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UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568 for
the Thirty Meter Telescope at the Mauna Kea
Science Reserve, Ka'ohe Mauka, Hāmakua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

UNIVERSITY OF HAWAI'I AT HILO'S
SUBSTANTIVE JOINDER RE [DOC.
NO. 555] TMT INTERNATIONAL
OBSERVATORY LLC'S MOTION FOR
**CLARIFICATION OR, IN THE
ALTERNATIVE, RECONSIDERATION
RE MINUTE ORDER NO. 44** [DOC. NO.
553]; CERTIFICATE OF SERVICE

**UNIVERSITY OF HAWAI'I AT HILO'S SUBSTANTIVE JOINDER RE [DOC. NO. 555]
TMT INTERNATIONAL OBSERVATORY LLC'S MOTION FOR
CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION
RE MINUTE ORDER NO. 44 [DOC. NO. 553]**

Applicant UNIVERSITY OF HAWAI'I AT HILO (“**University**”) substantively joins
and supports TMT International Observatory LLC’s (“**TIO**”) Motion for Clarification or, in the
Alternative, Reconsideration Re Minute Order No. 44 [Doc. No. 553] (“**Motion**”) [Doc. No.
555]. The University files this joinder in TIO’s Motion to provide additional arguments
supporting the Motion.

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2017 April 24 6:10 pm

I. INTRODUCTION

All parties and Hearing Officer Witnesses had ample notice—both actual and constructive—that the evidentiary hearing portion of the contested case proceeding concluded on March 2, 2017. As noted in Minute Order No. 44, Ms. Holi is the only Hearing Officer Witness to have entered any appearances at the evidentiary hearings in this matter; and, thus, to testify at the hearing. At no time since the close of the evidentiary hearing—*fifty-three days ago*—has Moses Kealamakia, Jr. (“**Kealamakia**”), Ivy McIntosh (“**McIntosh**”), or Crystal West (“**West**”) filed any formal claim that they were erroneously excluded from the proceeding, or otherwise notified the Hearing Officer of any such complaint or concern. The absence of such response despite the highly publicized closure of the hearing confirms that Kealamakia, McIntosh and West did not intend to testify at the hearing. Alternatively, having failed to timely assert a claim to the contrary, Kealamakia, McIntosh and West have waived any such argument. Having been aware of the impending and subsequent close of the evidentiary hearing, those Hearing Officer Witnesses may not sit on their claims in order to manufacture an issue for appeal that does not otherwise exist. Therefore, the University joins TIO’s Motion and respectfully requests that the Hearing Officer clarify Minute Order No. 44 to resolve the issue once and for all.

II. ARGUMENT

The evidentiary hearing concluded on March 2, 2017. Kealamakia, McIntosh, and West did not testify at the evidentiary hearing and have not otherwise filed a motion seeking to introduce additional testimony or evidence, or otherwise notified the Hearing Officer of any claimed prejudice. As noted in TIO’s Motion, the conclusion of the hearing was well-publicized in several news publications and media outlets. *See* Motion at Ex. 2. The contested case hearings were also broadcast live on television and online by Nā Leo TV; and was the subject of

extensive television news coverage.

As set forth in TIO's Motion, as early as March 11, 2017, non-party Nelson Ho and Intervenor J. Leina'ala Sleightholm indicated that Kealamakia and West, respectively, were still interested in testifying at the hearing.¹ Kealamakia and West were copied on those emails, but did not themselves raise any concerns about not testifying at the evidentiary hearing.² To date, neither Kealamakia, McIntosh, nor West has made any formal objection or request concerning their ability to testify at the evidentiary hearing.

Given the level of press coverage and communication amongst individuals interested in this proceeding, there is no reasonable dispute that those Hearing Officer Witnesses knew or should have known that the evidentiary hearing closed on March 2, 2017. Fifty-three days have passed since the close of the evidentiary hearing. Kealamakia, McIntosh, and West had ample notice and opportunity to formally raise an objection or otherwise make a claim that they were precluded from testifying or presenting evidence at the hearing, if that is what they believed; their failure to do so demonstrates that that was not their belief. Having failed to making *any* timely motion or other formal complaint concerning their opportunity to testify, the remaining Hearing Officer Witnesses have waived their right to assert such claims. It would be extremely prejudicial to the parties who have diligently and timely prosecuted their rights and claims to leave this issue open to any future, untimely challenge that could compromise these proceedings at the eleventh hour.

¹ As noted in the Motion, neither Mr. Ho nor Ms. Sleightholm represent Kealamakia or West. Therefore, Mr. Ho and Ms. Sleightholm lack standing to assert any objections or claims on Kealamakia's or West's behalf.

² In addition, on March 16, 2017, TIO and the University filed their respective oppositions to the motions to admit exhibits and testimony. *See* Doc. Nos. 512 and 514. Both oppositions make repeated references to the close of the hearing on March 2, 2017. Kealamakia and McIntosh were served with copies of those pleadings. *See* Certificate of Service for Doc. Nos. 512 and 514.

III. CONCLUSION

For the above reasons, the University joins TIO's motion and respectfully requests that the Hearing Officer grant TIO's Motion.

DATED: Honolulu, Hawai'i, April 24, 2017.



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Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

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The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

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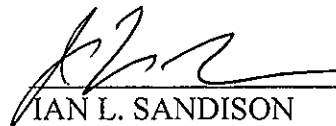
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