**ATTACHMENT H – SAMPLE AGREEMENT (PETROLEUM FUELS)**

**SUPPLY AGREEMENT FOR PETROLEUM FUELS**

This Supply Agreement for Petroleum Fuels (“Agreement”) is made this \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_, 2021, by and between **HAWAIIAN ELECTRIC CO., INC**., (“Hawaiian Electric”), **HAWAI‘I ELECTRIC LIGHT COMPANY, INC.** (“Hawai‘i Electric Light”), and **MAUI ELECTRIC COMPANY,** LIMITED (“Maui Electric”), Hawai‘i corporations, (collectively, the “Companies”) and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_corporation (“Seller”), with its principal place of business and mailing address at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. The Companies and Seller are each a party (“Party”) and collectively the parties (“Parties”) to this Agreement.

WHEREAS, the Companies are in the business of generation, transmission and distribution of electrical power on the islands of O‘ahu, Hawai‘i, Maui, Moloka‘i, and Lāna‘i, each in the State of Hawai‘i and are subject to the Hawai‘i Public Utilities Law (Hawai‘i Revised Statutes, Chapter 269) and the rules and regulations of the Public Utilities Commission of the State of Hawai‘i (“Commission”); and

WHEREAS, the Companies desire high sulfur fuel oil (“HSFO”), number 2 diesel (“Diesel”), low sulfur diesel (“LSD”) and/or ultra-low sulfur diesel (“ULSD”) (collectively, “Product”) in quantities that meet the Companies’ requirements; and

WHEREAS, Seller represents that it is equipped and has the ability to supply, transport and deliver the Product to the Companies in amounts sufficient to meet the Companies’ requirements; and

WHEREAS, Seller desires, has the capability, and is willing to supply, transport and deliver the Product to the Companies and the Companies are willing to purchase and receive the Product from Seller under the terms and conditions set forth hereinafter.

NOW, THEREFORE, it is mutually agreed by the Parties as follows:

**ARTICLE I**

**DEFINITIONS**

Except where otherwise indicated, the following definitions shall apply throughout this Agreement.

* 1. “Affiliate”, except where otherwise expressly provided, means a corporation controlling, controlled by or under common control with Seller or the Companies, as the case may be.
  2. “Agreement” means this Supply Agreement for Petroleum Fuels between the Companies and Seller.
  3. “API” means American Petroleum Institute.
  4. “Appeal Period” has the meaning set forth in Section 2.2(B) (Non-appealable Commission Order).
  5. “ASC” has the meaning set forth in Section 17.10(A) (Financial Compliance).
  6. “ASTM” means the American Society for Testing and Materials.
  7. “Barrel” means 42 American bulk gallons at 60 DF.
  8. “BPTF” means Hawaiian Electric’s Barbers Point Tank Farm, a fuel receiving, storage and distribution facility located at the Campbell Industrial Park, O‘ahu, Hawai‘i.
  9. “BTU” and “BTU content” means British Thermal Unit and refers to the standard assessment of fuel’s gross heating value or gross heat content.
  10. “Business Day” means any calendar day that is not a Saturday, a Sunday, or a federal or Hawai‘i state holiday.
  11. “Certificate of Quality” or “Quality Certificate” means the formal document recording Seller’s laboratory determination of the quality a particular sample which represents a specific Delivery, said laboratory determinations having been performed in accordance with the test methods specified in Article IV (Quality).
  12. “Certificate of Quantity” means the formal document recording the Independent Inspector’s determination of quantity of the Product as Delivered to the Companies.
  13. "Commission" means the Public Utilities Commission of the State of Hawai‘i.
  14. "Commission Approval Order" has the meaning set forth in Section 2.2(A) (Commission Approval Order).
  15. "Commission Approval Order Date" means the date the Commission files the Commission Approval Order.
  16. "Consumer Advocate" means the Division of Consumer Advocacy of the Department of Commerce and Consumers Affairs of the State of Hawai‘i.
  17. “Confidential Information” has the meaning set forth in Section 17.9(A) (Confidential Information).
  18. “Agreement” means this Petroleum Supply Agreement between Seller and the Hawaiian Electric Companies (Hawaiian Electric, Hawai‘i Electric Light, and Maui Electric).
  19. “Cover Costs” has the meaning set forth in Section 15.1(B) (Default by Seller for Failure to Deliver the Product; Remedies).
  20. “Cover Supplies” has the meaning set forth in Section 15.1(B) (Default by Seller for Failure to Deliver the Product; Remedies).
  21. “Day” or “Days” means a calendar day.
  22. “Default” has the meaning set forth in Section 15.1(A).
  23. “Defaulting Party” has the meaning set forth in Section 15.1(A).
  24. “Deliver”, “Delivery”, “Deliveries” or “Delivered” means the transfer of title or physical movement of the Product by Seller as purchased by the Companies.
  25. “DC” means degrees Celsius
  26. “DF” means degrees Fahrenheit.
  27. “Diesel” diesel produced in conformity with the provisions of the quality specified herein.
  28. “DOT” means the Department of Transportation of the State of Hawai‘i.
  29. “Disclosing Party” has the meaning set forth in Section 17.9(A) (Confidential Information).
  30. "Effective Date" has the meaning set forth in Section 2.3 (Effective Date).
  31. “Email” has the meaning set forth in Section 16.1 (Notices).
  32. "Extension" means any Agreement term in addition to and after the Initial Term, each of which is a consecutive 12-Month period beginning February 1.
  33. “Failure to Supply Position” has the meaning set forth in Section 6.4 (A) (Failure to Supply Position).
  34. “Gallon” means a United States liquid gallon of 231 cubic inches
  35. “Government Approvals” means all permits, licenses, approvals, certificates, entitlements and other authorizations issued by Governmental Authorities, as well as any agreements with Governmental Authorities, required to fulfill a Party’s obligations under this Agreement.
  36. “Governmental Authority” means any federal, state, local or municipal governmental body or other authority exercising judicial, legislative, policy, regulatory, or taxing authority or power; or any court or governmental tribunal.
  37. “G.S.V.” means gross standard volume in U.S. Barrels at 60 DF.
  38. “HEI” means Hawaiian Electric Industries, Inc.
  39. “HSE Data” has the meaning set forth in Section 12.2 (Material Safety Compliance).
  40. “HSFO” means high sulfur fuel oil produced in conformity with the provisions of the quality specified herein.
  41. “Independent Determination” means a determination made by an independent laboratory as to an aspect of the Product.
  42. “Independent Inspector” means a qualified third-party petroleum inspection contractor acceptable to both Parties providing petroleum sampling, measurement, and other relevant services before, during, and after a Delivery.
  43. “Information” has the meaning set forth in Section 17.10(a) (Financial Compliance).
  44. “Initial Term” has the meaning set forth in Section 2.1 (Term).
  45. “Law” or “Laws” means all present and future federal, state, and local laws, rules, regulations, orders, ordinances, permit conditions, and other actions of governmental or quasi-governmental authorities.
  46. “LSD” means low sulfur diesel produced in conformity with the provisions of the quality specified in this Agreement.
  47. “Month” means a calendar month.
  48. “Nominated” and “Nomination” means the Product specified by the Companies to be Delivered by Seller to the Companies for a specified month.
  49. “Non-appealable Commission Approval Order” has the meaning set forth in Section 2.2(B) (Non-appealable Commission Approval Order).
  50. “Non-Defaulting Party” has the meaning set forth in Section 15.1(A).
  51. “Offsetting Party” has the meaning set forth in Section 17.14 (Offsets).
  52. “Person” means an individual, partnership, corporation, limited liability company, business trust, joint stock company, trust, unincorporated association, joint venture, Governmental Authority, or other entity.
  53. "Party" and "Parties" have the meanings set forth in the preamble first paragraph of this Agreement.
  54. “Product” means HSFO, Diesel, LSD, and ULSD suitable for use as a fuel of the quality specifications described in Article IV (Quality) of this Agreement.
  55. “Receiving Party” has the meaning set forth in Section 17.9(A) (Confidential Information).
  56. “Receiving Facility” means any of Hawaiian Electric, Hawai‘i Electric Light, or Maui Electric’s generating facilities, storage facilities and/or other facilities used to receive, transport, store, or otherwise handle the HSFO, Diesel, LSD and/or ULSD located on the islands of O‘ahu, Hawai‘i, Maui, or Moloka‘i as designated by the Companies.
  57. “Representatives” means the officers, directors, members, managers, employees, or agents of a Party or its Affiliates.
  58. “SOX 404” has the meaning set forth in Section 17.10(A) (Financial Compliance).
  59. "Specifications" means the fuel quality specifications applicable to the Product as described herein.
  60. "Tank Final Sample" has the meaning set forth in Section 6.5 (Disputes Regarding Quantity or Quality) below.
  61. “ULSD” means Ultra-Low Sulfur Diesel produced in conformity with the provisions of the quality specified herein.
  62. “USD” means currency denominated in U.S. dollars.
  63. “Year” means a calendar year.

**ARTICLE II**

**TERM**

**Section 2.1: Term**. The term of this Agreement (“Initial Term”) shall be from the Effective Date through and including January 31, 2026, unless terminated earlier as provided in this Agreement. This Agreement shall continue thereafter on a successive year-to-year basis (each such year being an “Extension”) beginning on February 1, 2026, unless the Companies or Seller gives written notice to the other of termination at least one hundred twenty (120) Days before the beginning of any Extension.

**Section 2.2: Regulatory Approval**.

(A) Commission Approval Order. The Parties acknowledge and agree that this Agreement is subject to approval by the Commission and the Parties’ respective obligations hereunder are conditioned upon receipt of such approval, except as specifically provided otherwise herein. Upon execution of this Agreement, the Parties shall use good faith efforts to obtain, as soon as practicable, an order from the Commission (“Commission Approval Order”) that does not contain terms and conditions deemed to be unacceptable to the Companies, and is in a form deemed to be reasonable by the Companies, in its sole discretion, ordering that (i) this Agreement is approved; (ii) the Purchased cost of the Product to be incurred by the Companies as a result of this Agreement is reasonable; (iii) the Companies’ purchase of the Product pursuant to this Agreement is prudent and in the public interest; (iv) the Companies may include the Product purchased costs, costs incurred by the Companies pursuant to this Agreement in the Companies’ revenue requirements for ratemaking purposes and for the purposes of determining the reasonableness of the Companies’ rates and/or for cost recovery above those fuel costs included in the base rate through the Companies’ Energy Cost Recovery Clause during the Initial Term and any Extension of this Agreement.

