

DIVISION OF CONSUMER ADVOCACY
Department of Commerce and
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PUBLIC UTILITIES
COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)	
)	
HAWAIIAN ELECTRIC COMPANY, INC.)	DOCKET NO. 2014-0356
)	
For Approval of Power Purchase Agreement)	
for Renewable As-Available Energy with)	
<u>Kawailoa Solar, LLC.</u>)	

In the Matter of the Application of)	
)	
HAWAIIAN ELECTRIC COMPANY, INC.)	DOCKET NO. 2014-0357
)	
For Approval of Power Purchase Agreement)	
for Renewable As-Available Energy for)	
the 14.7 MW Solar Project Owned by)	
<u>Lanikuhana Solar, LLC.</u>)	

In the Matter of the Application of)	
)	
HAWAIIAN ELECTRIC COMPANY, INC.)	DOCKET NO. 2014-0359
)	
For Approval of Power Purchase Agreement)	
for Renewable As-Available Energy with)	
<u>Waiawa PV, LLC.</u>)	

DIVISION OF CONSUMER ADVOCACY'S
REPLY COMMENTS

Pursuant to Order Nos. 33517,¹ 33518,² and 33519,³ the Consumer Advocate is filing its reply comments in these dockets as allowed by the Public Utilities Commission's ("Commission") invitation to do so in the Status Orders.

I. BACKGROUND.

A. WAIVER PROJECTS.

The three projects at issue were procured through a waiver from the competitive bidding framework pursuant to Commission orders in Docket Nos. 2013-0156 and 2013-0381.⁴ Of the interested developers that offered potential waiver projects, seven projects were approved to move forward with negotiations for possible contracts. Of those seven projects, the Commission approved four projects for which SunEdison is now the project developer.⁵ As set forth in each of the applicable dockets, these projects were expected to be completed and in service prior to the end of 2016 in order to take

¹ Order No. 33517, Instructing Hawaiian Electric Company, Inc. to File a Status Report and Permitting Reply Comments, filed on January 28, 2016, in Docket No. 2014-0356 ("Order No. 33517").

² Order No. 33518, Instructing Hawaiian Electric Company, Inc. to File a Status Report and Permitting Reply Comments, filed on January 28, 2016, in Docket No. 2014-0357 ("Order No. 33518").

³ Order No. 33519, Instructing Hawaiian Electric Company, Inc. to File a Status Report and Permitting Reply Comments, filed on January 28, 2016, in Docket No. 2014-0359 ("Order No. 33519"). Collectively, Order Nos. 33517, 33518, and 33519 will be referred to hereinafter as the "Status Orders."

⁴ The Commission's Decision and Order Nos. 31913 and 32241, filed on February 13, 2014 and August 4, 2014, in Docket Nos. 2013-0156 and 2013-0381, respectively, approved the process to pursue the waiver projects.

⁵ The original project developer for the projects in Docket Nos. 2014-0356, 2014-0357, and 2014-0359 was First Wind. As will be discussed later, First Wind was acquired by SunEdison in late 2014 / early 2015. SunEdison was the project developer of the project that was the subject of Docket No. 2014-0358.

advantage of the tax credits that were then expected to expire at the end of December 2016.⁶ Each of the Power Purchase Agreements (“PPA”) entered into between Hawaiian Electric and the project developers included schedules that identified various milestone dates that were intended to ensure December, 2016 project completion.

B. SUNEDISON.

SunEdison is a publicly traded company on the New York Stock Exchange with its corporate headquarters in Missouri and operational headquarters in California. SunEdison manufactures solar technology and develops, finances, installs and operates distributed solar power plants. SunEdison has offices in North America, Europe, Latin America, Africa, India and Asia.

The original developer of three of SunEdison’s projects was First Wind, a closely held company that initially developed wind farm projects, such as the wind farm project in the Kahuku area. In November 2014, SunEdison announced that, together with its yieldco subsidiary, TerraForm, it would be acquiring First Wind and its holdings. This \$2.4 billion⁷ closed in January 2015, after the applications were filed in Docket

⁶ At the time, the available investment tax credits were to expire by January 1, 2017. However, as part of the Consolidated Appropriations Act passed on December 15, 2015, the investment tax credit for solar projects was extended another three years at its current level, and would ramp down through 2022.

⁷ <http://www.bloomberg.com/news/articles/2014-11-17/sunedison-and-terraform-to-buy-first-wind-for-2-4-billion>.

Nos. 2014-0356,⁸ 2014-0357,⁹ and 2014-0359,¹⁰ but before the Decision and Orders approving the projects and their power purchase agreements were issued by the Commission.

