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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF

A Contested Case Hearing Re Conservation
District Use Permit (CDUP) HA-3568 for the
Thirty Meter Telescope at the Mauna Kea
Science Reserve, Kahohe Mauka, Hamakua
District, Island of Hawaii,
TMK (3) 4-4-015:009

CASE NO. BLNR-CC-16-002

TMT INTERNATIONAL OBSERVATORY,
LLC'S OPPOSITION TO
PROTECTOR/PARTIES' PETITION FOR
DECLARATORY JUDGMENT AND
MOTION TO VACATE MINUTE ORDER
43 FILED MAY 11, 2017; CERTIFICATE
OF SERVICE

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2017 MAY 18 P 3:39

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

**TMT INTERNATIONAL OBSERVATORY, LLC'S
OPPOSITION TO PROTECTOR/PARTIES' PETITION FOR DECLARATORY
JUDGMENT AND MOTION TO VACATE MINUTE ORDER 43 FILED MAY 11, 2017**

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits this Opposition to Protector/Parties'¹ Petition for Declaratory Judgment and Motion to Vacate Minute Order 43, filed May 11, 2017 ("Petition"). The Petition should be denied for the reasons stated herein.

I. INTRODUCTION

The filing of the Petition is another dilatory tactic in a long line of attempts by the Petitioners to delay this proceeding in order to force TIO to abandon development of the Thirty Meter Telescope ("TMT") in Hawaii, instead of allowing this proceeding to be determined on the merits of the application for the Conservation District Use Permit ("CDUP"). This abuse of the process cannot and should not be allowed, especially where the numerous parties to this proceeding have dedicated substantial time and resources over the course of the 44-day contested case hearing.

The bottom line is that the Hearing Officer followed the letter of the law in setting deadlines for the parties to submit their proposed findings of fact and conclusions of law. The Petitioners were provided with an ample and extended period (of 41 days) to submit their proposed findings of fact and conclusions of law. Instead of taking this opportunity to move forward, the Petitioners, in another attempt to create a delay in this proceeding, filed a flurry of pleadings that required all parties to take time away from developing their proposed findings of

¹ Petitioner Kealoha Pisciotta ("Pisciotta") claims that the Petition is being brought on behalf of Mauna Kea Anaina Hou, Pisciotta, Paul Neves, Clarence Ching, Lanny Sinkin for the Temple of Lono, Mehana Kihoi, J. Leina'ala Sleightholm, Tiffany Kakalia, Cindy Freitas, and William Freitas (collectively "Purported Petitioning Parties"). Other than Pisciotta, however, none of the Purported Petitioning Parties have signed the Petition. None of the Purported Petitioning Parties have filed a joinder to the Petition.

fact and conclusions of law. All parties are required to comply with the deadlines set forth in Minute Order No. 43 and all parties are consequently on the same footing.

Notwithstanding the foregoing, the Petitioners' arguments that the record was not complete which somehow prevented them from developing proposed findings and conclusions is inaccurate, inasmuch as Minute Order No. 43 (setting deadlines) and Minute Order No. 44 (ruling on the admissibility of evidence) were issued within days of each other. Moreover, the Petition constitutes an improper interlocutory appeal, and this Board has already ruled that it will not consider interlocutory issues such as these until the Hearing Officer has issued the proposed decision and order and the case is properly presented to the Board.

II. BACKGROUND

Inasmuch as the Petitioners have already filed a petition requesting reconsideration of Minute Order No. 43, and the parties to this proceeding have already fully briefed the issue, the background and arguments are not fully repeated herein. Instead, in the interest of judicial efficiency and economy, the arguments and background set forth by TIO in those pleadings (including without limitation Doc. Nos. 596, 597, 598, 601, and 604) are incorporated herein by reference.

