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PUNA GEOTHERMAL VENTURE

A Hawaii Partnership

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October 18, 1993
DIV. OF WATER &
LAND DEVELOPMENT

Board of Land and Natural Resources
State of Hawaii
Kalanimoku Building, Room 310
1151 Punchbowl Street
Honolulu, Hawaii 96813
Attention: Chairman
Board of Land and Natural Resources

Dear Mr. Chairman:

Puna Geothermal Venture
Petition for Contest Case Hearing

This letter/petition is respectfully submitted by Puna Geothermal Venture, a Hawaii general partnership ("PGV"), which is engaged in the development of the State's geothermal resources and the operation of a geothermal power project in Puna, Hawaii.

During the regularly scheduled meeting of the Board of Land and Natural Resources ("Board") held on October 8, 1993, the Board considered, among other things, the appropriate methodology that it should adopt with respect to the determination of the value of the geothermal steam for purposes of calculating the geothermal royalty amount to be paid by PGV under its Geothermal Resources Mining Lease R-2, dated February 20, 1981. At or prior to the conclusion of the Board's meeting, PGV made a formal written request for a contested case hearing on the Board's decision. PGV made this request pursuant to Section 13-1-29 of Chapter 1 of Subtitle 1 of Title 13 of the Department of Land and Natural Resources ("Department") rules ("Rules").

PGV, in accordance with Section 13-1-29 of the Department's Rules, respectfully submits this petition for a contested case hearing and hereby states as follows:

1. The legal authority for PGV's request for a contested case hearing is Section 13-1-29 of Chapter 1 of Subtitle 1 of Title 13 of the Department's Rules and Hawaii Revised Statutes ("HRS") Chapter 91.

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2. PGV's interest that may be affected by the Board's action is direct and immediate in that it affects the manner and methodology by which the value of the geothermal steam from PGV's project is to be determined, and this value in turn will be used to calculate the geothermal royalty amount that PGV must pay under the Geothermal Resources Mining Lease R-2, dated February 20, 1981.

3. PGV is contesting the specific methodology adopted by the Board on the following grounds: (i) the methodology adopted by the Board violates and is directly contrary to the provisions set forth in the Geothermal Resources Mining Lease R-2 governing the calculation of geothermal royalties payable thereunder; (ii) the Board's action in adopting such methodology violates the provisions of the Hawaii Administrative Procedure Act, HRS Chapter 91; and (iii) such methodology does not comport with the generally accepted approaches (including the approach used by the U.S. Government) used in the U.S. geothermal industry for determining the value of geothermal steam in connection with the ultimate calculation of the appropriate amount of geothermal royalty payments.

4. The basic facts involved are as set forth above, and the issues raised are set forth in Paragraph 3 above.

5. The relief that PGV is seeking or otherwise deems itself entitled is either (i) the adoption by the Board of the federal "netback" method for the calculation of geothermal royalties set forth in the applicable federal regulations, or (ii) the adoption by the Board of a methodology for the determination of the value of such geothermal steam that represents a fair, just and equitable approach for both the State and PGV and that will encourage the continued development and operation of Hawaii's geothermal resources by the private sector in accordance with, among other things, the Hawaii State Plan, especially HRS Section 226-18.

PGV is more than willing to continue to work with the Board, the Department and the Department's staff to resolve this matter amicably and in a manner that is ultimately mutually satisfactory and beneficial to all parties concerned. PGV also wishes to express its appreciation for the continuing assistance that the Board and the Department have rendered to PGV during the course of the development and operation of its Puna project.

Sincerely yours,



Steven E. Morris
Vice President and General Manager

cc: Gerald A. Sumida, Esq.

PROOF OF RECEIPT

Received from Puna Geothermal Original Petition for Contest Case Hearing

Dorothy Chun
Name DOROTHY CHUN

Secretary
Title

Oct. 18, 1993
Date

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Water and Land Development
Honolulu, Hawaii

October 8, 1993

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

**Clarification of Board Action On Valuation Method
to Calculate Royalty for Geothermal Mining Lease R-2
With Puna Geothermal Venture**

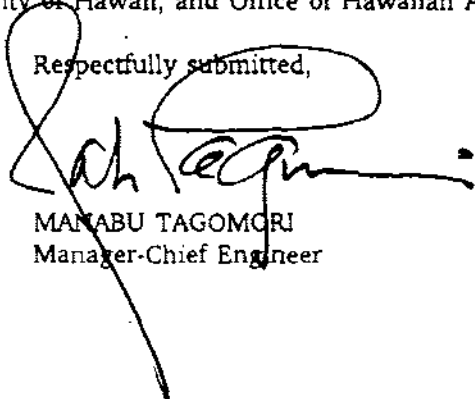
At the last meeting of the Board of Land and Natural Resources on September 24, 1993, the Board acted to provide Puna Geothermal Venture (PGV) the choice of two methods for evaluating geothermal resources for the purpose of royalty calculation, the proposed staff netback method, or a 42.5% of proceeds method. PGV was given seven days to respond in writing as to their choice of methods.