II. DISCUSSION.

As set forth in the Status Orders, the Commission, on its own motion, instructed Hawaiian Electric to file reports on the status of the efforts to complete the milestones in the respective contracts and any relevant information related to the successful completion of those contracts. The Consumer Advocate contends that there were compelling reasons to seek these status reports and to determine whether the projects were still expected to be completed on a timely basis. The Consumer Advocate shares the Commission's concerns regarding these projects since the relevant projects provide an opportunity to make meaningful contributions to the realization of the State's renewable portfolio standards ("RPS") and possibly lowering the cost of service to Hawaiian Electric's customers.

⁸ The application for this docket was filed on December 4, 2014. The Commission filed its Decision and Order No. 33036 on July 31, 2015, approving the power purchase agreement with Kawailoa Solar, LLC.

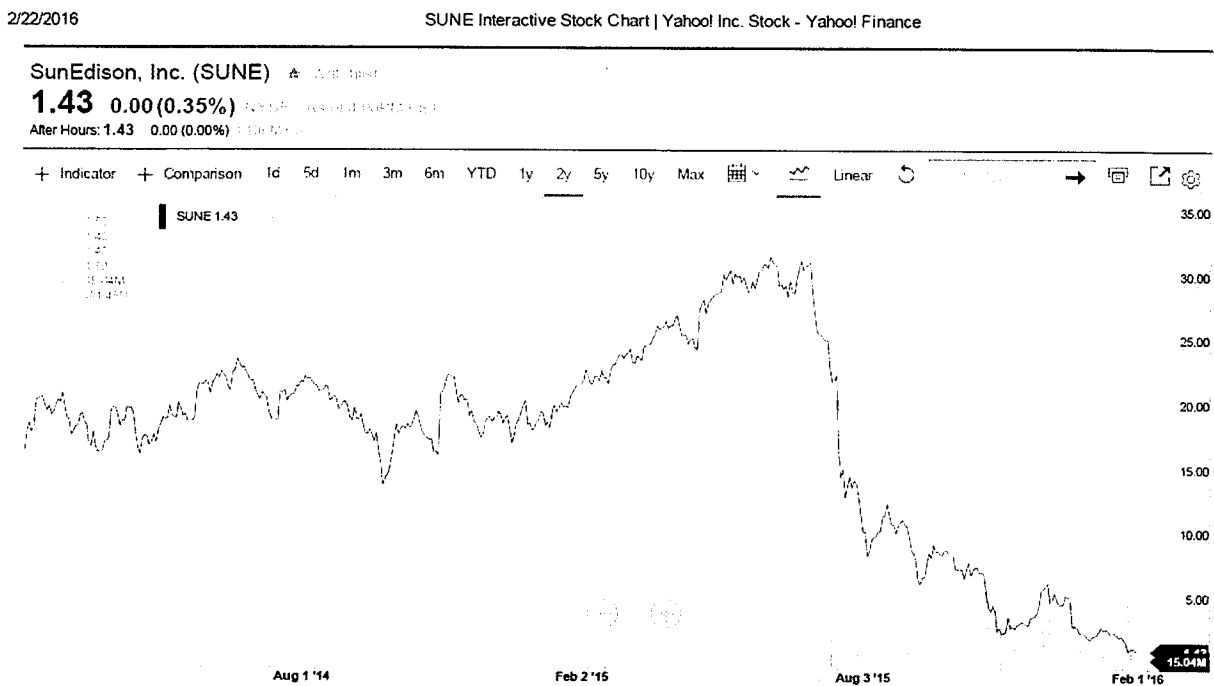
⁹ The application for this docket was filed on December 4, 2014. The Commission filed its Decision and Order No. 33037 on July 31, 2015, approving the power purchase agreement with Lanikuhana Solar, LLC.

¹⁰ The application for this docket was filed on December 4, 2014. The Commission filed its Decision and Order No. 33038 on July 31, 2015, approving the power purchase agreement with Waiawa PV, LLC.

A. SUNEDISON FINANCIAL ISSUES.

The Commission needs to be aware of and take into consideration the growing amount of public information related to SunEdison's financial problems, which could put these projects at risk for timely completion. There are a number of items that highlight the potential problems that SunEdison was and is experiencing:

- The 52 week high for SunEdison's share price was \$33.45, but more recently, the share price has tumbled to a 52 week low of \$1.37.¹¹ The falling share price is highlighted below:



- SunEdison's revenues have been flat (with a dip in 2013) during the period from 2012 through 2014 (2012: \$2.5 billion; 2013: \$2.0 billion; 2014: \$2.5 billion; and 2015: not yet officially available).

