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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

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

**TMT INTERNATIONAL OBSERVATORY,  
LLC'S OPPOSITION TO (1) CINDY  
FREITAS MEMORANDUM IN SUPPORT  
OF MOTION FOR RECONSIDERATION  
OF MINUTE ORDER 43, FILED 4/25/17  
[DOC. NO. 557] and (2) ERRATA RE  
CINDY FREITAS MEMORANDUM IN  
SUPPORT OF MOTION FOR  
RECONSIDERATION OF MINUTE  
ORDER 43, FILED 4/26/17 [DOC. NO. 562];  
CERTIFICATE OF SERVICE**

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**TMT INTERNATIONAL OBSERVATORY, LLC'S OPPOSITION TO (1) CINDY  
FREITAS MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION  
OF MINUTE ORDER 43, FILED 4/25/17 [DOC. NO. 557] and (2) ERRATA RE  
CINDY FREITAS MEMORANDUM IN SUPPORT OF MOTION FOR  
RECONSIDERATION OF MINUTE ORDER 43, FILED 4/26/17 [DOC. NO. 562]**

TMT INTERNATIONAL OBSERVATORY, LLC (“TIO”), by and through its  
undersigned counsel, hereby submits its Opposition to (1) Cindy Freitas Memorandum in

Support of Motion for Reconsideration of Minute Order 43, Filed 4/25/17 [Doc. No. 557] and (2) Errata Re Cindy Freitas Memorandum in Support of Motion for Reconsideration of Minute Order 43, Filed 4/26/17 [Doc. No. 562] (collectively, the “C. Freitas Motion”). The C. Freitas Motion should be denied for the following reasons:

- (1) Claims by the anti-TMT Petitioners/Intervenors<sup>1</sup> that they have been denied procedural due process during this contested case hearing are absolutely meritless.
- (2) The procedure to file and submit documents detailed in Minute Order No. 43 [Doc. No. 552] is the same procedure that has been in place throughout this contested case hearing. The setting of such a procedure is within the power of the Hearing Officer under the Hawai‘i Administrative Rules (“HAR”) and is not evidence of bias on the part of the Hearing Officer.
- (3) The alleged error in one of forty-four transcripts that Mrs. Freitas identifies, even if true, is not a reason to reconsider Minute Order No. 43. There is no prejudice to Mrs. Freitas as a result of the alleged error.
- (4) The Hearing Officer was authorized to and properly set the deadlines for the submission of proposed Decisions and Orders, Findings of Fact, and Conclusions of Law (“D&Os, FOFs, and COLs”) under HAR § 13-1-38.

## I. **DISCUSSION**

### 1. **The anti-TMT Petitioners/Intervenors were not and have not been denied procedural due process during this contested case hearing.**

Forty-four days of testimony from over seventy witnesses, including lengthy testimony from each and every anti-TMT Petitioner/Intervenor who wanted to testify at the contested case

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<sup>1</sup> The anti-TMT Petitioners/Intervenors refers to all parties except the applicant University of Hawaii at Hilo, TIO, and PUEO.

hearing. The submission of hundreds of exhibits, many of which bear absolutely no relevance to the material issues before the Hearing Officer. Hours upon hours of cross-examination by anti-TMT Petitioners/Intervenors of witnesses offered by UHH and TIO. Hours upon hours of friendly cross-examination by anti-TMT Petitioners/Intervenors of their own witnesses (eliciting testimony well beyond that offered in their written direct testimonies). Notwithstanding all of this and more, the anti-TMT Petitioners/Intervenors remarkably file a series of motions for reconsideration regarding Minute Order Nos. 43 [Doc. No. 552] and 44 [Doc. No. 553] arguing that they were or are somehow being denied procedural due process in this proceeding. The anti-TMT Petitioners/Intervenors were not and have not been denied procedural due process in this proceeding. To the absolute contrary, the Hearing Officer and the Board of Land and Natural Resources (“BLNR”) have bent over backwards to provide the parties, particularly the anti-TMT Petitioners/Intervenors, with a contested case full of accommodations that exceed the requirements of procedural due process under HRS Chapter 91. The motions for reconsideration should all be denied insofar as they speciously argue that the anti-TMT Petitioners/Intervenors have been denied procedural due process in this proceeding.

Procedural due process requires “notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” Alejado v. City and Cty. of Honolulu, 89 Hawai‘i 221, 230, 971 P.2d 310, 319 (App. 1998). “HRS chapter 91 sets out the procedural requirements agencies must follow in adjudicating ‘contested cases.’” Id. If HRS chapter 91 is followed, then procedural due process during a contested case hearing is satisfied. See id.

Regarding the conduct of the contested case hearing, HRS Chapter 91 required that “[o]pportunities [] be afforded [to] all parties to present evidence and argument on all issues

involved.” HRS § 91-10(c). It also required that “[e]very party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence.” HRS § 91-10(3).

HRS Chapter 91 did not dictate how the Hearing Officer was to handle the admission of exhibits, or any objections thereto. Rather, HRS Chapter 91 only required that the Hearing Officer provide parties the opportunity to “present evidence[,]” which she allowed throughout the contested case hearing and the filing of motions to admit exhibits.

