

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
 A Contested Case Hearing Re Conservation)
 District Use Application (CDUA) (HA-) **PROTECTOR/PARTIES' PETITION**
 3568) The Thirty Meter Telescope at the) **TO BOARD FOR DECLARATORY**
 Mauna Kea Science Reserve, Kaohe Mauka,) **JUDGMENT AND MOTION TO**
 Hamakua District, Island of Hawai'i,) **VACATE MINUTE ORDER 43;**
 TMK (3) 4-4-015:009) **MEMORANDUM IN SUPPORT; COS**
)

**PROTECTOR/PARTIES' PETITION FOR DECLARATORY JUDGMENT AND
 MOTION TO VACATE MINUTE ORDER 43**

NOW COMES Mauna Kea Anaina Hou, Kealoha Pisciotta, Paul Neves, Clarence Ku Ching, Lanny Sinkin for the Temple of Lono, Mehana Kihoi, Jennifer Leina'ala Slightholm, Tiffany Kakalia, Cindy Freitas and William Freitas(Protector Parties)¹, pursuant to HRS §91.8 and HAR § 13-1-27, and petition the Board of Land and Natural Resources to issue a declaratory judgment that the Hearing Officer in this proceeding erred in setting a deadline for all parties to submit their proposed orders and decisions, including findings of fact and conclusions of law, before the record was complete. Minute Order 43. DOC 552.

Based on the error noted above, the Protector/Parties also seek an order from the Board vacating Minute Order 43 that set the deadline.

This petition and motion is supported by the accompanying memorandum.

DATED: May 11, 2017,

/s/ Kealoha Pisciotta

¹ The "Protector/Parties" are all the parties in this proceeding that agreed to join in this motion. Because time is of the essence, the Petitioners offer the Declaration of Kealoha Pisciotta regarding the joining parties as a substitute for signatures required by HAR § 13-1-27(b)(6). See Declaration of Kealoha Pisciotta ¶¶ 1-3, attached hereto as Exhibit 1.

Received
 Office of Conservation and Coastal Lands
 Department of Land and Natural Resources
 State of Hawaii
 2017 May 11 12:53 pm

Kealoha Pisciotta
On behalf of
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Mauna Kea Anaina Hou
And
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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
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A Contested Case Hearing Re Conservation)
District Use Application (CDUA) (HA-) **PROTECTOR/PARTIES'**
3568) The Thirty Meter Telescope at the) **MEMORANDUM IN SUPPORT OF**
Mauna Kea Science Reserve, Kaohe Mauka,) **PETITION FOR DECLARATORY**
Hamakua District, Island of Hawai'i,) **JUDGMENT AND MOTION TO**
TMK (3) 4-4-015:009) **VACATE MINUTE ORDER 43**
_____)

**PROTECTOR/PARTIES' MEMORANDUM IN SUPPORT OF PETITION FOR
DECLARATORY JUDGMENT AND TO VACATE MINUTE ORDER 43**

I. INTRODUCTION

On April 19, 2017, the Hearing Officer in this proceeding filed Minute Order No. 43 (Order setting post-hearing deadlines.) ("MO 43"). DOC-552. This Minute Order set a deadline of May 30, 2017 for the filing of proposed decisions and orders, including findings of fact and conclusions of law. MO 43 at 2.

The Minute Order also scheduled motions to reconsider to be filed no later than 5 business days after the date of the filing of the order and responses to such motions to be filed no later than 5 business days after the date of the filing of the motion for reconsideration. MO 43 at 3.

The time for filing responses to motions for reconsideration expired on May 5, 2017. As of May 9, 2017, the Hearing Officer has not issued any minute order responsive to the motions for reconsideration and responses.¹

The following table reflects submissions in the Document Library related to Minute Order 43.

