the utility already has a project by which to address the reliability need, one could argue that a utility acting prudently to meet its service obligations would both (1) test the competitive market to determine whether a least-cost proposal can be acquired from that market, and (2) take reasonable steps to develop its own potential response to the identified need. This second step would ensure that the utility is prepared to respond in the event that a quality project proposal from the market is not received.

In the event that a utility fails to develop an effective self-build option to "backstop" the competitive bidding process, it is the Consumer Advocate's view that one reasonably could argue that the utility has failed to meet its service obligations. A utility cannot allow a reliability problem to develop or persist simply because its efforts to conduct a fair, competitive RFP might fail to produce a viable project solution. Rather, the utility must undertake reasonable actions, in keeping with its obligation to serve, to resolve such situations. The Consumer Advocate recommends that a "backstop" proposal from the utility would be a necessary

response to supplement any competitive bidding process in which system reliability or a statutory requirement is at stake. See Consumer Advocate's Final SOP at 31-32.

- b. Assume the utility has a legal obligation to prepare a self-build option for each competitive bid. What role should the utility's self-build option play in the competitive procurement process?

RESPONSE:

As discussed in Section III.A.4.b. of the Parties' Proposed Framework, when a utility advances its own project proposal, or accepts a bid from an affiliate, the utility should take reasonable steps to mitigate concerns over an unfair competitive advantage that may exist or reasonably be perceived by other bidders or stakeholders.

The Consumer Advocate contends that the role of the self-build option should be to establish the point of comparison for project proposals received through competitive bidding processes. Competitive bidding should serve as an opportunity for the utility to learn whether a competitive supplier is more cost effective in addressing a given utility resource need and/or with better-performing resources, than would the utility through its self-build option. The only way to make such determination is comparing the resource proposals obtained through the competitive processes to the utility's self-build option on a "level playing field."

In considering the role of the self-build option in the competitive procurement process, a number of issues must be addressed if the process is to be effective in identifying the best resource options for consumers. First, the utility's self-build proposal should be the project that the utility views as its best response to the identified need. Otherwise, a number of problems could arise. For example, ratepayers might find themselves supporting the costs of a sub-optimal project (e.g., if the self-build project is selected through the bid evaluation process). In addition, ratepayers might be at risk that the utility will "game" the results of the RFP process (e.g., the utility might withhold its best project until after the comparison to third-party alternatives had been completed), obscuring the results of the comparative process. See Consumer Advocate response to HECO/CA-FIR-14.

Second, it also would be important that the self-build proposal be evaluated in the same time period and using the same evaluation criteria (to the extent feasible) as would the project proposals received through its RFP. See, e.g., Consumer Advocate's Final SOP at 28-30. An effective comparison of the utility's option to market alternatives will be hampered if the comparison occurs at different points in time. For example, the costs of construction materials and generation fuels can move

considerably over short time intervals, which could easily introduce distortions to comparisons that are not contemporaneous.

Third, to ensure a fair comparison of utility and third-party projects, all must have comparable expectations regarding cost recovery. This rationale drives the Consumer Advocate's recommendation that, for ratemaking purposes and to the extent feasible, the utility's project proposal must be "capped" at its bid price and held to the same performance standards (e.g., for heat rate and availability) as would be applied to RFP bidders (see Consumer Advocate's Initial SOP at 60).⁸ Similarly, the Consumer Advocate recommends that a utility's self-build project proposal should be held to the same terms as would apply to the third-party proposals relative to which it might be evaluated (see Consumer Advocate's Initial SOP at 60). Absent a common set of delivery obligations, it may be very difficult to determine how the utility's self-build proposal compares to third-party alternatives.

Finally, if a third-party proposal is identified as more cost-effective and/or better performing than the utility self-build proposal, that third-party proposal would be secured contractually. Once this occurs, the role of the utility's self-build project would become one of a "backstop" to the RFP, whereby it would be

⁸ The Framework allows the utility to seek recovery of the costs in excess of the bid by demonstrating the reasonableness of such costs, and or changes in actual performance. See Section VI.D.

implemented if the third-party project fails.⁹ Furthermore, an approach developed through discussions makes clear that a self-build position may differ from the utility's bid in an RFP (see footnote 7).

- (1) The utility's self-build option competes directly in the competitive bidding process. Under this direct competition option, should the utility's self-build option be --
 - (a) announced in advance, in public, so competitors can try to beat it; or
 - (b) submitted one day in advance, in private?

RESPONSE: The Parties' Proposed Framework identifies a number of steps to avoid self-dealing (see, e.g., Section III.H.8). As noted in Section III.H.8.b.(i) of the Parties' Proposed Framework, when the utility or its affiliate is seeking to advance a resource proposal, the utility should submit its self-build option to the Commission one day in advance of receipt of other bids, and provide substantially the same information in its proposal as other bidders. By filing the utility's bid one day in advance of the RFP bid due date, the bidders would have confidence that the utility's self-build proposal will not be modified after the utility views their proposals. See, e.g., Consumer Advocate response to HREA-CA-FIR-6.

⁹ If an RFP fails to produce viable third-party resource proposals, or if a third-party proposal is selected as the RFP "winner" but fails to achieve commercial operation, the utility should proceed to implement its "next-best" option. Depending on circumstances, this "next-best" option may be another third-party proposal from the RFP, the utility's self-build proposal from the RFP, another permanent or temporary utility generation option, or demand-side resources.

By preserving the integrity of the bidding process, bidders will have confidence that utility solicitation processes are fully legitimate. This will also require that a utility's self-build proposal must be well-developed and fully documented (i.e., presenting information in largely the same type and form as is required of bidders) at the time that RFP bids are due. See Consumer Advocate FSOP at 29.

A significant concern lies in the fact that, if the utility does not put a "well-developed" project forward, bidders may become concerned that the RFP process is not serious, but rather one whose objective is merely to create the appearance of a competitive test for the utility project. This same concern arises if bidders see the utility as having latitude to adjust its proposal in response to bids received, so as to improve on characteristics to the degree necessary to better competitive options.

The term "well developed" as used by the Consumer Advocate is intended to communicate that, where an Electric Utility Company seeks to advance its own project proposal over those of other resource developers, the utility's proposal should be advanced to a degree that is consistent with the RFP's minimum requirements of competing bidders at the time that bids are due. While some exercise of reasoned judgment may be required to determine what is appropriate to the circumstances, some clear

expectations of this nature are important in order to: (1) ensure that the utility is taking seriously and acting prudently with respect to its service obligations, and (2) to minimize the risk that a utility might modify its project proposal in later stages of solicitation processes to gain a competitive advantage over bidders. The specific features of a "well developed" proposal will have to be identified on a case-by-case basis, in keeping with the utility's specific circumstances, resource need and RFP design. See Consumer Advocate response to HECO-CA-FIR-23.

Furthermore, the Consumer Advocate recognizes that utility self-build proposals may not be "bid" into RFP processes. However, they should be structured such that they can be readily compared to those that are. While a utility's IRP filings and RFP documents should be as specific as possible about the need that the utility is seeking to fill, the Consumer Advocate would not see it as necessary that the details of the utility's project proposal be revealed in advance of the RFP proposal due date. Indeed, it may be problematic if the details of the utility's price proposal are revealed in advance of the due date, because there is a risk that under some circumstances (e.g., relatively few bidders) bidders might "price up" to the utility's price proposal.

- (2) The utility prepares its self-build option in parallel to the competitive bidding process, as a backstop plan. Under this backstop approach,
 - (a) should the backstop plan be described in the RFP?

RESPONSE:

The Parties' Proposed Framework describes the parallel plan of a utility in Section I.E. It does not include a requirement that the "backstop" plan be described in an RFP because the utility's self-build option likely would serve as the "backstop" for many competitive bidding processes, in addition to being a point of comparison for third-party project proposals. The Consumer Advocate would not specify the utility's self-build option in the RFP, other than to make clear that such option exists and will be evaluated relative to bids in determining which project will be pursued by the utility.

- (b) if a third party project is selected, at what point should the backstop plan be definitively abandoned?

RESPONSE:

There is no definitive "point" at which backstop plans can be set aside. As noted in Section I.E of the Parties' Proposed Framework "the utility may continue to proceed with its Parallel Plan until it is reasonably certain that the awarded IPP project will reach commercial operation, or until such action can no longer be justified to be reasonable."

Determining the point at which to terminate a backstop plan presents a number of challenging issues. Ultimately, judgment must be applied on a case-by-case basis that considers the benefits, costs and risks of alternate paths. Factors to be considered might include the following:

- The nature of the need. A backstop plan that is intended to address a capacity deficiency that is expected to occur during many hours of the year might be deemed more indispensable than one that would target an infrequent “needle” peak. Similarly, a backstop plan that would resolve a large resource deficiency may be more critical than one that would resolve a small one.
- The degree of confidence that a third-party project will achieve commercial operation. There will be some competitive bidding processes for which the host utility will have a high degree of confidence in the result. As a general matter, confidence in third-party projects should increase as they move closer to the in-service date (assuming major developmental milestones are being achieved). In such circumstances, sinking resources into refining a backstop plan may be unwarranted. If significant questions develop regarding the viability of a third-party project proposal, more attention to the backstop plan may become.

- The resources required to sustain the backstop plan will be a consideration. If backstop plans are to be responsive to identified reliability concerns, they will have to be capable of being implemented within reasonable timeframes. As time proceeds, the commitment of capital to begin project development may have to be considered. The outlook for and magnitude of (e.g., the financial commitments necessary) such milestone decision points will have a bearing on the decision of whether to proceed.
- The degree to which a second-best solution (e.g., a “secondary” backstop plan) might better address identified resource needs. At some point, an alternate backstop plan (e.g., one that can be implemented with shorter lead times, even if somewhat more costly) might become desirable. This could be the case as time proceeds, and timelines required to implement the utility’s self-build proposal begin to extend beyond the time at which incremental supplied would be needed. See Consumer Advocate FSOP at 31-33.

As is currently the case, the Consumer Advocate anticipates that each utility will exercise reasoned judgment in developing and managing the plans by which it would respond to foreseeable contingencies.

For reasons explained in the Response to Commission Question II.A.3.d below, the Commission should appreciate the difference between: (1) the plans developed by a utility to respond to the reasonably foreseeable contingencies that it might face, and (2) the investments made to develop projects if it is determined that contingency plans must be implemented. A utility's effort to develop a backstop plan might be significantly less than what may be required to develop a backstop project (e.g., once project development has become advisable). Note also that, where a utility's self-build proposal is expected to serve as a backstop, the planning may be essentially complete, but for possible consideration of alternatives to that backstop.

- (c) if no third party project is selected, or if a third party project is selected but then fails,
 - i) must the utility proceed with the backstop plan without change,
 - ii) or should the utility be permitted (or required) to refine its backstop plan to take into account changes in circumstances since the backstop plan was formulated?

RESPONSE:

Section I.E. of the Parties' Proposed Framework addresses risk mitigation and contingency planning. As noted in Section V. of the Parties' Proposed Framework, the utility's "contingency plan" may be different from the utility's Parallel Plan and the Utility Bid. There likely will be times when changing circumstances will necessitate

changes to the utility's backstop plan. For example, changing economic circumstances might substantially reduce the identified need; in such case, project modifications to allow a smaller facility might be warranted. The Consumer Advocate does recommend that a utility be expected to justify any retrospective adjustments to its project proposal as reasonable (e.g., relative to fair bidding practices) and prudent. See, Consumer Advocate FSOP at 32).

3. Parallel planning
 - a. Under what circumstances should the Commission require the utility to engage in parallel planning?

RESPONSE:

Section I.E of the Parties' Proposed Framework addresses risk mitigation and contingency planning and Section V.A addresses participation by the host utility in the event of a need for generation for reliability purposes. It should be noted that as a general matter, the Commission should expect electric utility companies to engage in parallel planning whenever a project – third-party or utility self-build – is to be developed to address an important reliability or statutory need.

Parallel planning, as the Consumer Advocate understands the Commission's use of the term, is simply a specific application of contingency planning. A tenet of utility resource planning is that electric utilities should take reasonable steps to anticipate foreseeable contingencies. The greater the likelihood of a given

contingency, the more seriously the utility should take the task of developing a plan for that contingency in its planning processes. Therefore, the Commission should expect Hawaii's utilities to: (1) take prudent steps to anticipate the contingencies that might arise in relation to competitive bidding processes, and (2) develop parallel plans (i.e., a backstop plan) whenever there is an appreciable risk that system reliability in the absence of such plan.

Anticipating potential contingencies should be a central feature of utility planning processes. If the Commission were to determine that a utility failed to act prudently in assessing and responding to reasonably foreseeable contingencies in any aspect of the resource planning process, the Commission has authority to take appropriate action.

- b. Should parallel planning be required for every selected third-party project?
- c. Should parallel planning be required for every selected utility project?

RESPONSE:

Section I.E of the Parties' Proposed Framework addresses risk mitigation and contingency planning. Section V.A addresses participation by the host utility in the event of a reliability need. Parallel planning should not be expected for every incremental generation resource or block of resources, whether provided by a third-party or a utility self-build project. There may be instances in which the consequences of a project's failure could be insubstantial

(for example, system reliability would not be threatened if an RFP is conducted to help determine if it might be cost-effective to replace an existing generating facility). However, where reliability needs are at issue (which likely would be the case for many RFPs), parallel planning would be necessary for third-party and utility self-build projects (consider the case where significant risks may be involved, e.g., if gaining siting approvals may be problematic). The Commission should expect each electric utility to exercise reasonable judgment in determining whether and to what degree parallel planning is to be pursued.

- d. At what point in the development of a selected project should parallel planning cease?

RESPONSE:

Section I.E of the Parties' Proposed Framework indicates that "the utility may continue to proceed with its Parallel Plan until it is reasonably certain that the awarded IPP project will reach commercial operation, or until such action can no longer be justified to be reasonable." The decision regarding when to cease making investments in the development of a parallel project also could be complicated and one that will be highly case specific. Here information on the detailed circumstances of the RFP or selected project and parallel project are important. Expertise and reasoned judgment are also necessary. As noted in the Parties' Proposed Framework, investments in a parallel project should cease when it

becomes apparent that a selected project is on a path to successful commercial operation. In reality, the likely path of the selected project might be less clear. The Commission should rely on the electric utilities to make such judgments on a case-by-base basis.

As an aside, the Consumer Advocate notes that parallel planning is often recognized as another term for contingency planning. In this regard, electric utilities should always be considering the various risks that confront them, and should be thinking about the options that might be pursued should events not develop as expected. In this context, there is no "point" in the development of generation projects at which parallel planning should cease altogether. As a theoretical matter, any new generating facility (whether a third-party or utility self-build facility) might experience a catastrophic failure on the day that it is to begin commercial operation. Thus, a utility should have some idea (even if only an idea) of the course that it would follow if such event occurs.

The Commission's question may speak to the implementation of a "parallel" or "backstop" project, which under some circumstances could be initiated to ensure that an important utility objective (such as system reliability) will be met. The Consumer Advocate observes that it is, in fact, quite rare that utilities make significant investments in a parallel generating

facilities, while their "primary" options are under development. Nonetheless, such investments are possible. Determining when such investments should be initiated and when they should cease requires thoughtful, informed case-by-case analyses whose outcomes will be highly dependent on the facts specific to a given situation.

In the context of competitive bidding, the sequence of events in the life of a parallel plan generally should be as follows. In keeping with the tenets of good contingency planning, utility planners should begin to consider the resource options that they might implement in the event that a planned RFP does not yield an appropriate project proposal, or if a project selected through the RFP fails to achieve important milestones on the road to commercial operation. Generally speaking, the parallel plan would not be well-developed, unless the utility's self-build project proposal in the RFP would also serve as its parallel plan (which should be the case in many instances, because the utility is obligated to respond to reliability needs whether or not the RFP is ultimately successful). Similarly, the parallel plan likely would remain at a rudimentary level unless and until circumstances indicate that further development (i.e., planning) would be prudent.

As an RFP is being conducted and after selection of a winning bidder, a utility would be expected to carefully monitor the

status of the solicitation, and later project development (e.g., relative to critical milestones), in relation to the factors that would bear on the ultimate success (or failure) of the project. In very general terms and as with most contingency plans, parallel planning should begin in earnest if some event gives rise to concerns regarding either the viability of the RFP or the ability of a selected project developer to meet established developmental milestones. Conversely, if all is proceeding as planned and there are not significant concerns on the horizon, it may be entirely appropriate to allow any parallel (or contingency) plans to remain in a rudimentary form.

If there is concern that an RFP or selected project might not come to fruition, it may be appropriate for a utility to decide to move beyond "parallel planning" and into project development. These decisions will require a thorough understanding of the circumstances as they relate to the RFP or selected project and the parallel project that could be initiated. A measure of expertise and reasoned judgment also will be necessary. Presumably, initial investments in the development of a parallel project might be more limited. The Consumer Advocate reiterates that significant investments in parallel projects are quite infrequent. Nonetheless, as a theoretical matter they can occur.

