February 17, 2021

The Honorable Chair and Members
of the Hawai‘i Public Utilities Commission
Kekuanao‘a Building, First Floor
465 South King Street
Honolulu, Hawai‘i 96813

Dear Commissioners:

Subject: Docket No. 2018-0163
Instituting a Proceeding to Investigate Establishment
of a Microgrid Services Tariff
The Companies' Response to the Parties' Comments

Pursuant to the Commission Guidance, filed on December 10, 2020, in the subject proceeding,[1] as amended by the Commission letter dated January 22, 2021,[2] the Hawaiian Electric Companies[3] (the "Companies") appreciate the opportunity to provide their responses to Microgrid Resources Coalition's ("MRC") and the Division of Consumer Advocacy's ("Consumer Advocate") comments filed on February 10, 2021, attached herein as Attachment A.

Sincerely,

/s/ Kevin M. Katsura

Kevin M. Katsura
Director
Regulatory Non-Rate Proceedings

Attachment

c: Service List (via email)

[1] Letter dated December 10, 2020 from the State of Hawai‘i Public Utilities Commission, Commission Guidance, In re Public Utilities Commission, Docket No. 2018-0163 – Instituting a Proceeding to Investigate Establishment of a Microgrid Services Tariff.
[2] Letter dated January 22, 2021 from the State of Hawai‘i Public Utilities Commission, Letter Request to Modify Deadlines, In re Public Utilities Commission, Docket No. 2018-0163 – Instituting a Proceeding to Investigate Establishment of a Microgrid Services Tariff.
[3] "Hawaiian Electric Companies" are Hawaiian Electric Company, Inc., Maui Electric Company, Limited, and Hawai‘i Electric Light Company, Inc.

I. Overview

The Companies have reviewed MRC's February 10, 2021 filing, Comments on Hawaiian Electric's Transmittal of a Draft Microgrid Services Tariff ("MRC's Comments"), and the Consumer Advocate's February 10, 2021 filing, Establishment of a Microgrid Services Tariff ("Consumer Advocate's Comments") and provide their responses below.[1] The Companies' comments herein further elaborate on the Companies' Comments to the Working Group Areas of Disagreements ("Companies' Comments"), filed on February 10, 2021, and these topics were also covered during Working Group meetings between December 21, 2020 and January 21, 2021.

Before delving into the Companies' comments, the Companies would like to thank the Consumer Advocate's office for co-chairing this Working Group and the Commission for providing valuable guidance. The Companies also acknowledge and thank the members of the Working Group for their participation and lively discussion of the topics.

The Companies' responses to MRC's Comments are discussed in Section 2 below. In Section 3, the Companies respond to the Consumer Advocate's Comments, which centered around the Disclosure Checklist.

II. Companies' Responses to MRC's Open Items:

A. Introduction

1. The Proposed Tariff[2] Submitted on February 1, 2021 Was a Joint Filing of the Working Group

The Companies would first like to clarify the record regarding MRC's mischaracterization of the Working Group's February 1, 2021 joint filing. MRC frames the February 1, 2021 Working Group joint filing, which consisted of areas of agreement of all Working Group members, as the "Company Submittal." This is unfortunate and misleading and gives the false impression that the February 1, 2021 filing represents only the Companies and was approved by only the Companies, when the filing was approved by all Working Group members. Although representatives from the Companies, in collaboration with the Consumer Advocate, facilitated, compiled, and documented the Working Group process, the deliverables within the filing are indeed a representation of what was agreed upon in the Working Group process (while also identifying areas of disagreement or further discussion to be addressed in the instant filing), and the Working Group leaders confirmed the Proposed Tariff with MRC prior to submission. Nothing in the joint filing should have come as a surprise to MRC, as the process and documents submitted were transparent to the Working Group, spanning several iterations of communications.

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[1] Ulupono Initiative LLC did not submit areas of disagreement with the Proposed Tariff or proposed redlines.
[2] The Working Group's consensus proposed Microgrid Services Tariff and Hybrid Microgrid Agreement were submitted on February 1, 2021 (collectively "Proposed Tariff"). The Working Group's Proposed Tariff built upon the Companies' Draft Tariff submitted on March 30, 2020 ("Draft Tariff"), Working Group meetings, and the Commission's guidance and redline (provided on December 10, 2020).

2. MRC's Focus and Participation in This Proceeding Are Misaligned with the Purpose of This Docket of Resiliency

In MRC's Comments, MRC admits that resilience is not its focus in participating in these proceedings, and views any resilience offered by microgrids as merely "a side benefit." Rather, MRC acknowledges that its core focus and reason for participating in this docket is developer compensation and the goal of selling cheap power in order to attract participants, stating that the "fundamental economic proposition for microgrids is that they will be able to supply power at attractive rates to customers."[3]

In other words, MRC's focus in this docket is on developer compensation and profits over community resiliency and safety for the people of Hawai'i. MRC disregards and ignores the fundamental purpose of Act 200 ("Relating to Resiliency") to "build energy resiliency into our communities, thereby increasing public safety and security,"[4] given that "Hawaii's residents and businesses are vulnerable to disruptions in the islands' energy systems caused by extreme weather events or other disasters."[5]

MRC's position further disregards the Commission's clear guidance (1) that "given the priorities established by Act 200 and the remaining vulnerabilities of Hawai'i's energy systems to extreme events, the focus for the remainder of this docket is to facilitate the ability of microgrids to island and provide backup power to customers and critical energy uses during contingency events"[6] and (2) that "the proposed initial focus for this tariff is the islanding of a microgrid during emergency conditions and outages to improve resiliency and provide service to customers and subscribers while the utility grid is down."[7]