(B) Non-appealable Commission Approval Order. A non-appealable Commission approval order (“Non-appealable Commission Approval Order”) means a Commission Approval Order that is not subject to appeal to any Circuit Court of the State of Hawai‘i, the Intermediate Court of Appeals of the State of Hawai‘i, or the Supreme Court of the State of Hawai‘i, because the period permitted for such an appeal (“Appeal Period”) has passed without the filing of notice of such an appeal, or that was affirmed on appeal to any Circuit Court of the State of Hawai‘i, the Intermediate Court of Appeals of the State of Hawai‘i, or the Supreme Court of the State of Hawai‘i, or was affirmed upon further appeal or appellate process, and that is not subject to further appeal, because the jurisdictional time permitted for such an appeal and/or further appellate process such as a motion for reconsideration or an application for writ of certiorari has passed without the filing of notice of such an appeal or the filing for further appellate process.

(C) Companies’ Written Statement. Not later than thirty (30) Days after the issuance of a Commission Approval Order, the Companies shall provide Seller with a copy of such Commission Approval Order together with a written statement as to whether the conditions set forth in Section 2.2(A) (Commission Approval Order) and Section 2.2(B) (Non-appealable Commission Approval Order) have been satisfied.

(D) Commission Approval Date. As used in this Agreement, the term “Commission Approval Date” shall be defined as follows: If the Companies provide the written statement referred to in Section 2.2(C) (Companies’ Written Statement) to the effect that the conditions referred to in Section 2.2(A) (Commission Approval Order) and Section 2.2(B) (Non-appealable Commission Approval Order) have been satisfied, the Commission Approval Date shall be the date of the issuance of the Commission Approval Order; or

(1) If the Companies provide the written statement referred to in Section 2.2(C) (Companies’ Written Statement) to the effect that only the conditions referred to in Section 2.2(A) (Commission Approval Order) have been satisfied, the Commission Approval Date shall be as follows:

(a) if a Commission Approval Order is issued and is not made subject to a motion for reconsideration filed with the Commission or an appeal, the Commission Approval Date shall be the date one Day after the expiration of Appeal Period following the issuance of the Commission Approval Order;

(b) if the Commission Approval Order became subject to a motion for reconsideration, and the motion for reconsideration is denied or the Commission Approval Order is affirmed after reconsideration, and such order is not made subject to an appeal, the Commission Approval Date shall be deemed to be the date one Day after the expiration of the Appeal Period following the order denying reconsideration of or affirming the Commission Approval Order; or

(c) if the Commission Approval Order, or an order denying reconsideration of the Commission Approval Order or affirming approval of the Commission Approval Order after reconsideration, becomes subject to an appeal, then the Commission Approval Date shall be the date upon which the Commission Approval Order becomes a non appealable order within the meaning of the definition of a Non-Appealable Commission Approval Order in Section 2.2(B) (Non-appealable Commission Approval Order).

(E) Unfavorable Commission Order. The term “Unfavorable Commission Order” means an order from the Commission concerning this Agreement that: (i) dismisses the Companies’ application; (ii) denies the Companies’ application; or (iii) approves the Companies’ application but contains terms and conditions deemed unacceptable by the Companies in its sole discretion and therefore does not meet the definition of a Commission Approval Order as set forth in Section 2.2(A) (Commission Approval Order). If the Companies receive an Unfavorable Commission Order, the Companies may, but are not required to, file a motion for reconsideration and/or an appeal. If the Companies file a motion for reconsideration or an appeal, the Parties’ respective obligations remain conditioned upon the receipt of the items enumerated in Section 2.2(A) (Commission Approval Order) and Section 2.2(B) (Non-appealable Commission Approval Order). If, after receipt of an Unfavorable Commission Order, the Companies file neither a motion for reconsideration nor an appeal, this Agreement is null and void, and neither Party owes any further obligation to each other.

(F) Termination for Delay or Denial. If the Companies have not received the Commission Approval Order within three hundred sixty-five (365) Days of the Execution Date of this Agreement, or if the Companies’ request for Commission approval of this Agreement is denied in whole or in part, then either Seller or the Companies may terminate this Agreement by providing written notice of such termination delivered to the other prior to the Effective Date, as it is defined in Section 2.3 (Effective Date). In such event of termination, each Party shall bear its own respective fees, costs and expenses incurred prior to termination, if any, in preparation for performance hereunder, and the Parties shall have no further obligation to each other with respect to this Agreement except for indemnity and confidentiality obligations assumed by the Parties hereunder.

**Section 2.3: Effective Date**. This Agreement shall become effective (“Effective Date”) upon satisfaction of the relevant conditions set forth in Section 2.2(D)(1) (a) through (c), as such conditions are applicable. Alternatively, the Parties may mutually agree in writing that some other date shall be deemed the Effective Date. Except for the obligations and provisions described herein, neither Party shall have any binding obligations under this Agreement until the Effective Date, except that the Parties agree upon the Execution Date to be bound by Sections 2.2 (Regulatory Approval), Section 11.1 (Force Majeure), Section 14.1 (Indemnity), and Article XVII (General Provisions).

**ARTICLE III**

**QUANTITY**

**Section 3.1: Quantity of Product To Be Supplied/Delivered**. Subject to the terms and conditions herein, Seller shall sell and Deliver to the Companies, and the Companies shall purchase and receive from Seller, the Product as ordered by the Companies. **[NOTE: It is estimated that nominations will begin as early as December 2022 for Delivery as early as January 1, 2023.]** For any partial year of this Agreement, the total annual quantity for that particular partial year shall be calculated up to the maximum rates set forth in Section 3.2 (Purchase Volumes) for that year, multiplied by the number of Days remaining through December 31 in that year.

**Section 3.2: Purchase Volumes**. During each Year that this Agreement is in effect, Seller shall sell and Deliver to the Companies, and the Companies shall purchase and receive from Seller, the Product in delivery volumes as specified in Attachment A (Purchase Volumes) of this Agreement which is incorporated herein by reference.

Annual Average in Physical Barrels (volumes will be determined by delivery location/island).

Period Minimum Maximum

2024 0 TBD

2025 0 TBD

2026 0 TBD

The volumes for 2026 shall apply for each Year of any Extension, and the annual volumes of the Product to be sold and Delivered by Seller and to be Nominated, purchased and received by the Companies during each Year of any Extension shall remain at the 2026 volumes unless otherwise mutually agreed to in writing. Subject to availability, Seller will sell and Deliver and the Companies will purchase and receive such additional volumes as are mutually agreed by the Parties.

**ARTICLE IV**

**QUALITY**

**Section 4.1: Quality Of Product To Be Delivered**. Seller represents and warrants that the quality of the Product sold and Delivered by Seller and purchased and received by Hawaiian Electric shall be as stated on Seller’s Certificate of Quality for such Product. The quality of the Product to be sold and Delivered hereunder shall comply with the Specifications (“Specifications”) for HSFO, Diesel, LSD, and ULSD attached hereto as Attachment “[INSERT]” (HSFO Fuel Specification), Attachment “[INSERT]” (Diesel Fuel Specification), “[INSERT]” (LSD Fuel Specification) and “[INSERT]” (ULSD Fuel Specification) and made a part hereof and all applicable laws (“Laws”). If the quality does not comply with the Specifications and all applicable Laws, Seller shall reimburse the Companies for all costs associated with such failure to comply as determined by the Companies in their sole and absolute discretion. All Diesel and ULSD Delivered by Seller pursuant to this Agreement shall be dyed by Seller in accordance with governmental requirements for tax-exempt, off-road diesel fuel.

**ARTICLE V**

**PRICE**

**Section 5.1: Pricing**. The price for the Product purchased by the Companies pursuant to this Agreement shall be calculated as set forth in Attachment “[INSERT]” (“Pricing”) to this Agreement which is incorporated herein by reference **[NOTE: Pricing to be determined.]**

**Section 5.2: Rounding.** All prices, price formula component value averages and other sums payable with respect to the Product purchased pursuant to this Agreement shall be stated in the nearest hundredths of a dollar unless specifically provided otherwise.

**Section 5.3: Fees, Taxes, Assessments, Levies, and Imposts**.

(A) Seller’s Exclusive Liability. Seller shall comply with all applicable Laws concerning fees, taxes, assessments, levies, and imposts on the Product and the services performed by Seller pursuant to this Agreement. Seller assumes exclusive liability for all gross receipts, sales, use, excise, transportation, privilege, occupational, property, and other taxes applicable to the Product, services, tangible and intangible materials and supplies furnished in connection with Seller’s obligations pursuant to this Agreement, including any and all interest and penalties payable as a result of nonpayment thereof or noncompliance therewith.

(B) Hawai‘i General Excise Tax. The Companies shall not be liable for payment of any Hawai‘i General Excise Tax levied and assessed against Seller as a result of this Agreement.

(C) Increases. The rates and charges in this Article V (Price) shall not be adjusted by reason of any subsequent increase or reduction of any applicable tax.

**ARTICLE VI**

**DELIVERY**

**Section 6.1: Forecast**. Prior to the 20th Day of each Month, the Companies shall give Seller a forecast of the monthly quantity and type of the Product that Hawaiian Electric, Maui Electric and Hawai‘i Electric Light respectively require during the coming three (3) Months. In addition, and also prior to the 20th Day of each Month, the Companies shall provide Seller with a schedule of the Companies’ nominated barge loadings (e.g., for Moloka‘i) for the following Month. Such schedule shall show the expected place, date, and time of the commencement of the vessel’s loading. The Companies shall inform Seller of any changes with respect to the forecast as such changes might occur.

**Section 6.2: Delivery of the Product**.

(A) Coordination of Deliveries. The Companies shall provide the three (3) Month forecast described in Section 6.1 (Forecast) to Seller and shall coordinate Deliveries of the Product with Seller:

(1) Deliveries in Bulk to Company’s Barge or From Seller’s Barge or Pipeline. Seller shall Deliver Diesel and/or ULSD in bulk into the Companies’ nominated barge positioned at Kalaeloa Barbers Point Harbor at a minimum rate of 3,000 Barrels per hour. Seller’s Delivery rate of HSFO into the Companies’ nominated barge positioned at Kalaeloa Barbers Point Harbor shall be at a minimum rate of 1,600 Barrels per hour. Seller will undertake commercially reasonable efforts to coordinate its loading of the Product for the Companies in concert with the Companies’ loading of any other petroleum products.

