

BOARD OF LAND AND NATURAL RESOURCES

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, Hamakua, Hawai`i)
TMK (3) 4-4-015:009)
)
)
)
_____)

CASE NO. BLNR-CC-16-002

Minute Order No. 74
(Order Denying Motion to
Bring on Rebuttal Witness on
Behalf of Kealoha Pisciotta
And Mauna Kea Anaina Hou
(Doc. 462))

Certificate of Service

MINUTE ORDER NO. 74

**(Order Denying Motion to Bring on Rebuttal Witness on
Behalf of Kealoha Pisciotta and Mauna Kea Anaina Hou
(Doc. 462))**

On February 21, 2017, a hearing on the Motion to Bring on Rebuttal Witness on Behalf of Kealoha Pisciotta and Mauna Kea Anaina Hou (Doc 462) (“Motion”), was held at the Grand Naniloa Hotel, 93 Banyan Drive, Hilo, Hawai`i.

The following persons were present:

Ian Sandison, Esq., and John Manaut, Esq., Attorneys for the University of Hawaii-Hilo (“UHH”)
Kealoha Pisciotta in her individual capacity and for Mauna Kea Anaina Hou (“MKAH”) and Paul Neves
Dexter Kaiama, Esq., for the Hawaiian-Environmental Alliance (“KAHEA”)
Clarence K. Ching
Harry Fergerstrom
J. Douglas Ing, Esq., and Jeffrey Ono, Esq., Attorneys for TMT International Observatory, LLC. (“TIO”)
Vaughn Cook, Esq., Attorney for Perpetuating Unique Educational Opportunities Inc. (“PUEO”)
Mehana Kihoi in her individual capacity and for Leina`ala Sleightholm
Dwight Vicente

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2017 June 10 10:39 pm

Cindy Freitas
William Freitas

In addition to the Motion, the following submissions were considered:

Doc. #	Filed	Party	Title
467	2/17/2017	KAHEA	Kahea: The Environmental Alliance's Joinder in Motion to Bring Rebuttal Witness on Behalf of Kealoha Pisciotta and Mauna Kea Anaina Hou filed February 13, 2017
468	2/20/2017	TIO	TMT International Observatory, LLC's Memorandum in Opposition to "Motion to Bring on Rebuttal Witness[es] on Behalf of Kealoha Pisciotta and Mauna Kea Anaina Hou" [Doc-462]; Declaration of Summer H. Kaiawe; Exhibit "1"; COS
470	2/20/2017*	UHH	The University of Hawaii at Hilo's Joinder to TMT International Observatory, LLC's Opposition to Kealoha Pisciotta and Mauna Kea Anaina Hou's Motion to Bring Rebuttal Witness on Behalf of Kealoha Pisciotta and Mauna Kea Anaina Hou, dated February 13, 2017 *Received on 2/21/17
475	2/24/2017	TIO	Proposed Minute Order No. ____ (Order denying motion to Bring on Rebuttal Witness on Behalf of Kealoha Pisciotta and Mauna Kea Anaina Hou Filed on February 13, 2017 (Doc No. 462)

Kealoha Pisciotta and MKAH ("MKAH" collectively) seek leave to bring two rebuttal witnesses to this contested case hearing: Kupuna Liko Martin and Tom Peek. "Kupuna Liko Martin has requested the opportunity to be heard and to challenges the general assertions made by University witnesses claiming that the 8 Criteria have been met... His testimony will rebut UH witness [sic] such as Mr. Jim Hayes and others who may have asserted such claims." Doc. 462 at page 1. According to MKAH, Mr. Peek is needed as a rebuttal witness because he is "a Planner has [sic] education and work experience in planning and public policy" and he would rebut the testimony of several UHH and TMT witnesses. Doc. 462 at page 1.

KAHEA filed a Joinder to MKAH's Motion but has not offered any further factual or legal support for the Motion.

