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	) **MAUNA KEA ANAINA HOU**
District Use Application (CDUA) (HA-3568))	**MOTION REQUESTING TIME TO**
The Thirty Meter Telescope at the Mauna	) **RESPOND TO EXHIBIT**
Kea Science Reserve, Kaohe Mauka,	) **OBJECTIONS AND RELATED**
Hamakua District, Island of Hawai'i,	) **MATTERS; MEMORANDUM IN**
TMK (3) 4-4-015:009	) **SUPPORT; COS**
_____	)

MAUNA KEA ANAINA HOU MOTION REQUESTING TIME TO RESPOND TO EXHIBITS OBJECTIONS AND RELATED MATTERS

Now comes MAUNA KEA ANAINA HOU and moves the Hearing Officer to schedule time in which the parties may file responses to exhibit objections and to provide additional relief on related matters.

In setting the schedule for addressing the admission of exhibits, the Hearing Officer scheduled March 9, 2017 as the deadline for the filing of motions to have exhibits accepted in evidence.

The Hearing Officer also scheduled March 16, 2017 as the deadline for filling objections to exhibits being admitted into evidence.

The Hearing Officer scheduled March 23, 2017 as the date the Hearing Officer will file a minute order regarding exhibits to be accepted into evidence.

What the Hearing Officer did not schedule was any time for parties to respond to objections.

The absence of any response time became a serious matter when the Applicant and TIO filed extensive objections to exhibits that numerous parties have moved to be

admitted as evidence. The objections run into the hundreds.

These voluminous objections are counter to the expectations of the Hearing Officer, repeated numerous times throughout the hearing process, that almost all exhibits would be admitting subject to the weight they would be given and very few objections would be expected.

The actions of the Applicant and TIO, contrary to what the Hearing Officer expected, prejudiced and severely burdened those opposing the permit application.

This motion is filed to bring these matters to the attention of the Hearing Officer and to identify what appear to be partial remedies for a situation that is perhaps without remedy.

Mauna Kea Anaina Hou herein moves the Hearing Officer to schedule time for parties to respond to objections and to provide other relief called for by the circumstances. Movant files the accompanying memorandum in support of Motion for Time to Respond.

DATED: March 21, 2017

/s/ Kealoha Pisciotta

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On Behalf of Kealoha Pisciotta, Mauna Kea Anaina Hou and Paul K. Neves

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IN THE MATTER OF	) Case No. BLNR-CC-16-002
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The Thirty Meter Telescope at the Mauna	**) OF MOTION REQUESTING**
Kea Science Reserve, Kaohe Mauka,	) **TIME TO RESPOND TO**
Hamakua District, Island of Hawai'i,	) **EXHIBIT OBJECTIONS AND**
TMK (3) 4-4-015:009	) **RELATED MATTERS**
_____	)

Mauna Kea Anaina Hou Memorandum in Support of Motion Requesting Time to Respond to Exhibit Objections and Related Matters

I. INTRODUCTION

At the close of the evidentiary hearings in this matter on March 2, 2017, the Hearing Officer announced the following schedule:

March 9, 2017 – Deadline for moving exhibits into evidence

March 16, 2017 – Deadline for filing objections to the admission of exhibits

March 23, 2017 – Hearing Officer will issue minute order addressing which exhibits will be admitted into evidence.

What the Hearing Officer did not schedule was time for a party sponsoring an exhibit to respond to an objection to the admissibility of that exhibit.

The Applicant and TMT/TIO have both filed objections to numerous exhibits filed by other parties. University of Hawai'i at Hilo's Opposition to Motions to Admit Exhibits and Written Direct Testimony dated March 16, 2017 ("UHH Opp."); TMT International Observatory, LLC's Memorandum in Opposition to Motions to Admit Exhibits and Written Testimony dated March 16, 2017 ("TIO Opp.").

As matters stand, the parties sponsoring exhibits and/or written testimony objected to by the Applicant and/or TMT/TIO do not have an opportunity to respond to the objections.

II. ARGUMENT

A. The Applicant and TIO have interposed extensive objections on multiple grounds.

On the final day for filing objections to admission of exhibits and testimony, the University filed "general" objections on ten different legal and/or factual grounds. UHH Opp. at 1-3. The University filed specific objections to at least 237 different exhibits. Ibid. *passim.*

On that same day, TMT/TIO filed general objections on at least six different legal and/or factural grounds. TIO Opp. at 3. TMT/TIO filed specific objections to at least 76 different exhibits. Ibid. *passim*.[1]

B. To preclude a party sponsoring an exhibit from responding to an objection posed by another party would violate the sponsoring party's due process rights.