- e. How should the Commission regulate this parallel planning and the associated cost?
- (1) Should parallel planning activities be reflected in the IRP?
 - (2) Should parallel planning activities be anticipated in rate cases?
 - (3) Should the cost of parallel planning activities be deferred for consideration and recovery in subsequent rate cases?

RESPONSE:

Parallel planning introduces no new regulatory requirements (and no new cost categories) for the Commission, because "parallel" planning is simply another term for the contingency planning that should routinely accompany utility resource planning processes. Competitive bidding offers a mechanism by which a utility can determine whether its resource needs can be acquired from third-party suppliers in competitive markets at lower costs (and/or with better performance characteristics) than through self-build projects. As such, in many instances the parallel plan should be the utility's self-build project proposal.

Section VI of the Parties' Proposed Framework addresses cost recovery and ratemaking issues. The Consumer Advocate would not expect to see the costs of parallel planning activities being detailed in utility rate applications, because contingency planning is a routine function of utility resource planning departments. However, these costs and the costs that a utility reasonably and prudently incurs in developing a parallel project (or

backstop) should be recoverable through rates. See Consumer Advocate FSOP at 38.

The Consumer Advocate anticipates that the specific treatment of these costs would match the treatment that the Commission traditionally has afforded contingency planning costs incurred in the context of resource planning. The associated test-year expenses incurred by the utility would be treated as such; and any significant expenses associated with projects that did not materialize would be accounted for in accordance with the National Association of Regulatory Utilities Commissioners' accounting guidelines.

4. Definitions
 - a. Self-build option: the option created by the utility pursuant to its legal obligation to meet load. The self-build option is submitted in the competitive bidding process.
 - b. Parallel planning: the development efforts which the utility conducts when an independent bidder has been selected, to protect against the risk that the selected bidder fails to perform.

RESPONSE: Although not identified as such, footnote 7 of the Parties' Proposed Framework appears to define the "Utility Bid" project as the "Self Build Option: reflected above, and the "parallel plan" as noted above.

The Consumer Advocate contends that a self-build option may be advanced even where there is no imminent reliability need, and thus in the absence of an "obligation to meet load." For

example, a utility might advance a self-build option to meet its RPS obligations.

As discussed above, parallel planning also should occur when a utility's self-build project is selected, in order to guard against the risk that the utility's project does not come to fruition. In addition, the Consumer Advocate would make clear that parallel planning, as that term has been used in this proceeding, is merely a form of contingency planning. All electric utilities should routinely perform contingency planning relative to their existing and planned resources. As above, the Consumer Advocate would distinguish between (1) parallel planning and (2) investing in a parallel project (i.e., as would occur if it becomes prudent to implement a parallel plan).

B. Design of Request For Proposals

1. Scope of RFPs
 - a. Should the utility use a formal RFP for all of its power needs, or only for those projects exceeding a certain size?

RESPONSE: Section I.B.5 of the Parties' Proposed Framework establishes that the RFP processes should be flexible, and should not include unreasonable restrictions on the sizes and types of projects considered, taking into account the appropriate sizes and types identified in the IRP process. This is consistent with the Parties' agreement that competitive bidding is to be established as the preferred mechanism for acquiring new capacity and energy resources by Hawaii's electric utilities (see Section I.A.3. of the Parties' Proposed Framework).

- b. Should the Commission require the utility to use standard offer contracts?

RESPONSE: No. On occasion standard offer contracts may be effective in the procurement of long-term capacity and energy projects by Hawaii's utilities, but they should not be a requirement. As set forth in Section III.C. of the Parties' Proposed Framework, the RFP documentation should include proposed forms of contracts with commercially reasonable terms and conditions that properly allocate risks among parties in light of circumstances. To the extent practical, the terms and conditions of the proposed contracts should be specified so that bidders are aware of, among other

things, performance requirements, pricing options, key provisions that affect risk allocation and provision that may be subject to negotiation. The provisions set forth in Section III.C. of Parties' Proposed Framework are necessary in order to ensure that when a competitive bidding process is used to acquire a future generation resource or a block of resources, the generation acquired through the process meets that needs of the utility in terms of reliability and characteristics of the unit required by the utility as set forth in Section I.A. of the Parties' Proposed Framework.

The above is consistent with the position set forth in the Consumer Advocate's SOP (at 20-21), wherein the Consumer Advocate stated that a standard offer is a simple auction format where suppliers avail themselves of predetermined price and non-price terms. The Consumer Advocate anticipates that standard offer purchases may be appropriate where the needs and circumstances of a particular electric utility are such that both the price and non-price terms of a purchase (or set of purchases) can be fairly narrowly prescribed (e.g., purchases of as-available energy from projects of less than 100 kW). This approach may work well if the utility is seeking to promote the development of a specific resource type (e.g., for environmental or other public policy reasons). However, a standard contract for all purchases is not well-suited to more complex resource procurements.

In this proceeding the Consumer Advocate has focused its attention on processes to support a more sophisticated approach to resource acquisition, where more variation in the terms of resource procurements would be anticipated (and evaluated) through competitive bidding processes. Competitive bidding can be expected to be more widely used precisely because it is better suited to the acquisition of resources that can satisfy the complex range of planning objectives that are expected to define Hawaii's future incremental resources.

Note that the Consumer Advocate distinguishes between standard offer purchases and "standard form contracts." With the latter, a utility seeking to purchase from third-party suppliers of a certain type (e.g., distributed generators) might develop (for use, when appropriate) a contract containing "standard" terms (i.e., to apply to all such suppliers in similar circumstances) that may or may not be negotiable. See Consumer Advocate response to HECO-CA-IR-13.

- c. Should the Commission allow the utility to choose between RFPs that target specific resources, or RFPs with broad-based eligibility requirements? Or should the Commission make this decision on a case-by-case basis? Or should this decision be made as part of the IRP process?

RESPONSE:

As set forth in Section III. of the Parties' Proposed Framework, the Commission should allow – and expect – each utility to develop

proposed competitive bidding processes that most effectively and efficiently address the utility's identified resource needs. As noted in Section III.B.2 of the Parties' Proposed Framework, the RFP should identify any unique system requirement and provide information regarding the requirements of the utility, important resource attributes, and criteria used for the evaluation. Thus, a utility's solicitation, whether targeted or broad-based, should seek to secure the types of resources that will best respond to its resource needs.

It must be recognized that competitive bidding is just one of several mechanisms for acquiring new resources. A utility should acquire resources to meet its needs, and should engage procurement processes that do so in the most efficient, effective manner. Each utility should propose, on a case-by-case basis and as part of its IRP Plan (e.g., as part of the IRP Implementation Plan, if such acquisition is to occur within the designated five-year period), the procurement process that will best meet its resource needs. In some instances, an RFP may be "targeted" (e.g., a utility may request resources of a specific size and type to address a specific requirement, such as VAR requirements in a particular locality). In other instances, a "broad-based" solicitation may be preferred (e.g., a utility might issue an RFP seeking a variety of

supply- and demand-side resource proposals to respond to system-wide load growth).

Section I.B.1 of the Parties' Proposed Framework establishes that the IRP Plan will specify the scope of an RFP process. As a general matter, the RFP should address resource needs specified in the IRP process. The Consumer Advocate recommends that RFPs developed in response to an approved IRP should be submitted to the Commission for review.

- d. Should the utility use a formal RFP for all of its power needs, or only for those above a certain size?

RESPONSE:

As stated in response to Commission Question B.1.a, above, Section I.B.5 of the Parties' Proposed Framework establishes that the RFP processes should be flexible, and should not include unreasonable restrictions on the sizes and types of projects considered, taking into account the appropriate sizes and types identified in the IRP process.

- e. Should the Commission require RFPs to seek proposals for each of the following, or leave the choice to the utility?
- (1) conventional PPA
 - (2) tolling agreement
 - (3) fuel-sharing arrangement
 - (4) turnkey

RESPONSE:

As stated in response to the Commission's question I.A.1, above, Section I.A.3. of the Parties' Proposed Framework establishes

competitive bidding as the preferred mechanism for acquiring a future generation resource or a block of generation resources. The Parties' Proposed Framework recognizes, however, that competitive bidding should not be an immutable requirement because there will be circumstances in which competitive bidding may not be practical. Thus, conditions and possible exceptions under which alternative approaches to resource acquisition may be appropriate are described in Sections I.A.3.a. through I.A.3.e. of the Parties' Proposed Framework to make clear the possible exceptions under which a competitive bid process would not be appropriate.¹⁰

Section I.B.1 of the Parties' Proposed Framework establishes that the IRP Plan will specify the scope of an RFP process.

¹⁰

The Consumer Advocate has offered examples of the circumstances under which the Commission reasonably might conclude that competitive bidding might be contrary to the public interest. See, e.g., Initial SOP at 34-40; HECO/CA-IR-33. The Consumer Advocate has stated, for example, that an urgent need may necessitate procurement timelines that would render competitive bidding infeasible. It is conceivable, for example, that HECO's burgeoning need for reserve capacity may require attention (at least as may pertain to capacity requirements during the upcoming summer months) that could not be met through competitive bidding by virtue of the timelines involved. It also is possible – depending on the utility and the specific circumstances of its resource requirements – that competitive bidding might be rendered impractical for reason of emergency timing, size, lack of developer interest, utility expansion or repowering, and other factors. See Response to HREA-CA-IR-7.

2. Pre-qualification requirements
- a. Should the Commission require the utility to impose pre-qualification requirements?

RESPONSE:

No, as noted in III.B.5. of the Parties' Proposed Framework, a pre-qualification process may be incorporated in the design of some bidding processes, depending on the specific circumstances of the utility and its resource needs. There should not, however, be a requirement to impose pre-qualification requirements on potential respondents to all of a utility's RFPs. Rather, a utility should be expected to include whatever pre-qualification requirements may be necessary and appropriate when designing an RFP, giving due consideration to the specific need(s) to be addressed and the utility's specific circumstances. Section III.E. of the Parties' Proposed Framework describes the types of criteria to be included in bid evaluation processes.

- b. Assume the Commission requires the utility to impose pre qualification requirements. What pre-qualification requirements are appropriate?
- (1) mature technology
 - (2) site control
 - (3) credit worthiness
 - (4) entry fee
 - (5) operational flexibility

RESPONSE:

It is not possible to provide the requested response to this question without knowing the specific facts and circumstances under which such a requirement would be imposed. As indicated above, and provided for in Section III.B.5. of the Parties' Proposed Framework,

a pre-qualification process may be incorporated in the design of some bidding processes, depending on the specific circumstances of the utility and its resource needs. The Commission should not, however, require a utility to impose any particular type of pre-qualification requirement for all solicitations.

It must be recognized that generic pre-qualification requirements are likely to prove problematic. For example, a utility that has a serious reliability concern that requires immediate resolution reasonably may require bidders to demonstrate that their proposals incorporate a mature technology. By contrast, a utility seeking to "test the market" for creative new options for addressing a somewhat distant need (e.g., for future renewable facilities) may be quite willing to consider emerging technologies that some might view as immature. Similarly, site control may be an important factor for the utility with a serious reliability need. However, site control may be of less consequence to a utility that is exploring options by which to respond to more distant needs, because there may be ample time for a winning bidder to resolve site control issues. See also, Consumer Advocate response to HECO /CA-FIR-23(b).

3. Process for developing RFP
 - a. Should the Commission require the utility to develop an RFP for each competitive procurement?

RESPONSE:

As a general matter, and as provided for in Section III.B.1, of the Parties' Proposed Framework, the Commission should expect each utility to develop an RFP that is specific to its needs. (Also see e.g., Consumer Advocate response to HECO/CA-IR-14.) Note, however, that there are circumstances under which a utility might not develop a new RFP for each new resource acquisition. For example, a utility engaged in a series of 10 MW purchases over a period of years might repeatedly use a single RFP package (with perhaps some minor modifications or improvements). Similarly, a utility might borrow from an affiliate a similar RFP where the procurement of like resources in like amounts is in order.

- b. Should the Commission approve each RFP before issuance? [Questions relating to involvement of the IE are addressed in Part III.B below.]

RESPONSE:

As provided for in Section III.B.4.f. of the Parties' Proposed Framework, the proposed final RFP will be submitted to the Commission for its review. There is, however, no requirement that the Commission approve the RFP prior to issuance. The utility should have the right to issue the proposed final RFP if the Commission does not direct the utility to do otherwise within 30 days of its having been submitted to the Commission for review

(see Section III.B.4.g. of the Parties' Proposed Framework). This process will help to ensure the timely issuance of the RFP to competitively procure the resources that are identified as being needed in the utility's IRP.

Section III.B.4. of the Parties' Proposed Framework describes the process leading to the distribution of the RFP. Listed as likely steps are: (a) the filing of a draft RFP and supporting documentation with the Commission; (b) technical conferences to discuss the draft RFP with interested parties; (c) submission of comments on the draft RFP, if any, by interested parties to be submitted to the Commission and utility; (d) determination by the utility to incorporate the comments; and (e) the submission of final draft RFP, which may incorporate the comments of the interested parties to the Commission for review.¹¹ At that point, if the Commission determines that the comments not incorporated into the final proposed RFP rise to the level of requiring a more detailed review, the Commission can take action on the final proposed RFP that is submitted. When a Commission investigation of one or more issues is deemed necessary, some final approval likely would be

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It should be recognized that the level of review afforded by the Commission may vary considerably, in keeping with circumstances. For example, where an RFP results from a process (IRP Advisory Group meetings, for example) in which a utility has afforded stakeholders ample opportunity to review proposed RFP documents, and a consensus emerges that the RFP should be issued in a prescribed form, then any subsequent review by the Commission reasonably may be quite limited (it may take the form of an opportunity to file comments on a relatively short time track). By contrast, where a major acquisition is anticipated or where there is controversy in RFP design and implementation matters, a more involved Commission investigation may be necessary.

necessary. On the other hand, if the Commission determines that none of the comments to the draft RFP rose to the level of requiring further review, the Commission should allow the RFP to be issued without further regulatory process.

- c. What generic features of an RFP should the Commission require the utility to develop, and obtain approval of, prior to a competitive procurement process?

RESPONSE:

Section III.B.2. of the Parties' Proposed Framework sets forth the requirements of the RFP. Because the utility's generation resource needs for which an RFP is designed may differ, the Commission should not require utilities to develop and obtain Commission approval of generic features of their RFPs. As stated in Section I.B.5. of the Parties' Proposed Framework, the RFP process should be flexible, taking into account the appropriate sizes and types of generation resource needs identified in the utility's IRP process.

Thus, the Consumer Advocate does not recommend that the Commission establish "generic features" requiring Commission approval of prior to the competitive procurement process. Rather, as stated in the Consumer Advocate's response to HECO/CA-IR-14, the Consumer Advocate recommends that each utility be granted considerable latitude to design RFPs that are

consistent with its needs and its reasonably informed view of how the RFP best would be conducted.

While it may be possible to identify features of RFPs that would be typical of most RFPs that electric utility companies might issue, the Consumer Advocate sees no advantage to placing a specific focus on individual “generic features” of an RFP in its review processes. In fact, such approach may prove cumbersome because it would imply that the Commission would expect to consider each such section individually (e.g., in its Decision and Order) – even if stakeholders are fully satisfied with its construct. The Consumer Advocate recommends that the Commission should consider each RFP in its totality. If there are any aspects of a draft RFP that are problematic, the Commission should require that such problems be remedied before the final proposed RFP is issued.

- d. Should the Commission require the utility to develop the RFP in consultation with interested parties, or leave this decision to the utility’s discretion?

RESPONSE:

As provided for in Section III.B.4.d. of the Parties’ Proposed Framework, the Commission should leave to the electric utilities decisions of whether and how to engage comments of the interested parties in RFP design. In this regard, a utility should be free to consult whomever it deems appropriate in framing its RFPs.

There should be no requirement to consult with any particular party in the development of the RFP.

As provided for in Section III.B.4. of the Parties' Proposed Framework, the draft RFPs are to be submitted to the Commission, technical conferences to discuss the draft RFP are to be held with interested parties, and the parties can submit comments on the draft RFP to the utility and the Commission. This process allows opportunity for interested parties to express concerns, if any, with the draft RFP to the Commission, who can then decide if the concerns rise to the level of further review, should the utility elect to not address the concerns in the final proposed RFP that is submitted to the Commission. In framing the final proposed RFPs, the utilities would be well-served to take full advantage of consultations with interested parties and to consider seriously stakeholder comments received.

- e. What procedures should the Commission require to limit appropriately the time required for Commission approval?
 - (1) informal meeting with Commission or staff during the development process
 - (2) Commission-imposed schedule for submittal of utility drafts, parties' comments, independent entity reports and Commission approval
 - (3) Other

RESPONSE:

As provided for in Section III.B.4. of the Parties' Proposed Framework, there is no requirement that the Commission approve all RFPs submitted by the utilities. There will, however, be

opportunities for the Commission to review the draft RFP, be advised of the provisions in the draft RFP, and receive comments submitted by interested parties on the draft RFP prior to receipt of the final proposed RFP. All of the above, should appropriately limit the time required for the Commission to review the final proposed RFP and determine whether further action is required necessitating a formal approval by the Commission.