TIO opposes the Motion and Joinder because the "proposed rebuttal testimony attached to the Motion is mostly irrelevant to the issues ordered to be addressed in this contested case hearing pursuant to Minute Order No. 19, the Order Setting Issues." (footnote omitted) Doc. 468 at page 2. Further, TIO argues, "As to those narrow portions of the proposed rebuttal testimony that are not irrelevant, such testimony is not new, could have been introduced earlier, and is not necessary to rebut unexpected or surprise testimony," Doc. 468 at page 2. TIO contends that the proposed rebuttal witnesses "rehashes what has already been submitted or should have been submitted during Ms. Pisciotta and Mauna Kea Anaina Hou's ("MKAH") case in chief." Doc. 468 at pp. 2-3.

TIO cites *Takayama v. Kaiser Foundation Hosp.*, 82 Hawaii 486, 497, 923 P.2d 903, 914 (1996) (citation omitted) for the proposition that, "in the interests of expediency and limiting surprise, all evidence in support of a party's position should be presented when the issue it addresses is first presented." Doc. 468 at page 3. TIO charges that MKAH failed to offer any good cause reasons why the proposed rebuttal witnesses could not have been called in MKAH's case in chief.

UHH joined TIO's opposition but has not offered any further factual or legal support of the opposition.

At a hearing on the Motion, on February 21, 2017, the Hearing Officer ruled as follows:

For Mauna Kea Anaina Hou's request for – to bring Kupuna Liko Martin and Tom Peek, I am denying those requests for these reasons:

The information proffered through the memoranda and also the oral argument tells me that the testimonies would be cumulative in nature, immaterial. I do not find good cause that

these witnesses were not brought sooner. Perhaps they could have been offered then. I don't know that. And if those folks – if the standard was anyone watching the proceeding wishing to contest something that somebody said and therefore requested to be a witness, if that were the standard, we would be here for a long time because everybody has got an opinion out there about everything.

So this request does not meet the requirements in my view for rebuttal, and I'm going to ask TIO to please prepare the order denying the Mauna Kea Anaina Hou and Pisciotta request, and that would be document 462.

Tr. Vol. 38, 29:24-30:16

On February 24, 2017, TMT International Observatory, LLC, filed a Proposed Minute Order No. ____ (Order denying motion to Bring on Rebuttal Witness on Behalf of Kealoha Pisciotta and Mauna Kea Anaina Hou Filed on February 13, 2017 (Doc No. 462) (“Proposed Minute Order”). There were no responses to the Proposed Minute Order.

Based upon the Motion, all related and oral submissions from counsels and/or parties, the Proposed Minute Order and all submissions related thereto, all applicable law, the entire record having been considered by the Hearing Officer,

IT IS HEREBY ORDERED that the Motion is DENIED.

Motion to Reconsider. A party, who believes it appropriate, may file a motion to reconsider using the procedure set out herein. Any Motion for Reconsideration shall not be used to reargue the motion or set out positions of a purely repetitious nature or to present factual or legal grounds that could or should have been presented at the original hearing. AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114 (1992).

The deadline for submission of any **motion** to reconsider this minute order is no later than **5 business days** after the date this Minute Order is filed in the Documents Library. Any **responses to motions to reconsider**, shall be submitted no later than **10 business days** after this

order is filed in the Documents Library; essentially 5 business days after the deadline for motions to reconsider.

Any Motion to Reconsider shall be considered a non-hearing motion unless otherwise designated by the Hearing Officer.

DATED: Honolulu, Hawai`i, June 13, 2017.

A handwritten signature in black ink, appearing to be 'RMA', written over a horizontal line.

Judge Riki May Amano (Ret.)
Hearing Officer

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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

BLNR Contested Case HA-16-02
Document title: **Minute Orders 74-82**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by email (when indicated) on June 13, 2017 and by regular mail on June 13, 2017:

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Date:


June 13 2017