PGV responded on October 1, 1993 that neither method is acceptable (letter attached). Since PGV has not selected either method, the Division needs to know which method to use in order to calculate royalties.

RECOMMENDATION:

That the Board clarify its September 24, 1993 action to indicate which method, staff netback with 1.5 multiplier and absolute limits on transmission and generating deductions, or a 42.5% of proceeds method, should be used to evaluate geothermal resources for the purpose of calculating geothermal royalties due to the State of Hawaii, County of Hawaii, and Office of Hawaiian Affairs.

Respectfully submitted,


MANABU TAGOMORI
Manager-Chief Engineer

Attach.

APPROVED FOR SUBMITTAL:


KEITH W. AHUE, Chairperson

ADDED ITEM D-3

PUNA GEOTHERMAL VENTURE

A Hawaii Partnership

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October 1, 1993

Board of Land and Natural Resources
State of Hawaii
Kalanimoku Building, Room 310
1151 Punchbowl Street
Honolulu, Hawaii 96813
Attn: Chairman
Board of Land and
Natural Resources

HAND DELIVER

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DEPARTMENT OF WATER RESOURCES & LAND DEVELOPMENT
STATE OF HAWAII

Dear Mr. Chairman:

Puna Geothermal Venture:
Geothermal Royalties

At its regularly scheduled meeting held on September 24, 1993, the Board of Land and Natural Resources ("Board") considered the appropriate methodology that it should adopt with respect to the determination of the value of the geothermal steam for purposes of calculating the geothermal royalty amount to be paid by Puna Geothermal Venture ("PGV") under its Geothermal Resources Mining Lease R-2, dated February 20, 1981.

Although PGV is somewhat unclear as to whether the Board formally adopted a specific methodology for the purpose mentioned above, the Board did orally request that PGV respond to the Board as to PGV's preference between the two methodologies that the Board discussed during its meeting. PGV believes that this unclarity has not to date been resolved. Nonetheless, the Board did request that PGV provide its response by Friday, October 1, 1993, which PGV is pleased to do.

After preliminary consideration of these two methodologies, PGV has ~~concluded~~ **concluded** that neither methodology is acceptable, and therefore that it is inappropriate for PGV to choose between those two methodologies. PGV basically but strongly believes, among other reasons, that each of these two methodologies would violate and be directly contrary to the provisions set forth in PGV's Geothermal Resources Mining Lease R-2 governing the calculation of geothermal royalties payable thereunder.

PGV remains very willing to continue to work with the Board, the Department and its staff to resolve this matter amicably, expeditiously and in a manner that is ultimately

PUNA GEOTHERMAL VENTURE

A Hawaii Partnership

September 3, 1993

Mr. Manabu Tagomori
Department of Land and Natural Resources
Division of Water and Land Development
P. O. Box 373
Honolulu, Hawaii 96809

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DIV. OF WATER &
LAND DEVELOPMENT
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Dear Mr. Tagomori:

As a follow up to my letter dated August 31, the following is our proposal which could be included in your transmittal to the Board:


"Puna Geothermal Venture ("PGV") recognizes that the State and County have long been supporters of the development of geothermal energy. PGV appreciates as owners of the resource, the need to see a return on their investment as soon as possible. It is equally important that the Board carefully balance the scale of fairness to all parties so as to ensure preservation and expansion of future revenues from their resource assets.

To avoid any controversy as to the arbitrary nature of the proposed staff method, PGV strongly recommends the adoption of the U.S. Department of Interior's Mineral Management Services division methodology for valuing geothermal resource. We recognize that this method of steam valuation may result in low or zero royalties in the early years of the project. Accordingly we further recommend adoption of a minimum steam value provision. Using a minimum steam value to create a "floor royalty" is in our opinion better than having staff create royalties by making artificial changes to the established MMS steam valuation methodology.