Given the above, the Commission should consider establishing (on an ad hoc basis) the time period for submission of written comments on the utility's draft RFP to help ensure the timely completion of the RFP process contemplated by Section III.B.4. of the Parties' Proposed Framework.

4. Content of RFP
 - a. Should the Commission specify any content to be included in the RFP? For example:
 - (1) characteristics of utility bid option
 - (2) information on relationship between utility and its affiliate
 - (3) method by which utility will weigh cost and non-cost factors and rank bidders

RESPONSE:

No, the Commission should not specify any content to be included in the RFP. The Consumer Advocate anticipates that each RFP will provide a thorough discussion of the resource requirements that the utility is seeking to fill.

The Parties' Proposed Framework addresses the content of an RFP from various perspectives. Section III.B of the Parties'

Proposed Framework speaks to a number of RFP design considerations. Section III.C focuses on the proposed contracts to be issued with an RFP. Section III.E addresses the evaluation of bids. Section III.H addresses RFP fairness provisions. The Parties' Proposed Framework does not prescribe that an RFP must contain information on the utility's bid. While various Framework provisions provide guidance on the information to be included in an RFP, for the most part the approach is illustrative rather than prescriptive. The Parties' Proposed Framework (see Section II.A.2) provides that the electric utilities will take reasonable steps to be informed of relevant industry experiences.

While the utility may be expected to file with the Commission a thorough description of the self-build option that would be compared against bids received, describing the self-build option in detail in the RFP may be problematic. This is because (particularly when it is generally understood that relatively few bidders might respond to a given RFP) bidders might tend to design their proposals to better by a narrow margin the utility's self-build option, rather than develop proposals that would be their best response to the identified need.

Where a utility anticipates receiving a bid from its affiliate, it may be appropriate for the utility to make clear in the RFP (a) in that its affiliate may submit a proposal, (b) the nature of the

relationship between the utility and its affiliate, and (c) the provisions that are intended to preserve the level playing field in the RFP. Failure to provide this information might give rise to concerns among potential bidders that the RFP might not be implemented fairly, which might diminish the number and/or quality of bids received – to the detriment of ratepayers.

Bidders should be provided with a clear, thorough explanation of the evaluation methodology that will be used to identify winning bids. This, too, will promote an enthusiastic response to the RFP, and is also likely to serve to limit disputes later in the process.

As provided for in Section III.E.9. and 10. of the Parties' Proposed Framework, the type and form of non-price threshold criteria should be identified in the RFP documentation. The weights for each non-price criterion may not be fully specified in advance of submission, as they may be based on an iterative process that takes into account the relative importance of each criterion given system needs and circumstances in the context of a particular RFP.

5. Definitions
 - a. Standard offer contract: A form contract, created in advance by the utility and modified and approved by the Commission, which constitutes a legal offer by the utility to buy from the third party. Acceptance by the third party forms a legally enforceable mutual obligation.
 - b. Pre-qualification requirement: a requirement which a bidder must satisfy to be eligible to bid.

RESPONSE:

The Consumer Advocate assumes that the Commission is seeking a response as to whether the above definitions need to be established, since no question is posed. If the assumption is correct, the Consumer Advocate responds that it does not see the need for the Commission to establish a definition of "standard offer contract," even though the stated definition generally appears reasonable. As suggested by the above definition, standard offers contracts tend to support standing offers by a utility to purchase from any qualifying provider.

By contrast, the Consumer Advocate understands the focus of this docket to be a process to use competitive bidding to acquire a needed generation resource or block of resources. This situation implies that there is competition among providers to supply a specific utility need for generation.

The Consumer Advocate also sees no need for the Commission to establish a definition of "pre-qualification requirement." The term should be well-understood in relation to competitive bidding processes. The Consumer Advocate

recommends that the Commission establish no requirements of electric utility companies in this regard, as discussed in the response to Commission Question II.B.2. above.

- C. Design of Purchased Power Agreement
1. Should the Commission require each RFP to include model agreements (modified as necessary to reflect the particular resource desired for each of the following, or should the Commission leave this choice with the utility?
 - a. conventional PPA
 - b. tolling agreement
 - c. fuel-sharing arrangement
 - d. turnkey agreement

RESPONSE:

As provided for in Section III.C.1. of the Parties' Proposed Framework, the RFP documentation should include the proposed form of a PPA and other contracts, with commercially reasonable terms and conditions that properly allocate risks among parties in light of the circumstances. There should not, however, be a requirement that each RFP include model agreements for any of the above, as explained in response to Commission question B.1.e. above.

If the RFP seeks a conventional PPA, then a copy of the proposed power purchase agreement should be included as part of the RFP package (see Consumer Advocate Response to PUC-IR-72). If the utility believes that a tolling agreement is likely to result from the RFP, then a copy of the proposed tolling agreement should be included with the RFP. The same would apply to a turnkey agreement.

The Consumer Advocate would not anticipate that a "fuel-sharing arrangement" would be the objective of a competitive solicitation for generating capacity. Nonetheless, if the utility

anticipates that such arrangement is likely to be a central feature of its agreements with the winning bidder, then the anticipated fuel-sharing arrangement should be defined within the RFP. The Commission would be expected to consider the utility's proposal as to whether to include description of a fuel-sharing arrangement as part of its broader review of the proposed RFP.

2. Process for developing PPA
 - a. Should the Commission require the utility to develop a PPA for each competitive procurement?
 - b. Should the Commission require the utility to submit, for Commission approval, a subset of PPA provisions that can serve as model provisions?

RESPONSE:

As provided for in Section III.A.5. and III.B.3 of the Parties' Proposed Framework, the RFP should include proposed forms of PPA. The ultimate PPA that is to be submitted to the Commission for review and approval may be different from the document that is included in the RFP. The reason is because the specific terms may need to be modified depending the resource that is ultimately selected.

Thus, although the utility will develop a contract that is proposed, the degree to which the provisions of the contract will be unique to a given solicitation likely will depend on circumstances: many contract terms will be replicable from other contracts to the extent that contracts can be identified that apply to similar

generation products in similar circumstances. Also see Consumer Advocate response to Commission Question C.2. above.

- c. Assume the Commission requires the utility to submit, for Commission approval, a set of PPA provisions that can serve as model provisions. What are the PPA provisions appropriate for this treatment?

RESPONSE:

It is not possible to provide a reasoned response as requested because the response will depend on the facts and circumstances unique to each situation. As explained in response to Commission Question II.C.2.a. and II.C.2.b. above, it is not possible to define model provisions that might reasonably apply to the full range of resource acquisitions that might be pursued through competitive bidding.

Thus, the Parties' Proposed Framework does not anticipate that model PPAs would be submitted to the Commission for consideration as generic provisions. Rather, the Parties' Proposed Framework is flexible (see Section III.C) in terms of the provisions that might be included in a proposed contract (which would be submitted to the Commission for review as part of a proposed RFP).

- d. Should the Commission approve each PPA before issuance? [Questions relating to involvement of the IE are addressed in Part III.B below.]

RESPONSE:

No, the Commission need not specifically approve each PPA prior to issuance as part of the RFP. As explained in response to Commission Question C.2.b. above, the terms of the actual PPA that is negotiated for a given resource may differ from the proposed PPA. Thus, it is not reasonable to expect the Commission to approve the PPA form before it is issued in the RFP.

Thus, the Parties' Proposed Framework does not anticipate that the proposed contract would receive specific approval by the Commission before an RFP is issued (see, e.g., Section III.C of the Parties' Proposed Framework). Rather, the proposed contract would be treated as part of the RFP package to be reviewed by the Commission.

- d.[sic] Should the Commission require the utility to develop the PPA in consultation with interested parties, or leave this decision to the utility's discretion?

RESPONSE:

No, there should be no requirement for the utility to consult with interested parties in order to develop the PPA. The utility is in the best position to know what specific requirements are necessary to protect the utility's system and ensure the utility's ability to provide reliable power. The Parties' Proposed Framework, at Section III.B.4.c., allows interested parties an opportunity to

comment on the draft RFP and proposed contract. Furthermore, in Section III.C.4, the Parties' Proposed Framework provides bidders with the opportunity to request exceptions to the proposed contract as part of their bids.

e.[sic] Should the Commission review nonstandard PPA terms prior to the utility including the PPA in the RFP?

RESPONSE:

No, for the same reason that the Commission should not approve the PPA prior to it being included in the RFP (see response to Commission Question C.2.d. above). A proposed contract (with all terms) would accompany the RFP package that each electric utility company submits for review. The Parties' Proposed Framework anticipates (see Section III.B.4.f) that the Commission would review a proposed RFP, including all terms of a proposed contract. There is no need for the Commission to address individual contract terms, be they "standard" or "nonstandard," in the RFP process unless such terms give rise to issues that the Commission determines must be resolved before the RFP proceeds. To do otherwise runs the risk of precipitating a considerable amount of unnecessary regulatory process, which could waste Commission and stakeholder resources.

f.[sic] What procedures should the Commission require to limit appropriately the time required for Commission approval?

- (1) informal meeting with Commission or staff during the development process
- (2) Commission-imposed schedule for submittal of utility drafts, parties' comments, IE reports and Commission approval
- (3) Other?

RESPONSE:

As provided for in Section III.B. of the Parties' Proposed Framework, the Commission would have an opportunity to review the draft RFP, which includes the proposed PPA, participate in technical meetings to discuss the RFP, review comments provided by interested parties, and review the final proposed RFP. There is, however, no formal approval required for the proposed PPA to be included in the RFP for the reasons set forth in response to Commission Questions II.C.2.d. and II.C.2.e. above.

Furthermore, the Consumer Advocate anticipates that, as a general matter the Commission would: (a) review and approve the timing, amount (e.g., MWs) and type of resources to be procured (as part of its approval of a proposed IRP), (b) review the RFP that would be used to solicit specific resources, and (c) review and approve the contract that results from a competitive solicitation process. The Consumer Advocate emphasizes that it is critical to the successful implementation of competitive bidding that the Commission address each of the above in a timely manner. The commercial transactions that are the focus of competitive bidding

processes likely will require a steady progression from identification of need, to RFP issuance to contract finalization.

The first area that the Consumer Advocate addresses is the Commission's review of IRP filings. The Consumer Advocate would encourage the Commission to consider strategies to enable it to resolve concerns with the utility's IRPs that have been filed for approval on a timely basis. The various recommendations regarding improvements to the IRP process, as contained in the Consumer Advocate's Initial SOP (at 51-54), are intended to enhance the ability of stakeholders to participate effectively in IRP processes. With better information available to stakeholders in the early stages of IRP process, the potential to resolve differences are heightened, which could lead to expedited review and approval by the Commission. Note that the Consumer Advocate's recommendations for improving the timing of IRP cycles are contained in its Initial SOP (at 53-54). In addition, the Consumer Advocate would recommend that the Commission participate on an informal basis (e.g., through meetings, and otherwise) to the extent that the Commission deems appropriate to the circumstances. In any event, the Commission should make every effort to resolve IRP filings in a timely manner.

The second area that the Consumer Advocate addresses is the Commission's review of proposed RFPs. As described in

Section III.B.4. of the Parties' Proposed Framework, an RFP is automatically released for issuance if the Commission has not acted on within 30 days of its being filed for review. The Commission should treat each filed RFP on a case-by-case basis. RFP designs that have stakeholder support likely can be addressed more expeditiously than those that are controversial.

The third area that the Consumer Advocate addresses is the Commission's review and approval of proposed PPAs. The Commission has experience in reviewing such contracts with third-party suppliers. The Consumer Advocate does not see necessary changes to the process, but emphasize that the success of competitive bidding processes will hinge on the Commission's ability to approve (as appropriate) such contracts in a timely manner. It is the nature of these commercial transactions that bidders can be expected to extend offers to utilities that will be open for only limited amounts of time. The Commission should anticipate that it will have to act quickly on contract approvals. The Commission should avail itself of opportunities to accelerate its contract reviews (e.g., informal discussions with an independent evaluator might yield benefits, where such discussions can be engaged without undermining the integrity of Commission review processes).

The Parties' Proposed Framework anticipates that the Commission will need to establish review processes that respect the prompt decisions that occasionally might be needed to enable commercial transactions to occur (see, e.g., Section II.B.4 of the Parties' Proposed Framework). The Parties' Proposed Framework anticipates that a utility would be free to issue an RFP that has been submitted to the Commission for review, if it has not been directed to do otherwise within 30 days of having filed the RFP.

3. Content of PPA

What generic features of a PPA should the Commission require the utility to develop, and obtain approval of, prior to a competitive procurement process?

- a. Definitions
- b. Pricing and payment schedule
- c. Quantity
- d. Duration
- e. Conditions precedent
- f. Milestones
- g. Interconnection process
- h. Force Majeure
- i. Credit, security and insurance
- j. Construction approval and dispatch rights
- k. Regulatory out
- l. Dispute resolution
- m. Defaults
 - (1) developer inability to execute PPA after selection
 - (2) development delays
 - (3) generator nonperformance
 - (4) other
- n. Remedies
 - (1) forfeiture of security deposit
 - (2) liquidated damages
 - (3) utility ownership rights
 - (4) other

RESPONSE:

As explained in response to Commission Question II.C.2.b. the Commission should not require a utility to develop and obtain approval of a specific, generic set features in contracts that a utility would propose to award to winning bidders. Rather, at Section III.C. of the Parties' Proposed Framework, guidance as to the types of provisions that would be included in a PPA or other contract is provided, but the guidance is not prescriptive.

The features described above are fairly standard components of power purchase agreements. As such, the Consumer Advocate would anticipate that (a) RFPs routinely would

include provisions to address many of the listed items, and (b) the language of at least some of these provisions might be repeated from one RFP to the next. However, the Consumer Advocate recommends against Commission requirements for a generic set of PPA features. Commission efforts in this regard would not be particularly illuminating in that there already exists a long history of PPAs between independent suppliers and utilities, as has developed over the years since PURPA was enacted. Many persons have expertise in this area and will have a clear view of the provisions that should be included to enable these commercial transactions (i.e., as associated with various types of power generation facilities) to proceed under proper terms.

Certainly, the Commission should review proposed RFPs to ensure that they include reasonable definitions, pricing and payment schedules, specification of quantities to be purchased, etc. However, the Commission's review process should be open to comments on a wide range of RFP "features" that might extend well beyond the list presented here. Rather than attempt to identify a list of features that must be addressed, the Commission should simply establish that it will routinely review RFPs, and that it will remain open to comments on the reasonableness of the range and language content of RFP provisions.

4. Negotiations and dispute resolution
 - a. Should the Commission require the RFP to state that a bid binds the bidder if accepted by the utility?

RESPONSE:

No, as provided for in Section III.G. of the Parties' Proposed Framework, there may be opportunities to negotiate price and non-price terms to enhance the value of the contract for the bidder, the utility and its ratepayers. Thus, the Commission should not require RFPs to state that a bid binds the bidder if accepted by the utility.

The Consumer Advocate anticipates that, as a general matter, the electric utility companies and their ratepayers would benefit if the bids received through RFP processes are binding. This would help ensure that only "serious" bids are advanced, so as to avoid the risk of wasted time on those that are not. It also would tend to help secure for ratepayers the benefits of good proposals. Therefore, any steps that the utility reasonably might take to ensure that bids are binding on the bidder would be desirable.

However, as a practical matter, it may be very difficult to in fact "bind" bidders under many circumstances. For example, many of the power generation facilities that have been developed across the last decade have been done by single purpose, limited liability corporations. Such entities might cease to exist once they determine that their proposals will not be pursued, or cannot be pursued under terms that they would view as acceptable.

Moreover, the Consumer Advocate would expect that utilities will take reasonable steps in RFP designs (through security provisions, for example) to ensure that bidders, in fact, adhere to commitments in their proposals. Thus, the Consumer Advocate recommends that the Commission simply state its expectation that the RFPs that Hawaii's electric utility companies develop will be consistent with industry standards, and as such should be constructed in a way that reasonably safeguards the utility's and its ratepayers' interests.

- b. In responding to an RFP, should bidders have an opportunity to propose amendments to a model PPA?

RESPONSE:

Yes, as provided for in Section III.C.4. of the Parties' Proposed Framework, to the extent permitted by the RFP, bidders may request exceptions to the proposed contracts as part of their bids. The utility shall have the option of accepting or rejecting the requested exceptions. As a general matter, utilities always should be open to opportunities to improve their resource base (i.e., from cost and/or performance standpoints). However, limitations to PPA amendments are necessary for practical reasons. Preserving the integrity of RFP processes will require that proposed amendments do not dramatically alter the nature of what is being procured by a utility, otherwise other bidders rightfully might claim that they deserve a chance to submit proposals to what might be, in essence, a new set of solicitation requirements.

One common approach for allowing bidders the opportunity to amend PPAs with a minimum of disruption to a solicitation process is for the utility to circulate a draft PPA for comment in advance of RFP issuance. This approach, as proposed for in Section III.B. of the Parties' Proposed Framework, allows potential problems in a draft PPA to be identified and also allows bidders an opportunity to introduce changes.