¹¹ See Yahoo! Finance.

- SunEdison's losses have increased during the period from 2012 through 2014 (2012: (\$150.6 million); 2013: (\$586.7 million); 2014: (\$1.180 billion); and 2015 not yet officially available).
- SunEdison's balance sheet ratios have been steadily decreasing.
- SunEdison's long-term debt has been significantly increasing (in 2012, LT debt was \$2.3 billion and, in 2014, LT debt was \$6.2 billion) and, as a result, its interest expense has been increasing as well.

The discussion of SunEdison's financial problems has been recently increasing. For instance, in an article by Paul Ausick dated February 21, 2016, he discusses the possibility of analysts that are souring on SunEdison in Are Analysts Giving Up on SunEdison.¹² In this article, it discusses an analysis from Merrill Lynch where they state,

We are downgrading shares of SunEdison to Neutral. Our three main reasons are (1) continued concerns around access to financing, (2) legal issues related to the Latin America Power (LAP) and Vivint Solar transactions, and (3) execution challenges given the significant numbers of distractions facing the management team. While underlying solar market fundamentals remain robust and SUNE could continue to benefit from the industry trends, we believe financing and legal overhangs could continue to keep the stock volatile and therefore move to the sidelines.

In another article by Chris Martin and Brian Eckhouse on BloombergBusiness, they discuss how SunEdison's cash reserves are dwindling due to various factors, such as the aforementioned lawsuits that have been filed against SunEdison.¹³ In that article, there

¹² <http://247wallst.com/energy-business/2016/02/21/are-analysts-giving-up-on-sunedison/>.

¹³ <http://www.bloomberg.com/news/articles/2016-02-19/sunedison-s-cash-reserves-shrinking-amid-lawsuits-canceled-deal?cmpid=yhoo.headline>. There are lawsuits by shareholders of Latin America Power due to a unsuccessful bid to acquire Latin America Power as well as a shareholder class action lawsuit related to SunEdison's efforts to acquire Vivint.

is also a discussion of how SunEdison was downgraded by Credit Suisse and Janney Montgomery Scott.

Even around the time of the Commission's Status Orders, it was clear that there were issues that were garnering national attention as evidenced by various articles and market concerns with SunEdison even reaching back to the fall of 2015.¹⁴

The Consumer Advocate contends that careful consideration of the relevant facts is warranted. If SunEdison enters into bankruptcy, there is a possibility that SunEdison's and its affiliates' assets, including the projects in question, could be tied up in the bankruptcy proceedings, which could adversely affect the ability of these projects from being completed on a timely basis. If SunEdison continues on in some capacity on these projects, will a bankruptcy court halt the projects to prevent SunEdison from incurring additional expenses? Moreover, the bankruptcy code provides the ability of a bankruptcy trustee to "look back" at previous transactions that occurred prior to the bankruptcy filing to determine if an actual or constructive fraudulent transfer of assets took place if the debtor was given less than full value for the consideration it provided to specific creditors.¹⁵ In this instance, will a bankruptcy court deem that all or any part of the transaction between SunEdison and DE Shaw, Northwestern University, and Madison Dearborn Partners LLC be deemed to be a fraudulent transfer that could stop the funding of these projects to completion?

¹⁴ See, e.g., <https://finance.yahoo.com/news/sunedison-gives-einhorns-greenlight-capital-122928044.html> ; <http://www.bloomberg.com/news/articles/2016-01-26/sunedison-shopping-vivint-assets-before-1-9-billion-deal-closes?cmpid=yahoo.headline> ; http://www.thestreet.com/story/13255354/1/sunedison-sune-stock-earnings-estimates-lowered-at-rbc-capital.html?puc=yahoo&cm_ven=YAHOO ; <https://finance.yahoo.com/news/sunedison-plunges-25-wider-expected-155003151.html>.

¹⁵ See, 11 U.S.C. § 548 (2011).

B. MISSED CONTRACT MILESTONES.

As described in greater detail in the status report filed by Hawaiian Electric on February 12, 2016 ("Status Report"),

Sellers had been in default under the PPAs and had not cured important missed milestones. Hawaiian Electric made many accommodations in an effort to see the Waipio PV Project, Lanikuhana Solar Project, and Kawaiiloa Solar Project (the "Projects") completed as promised. Beginning in October of 2015, Company allowed several extensions and deferrals of milestones and conditions precedent to try and ensure the Projects stayed on track and provided the intended benefits for Hawaiian Electric's customers.¹⁶

Attachment 2 to Hawaiian Electric's Status Report highlights the project milestone dates for each of the SunEdison projects and, based on the information provided by Hawaiian Electric, there were various milestones events where the milestone was: 1) extended pursuant to a request by SunEdison; 2) missed but later cured; or 3) missed and yet to be cured.