Stated differently, based on the Companies' review of MRC's Comments and statements in the Working Group, the open items raised by MRC reconfirm MRC's focus on a narrow set of commercial interests. This is not unexpected given the business interests of MRC's membership. However, the open items involve issues of fairness, among other guiding principles as described in the Companies' Comments, in relation to all customers, not just a select group of commercial developers and equipment manufacturers represented by MRC. MRC has not provided any comments in this docket that suggest that it prioritizes the broader public interest of enhancing Hawai'i's resilience that is the focus of Act 200. To the contrary, MRC's Comments are directed at negotiating a bi-lateral agreement that serves the narrow interest of its members, which is incongruent with the framework of the Hawai'i Distributed Energy Resource ("DER") market the Companies and DER stakeholders have worked hard to establish (through other proceedings) over the past several years. MRC has continued to ignore the extensive set of DER tariffs, programs and procurements that lead the industry in terms of financial benefits that customers and local DER developers have realized. These existing tariffs, programs and procurements combined with the

[3] MRC's Comments at 8.
[4] H.R. 2110, 29th Leg., Reg. Session (Haw. 2018) ("Act 200"), Section 1.
[5] *Id.*
[6] *See* Order No 36481 issued in Docket No. 2018-0163 at 48.
[7] *Id* at 54.

Proposed Tariff and Proposed Hybrid Microgrid Agreement create a "plug and play" opportunity for development.

Instead, MRC continues to seek a non-competitive power purchase agreement with terms that are unfair to all customers and unlike any agreements approved by the Commission with independent power developers or DER providers. By repeatedly dismissing the potential development, MRC also appears unwilling to fully commit to the concept of community resilience. The Companies understand the development of microgrids includes clarifying requirements and clearing barriers for developers and other partners; however, the Companies do not see it prudent to clear such barriers for developers at the expense of all customers. Hawai'i's customers should not cross-subsidize the misaligned corporate interests of MRC's membership. All of MRC's proposed additions or comments, in the Tariff (Sections B.4 and E) and the Hybrid Microgrid Agreement (Sections 1, 2, 22.c, 22.f, Ex. C), either shift compensation towards the microgrid developer or shift risk to the Companies and their customers.

As the California Public Utilities Commission noted in its recent microgrid decision[8] in which MRC is an intervening party, "By contrast, some parties ask us to overlook our constitutional mandates, our various—and often times competing—statutory requirements, and continuity of service policies for tariffs, rates, and rules to serve a narrow set of specific interests. It is true, as SDG&E puts it, that some parties think there is another "gold rush" underway in California, particularly in this docket. This is indeed, evidenced by the number of intervening parties [including MRC] hoping to profit from microgrids by advocating for arrangements that could excessively burden the average California electric customer. We reject those arguments because they are expressly prohibited by statute. We have no basis for burdening a single ratepayer, let alone the broader rate base." Similarly, here, this docket should not burden Hawai'i ratepayers in order to support some perceived "goldrush" by external parties hoping to profit from microgrid development, with no consideration of resilience for the people of Hawai'i.

The Companies have concluded their review of MRC's proposed changes and urge the Commission to reject MRC's proposals as self-serving and contrary to the fundamental purpose of Act 200. The Companies maintain their position in the Companies' Comments that the "innovative [Proposed Tariff] should be implemented as submitted, or as clarified in Attachments A-1 and A-2, in order to obtain the knowledge and experience necessary to determine any further refinements and allow lessons learned to be incorporated prior to scaling or continuing the program."[9]

B. Discussion

1. Proposed Tariff, Section B.4: Availability

a. Section B.4.a.

The Working Group met to discuss certain items, of which Section B.4 was a significant point of discussion. The Companies worked with MRC to understand its areas of concern. The

[8] CPUC, Decision Adopting Rates, Tariffs, and Rules Facilitating the Commercialization of Microgrids Pursuant to Senate Bill 1339 and Resiliency Strategies, Decision 21-01-018, January 14, 2021, Rulemaking 19-09-009.
[9] Companies' Comments, Attachment A at 2.

Companies' understanding was that MRC was specifically concerned with a scenario in which a Microgrid Operator would be responsible for billing with the Utility and to its Customer Microgrid customer(s). In particular, Section B.4.a. in the Proposed Tariff reflects the clarification that, analogous to current customers under Rule 15B, such as condominiums or commercial retail properties where there is a master meter and the master meter owner divides up the electric bill without markup to its tenants, a Customer Microgrid Operator may similarly allocate costs without markup to its participants for electric service received from the Companies.

b. Section B.4.b.

MRC proposes to add a new Section B.4.b. to the Proposed Tariff that would effectively grant Customer Microgrids eligibility for all Company Rules and Programs, regardless of whether the Customer Microgrid meets the Rule or Program requirements based on ownership structure of the Customer Microgrid, ownership of generation or storage resources within the Customer Microgrid, or location requirements of generation or storage resources within the Customer Microgrid. In other words, through this single provision, MRC proposes to grant Customer Microgrid developers broad exceptions/exemptions to all Company Rules and Programs, including DER Programs, to ensure that developers obtain compensation even if there is no benefit to grid, electric system, or other Company customers. In essence, one of the main impacts of MRC's proposal is to embrace cross subsidization of microgrids for the benefit of Microgrid developers to the detriment of the Companies' customers. MRC's proposal is extremely overbroad and should not be adopted on this basis alone.

Moreover, MRC, a non-participant to the DER docket, is attempting an end-run around the DER proceedings and DER stakeholders to create potentially broad exceptions to the implementation of DER programs without stakeholder input and consideration of the impact on the programs or the overall strategy being considered in that docket. As noted in Order No. 36481, the Commission expects modification of programs to take place in other dockets[10] and, as noted in the Commission's January 16, 2020 Guidance, revisions or expansion of DER tariffs should be communicated to the appropriate proceedings as this docket is not intended to be the main venue for such discussions.[11] Therefore, it would be more prudent for MRC's proposed pre-emptive exceptions to be considered in the DER docket.