It is our understanding that the County of Hawaii and the Hawaii State Department of Business, Economic Development and Tourism concur with our proposal."

We appreciate the opportunity to submit our proposal for inclusion in your transmittal to the Board. Please call me if you have any questions.

Very truly yours,


Barry T. Mizuno
Financial Manager

cc. S. E. Morris
Sus Ono
ref.0903roya



STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
711 KAPIOLANI BOULEVARD, SUITE 500
HONOLULU, HAWAII 96813-5249
PHONE (808) 586-3777
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DIVISION OF WATER &
LAND DEVELOPMENT

September 16, 1993

The Honorable Keith W. Ahue
State of Hawaii
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Geothermal Royalty - Method of Calculation

Dear Mr. Ahue:

As you know the Division of Water Resource Management of the Department of Land and Natural Resources has proposed a method and formula to calculate geothermal royalties due to the Office of Hawaiian Affairs, the State and the County of Hawaii. Your staff has informed OHA of its proposed method and afforded us an opportunity to question them on the merits of this proposal. In addition, this office consulted various other experts in the field and on September 10, 1993 the Board of Trustees of the Office of Hawaiian Affairs accepted the method and formula proposed by the Division of Water Resource Management by passing the following motion:

To approve the Net Back method and formula to calculate geothermal royalties due the Office of Hawaiian Affairs, the State of Hawaii and the County of Hawaii as a fulfillment of fiduciary responsibility and not in any way, an approval of this particular project or any future geothermal development.

After a review of various methods and formula which could be used calculate geothermal royalties, the Board of Trustees of the Office of Hawaiian Affairs strongly recommends approval of the Net Back method and formula proposed by the Division of Water Resource Management. We believe that this method will provide the most benefit to Native Hawaiians from this resource.

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Water and Land Development
Honolulu, Hawaii

September 24, 1993

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

RESUBMITTAL — TO ESTABLISH A RESOURCE VALUATION METHOD
TO CALCULATE ROYALTY FOR GEOTHERMAL MINING LEASE R-2
TO PUNA GEOTHERMAL VENTURE (PGV)

At the request of the Office of Hawaiian Affairs (OHA), this item was deferred by the Board at the June 25, 1993 and July 23, 1993 meetings, to allow OHA time to study this royalty calculation. Since then OHA has completed their review of the royalty calculations and will be ready to provide testimony to the Board of Land and Natural Resources.

Background

The Board of Land and Natural Resources approved Geothermal Mining Lease R-2 on February 20, 1981 to Kapoho Land Partnership. Subsequently, the Board approved the transfer to Puna Geothermal Venture at its August 27, 1982 meeting. The terms of the Geothermal Mining Lease R-2 and Regulation 8, Administrative Rules which was then in effect, requires the Board to "In the event that geothermal resources hereunder is not sold to a third party but is used or furnished to a plant owned or controlled by the lessee, the gross proceeds of such production for the purposes of computing royalties hereunder shall be that which is reasonably equal to the gross proceeds being paid to other geothermal producers for geothermal resources of like quality under similar conditions without deducting any treating, processing and transportation costs incurred, notwithstanding Rule 3.136b. of Regulation 8." This condition of the lease is consistent with Section 182-18, Hawaii Revised Statutes and Section 182-31, Hawaii Administrative Rules.

Royalties received by the Board will be shared. 50% of the funds will go to the State of Hawaii; 30% of the funds will go to the County of Hawaii; 20% of the funds will go to Office of Hawaiian Affairs.

Staff has briefed the County of Hawaii (Mayor and County Council), and Office of Hawaiian Affairs (Chairman and Trustees). Briefings have also been provided to Hawaii Geothermal Alliance. Staff has also met with Puna Geothermal Venture and True/Mid-Pacific Geothermal Venture.

Subsequent to these meetings, the Office of Hawaiian Affairs Committee on Planning, Economic Development, and Housing voted on September 8, 1993 in favor of the staff netback method to calculate geothermal royalties, and the full Board of Trustees voted on September 10, 1993 in support of the staff netback method for geothermal resource valuation in their effort to carry out their fiduciary responsibilities. Copies of OHA's actions are attached.