557	25-Apr-17	C Freitas	Cindy Freitas memorandum in support of motion for reconsideration of Minute Order 43
558	25-Apr-17	Flores-Case	Flores-Case 'Ohana's motion to reconsider Minute Order No. 43
559	25-Apr-17	Lono	Temple of Lono motion for reconsideration of Minute Order 43
560	25-Apr-17	Ward	Deborah J Ward joinder to Temple of Lono motion for reconsideration of Minute Order 43
561	25-Apr-17	Pisciotta, Anaina Hou, Neves	Petitioners Kealoha Pisciotta, Mauna Kea Anaina Hou, and Paul K. Neves join with Temple of Lono's memorandum in support of motion for reconsideration of Minute Order 43
562	25-Apr-17	C Freitas	Errata re: Cindy Freitas memorandum of support of motion for reconsideration of Minute Order 43
563	26-Apr-17	Kihoi	Mehana Kihoi's joinder to Temple of Lono motion for reconsideration of Minute Order 43
565	26-Apr-17	Sleightholm	J. Leinaala Sleightholm joinder to Temple of Lono motion for reconsideration of Minute Order 43
567	26-Apr-17	Kealoha	Kamahana Kealoha joinder to Temple of Lono motion for reconsideration of Minute Order 43
568	26-Apr-17	W Freitas	William Freitas motion to reconsideration of Minute Order No. 43; Memorandum in support of motion to reconsideration of Minute Order No. 43
572	27-Apr-17	Ching	Clarence Kukaukahi Ching's joinder of Temple of Lono motion fo reconsideration of Minute Order 43 and memorandum in support
592	2-May-17	UHH	University of Hawaii at Hilo's opposition to the Flores-Case Ohana's motion to reconsider Minute Order No. 43
593	2-May-17	UHH	University of Hawaii at Hilo's joinder to TMT's Opposition to (1) Cindy Freitas Memorandum in

¹ The filing of Minute Order 43 set off extensive litigation that then used up time allotted for preparing findings of fact and conclusions of law. See Table of filings supra.

			Support of 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 562]
596	2-May-17	TIO	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]
597	2-May-17	TIO	TMT International Observatory, LLC's joinder to University of Hawaii at Hilo's opposition to the Flores-Case Ohana's motion to reconsider Minute Order No. 43 (Doc 558)
598	2-May-17	TIO	TMT International Observatory, LLC's joinder to University of Hawaii at Hilo's opposition to the Temple of Lono's motion for reconsideration of Minute Order 43 [Doc. 559]
604	3-May-17	TIO	TMT International Observatory, LLC's opposition to William Freitas motion to reconsideration of Minute Order No. 43 [Doc. No. 568]
607	3-May-17	UHH	The University of Hawaii at Hilo's joinder to TMT International Observatory, LLC's opposition to William Freitas motion to reconsideration of Minute Order No. 43 [Doc. No. 568]

II. ARGUMENT

A. The Hearing Officer violated the statutes and rules to set a schedule for the filing of findings of fact and conclusions of law.

A Complete Record is defined under §91-9 Contested cases; notice; hearing; records, and it reads as follows;

“(e) For the purpose of agency decisions, the record shall include:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

- (3) Offers of proof and rulings thereon;
- (4) Proposed findings and exceptions;
- (5) Report of the officer who presided at the hearing;
- (6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.”

In the Minute Order, the Hearing Officer cites a rule related to decision and orders:

HAR §13-1-38 Decisions and orders.

(a) After all evidence has been taken, the parties may submit, within the time set by the presiding officer, a proposed decision and order which shall include proposed findings of facts and conclusions of law. A party to the proceedings may submit a proposed decision and order which shall include proposed findings of fact and conclusions of law.

MO 43 at 2.

The Minute Order states that the Hearing Officer is setting a deadline for the filing of “proposed decisions and orders, including findings of fact and conclusions of law” on May 30, 2017. Id.