(2)Liftings from Truck Rack. Seller shall Deliver HSFO, Diesel, LSD and/or ULSD into the Companies’ nominated tanker trucks from Seller’s nominated terminal truck rack at a minimum Delivery rate of 190 Barrels per hour.

**Section 6.3: Determination of Quantity**.

(A) Under the supervision of the Independent Inspector, the quantity of the Product Delivered by Seller to the Companies on O‘ahu shall be determined by gauging Seller’s issuing tanks immediately before and after pumping of the Product.

(B) Under the supervision of the Independent Inspector, the quantity of the Product Delivered by Seller to the Companies’ nominated marine terminal at Kaunakakai, Moloka‘i, shall be determined by gauging the receiving tanks at said marine terminal immediately before and after pumping of the Product.

(1) The quantity of the Product Delivered by Seller (i) at Seller’s nominated terminal to the Companies’ nominated tanker truck or (ii) in Seller’s nominated tanker truck to the Companies’ Receiving Facilities shall be determined at the time of each Delivery based on Seller’s calibrated load rack meters, converted in each instance to volume at sixty (60) degrees Fahrenheit by the automated rack control system. Seller’s meters shall be calibrated on an annual basis or otherwise as may be mutually agreed upon by Seller and the Companies. The Companies shall have the right at their expense, and in accordance with reasonable procedures at Seller’s nominated terminal to independently certify said calibration. The Companies and Seller shall have the right to each have one (1) representative present to witness such meter calibration.

**Section 6.4: Failure to Supply**.

(A) Failure to Supply Position. Except in the event of Force Majeure as provided in Section 11.1(A) (Definition of Force Majeure) that directly affects Seller’s ability to Deliver the Product to the Companies or an agreement by the Parties to the contrary, if Seller’s anticipated Delivery cannot be made or does not meet the quantity ordered, Seller will be in a failure to supply position (“Failure to Supply Position”) and Seller shall immediately give written notice to the Companies of the same.

(B) Remedy for Seller’s Failure to Supply. Seller shall undertake its best efforts to minimize the impact of any Failure to Supply Position on the Companies. The Companies may, at their option, purchase an amount of the Product equal to Seller’s deficiency from another vendor at the then prevailing market rates. The Companies will invoice to Seller, and Seller shall pay to the Companies within thirty (30) Days of such invoice issuance date, the cost difference between the Product so purchased by the Companies and the cost of the Product as it would have been Delivered by Seller. If the Companies elect to purchase the Product from another vendor as provided under this Section 6.4(B) (Remedy for Seller’s Failure to Supply) then any annual purchase requirements set forth under this Agreement for the year in question shall be reduced correspondingly. The rights of the Companies set forth in this Section 6.4(B) (Remedy for Seller’s Failure to Supply) are without prejudice to any other remedies the Companies may have under this Agreement with respect to Seller’s failure to comply with the Product purchase volumes set forth in this Agreement.

**Section 6.5:** **Disputes Regarding Quantity or Quality.**

(A) **Quantity Disputes**.

(1) All determinations as to the quantity of the Product sold and Delivered by Seller to the Companies pursuant to this Agreement shall be calculated in accordance with current measurement standards adopted by API, ASTM-IP and other recognized standard-setting bodies as may be applicable in the opinion of the Independent Inspector and shall be expressed in G.S.V., U.S. barrels @ 60 degrees Fahrenheit and U.S. gallons @ 60 degrees Fahrenheit.

(2) For Delivery of the Product in bulk, the Independent Inspector shall (i) prepare and sign a Certificate of Quantity stating the quantity of the Product determined according to the provisions of Section 6.3 (Determination of Quantity) and Section 6.5(A) (Quantity Disputes) that has been Delivered to the Companies, (ii) furnish the Companies and Seller each with a copy of such Certificate of Quantity, and (iii) inform Seller and the Companies by electronic mail of the quantity of the Product as Delivered by Seller. The data in the Independent Inspector’s Certificate of Quantity prepared as provided herein shall, absent fraud or errors and omissions, be binding and conclusive upon both Parties, and shall be used for verification of the invoice and bill of lading for barge deliveries.

(3) If the Companies or Seller has reason to believe that the quantity of the Product in a particular Delivery is incorrect, the Party claiming an incorrect Delivery quantity shall, within five (5) Days of the date of the Delivery at issue, present the other Party with documentation supporting such claim and the Parties will confer, in good faith, on the causes for the discrepancy and shall proceed to correct such causes and adjust the quantity, if justified, for the Delivery in question.

(B) **Quality Disputes.**

(1) The quality of the Product sold and Delivered by Seller to the Companies shall be as stated on Seller’s Certificate of Quality for such Product. The quality of the Product in the Companies’ nominated truck or in Seller’s nominated truck delivered to the Companies’ Receiving Facilities shall be determined on the basis of a volumetric weighted average composite of samples drawn by the Independent Inspector or Seller representative from Seller’s nominated terminal issuing tank(s) after the completion of each bulk receipt into such terminal tanks in such a manner as to be representative of the volume of the tank inventory from that time until the time of the next bulk receipt. Such samples of the Product shall be divided into a minimum of two (2) parts one of which shall be sealed and dated and retained by Seller, or an Independent Inspector at the option of Seller, for a period of forty five (45) Days.

(2) The quality of the Product sold and Delivered by Seller to the Companies shall be as stated on Seller’s Certificate of Quality for such Product. The quality of the Product in the Companies’ nominated barge, the harbor terminal piping, or from Seller’s nominated barge to the Companies’ nominated terminal shall be determined on the basis of a volumetric weighted average composite of samples drawn by the Independent Inspector or Seller representative from Seller’s nominated terminal issuing tank(s) in such a manner as to be representative of the volume of the tank inventory. Such tank samples of the Product shall be divided into a minimum of two (2) parts, one of which shall be sealed and dated and retained by Seller (or an Independent Inspector at the option of Seller) for a period of forty five (45) Days.

(3) If the Companies have reason to believe that the quality of the Product in a Delivery fails to conform to the Specifications as provided in Article IV (Quality), the Companies shall, within five (5) Days after the later of the date of the completed Certificate of Quality is received by the Companies or the date of the Companies receipt of the Companies’ determination of quality, present Seller with documentation supporting such determination and the Parties will confer, in good faith, on the causes for the discrepancy. If the discrepancy is attributable to Seller, Seller shall proceed to correct such causes and adjust the quality for the Delivery in question. In the event of an unresolved difference between Seller and the Companies as to the quality of the Product, the sealed sample of the Product in question that is in the possession of the Independent Inspector shall be provided to an independent laboratory for an independent determination of quality (“Independent Determination”), which Independent Determination shall be binding on the Parties. Seller shall be solely responsible for the cost for such Independent Determination in the event that it is determined that the quality of the Product in question does not conform to the Specifications.

(4) Remedies for Non-Conforming Product. If the quality of the Product Delivered by Seller to the Companies fails to conform to the Specifications as provided in Article IV (Quality), the Companies may, in their sole discretion, issue a Specification waiver if the Companies determine that their use of the non-conforming Product will not adversely affect the Companies. If the Companies elect not to issue a Specification waiver, Seller shall correct the non-conforming Product by Delivering to the Companies additional Product of a quality that, when blended with the non-conforming Product, will result in conformance with the Specifications. Seller shall Deliver such additional Product to the Companies’ storage tank(s) at a Receiving Facility as directed by the Companies. If such efforts fail to resolve the failure of the Product to conform to the Specifications, the Companies may return the non-conforming Product to Seller, in which case Seller shall replace the non-conforming Product by Delivering an equal volume of conforming Product, quality verified by the Companies, to the Companies’ designated Receiving Facilities in a timely manner. Notwithstanding the preceding, the Companies shall always have the right to refuse Delivery of any Product if the Companies have a good faith basis to believe that the Product does not meet the Specifications. In such an event, either (i) Seller shall replace the non-conforming Product in the manner described above at Seller’s sole cost and expense; or (ii) the Companies may obtain the Product from another vendor if, in the Companies’ reasonable discretion, the Seller’s replacement of non-conforming Product may not be performed in time to prevent a possible interruption of the Companies’ operations. Any remedy of non-conforming Product accepted by the Companies under this Section 6.5(B)(4) (Remedies for Non-Conforming Product) shall not operate or be construed to remedy any similar non-conforming Product or to change the Specification of the Product acceptable to the Companies under the terms of this Agreement.

(5) Seller shall be solely responsible for all cost and expense, including without limitation, testing, transportation, re-refining, emptying and cleaning of storage tanks, and handling costs incurred by the Companies in returning, replacing, or otherwise correcting the non-conforming Product.

**Section 6.6: Records/Right to Audit.** Seller shall retain any and all documents and records regarding the Delivery, quantity and quality of the Product sold under the terms of this Agreement for the later of twelve (12) Months after the date of the invoice for such Product, or, in the event of any dispute concerning the quantity or quality of the Product, until any such dispute is resolved. Upon request by the Companies, Seller shall promptly make such records available to the Companies at a location designated by the Companies for its review thereof.

**Section 6.7: Inspection.** The Companies may participate in all sampling, inspection, measurements, and tests of the Product that may be conducted pursuant to this Agreement. The Companies may also inspect any equipment owned or controlled by Seller that is used in determining the quantity or quality of the Product, provided that any such participation by the Companies shall not materially interfere with or otherwise disrupt the inspection, measurement and tests of the Product conducted by Seller. Upon reasonable notice to Seller and during normal business hours, the Companies may, at their sole expense, inspect and audit any sample analysis of the Product conducted by or for Seller. Such inspection and audit rights shall include the review of records and data used in the preparation of such analysis.

**Section 6.8: Independent Inspector.** Seller and the Companies shall mutually agree on appointment of the Independent Inspector and such agreement shall not be unreasonably withheld by either Party. All samples, measurements, and determinations as provided in this Agreement shall be drawn, taken, and made under the supervision of the Independent Inspector, who shall attend Deliveries of the Product as designated by the Parties or as otherwise provided for in this Agreement. All charges for services rendered by the Independent Inspector shall be borne equally by the Companies and Seller except as otherwise provided for in this Agreement.