Staff Analysis

In order to find reasonably equal valuations to fulfill the terms of the statutes, rules and the lease, staff has investigated various methods currently being used in projects in other states to determine the value of the geothermal resource produced and used for electrical power generation. Consultants have told us that a majority of geothermal projects on the mainland have resource values ranging between 25% and 70% of gross electricity revenues, with the median falling between 35% and 50%. The median of 35% to 50% is the basis which staff used to determine whether the valuation method was reasonably equal to the gross proceeds being paid to other geothermal producers.

Parameters Used in the Netback Method

As stated, the netback method calculates geothermal resource value by subtracting transmission and generating costs from gross electricity revenues. The remainder is considered to be the resource value. Historically, the Minerals Management Service of the U.S. Department of the Interior, in administering thousands of leases on federal lands in oil, gas and geothermal resource producing projects, has used estimates for the developer's cost of capital, rather than actual figures. Threshold limits were established, historically deriving from the oil and gas industries, to estimate relationships between the costs of transmission as a percentage of revenues and the cost of generation relative to revenues and transmission costs. The estimates for the developer's cost of capital and the limits on transmission and generating costs are known as the parameters of the netback method. Varying these parameters affects the calculation of the resource value.

Prior to January 1, 1992, the MMS used first a prime rate for estimating capital costs, then changed to the Standard and Poor's BBB industrial bond rate. In January 1989 MMS promulgated proposed new rules in the Federal Register using a multiplier of 1.5 on the BBB industrial bond rate and limits on transmission and generating deductions.

The final rules were promulgated in November 1991, with a multiplier on the BBB industrial bond rate of 2.0 and no limits on transmission or generating costs.

In summary, the MMS netback parameters are:

- 2.0 multiplier on the BBB industrial bond rate for estimating developer's cost of capital
- no limits on transmission costs
- no limits on generating costs

If the MMS parameters are used in Hawaii, the gross proceeds of the PGV project is not reasonably equal to the gross proceeds being paid to other geothermal producers for geothermal resources of like quality under similar conditions. Hawaii's geothermal resources will have a zero value for the next 7 to 14 or more years under the MMS parameters. It is apparent the parameters used by MMS applies only to federal leases. Therefore, the staff proposes to use a modified version of the netback parameters.

Staff Parameters

The staff's modified version is patterned after the proposed January 1989 MMS rules as published in the federal register.

Specifically, the parameters proposed for use in the State of Hawaii are as follows:

- A multiplier of 1.5 times the Standard and Poor's BBB industrial bond rate in place at the time cost rates are established (the multiplier is multiplied by the bond rate to estimate the developer's cost of capital).
- A threshold limit on actual transmission costs of 50% of the gross electricity revenues ("threshold" means the limit would be subject to administrative relief upon the developer's substantiation of actual financial burden).
- A threshold or limit on actual generation costs to two-thirds of the tailgate value of electricity (gross electricity revenues minus allowable transmission costs and also subject to administrative relief upon substantiation of actual financial burden).

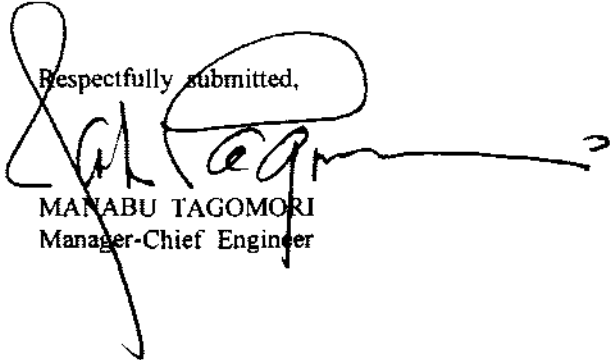
of capital to the developer. It would be more accurate to use either **actual** cost of capital for transmitting and generating costs, or a multiplier of 1.5 times the BBB industrial bond rate to estimate the developer's actual cost of capital. Two times the current BBB industrial bond rate currently would be about 16%. We doubt that PGV's actual cost of capital is this high. It is more likely in the 12% range. Regarding limits on cost deductions, staff's proposal is to adopt the same standards used by MMS when its method included cost limits, i.e. when the developer has actual documented expenses in excess of limits, these actual expenses will be allowable in calculating the value of the resource. The audit requirements will consist of looking into directly related or directly allocable transmission and generating costs only.

