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STATE OF HAWAII

Co-Counsel for Petitioner
KAHEA: The Hawaiian Environmental Alliance,
a domestic non-profit Corporation

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

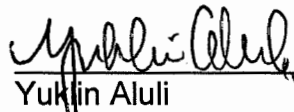
In the Matter of:) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re) KAHEA: THE ENVIRONMENTAL
Conservation District Use Permit) ALLIANCE'S MOTION FOR
(COUP) HA-3568 for the Thirty Meter) PRODUCTION OF TIO
Telescope at the Mauna Kea Science) DECOMMISSIONING FUNDING PLAN;
Reserve, Kahohe Mauka, Hamakua) MEMORANDUM IN SUPPORT OF
District, Island of Hawai'i, TMK (3) 4-4-) MOTION; CERTIFICATE OF SERVICE
015:009)
)
)
) **HEARING:**
) **Date:** January 3, 2017
) **Time:** 9:00 a.m.
) **Hearings Officer:** Riki J. Amano
)

**KAHEA, THE ENVIRONMENTAL ALLIANCE'S MOTION FOR
PRODUCTION OF TIO DECOMMISSIONING FUNDING PLAN**

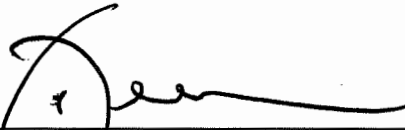
COMES NOW KAHEA: The Hawaiian Environmental Alliance, a domestic non-profit Corporation (KAHEA), by and through its counsel Yuklin Aluli and Dexter K. Kaiama, and moves pursuant to Hawaii Administrative Rule (HAR) Sec 13-1-32.3 and 13-1-33(a)(2), to compel the production of the TMT International Observatory, LLC

(TIO) Decommissioning Funding Plan submitted to the Office of Mauna Kea Management in 2014, as referred to in the WDT of Edward C. Stone. This motion is made for the reason that it is material and relevant to the issuance of a conditional use permit as sought herein by the University of Hawaii for the proposed TMT project, as is required under the subplan of the Mauna Kea Comprehensive Management Plan, known as the Decommissioning Plan.

DATED: Kailua, Hawaii, 12-27-16.



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Co-counsel for Petitioner KAHEA:
The Hawaiian Environmental Alliance,
a domestic non-profit Corporation



Dexter K. Kaiama
Co-counsel for Petitioner KAHEA:
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_____)

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Pursuant to Haw. Admin. Rule Sec. 13-1-32.3, no discovery is allowed of the parties. The parties herein were however required to submit all witness statements by way of a writing as well as all exhibits. The WDT for Edward C. Stone, Executive Director of Intervenor TIO, includes on page 5, reference to the Decommissioning Funding Plan (DFP) submitted by TIO to the Office of Mauna Kea Management (OMKM) in 2014. However, the DFP was not an exhibit presented by TIO and is not found within the exhibits submitted by the University of Hawaii, nor of any of the other parties.

TIO's counsel has declined to provide a copy of the DFP when its witness, Edward C. Stone, was being cross examined by the Temple of Lono on December 19, 2016.

II. STATEMENT OF FACTS

On November 15 and 16, 2016, Robert McClaren, Associate Director of the UH Institute for Astronomy, was presented as a witness by the applicant, University of Hawaii. His primary purpose, as he stated on multiple occasions throughout cross, was to present the Decommissioning Plan of January 2010 (Exhibit A013), which has been adopted as a subplan of the Mauna Kea Comprehensive Management Plan.

A read of the DP at page 14 states: "For new and renegotiated subleases, decommissioning funding plans should be divulged in the negotiation of the sublease ... or should become part of the subleases." In fact, Table 4 on page 14 requires OMKM approval of the DFP within six months of its receipt or its inclusion in the sublease.

The TIO Prehearing Statement submitted herein also references the Decommissioning Plan at page 11 FN 7 in its argument contending that its project complies with the comprehensive management plan and its subplans and hence meets the criteria for issuance of a conditional use permit.

During his cross examination on December 19, 2016, by counsel for Kahea, Edward C. Stone acknowledged the publication of the TIO financial statements for 2014 on its website, which financial statement has been marked and submitted as Exhibit B-47. Witness Stone was examined at length on this financial statement and specifically its notes as they relate to Asset Retirement Obligations on page 11 (Note 4).

In Note 4 it is stated that TIO's liability for decommissioning, discounted by 5.36%, stood at \$15.6 million. This liability was described as being "part of its lease with the University of Hawaii." The note further referenced the fact that "In future years, the ARO liability will be increased for accretion and the related asset depreciated over the useful life of the observatory." In as much as the "useful" or "expected" life of the TMT has been stated as being 50 years but the sublease (now invalidated) ends in 2033, there is an inconsistency as to depreciation as well as some question as to the "site specific studies " contemplated in the decommissioning costs.

The sublease between TIO and the UH was submitted as an Exhibit to TIO's Motion to Intervene and is Exhibit B.02f. It was entered into on June 28, 2014 and requires at page 8 Para 10b, that the TIO comply with the DFP. A triggering event in the sublease is that its termination could result in a range of remedies, some of which are to be stated in the DFP.

Many questions which were posed to Executive Director Stone were answered by way of deferral to project manager Gary Sanders. In fact, Mr. Sanders' WDT discusses the TIO decommissioning plan in Para III.D. beginning on page 11 and goes on to state at page 13 that "The TMT Project anticipates that decommissioning and site

restoration requirements will be included in the sublease”, which has not in fact happened. It goes on further to state at page 13 the specific site decommissioning plans will be developed in accordance with the general timelines of the Decommissioning Plan (Exhibit A013) which have been set forth in Table 4 on page 14.