**ARTICLE VII**

**SELLER’S REPRESENTATIONS AND WARRANTIES**

**Section 7.1: Seller’s Representations and Warranties**. In addition to any other representations and warranties of Seller set forth in this Agreement, Seller agrees, represents, and warrants as follows:

(A) Ability to Supply. Throughout the Initial Term and any Extension, Seller shall supply the Product in conformance with the Specifications in the amounts necessary to meet all of Seller’s obligations under this Agreement. At any time upon the Companies’ reasonable request, Seller shall provide the Companies with assurances of Seller’s ability to perform such supply obligations under this Agreement.

(B) Ability to Deliver.

(1) Seller shall own, lease, or have the right to use facilities sufficient to meet Seller’s obligations for truck rack Deliveries under this Agreement.

(2) Seller shall own, lease, or have the right to use tanker trucks sufficient to meet Seller’s obligations for Deliveries to the Companies’ Receiving Facilities under this Agreement.

(3) For barge Deliveries, Seller’s nominated vessels employed to Deliver the Product to the Companies shall comply with all regulations, pier operator’s standards for vessel acceptance quality, pollution mitigation, required pollution liability, Protection and Indemnity Insurance (“P&I”) and other insurance coverages, and pier operators’ operations manual requirements for barge Deliveries under this Agreement. Seller will also timely pay and be solely responsible for the cost of all dues and other charges on said vessels.

(C) Quality. All of the Product Delivered hereunder will be so Delivered in compliance with the terms of this Agreement.

(D) Right, Title, and Interest. Seller possesses all title to, right, and interest in the Product to be sold and Delivered to the Companies pursuant to this Agreement. Seller will Deliver the Product to the Companies free and clear of all liens, security interests, claims, and encumbrances or any interest therein or thereto by any person.

(E) Duly Organized. Seller is duly organized, validly existing, and in good standing under the laws of the State of Hawai‘i. Seller has full power, authority, and legal right to execute, deliver, and perform its obligations under this Agreement.

(F) No Conflict. Seller’s performance of its obligations under this Agreement will not result in a violation of, or be in conflict with, any provisions of its articles of incorporation, bylaws, and/or other organizational documents, or result in a violation of, or be in conflict with, or constitute a default or an event that would, with notice or lapse of time, or both, become a default under any mortgage, indenture, contract, agreement, or other instrument to which Seller is a party or by which it or its property is bound, where such violation, conflict, default or potential default would materially adversely affect Seller’s ability to perform its obligations under this Agreement, or result in a violation of any statute, rule, order of any court or administrative agency, or regulation applicable to Seller or its property or by which it or its property may be bound, or result in a violation of, or be in conflict with, or result in a breach of, any term or provision of any judgment, order, decree or award of any court, arbitrator, or governmental or public instrumentality binding upon Seller or its property, where such violation, conflict, or breach would have a material adverse effect on Seller’s ability to perform its obligations under this Agreement.

(G) No Default. Seller represents and warrants that it is not in default, and no condition exists which, with notice or lapse of time, or both, would constitute a default by Seller under any mortgage, loan agreement, deed of trust, indenture or other agreement with respect thereto, evidence of indebtedness or other instrument of a material nature, to which it is party or by which it is bound, or in violation of, or in default under, any rule, regulation, order, writ, judgment, injunction or decree of any court, arbitrator or federal, state, municipal or other governmental authority, commission, board, bureau, agency, or instrumentality, domestic or foreign, where such default, condition or violation would have a material adverse effect on Seller’s ability to perform its obligations under this Agreement.

(H) Seller represents and warrants that there is no action, suit, proceeding, inquiry or investigation, at law or in equity, or before or by any court, public board or body, pending against such Seller, or of which Seller has otherwise received official notice, or which to the knowledge of Seller is threatened against Seller, wherein an adverse decision, ruling or finding would have a material adverse effect on Seller’s ability to perform its obligations under this Agreement.

(I) Experience, Qualifications, and Resources. Seller represents that it has entered into this Agreement in connection with the conduct of its business and it has the experience, qualifications and financial resources necessary to sell and Deliver the Product to the Companies in accordance with the terms and conditions of this Agreement.

(J) Continuing Obligation. Seller’s representations and warranties as set forth in this Article VII (Seller’s Representations and Warranties) are continuous for the extent of the Initial Term and any Extension of this Agreement. Seller shall provide notice to the Companies of the occurrence or non-occurrence of any event that compromises its representations and warranties made herein within five (5) Business Days of Seller’s knowledge thereof.

**ARTICLE VIII**

**INVOICING AND PAYMENT**

**Section 8.1: Invoicing**.

(A) Seller shall submit its invoice for the Product sold and Delivered to the Companies following the Companies’ receipt of such Product. All invoices shall, at a minimum, show the type of the Product and price per physical Barrel of the Product and shall be accompanied by full documentation concerning the Product, including the report of the Independent Inspector (as applicable), Certificate of Quality, Certificate of Quantity, and price calculation.

(B) Invoices will be prepared and dated by Seller following Delivery of the Product to the Companies and shall be sent to each respective company at the following address:

Hawaiian Electric: Hawaiian Electric Co., Ltd.

P. O. Box 2750

Honolulu, HI 96840-0001

Attn: Manager of Fuel Operations, mailstop: CIP3- IF

Facsimile: 808-695-3273

Email: [INSERT]

Hawai‘i Electric Light: Hawai‘i Electric Light Co., Inc.

P. O. Box 1027

Hilo, HI 96721-1027

Attn: Production Department

Facsimile: 808-969-0425

Email: [INSERT]

Maui Electric: Maui Electric Company, Limited

P. O. Box 398

Kahului, HI 96732

Attn: Production Department

Facsimile: 808-422-4975

Email: [INSERT]

(C) Invoices, invoice documentation, laboratory analyses, and other documents having to do with the quality, quantity, and Delivery of the Product or otherwise with the Product sold and Delivered to the Companies hereunder may be sent by first class mail or by electronic transmission (facsimile or electronic mail). The Parties may substitute other addresses upon the giving of proper notice. Correspondence and documents of a similar nature may be sent to Seller at the following address or as otherwise instructed:

Seller’s NAME

And address

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Facsimilie: [INSERT]

Email: [INSERT]

**Section 8.2: Payment**.

(A) Method of Payment. Payment of Seller’s invoices shall be made by bank wire transfer of immediately available funds by the Companies in U.S. dollars to:

[INSERT SELLER’S BANK ROUTING NUMBER ACCOUNT HERE]

The Companies will pay properly submitted invoices within forty (40) Days of the invoice issuance date. If the due date for an invoice falls on a holiday or a Saturday, the payment shall be due on the preceding Business Day. If such date falls on a Sunday or a holiday falling other than on a Friday, payment shall be due the following Business Day.

(B) If an invoice incorporating an item that is disputed has been sent to the Companies, then the Companies shall make payment in accordance with Section 8.2(A) (Method of Payment) for that portion of the invoice that is not disputed by the Companies and in which case, the Companies shall make such adjustment to taxes and other value-dependent items as are reasonable under the circumstances.

(C) Any invoice incorporating items in dispute shall be adjusted in accordance with the terms of Article V (Price) by Seller’s subsequent invoicing or issuing a credit or debit with respect to the original invoice within seven (7) Business Days of the Companies’ receipt thereof. The Companies shall make payment for such subsequent invoices or debits in accordance with Section 8.2(A) (Method of Payment).

**ARTICLE IX**

**TITLE, CUSTODY, AND RISK OF LOSS**

**Section 9.1: Title, Custody, and Risk of Loss**.

(A) Deliveries to the Companies’ Sites. Title, custody, and risk of loss concerning the Product Delivered to sites owned by the Companies such as BPTF and the Companies’ generating facilities shall pass from Seller to the Companies at the flange of the receiving hose of the Companies’ receiving storage tanks. If Delivery is made to a site owned by the Companies where Seller’s hose is employed in the Delivery, then title, custody, and risk of loss concerning the Product shall pass from Seller to the Companies at the connection flange of the Companies’ Site facility’s piping. If Delivery is made to a Company Site by pipeline, then title, custody, and risk of loss concerning the Product shall pass from Seller to the Companies at the connection flange of Seller’s facility to the Companies’ pipeline.

(B) Deliveries at Seller’s Terminals’ Truck Racks. Title, custody, and risk of loss concerning the Product lifted from Seller’s terminals’ truck racks into the Companies’ truck shall pass from Seller to the Companies at the flange connecting the truck rack arm/hose at Seller’s terminal’s truck loading facility to the Companies’ truck receiving equipment.

(C) Deliveries to the Companies’ Barge or to the Harbor Terminal piping (e.g., for delivery to Moloka‘i). Title, custody, and risk of loss concerning the Product Delivered in bulk to the Companies’ barge at either (i) Seller’s loading pier, or (ii) a third-party pier shall pass from Seller to the Companies at the flange of the receiving hoses of the Companies’ barge at Seller’s loading pier or said third-party pier. Title, custody, and risk of loss concerning the Product Delivered in bulk to the Companies’ selected harbor terminal piping shall pass from Seller to the Companies at the flange of the pipeline segment interconnection junction between Seller and said harbor terminal piping.

(D) Deliveries by Seller’s Barge. Title, custody, and risk of loss concerning the Product Delivered in bulk by Seller’s barge shall pass from Seller to the Companies at the connection flange of the receiving pipeline at the Companies’ selected marine terminal.

**ARTICLE X**

**INSURANCE**

**Section 10.1: Insurance Requirements**. Seller and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain in full force and effect at all times during the term of this Agreement the following insurance and all other forms of insurance that may be required by any applicable Law:

(A) If Seller employs an ocean-going tank barge for the Delivery of the Product, Seller shall maintain or cause to be maintained with respect to said vessel full form Protection & Indemnity Insurance, including Excess Collision, pollution/ environmental risk coverage, upon the vessel pursuant to a standard Protection & Indemnity Club entry, with a Club which is a member of the International Group of Protection and Indemnity Clubs, with minimum limits for pollution/environmental risks to be $1,000,000,000 per occurrence, at least equal to the actual value of each vessel and barge, or the maximum commercially available, whichever is greater. Such insurance shall cover all of the risks covered under a standard Lloyd’s Maritime Insurance policy, including all the denominated “Institute Cargo Clauses” (Free of Particular Average, F.P.A. and clauses referring to wars, strikes, riots and civil disturbances).