The Applicant defends the issuance of this Minute Order by misrepresenting the clear meaning of the cited rule. In responding to the motion for reconsideration filed by the Temple of Lono, DOC-553, the Applicant argued:

Contrary to the Temple’s assertion that “clearly the purpose of HAR §13-1-38 was to define the point in the proceeding when setting the schedule for such filings was appropriate[,] a plain reading of the statute [sic] demonstrates that the rule was meant to govern the parties, not the presiding officer. The clause “[a]fter all evidence has been taken” modifies the subject immediately following it – i.e. “the parties.” Plainly the reference to “the presiding officer” is only meant to qualify the “time set[,] not subject the presiding officer to the condition of waiting until all the evidence has been received before setting a time by which the FOF/COL must be filed.

Applicant University of Hawai'i at Hilo's Opposition to the Temple of Lono's Motion for Reconsideration of Minute Order 43 [DOC-559]. DOC-594 at 2-3 ("Opp.")

This interpretation of the rule is followed by a footnote that states:

Moreover, as the contested case proceeding has concluded and no new evidence is being admitted, all evidence in his [sic] case has been presented – motions for reconsideration notwithstanding.

Ibid. at 3.

While the Applicant's attempt to defend the indefensible Minute Order is gallant, the defense is a tortured reading of a rule whose plain meaning is clear.

The rule contains various steps in the process leading to the filing of findings of fact and conclusions of law.

The first step is taken by the Hearing Officer, not the parties. The phrase "[a]fter all the evidence has been taken in" is implicitly completed by the phrase "by the Hearing Officer." In the argument quoted above, the Applicant leaves off the "in" at the end of that phrase. Only the Hearing Officer can take evidence "in. The parties do not take evidence in.

The completion of the evidentiary record by the Hearing Officer precedes the second step of starting the time in which the parties may file their findings. The Hearing Officer then sets the time for submitting those findings. That time cannot begin until the Hearing Officer has completed the record.

The Applicant's distortions continue in the footnote, which argues that "all evidence in his [sic] case has been presented", Opp. at 3, n. 2 (emphasis added), is the same as "all evidence has been taken in." HAR §13-1-38(a). The distinction only highlights the Applicant's inappropriate reading of the rule. The parties "present"

exhibits and other documents, which the parties then seek to have admitted as evidence. The Hearing Officer decides whether the exhibits or other documents will be admitted into evidence, i.e. “taken in.”

While the Applicant argues that the Temple “distorts the plain language [of the rule] and would render it meaningless,” it is the Applicant’s distortion that would render the rule meaningless. The Applicant argues that the Hearing Officer has unfettered discretion to fix the time for the filing of findings “without any conditions on when such times can be set.” Opp. at 3. The Applicant’s interpretation would allow the Hearing Officer to set a schedule for findings before all the evidence has been taken in. That would make preparation of the findings a moving target because the record could continue to change while the findings were being prepared. To illustrate the absurd nature of the Applicant’s interpretation of the rule, under that interpretation, the Hearing Officer could set a time for the filing of findings before the hearings even begin with a deadline before the first witness is called.

The rule only makes sense if the completion of the record is required before findings begin. The Protector/Parties seek a declaratory ruling that the record must be complete before a deadline is set for the filing of proposed decisions and orders, including findings of fact and conclusions of law.

B. The record is not complete.

On April 27, 2017, the Temple of Lono brought to the attention of the Board that the record is incomplete while time is running out for the preparations and filing of proposed decisions and orders, including findings of fact and conclusions of

law. DOC-573 (Temple of Lono emergency motion to Board to stay proceedings).

That pleading detailed the many unresolved matters that must be resolved prior to the record being complete and any deadline being set.

The Temple urged the Board

to enter a stay until such time as all issues regarding the record are resolved, including the Temple's motion to dismiss pending before the Board, or the flaws in the proceeding are found to be without remedy.

Ibid. at 17.

The Temple stated that:

This motion for a stay is made on an emergency basis because the clock is running out on the time available to prepare findings and conclusions, while the parties are compelled to spend time litigating which exhibits will be part of the "entire record" – exactly what HAR §13-1-38(a) was meant to prevent.²

Id.

² The Protector/Parties also note when the Hearing Officer set the schedule for the filing of decisions and orders, including findings of fact and conclusions of law, Minute Order 43 also included the following:

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 96813: **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, or delivered to the above office on the same deadline.