The Consumer Advocate notes, however, that Hawaiian Electric's Status Report also identifies situations where Hawaiian Electric appears to have been responsible for causing certain milestone extensions as well. In addition, on the morning of February 23, 2016, the Consumer Advocate received an electronic version of a February 22, 2016 letter from SunEdison to Hawaiian Electric, which disputes a number of assertions and positions held by Hawaiian Electric in its termination notices. At this time, the Consumer Advocate has not had sufficient time to comprehensively analyze the claims raised by SunEdison. The Consumer Advocate contends that additional evidence may be necessary to evaluate and analyze the claims that are being made by both

¹⁶ Status Report, at 2.

SunEdison and Hawaiian Electric before the Commission determines whether SunEdison missed significant contract milestones that should result in contract termination or whether Hawaiian Electric's acts or failure to act effectively extended the allegedly missed milestones.

C. WAS IT REASONABLE FOR HAWAIIAN ELECTRIC TO TERMINATE THE CONTRACTS?

The PPAs entered into between Hawaiian Electric and SunEdison provide the contractual obligations of both parties. In order to have a successfully developed project, both parties to the PPA must perform according to its terms. In the event of a material breach of the PPA, both parties are legally entitled to rely upon the default and termination provisions of the contract.

When the facts support a finding that there have been failures to meet project completion milestones, it should be undisputed that the grounds for finding a breach of the PPA has occurred. Based on the available record, the Consumer Advocate cannot opine whether sufficient basis exists to determine that a breach of the PPA has occurred.

The Consumer Advocate would like to point out that, until the contracts are terminated, Hawaiian Electric would not be in a position to seek potential alternatives to the project. If Hawaiian Electric sought such alternatives while the PPAs were still valid and binding, undoubtedly, SunEdison would have accused Hawaiian Electric of acting in bad faith in an attempt to subvert SunEdison's ability to perform under the existing contracts. Neither the Commission nor the Consumer Advocate should require or suggest that Hawaiian Electric seek alternatives to the relevant projects until such time that the approved PPAs are deemed terminated and no longer binding on the parties.

It should also be pointed out that renewable project developers, such as SunEdison, should not assume that with the passage of Act 97 of the 2015 Hawaii's Legislature that set the Renewable Energy Portfolio Standards at 100% by the year 2045 that this means renewable energy at any costs. Furthermore, developers should not assume that utility regulators will allow for extensions of PPAs in order to allow troubled projects to be completed well after the agreed upon and approved deadlines. Both parties to the PPA must fulfill their respective contractual obligations in good faith and in a timely manner. When one party fails to perform as required, then it should bear the consequences of its actions based upon the terms of the contract.

It should be further noted that, while there were seven waiver projects, the Commission did not approve all of the waiver projects. In its discussion in the applicable orders, the Commission offered that it did not approve all of the projects due, in part, to the consideration of the risks that customers might experience if all seven were approved. Consistent with the Commission's discussion on diversifying risks associated with the waiver projects, the Consumer Advocate contends that one of the relevant risks is developer risk, where too many projects are being concurrently developed by the same developer. While the Consumer Advocate believes that Hawaiian Electric had adequately evaluated the financial fitness of the project developers at the time preceding the application, current events support the need to modify the assessment of developer risk. When multiple significant renewable energy projects are being developed by the same entity, greater scrutiny should be applied to ensure the wherewithal of that entity to fulfill all of the relevant duties and responsibilities that are associated with developing those

projects. This concern had been articulated by the Consumer Advocate in its supplemental response filed on June 25, 2015 in the waiver project dockets.¹⁷

D. RECOMMENDATIONS.

The primary issue for the Commission is to determine whether the proposed termination of the contracts is reasonable and in the public interest. The alternative is to reject the terminations and allow modifications of the contracts to accommodate, at a minimum, changes to the milestone dates. If the relevant evidence support a finding that the terms of the PPAs allow additional periods of time to meet certain outstanding milestones, then the Commission should require that SunEdison provide additional customer benefits as a condition for the granting of any extension.

The Consumer Advocate also contends that prior to the Commission reaching its decision on this matter, the Commission should require certain assurances from the developer to address outstanding concerns with the SunEdison projects.