Mr. Sanders has been identified by TIO as being presented for testimony on January 3, 2017. That being said, this motion is being heard on the same date and with prejudice to the parties in view of the shortness of time.

III. STATEMENT OF LAW

HRS Sec 91-9 c provides that in a contested case hearing “opportunities shall be afforded all parties to present evidence and argument on all issues involved.” As has been stated in In re Kauai Elec. Div. Of Citizens Util. Co., 60 Hawaii 166, 182 (1978) such opportunity must be afforded all parties “to **obtain** and present all their evidence, to present testimony, both written and oral, to cross examine witnesses, and to argue the issues on the merits” (emphasis added). What is axiomatic in this instance is the opportunity to “obtain” all the evidence.

This contested case hearing is being held on a remand from the Hawaii Supreme Court , Mauna Kea Anaina Hou et al v Board of Land and Natural Resources, 136 Hawaii 376 (2015), which stated at 380

A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross examination. It provides a high level of procedural fairness and protections to ensure that decisions are made based a factual record that is developed through a rigorous adversarial process.

Hawaii Admin Rule Sec 13-1-32.3 precludes discovery in a contested case hearing. In this regard it is unlike the Hawaii Rules of Civil Procedure which govern the administration of a civil trial. However, this same rule authorizes the hearing officer to require that parties serve upon other parties exhibits. And HAR Sec. 13-1-33(a)(2) authorizes a hearing officer to subpoena the production of documents or records upon a showing that such record or document is material and relevant to the issues involved.

IV. ARGUMENT

A. **TIO IN THE WDT OF ITS EO AND PROJECT MANAGER AND ITS PREHEARING STATEMENT HAVE MADE ITS DECOMMISSIONING FUNDING PLAN SUBMITTED TO THE OMKM IN 2014 RELEVANT AND MATERIAL**

In its prehearing statement submitted herein TIO has argued that the TMT Project complies with the Mauna Kea Comprehensive Management Plan and its subplans. Although TIO did not submit these plans as exhibits, they were submitted by the applicant and attested to by its witnesses. One UH witness, Robert McClaren, specifically focused on the Decommissioning Plan (Exhibit A013). He was not able to address with specificity the financial obligation being undertaken by TIO in its decommissioning funding plan, but he did acknowledge that it was the only sublease which required compliance with such a funding plan.

TIO, however, presented two WDTs from its Executive Director and from its Project Manager which specifically discuss the existence of such a funding plan and its compliance with the subplan of the Comprehensive Management Plan for Mauna Kea. TIO also published on its website a 2014 financial statement which goes to lengths in discussing the present value of what is called an Asset Retirement Obligation.

TIO by its very prehearing argument and the testimony of its corporate executives have made its DFP relevant and material.

B. **THE DECOMMISSIONING FUNDING PLAN IS REQUIRED UNDER THE TERMS OF THE DECOMMISSIONING PLAN, A SUBPLAN OF THE MAUNA KEA COMPREHENSIVE MANAGEMENT PLAN, AND THE SUBLEASE, NOW INVALID**

The DP (Exhibit A.013) presents, on p 14, a table describing a timeline for the submission and approval of a decommissioning funding plan, for both new and renegotiated subleases. Compliance with the terms of the subplan is a requirement for the issuance of a conditional use permit. TIO cannot possibly argue now that it is somehow exempt from the terms of the subplan and its own sublease, not to mention the representations of its website and two executives.

C. THE HEARING OFFICER SHOULD AFFORD THE PARTIES WITH THE PROCEDURAL FAIRNESS AND PROTECTIONS TO WHICH IT IS ENTITLED UNDER THE REMAND OF THIS MATTER FROM THE HAWAII SUPREME COURT

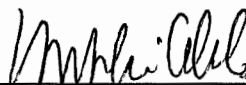
Whether or not TIO is in compliance with the Comprehensive Management Plan and its subplans should not be the subject of conjecture. If there is in fact a Decommissioning Funding Plan which has been entered into between the UH and TIO, it should be made available to the parties sooner rather than never. If OMKM and/or TIO have failed to comply with Table 4 of the DP, the movant is entitled to make its case.

If this hearing officer should consider one thing, it should be the remand recently made by the Intermediate Court of Appeals in Lanaians for Sensible Growth v Lanai Resorts, 137 Hawaii 298 (2016) in which a 1996 Land Use Commission proceeding on remand in 2010, was sent back yet again because it failed to afford a full and fair opportunity to have all the evidence adduced upon which it could render its decision.

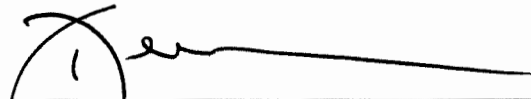
V. CONCLUSION

For all of the reasons stated above, KAHEA argues that this Hearing Officer should require the production of the Decommissioning Funding Plan submitted by TIO in 2014 to the OMKM.

DATED: Kailua, Hawaii, 12-27-16.



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Co-counsel for Petitioner KAHEA:
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a domestic non-profit Corporation



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Telescope at the Mauna Kea Science)
Reserve, Kahohe Mauka, Hamakua)
District, Island of Hawai'i, TMK (3) 4-4-015:009)
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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing was served on the following via email unless otherwise specified below:

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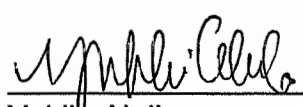
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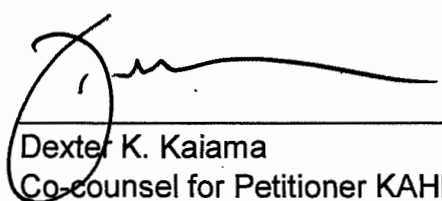
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DATED: Kailua, Hawaii, 12-27-16



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