HRS Chapter 91 also notably did not require the Hearing Officer or BLNR to create a Documents Library for all parties to access online. It did not require the Hearing Officer or BLNR to hold the contested case hearing in a facility that had wireless Internet access so that parties could access the Documents Library online during and throughout the contested case hearing. It did not require the Hearing Officer or BLNR to provide the parties with sample Decisions and Order, Findings of Fact and Conclusions of Law. It did not require the Hearing Officer to spend countless hours on and off the record explaining to the anti-TMT Petitioners/Intervenors how this process worked. Finally, HRS Chapter 91 also did not require the Hearing Officer or BLNR to make the transcripts of the contested case hearings available at no cost to the parties at multiple locations across the State of Hawai‘i. Notwithstanding that none of this was required, the Hearing Officer and BLNR bent over backwards to deliver such accommodations to assist the anti-TMT Petitioners/Intervenors in this process.

Simply stated, the anti-TMT Petitioners/Intervenors were provided forty-four days of opportunities to present evidence (through testimony and exhibits) and argument on all the issues involved. They were given the opportunity to cross-examine every witness that testified at the contested case hearing. They were also allowed to submit rebuttal evidence. See e.g.,

Testimony of David Frankel on November 11, 2016; Testimony of Brian Cruz on February 28, 2017. Nothing more is required and any claim by the anti-TMT Petitioners/Intervenors that they have been or are being denied procedural due process during this contested case hearing is absolutely meritless.

2. **The procedure to file and submit documents detailed in Minute Order No. 43 is the same procedure that has been in place throughout this contested case hearing and proper pursuant to the Hearing Officer's powers under HAR § 13-1-32(c).**

HAR § 13-1-32(c) provides 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.” Id. The Hearing Officer “shall set the time for filing all motions and opposing memoranda, if any.” HAR § 13-1-34(a).

In exercise of her clear “power” under the HAR, the Hearing Officer, as part of Minute Order No. 43, repeated the procedure to file and submit documents that has applied throughout this contested case. The Hearing Officer provided in Minute Order No. 43:

**FILING/SUBMISSION PROCEDURE.** An original of the filing/submission **must be received** by the DLNR Office of Conservation and Coastal Lands, 1151 Punchbowl Street, Room 131, Honolulu, Hawai‘i; **no later than 4:00 p.m. on the deadline set forth.** (emphasis added). A digital copy in pdf form should be sent to [dlnr.maunakea@hawaii.gov](mailto:dlnr.maunakea@hawaii.gov), or delivered to the above office, on the same deadline.

Id. at 3.

Minute Order No. 43 detailed the same procedure to submit and file documents that the Hearing Officer set forth over nine months ago on July 21, 2016 as part of Minute Order No. 13 [Doc. No. 115]. Minute Order No. 13 provided:

**Filing/Submission Procedures.** All parties shall abide by the following procedures for filing and/or submission of documents, including but not limited to motions, objections, and other required papers.

1. **Both the original hard copy** plus one digital copy in pdf or doc format of the filing/submission **must be received** by the DLNR Office of Conservation and Coastal Lands (“OCCL”), 1151 Punchbowl Street, Room 131, Honolulu, Hawai‘i 96813; **no later than 4:00 p.m. on the deadline set forth**. To the extent possible, digital copies of any submission must be contained in one single file.
2. In addition, copies of the filing/submission shall be sent to all other parties; and Deputy Attorney General Julie China, attorney for the Board of Land and Natural Resources (465 South King Street, Room 300, Honolulu, Hawai‘i 96813). This service may be completed by e-mail.

Id. at 7 (emphases added).<sup>2</sup>

Consequently, the procedure to file and submit documents detailed in Minute Order No. 43 is the same procedure that has been in place throughout this case. Mrs. Freitas’ claim that the Hearing Officer changed the procedure to negatively impact the anti-TMT Petitioners/Intervenors is therefore completely meritless. Her claim that this non-existent change

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<sup>2</sup> The Hearing Officer issued Minute Order No. 16 on August 23, 2016 [Doc. No. 238], which made certain amendments, additions, and clarifications, to the procedure for filing and submitting documents detailed in Minute Order No. 13. For example, Minute Order No. 16 amended Minute Order No. 13 by removing Ms. China from the service list and adding OCCL at [dlnr.maunakea@hawaii.gov](mailto:dlnr.maunakea@hawaii.gov). The reference to 4:30 p.m. in Minute Order No. 16 (as opposed to 4:00 p.m. in Minute Order Nos. 13 and 43) is the deadline to ensure that OCCL will upload a particular document to the Documents Library by the close of the business the next day. Indeed, during this time, certain parties were complaining that their documents were not being uploaded to the Documents Library in a timely fashion. This amendment in Minute Order No. 13 to the procedure for filing and submitting documents clarified the timing of when a document would be uploaded to the Documents Library by. Minute Order No. 16 did not change Minute Order No. 13’s requirement that the original hard copy of any document had to be received by OCCL no later than 4:00 p.m. on the deadline set forth.