However, because bidders will, from time to time, propose even uninvited amendments, the utility must be prepared to deal with them. Clearly, a utility should not accept proposed amendments that are contrary to its needs (and, more generally, the public interest). If, by contrast, a bidder proposes a contract amendment that offers clear benefits to the utility and its ratepayers, such proposal should receive serious consideration. In considering proposed contract amendments, the utility would have to address (among other things) whether acceptance of the proposed amendment would unduly compromise the integrity of its RFP process. Ideally, the degree to which the utility might be willing to consider proposed contract amendments would be addressed in the RFP itself. See, e.g., Consumer Advocate response to HREA-CA-FIR-15.

- c. Should the Commission require the RFP to state that post-selection negotiations are permissible, but if not concluded within 60 days after selection will be resolved by the Commission based on written submissions only, pursuant to expedited procedures determined by the Commission at that time?

RESPONSE:

No, although Section III.G.1. of the Parties' Proposed Framework allows for opportunities to negotiate price and non-price terms to enhance the value of the contract for the bidder, the utility and its ratepayers, the Commission should not impose generic requirements of this type suggested in this question. This suggested approach is overly prescriptive, and unlikely to yield satisfactory results in many cases. For example, suppose contract negotiations of a PPA amendment that is highly beneficial to the utility and its ratepayers is not concluded until the 61st day, and the bidder is able to keep "open" its bid for only seven more days. The time required to conduct written submission may be highly problematic, whereas a hearing with oral comments on day 65 may be exactly what is needed. Problems also might arise if the procurement is necessarily on a "fast track," such that all but very minor modifications to a proposed RFP could adversely affect the public interest.

The Consumer Advocate recommends that each utility should have the flexibility to respond to proposed contract amendments on case-by-case basis. Any such response should be in keeping with RFP provisions that the utility proposes in

anticipation of proposed contract amendments, which in turn should be consistent with other elements of its RFP. Some basic preparations of this nature should reasonably position the utility to effectively address any requests for modifications to proposed contract terms. Generic Commission requirements are unlikely to improve the overall results of contract negotiations. See also the Consumer Advocate's response to the preceding Commission question.

d. Should the Commission require competitive negotiations among short-listed bidders, subject to dispute resolution?

RESPONSE:

No, the Commission should not seek to prescribe an approach. Rather, it should allow each utility to select an approach to each competitive solicitation that is appropriate to its needs and consider each utility's design when it reviews the final proposed RFPs.

There are two basic approaches to competitive bidding. The first would have the utility issue an RFP, then simply evaluate bids received and declare a winner (or winners). The second would have the utility evaluate bids received and then identify a short-list of bidders that would be candidates for subsequent negotiations. An RFP winner (or winners) likely would be declared after the negotiations had run their course. The first approach can be effective when the "product" being procured is relatively simple, such that a single iteration (i.e., in solicitation and responses) is

likely to provide sufficient information to the utility to allow an effective choice of winner to be made. The second is better suited to solicitations in which the "product" being procured is complex, as is often the case where generating unit procurements are concerned. Here, careful communications may be necessary to establish rights and obligations on both sides of the transaction.

- e. Concerning negotiations between the winning bidder and the utility, what forms of dispute resolution should the Commission allow or require?

RESPONSE:

As provided for in Section IV. of the Parties' Proposed Framework, the Commission will serve as an arbiter of last resort, after the utility, independent observer, and bidders have attempted to resolve any dispute or pending issue. The Commission should encourage affected parties to work cooperatively to resolve any dispute or pending issue, perhaps with the assistance of an independent observer. The utility may also conduct informational meetings with the Commission and Consumer Advocate to keep each apprised of issues that arise between or among the parties.

In this regard, the Consumer Advocate anticipates that the Commission may (depending on circumstances): (1) request the affected parties to attempt to resolve their differences themselves through negotiations; (2) rely on facilitation and mediation; (3) engage in informal discussions with Commission staff or with

the Commission; and (4) initiating formal hearing processes. The Commission should anticipate that it will have to resolve disputes that do not fall under the jurisdiction of other government authorities. The court system, for example, may be the necessary venue for disputes related to the contract between the utility and a winning bidder. See Consumer Advocate response to HECO/CA-FIR-25.

D. Selection Process

Regarding the choice between "open" and "closed" bidding, should the Commission --

- a. prohibit "open" bidding and require "closed" bidding?
- b. Require "open" bidding and prohibit "closed" bidding?
- c. Leave the choice with the utility?

RESPONSE:

As noted by the provisions in Section III.H.3. of the Parties' Proposed Framework, the choice should be left to the utility, although it is anticipated that closed bidding processes will typically be employed. The Commission should expect that each utility will design its RFP according to industry standards with the objective of bringing maximum benefits to itself and its ratepayers. The utility's proposed RFP would be subject to review by the Commission, at which time interested parties would have opportunity to comment on the efficacy of the utility's proposal.

E. What Time Frame Should Apply to the Competitive Bid Process?

1. Should competitive bidding rules or framework include deadlines for the completion of each stage in the process?

RESPONSE:

No, the Commission should not seek to prescribe deadlines for each stage of the competitive bidding processes. The ideal timelines for various competitive solicitations will be highly dependent of a range of factors related to the specific circumstances of the utility and its resource needs. As such, the Consumer Advocate sees little to be gained (and potential harms) in attempting to prescribe solicitation timelines. For example, a utility that seeks to solicit generating capacity to address an unanticipated but emerging capacity deficiency may need to conduct an abbreviated RFP process on an expedited schedule. By contrast, a utility seeking to identify the resources that it might seek to implement at some future date (e.g., five years later) to ensure that its RPS is met in full, or simply as a possible hedge (if the price is right) against higher-than-anticipated load growth, might prefer to conduct an RFP according to an attenuated schedule (i.e., because it has the luxury of acting more deliberately).

The Commission should expect that each utility will design its RFP according to industry standards with the objective of bringing maximum benefits to itself and its ratepayers. Furthermore, as provided for in Section III.B. of the Parties' Proposed Framework, the utility's proposed RFP would be subject

to review by the Commission, and interested parties will have an opportunity to comment on the utility's proposal, including the reasonableness of any proposed timeline.

2. Should these deadlines apply to Commission approvals as well as to utility and bidder actions?

RESPONSE:

The Parties' Proposed Framework includes no deadlines for the completion of each stage of a competitive bid process because the time that may be required will differ depending on the facts and circumstances and the issues, if any, to be addressed. As discussed in the response to Commission Question II.C.g. above, however, there likely will be benefits to the Commission's making clear that it will review proposed IRPs, RFPs, and resultant PPA contracts and resolve concerns with any of the above in an expeditious and timely manner. While there may be solicitation processes for which delay by the Commission in addressing a proposed RFP or PPA would not be problematic, the Commission should anticipate that the realities of commercial transactions will generally dictate that time will be of the essence.

3. What would be reasonable deadlines for each step in the competitive bidding process?

RESPONSE:

As stated in response to the preceding question, there is no generic time frame to complete each step of the competitive bidding

process because the timelines will depend on the specific circumstances of each solicitation. As a result, the Parties' Proposed Framework does not include deadlines for the completion of each stage of a competitive bid process.

III. Assure Even-Handed Competition Between Utility and Independent Generators

A. Utility Participation as Generation Competitor

1. Does the utility's service obligation require it to - -
 - a. determine the need for new resources
 - b. validate each bidder's ability to serve
 - c. determine the operating flexibility necessary for a generating unit to fit reliably and economically into the utility's generation portfolio
 - d. determine the maintenance scheduling necessary for a generating unit to fit reliably and economically into the utility's generation portfolio
 - e. determine the interconnection facilities and transmission upgrades necessary to accommodate new generation
 - f. offer a self-build option in any competitive bid process
 - g. manage the RFP process, including
 - (1) designing the RFP documents, including the PPA's;
 - (2) establishing evaluation criteria;
 - (3) communicating with bidders;
 - (4) evaluating the bids and selecting the winners;
 - (5) negotiating PPAs

RESPONSE:

The answer to 1.a. through e and g. above is yes. As explained in Section V. of the Parties' Proposed Framework, a utility is not required to offer a self-build option in the competitive bid process. The utility is, however, required develop a Contingency Plan or Parallel Plan if the RFP process results in the selection of a non-utility project to meet a system reliability need or statutory requirement.

The Commission is authorized to require Hawaii's electric utility companies to perform all of the above tasks (i.e., whether or not they are explicitly defined as part of each utility's service obligation under Hawaii Law), in order to meet their service obligations.

The Commission has authority to require utilities to provide reliable service in a reasonable cost manner.¹² Each of subtasks a. through g. identified has a parallel in the utility self-build paradigm. Consider, for example, a utility that is itself building a facility to ensure reliable service in response to load growth on its system. The utility would determine that it has a need for new resources and would determine the nature of the facility that likely would best complement its existing generation portfolio from the standpoints of reliability and economics. The utility might also consider the maintenance requirements of different types of facilities relative to its existing generation portfolio (or perhaps request facility providers to address this matter). The utility also might determine the interconnection and transmission requirements necessary to accommodate a new generation facility, and might consider its "backstop" options in the event that its preferred resource option does not come to fruition. The utility also might determine to issue an RFP to several architect/engineering firms for a turnkey power plant. In conducting the competitive process, the utility might validate each bidder's ability to provide the requested facilities, and generally would manage the RFP process including designing the RFP documents, establishing the evaluation criteria,

¹² HRS § 269-7 for example provides the Commission broad investigative powers to examine the operations of a public utility.

communicating with bidders, evaluating bids and selecting a winner and negotiating a contract for the needed facilities.

In fulfilling its service obligations, the Commission currently would expect the utility to perform these functions in a prudent manner, in keeping with established practices in the power industry. To the extent any party could demonstrate that a utility had not pursued the lowest reasonable cost resources or that imprudent action in any of these identified subtasks had adversely affected costs, the Commission could hold the utility responsible and/or require corrective action.

The only difference between the traditional interpretation of a utility's service obligations and the approach that the Consumer Advocate recommends lies in whether the Commission can formally require that markets accessible through competitive bidding processes must be considered as a source of "least cost" options. The Consumer Advocate concludes that competitive markets are a necessary part of the lowest reasonable cost approach. Therefore, all subtasks a. through g. are within the Commission's purview and can be recognized as part of an electric utility's service obligation.

2. Utility self-build option
 - a. For each resource need, should the Commission require the utility to present a self-build option?

RESPONSE:

No, as provided for in Section V of the Parties' Proposed Framework, the Commission should not require the utility to present a self-build option for each resource need. Rather, the Parties' Proposed Framework addresses the response of the host utility to various types of resource needs. Furthermore, as explained in the Consumer Advocate's Final Statement of Position (at 33), where a competitive bidding process is not reliability-based (or where no statutory requirement applies), it may be reasonable for a utility to choose not to advance any backstop proposal (or any other project proposal) to address its identified need. For example, a utility might identify a need for peaking capacity some years hence. If one assumes that a peaking facility can be sited and built in substantially less than the available time, one can envision that the utility might determine to "test the market" well in advance of the time at which it would have to make a commitment to meet the need date, in order to procure qualified resources that may be bid below a target price (for example).

Under such scenario, the lack of a self-build option would not be problematic – i.e., at least not until the time at which a self-build option would have to be initiated in order to prevent a reliability deficiency (or failure to meet a statutory requirement). Where such

a risk presents itself, prudent planning likely would require that a self-build option be advanced.

Another example might involve a utility that "needs" additional forms of low cost energy and/or a hedge against rising oil prices. That utility might issue an RFP with its existing supply portfolio (i.e., and no self-build option) serving as the alternative to be pursued if bidders do not offer attractive projects.

- b. Assume that for each resource need, the Commission will require the utility to present a self-build option. Which of the following choices are appropriate role for the self-build option?
 - (1) a bid to be evaluated like any other bid, submitted confidentially one day ahead of deadline

RESPONSE:

Yes, as provided for in Section III.G.8.b., of the Parties' Proposed Framework, where a utility or its affiliate is seeking to advance a resource proposal, including the utility self-build option, the submission should be made to the Commission one day in advance of receipt of other bids, and provide substantially the same information in its proposal as other bidders, and the utility should develop and follow a Code of conduct and may implement appropriate confidentiality agreement prior to issuance of the RFP to guide the follows and responsibilities of utility personnel. The Consumer Advocate believes that requiring the utility to submit information that documents the utility's proposal one day ahead of the bid deadline may be a good, simple, low cost approach that

would help to mitigate self-dealing concerns. See also Consumer Advocate response to HREA-CA-FIR-6.

- (2) backstop proposal, to be utilized only if a winning project fails, regardless of whether the winning project's cost exceeds the backstop's cost

RESPONSE:

The Consumer Advocate is troubled by the fact that, if this approach were to be adopted, a utility might not implement the lowest reasonable cost option to address a generation resource need. This would be problematic because it might ignore the utility's self-build proposal, even if it were the lowest reasonable cost option. As a result, the Parties' Proposed Framework does not anticipate the approach described in this question.

Each utility should seek to identify the "lowest reasonable cost" response to its needs (consistent with the Goal of IRP, set forth in Section II.A. of the Commission's IRP Framework) and implement the "lowest reasonable cost" option regardless of whether it is a utility self-build project or a bid received through an RFP.

In very basic terms, the Consumer Advocate views competitive bidding as an opportunity to "test the markets" to see if another entity can step forward with a project that can better meet (i.e., at lower costs and/or with better performance characteristics) a utility's stated need than the project that the utility would

otherwise pursue. In this context, the utility's "proposal" and its "backstop" to the RFP may well be one in the same. If the utility's proposal/backstop exhibits better cost and consumer risk characteristics (all else being equal) than the best of the competing bids, then the utility's proposal should be selected to go forward.

- (3) a benchmark proposal, announced and described in detail at the time of the RFP, such that a non-utility bid must better the utility's benchmark to be considered

RESPONSE:

The Consumer Advocate anticipates that the term "benchmark" is used here to describe a proposal that is not fully developed, and thus not necessarily the utility's best response to an identified need. The approach described in the Commission's question is also problematic for several reasons. First, it means that a utility might not respond vigorously with a well-considered proposal that represents its best approach to addressing an identified need. While a limited response may be sufficient if the utility is confident that competitive suppliers will offer viable, lower cost projects than could be developed by the utility, this may not always be the case. Therefore, the approach suggests that the utility might not fully respond to its service obligations with "the lowest reasonable cost" project proposals.

Second, and perhaps more pragmatically, to compare bids against a proposal that is not fully developed cannot but invite

problems in bid evaluation processes. An RFP process might take on the appearance of a sham if, for example, shortly after completion of a bidding process a utility that has found its benchmark project to be the “lowest reasonable cost” project learns that it will be considerably more costly than had been anticipated. Ratepayers also may suffer if the utility has by then dismissed other attractive bids (or they have expired).

In short, competitive bidding processes will be best sustained over time if bidders are confident that any utility proposals that they are bidding against are real proposals that represent the best that the utility can do. Such approach will also provide the Commission and Consumer Advocate with assurances that each utility is committed to competitive processes and its responsibility to meet its service obligations with “the lowest reasonable cost” projects. Ratepayers will be the ultimate beneficiaries.

(4) Other

RESPONSE:

The Consumer Advocate is unable to provide a response because it is not clear what circumstances are being considered as “Other.”

- c. Are there any circumstances under which the Commission should exempt the utility from identifying a self-build option?

RESPONSE:

Yes as explained in Section V of the Parties' Proposed Framework, there may be circumstances under which a utility might not be expected to develop a self-build project proposal. A competitive bidding process can proceed without the host utility having identified a self-build option whenever the utility can present evidence to the Commission that demonstrates, with a high degree of confidence, that competitive suppliers will respond to an identified need (the results of prior RFPs of similar type, or Requests For Statement of Interest might satisfy this requirement). Alternately, an RFP might be offered without a self-build option if the utility can demonstrate that the RFP can fail without any substantial adverse consequences to the utility or its ratepayers. Here, an example might take the form of an RFP to "test the market" to see if cost-effective replacements to a viable, existing generating facility might be available from the market. Also see the response to Commission Question III.A.2.a, above.

- d. Structural separation issues
- (1) Assume that (a) the Commission will mandate that the utility offer a self-build option; (b) the Commission will require the self-build option to come from the utility rather than a utility affiliate; and (c) an independent observer will monitor, and certify the appropriateness of, each stage in the competitive bidding process.
 - (2) Should the Commission require an arms-length relationship between (a) the utility staff running the competitive bid process and (b) the utility staff preparing the self-build option?

