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BOARD OF LAND AND NATURAL RESOURCES

FOR THE 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'ohē Mauka, Hāmākua,  
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

**TMT INTERNATIONAL OBSERVATORY  
LLC'S STATEMENT OF POSITION RE:  
HARRY FERGERSTROM'S MOTION TO  
RECONSIDER (DOC 553, MINUTE  
ORDER 44); et al., FILED 4/23/2017 [Doc.  
No. 554]; EXHIBIT "1"; CERTIFICATE OF  
SERVICE**

**TMT INTERNATIONAL OBSERVATORY LLC'S STATEMENT OF POSITION RE:  
HARRY FERGERSTROM'S MOTION TO RECONSIDER (DOC 553,  
MINUTE ORDER 44); et al., FILED 4/23/2017 [Doc. No. 554]**

TMT INTERNATIONAL OBSERVATORY, LLC ("TIO"), by and through its  
undersigned counsel, hereby submits its Statement of Position Re: Harry Fergstrom's Motion  
to Reconsider (Doc 553, minute order 44); et al. ("Position Statement"), which was uploaded to

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STATE OF HAWAII

the Documents Library on Sunday, April 23, 2017 as Doc. No. 554.<sup>1</sup> Harry Fergerstrom's own neglect, as detailed infra, is to blame for his Written Direct Testimony, dated November 14, 2016 ("Fergerstrom WDT") not being admitted into evidence. Mr. Fergerstrom has also failed to establish sufficient "good cause" to reasonably excuse his failure to timely move the Fergerstrom WDT into evidence. Nevertheless, given that the Fergerstrom WDT appears to have been submitted and uploaded to the Documents Library before the close of the testimony portion of the contested case hearing on March 2, 2017, and was referred to by Mr. Fergerstrom during his oral testimony on January 23, 2017, and in consideration of the "considerably more relaxed" evidentiary standard that applies to administrative hearings, TIO respectfully submits that it does not object to the admission of the Fergerstrom WDT into evidence as part of this contested case.

Preliminarily, in his Motion, Mr. Fergerstrom complains that the Fergerstrom WDT was not uploaded to the Documents Library. Mr. Fergerstrom is incorrect. The Fergerstrom WDT can be found in the Documents Library under the "Evidentiary Hearing Submittals" tab. The Fergerstrom WDT was uploaded to the Documents Library on November 15, 2016. See Exhibit "1" attached hetero, which is a screenshot of the Fergerstrom WDT in the Documents Library.

Mr. Fergerstrom also complains in his Motion that the Fergerstrom WDT was not admitted into evidence by the Hearing Officer. The Hearing Officer did not admit the Fergerstrom WDT into evidence because it was not timely moved into evidence by Mr. Fergerstrom. Mr. Fergerstrom filed his "Motion to move all documents in evidentiary hearing submittals, identified by letter 'D' in to evidence" on March 6, 2017 [Doc. No. 494] ("March 6

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<sup>1</sup> Mr. Fergerstrom filed a second motion to reconsider, inter alia, Minute Order No. 44, on April 26, 2017 [Doc. No. 566]. The second motion to reconsider raises similar arguments to those raised in the instant Motion. Nevertheless, for clarity of the record, TIO will submit a separate response to Mr. Fergerstrom's second motion to reconsider by the deadline to do so.

Motion”). Notably, Mr. Fergerstrom failed to move the Fergerstrom WDT into evidence as part of his motion. See generally March 6 Motion.

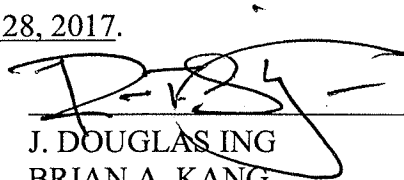
Likely aware of his own neglect, Mr. Fergerstrom later filed his “Clarification of items identified as evidentiary submittals under letter ‘D’ to be moved into evidence (Doc 494)” on March 18, 2017 [Doc. No. 515] (“Clarification”). Mr. Fergerstrom’s Clarification identified the Fergerstrom WDT as one of the exhibits he was moving into evidence. His Clarification, however, was untimely because it was filed eleven days after the March 9, 2017 deadline to move exhibits into evidence. The Hearing Officer, as a result of its untimeliness and as was well within her discretion, did not review or consider Mr. Fergerstrom’s Clarification in issuing Minute Order No. 44 [Doc. No. 553]. See Minute Order No. 44 at 6; see also Hawaii Administrative Rules § 13-1-32(c) (providing that the Hearing Officer has the “power to . . . fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing”). Because it was not timely moved upon, Minute Order No. 44 did not admit the Fergerstrom WDT into evidence.

Mr. Fergerstrom recognizes in his Motion that he “ha[s] a responsibility to submit documents in a timely manner.” Motion at 2. In contravention of his recognized responsibility, Mr. Fergerstrom did not timely move into evidence the Fergerstrom WDT. In his Motion, Mr. Fergerstrom does not provide any explanation to reasonably excuse his own failure to move the Fergerstrom WDT into evidence as part of his March 6 Motion. The only “good cause” explanation Mr. Fergerstrom provides in the Motion to excuse his failure is that the Fergerstrom WDT was not uploaded to the Documents Library. That claim is incorrect as detailed supra.

Simply stated, Mr. Fergerstrom has not established “good cause” to reasonably excuse his own failure to timely move the Fergerstrom WDT into evidence.

Notwithstanding the foregoing, given that the Fergerstrom WDT appears to have been submitted and uploaded to the Documents Library before the close of the testimony portion of the contested case hearing on March 2, 2017, and was referred to by Mr. Fergerstrom during his oral testimony on January 23, 2017, and in consideration of the “considerably more relaxed” standard that applies to administrative hearings<sup>2</sup>, TIO respectfully submits that it does not object to the admission of the Fergerstrom WDT into evidence as part of this contested case.

DATED: Honolulu, Hawaii, April 28, 2017.



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<sup>2</sup> See Price v. Zoning Bd. of Appeals, 77 Hawaii 168, 176 n. 8, 883 P.2d 629, 637 n. 8 (1994) (citing 4 J. Stein, G. Mitchell & B. Mezines, Administrative Law § 22.01 (1994)).

Discoveries (October 3, 2016)

Testimony of David M. Callies

10/11/2016 [C-6](#)

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**Harry Fergerstrom (Series D)**

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11/15/2016 [Amendments to exhibits](#) Amendments to exhibits of Michael Lee

11/15/2016 [Written direct](#) Written direct testimony of Harry Fergerstrom

12/7/2016 [Opposition](#) Fergerstrom opposition to University of Hawaii confirmation of exhibits and direct written testimonies of witnesses to be entered into evidence; Memorandum of support; Motion to recall Mr. Perry White; COS

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

Contested Case Hearing Re Conservation  
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BLNR Contested Case HA-16-002

**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that the attached document was served upon the following parties by the means indicated:

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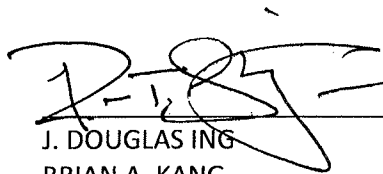
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