In addition, although MRC claims that the Proposed Tariff does not provide for any compensation to Customer Microgrid Operators (developers), MRC ignores the fact that such developers have avenues for compensation through participation in DER programs (by following the same application procedure as all other potential participants or, if necessary, seeking to modify program rules within the DER docket itself rather than through a separate proceeding) and through private agreements with Customer Microgrid participants, and/or other third parties. The Proposed Tariff does not impose any restrictions on these private agreements between a Microgrid Operator and its participants which would allow the parties benefitting from the microgrid to pay for those benefits. Notably, as stated in the Companies' February 10, 2021 filing, under the current tariffs

[10] *See* Order No. 36481 issued in Docket No. 2018-0163 at 55.
[11] January 16, 2020 Letter at 2.

there are over 9,000 systems approved by the Companies with backup generators or energy storage systems, and a substantial number of these customers have configured their storage systems to provide microgrid capabilities to power whole home or critical loads during a grid outage.

Recommendation: The Companies recommend the Commission accept Section B.4 as provided in the Proposed Tariff, and do not recommend inclusion of MRC's proposed Section B.4.b. As discussed above, inserting Section B.4.b. into the Proposed Tariff is not the appropriate means to carve out broad exceptions to ensure DER program compensation for Customer Microgrid developers; rather MRC's proposed broad pre-emptive exceptions should be properly vetted within the DER docket.

2. Tariff Section E: Billing and Compensation

At the outset, the Companies note that MRC does not object to the current language in Section E of the Proposed Tariff.

a. MRC's Proposed Addition to Section E is Beyond the Scope of this Part of the Proceeding

In MRC's Comments, however, MRC also suggests consideration of an additional compensation model. Importantly, during the Working Group meetings, the Parties received verbal guidance through Commission staff that the Proposed Tariff should be submitted without any new compensation model, and that any consideration of such a model would happen at a later date. In accordance with this guidance, the Parties stopped discussion of alternative compensation models. Accordingly, MRC's suggested Operator Supplied Hybrid Microgrid, included in its filing despite Commission guidance, must be disregarded for purposes of the Proposed Tariff. Indeed, as discussed in the Companies' February 10, 2021 filing, the Companies recommend moving forward with the Proposed Tariff in its present form in order to facilitate enablement of Hybrid Microgrids as soon as practicable, while considering through lessons learned whether adjustments are necessary to encourage development.

b. MRC's Proposed Addition to Section E Raises Critical Issues

In addition to the fact that MRC's proposed Operator Supplied Hybrid Microgrid is outside the scope of this part of the proceeding, the Companies also note that the proposal raises a number of critical concerns/issues.

In the first instance, although MRC purports to base its suggested Operator Supplied Hybrid Microgrid on the Community Based Renewable Energy ("CBRE") Program, there are material differences between the two models. MRC's compensation proposal for Hybrid Microgrids is retail wheeling that MRC attempts to cloak in a flawed CBRE analogy. Unlike the CBRE program, MRC is proposing to sell energy directly to participating Microgrid Customers at prices and terms outside the Commission's oversight utilizing the Companies' distribution system. There would be no regulation or rate setting process as MRC's proposal requires the Companies to charge the Microgrid Customer for energy supplied "in accordance with the [private] agreement executed by the

Microgrid Operator and the Microgrid Participant."[12] MRC further states that, "the Company thereafter shall pay the Microgrid Operator for the portion of the energy supplied by the Microgrid Operator at the rate charged by the Microgrid Operator to the Customers."[13] In contrast, under CBRE, compensation for a CBRE Subscriber Organization and Subscriber is set by Commission order, an auction mechanism, or competitive procurement, subject to approval by the Commission; CBRE compensation rates are not set based on a private agreement that does not involve the Public Utilities Commission, Consumer Advocate, or the Companies.

Based on the Companies' understanding of MRC's proposal, the Companies would credit the Microgrid Operator at the energy credit rate specified under the appropriate tariff (or payment under other interconnection agreement or power purchase agreement) and then bill a Microgrid Participant at whatever rate the Microgrid Operator and Participant agreed to, which could be a much lower rate since the Microgrid Operator is already backed by a rate guaranteed under the existing DER Tariffs. In other words, all customers (including non-participating customers) pay for energy produced by the Microgrid Operator, that only benefits the Microgrid Participants in the form of lower electric bills (as the Companies will only collect through the electric bill at a rate much lower than what it credited for that same energy), all while Microgrid Customers are still using the wires and other services provided by the Company. Further, for any "unused" energy that the Microgrid Operator can provide to the system, the Companies are required to compensate the Microgrid Operator at the same rate it is charging to its customers with no limits on the amount of energy.[14] MRC's proposal would significantly burden non-microgrid-participating customers while leaving the Companies with the obligation to serve the Microgrid Participants anytime the Microgrid Operator cannot serve its customers.

Further, MRC's proposal forces customers within the electrical boundary of a Hybrid Microgrid to take service from the Microgrid Operator. If it were possible for a customer to opt out, the Companies may need to add additional distribution infrastructure to serve that customer from power outside of the Hybrid Microgrid – which raises cost allocation and/or subsidization issues. Under the Proposed Tariff and agreement this boundary can effectively encompass an entire distribution feeder – approximately 1,000 customers. It does not matter that MRC, whose members only focus on commercial and institutional developments, does not think this will happen - as MRC's proposal says that it can.

