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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Application (CDUA) (HA-) **DEBORAH J WARD JOINDER TO**
3568) The Thirty Meter Telescope at the) **MAUNA KEA ANAINA HOU MOTION**
Mauna Kea Science Reserve, Kaohe Mauka,) **REQUESTING TIME TO RESPOND TO**
Hamakua District, Island of Hawai'i,) **EXHIBIT OBJECTIONS**
TMK (3) 4-4-015:009)
_____)

**WARD JOINDER TO MAUNA KEA ANAINA HOU
MOTION REQUESTING TIME TO RESPOND TO EXHIBIT OBJECTIONS**

I. INTRODUCTION

Deborah J Ward herein joins the Mauna Kea Anaina Hou Motion (“MKAH Mot. Doc 522”) Requesting Time to Respond to Exhibit Objections.

As noted by MKAH, the Hearing Officer did not schedule any time for parties to respond to objections filed to the admission of exhibits.

As also noted by MKAH, the Applicant and TIO filed multiple objections to more than 300 exhibits being moved into evidence.

The Applicant and TIO also reserved the right to file additional objections once the transcripts are available and/or once additional information is available about certain exhibits, and/or as part of the findings of fact and conclusions of law.

This massive filing of objections goes counter to the express intent of the Hearing Officer, as laid out in the Contested Case Hearing.

II. ARGUMENT

A. Due process, at a minimum, requires that parties moving exhibits into evidence have an opportunity to respond to objections.

Petitioner Ward agrees with MKAH that denying the parties sponsoring exhibits the opportunity to respond to objections would be a clear violation of the sponsoring party’s due process rights.

The motions made to admit exhibits and related filings into evidence initiated the discussion. If the filing of the motion ended the sponsoring party’s right to argue for such admission and the discussion became limited to a discussion between the party objecting and the Hearing Officer, then the sponsoring party is improperly excluded.

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The implicit assumption is that the moving party offered all the available arguments for admission of the documents at the time the motion was filed. Yet there was no instruction from the Hearing Officer that the moving party provide **any** arguments for admission. A review of the motions for admission of exhibits and/or testimony will find that the motions uniformly provide only the exhibit number and a brief description of the exhibit in conformance with the Hearing Officer's instructions, with some motions providing generic legal argument for admission of the documents identified.

With no requirement to provide arguments for the admissibility of each document with the motions seeking admission and no opportunity to respond to any objections, those parties sponsoring exhibits that now face objections will have had no opportunity to be heard on the legal and factual bases for admitting the specific documents objected to.

At a minimum, due process requires that the parties filing motions to admit evidence be provided an opportunity to respond to objections filed to such motions.

B. It is clear that this is only the first set of objections.

The University included the following in its filing:

Because the transcripts of the evidentiary hearings remain incomplete as of the filing date of this opposition, the University is still unable to determine with certainty the appropriate **objections to hundreds of exhibits sought to be introduced through the parties' motions**. As such, the University hereby asserts each of its General Objections to any exhibits and written direct testimony to the extent applicable, and reserves the right to object further as transcripts become available.

The Applicant has apparently laid down a blanket objection to hundreds of additional documents, with details to be provided later.

While TIO does not identify exhibits to which TIO's general objections are applied, TIO states:

By not objecting to the admission of a particular exhibit or written direct testimony, TIO is not waiving and instead hereby expressly reserves its right to later argue in connection with the proposed Findings of Fact and Conclusions of Law ("FOFs and COLs") that any such exhibit or written direct testimony is irrelevant, immaterial, not credible, or should otherwise not be considered by the Hearings Officer.

TIO is unilaterally altering the process set out by the Hearing Officer, which stated that now was the time to file objections to the admissibility of any exhibits.

TIO is reserving its right to object to exhibits already admitted into evidence at this point, when the findings and conclusions are prepared later, i.e. claiming the right to object twice.

If that claim is allowed, then TIO can burden the other parties with having to respond to admissibility arguments by TIO, while also preparing exceptions to proposed findings and conclusions filed by other parties. That detraction from the time available to prepare exceptions is unduly burdensome. Parties may end up having to reargue the admissibility of documents that have already been admitted at this point in the proceeding.

TIO will also have the advantage of litigation now informing the shape of objections to be filed later, i.e. if an objection is not successful this time, TIO may learn from the sponsoring party's arguments and/or the Hearing Officer's ruling how to restructure the objection when filed the second time.

III. CONCLUSION

Parties were led to believe that all exhibits were going to be admitted subject to weight, so there was no need to file any significant number of objections. The result is that the many opponents of the permit did not file objections. Contrary to the expressed intent of the Hearing Officer, the Applicant and TIO filed thousands of objections, with the promise of more to come.

The Applicant and TIO have created a situation where the Hearing Officer is either called upon to admit hundreds of exhibits over the objections of the Applicant and TIO or to exclude hundreds of exhibits to the detriment of the opponents of the permit application, making some references to exhibits in the transcripts impossible to examine. Either way creates the potential for a due process challenge to the outcome of the contested case.

March 22, 2017,
Kurtistown, Hawai'i

Deborah J Ward, Petitioner