III. ARGUMENT

A. The Petition is an improper interlocutory appeal.

As an initial matter, the Board should deny the Petition without reviewing its merit, inasmuch as it constitutes an improper interlocutory appeal to the Board. In Minute Order No. 48, issued on May 12, 2017, the Board already denied the Temple of Lono Emergency Motion to Board to Stay Proceeding filed April 27, 2017 ("Temple of Lono Motion"), ruling that it would not consider these interlocutory issues prior to the issuance of the Hearing Officer's proposed

decision and order. In the Temple of Lono Motion [Doc 573], it essentially asserted the same arguments as the Petition does – that the process for determining the record and setting deadlines in the scheduling order were improper. Accordingly, this Board has already rejected the same arguments as an improper interlocutory appeal, and this Board should again deny the Petition until such time as the case is properly before the Board.

B. The Hearing Officer did not err by issuing Minute Order No. 43.

If this Board nonetheless chooses to review the interlocutory issues now, the record is clear that the Hearing Officer did not commit any error in issuing the deadlines set forth in Minute Order No. 43.

Pursuant to HAR 13-1-32(c), the Hearing Officer is granted considerable authority to set deadlines for the submission of pleadings. Pursuant to HAR 13-1-38(a), proposed findings and conclusions are typically due “no later than ten days after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe.” In Minute Order No. 43, the Hearing Officer exercised discretion and afforded the parties 41 days after the transcripts to submit proposed findings and conclusions. Acknowledging the numerous witnesses and evidence presented in this case, this gave all parties 31 more days than is typically required under HAR 13-1-38(a). As set forth in Applicant University of Hawaii at Hilo’s Opposition to the Temple of Lono’s Motion for Reconsideration of Minute Order 43, filed May 2, 2017 [Doc 594] (which TIO joined [Doc 598] and which is incorporated herein by reference), as early as October 2016, the Hearing Officer had given the parties notice that she intended to provide a 2-week deadline to prepare findings and conclusions. Accordingly, the 41-day, or 5 week period, to prepare findings and conclusions afforded the parties a further extension of time than the parties had anticipated.

Moreover, there is nothing in HAR 13-1-32(c), 13-1-38(a), or any other rule that prohibits the Hearing Officer from issuing far-off deadlines prior to ruling on the admissibility of evidence. HAR 13-1-38(a) provides in relevant part that “after all evidence has been taken, the parties may submit, within the time set by the presiding officer, a proposed decision and order....” The Hearing Officer did not violate this rule. The Hearing Officer did not require the parties to submit proposed findings and conclusions on a date that occurred prior to the taking of evidence. Indeed, the Hearing Officer issued Minute Order No. 44 within 2 days of issuing Minute order No. 43. In other words, all parties had notice of what evidence was admitted, within 2 days of learning that they were given 41 days to submit proposed findings and conclusions. The fact that motions for reconsideration were subsequently filed does not affect the Hearing Officer’s authority to set deadlines. The delay tactics and patterns of the Petitioners in this proceeding have been blatantly obvious to anyone observing the contested case hearing. The Hearing Officer has been more than generous in her accommodations for the pro se Petitioners, especially in terms of providing access to documents and scheduling deadlines. This proceeding, and the deadlines to submit proposed findings and conclusions, cannot be held at bay by the simple filing of a motion for reconsideration, which would give the Petitioners the unfettered ability to delay this proceeding indefinitely.

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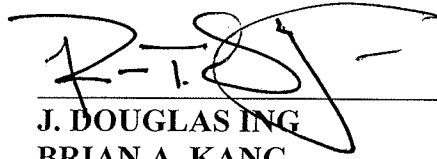
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IV. CONCLUSION

For all the reasons set forth herein, and in all documents incorporated herein, as well as all other reasons and authorities appearing of record, the Petition should be denied.

DATED: Honolulu, Hawaii, May 18, 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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BOARD OF LAND AND NATURAL RESOURCES

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IN THE MATTER OF

A Contested Case Hearing Re Conservation District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawaii, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

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

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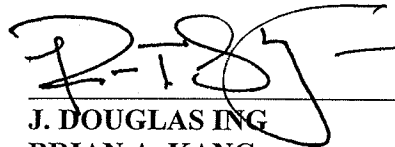
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