RESPONSE:

Yes, as provided for in Section III.H. of the Parties' Proposed Framework, the competitive bidding process should be fair and equitable to all bidders. There should be safeguards in place when the host electric utility is allowed to submit proposals in response to needs identified in its RFP, and/or to consider qualified bids submitted by its affiliates. Section III.H.4. of the Parties' Proposed Framework sets forth the proposed mechanisms. Furthermore, procedures should be developed by the utility prior to initiation of the bidding process to define the roles of the members of its various project teams, to outline communication processes with bidders, and to address confidentiality of the information submitted by bidders as provided for in Section III.H.5. of the Parties' Proposed Framework. Finally, in addition to retaining an independent monitor as provided for in Section III.H.7, of the Parties' Proposed Framework, the utility will take additional steps to avoid self-dealing in both fact and perception as provided for in Section III.H.8. of the Parties' Proposed Framework.

The Consumer Advocate notes that the challenges to maintaining an arms-length transaction will lie in applying these concepts at a practical level. For example, some utilities may be capable of establishing that the staff implementing an RFP would have minimum contact with the staff that would develop a self-build option. For smaller utilities with small staffs and individuals with multiple responsibilities, the separation of staff may be infeasible.

In short, some strategies to mitigate self-dealing likely can be pursued generically (see subpart (3) below). Others will have to be considered on a case-by-case basis. Certainly, the presence of an independent observer can help mitigate self-dealing concerns, depending on its specific assigned role. Other measures to ensure arm's-length transactions will be essential to the viability of particular competitive bidding processes. Accordingly, the Consumer Advocate recommends that package of measures to mitigate self-dealing be proposed by utilities through the design processes for each RFP, and considered by the Commission as part of its review. See Consumer Advocate response to HREA-CA-FIR-6(4).

- (3) Assume the Commission will require an arms-length relationship between (a) the utility staff running the competitive bid process and (b) the utility staff preparing the self-build option. What structural measures are necessary to create this arms-length relationship? Consider all of the following, plus other appropriate measures:
- (a) There must be a written code of conduct signed by all employees involved, which code assures that there is no special treatment or advantage granted to the self-build project.
 - (b) The self-build bid team and RFP evaluation team must be in different buildings, with neither having access to the others building
 - (c) There is a prohibition on any oral or written contacts during the RFP/bid evaluation process between the utility's employees preparing the self-build option and the utility's employees on the bid evaluation team, other than contacts authorized by the Code of Conduct and the RFP.
 - (d) All bid information must be maintained on a separate computer system to which no employee of the self-build team has access
 - (e) Any requests for clarification of the RFP be in writing, with the request and the utility's response immediately posted to the RFP website and served by email on every other party that has indicated an interest in responding to the RFP.
 - (f) A company officer must have explicit, written authority and obligation to enforce the code of conduct. Such officer shall certify, by affidavit, Code compliance by all employees.

RESPONSE:

Depending on circumstances, some or all of the above actions might be appropriate to ensuring an arms-length transaction. See also the examples identified in Section III.H.8. of the Parties' Proposed Framework.

It is difficult, however, to prescribe all requirements that may be necessary to mitigate self-dealing concerns because the specific

measures will depend on the facts and circumstances of each situation. Thus, self-dealing mitigation measures should be developed by utilities through RFP design processes, and considered by the Commission as it reviews draft and final proposed RFPs. In that review, the steps necessary to mitigate self-dealing can be addressed on a case-by-case basis, taking into consideration the comments that may be offered by interested parties to the draft RFPs and the information disseminated at the technical meetings to be held on the draft RFPs. In addition, some measures could be prohibitively costly, and thus may be impractical for certain solicitations. As noted in Section III.H.1. of the Party's Proposed Framework, at no time should the issue of fairness to bidders create an undue burden on ratepayers or the host electric utility's shareholders.

3. Utility affiliate participation
 - a. Assume the Commission will not require the utility to use an affiliate for the utility's self-build obligation. These questions explore the extent to which a utility affiliate may participate in the bidding as a third-party competitor.
 - b. What are the limits, if any, on the Commission's authority to permit, prohibit or condition a utility affiliate's participation in a competitive bid?

RESPONSE: Section I.B.3. of the Parties' Proposed Framework states that a utility and its affiliates should not be unduly restricted from participation in any supply-side RFP. Furthermore, it would appear that the Commission does not have jurisdiction over the actions of

an entity that is not subject to the Commission's regulatory oversight. The Commission, can, however, investigate those actions under the provisions of HRS § 269-7 and impose conditions on the utility to ensure that the actions of the affiliate do not harm the utility's ratepayers. For example, where common costs are incurred on behalf of the utility and its non-regulated affiliate, the Commission can review the allocation factors to determine whether the costs that are allocated to the utility are unreasonable and result in the utility's ratepayers cross-subsidizing the operations of the non-regulated utility.

- c. Assume the Commission has legal authority to permit, prohibit or condition a utility affiliate's participation.
- d. Should the Commission permit a utility affiliate to bid?

RESPONSE:

Yes; as stated in Section I.B.3. of the Parties' Proposed Framework, the Commission should not unduly restrict a utility or its affiliate from participating in any supply-side RFP. When a utility or its affiliates participate in the RFP, Section III.H. of the Parties' Proposed sets forth the conditions that are intended to avoid self-dealing in both fact and perception.

- e. Assume the Commission will permit a utility affiliate to bid, provided there is a code of conduct. What elements should the code contain?

RESPONSE:

Section III.H.8.b. of the Parties' Proposed Framework anticipates that codes of conduct will be developed, but it leaves to the utility the content of such code. Furthermore, the Consumer Advocate has not performed an extensive review of codes of conduct, but can offer the following recommendations as examples of what can be contained in such document.

First, the provisions of such a code of conduct that would be relevant to a particular solicitation likely would depend on the nature of the solicitation being conducted, and the nature of the relationship between the utility and the affiliate. For example, the code of conduct that applies to a situation in which the utility and affiliate have separate offices on different islands may differ considerably from a situation in which individuals (e.g., resource planners) serve both the utility and its affiliate from the same office. The Consumer Advocate recommends that identification of which provisions of a code of conduct would be applicable to a particular RFP would be resolved during the design of that RFP.

Second, the Consumer Advocate has identified several codes of conduct that offer generic examples of the types of code provisions that the Commission could adopt. Pennsylvania's code of conduct has been formally adopted. See 52 Pa. Code § 54.122.

The Maryland Public Service Commission also has adopted standards of conduct for affiliate transactions. See Order No. 74038 in Case No. 8747. Affiliate transactions rules also provide a view of the types of limitations necessary to ensure a “level playing field” where a utility is allowed to participate in its own competitive solicitation. Georgia’s rules to ensure fair competition in competitive bidding processes are contained in its General Rules, Chapter 515. The Arkansas Public Service Commission, for example, has established affiliate transactions rules.¹³

The Federal Energy Regulatory Commission (“FERC”) has no established code of conduct. However, the FERC has issued a set of guidelines that are intended to ensure that affiliates gain no undue advantage over non-affiliates in competitive processes (see Consumer Advocate’s Initial SOP at 68; Response to PUC-IR-23). The FERC provides a discussion of the “five core requirements” that it typically applies to govern the relationship between a power supplier and its affiliated electric company:

- (a) To the maximum extent practical, the employees of [Applicant, i.e., a power supplier] will operate separately from the employees of the [Traditional electric utility];
- (b) All market information shared between [Traditional electric utility] will be disclosed simultaneously to the public. This

¹³ See www.apscservices.info/Rules/affiliate_transaction_rules_electric.pdf.

includes all market information, including but not limited to, any communication concerning power or transmission business, present or future, positive or negative, concrete or potential. Shared employees in a support role are not bound by this provision, but may not serve as an improper conduit of information to non-support personnel;

- i. [Applicant] will offer [Traditional Electric Utility's] power first;
- ii. The arrangement between [Applicant] and [Traditional Electric Utility] is non-exclusive; and
- iii. [Applicant] will not accept any fees in conjunction with any Brokering services it performs for [Traditional Electric Utility].¹⁴

- f. What changes are necessary, in the relationship between the affiliate and the HECO utilities, to make the relationship arm's-length?

RESPONSE:

There are no changes short of preventing the sharing of any common resources to support both the utility and the non-regulated affiliate. This requirement may, however, be unreasonable as it will prevent the utility and non-regulate affiliate from benefiting from the perceived economies of scale expected to be derived from such

¹⁴ See www.ferc.gov/legal/maj-ord-reg/land-docs/order2004/resources/codes-conduct.pdf.

sharing arrangements. In addition, it is very likely that entities submitting a bid in response to an RFP also engage in the sharing of resources with a parent or affiliate. In short, there always will be concerns when common resources are shared between entities and one of the entities is a public utility subject to rate regulation by a Commission.

The question then is whether a sufficient degree of separation between the HECO utilities and an affiliate can be achieved to allow competitive bidding transactions to proceed. The Consumer Advocate contends that the procedures set forth in Section III.H. of the Parties' Proposed Framework attempt to provide adequate protections that can be put in place to allow affiliates to participate in utility RFPs. The use of an independent observer likely would be an important step in the right direction. Furthermore, the Consumer Advocate recommends that any additional changes required to ensure the arms-length relationship between a utility and its affiliate ultimately be addressed on a case-by-case basis in the design of the RFP.

4. Access to generating sites
 - a. Where the Commission has determined that a particular site has unique attributes that are competitively significant, such that denial of bidder access will impede effective competition, should the Commission require the utility to make its undeveloped generation sites available to bidders?

RESPONSE:

No, there should be no requirement by the Commission to make a utility-owned site available, as provided for in Section II.A.3 and II.A.4 of the Parties' Proposed Framework. Just because a party has site control, however, does not mean that competitive bidding cannot occur. In the situation posed, the utility could seek competitive bids to construct, operate and own a facility. However, there also may be circumstances under which the benefits of making the site available to bidders might be limited. Therefore, as provided in Section II.A.4. of the Parties' Proposed Framework, the utility should be allowed to demonstrate on a case-by-case basis, the reasons why a particular undeveloped site should not be made available to bidders.

- b. Assume the Commission requires the utility to make its undeveloped generation sites available to bidders.
- (1) Should the price be book cost or market value?
 - (2) If market value, assume the Commission finds that negotiations between the utility and the bidder will not be productive due to the utility's control of a competitively significant site. What will be the most efficient process for determining the price?
 - (3) If market value, what should be done with the gain if market value exceeds book?

RESPONSE:

In the above situation, it is not clear what is meant by "make available" (i.e., whether the intent is to sell versus lease the site). If a lease is used, then the site would continue to be owned by the utility. Charges for lease of the site will ultimately need to be reflected in the contract costs from the project to the utility. So, any revenue from a site lease will then be offset by such contract costs. The offsetting costs and revenues presumably would be recognized in rates, and should be recognized in bid evaluation processes, so neither the utility nor its customers would be affected by the magnitude of the lease. However, bidders likely would find a low cost lease more attractive because it could allow them to better compete with projects at non-utility sites. So in a site lease situation, the Consumer Advocate would seek an approach by which a utility would lease such a site at relatively nominal costs.

On the other hand, if a sale were to occur, the transfer should occur at market value to capture the long-term value (e.g., post PPA) of the site. Appraisals from one or more qualified professionals may be required to establish a price. The gain, if any,

on the sale of the site will be treated in the same manner as the gain realized from the sale of utility property that is no longer needed for the provision of the utility service. That is, the gain will be apportioned "above" and "below the line" based on the number of years that the property was reflected in a utility's rate base for rate setting purposes. The period over which the gain is to be amortized will depend on the amount of the gain.

- (4) What actions should the Commission take to minimize or eliminate the following problems?
 - (a) reduction in the utility's ability to carry out parallel planning
 - (b) risk that the utility would incur liability risk associated with the bidder's option
 - (c) other

RESPONSE:

It is not possible to answer these questions in the abstract as there may be a range of foreseeable benefits, costs and risks associated with allowing third-party bidders to have access to a utility's undeveloped generation sites, depending on the specific facts of each situation. For example, there may be situations under which release of a site would have no appreciable effect on the utility's self-build (i.e., backstop or parallel) plans. This may be the case if a utility's needs can be met through facilities sited at any of a number of its sites, and otherwise. Conversely, the release of a site that represents the utility's only feasible option for resolving a

notable reliability need may be problematic. Clearly, the degree to which such problem might occur would be highly situation-specific.

Similarly, mitigating the risk that the utility would incur liability risks associated with the release of its site also would be highly situation-specific. Such risks might be affected by the nature of the facility to be developed on the site, among other things.

The actions that the Commission should take to mitigate problems are difficult to prescribe without knowing the specific facts of the circumstance under which the problem arose. Recognizing this challenge, the Parties' Proposed Framework anticipates that a range of factors may need to be considered in order to evaluate whether utility-owned or controlled sites should be offered to bidders (see Section II.A.4 of the Parties' Proposed Framework). Thus, although the Parties' Proposed Framework does not address the specific steps to address problems in all of the above potential situations set forth in the Commission's question, the Parties' Proposed Framework does not preclude the inclusion of steps deemed necessary to address any potential problems. The Commission should expect each utility to be attuned to potential liabilities in the design and implementation of its RFP and also expect each utility to take reasonable steps to identify risks and implement risk mitigation measures that are appropriate to its circumstances. As noted in Section III.B. of the Parties' Proposed

Framework, the Commission will be able to review the utility's proposed draft RFP, attend technical meetings to explain the draft RFP, review comments offered by interested parties, and finally review the final proposed RFP prior to issuance. If the Commission determines that there are potential problems that have not been adequately addressed in the design of the RFP, the Commission can take appropriate action to remedy the concerns noted.

- (5) Should competitive bidding of utility sites be limited to turnkey projects?

RESPONSE:

No. the release of utility sites to third-parties should not occur only when a turnkey project is anticipated. At times, providing utility sites to third-parties would result in the development of projects that may offer ratepayer benefits in terms of cost of capital and construction and operating risk. Each step in a project offers opportunities for competitive comparison. In other words, which party can best construct, finance and/or operate a project may vary depending on the specific facts of each circumstance. In some cases, a bundled delivery of these functions may be best; in others, separate performance of each function may be preferable. As a result, the Parties' Proposed Framework does not limit the release of utility-owned or controlled sites to competitive solicitations to turnkey projects.

5. Access to transmission
 - a. Should the Commission require a written policy on procedures for interconnection and transmission upgrades, to ensure comparable treatment among bidders, and between independent bidders and the utility's self-build option?

RESPONSE:

Yes. The Commission should require the utility to make available to interested persons a statement containing basic information on interconnection and transmission upgrades. This statement should establish a foundation for understanding the utility's approach to such matters, and will help ensure comparable treatment among third-party bidders, and between third-party bidders and a utility advancing its self-build option.

Moreover, the Commission should expect that each proposed RFP for generating resources will include a clear statement describing procedures and timing for interconnection and transmission upgrades. The Consumer Advocate assumes the utilities would anticipate such requirements, and that such matters can be resolved in the Commission's reviews of proposed RFPs. The Consumer Advocate notes that the FERC has pursued initiatives to establish interconnection standards for various types of generators, which may inform similar efforts in Hawaii. See the FERC website at www.ferc.gov/industries/electric/indus-act/gi.asp.

The Parties' Proposed Framework establishes that transmission costs and system impacts would be addressed in the bid evaluation process (see Section III.E.6). Such information

would be important in a variety of resource acquisition processes (i.e., beyond competitive bidding). Accordingly, the Consumer Advocate recommends that the Commission establish such requirements more broadly (i.e., outside of the Parties' Proposed Framework).

- b. Assume the Commission will require a written policy on procedures for interconnection and transmission upgrades, to ensure comparable treatment among bidders, and between independent bidders and the utility's self-build option. What elements should the policy contain? Consider:
- (1) advance identification of zones reflecting different levels of interconnection cost and transmission upgrade cost
 - (2) a formal queuing process that ensures nondiscriminatory treatment of all requests for interconnection, upgrades and studies there of
 - (3) a means of minimizing the cost of studies by bundling different requests into a single study
 - (4) information about capacity, operations, maintenance and expansion plans relating to the transmission and distribution system?
 - (5) other

RESPONSE:

The question addresses "ensuring comparable treatment" – among bidders and between bidders and a utility advancing its self-build option. As framed, the focus appears to be on the evaluation of competing proposals. In this context, ensuring comparable treatment is as simple as (1) ensuring that all bidders and those responsible for preparing a utility's self-build project proposal have access to the same information regarding interconnection requirements and potential transmission upgrades, and

(2) ensuring that bid evaluation criteria are applied in a fair and equal manner (i.e., regardless of whether those proposals are based on sparse or extensive information).

This means that there will be two substantial underlying issues for bidders. First, bidders will want to be provided with an adequate understanding of what will be required of them in connecting to the utility's system (here the Consumer Advocate means, generally, what the equipment requirements will be.) Armed with this information they will be able to frame bids that adequately accommodate the costs of complying with those interconnection requirements. Absent this information, bidders carry a large risk that their bids may be substantially off the mark (either too high or too low) relative to the actual project development costs that they would incur.

Second, bidders will need a clear view of the transmission upgrade costs that might be assigned to them. Once again, their concern will lie with the level of costs that they would need to anticipate in framing their bids. As before, poor information in this regard would lead to misunderstandings regarding the costs that may be assignable to them, which in turn will place bidders at risk for overstating or understating their bid prices.