According to the current schedule, the parties sponsoring challenged exhibits have no opportunity to respond to those challenges.

While the administrative rules for motions provides for the filing of a motion and then an opposition, without providing time for a reply, applying that template to the issue of admitting exhibits is inappropriate.

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[1] Both the Applicant and TMT/TIO have reserved their right to file additional objections as more information is gathered about a particular exhibit or based on the information available once the transcripts are completed. UH Opp. at 3;TIO Opp. at 4.

The party moving to admit an exhibit or testimony cannot know what objections another party may interpose until the objecting party files its objections. The moving party cannot, therefore, be limited to arguing admissibility only at the time of the initial motion to move the exhibits or testimony into evidence. To so limit the sponsoring party would deny that party an opportunity to be heard on the matter of the objections.

Many objections are based on the exhibit being immaterial, irrelevant, or duplicative. If the party sponsoring the exhibit does not have an opportunity to explain the materiality and relevance, the record will reflect only the position of the party objecting and the decision-maker will have only that objection to consider in the ultimate ruling on admissibility.

If the objection is not accompanied by any explanation as to the basis for the objection and there is no response to the objection allowed, the Hearing Officer is left to make a determination on admissibility without any record to rely upon.

C. To preclude responses to exhibit objections gives the objecting parties free reign to interpose baseless objections.

Foreclosing responses to exhibit objections from the sponsors of the exhibit would also provide the party objecting with a free pass to make objections that are not well founded in law and/or fact without concern for a response from the sponsoring party. Given the objecting party such a free pass is also a violation of the sponsoring party's due process rights.

D. Given the number of general objections and specific objections, the Hearing Office should allow sufficient time to respond.

While not all parties face the same burden in responding to objections, a general

observation is that the most active participants put on the most extensive case, moved to admit the most exhibits and testimony, and now face the most objections. That means those same parties have to spend the most time responding to objections, while also engaged in preparing what are likely to be the most extensive Findings of Fact and Conclusions of Law.

The huge burden of objections impedes their ability to prepare findings of fact and conclusions of law, which would appear to be one purpose of the voluminous objections filed by UHH/TMT/TIO.

For example, the University identified ten General Objections and then interposed those objections to almost 100 exhibits moved into evidence by Petitioners.

> The University asserts its General Objections as to each of the following exhibits and written testimony moved into evidence by Mauna Kea Anaina Hou ("**MKAH**"), Kealoha Pisciotta, and Paul Neves (collectively, the MKAH Hui) (MKAH Hui Motion to Admit [DOC_482]; MKAH Hui Supplemental Motion to Admit [DOC-509], Deborah Ward (Ward Motion to Admit [DOC-483]; Ward Supplemental Motion to Admit [DOC-507, Clarence Kukauakahi Ching (Ching Motion to Admit [DOC-488]; Ching Supplemental Motion to Admit [DOC-497], the Flores-Case Ohana (Flores-Case Motion to Admit [DOC 487], Flores Case Supplemental Motion to Admit [DOC-500], and KAHEA Motion to Admit [DOC-472]; Kahea First Supplemental Motion to Admit [DOC-486], KAHEA Second Supplemental Motion to Admit [DOC-505] (collectively the **"Original Named Petitioners"**).

UHH Opp. at 3-4 (emphasis added).

This assertion of general objections to large groups of exhibits creates a huge burden on the party sponsoring the challenged exhibits.

First the sponsoring party has to determine which of the ten general objections are relevant to the challenged exhibit.

Then the sponsoring party has to prepare responses – assuming time is provided

for responses – to hundreds of objections.[2]

The burden of responding to such voluminous objections requires the parties be given adequate time to address every objection. If the Hearing Officer does decide to individually address the exhibits and testimony challenged by UHH/TMT/TIO as presented in the most recent motions,[3] the movant requests a period of no less than two months first to make the determination of which objections apply to which exhibits and second prepare a response to every objection.[4]

E. The abusive objections interposed by UHH/TMT/TIO subvert the public policy of providing contested case hearing participation accessible to the public.

