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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

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 AND
OPPOSITION TO HARRY
FERGERSTROM'S MOTION TO
RECONSIDER (DOC 553, MINUTE
ORDER 44); MOTION TO INCLUDE WDT
AND PRE-HEARING STATEMENT INTO
EVIDENCE; et al., FILED 4/26/17 [DOC.
NO. 566]; EXHIBIT "1"; CERTIFICATE
OF SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S STATEMENT OF POSITION AND
OPPOSITION TO HARRY FERGERSTROM'S MOTION TO RECONSIDER (DOC 553,
MINUTE ORDER 44); MOTION TO INCLUDE WDT AND PRE-HEARING
STATEMENT INTO EVIDENCE; et al., FILED 4/26/17 [DOC. NO. 566]**

TMT INTERNATIONAL OBSERVATORY, LLC ("TIO"), by and through its
undersigned counsel, hereby submits its Statement of Position and Opposition to Harry
Fergstrom's Motion to Reconsider (Doc 553, Minute Order 44); Motion to Include WDT and

Pre-Hearing Statement Into Evidence; et al. (“Motion”), which was uploaded to the Documents Library on April 26, 2017 as Doc. No. 566.

I. DISCUSSION

1. Harry Fergerstrom’s Written Direct Testimony, dated November 14, 2016 (“Fergerstrom WDT”).

Mr. Fergerstrom filed an earlier motion for reconsideration of Minute Order No. 44 [Doc. No. 554] seeking the untimely admission of the Fergerstrom WDT into evidence. TIO hereby incorporates by this reference its Statement of Position to Mr. Fergerstrom’s first motion for reconsideration [Doc. No. 588]. For the Hearing Officer’s convenience, TIO’s Statement of Position is attached hereto as Exhibit “1”. TIO does not object to the admission of the Fergerstrom WDT for the reasons stated therein.

2. Pre-Hearing Statement

Mr. Fergerstrom seeks admission of his Pre-Hearing Statement into evidence. Like the Fergerstrom WDT, Mr. Fergerstrom did not move his Pre-Hearing Statement into evidence as part of his “Motion to move all documents in evidentiary hearing submittals, identified by letter ‘D’ into evidence” on March 6, 2017 [Doc. No. 494] (“March 6 Motion”).¹ In his Motion, Mr. Fergerstrom does not establish sufficient “good cause” to reasonably excuse his failure to timely move his Pre-Hearing Statement into evidence.

In Minute Order No. 44 [Doc. No. 553], the Hearing Officer ordered the following regarding pre-hearing statements:

Pre-hearing statements were denied as they are not evidence **except** where movant had no written direct testimony filed in the Documents Library and the movant’s hearing testimony was

¹ Mr. Fergerstrom did identify his Pre-Hearing Statement in his untimely “Clarification of items identified as evidentiary submittals under the letter ‘D’ to be moved into evidence (Doc 494)” [Doc. No. 515] (“Clarification”).

reflected in his/her pre-hearing statement; in those cases, the Hearing Officer will discern testimony from argument when reviewing the pre-hearing statement received into evidence and determine the application and weight to be given the evidence, if any.

Id. at 7 (emphasis in original).

Mr. Fergerstrom did submit written direct testimony and therefore his Pre-Hearing Statement would technically be excluded under the above order. However, TIO submits that select pages of Mr. Fergerstrom's Pre-Hearing Statement – e.g., pages 4-5 of Pre-Hearing Statement² – could be considered written direct testimony of Mr. Fergerstrom. Given the foregoing and the fact that the Pre-Hearing Statement 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, 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 Mr. Fergerstrom's Pre-Hearing Statement under the condition set forth in Minute Order No. 44 – i.e., that “the Hearing Officer will discern testimony from argument when reviewing the pre-hearing statement received into evidence and determine the application and weight to be given the evidence, if any.” Id.