The issues here are distinct from the equity issues that can arise through the bid evaluation process. For example, if those

framing a utility's self-build proposal have sole access to information that enables them to understand that interconnection costs will be limited, or that locating a facility in a particular location will dramatically reduce transmission system impact costs that would be assignable to that project, then they will enjoy a distinct advantage in the bidding process (largely because bidders' cost uncertainties could cause them to inflate their bid prices). Similarly, "comparable treatment" problems will arise if the bid evaluation scheme is unduly biased (by overstating the transmission system impacts attributable to non-utility bidders, or by understating utility self-build transmission system impacts). Note that ratepayers are at risk to the extent that a utility's bid evaluation scheme does not reflect with some reasonable accuracy the transmission system costs that might be "socialized" through rates under different project proposals at different locations. This is because the utility might, for example, select as the "winner" a project at a location that would never be so selected if the transmission system costs that would be imposed on the utility – and assigned to ratepayers – were not ignored.

Thus, well before bids are due, it will be important that bidders have an idea of the interconnection and transmission system costs that their project(s) might impose, and on how those costs ultimately would be allocated between the bidder and the

utility. The Commission has already provided guidance on this matter in Decision and Order No. 15053 filed in Docket No. 94-0079 on October 4, 1996. Given (1) the sophisticated analysis that occasionally are necessary to resolve such matters and (2) probable RFP timelines, the Consumer Advocate appreciates that precise information on costs and locations may not be available before bid due dates. Therefore, the above Question often may reduce the steps a utility can reasonably be expected to take to assist bidders in understanding potential interconnection and transmission cost impacts.

The Consumer Advocate acknowledges that the "elements" identified in each of subparts (1) through (4) might be important to bidders in at least some circumstances. Advance identification of zones (see subpart (1)) reflecting different identified levels of interconnection and transmission upgrade costs will help bidders in site selection processes and in forming their bids. As is suggested above, such action also can serve ratepayers by helping to ensure that important information of this nature is not ignored in bid evaluation processes. Defining a formal queuing process (see subpart (2)) likely will be important, largely because it will diminish concerns among bidders that their efforts to obtain specific information (which may be unique to specific projects) on interconnection and transmission system costs will be treated in a

non-discriminatory manner. The bundling of requested cost studies (see subpart (3)) may be appreciated as a cost-cutting measure to benefit bidders. Transmission system expansion plans (see subpart (4)) would probably be most useful to non-bidder stakeholders, who could thus be provided with a better view of the longer-term plans for development of the power system, and thus may better appreciate resource decisions that involve selecting among project proposals with differing levels of interconnection and transmission system costs.

The Consumer Advocate offers two further suggestions. First, publication of a fee schedule and characterization of the specific analyses and conclusions to be reached through an interconnection study might be an important supplement to the approach described in subpart (2). Second, placing greater emphasis on the transmission system descriptions that routinely could enhance filings under the IRP Framework may be highly beneficial to potential bidders. (See, e.g., the IRP Framework, Section III.D.1).

- c. What form should the Commission's requirement take?
Consider:
- (1) Commission-issued rules
 - (2) utility tariff
 - (3) Commission-issued framework
 - (4) other

RESPONSE:

The Consumer Advocate recommends the following language reflect the Commission's requirement that: "where applicable, each electric utility company should provide as part of its IRP Plan documentation reasonable guidance and transmission interconnection system feasibility and cost information to bidders. This information may include, for example, a schematic identifying preferred zones for locating generating facilities and foreseeable system costs that might be allocated to bidders within the different zones." Note that the Commission's IRP Framework already provides a suitable foundation for these recommended, routine filings on the state of and plans for a utility's transmission system. See, e.g., IRP Framework Sections III.D.2.b(3) and IV.F.3.

- d. Should interconnection costs (costs necessary to interconnect the generator with the utility's transmission system) be assigned directly to the generator, and therefore not affect cost comparisons among the bids?

RESPONSE:

The Commission has already provided guidance on this matter in Decision and Order No. 15053 filed in Docket No. 94-0079 on October 4, 1996. The bidder should include these costs in its bid to help ensure that project-specific costs are considered in the

evaluation of each bid. This would be consistent with the Framework which stated that "all relevant incremental costs to the electric utility and its ratepayers should be considered" (see Section III.E.6 of the Parties' Proposed Framework).

- e. What treatment should the Commission require for transmission upgrade costs? Consider these possibilities:
- (1) the upgrade would never have been built for utility system purposes, and - -
 - (a) provides no cost or reliability benefit to the utility's customers
 - (b) does provide cost or reliability benefit to the utility's customers
 - (2) upgrade would have been built for utility system purposes, five years later than the IPP in-service date; and, during the five-year wait - -
 - (a) provides no cost or reliability benefit to the utility's customers
 - (b) does provide cost or reliability benefit to the utility's customers

RESPONSE:

The Commission has already provided guidance on this matter in Decision and Order No. 15053 filed in Docket No. 94-0079 on October 4, 1996 already provides guidance on cost responsibility for the above situations. The Commission should require a project proponent to support the costs of transmission system upgrades that provide no cost or reliability benefit to the utility's customers. Conversely, the utility (and thus its customers) should bear the full amount of transmission upgrade costs that are fully needed for economic or reliability purposes. In many instances, transmission upgrades will become necessary to allow new generation projects

(i.e., both utility and non-utility projects) to enter a utility's system, but those upgrades will also bring benefits to the utility's customers. A reasoned approach to cost sharing must be developed.

The has already established a policy that requires that the costs of transmission system improvements be allocated between the utility and project developers as a function of the resultant benefits. The Parties' Proposed Framework establishes that "all relevant incremental costs to the electric utility and its ratepayers should be considered" (see Section III.E.6). It does not address the details of interconnection cost assignments, as such assignment cannot be determined without knowing the specific facts of each situation.

- f. What measures should the Commission employ to ensure that the utility does not discriminate against IPPs in carrying out transmission studies and allocating transmission upgrade costs?
- (1) Should the interconnection and transmission studies involving IPPs be - -
 - (a) performed by an independent entity and
 - (b) be approved by the Commission?
 - (2) If the utility does the study, should the study be - -
 - (a) evaluated by an independent entity and
 - (b) approved by the Commission?

RESPONSE:

The single most important step that the Commission can take is to ensure that a maximum amount of information regarding the utility's transmission system is made available to stakeholders in resource planning processes and qualified bidders in competitive bidding

processes. These parties are the Commission's first line of defense with respect to the concerns identified. It also will be important that, when appropriate, these parties should be allowed access to the assumptions to the planning models that support transmission upgrade studies and the various analyses behind the allocation of transmission system upgrade costs.

The Consumer Advocate would not recommend that an independent entity be required, at this time. The proper conduct of interconnection studies and transmission system studies will require tremendous amounts of information and knowledge that is specific to the utilities. As such, both the practical and cost implications of introducing a third-party may be substantial. This also suggests that the Commission may find it challenging to conduct prospective reviews of likely interconnection and transmission impacts.

Instead, the Consumer Advocate recommends that the Commission rely on Hawaii's electric utilities to take the lead in developing and implementing appropriate transmission system impact studies. Information regarding the state of a utility's transmission system and anticipated transmission expansion projects can be addressed within the context of its IRP review processes. Similarly, where a utility proposes an RFP and advances a method of allocating transmission improvement costs

between a successful bidder and utility ratepayers, the Commission should anticipate the release of at least basic information regarding assumptions, inputs and planning models that support its recommended cost allocations. In many instances, by simply ensuring that proposed RFP documentation contains the anticipated results of transmission impact studies and proposed methods for allocating costs, the Commission can do much to contain opportunities for bias on the part of the utility.

Finally, the Commission should be prepared to address disputes when they arise, and will have to develop strategies for action, accepting that there will be limitations due to the complexities of the transmission impact studies and uncertainties in the process. Depending on circumstances (i.e., where accusations of utility bias are acute, persistent, or where substantial costs are involved), the Consumer Advocate may determine to engage a third-party expert to contribute to the Commission's review.

The Parties' Proposed Framework establishes that an independent observer may be employed to monitor the competitive bidding process (see Section II.C). The review processes encompassed by the Parties' Proposed Framework would allow stakeholders and bidders to present evidence of discriminatory treatment to the Commission (see, e.g., Section III.B.4.c.).

B. Independent Entity Roles

1. When is an independent entity necessary?
 - a. when the utility presents a self-build option?
Question: when, if ever, would the utility not present a self-build option?
 - b. when a utility affiliate is bidding?

RESPONSE:

As noted in Section II.C.1 of the Parties' Proposed Framework, an independent entity should monitor the competitive bidding process and report on the progress and results of the process to the Commission when the utility or its affiliate is seeking to advance a proposal for a need that is identified in the utility's RFP. With regard to the question of when the utility might not present a self-build option above, in response to Commission Question II.A.2 and II.A.3, the Consumer Advocate would distinguish, at least conceptually, between the utility seeking to advance its proposal and one that would prefer to rely on third-party providers to meet a particular need. See Consumer Advocate responses to HREA-CA-FIR-11(2) and HREA-CA-FIR-16.

2. What roles should the independent entity have? Consider:
 - a. administrative roles
 - (1) manage the correspondence between the utility and bidders
 - (2) other

RESPONSE:

The role of the independent observer is set forth in Section II.C. of the Parties' Proposed Framework. The specific tasks of the independent observer will have to be defined on a case-by-case basis (they should be proposed by utility as part of its RFP

documentation based on careful consideration of its specific circumstances). The tasks performed by an independent monitor might be quite limited in some instances. For example, for a small utility conducting an RFP seeking a small increment of power, the independent observer might be asked to perform a few rudimentary reviews, because the costs of securing the services of an independent observer otherwise may be prohibitive (i.e., relative to foreseeable competitive bidding benefits). The independent monitor should be expected to prepare a report to the Commission summarizing its observations.

The Consumer Advocate recommends that the independent entity should not be responsible for administering the RFP (in which it would engage such roles as managing correspondence between the utility and bidders and selecting a winner). There may be several reasons why this may be undesirable. Among them would be the fact that such an intensive effort likely would bring a level of independent entity fees that could overwhelm the benefits of competitive bidding.

- b. advisory roles
- (1) certify to the Commission that each of the following utility proposals was based on a fair process and will promote fair decision making:
 - (a) pre-qualification criteria
 - (b) IRP
 - (c) RFP
 - (d) Model PPA to be attached to the RFP
 - (e) Code of conduct
 - (f) Self-build bid to be included with the RFP
 - (g) Selection criteria
 - (h) Final decision to purchase power or proceed with self-build option
 - (i) other
 - (2) advise the utility on the fairness of utility decision making during, and with respect to, each of the utility actions listed in the preceding question
 - (3) advise the Commission on the fairness of utility decision making during, and with respect to, each of the utility actions listed in the second preceding question
 - (4) resolve disputes that arise during - -
 - (a) the procurement process
 - (b) post-selection negotiations
 - (5) report violations of any procurement rules
 - (6) after the procurement decision, provide the Commission with - -
 - (a) an overall assessment of whether the goals of the RFP were achieved, including solicitation of sufficient competitive bids were received and the results of the RFP were unbiased; and
 - (b) recommendations for improving future competitive bidding processes
 - (7) **Question:** Is an independent entity certification a certification of fairness only, or is it also a certification of prudence?

RESPONSE:

The Commission should prescribe none of these roles. These (i.e., items (1) through (7)) are all services that could be provided by an independent entity and that could improve the quality of the outcome of a competitive bidding process. However, the merits of engaging an independent entity to provide any of these services will

be highly dependent on the nature of the solicitation and the utility's specific circumstances. A large utility that is anticipating procuring a substantial generating facility through competitive bidding may propose that an independent entity be hired to provide many or all of these services. A very small utility on a limited budget may have to get by with an independent entity that merely provides a quick, overall assessment of whether the RFP was fairly conducted (along the lines of item (6)(a)).

As provided for in Section II.C. of the Parties' Proposed Framework, an appropriate role for an independent entity would be as monitor of the utilities performance in implementing the solicitation and reporting on the progress and results to the Commission. Thus, one of the basic responsibilities of the independent observer should be to submit a report to the Commission on its observations regarding the solicitation process (i.e., the range of issues to be addressed by the independent monitor should be consistent with the range of its assigned tasks). In some circumstances, the independent entity could be directed to address the fairness of the solicitation process. A "certification" of fairness from the independent entity might lend support to a Commission finding that an RFP process had been conducted in a manner by which the winning bidder identified was deserved of a contract. In others, it might be asked to present its views on

whether the solicitation had been conducted by the utility in a fair and reasonable manner. A "certification" of prudence from the independent entity might lend support to a Commission finding that the costs incurred during the course of a particular solicitation process were reasonably incurred and thus could be properly recoverable through rates. This latter "certification" might be of value to the Commission, but might be of lesser concern to participants in an RFP process.

- c. decision making roles
 - (1) disqualify bidders
 - (2) require rebidding where there are flaws in the procurement process
 - (3) amend a particular stage of the procurement process to cure flaws
 - (4) determine bid evaluation criteria
 - (5) decide disputes

RESPONSE: Section II.C.1 of the Parties' Proposed Framework describes the roles and specific tasks to be performed by the independent observer. The independent observer may assist with dispute resolution, as per Section IV of the Parties' Proposed Framework. The Consumer Advocate recommends that, at least initially, the Commission should limit the involvement of independent entities to advisory roles. As a conceptual matter, an independent entity could take on a decision-making role, either (1) on behalf of a utility, subject to Commission review, or (2) on behalf of the Commission. However, such action would appear potentially costly where the

independent entity would step in on behalf of the utility in a decision-making capacity (i.e., by virtue of the time that the independent entity would have to spend to be sufficiently informed to make good decisions). Similarly, action by the Commission to transfer its decision-making authority to another party would appear problematic. It is not clear, for example, whether the Commission has the legal authority to do so.

The independent entity also could be asked to assist in the resolution of disputes. While having the independent entity assist with disputes may yield benefits from time to time, the Commission likely would continue to be viewed as an "arbiter of last resort." Note that, here too, there are unresolved legal questions regarding whether the Commission could transfer its authority in this regard to the independent entity (and also questions regarding the costs of engaging such entity in what could be a fairly intensive effort). As such, the Commission likely should anticipate at least some ongoing role in dispute resolution.

3. Who should select the independent entity, and by what process?
Consider:
- a. Commission approves list of candidates, utility selects from the list
 - b. Utility presents approves list of candidates, Commission selects from the list
 - c. Utility and Commission jointly create list of candidates (list created by each proposing a list from which the other may delete names); then - -
 - (1) utility selects from the list
 - (2) Commission selects from the list, or
 - (3) Both utility and Commission approve selection

RESPONSE:

As set forth in Section II.C.3. of the Parties' Proposed Framework, the utility is expected to select the independent observer. The section also describes the possible process for such selection.

4. To whom should the independent entity be contractually accountable -- Commission, utility, or both?
- a. Commission
 - b. utility
 - c. both

RESPONSE:

As stated in Section C.1. of the Parties' Proposed Framework, the independent observer is required to monitor the competitive bidding process when the utility or its affiliate seeks to advance a project proposal in response to a need that is addressed by its RFP. Furthermore, the independent observer is expected to report on the progress and results of the process to the Commission. In many ways this function is similar to the role of an independent auditing firm. Consistent with the approach used for auditors, the Consumer Advocate recommends that the independent entity should be accountable to the utility, which in turn would be accountable to the

Commission. The Consumer Advocate recognizes that the independent entity could be made contractually accountable directly to the Commission (or perhaps the Consumer Advocate). However, this level of involvement would require a greater commitment of government resources that has not yet been shown to be necessary. Should concerns materialize, the Commission would always have the option of changing the proposed process, or hiring its own expert to review the competitive bidding process.

5. Who should pay the costs of the independent entity? Consider:
 - a. Commission, with costs recovered from the utility who then recovers costs from ratepayers
 - b. Utility, who then recovers costs from ratepayers
 - c. Other

RESPONSE:

As stated in Section III.H. of the Parties' Proposed Framework, where the electric utility is responding to its own RFP, or is accepting bids submitted by its affiliates, the utility will take additional steps to avoid self-dealing in both fact and perception. All other costs of the procurement will be borne by the utility, and the Consumer Advocate recommends that the utility be responsible for paying the costs of the independent observer.

For cost recovery purposes, these costs would be treated in the same manner as would other costs of administering the RFP. As such, ratepayers would pay for the costs through the rates charged for the utility service. Ultimately, however, the details of

the level of cost-recovery allowed for rate setting purposes should be resolved in rate proceedings on a case-by-case basis.