(B) If Seller employs an ocean-going tank barge for the Delivery of Product, SELLER shall maintain Hull and Machinery Insurance with reputable marine underwriters and insured for no less than the full replacement value of the vessel and subject to The American Institute Hull Clauses (June 2, 1977).

(C) Standard Workers Compensation and Employers Liability Insurance endorsed to be applicable to the State of Hawaiʻi as well as the Longshore Act, with statutory limits for workers compensation and limits of $5,000,000 per occurrence for employers liability.

(D) Commercial General Liability Insurance with a bodily injury and property damage combined single limit per occurrence of at least $10,000,000.

(E) Pollution Legal Liability Insurance with minimum limits of $5,000,000 per occurrence and $5,000,000 general aggregate for the full scope of the Seller’s operations (ongoing and completed) as described within the scope of work for this Contract. Coverage to include but not be limited to: third party liability for bodily injury to persons, property damage resulting from any spill, leak, or discharge into the air, surface water, ground water, land surface or subsurface strata, and defense arising from the operations; diminution of value and Natural Resources damages; contractual liability. Such insurance shall include coverage for clean-up and remediation expenses that are not subject to sub-limits.

(F) Automobile Liability Insurance on all owned, non-owned and hired vehicles used in conjunction with the Delivery of the Product to the Companies with a bodily injury and property damage combined single limit per occurrence of at least $5,000,000.

(G) Other Coverage. Seller and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain in full force and effect at all times during the term of this Agreement on all owned, non-owned and hired vehicles used in conjunction with the Delivery of the Product to Hawaiian Electric, Hawai‘i Electric Light, or Maui Electric, any other insurance or surety bonding that may be required under the laws, ordinances and regulations of any governmental authority, including the Federal Motor Carrier Act of 1980 and all rules and regulations of the DOT and/or the USDOT.

**Section 10.2**: **Insurance Paid.** Premiums for all necessary insurance policies are included in the Delivered price of the Product as determined in Section 5.1 (Pricing). No special payments shall be made by the Companies to Seller in respect to such premiums.

**Section 10.3: Waiver of Subrogation**. Seller and anyone acting under its direction or control or on its behalf will cause its insurers (except for Workers Compensation insurance) to waive all rights of subrogation which Seller or its insurers may have against the Companies, the Companies’ agents, or the Companies’ employees.

**Section 10.4: Hawaiian Electric, Hawai‘i Electric Light and Maui Electric As Additional Insured**. Insurance policies (except for Workers Compensation insurance) providing the insurance coverage required in this Agreement will name the Companies, the Companies’ agents, or the Companies’ employees as an additional insured. Coverage must be primary in respect to the additional insured. Any other insurance carried by the Companies will be excess only and not contribute with this insurance.

**Section 10.5: Certificates of Insurance**. Before performance of this Agreement, Seller shall file with the Companies’ designated representative certificates of insurance, or other documentary evidence acceptable to the Companies, certifying that each of the foregoing insurance coverages is in force, and further providing that the Companies will be given thirty (30) Days’ written notice of any material change in, cancellation of, or intent not to renew any of the required policies. Seller shall provide new insurance certificates reflecting the required policies prior to the expiration date of any coverage. Receipt of any certificate showing less coverage than required is not a waiver of Seller’s obligation to fulfill the coverage requirements.

**Section 10.6**: **Failure to Procure Insurance.** In the event Seller fails to procure and/or maintain an insurance as required above, an insurance fails for any reason (including, without limitation, breach of policy condition or warranty) and/or an insurer otherwise refuses or is unable to pay, the Party required to procure that insurance shall be deemed an insurer or self-insurer, shall accept and pay claims which would have otherwise been submitted to the failed insurance and shall indemnify and hold harmless (including legal fees and costs) the other Party of and from any loss, damage, expense, claim, liability and/or suit resulting from such failure.

**Section 10.7: Performance Bond/Letter of Credit**. A Performance Bond or an Irrevocable Standby Letter of Credit in the form reasonably acceptable to the Companies shall be furnished by Seller and deposited with the Companies in the amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_, guaranteeing Seller’s full compliance with and performance under this Agreement. The Performance Bond or Irrevocable Standby Letter of Credit shall remain in effect from the Effective Date until the end of the Initial Term and any Extension thereof. Said Bond or Letter of Credit is to be submitted to the Companies no later than thirty (30) Days following the Effective Date. No special payments shall be made by the Companies to Seller in respect to premiums for a bond or letter of credit.

**ARTICLE XI**

**FORCE MAJEURE**

**Section 11.1: Force Majeure**.

(A) Definition of Force Majeure. The term force majeure (“Force Majeure”) as used in this Agreement means any occurrence that: i) in whole or in part delays or prevents a Party’s performance under this Agreement; ii) is not the direct result of the fault or negligence of that Party; iii) is not within the control of that Party notwithstanding such Party having taken all reasonable precautions and measures in order to prevent or avoid such event; and iv) the Party has not been able to overcome by the exercise of due diligence.

(B) Events of Force Majeure. Subject to the foregoing, events that could qualify as Force Majeure include, but are not limited to the following:

(1) acts of God, flooding, lightning, landslide, earthquake, fire, drought, explosion, epidemic, pandemic, quarantine, storm, hurricane, tornado, volcano, other natural disaster or unusual or extreme adverse weather-related events;

(a) Effects of COVID-19. The Parties recognize and agree that there is an ongoing epidemic at the time of execution of this Agreement, namely the coronavirus/COVID-19 pandemic, the full effects of which are presently unknown. The Parties agree that if coronavirus/COVID-19 impacts a Party’s performance, satisfying the conditions of Section 11.1(A) (Definition of Force Majeure), that Party will provide notice to the other Party in accordance with Section 11.1(D)(1) (Satisfaction of Certain Conditions) upon that Party’s recognition that it has been impacted by the coronavirus/COVID-19 pandemic consistent with and satisfying the conditions of said Section 11.1(A) (Definition of Force Majeure).

(2) war (declared or undeclared), riot or similar civil disturbance, acts of the public enemy (including acts of terrorism), sabotage, blockade, insurrection, revolution, expropriation, or confiscation;

(3) except as otherwise provided in this Agreement, a direction of any Governmental Authority limiting the Companies’ recovery of all allowable costs incurred under this Agreement;

(4) except as otherwise provided in this Agreement, strikes, work stoppage or other labor disputes (in which case the affected Party shall have no obligation to settle the strike or labor dispute on terms it deems unreasonable).

(C) Exclusions from Force Majeure. Force Majeure, however, does not include:

(1) a strike, work stoppage, or labor dispute by a third party engaged by Seller in support of its performance pursuant to this Agreement;

(2) any acts or omissions of any third party, including, without limitation, any vendor, materialman, customer, or supplier of Seller, unless such acts or omissions are themselves caused by an event of Force Majeure as herein defined;

(3) changes in market conditions that affect the cost of Seller’s supplies, or that otherwise render this Agreement uneconomic or unprofitable for Seller;

(4) Seller’s inability to obtain government approvals or approvals of any type concerning the services to be performed and the Product to be sold by Seller hereunder, or Seller’s loss of any such governmental approvals once obtained;

(5) litigation or administrative or judicial action pertaining to Seller’s interest in this Agreement or any government approval required for Seller to perform its obligations pursuant to this Agreement;

(6) Seller’s inability to obtain sufficient power or materials to Deliver the Product, except if Seller’s inability to obtain sufficient power or materials is caused by an event of Force Majeure; or

(7) litigation or administrative or judicial action pertaining to Seller’s interest in this Agreement or any Government Approvals required for Seller to sell and Deliver the Product pursuant to this Agreement.

(D) Consequences of Force Majeure.

(1) Satisfaction of Certain Conditions. Section 11.1(E) (Effect on Performance) defers or limits certain liabilities of a Party for delay and/or failure in performance to the extent such delay or failure is the result of conditions or events of Force Majeure; provided, however, that a non-performing Party is only entitled to such limitations or deferrals of liabilities as and to the extent the following conditions are satisfied:

(a) The non-performing Party gives the other Party, within forty-eight (48) hours after the Force Majeure condition or event begins, written notice stating that such non-performing Party considers such condition or event to constitute a Force Majeure and describing the particulars of such Force Majeure condition or event;

(b) The non-performing Party gives the other Party, within fourteen (14) Days after the Force Majeure condition or event begins, a written explanation of the Force Majeure condition or event and its effect on the non-performing Party’s performance, which explanation shall include evidence reasonably sufficient to establish that the occurrence constitutes Force Majeure;

(c) The suspension of performance is of no greater scope and of no longer duration than is required by Force Majeure;

(d) The non-performing Party proceeds with due diligence to remedy its inability to perform and provides weekly progress reports to the other Party describing actions taken to end or minimize the effects of the Force Majeure and the anticipated duration of the Force Majeure; and

(e) When the non-performing Party is able to resume performance of its obligations under this Agreement, such Party shall give the other Party written notice to that effect.

(2) Reasonable Efforts. The Party excused from performance under this Agreement shall make all reasonable efforts to cure, mitigate or remedy such Force Majeure event. Any payments dues as compensation for the obligation so excused shall also be excused for so long as the obligation is not performed due to Force Majeure. The burden of proof shall be on the Party claiming Force Majeure pursuant to this Article 11 (Force Majeure).

(E) Effect on Performance. Neither Party shall be liable in any manner for any delays or failures in its performance under this Agreement as and to the extent (i) such failures or delays are substantially caused by conditions or events of Force Majeure, and (ii) the conditions of Section 11.1(D)(1) (Satisfaction of Certain Conditions) are satisfied. Except as otherwise expressly provided for in this Agreement, the existence of an event of Force Majeure shall not relieve the Parties of their obligations under this Agreement to the extent that performance of such obligations is not precluded by the event of Force Majeure.

(F) Alternate Supplier. If Delivery is suspended or reduced by Seller pursuant to an event or act of Force Majeure, it shall not be a breach of this Agreement for the Companies to buy the Product from a supplier other than Seller for the quantities of the Product which Seller does not Deliver; and the Companies shall not be obligated to buy, after the period of suspension or reduction, the undelivered quantity of the Product which normally would have been sold and Delivered hereunder during the period of suspension or reduction.