A Contested Case Hearing (CCH) is a quasi-judicial administrative proceeding to provide information to decision makers, so that they can make an informed decision relating to important land use decisions that will affect all of the Hawai'i. The point, therefore, is for the Parties to bring forth relevant and critical information that may help the agency to make a truly informed decision and to reduce injuries to those who have

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[2] If the University is asserting its ten general objections to all 237 exhibits challenged, then the sponsoring parties' required responses run into the thousands.

[3] Movant argues below that the Hearing Officer should require UHH and TMT/TIO to resubmit their objections at a later time and in a more "user friendly" form.

[4] Movant notes that opponents of the permit application filed almost no objections to the UHH/TMT/TIO exhibits or testimony. DOC-510; DOC-512. Movant argues that there was no reason for opponents to file any such objections because the opponents were relying on the Hearing Officer's repeated explanations that the exhibit process would be an "all in" admission, absent a serious issue, and that she was expecting few objections. There is no question that the Protectors were misled into believing that there was no point in any party making objections.

While parties at various points in the proceeding may have indicated disagreement with the proposed handling of exhibits, there was never any motion or other formal effort to dispute the plan as announced by the Hearing Officer. UHH/TMT/TIO essentially acquiesced in the plan by their silence and then ignored the plan when the time came to disrupt this proceeding.

legal rights, duties and privileges to the associated land in question. The land in question in this case is Mauna Kea, Hawai'i.

The "quasi" nature of a CCH is important for establishing that the overall nature of the CCH process is a people's process; and to otherwise eliminate the burden of expensive and overly litigious proceedings that regular citizens are not equipped to handle.

Chapter 91 affirms that a person who has standing to participate in the CCH is not required to be a lawyer or even to retain a lawyer to represent them. (See HRS Chapter 91-9(5).

Chapter 91 also requires the admission of any and all evidence limited only by considerations of relevancy, materiality and repetition. *Cazimero v. Kohala Sugar Co.*, 54 Haw. 479, 510 P.2d 89 (1973). By their very terms, the Hawai`i Rules of Evidence (HRE) only "govern proceedings in the courts of the State of Hawaii." HRE Rule 101. Thus, the rules of evidence do not apply in a contested case proceeding. This means, for example, that hearsay evidence is admissible in administrative hearings. *Price v. Zoning Bd. of App. of Honolulu*, 77 Hawai`i 168, 176, 883 P.2d 629, 637 (1994).

The UH/TMT/TIO has repeatedly accused the MK Pro Se Petitioners of attempting to block, encumber and otherwise delay this CCH process. They have made these accusations in the media, forcing us to have to respond to such accusations. This has not in fact been the case, and all we can be accused of is holding firm in having our due process rights be honored.

Now in this instant case we obviously support the idea that all parties should have an opportunity to reasonably object to exhibits that are not relevant, material or excessively

repetitions, however, what UHH/TMT/TIO have done in the filing of their objections is anything but reasonable and in fact could be best described as abusive and heavy handed actions that are not supported by law.

The voluminous objections will apparently require delaying the final phase of this proceeding by months. The final record will not be known until all the exhibits have been accepted or rejected. To the extent the Findings of Fact and Conclusions of Law rely on exhibits and testimony the sponsors thought were going to be admitted, that phase of this proceeding should be suspended until the final record is known.

Otherwise, those with challenged testimony and/or exhibits, or those who wish to use such testimony and exhibits, will have to limit their findings and conclusions to testimony and exhibits not challenged for now. When the transcript is available, there will be another pass at creating the findings and conclusions. When the final exhibits are known, there will be a third pass. This process is obviously extremely burdensome and a waste of time and resources.

E. Movant sought protection from such anticipated abuse.

On the evening of March 2, 2017 at the conclusion of the oral testimony part of the CCH, Movant voiced her concerned that this exact situation would be exploited in exactly this manner, asking in essence to give her leave to file something like a protective order, if UHH/TMT/TIO did "paper" all of the Mauna Kea Pro Se Parties. UHH/TMT/TIO have now "papered' the pro se parties by filing hundreds of objections. Thus forcing all of the challenged Parties to have to file innumerable responses. See footnote 2 above for example.

The MK Pro Se Parties have collectively hundreds of documents moved into evidence, so the MK Pro Se Petitioners in their defense will be forced to collectively file thousands of responses to address all of the UHH/TMT/TIO objections. General objections, such as materiality, still have to be responded to based on the specific nature of the exhibit or testimony. We note also that Hearing Officer will have to sort though these hundreds of documents and consult the transcripts to determine and decide the outcome of each of the UHH/TMT/TIO objections. This is abusive!