C. Commission Roles

1. Which if any of the following roles should the Commission play?
 - a. approve utility proposals on --
 - (1) pre-qualification criteria
 - (2) IRP
 - (3) RFP
 - (4) model PPA to be attached to RFP
 - (5) code of conduct
 - (6) self-build bid to be included with the RFP
 - (7) selection criteria
 - (8) final decision to purchase power from a specific seller or proceed with self-build option
 - b. resolve disputes that arise during --
 - (1) the procurement process
 - (2) post-selection negotiations
 - c. other

RESPONSE:

The role of the Commission is set forth in Section II.B. of the Parties' Proposed Framework. As noted from the discussion contained in that section, competitive bidding would not, in and of itself, dramatically alter the roles that the Commission would play in resource planning and procurement processes. The Commission would continue to review and approve the IRP Plans that set a foundation for resource procurements of all varieties. It also would continue to review and approve any third-party power purchase contracts by which the electric utility companies address their resource needs.

The significant changes would lie in the fact that the Commission would also have to: (1) review (and perhaps, modify) the RFPs by which competitive bidding would be implemented, (2) oversee competitive bidding processes (this should require relatively little effort, unless implementation problems arise as

detected by stakeholders, RFP participants, or an independent observer), and (3) be prepared to resolve disputes that might arise during the course of RFP processes.

With respect to IRP Plan filings, competitive bidding will require that the Commission review and approve each such filing in a timely manner. The IRP Plans will set a foundation for many of the utilities' resource acquisition processes. Approval of the IRP Plan filings, particularly conclusions regarding the amount and timing of resource needs, is essential because these findings will help give participants in each RFP confidence that they are not investing time and money in pursuit of a lost cause. Where a utility initiates a competitive bidding process absent Commission approval of the needs to be met and consequent acquisition, bidders run a considerable risk of investing time and money in developing and advancing proposals that ultimately could be rejected by the Commission as unnecessary. This risk can considerably diminish the enthusiasm with which bidders respond to an RFP – if they respond at all.

The Commission should consider the various components of an RFP and supporting documentation in its review. These might include pre-qualification criteria, the proposed PPA, proposed measures to mitigate self-dealing concerns, selection criteria, etc. However, the Commission need not prescribe the factors that it

would consider, nor should it confine itself to the list above. Rather, in the review of the proposed draft RFPs and final proposed RFP before issuance, the Commission will need to determine if changes are required to address concerns raised by parties in the comments that have been submitted to the Commission. The review is to enable the Commission to determine whether the RFP contains any inappropriate bias, and is likely to support a fair, competitive process. Furthermore, the Commission's resolution of problems in RFP designs must be done well in advance of the critical path timelines that govern project development. The Consumer Advocate anticipates, however, that in many instances important elements of an RFP can be resolved during discussions among IRP participants (e.g., at Advisory Group meetings). Thus, where an RFP has broad support from stakeholders, the Commission's review likely can be more limited (e.g., perhaps providing an opportunity for any aggrieved parties to identify themselves and problems that might rise to the level of requiring Commission intervention).

2. Assume that the Commission should issue an order determining whether the utility has complied with the competitive procurement procedures. When should such an order be issued? Consider:
 - a. in the proceeding to approve the PPA, pursuant to the terms of the PPA, HRS § 269-27.2, HAR ch. 6-74, and HAR § 6-60-6(2), to the extent applicable?
 - b. in a general rate case, pursuant to HRS § 269-16?
 - c. in an energy cost adjustment clause case, pursuant to HAR § 6-60-6(2) and HRS § 269-16(b)?
 - d. in a proceeding separate from each of the preceding three options?

RESPONSE:

The Consumer Advocate does not see an Order of this nature to be particularly useful. The Commission should expect that each utility will comply with the Commission's competitive bidding procedures. Where there is evidence that a utility has not done so, the Commission should act to ensure that the situation is remedied.

If the Commission determines to add to its responsibilities issuing orders determining whether individual utilities have complied with competitive procurement procedures, the Consumer Advocate would recommend that such matters be addressed as part of established proceedings that address cost recovery for resource acquisitions. For instance, such an order could be issued as part of the proceeding to approve a contract with a third-party supplier, or as part of one of the existing proceedings by which the commitment of funds for utility investments are approved pursuant to the requirements of Paragraph 2.3.g.2. of General Order No. 7

("G.O.7"), as modified by Decision and Order No. 21002 in Docket No. 03-0257.¹⁵

Where a third-party contract is the result of the competitive bidding process, reviewing any complaints from bidders and issuing an Order of this nature as part of its review of the contract (e.g., a PPA) also would seem most likely to avoid potentially conflicting and problematic results (e.g., suppose the Commission were to approve a PPA absent such review and finding, but then found in a subsequent proceeding that the utility did not comply with appropriate competitive bidding procedures, such that another party should have been the winner).

Note that the Parties' Proposed Framework provides that the Commission shall review and approve the contracts that result from competitive bidding processes (see Section II.B.4 of the Parties' Proposed Framework). The Parties' Proposed Framework does not, however, anticipate an order that addresses "whether the utility has complied with the competitive procurement procedures" as an independent event.

¹⁵

Through Decision and Order Nos. 21001 and 21002 filed May 27, 2004 in Docket Nos. 03-0256 and 03-0257, the Commission authorized the modification of the G.O. 7 capital expenditures filing threshold from \$500,000 to \$2.5 million, excluding customer contributions.

D. Utility Cost Recovery of Wholesale Purchase Costs and Utility Self-Build Costs

1. Does Commission approval of a PPA preclude the Commission from making later disallowances due to --
 - a. imprudent negotiation of the PPA
 - b. imprudent management of the PPA
 - c. failure to enforce certain rights under the PPA?

RESPONSE:

No, as the Commission stated in Decision and Order No. 10448 filed in Docket No. 6177 on December 29, 1989, starting at page 23:

At the outset we observe that it is HECO that decided to meet its generation requirement through a power purchase agreement, rather than by a HECO-owned generation facility, and it is HECO that negotiated the agreement with AES-BP. The AES-BP contract, therefore, is the product of a judgment exercised by HECO and will always remain so. No amount of Commission approval of the contract can change that fact, and HECO must ultimately be responsible for all consequences that flow from that managerial decision. The Commission's approval of the contract does not convert HECO's judgment to that of the Commission. It signified, unless qualified, that the Commission is satisfied that HECO reasonably and prudently exercised its judgment and that the terms and conditions of the contract are reasonable. The Commission's conclusion as to reasonableness, however, reached only to the extent of the facts presented at the time of the Commission's approval.

There is something to be said for requiring certainty and finality in the Commission's decision. Reasonable certainty and finality in the Commission's findings and conclusions are important to a utility in the utility's planning for the future. This compels us to hold that we ought not re-evaluate at a later date any decision we might make that HECO reasonably and prudently exercised its judgment in opting for a power purchase contract to meet its generation needs and that the power purchase contract is reasonable, except where our determination as to reasonableness is procured through fraud or deception or through

conscious or deliberate misrepresentation of facts or manipulation of data and, further, where it later comes to light that HECO failed to disclose facts known or which should have reasonably been known to HECO at the time of the Commission's decision which bear on the reasonableness and prudence of HECO's decision to enter into the power purchase agreement or on the reasonableness of the terms of the agreement.

Our holding here that a re-evaluation ought not be made once the Commission determines HECO's judgment to be reasonable and prudent and the contract terms reasonable does not preclude the Commission from reviewing, as a part of its general oversight responsibilities over HECO, the manner in which HECO administers and implements the power purchase agreement. Thus, the Commission may review the decisions that HECO may or must make under the contract, including those relating to project deferral and contract cancellation, liquidated damages, ancillary contracts, and performance standards. The Commission further retains the right to review and determine the proper allocation of the cost consequences of failure of AES-BP to perform under the contract. Indeed, the Commission retains the right to review and make decisions with respect to any matter that may arise in the future which affect or flow from the AES-BP contract.

HECO in its brief concedes the right of the Commission to exercise its oversight responsibilities in the administration and implementation of the contract by HECO, and it also concedes that the Commission may revisit its decision concerning the reasonableness of HECO's decision to enter into the power purchase contract and the reasonableness of the contract terms and provisions where the Commission's approval is secured by fraud or deception.

Based on the above, it is clear that each utility should be expected to act prudently in carrying out its responsibilities vis-à-vis a PPA or other contract. To the extent that facts come to light subsequent to Commission approval of a PPA that support a finding (i.e., based on what was known or reasonably should have

been known at the appropriate time) that the utility (1) was imprudent in negotiating the PPA, (2) was imprudent in managing the PPA, or (3) failed to enforce certain rights under the PPA, the Commission precedent is clear that the utility should be held responsible for the resultant damages to ratepayers. The situation is no different that if the utility were to sign a contract with an architect / engineering firm for the construction of a self-build facility. In fulfilling its service obligations, the utility would be expected to act prudently in contract negotiations, contract management and in enforcing its contractual rights.

2. Recovery of utility parallel planning costs
 - a. Who should pay for the utility's parallel planning costs?
Consider:
 - (1) utility ratepayers
 - (2) all bidders
 - (3) winning bidders
 - (4) some combination of the foregoing

RESPONSE:

The matter of cost recovery for parallel planning costs is addressed in Section VI.B. of the Parties' Proposed Framework. Ratepayers should support a reasonable level of costs for parallel planning. Contingency planning (a more familiar characterization of parallel planning) is a necessary and very basic part of resource planning and providing good utility service. The costs that utilities reasonably incur in anticipating the contingencies that they reasonably might confront should be recovered from ratepayers

although not necessarily on a dollar for dollar basis. This applies to costs incurred at the planning level and to the more significant investment costs associated with the implementation of parallel projects, where such implementation costs are reasonably and prudently incurred.

b. By what mechanism should cost recovery occur?

RESPONSE:

See Section VI. of the Parties' Proposed Framework for the ratemaking treatment of parallel and/or contingency costs incurred by the utility. As stated above, contingency planning is a basic element of utility resource planning. Indeed, scenario analysis is a common feature of integrated resource plans. There are many contingencies that electric utility companies should consider in assembling their IRPs. The Commission's IRP Framework (at 22-24) requires consideration of a range of assumptions, risks and uncertainties. That document (at 23) prescribes that the utility should develop "a number of alternative plans." Presumably, such alternate plans would be evaluated relative to the dominant risks that confront the utility. Parallel planning (e.g., in the form of implementation of a back-up plan) related to the risk that third-party resource projects might not achieve commercial operation is thus fully consistent with contingency planning. Moreover, parallel

planning could readily apply to a utility's self-build projects (suppose such a project fails to obtain requested siting approvals).

Thus, it is reasonable to conclude that contingency planning and parallel planning costs can occur under the current regulatory construct – i.e., as associated with self-build project proposals. While the Consumer Advocate recommends that such costs, if prudently and reasonably incurred, would be recoverable through rates, these costs should be recovered through the existing rate setting process and no new cost recovery mechanisms are required. In general terms, expenses would be expensed within the year to which they apply and capital costs would be amortized over an appropriate time period. The Consumer Advocate anticipates that the particulars of these matters would be resolved in base rate proceedings, when specific information will be available.

3. Competitive effects of different cost recovery treatments
 - a. Where the utility selects its self-build option in a competitive bidding scenario: Should the Commission require the utility to absorb the risk that its actual cost will exceed the price associated with its self-build option?
 - b. Assume the answer is yes. What are the mechanics, in terms of bid submission and later ratemaking, necessary to achieve this result?
 - c. Should there be any exceptions to this rule?

RESPONSE:

The utility cost recovery should be pursuant to the provisions of the bid under which the utility project was selected. This includes capital and operating costs as well as performance of the plant.

Should the utility seek to recover costs in excess of the bid price, it must demonstrate that other bidders would have had the same opportunity to recover the excess costs under the operative RFP documents and that the costs incurred are reasonable. Section VI.D. of the Parties' Proposed Framework anticipates this effort.

It is critical to hold the utility to its bid in all respects. For competitive bidding to work, all parties must be held to the same terms and conditions. Bids submitted by independent power producers will be priced to include all risks presented in the proposed PPA and other RFP documents. Thus, if the RFP is to be truly competitive, utility options must be priced using the same sets of terms and operating requirements.

The Consumer Advocate's view is that competitive bidding creates an opportunity to "test the market" to determine whether some third-party provider can provide needed resources at a better price or with better performance characteristics than can a utility proposing to advance a specific project. The validity of this test dissipates if the utility is permitted to propose what would amount to a non-binding bid. It is fair to assume that, at least at times, Hawaii's utilities will have strong incentives to expand rate base. As such, utilities that have the ability to "lowball" their "bid" with the

expectation that the cost recovery will fully support higher prices would be expected to routinely undermine competitive processes.

To explain further, the Consumer Advocate begins with the question of how to create a fair market test under such circumstances. The Consumer Advocate submits that such test has two basic components. The first is a proposed contract, which would be presented and explained through an RFP. This contract prescribes in (legally enforceable) detail the key features of the "deal" that would be struck between the winning bidder and the host utility. Note that the utility is, in fact, acting as agent for ratepayers under terms established through the practice of regulation by the Hawaii Commission. Contract costs, for example, will be a direct "pass-through" to customers. In this light, the utility advancing a self-build option is simply one of many bidders. The second basic component of the competitive test takes the form of the weighting and ranking scheme whereby any differences between project proposals that are of importance to ratepayers are considered in a systematic fashion in selecting bids. The contract and weighting and ranking scheme combine to ensure that (1) the delivery obligations of all bidders are substantially the same, (2) the risks that all bidders would assume are substantially the same, and (3) any variations that may affect ratepayers are weighed in manner that ensures a level playing field between bidders.

Several factors that are essential to the Consumer Advocate's recommended treatment of costs associated with a utility's bid are worth noting at this juncture. First, the proposed contract ensures that all bidders bid to what is essentially the same "product" (e.g., capacity and energy delivered at a particular time) and according to the same terms (e.g., prices to be paid are fixed according to allowed payment schedules, curtailment rules, etc.). Any substantial deviations from the terms of the proposed contract are problematic because it means that some bidders would bid to one "product"/terms combination while others advance another. Under such conditions, the value of having requested multiple proposals is in question. Second, the weighting and ranking scheme should treat all bidders in a fair manner in assessing any differences (i.e., those that conform to the terms of the RFP) that matter to ratepayers. If not, the weighting and ranking scheme is in need of repair. Third, differences between bidders that do not present benefit or risk to ratepayers are not relevant to this process.

Within this context, the Consumer Advocate recommends that there be a cost cap on any self-build proposals advanced in an RFP process. This cap is necessary to ensure that the utility and other bidders are all bidding to a "contract" with the same set of terms. If the utility's bid is allowed to change with actual costs

incurred, while third-party bidders are held to their bid price, there has not been a fair test of the utility's proposal.

Several items must be noted at this juncture. First, the cap that is imposed on the utility must be allowed to vary to the extent that third-party bid prices are allowed to vary over time. For instance, if third-party bids may be indexed to rising steel prices, then the utility proposal should enjoy the same provision. Second, the utility that does not seek to advance any particular project but does identify a self-build project as a backstop to a reliability need is not disadvantaged by this process. The utility would be free bid a price that is fully sufficient to cover any cost-risk exposure that it may have to ensure that it does not run up against the cap if its self-build project is needed. Third, this approach ensures that competitive bidding does not impose a different cost-recovery scheme on the utility. If the utility would build a project only if necessary to meet a reliability need, it would then receive traditional cost-of-service ratemaking. If it chooses to compete against other bidders, it would do so on like terms (both in terms of price caps and performance guarantees).

The Consumer Advocate therefore recommends that utilities be held to the price and operating terms that are used in comparisons to bid projects.¹⁶ The mechanics of the process would

¹⁶ If the utility can recover unanticipated costs while bidders cannot, an unfair comparison will occur.

begin with identification of the construction costs that are to be used in comparing the utility's self-build option to bids. That amount would ultimately set a cap on what would be allowed into rate base, the remaining amounts would be at risk absent a demonstration by the utility to support the inclusion of such costs. The Consumer Advocate likewise recommends that where a utility seeks to compete against other bidders, the utility's proposal should be held to whatever performance standards are assumed in the process of comparing the utility's self-build option to bids. For example, if capacity costs to be paid to support a PPA are to be reduced by some percentage if availability falls below a given level (as defined in the proposed PPA); then rates paid to the utility should fall by a like amount in similar circumstances. See also Consumer Advocate response to PUC-IR-75.

IV. Assure Proper Comparisons of Competing Bids
A. Debt Equivalency Treatment of Long-Term PPAs

1. When is debt equivalency triggered?
 - a. To what extent does debt equivalency depend on contract terms?
 - (1) contract shifts operating risks to the IPP
 - (2) contract shifts fuel risks to the IPP
 - (3) contract gives utility right to own project on default
 - (4) other terms
 - b. To what extent does debt equivalency depend on - -
 - (1) the size of a specific contract?
 - (2) the utility's total PPA obligations?
 - (3) the length of the contract?

RESPONSE:

The facts considered to respond to the question posed by the PUC will vary depending on the circumstances for each utility on a case-by-case basis. Because of this, the Parties' Proposed Framework does not address this issue specifically. Rather the Parties' Proposed Framework sets forth the general guidelines that must be considered during the bid evaluation processes as noted in Section III.E of the Parties' Proposed Framework.