RECOMMENDATION:

Staff recommends that the netback method be adopted by the Board together with the proposed parameters (1.5 multiplier, 50% threshold limit on transmission costs and threshold limit on generation costs of two-thirds of the tailgate value of electricity, and allowance of depreciation of capital equipment) to calculate the value of geothermal resource used in the production of electricity. This method results in a reasonable resource valuation of about 28%—30% of gross electricity revenues over the first 15 years, and provides administrative relief from deduction limits if cost limits are exceeded for legitimate causes. This results in resource valuation as a percentage of gross electricity revenues **below** the median industry range of 35%—50%.

It is further recommended to authorize the chairperson to sign the appropriate documents to implement the staff's modified netback resource valuation method and to carry out annual audits of PGV's financial documents to verify the accuracy and legitimacy of cost deductions.

Respectfully submitted,


MANABU TAGOMORI
Manager-Chief Engineer

Attach.

APPROVED FOR SUBMITTAL:


KEITH W. AHUE, Chairperson

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBTITLE 1 ADMINISTRATION
CHAPTER 1 RULES OF PRACTICE AND PROCEDURE

Adopting Rules for Contested Case Hearings

Summary

1. Section 131-1-2 of Title 13, Chapter 1, entitled "Definitions" is amended.
2. Subchapter 4 of Title 13, Chapter 1, is amended to read "Declaratory Rulings."
3. Subchapter 5 of Title 13, Chapter 1, providing for "Contested Case Proceedings" is adopted.

"Sec. 13-1-2 Definitions. (a) As used in this title, unless the context requires otherwise:

"Board" means the board of land and natural resources.

"Chairperson" means the chairperson of the board of land and natural resources.

"Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.

"Department" means the department of land and natural resources.

"Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party in any court or agency proceeding.

"Person" means as appropriate individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.

"Petitioner" means the person or agency on whose behalf the petition or application is made.

"Presiding officer" means the person conducting the hearing which shall be the chairperson or the chairperson's designated representative.

"Proceeding" means the board's consideration of the relevant facts and applicable law, consideration thereof, and action thereupon with respect to a particular subject within the board's jurisdiction, initiated by a filing or submittal or request or a board's notice or order, and shall include but not be limited to:

- (1) Proceeding involving the adoption of forest reserve or watershed boundaries;
- (2) Petitions for the creation of land use sub-zones in conservation districts;
- (3) Proceedings involving the adoption of forest, forest reserve, watershed, fish and game, water, parks, historical sites, recording and land development, use, management, disposal and acquisition rules;

- (4) Petitions or applications for the granting or declaring any right, privilege, authority, or relief under or from any provision of law or of any rule or requirement made pursuant to a power granted by law;
- (5) An investigation or review instituted or requested to be instituted by the board;
- (6) Other proceedings involving the adoption, amendment, or repeal of any rule of the board, whether initiated by board order or notice or by petition of an interested person.

"Public hearing" means a hearing required by law in which members of the public generally may comment upon a proposed rule or application.

"Rules" means the rules of practice and procedure before the board.

"Public records" is defined in section 92-50, Hawaii Revised Statutes. The term shall include all rules, written statements of policy or interpretation formulated, adopted or used by the board, all final opinions and orders, the minutes of meetings of the board and any other material required by law to be kept on file in the office of the board unless accorded confidential treatment pursuant to statute or the rules of the board." [Eff. 6/22/81; SEP 07 1982 (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-2, 91-8, 171-6)

"Subchapter 4 Declaratory Rulings."

"SUBCHAPTER 5
CONTESTED CASE PROCEEDINGS

§13-1-28 Contested case hearings. When required by law, the board shall hold a contested case hearing upon its own motion or on the written petition of any government agency or any interested person who is properly admitted as a party pursuant to section 13-1-31. Unless specifically prescribed in this chapter or by chapter 91, Hawaii Revised Statutes, the board may adopt procedures that in its opinion will best serve the purposes of the hearings. Where a public hearing is required by law, it shall be held prior to the contested case hearing. [Eff. SEP 07 1982 (Auth: HRS §§91-2, 171-6)
(Imp: HRS §91-9)

§13-1-29 Request for hearing. (a) A hearing on a contested matter may be requested by the board on its own motion or upon the written petition of any government agency or any interested person who then properly qualifies to be admitted as a party. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the board meeting at which the matter is scheduled for disposition (if no public hearing is required). In either situation, ~~the person or agency requesting the contested case hearing must file~~ (or mail and postmark) a written petition with the board not later than ten days after the close of the public hearing or the board meeting, whichever is applicable. The time for making an oral or written request and submitting a written petition may be waived by the board.