**11.2: Option to Terminate**. If Delivery of the Product is suspended or reduced pursuant to an event or act of Force Majeure for more than thirty (30) Days, the Companies shall have the option while such suspension or reduction continues to terminate this Agreement upon written notice to Seller. If the Companies terminate this Agreement pursuant to this Section 11.2 (Option to Terminate), then this Agreement shall be of no further force and effect and the Parties shall each be relieved of any and all further obligations to each other, save and except for any payment obligations and liabilities incurred by a Party prior to the date of termination.

**ARTICLE XII**

**COMPLIANCE WITH LAWS**

**Section 12.1: Compliance with Laws**.

(a) This Agreement is subject to and the Parties shall comply with all applicable present and future Laws.

(b) If the Delivery or supply of the Product pursuant to this Agreement conflicts with or is limited or prohibited by any applicable Law, then to the extent of such conflict, limitation or prohibition, Seller shall have no obligation to Deliver or supply the Companies with the Product under this Agreement and the Companies shall have no obligation to purchase or receive the Product under this Agreement. The Companies, in the Companies’ discretion, may elect to complete and file any and all required Federal or State regulatory forms to permit, facilitate, or enable the supply of the Product to the Companies under this Agreement. Seller shall fully cooperate with the Companies in the completion and filing of the foregoing forms. If the Companies’ purchase, receipt or use of the Product pursuant to this Agreement, or the Companies’ emissions from the Companies’ use of the Product conflicts with or is limited or prohibited by any Law, then to the extent of such conflict, limitation, or prohibition, the Companies shall have no obligation to purchase and receive the Product under this Agreement.

**Section 12.2**: **Material Safety Compliance.** Seller warrants that it is fully informed concerning the nature and existence of risks posed by transporting, storing, using, handling and being exposed to the Product. Seller shall furnish to the Companies health, safety, and environmental information (including, without limitation, Material Safety Data Sheets (“HSE Data”) concerning health, safety and environmental aspects of the Product purchased by the Companies, including health, safety, and environmental warnings, if any, required by applicable Law. Seller shall not be entitled to rely upon such HSE Data as being an inclusive presentation of all potential health, safety and environmental risks associated with the Product to be Delivered by Seller. Seller shall furnish HSE Data to, and otherwise inform Seller’s nominated vessel of, all such risks and the master of such vessel shall advise and instruct all crew, seamen, and employees of the vessel about the hazards, if any, associated with the Product and the safe and proper methods of handling and storing of the Product. Compliance by the Seller with recommendations in HSE Data shall not excuse the Seller from its obligations under Article XIV (Indemnity) and this Section 12.2 (Material Safety Compliance).

**Section 12.3: Permits and Licenses**. Seller shall secure and pay for all required permits and licenses applicable to this Agreement and its performance hereunder, (including the provisions of the Occupational Safety and Health Act of 1970 and all amendments thereto, and the DOT Hazardous Materials Regulations), and shall indemnify, defend, and save the Companies harmless from any and all liability, fines, damages, costs and expenses, including but not limited to reasonable attorneys' fees and costs, arising from Seller’s failure to do so.

**ARTICLE XIII**

**RELEASES**

**Section 13.1: Spills/Environmental Pollution**. In the event any spill or discharge occurs from any vessel, tanker truck, shipping container, or pipeline utilized by Seller in the performance of this Agreement, or if any spill, discharge, or pollution damage is caused by or is threatened in connection with the loading, transportation, or Delivery of the Product by Seller, then all regulatory notifications and filings, as well as all efforts and costs of containment and clean up shall be the sole responsibility of Seller, unless such spill, discharge, or pollution damage was solely or primarily the result of the gross negligence or willful misconduct of the Companies.

**Section 13.2: Pollution Mitigation.**

(A) Mitigation Measures. When an escape or discharge of oil or any polluting substance occurs in connection with or is caused by Seller’s or its agent's vessel or occurs from or is caused by discharging operations, Seller or its agents (as the case may be) shall promptly take all measures that are necessary or reasonable to prevent or mitigate environmental damage, without regard to whether said escape or discharge was caused by the negligence or willful misconduct of Seller’s equipment, Seller, the Companies, or others. Failing such action by Seller or its agents, the Companies, on Seller’s behalf, may promptly take whatever measures are reasonably necessary to prevent or mitigate pollution damage and notify Seller as soon as practicable thereafter of such actions. Each Party in good faith shall keep the other advised of the nature and results of the measures taken, and if time permits, the nature of the measures intended to be taken.

(B) Prevention and Mitigation Cost; Reimbursement. Seller shall be responsible for the cost of all such measures unless the spill, discharge, or pollution damage was solely or primarily the result of the gross negligence or willful misconduct of the Companies, and prompt reimbursement shall be made as appropriate; provided, however, that should Seller or its agents give notice to the Companies to discontinue said measures (and to the extent Governmental Authorities allow the Companies to discontinue said measures) the continuance of the Companies’ actions will no longer be deemed to have been taken pursuant to the provisions of Sections 13.2(A) (Mitigation Measures) and Section 13.2(b) (Prevention and Mitigation Cost; Reimbursement). Each Party in good faith shall provide written notice to the other of such actions and measures taken.

(C) Third Party Applicability. Notwithstanding any other provision in this Agreement, the foregoing provisions shall be applicable only between Seller and the Companies and shall not affect, as between Seller and the Companies, any liability that either Seller or the Companies shall have to any third parties, including the State of Hawai‘i and the U.S. Government, if either Party shall have such liability.

**Section 13.3: Release Liability.** Should the Companies incur any liability under Chapter 128D of the Hawai‘i Revised Statutes as a result of a spill from Seller’s nominated vessel during discharge, Seller shall indemnify, defend, and hold the Companies harmless unless such spill was solely or primarily the result of the gross negligence or willful misconduct of the Companies.

**Section 13.4: Operational Contacts**. In the event of any accident, spill, or reportable incident incurred under the performance of this Agreement, the following individuals shall be immediately contacted:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
|  |  |  |  |  |  |  |  |
| Hawaiian Electric | Name | Position | Phone | Cellular |
|  |  |  |  |  |  |  |  |
| Primary |
|  |  |  |  |  |  |  |  |
| Backup |
|  |  |  |  |  |  |  |  |
| Hawai‘i Electric Light |  |  |  |  |
|  |  |  |  |  |
| Primary |  |  |  |  |
|  |  |  |  |  |
| Backup |  |  |  |  |
|  |  |  |  |  |
| Maui Electric |  |  |  |  |
|  |  |  |  |  |
| Primary |  |  |  |  |
|  |  |  |  |  |
| Backup |  |  |  |  |
|  |  |  |  |  |
| Seller |  |  |  |  |
|  |  |  |  |  |  |  |  |
| Primary |
|  |  |  |  |  |  |  |  |
| Backup |

**ARTICLE XIV**

**INDEMNITY**

**Section 14.1: Indemnity**. In addition to any other indemnification obligations Seller may have elsewhere in this Agreement, which are hereby incorporated in this Section 14.1 (Indemnity), to the fullest extent permitted by applicable law, Seller shall forever indemnify, defend, and hold harmless the Companies, their respective controlling persons, directors, officers, employees, agents (including but not limited to affiliates and contractors and their employees), servants, successors, and assigns (collectively, “Company Indemnified Parties”), from and against all liabilities, losses, penalties, claims, demands, judgments, actions, costs and expenses (including reasonable attorneys’ fees and costs of litigation), and proceedings of any nature whatsoever, based upon or in any way arising out of damage to property or injuries to persons (including death), fines or penalties or other tortious acts (collectively, “Injury or Damage”), that arise out of, are incident to or result directly or indirectly from (a) any of the Product that does not meet the Specifications or is contaminated; (b) the operation of any vessel or motor vehicle used or hired by Seller, its agents, or contractors in the Delivery of the Product to the Companies; (c) any breach made by Seller of its representations, warranties, and covenants in this Agreement; (d) Seller’s performance or failure to perform its obligations under this Agreement, including without limitation its obligation to comply with Article XII (Compliance with Laws) hereof; or (e) the acts or omissions of Seller, its successors, permitted assigns, affiliates, controlling persons, directors, officers, employees, servants, and agents (including but not limited to Seller’s contractors, subcontractors, and the employees of any of them); such indemnification, defense and hold harmless obligations of Seller shall apply regardless of whether any act, omissions, misconduct, negligence, or default on the part of the Company Indemnified Parties contributed to the Injury or Damage unless such act, omission, misconduct, negligence, or default by a Company Indemnified Party was the sole or primary cause of the Injury or Damage.

**ARTICLE XV**

**DEFAULT**

**Section 15.1: Default**.

(A) Breach by Seller of any of its representations and warranties in this Agreement or failure of either Party to promptly perform any obligation under this Agreement shall constitute an event of default. If, as the non-defaulting Party (“Non-Defaulting Party”), the Companies or Seller considers the other Party (“Defaulting Party”) to be in default under this Agreement, the Non-Defaulting Party shall give the Defaulting Party prompt notice thereof, describing the particulars of such default. The Defaulting Party shall thereafter have thirty (30) Days (or such other amount of time as mutually agreed upon in writing by the Parties) from the receipt of said notice in which to remedy such default. If the default is not cured, the Non-Defaulting Party may, without prejudice to any other right or remedy of such Party in respect of such default, immediately terminate its obligations under this Agreement by written notice to the Defaulting Party. Any termination shall be without prejudice to accrued rights, including without limitation the right of either Party to damages arising from such breach resulting in default or prior breaches hereof. All rights and remedies hereunder are independent of each other and election of one remedy shall not exclude another. The prevailing Party in any action pursuant to this Section 15.1(A) shall be entitled to recover its attorneys’ fees and costs from the other Party.

(B) Default by Seller for Failure to Deliver the Product; Remedies. Notwithstanding the foregoing, if Seller’s default is a failure by Seller to Deliver the Product as required by this Agreement, Seller’s time to cure such breach shall be five (5) Days from the Companies’ issuance of the notice of default. Without limiting any other right or remedy available to the Companies, if Seller does not cure the default in such time by Delivering the Product to the Companies and Seller fails to provide alternative arrangements as reasonably approved by the Companies, the Companies may immediately acquire substitute Product from another supplier (“Cover Supplies”), and, except as otherwise provided in this Agreement, Seller shall be liable to the Companies for the difference in cost between the Cover Supplies acquired from another supplier and the price the Companies would have paid to Seller under this Agreement for the same amount of the Product Delivered at the same time as the substitute Product, plus all reasonable costs and expenses incurred by the Companies in obtaining such Cover Supplies (“Cover Costs”).