F. The situations created by UHH/TMT/TIO calls for some form of protection to be given to the Mauna Kea Pro Se Petitioners

Your Honor, we recall from the beginning of the CCH that you maintained a generally liberal stand on the admission of evidence, supported by the rules, and therefore an inclination to admit all relevant evidence at the end of the hearing. We specifically recall your Honor warning against our own zealous objections, and reminding us that if we used a exhibit to cross a witness, we might want to be careful asking to have that exhibit thrown out. Time at the end of the hearing was not allocated for the parties to take up the exhibit questions however. Hence Movant's concern and her request for the some kind of protection for all of the MK Parties, if it was needed. It is clear it is needed.

G. The abusive objections burden the pro se petitioners and taxpayers.

It has been pointed out repeatedly that the UH is using taxpayer funds to pay for the lawyers, while the MK Pro Se Petitioners are not publicly funded and don't have the means or way to compete on a level playing field. The Pro Se Petitioners must also make a living and they should not be forced to decide between their basic survival and being Parties in in a CCH in order to ensure constitutional protected rights are in fact protected.

No one should be required to choose between making a living and their rights. This is a fundamental basis and point of due process. What the UHH/TMT/TIO are proffering here is unreasonable, heavy handed and quite frankly pono ole (not righteous).

H. The abusive objections impermissibly shift the burden of proof and constitute a fishing expedition.

Chapter 91-10 (5) reads in relevant part:

> [t]he party initiating the proceeding shall have the burden of proof, including the burden of producing the evidence as well as the burden of persuasion. The quantum of proof shall be a preponderance of evidence."

There is no dispute that the UHH/TMT/TIO have the burden of proof, yet the UH relies on broad and sweeping statements without specifically articulating the exact nature of the objections. For example, they say we object to MKAH exhibit X because it is immaterial and irrelevant. But that does not explain why it is immaterial and/or irrelevant and in turn demands that MKAH explain its materiality and or relevance. Without UHH/TMT/TIO expressly stating why something is immaterial and or irrelevant, we are not able to the objection with any certainty as to why the objection was made. Perhaps the most disturbing thing is that by doing this the UH/TMT/TIO is impermissibly shifting the burden on to the MK Pro Se Parties.

I. The overall process handicaps the sponsoring parties facing objections.

The holding of all questions regarding the admissibility of documents until the end of the hearing process only made sense, if the general rule would be documents would be admitted and subject to being given weight by the Hearing Officer. That understanding freed up time for what everyone agreed was to be a very extensive case to be heard.

In not addressing each exhibit at the time of pre-filed testimony admission and/or during cross-examination, the sponsoring parties are now faced with the fact that the witnesses are gone and cannot be called upon to counter the objections now being raised. That handicaps the sponsoring parties both in terms of being able to establish the admissibility of their exhibits and in terms of having to respond to hundreds of totally unexpected objections for which the sponsors had no reason to develop a record to defeat. By impermissibly shifting the burden from themselves to the MK Pro Se Petitioners they are also forcing us to reveal our hand while they are allowed to hold their own hand, making this no more than a fishing expedition that expressly benefits the UHH/TMT/TIO's later preparation of Findings of Fact and Conclusions of Law, while simultaneously burdening the MK Pro Se Petitioners to lay out their arguments.

To add further insult to the injury the UHH is also reserving their right to object further when the transcripts become available. TIO is holding back on objecting to specific documents until some time later, such as within the Findings of Fact and Conclusions of Law. That means that, even after we have answered all of the current UHH/TMT/TOI objections, we may have to face yet another round of hundreds more objections after the transcripts are out and then again when the Findings of Fact and Conclusions of Law exceptions are being filed. We believe protection from this kind of abuse is needed immediately!

J. This extraordinary circumstance requires an extraordinary remedy.

By never indicating their intent to file hundreds of objections, UHH/TMT/TIO designed a no win situation for the Hearing Officer. Here is why. If the Hearing Officer decides to

go with her initial inclination to admit all evidence offered, subject to weight, she will be denying the hundreds if UHH/TMT/TIO objections. If that decision is made without an exhibit by exhibit determination of admissibility, where an objection has been filed, the sweeping admission of challenged testimony and exhibits will violate the due process rights of UHH/TMT/TIO.