(b) A petition requesting a contested case hearing shall contain concise statements of:

- (1) The legal authority under which the proceeding, hearing or action is to be held or made;
- (2) The petitioner's interest that may be affected;
- (3) The disagreement, denial, or grievance which is being contested by the petitioner;
- (4) The basic facts and issues raised; and
- (5) The relief to which the party or petitioner seeks or deems itself entitled.

[Eff. SEP 07 1982] (Auth: HRS §91-2)
(Imp: HRS §91-9)

§13-1-30 Notice of hearing. After a determination is made that a contested case hearing is required, ~~the written notice of hearing shall be served on parties in accordance with section 91-9.5, Hawaii Revised Statutes, and shall be served on all persons or agencies deemed interested at their last recorded addresses at least fifteen days before the hearing date.~~ Further, the notice shall be published as provided by law but not less than once in a newspaper of general circulation within the State and within the county provided that matters of internal management shall not be subject to the publication requirement. [Eff. SEP 07 1982 (Auth: HRS §91-2, 171-6) (Imp: HRS §§91-9, 91-9.5)]

§13-1-31 Parties. (a) The following persons or agencies shall be admitted as a party:

- (1) The petitioner shall be a party.
- (2) All government agencies whose jurisdiction includes the land in question may be admitted as parties upon timely application.
- (3) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.
- (4) Other persons who can show a substantial interest in the matter may apply to be a party. The presiding officer or the board may approve the application only if the applicant's participation will substantially assist the board in its decision making.

(b) The presiding officer or the board as provided by law may deny any application to be a party when it appears that:

- (1) The position of the applicant for participation is substantially the same as the position of a party already admitted to the proceedings; and
- (2) The admission of additional parties will not add substantially new information or the addition will render the proceedings inefficient and unmanageable.

(c) All persons with similar interests seeking to be admitted as parties shall be considered at the same time so far as possible.

(d) Where a contested case hearing has been scheduled, any other interested person who qualifies to be a party under subsection (a) may apply to participate, in accordance with this subchapter by filing a written application with the board not later than ten days before the scheduled contested case hearing. Except for good cause shown, late filings shall not be permitted.

(e) The application to become a party shall contain the following:

- (1) The nature of applicant's statutory or other right.
- (2) The tax map key number of the applicant's property as well as the petitioner's property. The nature and extent of applicant's interest.

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- (3) The effect of any decision in the proceeding on applicant's interest.
- (4) The difference in the effect of the proposed action on the applicant's interest and the effects of the proposed action on the general public.
- (f) If relevant, the application shall also address:
 - (1) Other means available whereby applicant's interest may be protected.
 - (2) The extent the applicant's interest may be represented by existing parties.
 - (3) The extent the applicant's interest in the proceedings differs from that of the other parties.
 - (4) The extent the applicant's participation can assist in development of a complete record.
 - (5) The extent the applicant's participation will broaden the issue or delay the proceeding.
 - (6) How the applicant's intervention would serve the public interest.
 - (7) Any other information the board may add or delete.
- ~~(g)~~ If any party opposes another person's application to be a party, the party may file objections for the record no later than ~~the hearing~~ prior to the hearing.
- (h) All applications to be a party shall be acted upon as soon as practicable and shall be decided not later than the commencement of the contested case hearing.
- (i) A person whose petition to be admitted as a party has been denied may appeal that denial to the circuit court pursuant to section 91-14, Hawaii Revised Statutes. [Eff. SEP 07 1983] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-9, 91-9.5)

§13-1-32 Conduct of hearing. (a) Contested case hearings shall be conducted in accordance with this subchapter, and chapter 91, HRS.

(b) The presiding officer shall have the power to give notice of the hearing, administer oaths, compel attendance of witnesses and the production of documentary evidence, examine witnesses, certify to official acts, issue subpoenas, rule on offers of proof, receive relevant evidence, hold conferences before and during hearings, rule on objections or motions, 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. The board members may examine and cross-examine witnesses.

(c) The chairperson of the board shall be the presiding officer. However, the chairperson may designate another board member, an appointed representative or a master to be presiding officer unless prohibited by law.

(d) The board may conduct the hearing or, unless otherwise prohibited by law, the board in its discretion may designate a hearing officer or master to conduct contested case hearings.

(e) The presiding officer shall provide that a verbatim record of the evidence presented at any hearing is taken unless waived by all the parties. Any party may obtain a certified transcript of the proceedings upon payment of the fee established by law for a copy of the transcript.