MO 43 at 3.

Throughout this proceeding, the filing of an electronic copy within the deadline satisfied the deadline. See Declaration of Kealoha Pisciotta. Exhibit 1 ¶¶ 4-8. This sudden change in the rule took place with no notice and no consultation. Under this new rule, those parties who are not represented by lawyers on Oahu, are required to complete their documents and put them in the hands of a delivery service in time to have the original delivered on Oahu by the deadline. Essentially, the new filing rule reduces the time available to parties not on Oahu for preparing a pleading by at least a day and a half. In this particular case, Monday, October 29 is a holiday. That means that pleadings to be delivered by 4:00 p.m. from outer islands must be given to the delivery service no later than Saturday, May 27.

Twelve days after the Temple filed its emergency motion, the Board has taken no action.

III. CONCLUSION

By violating the rule and setting the time for the filing of findings and conclusions before the record was complete, the Hearing Officer forced the filers of this petition and motion to continue litigation to determine the completed record, while also preparing findings and conclusions. The question of the many motions never rules upon is also unresolved.

The obvious intent of the rule and the obvious violation of the rule by Minute Order 43 support a conclusion that the Hearing Officer issued Minute Order 43 prematurely.

The Protector/Parties petition for a declaratory judgment, pursuant to HRS §91.8 and HAR § 13-1-27 that HAR §13-1-38(a) requires the record to be complete before a schedule can be set for the issuance of a deadline for the preparation of decisions and orders, including findings of fact and conclusions of law.

Given that the Hearing Officer has violated that statute and rule by setting such a deadline prior to the record being complete, the Protector/Parties also move the Board to vacate Minute Order 43 and direct the Hearing Officer not to issue a new deadline for the filing of proposed decisions and orders, including findings of fact and conclusions of law, until such time as all motions are decided, the status of all exhibits as either evidence or excluded is determined, and any other matters not resolved to date are resolved.

DATED: May 11, 2017

/s/ Kealoha Pisciotta

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
 A Contested Case Hearing Re Conservation) **DECLARATION OF**
 District Use Application (CDUA) (HA-) **KEALOHA PISCIOTTA**
 3568) The Thirty Meter Telescope at the)
 Mauna Kea Science Reserve, Kaohe Mauka,)
 Hamakua District, Island of Hawai'i,)
 TMK (3) 4-4-015:009)
 _____)

DECLARATION OF KEALOHA PISCIOTTA

I, KEALOHA PISCIOTTA, hereby declare and state as follows:

1. I am a party to the above-captioned proceeding.
2. In preparing the Petition seeking a declaratory ruling and vacating of Minute Order 43, I received permission from all the parties listed as Protectors/Parties within the petition to include their names on the petition.
3. All the Protectors/Parties are parties to the above-captioned proceeding.
4. Prior to Minute Order 43, the process for filing pleadings was to file everything electronically with a hard copy with an original signature sent to the Custodian of Records.
5. The electronic filing of the pleading determined whether the pleading was timely filed.
6. The hard copy with the original signature did not have to be delivered to the Custodian of Records prior to the filing deadline.
7. The Hearing Officer changed that procedure in Minute Order 43, requiring the hard copy with an original signature to be delivered to the Custodian of Records prior to the deadline.
8. This change was made without notice to or consultation with the parties.

Dated: May 11, 2017

_____/s/_____
 Kealoa Pisciotta

Kealoha Pisciotta
On behalf of
Kealoha Pisciotta
Mauna Kea Anaina Hou
And
Paul K.Neves
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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) HA-3568 for) **CERTIFICATE OF SERVICE**
The Thirty Meter Telescope at the Mauna)
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of "THE PETITION FOR
DECLARATORY JUDGMENT AND MOTION TO VACATE MINUTE ORDER 43"

was served on the following parties by email on May

11, 2017:

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Dated: May 11, 2017

_____/s/_____
KEALOHA PISCIOTTA