3. **Professor Williamson Chang's Written Direct Testimony (“Chang WDT”)**
[Exhibit D-2]

Professor Chang was prohibited from testifying at the contested case hearing because the Hearing Officer correctly ruled that his testimony was not material to the relevant issues as detailed in Minute Order No. 19 [Doc. No. 281]. His testimony was instead related to the issues

² Mr. Fergerstrom's Pre-Hearing Statement is not paginated. The page numbers referenced herein were arrived at by manually counting the pages in his Pre-Hearing Statement.

that the Hearing Officer specifically excluded from this contested case pursuant to Minute Order No. 19. Consistent with these rulings, Mr. Fergerstrom did not move the Chang WDT into evidence as part of his March 6 Motion or his Clarification.

Though not entirely clear, Mr. Fergerstrom now apparently seeks to have the Hearing Officer receive the Chang WDT into evidence, but not weigh it as evidence. This is nonsensical. TIO opposes any belated attempt by Mr. Fergerstrom to move or have the Chang WDT received into evidence. The Chang WDT is not relevant to the issues in this contested case hearing as detailed in Minute Order No. 19.

The Chang WDT is already marked as an exhibit in the record and the Hearing Officer's ruling on the admissibility of said exhibit is also already in the record. The Hearing Officer does not need to receive said exhibit into evidence for Mr. Fergerstrom to raise the exclusion of Mr. Chang and the Chang WDT on appeal. The Motion should be denied insofar and to the extent Mr. Fergerstrom seeks to have the Hearing Officer belatedly admit or receive into evidence the Chang WDT.

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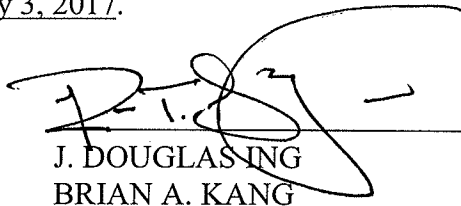
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III. CONCLUSION

Based on the foregoing, TIO respectfully submits that it does not object to the admission into evidence of the Fergerstrom WDT or his Pre-Hearing Statement under the condition set forth in Minute Order No. 44. However, TIO opposes any attempt by Mr. Fergerstrom to belatedly admit or receive the Chang WDT into evidence and opposes the Motion on those grounds.

DATED: Honolulu, Hawaii, May 3, 2017.

A handwritten signature in black ink, appearing to read 'J. Douglas Ing', is written over a horizontal line. The signature is stylized and somewhat cursive.

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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 Fergerstrom's Motion
to Reconsider (Doc 553, minute order 44); et al. ("Position Statement"), which was uploaded to

EXHIBIT "1"

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the Documents Library on Sunday, April 23, 2017 as Doc. No. 554.¹ 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

¹ 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.

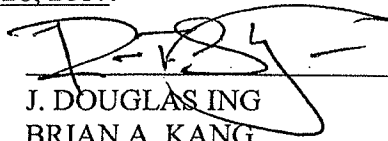
Likely aware of his own neglect, Mr. Fergerstrom later filed his “Clarification of items identified as evidentiary submittals under letter ‘D’ to be moved into evidence (Doc 494)” on March 18, 2017 [Doc. No. 515] (“Clarification”). Mr. Fergerstrom’s Clarification identified the Fergerstrom WDT as one 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 hearings², 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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² 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)

10/11/2016 C-6

Testimony of David M. Callies

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Harry Fergerstrom (Series D)

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11/15/2016 Amendments to exhibits of Michael Lee to exhibits

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10/11/2016 Exhibit list List of exhibits

10/24/2016 Second supplemental exhibit list Second supplemental exhibit list

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CERTIFICATE OF SERVICE

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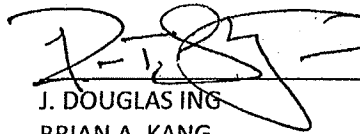
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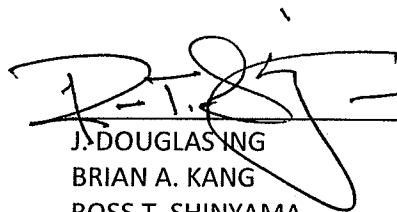
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