Through MRC's proposed model, Microgrid Operators would effectively act as a subsidized utility, aiming to directly supply its Microgrid Participants with low cost power at the expense of non-participating utility customers, and without compensating the Companies for the use of the Companies' infrastructure to privately distribute this power (wheeling). Again, this is in derogation of clear Commission guidance:

> The Commission is supportive of reducing or removing regulatory barriers to private investment in microgrids when primary resiliency

[12] MRC's Comments at 7.
[13] *Id.*
[14] In addition, among other issues, the MRC's proposal shifts collection and billing risk to the Companies and their customers.

> benefits accrue to microgrid participants, but is not inclined to provide compensation from non-participants if there are limited or no broader benefits to the public and non-participants.

As discussed above, a fundamental disagreement between the Companies and MRC may be best summarized by MRC's Comment, "resilience offered by the microgrid is a side benefit."[15] The Companies disagree with this statement, and interpret the purpose and intent for development of a Microgrid Services Tariff to be primarily a resilience benefit. As the Commission noted, "given the priorities established by Act 200 and the remaining vulnerabilities of Hawai'i's energy systems to extreme events, the focus for the remainder of this docket is to facilitate the ability of microgrids to island and provide backup power to customers and critical energy uses during contingency events."[16] The structure of the Companies' Draft Tariff and related documents (submitted March 30, 2020), and modified and filed by the Working Group on February 1, 2020, reflect a tariff that balances the interests of all customers, as well as provides a compensation approach that fairly allocates cost of the resiliency benefit to those who benefit from it.

MRC states that the "Company proposal in the tariff would require that the Microgrid Operator have a separately negotiated power purchase agreement with the Company;" however, MRC misunderstands the requirements. For clarification, as provided in Appendix II, a Hybrid Microgrid Operator will need to execute a Hybrid Microgrid Agreement with the Companies to enable operation of the microgrid. Similarly, all generating facilities within the Hybrid Microgrid will need to have an executed interconnection agreement with the Companies, which may include previously executed power purchase agreements or interconnection agreements under DER tariffs for which the generating facilities qualify. There are no requirements for a power purchase agreement to be executed with the Microgrid Operator. Section E.2.b, does in fact encourage microgrids intended to enhance resilience by providing compensation during island mode for generators that may not qualify for energy export compensation under existing programs or contracts.

The Companies also note that, if there were issues with microgrid compensation and development, it would seem that Hawai'i DER developers that are a party to this docket would have participated in the Working Group and provided comments. Distributed Energy Resources Council of Hawaii ("DERC") has not been circumspect in any other proceeding about expressing its interests.

A thoughtful, planned approach would yield a more appropriate resilience benefit to the State and the Companies' customers. MRC's proposed compensation seeks to bypass competitive procurements or commission oversight on ratemaking and provide energy directly with its participants - effectively wheeling. This is in contrast to the current Hybrid Microgrid model in Section E in the Proposed Tariff, which simply applies current Tariff Rates and Rules, providing established and fair compensation without the need to introduce retail wheeling, exemptions for non-

[15] MRC's Comment at 8.
[16] *See* Order No 36481 issued in Docket No. 2018-0163 at 48.

utility entities, or other complex arrangements.[17] In short, MRC's proposal is simply another method to obtain cross-subsidization from the Companies' customers without any corresponding benefit

Recommendation: The Companies recommend the Commission accept Section E as provided in the Proposed Tariff, and do not recommend inclusion of MRC's proposed addition of a new compensation model to Section E. The Companies recommend the Commission address MRC's contention that the Proposed Tariff does not "represent a serious effort to attract interest in hybrid microgrids"[18] through the broader context of other matters currently before the Commission that may further incent microgrid development, such as advanced rate designs, new long-term DER programs, grid services, CBRE, integrated grid planning, among others. If any compensation mechanisms that closely resemble wheeling or leasing models need to be considered at this time, they should be more deliberately and thoughtfully considered and implemented and not hastily enacted.

3. Hybrid Microgrid Agreement Section 1: Notice and Disclaimer Regarding Future Rate and Tariff Modifications

a. Section 1

On February 1, 2021, the Working Group submitted the Hybrid Microgrid Agreement with the following language agreed to by the Consumer Advocate and the Companies:

> 1. **Notice and Disclaimer Regarding Future Rate and Tariff Modifications**. This Agreement shall, at all times, be subject to modification by the Commission as said Commission may, from time to time, direct in the exercise of its jurisdiction. Without limiting the foregoing, Microgrid Operator expressly acknowledges the following:
>
> (a) The Microgrid Services Tariff is subject to modification by the Commission.
>
> (b) **Your Agreement and Hybrid Microgrid shall be subject to any future modifications ordered by the Commission. You agree to pay for any costs related to such Commission-ordered modifications**.
>
> **BY SIGNING BELOW, YOU ACKNOWLEDGE THAT YOU HAVE READ, UNDERSTAND AND AGREE TO THE ABOVE NOTICE AND DISCLAIMER.**

MRC, however, wanted to insert additional language in the highlighted areas and urges the Commission to consider what MRC erroneously claims is a "version of industry standard language (often referred to as a Mobile-Sierra clause)", MRC Comments at 9, that reads as follows:

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[17] *See* January 16, 2020 Guidance Letter at 2-3 (the Commission recognizes the Companies' simplified hybrid microgrid proposal may result in a more expedited offering, as their proposal does not require retail wheeling; as a general matter, the Commission believes retail wheeling will likely require additional discussion after the filing deadline and as such, this issue should be addressed at a later time).

[18] MRC's Comments at 8.

> The Company will not support proposals to change this agreement after its execution or tariff changes that requires such a change in this agreement once executed without the agreement of the Microgrid Operator.