**Section 15.2: Consequential Damages**. Except with respect to indemnification obligations, claims arising out of breach of confidentiality obligations, or claims due to the fraud of a Party, neither Party shall be liable to the other for any prospective profits, or special, indirect, incidental or consequential damages of any kind, whether based in contract, tort (including negligence or strict liability), or otherwise.

**ARTICLE XVI**

**NOTICE**

**Section 16.1 Notices**. Except as otherwise expressly provided in this Agreement, all notices shall be given in writing, by electronic mail (“Email”) or first-class mail, to the following addresses, or such other address as the Parties may designate by notice:

-SELLER’S ADDRESS---

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Hawaiian Electric Company, Inc.

PO Box 2750

Honolulu, HI 96840-0001

Attention: Manager of Fuel Operations – mailstop CIP-IF

Email:

Hawai‘i Electric Light Co., Inc.

P. O. Box 1027

Hilo, Hawaii 96721-1027

Attn: Production Department

Email:

Maui Electric Company, Limited

P. O. Box 398

Kahului, Hawaii 96732

Attn: Production Department

:

Notice shall be deemed to have been effectuated upon the earlier to occur of actual receipt or two (2) Days after sending.

**ARTICLE XVII**

**GENERAL PROVISIONS**

**Section 17.1: Waiver and Severability**. If any section or provision of this Agreement or any exhibit or rider hereto is held by any court or other competent authority to be illegal, unenforceable, or invalid, the remaining terms, provisions, rights, and obligations of this Agreement shall not be affected. The failure of a Party hereunder to assert a right or enforce an obligation of the other Party shall not be deemed a waiver of such right or obligation. In no event shall any waiver by either Party of any Default under this Agreement operate as a waiver of any further Default.

**Section 17.2: Assignment**. This Agreement shall extend to and be binding upon the successors and assigns of the Companies and Seller. Neither Party shall assign this Agreement or its rights and obligations without the prior written consent of the other Party, which consent may be withheld in the exercise of such Party’s sole discretion.

**Section 17.3: Conflicts of Interest**. Conflicts of interest related to this Agreement are strictly prohibited. Except as otherwise expressly provided herein, no Party, nor any director, employee, or agent of a Party shall give to or receive from any director, employee or agent of the other Party any gift, entertainment or other favor of significant value, or any commission, fee, or rebate. Likewise, no Party nor any director, employee, or agent of a Party shall enter into any business arrangement with any director, employee or agent of the other Party (or any affiliate), unless such person is acting for and on behalf of the other Party.

**Section 17.4: Governing Law, Jurisdiction, and Venue**. This Agreement shall be governed by and construed in accordance with the laws of the State of Hawai‘i, without regard to choice of law principles. Any disputes arising out of this Agreement, however defined, shall be brought exclusively in a court of competent jurisdiction in the State of Hawai‘i. Each Party agrees and irrevocably consents to the exercise of personal jurisdiction by such courts and waives any right to plead, claim, or allege that the State of Hawai‘i is an inconvenient forum or improper venue. Notwithstanding the foregoing, the Companies may elect to submit any such dispute to binding arbitration pursuant to the commercial arbitration rules of Dispute Prevention and Resolution, Inc. or the American Arbitration Association then in effect, in which case the Parties agree that the arbitration shall take place in the State of Hawai‘i. Each Party hereby irrevocably and unconditionally waives it right to a trial by jury in any legal action or proceeding relating to, arising out of, or in connection with this Agreement.

**Section 17.5: Entire Agreement/Modification**. This Agreement, including all attachments and exhibits hereto, shall constitute the entire understanding and agreement between the Parties with respect to all matters and things herein mentioned, superseding all prior agreements, understandings, or undertakings, oral or written. It is expressly acknowledged and agreed by and between the Parties that neither Party is now relying upon any collateral, prior, or contemporaneous agreement, assurance, representation, statement, or warranty, written or oral, pertaining to the subject matter contained herein. This Agreement shall not be modified or changed except by written instrument executed by the duly authorized representatives of the Parties hereto.

**Section 17.6: Agreement not an Asset; Insolvency**. This Agreement shall not be deemed to be an asset of either Party. If a Party is (i) dissolved, liquidated, adjudicated as bankrupt, or becomes subject to an order for relief under any federal bankruptcy law; (ii) fails to pay or admits in writing its inability to pay its debts generally as they become due; (iii) makes a general assignment of substantially all of its assets for the benefit of creditors; (iv) applies for, seeks, consents to, or acquiesces in the appointment of a receiver, custodian trustee, examiner, liquidator, or similar official for itself or any substantial part of its property; (v) institutes any proceedings seeking an order for relief or to adjudicate it as bankrupt or insolvent, or seeking dissolution, winding up, liquidation, reorganization, arrangement, adjustment, or composition of it or its debts under any law relating to bankruptcy, insolvency, reorganization or relief of debtors; or (vi) takes any action to authorize or effect any of the foregoing actions, that Party shall be in default pursuant to Section 15.1 (Default). If such Defaulting Party fails to cure such Default pursuant to the requirements of Section 15.1 (Default), the Non-Defaulting Party may terminate this Agreement according to Section 15.1 (Default).

**Section 17.7: Status of the Parties**. Nothing in this Agreement shall be construed to constitute either Party as a joint venturer, co-venturer, joint lessor, joint operator, agent, or partner of the other or to create any fiduciary relationship between the Parties. In performing services pursuant to this Agreement, Seller is acting solely as an independent contractor maintaining complete control over its employees and operations. Unless otherwise provided in this Agreement, neither the Companies nor Seller is authorized to take any action in any way whatsoever for or on behalf of the other.

**Section 17.8: Headings**. The headings or captions are for convenient reference only and shall not modify, define, or limit any of the terms or provisions hereof and shall not be used in the interpretation of any term or provision of this Agreement.

**Section 17.9: Confidentiality and Non-Disclosure**.

(A) Confidential Information. Each Party may have a proprietary interest or other need for confidentiality in information that may be furnished to the other pursuant to this Agreement (“Confidential Information”). The Party disclosing such information shall be referred to in this section as the “Disclosing Party,” and the Party receiving such information shall be referred to as the ”Receiving Party.”

(B) The Receiving Party will hold in confidence and, without the consent of the Disclosing Party, will not use, reproduce, distribute, transmit, or disclose, directly or indirectly, the Confidential Information of the Disclosing Party except as permitted herein. The Receiving Party may only disclose the Confidential Information to its officers, directors, employees, professional advisors, and independent contractors and consultants with a direct need to know the information for the implementation or exercise of rights and/or performance of obligations under or arising from this Agreement, provided that such persons/entities (other than officers, directors, and employees) are bound by written confidentiality agreements with terms and conditions that are no less restrictive than those contained in this section. Without limiting the foregoing, the Receiving Party agrees that it will exercise at least the same standard of care in protecting the confidentiality of the Disclosing Party’s Confidential Information as it does with its own Confidential Information of a similar nature, but in any event, no less than reasonable care.

(C) Confidential Information for purposes of this Agreement shall not include information if and only to the extent that the Receiving Party establishes that the information: (i) is or becomes a part of the public domain through no act or omission of the Receiving Party; (ii) was in the Receiving Party’s lawful possession prior to the disclosure and had not been obtained by the Receiving Party either directly or indirectly from the Disclosing Party; or (iii) is lawfully disclosed to the Receiving Party by a third party without restriction on disclosure. Confidential Information may also be disclosed by the Receiving Party pursuant to a requirement of a governmental agency, regulatory body or by operation of law, provided that the recipient shall disclose only that part of the Confidential Information that it is required to disclose and shall notify the Disclosing Party prior to such disclosure in a timely fashion in order to permit the Disclosing Party to lawfully attempt to prevent or restrict such disclosure should it so elect, and shall take all other reasonable and lawful measures to ensure the continued confidential treatment of the same by the party to which the Confidential Information is disclosed.

(D) Any provision herein to the contrary notwithstanding, the Companies may disclose Confidential Information to the Commission, the Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs of the State of Hawai‘i (“Consumer Advocate”), and/or any other governmental regulatory agency with notice to, but without need of prior consent by Seller, provided that the Companies take reasonable steps to obtain approval to submit the same under seal or under other procedures designed to preserve the confidentiality of the Confidential Information.

**Section 17.10** **Financial Compliance/Capital Lease/No Consolidation:**

(A) Financial Compliance. Seller shall provide or cause to be provided to the Companies on a timely basis, as reasonably determined by the Companies, all information, including but not limited to information that may be obtained in any audit referred to below (“Information”), reasonably requested by the Companies for purposes of permitting the Companies and its parent company, Hawaiian Electric Industries ("HEI"), to comply with the requirements (initial and on-going) of (i) identifying variable interest entities and determining primary beneficiaries under the accounting principles of Financial Accounting Standards Board (“FASB”) Accounting Standards Codification (“ASC”) 810, Consolidation (“FASB ASC 810”), (ii) Section 404 of the Sarbanes-Oxley Act of 2002 (“SOX 404”), (iii) FASB  ASC 840 Leases ("FASB ASC 840"), and (iv) all clarifications, interpretations and revisions of and regulations implementing FASB ASC 810, SOX 404, and  FASB ASC 840, Securities and Exchange Commission, the Public Company Accounting Oversight Board, Emerging Issues Task Force or other governing agencies. In addition, if required by the Companies in order to meet its compliance obligations, Seller shall allow the Companies or its independent auditor, to audit, to the extent reasonably required, Seller’s financial records, including its system of internal controls over financial reporting; provided that the Companies shall be responsible for all costs associated with the foregoing, including but not limited to Seller's reasonable internal costs.

(B) If there is a change in circumstances during the Term or any Extension that would trigger consolidation of Seller’s finances on to the Companies’ balance sheet, and such consolidation is not attributable to the Companies’ fault, then the Parties will take all commercially reasonable steps, including modification of the Agreement, to eliminate the consolidation, while preserving the economic “benefit of the bargain” to both Parties. Notwithstanding the foregoing, if for any reason, at any time during the Term or any Extension, the Companies (and/or the Companies’ affiliates or HEI) in their good faith analysis and sole discretion are required to consolidate Seller into its financial statements in accordance with U.S. generally accepted accounting principles, then the Companies may take any and all action necessary to eliminate consolidation, including without limitation, by immediately terminating this Agreement without fault or liability.