in procedures evidences bias on the part of the Hearing Officer is equally meritless. The C. Freitas Motion should be denied.<sup>3</sup>

3. **The alleged error in one of forty-four transcripts that Mrs. Freitas identifies, even if true, is not a reason to reconsider Minute Order No. 43. There is no prejudice to Mrs. Freitas as a result of the alleged error.**

Rather than focus on the substantive merits of the relevant issues before the Hearing Officer, the anti-TMT Petitioners/Intervenors have spent a significant amount of their time and effort trying to manufacture non-existent procedural errors. In the latest example, Mrs. Freitas turns her attention to the court reporters in this contested case. Mrs. Freitas' claim of procedural error or an incomplete record is completely meritless.

Preliminarily, and to repeat, the Hearing Officer went above and beyond to make the 44 plus volumes of transcripts of the contested case proceedings available to the parties at no cost to them. Indeed, despite their cries to the contrary, the anti-TMT Protestors/Intervenors cannot and have not pointed to a single legal authority that required the Hearing Officer to make the transcripts available to them for FREE. HAR § 13-1-32(d) only required the Hearing Officer to do the following:

The presiding officer shall provide that a verbatim record of the evidence presented at any hearing is taken unless waived by all the parties. **Any party may obtain a certified transcript of the proceedings upon payment of the fee established by law for a copy of the transcript.**

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<sup>3</sup> Mrs. Freitas apparently also argues that the deadline of five business days to file a motion for reconsideration of Minute Order No. 43, which applies equally to all parties, somehow demonstrates bias on the part of the Hearing Officer. To repeat, the Hearing Officer has “the power to . . . fix times for submitting documents [and] briefs” and “shall set the time for filing all motions and opposing memoranda, if any.” *Id.* Moreover, the deadline of five business days set by the Hearing Officer is consistent with the guidance found in HAR § 13-1-39. *Id.* (providing that “a motion for reconsideration shall be made not later than five business days after the decision”). It is also moot given that Mrs. Freitas timely filed the C. Freitas Motion.

Id. (emphasis added).<sup>4</sup>

Mrs. Freitas states that she found an error in one of the transcripts, specifically that one of the transcripts identified Mr. Freitas, not Mrs. Freitas, as the cross-examiner.<sup>5</sup> Even if true, this is not an appropriate argument on a motion to reconsider Minute Order No. 43, which merely set the deadlines for the filing of proposed D&Os, FOFs, and COLs” under HAR § 13-1-38. On that basis alone, the Motion should be denied.

More importantly, however, Mrs. Freitas fails to demonstrate how this alleged error prejudices her. Indeed, the alleged error raised by Mrs. Freitas, even if true, merely misidentifies the individual speaking with the Hearing Officer during a dialogue between the two. It is not an alleged error regarding a question asked or an answer given. Simply stated, even if there is an error in the transcript as identified by Mrs. Freitas in the Motion, there is no prejudice to Mrs. Freitas. The C. Freitas Motion should therefore be denied.<sup>6</sup>

**4. The Hearing Officer was authorized to and properly set the deadlines for the submission of proposed D&Os, FOFs, and COLs under HAR § 13-1-38.**

Mrs. Freitas lists sixteen motions or other documents that she claims have not been ruled upon by the Hearing Officer. Like the transcript issue above, this is not an appropriate argument on a motion to reconsider Minute Order No. 43. Indeed, Minute Order No. 43 did not concern any motions or documents that may be outstanding at this time.

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<sup>4</sup> HAR § 13-1-32(d), and its requirement that the parties pay for transcripts, is consistent with the Rules of the Circuit Courts of the State of Hawaii (“RCCH”) and the Hawaii Rules of Appellate Procedure (“HRAP”). See RCCH Rule 25 (requiring prepayment for transcripts); HRAP Rule 10(b)(1)(B) and (C) (same).

<sup>5</sup> Ironically, the Freitases had no problem speaking for each other during the contested case hearing.

<sup>6</sup> It is unclear what relief Mrs. Freitas is even seeking in the Motion as a result of an alleged error in the transcript.

Mrs. Freitas seemingly argues that the Hearing Officer is prohibited from setting deadlines for the submittal of proposed D&Os, FOFs, and COLs, because there are motions that have not been ruled upon by the Hearing Officer. Mrs. Freitas does not cite to any legal authority to support her argument. HAR § 13-1-38, and its reference to evidence, is inapposite insofar as none of the motions or other documents identified by Mrs. Freitas constitute evidence. Simply stated, after the issuance of Minute Order No. 44, which ruled on the admission of exhibits, the Hearing Officer properly set deadlines for the submission of proposed D&Os, FOFs, and COLs. The C. Freitas Motion should be denied.

## II. CONCLUSION

Based on the foregoing, TIO respectfully requests that the Hearing Officer deny the C. Freitas Motion in its entirety.

DATED: Honolulu, Hawaii, May 2, 2017.



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BOARD OF LAND AND NATURAL RESOURCES

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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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