- SunEdison should be required to provide the Commission a thorough and complete assessment of its financial condition. As part of this assessment, the Commission should also consider the reasonableness of requiring a going concern opinion from a reputable independent auditing firm.
- If the projects will not be terminated, the Commission should also consider the need for a surety bond to cover any remaining SunEdison financial

¹⁷ See, e.g., the Division of Consumer Advocacy's Supplemental Response to Hawaiian Electric Company, Inc.'s Supplemental Statement of Position, filed on June 25, 2015 in Docket No. 2014-0356. On page 26, the Consumer Advocate "notes that there may be other, more general reasons to prefer diversification (e.g., potentially reduced risk by dealing with several well-established firms instead of one firm)."

requirements where they are required to make payments to Hawaiian Electric. A surety bond may be reasonable to ensure that no further delays due to ongoing SunEdison financial matters will adversely affect any future requirements to make payments to Hawaiian Electric.

- SunEdison should also be required to provide a detailed discussion of the proposed transaction with DE Shaw & Co, Madison Dearborn Partners LLC, and Northwestern University (collectively referred to as “DE Shaw et al”) that will result in the extinguishment of over \$300 million of debt, the transfer of shares in Terraform, and the transfer of the projects, upon completion, to DE Shaw et al. As part of that discussion, it should be made clear what role and ownership position SunEdison, and/or its affiliates, will have at the various stages of construction and after completion of the projects, if allowed to be completed.
- If the projects will not be terminated, the Commission should require that SunEdison, DE Shaw, Madison Dearborn Partners LLC, and Northwestern University provide separate legal opinions that assess their respective positions in this transaction and that unequivocally states that these proposed projects will not be delayed or deemed to be a fraudulent transfer pursuant to 11 U.S.C. § 548 (2011) by any bankruptcy court in the event of a SunEdison bankruptcy proceeding. Hawaiian Electric ratepayers should not bear any risk that these projects will be delayed or halted by a SunEdison bankruptcy.

- Additionally, if the projects will not be terminated and there is a showing that the projects are being delayed as a result of failure of SunEdison to live up to its responsibilities set forth in the contracts, the Consumer Advocate contends that it should be made clear where SunEdison and/or DE Shaw et al have made meaningful concessions in the favor of Hawaiian Electric customers. This position is consistent with past recommendations and the Commission's requirements. For example, in Decision and Order No. 31044, filed on February 27, 2013, in Docket No. 2010-0010, the Commission stated that it "urges [Hawaiian Electric], in future instances where liquidated damages are foregone and/or significant delays for the in-service date are experienced, to seek other advantages for its ratepayers by, for example, requiring a reduction in energy pricing." In that same Decision and Order, the Commission also stated that "termination for failure to meet significant milestones is an important PPA provision, since it allows HECO to move to other developers with projects that are shovel ready." Thus, if the termination of the contract is not exercised even though delays are caused by the developer, it should be made clear that there should be concessions to the customers' benefit.

Finally, Hawaiian Electric should provide a detailed account of NextEra's role in Hawaiian Electric's decision to terminate the PPAs. If NextEra had any involvement in the decision to terminate the PPAs, then the Commission should require NextEra to come forward to explain why NextEra does not have a conflict of interest in having Hawaiian Electric terminate these PPAs when NextEra could stand to benefit by having a NextEra renewable developer affiliate replace all or some of SunEdison's projects.

In general, the Consumer Advocate expresses its hope that the issues raised by Hawaiian Electric's termination notices can be settled in a manner that best serves Hawaiian Electric's customers. If the PPA terms do, in fact, support additional grace periods to allow satisfactory compliance, then SunEdison should be allowed sufficient time to meet any missed milestones. It should be made clear, however, that any extensions should not place Hawaiian Electric's customers at risk for a delayed or failed project. Furthermore, any extensions granted by the Commission should also require that SunEdison make significant concessions that benefit consumers.

DATED: Honolulu, Hawaii, February 23, 2016.

Respectfully submitted,

By 
For JEFFREY T. ONO
Executive Director

DIVISION OF CONSUMER ADVOCACY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DIVISION OF CONSUMER ADVOCACY'S REPLY COMMENTS** 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).

DANIEL G. BROWN
MANAGER, REGULATORY NON-RATE PROCEEDINGS
HAWAIIAN ELECTRIC COMPANY, INC.
P.O. Box 2750
Honolulu, Hawaii 96840-0001

1 copy
by hand delivery

DATED: Honolulu, Hawaii, February 23, 2016.

U. Adair