Id. In so doing, MRC falsely asserts that "the Company flatly refused to consider" the proposed language. As MRC is well-aware, the Companies considered the proposal and explained to MRC that the Mobile-Sierra doctrine is a Federal Energy Regulatory Commission ("**FERC**") doctrine that is not applicable to the Companies. The Mobile-Sierra doctrine applies to FERC-regulated companies under a specific statutory regime - the Natural Gas Act[19] and the Federal Power Act,[20] neither of which apply to the Companies as the Companies are not regulated by FERC. Further, the proposed language is overly broad, would prohibit the Companies from participating in any other docket and/or tariff that could impact the Hybrid Microgrid Agreement, and the context surrounding the use of the Mobile-Sierra doctrine is factually and fundamentally different from this docket - for example, it applies to FERC contract rates set in arms-length negotiated agreements, not in a non-negotiated tariff setting, and certainly not to every provision in an agreement as MRC suggests. Accordingly, the Companies did not support the proposed language and, as a consequence, rejected it. MRC did not like the Companies' response. Irrespective of MRC's wishes, the law remains clear.

As the Commission knows, wholesale interstate sales of natural gas and electricity are regulated by the FERC under the Natural Gas Act and the Federal Power Act, respectively. Under both statutes, regulated utilities must file compilations of their rate schedules, or "tariffs," with FERC and provide service to customers on the terms and prices set forth therein,[21] and utilities wishing to change their tariffs must notify the FERC within a prescribed time before the change is to go into effect.[22] Utilities are also permitted to set rates with individual purchasers through bilateral contracts, which also must be filed with the FERC before they go into effect.[23]

Under the Natural Gas Act, rates charged by sellers of natural gas are required to be "just and reasonable," and any such rate or charge that is not just and reasonable is declared to be unlawful.[24] The language of § 205(a) of the Federal Power Act is virtually identical: all rates and charges of any public utility in connection with the transmission or sale of electric energy subject to the jurisdiction of FERC must be just and reasonable and any such rate or charge that is not just and reasonable is unlawful.[25]

Under the Mobile-Sierra doctrine, the FERC must presume that the electricity rate set in a ***freely negotiated wholesale energy contract*** meets the "just and reasonable" requirements of the Federal Power Act and the presumption may only be overcome if FERC concludes that the contract seriously harms the public interest. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co*., 350 U.S. 348 (1956); *see also Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County, Wash*., 554 U.S. 527 (2008). *Mobile*, *Sierra* and subsequent cases interpreting and applying the doctrine set forth the same principle—where

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[19] 15 U.S.C.A. §§ 717 et seq.
[20] 16 U.S.C.A. §§ 824 et seq.
[21] 15 U.S.C.A. § 717c(c); 16 U.S.C.A. § 824d(c).
[22] 15 U.S.C.A. § 717c(d) (30 days); 16 U.S.C.A. § 824d(d) (60 days).
[23] 15 U.S.C.A. § 717c(c), (d); 16 U.S.C.A. § 824d(c), (d).
[24] Am. Jur. 2d, Public Utilities § 218, citing 15 U.S.C.A. § 717c(a).
[25] Am. Jur. 2d, Public Utilities § 211, citing 16 U.S.C.A. § 824d(a).

parties enjoy bargaining power and agree to an electricity rate set in a freely negotiated wholesale energy contract, the Mobile-Sierra doctrine applies to preserve the integrity of those rate-related provisions of the contract, which ultimately permits the stability of supply arrangements that all agree is essential to the health of the industry. In short, the doctrine and its presumption apply only to (1) electricity rates and related provisions (2) in freely negotiated wholesale energy contracts.[26] Accordingly, MRC's proposed language and position is unsupported by the doctrine for a number of reasons including, but not limited to, those raised in the following discussion.

First, the Hybrid Microgrid Agreement is ***not*** a freely negotiated wholesale energy contract entered into by parties enjoying equal bargaining power. Rather, parties are ***required*** by the Microgrid Services Tariff to enter into the form Hybrid Microgrid Agreement. Critically absent from the Hybrid Microgrid Agreement are the contracting parties' abilities to freely negotiate the terms of the agreement. Indeed, MRC seeks to inappropriately apply a negotiated term as a non-negotiated base term of a standardized contract. The Mobile-Sierra doctrine simply does not apply in this case. It is clear that any use of a provision even slightly similar to what MRC suggests should be negotiated in an arms-length transaction - not in a standardized non-negotiable tariff.

Second, even if the Mobile-Sierra doctrine was applicable, which it is not, the proposed language is overbroad because it seeks to invoke the doctrine to protect the ***entire*** agreement, including provisions wholly unrelated to an agreed-upon electricity rate. MRC's own link to sample Mobile-Sierra clauses confirms that only the provisions related to agreed-upon electricity rates trigger the presumption. *See* MRC Comments at 9, fn 6 (Sample 1: "Absent the agreement of all Parties to the proposed change, the standard of review for changes to any rate, charge . . . shall be the 'pubic interest standard of review set forth in [Mobile and Sierra].") (Sample 2: "The rates for service specified in this Agreement shall remain in effect until expiration of the Term, and shall not be subject to change for any reason, including regulatory review, absent agreement of the parties. . . . Further, absent the agreement in writing by both Parties, the standard of review for changes to this Agreement proposed by a Party, a non-party or the FERC acting sua sponte shall be the 'public interest' application of the 'just and reasonable' standard of review set forth in [Mobile-Sierra]."). The Mobile-Sierra doctrine has no bearing on standardized tariff contracts.