(f) In hearings on applications, petitions, complaints, and violations, the petitioner or complainant shall make the first opening statement and the last closing argument unless the board directs otherwise. Other parties shall be heard in such order as the presiding officer directs. After all parties close their case, the department may make its recommendations, if any.

(g) Where a party is represented by more than one counsel, they may allocate witnesses between them but only one of the counsel shall be permitted to cross-examine a witness or to state any objections or to make closing arguments.

(h) Each party shall have the right to conduct such cross-examinations of the witnesses as may be required for a full and true disclosure of the relevant facts and shall have the right to submit rebuttal evidence, subject to limitation by the presiding officer.

(i) To avoid unnecessary or repetitive evidence, the presiding officer may limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue, subject to law. [Eff. (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-9, 92-16)]

(j) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. [Eff. SEP 07 1982 (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-9(d))]

§13-1-33 Procedure for witnesses. (a) Witnesses may be subpoenaed as set forth below:

- (1) Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the board shall be in writing, and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved. Only parties or a board member may request the issuance of a subpoena.
- (2) Request for the issuance of subpoenas for the production of documents or records shall be in writing, shall specify the particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved. Only parties or a board member may request the issuance of a subpoena duces tecum.

(b) Subpoenas may be issued by the presiding officer. No subpoena shall be issued unless the party requesting the subpoena has complied with this section giving the name and address of the desired witness and tendering the proper witness and mileage fees. Signed and sealed blank subpoenas shall not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. Subpoenas shall state at whose request the subpoena is issued. ~~Requests for subpoenas shall be filed with the board at least ten days before the date of the hearing.~~

(c) Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii and such fees and mileage shall be paid by the party at whose request the witness appears.

[Eff. SEP 07 1982] (Auth: HRS §§91-2, 171-6)
 (Imp: HRS §92-16)

§13-1-34 Motions. (a) All motions other than those made during a hearing shall be made in writing to the board, shall state the relief sought, and shall be accompanied by an affidavit or memorandum setting forth the grounds upon which they are based. The presiding officer shall set the time for all motions and opposing memorandum, if any.

(b) ~~The moving party shall serve a copy of all motions on all other parties at least forty-eight hours prior to the hearing on the motion and shall file with the board the original with proof of service.~~

(c) ~~A memorandum in opposition to a motion shall be served on all parties not later than twenty-four hours prior to the hearing.~~ The original and proof of service shall be filed with the board.

(d) Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing shall be deemed a waiver of objection to the granting or denial of the motion. [Eff. SEP 07 1982 (Auth: HRS §§91-2, 171-6)
(Imp: HRS §91-7)

§13-1-35 Evidence. (a) The presiding officer may exercise discretion in the admission or rejection of evidence and the exclusion of immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view to doing substantial justice.

(b) The presiding officer shall rule on the admissibility of all evidence. The rulings may be reviewed by the board in determining the matter on its merits.

(c) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.

(d) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained, or the submission of the evidence itself.

(e) With the approval of the presiding officer, a witness may read testimony into the record on direct examination. Before any prepared testimony is read, unless excused by the presiding officer, the witness shall deliver copies thereof to the presiding officer and all counsel parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, a copy of the prepared testimony may be received in evidence without reading, provided that copies thereof shall have been served upon all parties and the presiding officer ~~five days before the hearing~~ or if such prior service is waived, to permit proper cross examination of the witnesses on matters contained in the prepared testimony.

(f) If relevant and material matter is offered in evidence in a document containing other matters, the party offering it shall designate specifically the matter so offered. If the other matter in the document would burden the record, at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies of it received as an exhibit. Other parties shall be afforded opportunity at the time to examine the document, and to offer in evidence other portions believed material and relevant.

(g) Exhibits shall be prepared as follows:

(1) Documents, pleadings, correspondence and other exhibits shall be legible and must be prepared on paper either 8-1/2 x 13 inches or 8-1/2 x 11 inches in size. Charts and other oversize exhibits must be bound or

folded to the respective approximate size, where practical. Wherever practicable, sheets of each exhibit shall be numbered and data and other figures shall be set forth in tabular form.

- (2) When exhibits are offered in evidence, the original and eight copies, unless otherwise waived by the board, shall be furnished to the presiding officer for the board's use with adequate copies for review by other parties, unless the copies have been previously furnished or the presiding officer directs otherwise.

