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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'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:  
KAHEA: THE HAWAIIAN  
ENVIRONMENTAL ALLIANCE'S  
MOTION FOR RECONSIDERATION OF  
MINUTE ORDER NO. 44, FILED 4/28/17  
[DOC. NO. 586]; CERTIFICATE OF  
SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S STATEMENT OF POSITION  
RE: KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE'S MOTION  
FOR RECONSIDERATION OF MINUTE ORDER NO. 44,  
FILED 4/28/17 [DOC. NO. 586]**

TMT INTERNATIONAL OBSERVATORY, LLC ("TIO"), by and through its  
undersigned counsel, hereby submits its Statement of Position Re: KAHEA: The Hawaiian

RECEIVED  
OFFICE OF CONSERVATION  
AND COASTAL LANDS

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DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

Environmental Alliance's Motion for Reconsideration of Minute Order No. 44, Filed 4/28/17  
[Doc. No. 586].

KAHEA: The Hawaiian Environmental Alliance ("KAHEA") seeks to reconsider Minute Order No. 44 [Doc. No. 553] insofar as the Hearing Officer did not admit the Written Direct Testimony of David Kimo Frankel (Exhibit B.53) ["Frankel WDT"] into evidence. The Hearing Officer did not admit the Frankel WDT into evidence because of KAHEA's own negligence in not timely moving the Frankel WDT into evidence. Incredibly, KAHEA demonstrates an extremely cavalier attitude toward the issue, giving short shrift to its own negligence by chalking it up to a mere "oversight." One word is all KAHEA spends to explain its neglect. No additional explanation or reason is given to support KAHEA's essentially non-existent attempt to establish "good cause." KAHEA's negligence is clear and its response to the issue is troubling. Nevertheless, given that the Frankel WDT was 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. Frankel during his oral testimony on January 11, 2017, TIO respectfully submits that it does not object to the admission of the Frankel WDT into evidence.

KAHEA is represented by legal counsel in this contested case. Its legal counsel is (or at least should be) acutely aware of the importance of deadlines to the orderly administration of any legal proceeding, let alone a legal proceeding that involves the amount of parties to this contested case hearing. The Hearing Officer set a deadline of March 9, 2017 for all parties to file motions to admit exhibits into evidence. See 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").

KAHEA filed three motions to admit exhibit on or before March 9, 2017. See KAHEA: The Hawaiian Environmental Alliance’s Motion to Admit Exhibits and Written Direct Testimony Into Evidence, filed February 21, 2017 [Doc. No. 472]; KAHEA: The Hawaiian Environmental Alliance’s First Supplemental Motion to Admit Exhibits and Written Direct Testimony Into Evidence, filed February 28, 2017 [Doc. No. 486]; KAHEA: The Hawaiian Environmental Alliance’s Second Supplemental Motion to Admit Exhibits and Written Direct Testimony Into Evidence, filed March 9, 2017 [Doc. No. 505].<sup>1</sup>

None of these motions sought to move the Frankel WDT into evidence. KAHEA did not move the Frankel WDT into evidence before the Hearing Officer’s March 9, 2017 deadline. This is undisputed.

Incredibly, KAHEA cavalierly responds to its own negligence by chalking it up to a mere “oversight.” One word is all KAHEA spent to explain or attempt to explain its neglect.<sup>2</sup> No additional explanation or reason is given to establish “good cause” to excuse KAHEA’s negligence in failing to timely move the Frankel WDT into evidence. KAHEA apparently just expects the Hearing Officer to excuse its failure to timely move the Frankel WDT into evidence.<sup>3</sup>

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<sup>1</sup> KAHEA did file its Errata to KAHEA: The Hawaiian Environmental Alliance’s Motion to Admit Exhibits and Written Direct Testimony Into Evidence, filed February 21, 2017 [Doc. No. 517]. This Errata was untimely as it was not filed until March 20, 2017, eleven days after the Hearing Officer’s deadline to move exhibits into evidence.

<sup>2</sup> KAHEA, however, does find the time in its Motion to tell the Hearing Officer that she will be committing reversible error if she does not excuse KAHEA’s own error in failing to timely move the Frankel WDT into evidence.

<sup>3</sup> KAHEA correctly notes that a “considerably more relaxed” evidentiary standard applies to administrative hearings. 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)). Price, however, does not hold or stand for the proposition that deadlines in administrative hearings are considerably more relaxed.

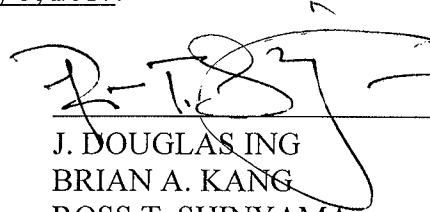
KAHEA further demonstrates its cavalier attitude towards the Hearing Officer's deadlines through its untimely filing of this Motion. The Hearing Officer required that any motions for reconsideration of Minute Order No. 44 were to be filed by no later than 5 business days after the date that Minute Order No. 44 was filed in the Documents Library. Minute Order No. 44 was filed in the Documents Library on April 20, 2017. The deadline to file this Motion was therefore April 27, 2017. KAHEA, however, did not file this Motion until April 28, 2017, a day after the deadline to do so. KAHEA does not even address its untimely filing of the Motion.

TIO and the applicant University of Hawaii at Hilo ("UHH") are also prejudiced by KAHEA's failure to timely move the Frankel WDT into evidence. Indeed, other anti-TMT Intervenors/Petitioners are using the Motion (and other motions for reconsideration like it) to argue that there are unresolved issues regarding the evidence in this contested case that precluded the Hearing Officer from setting the deadlines to submit proposed Decisions and Order, Findings of Fact, and Conclusions of Law in Minute Order No. 43. They are using KAHEA's neglect to argue that they are being denied procedural due process in this case. Though this argument is completely meritless as set forth in the respective oppositions to said motions for reconsideration, TIO and UHH have nevertheless still had to expend precious time and resources to respond to these specious arguments.

In short, KAHEA has not established "good cause" to reasonably excuse its neglect in failing to timely move the Frankel WDT into evidence in this contested case. KAHEA's negligence is clear and its response to the issue is troubling. Nevertheless, given that the Frankel WDT was 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. Frankel

during his oral testimony on January 11, 2017, TIO respectfully submits that it does not object to the admission of the Frankel WDT into evidence.

DATED: Honolulu, Hawaii, May 5, 2017.

A handwritten signature in black ink, appearing to read 'R-T-S', is written over a horizontal line. The signature is stylized and cursive.

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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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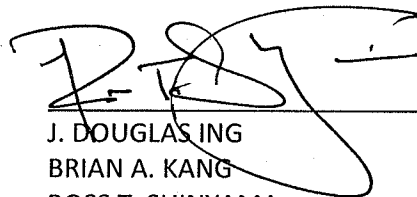
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