Third, MRC attempts to use the doctrine as both a shield against any changes to the Hybrid Microgrid Agreement and a sword to flatly prohibit the Companies (and thus impede any assistance to the Commission) from making any changes, beneficial or otherwise, to any tariff that could impact the Hybrid Microgrid Agreement, even if it is in the best interests of the Companies' customers, the State of Hawai'i, or other Microgrid Operators. Further, MRC's erroneous language would impact the Companies' ability to participate and support any tariff that could impact the Hybrid Microgrid Agreement, such as DER tariffs Rules 22 through 27, for example, which were approved with the idea that over time such modification to those tariffs would be needed. Moreover, even in a FERC context, the

[26] *See Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County, Wash*., 554 U.S. 527 (2008) (the United States Supreme Court explained that the Mobile-Sierra doctrine "was grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'").

Mobile-Sierra doctrine does **not** prohibit a contracting party from raising a rate change or rate issue with an agreement. In such a case, the proposed change or issue would be submitted to FERC and under the Mobile-Sierra doctrine, FERC would be required to apply the "just and reasonable" presumption to the agreed-upon electricity rate or related provisions. The presumption could be overcome if FERC concluded that the contract seriously harms the public interest. MRC, on the other hand, attempts to eliminate all rights to change or challenge a provision under the guise of the doctrine.

Finally, MRC wrongly claims that without its proposed language prohibiting the Companies from making or supporting changes to the Hybrid Microgrid Agreement or tariff changes, "the Company will seek to unilaterally modify its contract with and improperly shift costs to the microgrid operator." MRC Comments at 9. The claim reflects a lack of understanding of the tariff process in Hawai'i. Importantly, the tariff process makes it impossible for the Companies to unilaterally modify a contract. Tariff changes are approved by the Commission and interested parties will have the opportunity to intervene, participate or comment on the change. A prime example is the instant tariff docket, which MRC is participating in. The Companies cannot unilaterally modify their contract as suggested by MRC.

In short, MRC fails to meet its burden of proof as MRC's proposed language is overly broad, over-reaching, fails to protect customer interests, and is based on a misleading interpretation of the FERC Mobile-Sierra doctrine that does not apply to the Companies. MRC's proposed language should be rejected.

Recommendation: The Companies recommend the Commission accept Section 1 as provided in the Proposed Tariff, and do not recommend adoption of MRC's proposed language.

b. Section 1(b)

MRC also seeks to delete or modify Section 1(b), "You agree to pay for any costs related to such Commission-ordered modifications," arguing that this is an effort to defeat Commission jurisdiction as to which party bears the costs of a Commission decision. In essence MRC seeks to have the Microgrid Operator and Hybrid Microgrid Participants' benefits subsidized by having all of the Companies customers pay for any Commission ordered modifications. MRC's argument is untenable. As between the Microgrid Operator and the Companies' customers, costs related to the Hybrid Microgrid program should be borne by the Microgrid Operator – cross subsidization by non-participating customers of the Hybrid Microgrid program should not be allowed.[27] Moreover, the Companies note that Hybrid Microgrid Agreement Section 1 is consistent with precedent, contains standard language, including Section 1(b), used in standard Company interconnection agreements, and should therefore remain consistent. Examples of this standard language are reflected in Rule No. 22, Appendix I, Rule No. 23, Appendix I, Rule No. 24, Appendix I, Rule No. 25, Appendix I, and Rule No. 26, Appendix III, among others.

[27] It is likely that a participant agreement will pass these types of costs incurred by the Microgrid Operator to the Hybrid Microgrid Participant benefiting from the Hybrid Microgrid.

Recommendation: The Companies recommend the Commission accept Section 1(b) as provided in the Proposed Tariff; MRC's argument that Section 1(b) should be modified or deleted should be rejected.

4. Hybrid Microgrid Agreement Section 2: Term and Termination

MRC's Comments raise an issue with the five (5) year term agreement as provided (and highlighted for further discussion) in the Proposed Tariff, and instead suggests a fifteen (15) year minimum term. Notably, the Companies' Comments included a redline to revise the term of the agreement to ten (10) years, and therefore adopts the Commission's recommended 10-year term reflected in the Commission's redlined version. [28]

The Companies support the inclusion of a 10-year term, to provide a checkpoint and determine if any changes to the arrangement are needed. In all parts of the United States, Hybrid Microgrids with private developers have not been implemented before; with the exception of bi-lateral, one-off arrangements between developers and the utility. What is being proposed in the Tariff is as close to "plug and play" as a complex system as a Hybrid Microgrid can get, without incurring undue risk to Customers, Participants, and the Companies. The Companies envision working with various developers and entities (with varying levels of expertise) to create Hybrid Microgrids (with varying levels of complexity). As with any other arrangement, developments compatible with the Companies through the term of the agreement (commercially, technically, etc.) may be extended, and those requiring additional support have the opportunity to work with the utility to amend the agreement to mitigate any realized issues.

It is prudent to have a term (with provisions to extend upon agreement of the Parties) given the complexities and nascency of third-party Hybrid Microgrids. Contributing to the complexity of Hybrid Microgrids is the dynamic nature of the distribution system. Even prior to the adoption of customer technologies, the distribution system constantly underwent changes (i.e., every 2-5 years) due to load growth, circuit reconfigurations, new substations, and transformers, whereas other parts of the system, such as the transmission system, were often more static. The Companies will re-configure the distribution circuits often to accommodate changing loads as an efficient operational way to defer larger investments such as substations. With customer technologies, the distribution system is expected to evolve more dramatically over the next 10 years from battery energy storage, Customer Microgrids, electric vehicle charging, among others. The dynamic and complex nature of the distribution system is an opportunity for Hybrid Microgrids, but such changes should be considered in the operations and terms of the Hybrid Microgrid Agreement.

Recommendation: The Companies recommend the Commission accept a 10-year term to the Hybrid Microgrid Agreement, as provided in the Commission's Redlines and the Companies' Comments.