As a general matter, in establishing a utility's credit rating, some rating agencies treat a utility's fixed obligations under purchased power contracts as a form of debt. The Consumer Advocate assumes that, in asking "when is debt equivalency triggered," the Commission is seeking information regarding the point at which a rating agency would determine that a credit rating impact would be considered in order to properly reflect the debt implications of the utility's PPAs. The record in this proceeding does not, however, clearly identify the extent that any such point

can be defined, as the point will vary depending on the specific facts of each situation.

The record in this proceeding does show that (a) different rating agencies place different emphasis on debt equivalency considerations, and (b) utility debt ratings can be affected by a range of risk factors that extend well beyond the debt implications of its PPAs.¹⁷

Standard and Poors indicates that it considers imputed debt:

to allow for more meaningful comparisons with utilities that build generation. Utilities that build typically finance construction with a mix of debt and equity. A utility that leases a power plant has entered into a debt transaction for that facility; a capital lease appears on the utility's balance sheet as debt. A PPA is a similar fixed commitment. When a utility enters into a long-term PPA with a fixed-cost component, it takes on financial risk. "*Buy Versus Build: Debt Aspects of Purchased-Power Agreements*, Standard & Poors, May 8, 2003.

In essence, Standard and Poors is evaluating the riskiness of the PPA to the utility. This would include the risk of non-recovery (i.e., through rates) of purchased power costs (risk here would tend to increase the total imputed debt amount) as well as the risk of non-delivery under the PPA thereby causing the utility to have to obtain energy from other sources. Therefore, all else being equal, contracts that shift risk to an IPP would tend to decrease the utility's

¹⁷ See Testimony of Wayne Oliver, Transcript Volume III, pgs. 728 – 735; and Testimony of Gayle Ohashi, Transcript Volume IV, pgs. 846 – 920.

exposure; of course, the shifting of risk to an IPP will likely be accompanied by higher pricing to cover the risk.

Some other considerations are as follows:

- Presumably, contracts that shift operating risks to the IPP might result in relatively less imputed debt (all else equal) if rating agencies are persuaded that the utility would not have to support fixed payments to the IPP in the long-run without commensurate delivery of power;
- Standard and Poors indicates that it does not consider the energy component of PPAs because imputed debt "is to equate the comparison between utilities that buy versus build – i.e., Standard and Poors does not capitalize utility fuel contracts." Therefore, contracts that shift fuel risks to IPPs would not affect Standard & Poors calculation of imputed debt; and
- Debt imputation has as its focus the fixed payment obligations that a utility must make as a consequence of a PPA. The Consumer Advocate notes, however, that provisions that preserve for a utility ready access to a low-cost power supply might be considered beneficial by rating agencies.

Standard & Poors indicates that it calculates debt imputation amounts as a direct function of the net present value of future fixed payment obligations. See, e.g., *"Buy Versus Build." Debt Aspects of Purchased-Power Agreements, Standard & Poors, May 8, 2003.* Therefore, holding all else equal, the debt imputation amount would depend upon each of (a) the size of a given contract, (b) the amount of the total PPA obligations, and (c) the length of the contract.

2. Comparability between PPA and self-build
 - a. What are the specific differences between the debt equivalency effects of a PPA and the utility's self-build option, given that the utility finances its self-build option with debt in part?
 - b. When comparing a proposed PPA with the utility's self-build option, how should the utility take into account the similarities and differences between the capital structure effects of each?

RESPONSE:

The Parties' Proposed Framework sets forth the general guidelines that must be considered during the bid evaluation processes as noted in Section III.E. The use of general guidelines is appropriate because it is difficult to assess in the abstract the full range of risk factors that should be considered in comparing self-build to third-party resource options.

Many risks are project-specific. For example, the risks of a PPA with a 50 MW renewable resource likely will differ from those associated with utility ownership of a 50 MW fossil fueled facility. The range of risks might include construction cost overruns, operating cost overruns (including fuel cost risk), and performance differences. Similarly, some third-party facilities may bring benefits that may be more difficult to quantify or perhaps not be fully captured in project evaluation criteria. The benefits of diversifying the resource base through reliance on renewable resources might fall into this category.

Thus, it is not possible to respond to the questions posed in the abstract without knowing the specific facts and circumstances

under which the analysis would be performed for each utility and each PPA or self-build project. As a general matter, taking the debt implications of PPAs as an issue to be addressed in isolation of the other factors that might affect a utility's credit rating, a utility might seek to understand the degree to which a PPA might move it off of its target debt-equity structure, then acquire additional equity to reestablish the target balance. If the utility's self-build option is financed in a manner that does not impact the utility's target debt-equity ratio, then arguably that self-build option would have no impact. The specific differences between the debt effects of a PPA and the utility's self-build option depend fully on the degree to which the imputed (for the PPA) or actual (for the self-build option) debt infusion would threaten to affect the utility's target debt-equity ratio.

Standard and Poors provides a fairly straightforward presentation of how to offset the debt effects of purchased power. However, determining how to take into account capital structure effects in comparing a potential PPA to a utility's self-build option brings difficult questions. The answers lie in assessing the probability that imputed debt from a PPA might in fact affect a utility's debt ratings.

A utility that projects a need for additional power supplies can react to that need by acquiring its own "self-build" generating unit, or by purchasing a similar increment of power through a

third-party PPA. The two transactions might secure essentially identical amounts of power for ratepayers, but they necessarily will have significantly different risk characteristics. This proceeding has seen a considerable focus placed on a single risk factor that might weigh on the side of diminishing the value of purchased power. Because assessing imputed debt appears to rely on a fairly straightforward calculus, there may be a temptation to consider imputed debt alone in weighing utility self-build projects versus purchased power projects. However, a fair comparison of projects requires a thorough assessment of all risks on both sides of the equation. Otherwise, a bias may be introduced favoring self-build projects.

The Electric Power Supply Association argues that “debt equivalence is properly part of a comprehensive analysis of the costs, risks, and benefits – both quantitative and qualitative – of all bids. Some may argue that other factors, including the PPA itself, will decrease risk for utilities. The absence of consideration of all these factors in a resource procurement proceeding suggests that cost-of-capital proceedings are more suitable for managing the impact of debt equivalence.” See for example, *Electric Utility Resource Planning: The Role of Competitive Procurement and Debt Equivalency*, Electric Power Supply Association, July 2005 (at 8).

3. What technical methods should the Commission require for translating applying debt equivalency analysis to specific IPP offers and utility self-build options? Consider:
 - a. Commission-specified percentage debt figures (e.g., 10%)
 - b. Commission-specified sliding scale with pre-defined minimum and maximum figures
 - c. utility internal analysis followed by Commission review

RESPONSE:

The Parties' Proposed Framework does not establish a specific approach with respect to debt-equivalency analysis because there is no set answer to the above questions posed by the Commission and debt equivalency is only one of a number of risk factors that must be considered. Rather, the Parties' Proposed Framework provides general guidance on how to evaluate the bids, taking into consideration, among many risk factors, the potential impact of the PPA on the utility's credit rating.

The best approach to respond to the Commission's questions would be to obtain the utility's total risk analysis pertaining to the specific RFP, followed by Commission review. As an initial step in its review, the Commission should satisfy itself that the utility has completed a reasonable, comprehensive analysis of the full range of risk factors that would impact a comparison of the utility's self-build option to third-party proposals.

The assessment of debt equivalency should be made as a part of the overall risk assessment. Ideally, each utility should attempt to mirror the analyses that debt rating agencies would apply. The difficulty in addressing debt equivalency begins here

because the debt rating agencies do not have a common approach to assessing the possible impacts of PPA debt. Perhaps as a consequence, the record in this case indicates that some public utility commissions require consideration of debt equivalency costs (e.g., California) and some do not (e.g., Georgia). See Consumer Advocate response to HECO/CA-IR-51.

Ad hoc reviews are essential if the results of these analyses are to be meaningful. There may be circumstances in which a given PPA is unlikely to materially affect a utility's debt ratings. For example, if a utility has a particularly low debt ratio (i.e., relative to the target level) and the PPA terms would result in relatively little imputed debt, credit ratings effects may be of no concern. Alternately, there may be circumstances in which a protracted ratings downgrade related to third-party PPA acquisitions may be a genuine risk. In such instances, the costs that would be necessary to "rebalance" the utility's capital structure should be factored into RFP evaluations. However, even in such an instance, the Consumer Advocate urges the Commission to recognize that the debt equivalency discussion is only one component of the risk factors that need to be considered in producing superior resource decisions for consumers.

4. In HECO's pending case, the company and the CA differed by about \$20 million on the return on equity issue, but ultimately settled this issue. Hypothetically speaking, under what circumstances would a PPA's cost-of-equity effect be sufficiently small to "get lost in the noise"?

RESPONSE:

The Parties' Proposed Framework does not address when debt-equivalency effects are too small to be of concern because the facts under which a PPA might reasonably be expected to have no significant impact on a utility's debt ratings will depend on a number of factors that could contribute to this result (including the utility's existing capital structure, the size and duration of the PPA, etc.). Thus, the Consumer Advocate is unable to identify a point at which debt equivalency can be set aside as an issue. Furthermore, it is not uncommon for the cost of capital witnesses in a rate proceeding to differ on the recommended return on common equity. Again, there are many reasons for such differences. Ultimately, as noted by the settlement, the parties were able to compromise on their differences and agree on a return that was deemed reasonable by both parties, taking the entire global settlement into consideration.

Once again, the Consumer Advocate recommends that the matter be considered from a different perspective. In this case, the problem is that the "squeaky wheel" (e.g., much is heard here, because of the focus that Standard and Poor's places on this issue) may not be the one that most requires attention. Debt equivalency is but one of a number of risk factors that may warrant

consideration in project evaluation schemes. The resource selection process presents other more significant risks that must be considered; e.g. a self-build project that places ratepayers at risk for price escalations to a degree that a third-party PPA would not. The Consumer Advocate's position is that, before setting the stage for utilities to use debt equivalency to tip project evaluation processes in favor of self-build options, the Commission should (1) ensure that all risks that apply to the self-build and third-party projects be given fair consideration in the calculus, and (2) consider debt equivalency "costs" only if it is reasonably convinced that such costs are real and would accrue to ratepayers if a given PPA were to be accepted.

B. Other Considerations

1. What requirements should the Commission establish concerning evaluation of each of the following considerations?

a. Reliability considerations

(1) Credit rating: Should the Commission establish credit rating cutoffs, whereby IPPs or developers with lower ratings are precluded from bidding at all?

(2) Track record

(a) Should the Commission establish experience prerequisites, whereby developers with insufficient experience are precluded from bidding at all?

(b) If the utility creates a new affiliate for purposes of bidding, will the new affiliate have zero experience for purposes of applying an experience screen?

(3) Development feasibility

(a) Siting status

(b) Ability to finance

(c) Environmental permitting status

(d) Commercial operation date certainty

(e) Engineering design

(f) Fuel supply status

(g) Bidder experience

(h) Reliability of the technology

(4) Operational viability

(a) Operation and maintenance plan

(b) Financial strength

(c) Environmental compliance

(d) Environmental impact

(5) Effects of total amounts of firm and as-available purchase power on utility's system

b. Operational flexibility

(1) Dispatchability

(2) Flexibility of maintenance schedules

(3) Ramp rates

(4) Quick start capability

(5) Coordination of planned maintenance

c. Contract flexibility

(1) In-service date flexibility

(2) Expansion capability

(3) Contract term

(4) Stability of the price proposal

d. Cost Considerations

(1) Pricing path

(2) Post-contract benefits

- (3) Willingness and ability of seller to accept financial risk
- e. Other public interest considerations
 - (1) Net impact on the number of jobs created or lost
 - (2) Net impact on the state's economy (increase or decrease in state gross product)
 - (3) Net impact to the ratepayer (increase or decrease in rates and net bills)
 - (4) Level of fossil emissions introduced or avoided to our atmosphere
 - (5) Increase or reduction in the amount of imported fossil energy
 - (6) Reduction in the exposure to fuel price volatility and supply.

RESPONSE:

The Consumer Advocate is unable to respond to the above questions because the answer will depend on the facts of each specific situation. As a result, the Consumer Advocate contends that the Commission should not prescribe any of the above as general requirements for its RFPs. As noted in the Parties' Proposed Framework, a range of considerations for RFP design processes are addressed in Section III.B.

The above list posed by the PUC illustrates the types of provisions that the Commission should expect to see considered by electric utilities as they develop their RFPs. However, these factors will require evaluation on a case-specific basis. For example, a utility seeking to resolve a vexing reliability problem may seek to require bidders to demonstrate reasonable creditworthiness. By contrast, a utility seeking to explore future opportunities with developers of innovative renewable strategies may have little interest in current credit ratings (e.g., where emerging developers

may have no established credit history.) The same may hold where other factors identified in this question are concerned. A utility that must resolve a reliability problem may properly be concerned about developer track records, development feasibility, operational viability, etc. A utility that plans to conduct a competitive solicitation to explore possibilities for adding different types of emergent technologies in its resource mix (or a utility that is determined to achieve a more balanced resource mix) might reasonably be more flexible where these evaluation criteria are concerned. See also Consumer Advocate response to PUC-IR-69.

2. Methods of evaluating non-price and price factors
 - a. Should the Commission require one or more methods for applying price and non-price criteria? Consider:
 - (1) Non-price criteria are threshold requirements, followed by evaluation on price only
 - (2) Price only evaluation, w/non-price as tie breaker
 - (3) Actual scoring of each non-price factor, combined with scoring of price factors
 - b. If the Commission should not require one or more methods for applying price and non-price criteria, who should develop these methods, and subject to what level of Commission review?

RESPONSE:

The Commission should not prescribe methods for applying price and non-price criteria. Rather, the electric utilities should be responsible for designing and implementing evaluation schemes that are designed to ensure that identified needs are met in the most effective manner possible. See also Consumer Advocate response to HECO/CA-FIR-27. The Commission would have

responsibility for overseeing the evaluation of these processes: (1) it would review proposed evaluation schemes as part of its review of each RFP and supporting documentation; and (2) it would review reports issued by an independent monitor, which would address (among other things) the degree to which those evaluation criteria were applied in a fair manner. It is critical that Hawaii's electric utilities have the flexibility necessary to design bid evaluation schemes that can be optimized relative to the specific needs that they seek to meet through each RFP. This applies to both the development and application of price and non-price criteria.

The Consumer Advocate anticipates that different approaches to project evaluation may apply in different circumstances. A utility whose need focuses on obtaining energy at the lowest possible cost (e.g., where rate minimization objectives may be paramount), may treat non-price criteria as thresholds that must be met. By contrast, a utility that is less concerned with its rate levels and more concerned with the potential environmental impacts of its resource options might put relatively less emphasis on price criteria and more on non-price criteria (particularly those that seek to measure environmental impacts). The application of price and non-price criteria is likely to change on a case-by-case basis.

The Parties' Proposed Framework addresses price and non-price evaluation criteria in Section III.E.3.5, 9 and 10.

- c. If turnkey proposals compete with non-turnkey proposals, how should the utility and the Commission value the additional benefits of the turnkey offering?

RESPONSE:

In anticipation of future RFP evaluation processes, it is not necessary for the Commission to prescribe the value that a turnkey project might bring relative to other types of resource proposals (or vice versa). Competition between turnkey proposals and "non-turnkey" proposals will introduce challenges to bid evaluation schemes, largely because they represent very different allocations of costs and risks between developers and utilities (and thus, consumers). In very general terms, a turnkey proposal would have the bidder carry most risks related to project development (including perhaps those related to completing the project on time). However, once the project is transferred to the utility, the utility would assume the ongoing risks (which may include, for example, the risk of catastrophic failure, the risk that operating costs might exceed expectations, the risk that the unit's performance might deteriorate more rapidly than expected, etc.). The utility might benefit from the operational flexibility that it might have as the owner/operator of the facility. The utility (and ratepayers) would

carry the risk that the project technology might experience early obsolescence.

By contrast, a third-party developer selling power from a “non-turnkey” facility according to the terms of a PPA would generally be expected to carry all risks of project development, and many or all ongoing operating risks. If the project fails or fails to meet performance requirements prescribed in the PPA, adverse consequences typically would accrue to the third-party developer. Similarly, early obsolescence would remain a risk for the developer.

Accommodating these different risks and benefits in an evaluation that is intended to address both turnkey and “non-turnkey” projects presents challenges. The utility must make reasonable effort to (1) identify the full range of risks and benefits that would be presented, and (2) develop an evaluation method that weights the various risks and benefits in a manner that is consistent with its circumstances and the needs of its system. The Commission should (1) expect to be presented with evidence that such a process has occurred, and (2) review the utility’s proposal in this light.

The Parties’ Proposed Framework anticipates consideration of a range of non-price factors in Section III.E.9.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DIVISION OF CONSUMER ADVOCACY'S RESPONSES TO COMMISSION'S POST-HEARING QUESTIONS** was duly served upon the following parties, by personal service, hand delivery, and/or U.S. mail, postage prepaid, and properly addressed pursuant to HAR § 6-61-21(d).

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