(C) If there is a change in circumstances during the Term or any Extension that would trigger the treatment of this Agreement as a capital lease under FASB ASC 840, and such treatment is not attributable to the Companies’ fault, then the Parties will take all commercially reasonable steps, including modification of this Agreement, to eliminate the capital lease treatment, while preserving the economic “benefit of the bargain” to both Parties. Notwithstanding the foregoing, if for any reason, at any time during the Term, the Companies’ (and/or the Companies’ affiliates, or HEI) in their good faith analysis and sole discretion are required to treat this Agreement as a capital lease under FASB ASC 840, then the Companies may take any and all action necessary to eliminate this capital lease treatment, including without limitation, by immediately terminating this Agreement without fault or liability.

(D) Confidentiality. The Companies shall, and shall cause HEI to, maintain the confidentiality of the Information as provided in this Section 17.10 (Financial Compliance/Capital Lease/No Consolidation). The Companies may share the Information on a confidential basis with HEI and the independent auditors and attorneys for the Companies and HEI. (The Companies, HEI, and their respective independent auditors and attorneys are collectively referred to in this Section 17.10 (Financial Compliance/Capital Lease/No Consolidation) as “Recipient.”) If either the Companies or HEI, in the exercise of their respective reasonable judgments, concludes that consolidation or financial reporting with respect to Seller and/or this Agreement is necessary, the Companies and HEI each shall have the right to disclose such of the Information as the Companies or HEI, as applicable, reasonably determines is necessary to satisfy applicable disclosure and reporting or other requirements and give Seller prompt written notice thereof (in advance to the extent practicable under the circumstances). If the Companies or HEI disclose Information pursuant to the preceding sentence, the Companies and HEI shall, without limitation to the generality of the preceding sentence, have the right to disclose Information to the Commission and the Consumer Advocate in connection with the Commission’s rate making activities for the Companies, and other HEI affiliated entities, provided that, if the scope or content of the Information to be disclosed to the Commission exceeds or is more detailed than that disclosed pursuant to the preceding sentence, such Information will not be disclosed until the Commission first issues a protective order to protect the confidentiality of such Information. Neither the Companies nor HEI shall use the Information for any purpose other than as permitted under Section 17.10 (Financial Compliance/Capital Lease/No Consolidation).

(E) Required Disclosures. In circumstances other than those addressed in Section 17.10(D) (Confidentiality), if any Recipient becomes legally compelled under applicable Law or by legal process (e.g., deposition, interrogatory, request for documents, subpoena, civil investigative demand or similar process) to disclose all or a portion of the Confidential Information, such Recipient shall undertake reasonable efforts to provide Seller with prompt notice of such legal requirement prior to disclosure so that Seller may seek a protective order or other appropriate remedy and/or waive compliance with the terms of this Section 17.10 (Financial Compliance/Capital Lease/No Consolidation). If such protective order or other remedy is not obtained, or if Seller waives compliance with the provisions of Section 17.10 (Financial Compliance/Capital Lease/No Consolidation), Recipient shall furnish only that portion of the Information which it is legally required to so furnish and shall use reasonable efforts to obtain assurance that confidential treatment will be accorded to any disclosed material.

(F) Exclusions from Confidentiality. The obligation of nondisclosure and restricted use imposed on each Recipient under Section 17.10 (Financial Compliance/Capital Lease/No Consolidation) shall not extend to any portion(s) of the Information which (i) was known to such Recipient prior to receipt, or (ii) without the fault of such Recipient is available or becomes available to the general public, or (iii) is received by such Recipient from a third party not bound by an obligation or duty of confidentiality.

(G) Consolidation. The Companies does not want to be subject to consolidation in FASB ASC 810, as issued and amended from time to time by FASB. Consolidation. The Companies represent that, as of the Execution Date, it is not required to consolidate Seller into its financial statements in accordance with relevant accounting guidance under U.S. generally accepted accounting principles (“GAAP”). If, due to a change in applicable law or accounting guidance under U.S. GAAP, or as a result of a material amendment to the Agreement, in each case, after the Execution Date, the Companies determines, in its sole but good faith discretion, that it is required to consolidate Seller into its financial statements in accordance with relevant accounting guidance in accordance with U.S. GAAP, then Seller shall, as soon as reasonably practicable (but in no event longer than fifteen (15) Days) provide audited financial statements (including footnotes) in accordance with U.S. GAAP (and as of the reporting periods the Companies is required to report thereafter) in order for the Companies to consolidate and file its financial statements within the reporting deadlines of the Securities and Exchange Commission; provided, however, that if Seller does not normally prepare audited financial statements for the periods requested, the Companies shall reimburse Seller fifty percent (50%) of the reasonable costs of having necessary audits performed and preparation of the audited financial statement; provided, further that the foregoing reimbursement shall only apply if Seller normally prepares financial statements on an annual basis. Notwithstanding the foregoing requirement that Seller provide audited financial statements to the Companies, the Parties will take all commercially reasonable steps, which may include modification of this Agreement to eliminate the consolidation treatment, while preserving the economic "benefit of the bargain" to both Parties.

**Section 17.11: No Dedication of Facilities.** No use of the pipelines, facilities or equipment used in connection with this Agreement shall be construed as having been dedicated to public use and it is hereby acknowledged by the Parties that the owner of any pipelines used to transport the Product under this Agreement retains the rights to determine who, other than the Parties to this Agreement, shall use said pipelines, facilities, and equipment.

**Section 17.12: Notice of Certain Events.** To the extent any of the following events occur and could reasonably be likely to have a material adverse effect on Seller’s performance under this Agreement, Seller shall provide the Companies with timely notice of the occurrence of such event and Seller’s proposed measures to ensure that such event will not lead to an Event of Default or otherwise materially impair Seller’s ability to perform its obligations under this Agreement:

(A) Any final non-appealable order, judgment or decree is entered in any proceeding, which final order, judgment or decree provides for the payment of money in excess of five million dollars ($5,000,000) by Seller, and Seller shall not discharge the same or provide for its discharge in accordance with its terms, or procure a stay of execution thereon within (60) Days from the entry thereof, and within such period of sixty (60) Days, or such longer period during which execution on such judgment shall have been stayed, appeal thereof and cause the execution thereof to be stayed during such appeal.

(B) Seller shall have received any notice that is not in compliance with any of the applicable material permits that enable Seller to operate any of its facilities required for Seller’s performance under this Agreement.

**Section 17.13: Attorneys’ Fees**. If there is a dispute between the Parties and either Party institutes a lawsuit, arbitration, mediation, or other proceeding to enforce, declare, or interpret the terms of this Agreement, the prevailing Party shall be awarded its reasonable, documented outside attorney’s fees and costs.

**Section 17.14: Offsets**. In the event that a Party owes the other Party (“Offsetting Party”) any amount under this Agreement, the Offsetting Party owed such amount may at any time offset any and all amounts that are due and owed to the other Party against such amount that the other Party owes the Offsetting Party. The Offsetting Party asserting an offset shall provide a prompt written explanation of the amount and the basis for the offset.

**Section 17.15: Further Assurances**. If either Party determines that any further instruments, assurances, or other things are necessary or desirable to carry out the terms of this Agreement, the other Party will execute and deliver all such instruments and assurance and do all things reasonably necessary or desirable to carry out the terms of this Agreement.

**Section 17.16: Promotional Limitation**. Seller agrees that it will not, without written authorization of the Companies, use the Companies’ name for the purpose of promotion, including, without limitation, references to the Companies in press releases, lists of customers or other material advertising that the Companies uses Seller’s products or services.

**Section 17.17: Patents and Copyrights**. Seller agrees that, in performing its obligations pursuant to this Agreement, it will not use any process, program, design, device or material that infringes on any United States patent or copyright or any trade secret agreement. Seller agrees to indemnify, defend, and hold harmless the Companies from and against all losses damages, claims, fees and costs (including, without limitation, reasonable attorneys’ fees and costs) arising from or incidental to any suit or proceeding brought against the Companies for patent, copyright or trade secret infringement relating to Seller’s performance hereunder. The Companies shall promptly notify Seller of any such suit or proceeding and shall assist Seller in defending the action by providing any necessary information.

**Section 17.18: Cumulative Remedies**. No rights or remedies herein conferred upon or reserved to either Party are intended to be exclusive of any other right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy under this Agreement or under applicable Law.

**Section 17.19: Amendments**. Any amendment or modification of this Agreement shall not be valid unless in writing and signed by both Parties. Any waiver of rights shall not be valid unless in writing and signed by the Party against whom waiver is asserted.

**Section 17.20: Negotiated Terms**. The Parties agree that the terms and conditions of this Agreement are the result of negotiations between the Parties and that this Agreement shall not be construed in favor of or against either Party by reason of the extent to which any Party or its professional advisors participated in the preparation of the Agreement.

**Section 17.21: Relationship of the Parties**. Seller shall act solely as an independent contractor of the Companies. Nothing in this Agreement shall be deemed to designate either Party hereto as partner, agent or representative of the other Party or to create any fiduciary relationship between the Parties. All employees of Seller will work under the supervision of Seller and not act as the Companies’ agents or servants for any purpose.

**Section 17.22: No Third-Party Beneficiaries**. Nothing expressed or referred to in this Agreement will be construed to give any person or entity other than the Parties any legal or equitable right, remedy or claim under or with respect to this Agreement or any provision hereof. This Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the Parties and their successors and permitted assigns.

**Section 17.23: Counterparts**. This Agreement and any subsequent writings, including amendments, may be executed in as many counterparts as desired by the Parties, any one of which shall have the force and effect of any original but all of which together shall constitute the same instrument. Duplicate, unexecuted, and acknowledged pages of the counterparts may be discarded, and the remaining pages assembled as one document. This Agreement and any subsequent writings, including amendments, may also be executed by exchange of executed copies via electronic means, such as PDF, in which case – but not as a condition to the validity of the Agreement – each Party shall subsequently send the other Party by mail the original executed copy. A Party's signature transmitted by electronic means shall be considered an "original" signature that is binding and effective for purposes of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the day and year first above written.

HAWAIIAN ELECTRIC COMPANY, INC. [SELLER]

By\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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HAWAIʻI ELECTRIC LIGHT COMPANY, INC. MAUI ELECTRIC LIGHT CO., LTD.

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