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[28] MRC's argument that "A term less than the useful life of the equipment involved will raise questions as to whether the microgrid operator is actually the owner of equipment for tax purposes and may further damage the ability to finance" is a red herring as in the Companies' experience many of the tax credit renewable energy power purchase agreements and other similar arrangements are based on a period of well less than 10 years. Accordingly, the Companies find the Commission's suggestion of 10 years acceptable.

5. Hybrid Microgrid Agreement Section 22.c: Microgrid Operator Fees

Due to the timeline of the Working Group process and prioritization of items, the Companies acknowledge that the $5/kW fee was not discussed in depth during the Working Group meetings. However, as provided in the Companies' Comments,

> [t]he proposed Hybrid Microgrid Agreement includes a modest $5/kW recurring annual fee intended to cover costs for the Company to administer the Hybrid Microgrid program, which may include the processing of Hybrid Microgrid applications, resources to work with Microgrid Operators to appropriately design the Hybrid Microgrid boundaries and operations, and to cover recurring costs needed to assure safety and reliability each time a microgrid transition is initiated.[29]

What has not yet been contemplated was whether an escalation factor is appropriate for the fees within the Hybrid Microgrid Agreement. A change that was suggested in the Companies' Comments was to increase the term of the agreements to 10-years, reducing the Companies' ability to recover additional costs to administer the program. The Microgrid Tariff is novel, with much to learn in terms of administering the program and actual costs incurred. As such, the Companies are amenable to reviewing the escalation at a later date, provided the modest $5/kW annual fee is included with the program cap, as provided in the Proposed Tariff Section I.2.

Recommendation: The Companies recommend the Commission accept Section 22.c as provided in the Proposed Tariff.

6. Hybrid Microgrid Agreement Section 22.f: Fair Disclosure; Disclosure Checklist

MRC has reserved its comments as to the Disclosure Checklist. MRC has; however, objected "to the requirement that a participant sign or initial dozens of initial boxes," contending that "[w]hen consumers take on much larger obligations for home mortgages, they get a settlement sheet and one or two other disclosure acknowledgements to sign." A similar comment asking for disclosures for purchasing homes was raised by MRC in the Working Group. Contrary to MRC's assumptions about the Hawaii market, purchasing a home in Hawai‘i does in fact require that a disclosure checklist be completed, with dozens of boxes to be checked. The disclosure checklist provided in the Hybrid Microgrid Agreement is consistent with this practice (and is also consistent with disclosures required for CBRE participation, where there are similar consumer protection concerns) and appropriate and necessary to ensure Microgrid Participants understand the details of the Hybrid Microgrid Services Program.

Recommendation: The Companies recommend the Commission accept the Disclosure Checklist as provided in the Consumer Advocate's Comments.

[29] Companies' Comments, Attachment A at 13.

7. Hybrid Microgrid Agreement Exhibit C, Section 2 Microgrid Operator Payment for Company Interconnection Facilities, Review of Hybrid Microgrid, and Review of Verification Testing

MRC has requested the Companies provide their justification for inclusion of a 14-day term for payment. As provided in the Companies' Comments, 14 calendar days is a requirement in all the Companies' interconnection agreements. It is appropriate for this requirement to remain consistent across all agreements, and all developer/operators.

Recommendation: The Companies recommend the Commission accept Exhibit C, Section 2 as provided in the Proposed Tariff.

8. Further Issues Raised by Act 200

MRC's Comments (Section III) include a discussion regarding Act 200 and the Proposed Tariff. In this discussion, MRC cites the recent Order regarding Performance-Based Ratemaking, microgrid's enhancement to the stability of the grid, and issues related to the interconnection of microgrids.

Performance-Based Ratemaking. MRC cites the Commission ordered Performance Incentive Mechanisms ("PIMs") related to (1) acceleration of RPS, (2) expeditious acquisition of grid services capabilities from DERs, and (3) faster interconnection times for DER systems. MRC contends that the Tariff fails to progress on these fronts.

The Companies disagree with MRC's assessment as the Proposed Tariff clearly aligns with the intent of these PIMs. First, the enablement of Customer and Hybrid Microgrids provide another incentive for customers to adopt renewable energy, thus accelerating RPS, through well vetted and approved DER tariffs currently in place. Second, the existing DER tariffs do in fact provide compensation for energy services that they provide to the Companies. Additionally, the Companies are actively pursuing other grid services, in alignment with other on-going initiatives (i.e., Integrated Grid Planning, CBRE, Grid Services procurements), all of which are also eligible for microgrid operations under the Proposed Tariff. The Companies procure or implement projects with the best value to their customers; and those proceedings are the appropriate venue for Grid Services provided by a microgrid to be valued. Third, many of the generating facilities that are expected to comprise microgrids will go through the existing interconnection processes pursuant to Rule 14H. Through the DER docket the Companies have made substantial process improvements[30] to allow for faster interconnection times. By extension, proposed microgrids will realize those benefits.

Microgrids Enhancing Grid Stability. MRC states "microgrids incorporate renewable resources along with storage and in some cases other generation sources that allow them to act as controllable integrated resources, which enhance grid stability." If designed and operated properly, with the appropriate interconnection standards and performance requirements (i.e., Rule 14H, among others), the Companies are in general agreement with this statement. Microgrids may enhance or not worsen grid stability; however, a microgrid with renewable resources along with storage, is nothing

[30] *See* Hawaiian Electric's Status Update Filing filed in Docket No. 2019-0323 on December 4, 2020.

new. These systems are no different than the types of systems already prevalent on the Companies' systems and enabled through existing tariffs. The Proposed Tariff includes operational characteristics for Customer Microgrids, which complement revisions to DER Tariffs, as well as a comprehensive Hybrid Microgrid Agreement. These elements ensure safe and reliable operation of Customer and Hybrid Microgrids, consistent with MRC's claim that microgrids enhance grid stability.