If the Hearing Officer decides to address the UHH/TMT/TIO objections individually, she will first have to provide an opportunity for the sponsors of challenged exhibits to respond to the objections and then she will have to decide whether to admit or exclude hundreds of exhibits.

That process is compromised because the MK Pro Se Petitioners had no reason to expect testimony and exhibits would be challenged and, therefore, no reason to make a record of admissibility when the related witness was testifying. Even if allowed to respond to objections, the challenged sponsor will not have the benefit of the witness to establish admissibility.

That barrier to the sponsor successfully arguing for admission is a fatal defect in the proceeding. If the Hearing Officer granted an objection by UHH/TMT/TIO, the question would remain for each such exhibit whether the Hearing Officer would have reached the same decision had the sponsor made the case for admissibility when the related witness was testifying. With that question hanging over hundreds of exhibits, there is no readily apparent way to remedy the denial of due process.

K. A partial remedy is to step back and redo the process.

A partial solution to the situation created by the UHH/TMT/TIO pleadings is to

do the following:

1. Strike the pleadings of UHH/TMT/TIO regarding objections without prejudice to their being refilled at an appropriate time.

2. Wait until the Transcripts are complete and then set a time to file objections, so all parties can make all of their objections at one time. Make it clear that once a document is admitted into evidence, there can be no objections made to that document's admissibility in the Findings of Fact and Conclusions of Law.

3. Schedule an adequate time for all parties to respond to objections, with the assumption that there may still be hundreds of objections requiring a response, e.g. two months.

4. Instruct UHH/TMT/TIO to resubmit objections identifying which general objections are being made to any given specific exhibit and providing a reason that a general objection applies to a specific exhibit. Specific objections to specific documents would also be included.

5. Provide time for the Hearing Officer to review and assess the objections and responses and prepare a minute order regarding the testimony and exhibits that will be part of the record as evidence. (2 months)

6. Provide time for Motions for Reconsiderations to be filed and a reasonable time for the Hearing Officer's consideration of those motions and the issuance of a Final Minute Order relating to the Exhibits to be testimony and exhibits admitted into evidence. (2 months)

7. Suspend the time for the Findings of Fact, Conclusions of Law, and a proposed

Decision and Order, until 1-6 above have been completed and the final record is known.

8. This matter needs to be on the record publicly. The Hearing Officer should convene a hearing to discuss whether the plan proposed herein will be accepted or some alternative plan will be adopted.

III. CONCLUSION

When the Hearing Officer decided not to address the admissibility of exhibits until the end of the hearing process, the underlying rationale was that this proceeding is a contested case in which the parties are providing information to the agency to assist in the agency's decision-making. There is no party on trial or being sued that would be prejudiced by admission or denial of an exhibit. The decision-maker is tasked with evaluating the probative value of a given exhibit.

Surely the Hearing Officer did not foresee that there would be objections to more than 300 exhibits when the decision was made to wait until the hearing process was complete to address admissibility of exhibits.

Certainly, the Hearing Officer gave every indication that she expected very few objections based on her inclination to admit almost everything and decide on what weight to give each item afterwards.

The omission of time to respond to objections appears to be simply an error on the part of the Hearing Officer. The voluminous objections filed by the Applicant and TIO are not what the Hearing Officer expected. Under these circumstances, providing time for the eight point remedy urged by Movant helps address the situation.

We trust that the Hearing Officer can understand that it feels like we were set up

by UHH/TMT/TIO pretending to be going along with the Hearing Officer's plan of admitting everything. That plan made it seem that there was no reason to object to exhibits being offered by UHH/TMT/TIO and practically none were made. Then UHH/TMT/TIO dropped a bombshell of hundreds of objections, while the other parties are in the midst of preparing their findings and conclusions.

On equitable grounds alone, e.g. reliance on the Hearing Officer's representations regarding the exhibit process, the Hearing Officer needs to make this right. Adoption of the eight point plan goes a long way toward correcting the situation.

There is still the problem of prejudice against those sponsoring challenged testimony and exhibits, who did not make the case for admission of testimony and exhibits at the time a related witness was testifying and who cannot recall witnesses to establish admissibility of challenged testimony and exhibits now.

Movant does not see a cure for that due process problem.

DATED: March 21, 2017

/s/ Kealoha Pisciotta On Behalf of Kealoha Pisciotta, Mauna Kea Anaina Hou, Paul K.Neves

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