Issues Related to Interconnection of Customer Microgrids. MRC claims the Working Group process has bypassed issues related to interconnection of microgrids. The Companies disagree with this statement, as Customer Microgrids were consistently discussed during the Working Group process between October 2019 and February 2020, and December 2020 through January 2021. This is despite the Commission providing guidance to prioritize Hybrid Microgrid enablement[31].

MRC also stated that standby charges (Proposed Tariff Section E.5) were covered in Section B.4 and E.1. The Companies do not agree Schedule SS (Standby Service) is sufficiently covered in Sections B.4 and E.1, and seek to clarify such responsibilities to potential developers upfront. The Companies included this provision in their Draft Tariff (filed March 30, 2020) to provide a fair mechanism for Customer Microgrids to have the ability to go into Unscheduled Island Mode. The intent of Schedule SS is to cover systems which rely on the Utility to provide a backup should the primary (non-utility) source of power go offline. This is the same function as a Customer Microgrid that has the ability to island at will (assuming disturbance to the grid is mitigated). Removing this provision will provide a pathway for those who would otherwise fall under Schedule SS to apply as a Microgrid (given the broad interpretation of a Customer Microgrid) and not be subject to Schedule SS. The Companies are not being "double sure that microgrids were subject to standby charges," but rather balancing fairness across all ratepayers and mitigating cross-subsidization for systems using the grid as a backup source.

MRC summarizes this section by contending the "process has focused almost entirely on protecting the Company and its customers from microgrids rather than assuring the benefits of microgrids to the Company and its customers as contemplated by Act 200." The Companies disagree with this mischaracterization. Act 200 was developed as a response to Hawai'i's vulnerability to disruptions caused by "extreme weather events or other disasters," citing the effects Hurricane Maria left on Puerto Rico as an example. The Proposed Tariff aligns with the intent of Act 200 in providing enablement for microgrids to serve as a resilience measure during events disrupting the electrical system. The approach and arguments made by MRC focus on benefits to the Microgrid developer (or Operator) and its participants during normal conditions rather than during emergency events. MRC has not provided any comments on how its proposed concept of Hybrid Microgrids, or multiple Customer-Customer Microgrids would benefit Hawai'i in line with the intent of Act 200. Nearly all MRC's comments are related to normal "blue sky" economic opportunities. While this is one approach to incentivize the development of microgrids, this was not the intent of

[31] PUC Technical Conference held on November 14, 2019. The Commission provided guidance to prioritize development of the hybrid microgrid tariff, and questioned the need to develop a tariff covering Customer Microgrids.

Act 200. The Proposed Tariff reflects a balanced approach, considering *safety, customer benefit and fairness, resilience and reliability, and consumer protection,*[32] aligning with the Companies' guiding principles. What this means for microgrid developers or organizations representing microgrid developers, such as MRC, is that they will not be able to proliferate their developments at the expense of ratepayers, but they will be able seek opportunities that provide value (i.e., resilience, reliability, grid service, etc.) and be compensated by the individual(s), organization(s), or agency(s) benefiting from these services.[33]

III. Companies' Reponses to the Consumer Advocate's Comments:

The Companies appreciate the Consumer Advocate's efforts to address the Working Group's feedback to the disclosure checklist and have no further comments as to the disclosure checklist. The Companies support the inclusion of the disclosure checklist to ensure Hybrid Microgrid Participants, who are also the Companies' customers, comprehensively understand the arrangement between the Microgrid Operator, its role as a Participant, and its relationship with the Companies.

IV. Conclusion

The Companies' review of MRC's Comments and the Consumer Advocate's Comments has reaffirmed the Companies' recommendation that the Commission accept the Proposed Tariff and/or include the redlines provided in the Companies' Comments. MRC's Comments have confirmed MRC's objective to use Act 200 as a pathway to subsidize microgrid development at the expense of customers who would otherwise not benefit from such developments. In contrast, the Companies believe that Act 200 and the Proposed Tariff should focus on enabling microgrids to play a critical role in delivering value in the form of resilience and providing backup power to serve demands that support the community in times of distress. Microgrids are already being pursued today – Customer Microgrids are enabled through the Companies' various DER programs, the Companies will propose microgrids when they provide value for customers (i.e., in critical areas), and microgrids are permitted to participate in grid service programs.

The Proposed Tariff opens opportunities for microgrid development, and is guided by the principles of *safety, customer benefit and fairness, resilience and reliability, and consumer protection*. Understandably, these principles are not considered holistically by organizations concerned with developer profit over community safety, security, and resiliency. However, the Companies, as representatives of their customers and community must ensure such considerations are managed and implemented.

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[32] *See* February 10, 2021 The Companies' Comments to the Working Group Areas of Disagreements, Attachment A at 6-8.

[33] *See, e.g.,* Order 36481 at 53-55 ("The Commission is supportive of reducing or removing regulatory barriers to private investment in microgrids when primary resiliency benefits accrue to microgrid participants, but is not inclined to provide compensation from non-participants if there are limited or no broader benefits to the public and non-participants.").

Once again Hawai‘i finds itself at the forefront[34] of industry transformation that other jurisdictions will follow and build upon. The Working Group produced the first of its kind Microgrid Services Tariff that represents a significant step forward towards enhancing the resilience in the State. The Commission must consider the broad implications of accepting MRC's proposals, made solely from the perspective of a developer pushing to create profit opportunities without regard to the impact on others (i.e. being subsidized by non-participants) and without regard to the underlying purpose of Act 200 and this docket - resilience. Again, the Companies recommend that the Commission adopt the Proposed Tariff with the redlines provided in the Companies' Comments.

[34] *See* How to Design Multi-User Microgrid Tariffs. Smart Electric Power Alliance, August 2020.

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