(h) If any matter contained in a document on file as a public record with the department is offered in evidence, unless directed otherwise by the presiding officer, the document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of the document are specifically identified and otherwise competent, relevant, and material. If testimony in proceedings other than the one being heard is offered in evidence, a copy shall be presented as an exhibit, unless otherwise ordered by the presiding officer.

(i) Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

(j) At the hearing, the presiding officer may require the production of further evidence upon any issue. Upon agreement of the parties, the presiding officer may authorize the filing of specific documentary evidence as a part of the record within a fixed time. [Eff. SEP 07 1962
(Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-9, 91-10)]

§13-1-36 Prehearing conferences; exchange of exhibits; briefs. (a) The presiding officer may hold or cause to be held pre-hearing conferences with the parties for the purpose of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or proposed written testimony, setting of schedules, exchanging names of witnesses, limitation of number of witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding as permitted by law.

(b) The presiding officer may request briefs setting forth the issues, facts and legal arguments upon which the parties intend to rely and the presiding officer may fix the conditions and time for the filing of briefs and the number of pages. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. [Eff. SEP 07 1932
(Auth: HRS §§91-2, 171-6) (Imp: HRS §91-9)]

§13-1-37 Correction of transcript. Motions to correct the transcript shall be made within ~~five~~ days after receipt of the transcript and shall be acted upon by the presiding officer. [Eff. SEP 07 1982] (Auth: HRS §§91-2, 171-6)
(Imp: HRS §91-10)

§13-1-38 Disqualification. No board member shall sit in any proceeding in which the member has any pecuniary or business interest involved in the proceeding or who is related within the first degree by blood or marriage to any party to the proceeding. If, after declaring any pecuniary interest or consanguinity to the parties, the parties do not oppose the member from sitting in a proceeding, the record shall note clearly the waiver by the parties. [Eff. SEP 07 1982 (Auth: HRS §§91-2, 171-6) (Imp: HRS §§84-14, 91-13, 171-4)]

§13-1-39 Ex parte (single party) communications.

(a) No party or person petitioning to be a party to a proceeding before the board nor their employees, representatives or agents shall make an unauthorized ex parte communication either oral or written concerning the contested case to any member of the board who will be a participant in the decision-making process.

(b) The following classes of ex parte communications are permitted:

- (1) Those which relate solely to matters which a board member is authorized by the board to dispose of on ex parte basis.
- (2) Requests for information with respect to the status of a proceeding.
- (3) Those which all parties to the proceeding agree or which the board has formally ruled may be made on an ex parte basis.
- (4) Those with representatives of any news media on matters intended to inform the general public. [Eff. SEP 07 1982] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-13)

§13-1-40 Decisions and orders. (a) A proceeding shall be deemed submitted for decision by the board after the taking of evidence, the filing of briefs, the consideration of motions, and the presentation of oral argument as may have been permitted or prescribed by the presiding officer. Where a hearing officer has conducted the hearing, the hearing officer shall file a report with the evidence, or a summary thereof, as well as proposed findings of fact and conclusions of law which the board may adopt, reject or modify. A party to the proceedings may submit a proposed decision and order which shall include proposed findings of fact and conclusions of law. ~~The proposals shall be filed with the board and mailed to each party to the proceeding not later than ten days after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe.~~

(b) ~~Within the time established by the board, or within a reasonable time after the hearing, the board shall render its findings of fact, conclusions of law and decision and order approving the proposal, denying the proposal, or modifying the proposal by imposing conditions. The vote of each member shall be recorded. Upon agreement by the parties, the examination and proposed decision provisions under section 91-11, HRS, may be waived pursuant to section 91-9(d), HRS.~~

(c) Every decision and order adverse to a party to the proceeding, rendered by the board in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the board shall incorporate in its decision a ruling upon each proposed findings so presented.

(d) Decisions and orders shall be served by mailing copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a certified copy. When a party to an application proceeding has appeared by a representative, service upon the representative or counsel shall be deemed to be service upon the party. [Eff. SEP 07 1982] (Auth: HRS §§91-2, 171-6) (Imp: HRS §91-12)

§13-1-41 Reconsideration. (a) The board may reconsider a decision it has made on the merits only if the moving party can show:

- (1) New information not previously available would affect the result; or
- (2) That a substantial injustice would occur.

(b) ~~In this case, a motion for reconsideration shall be made not later than five business days after the date of any decision established by law for the disposition of the subject matter, whichever is earlier.~~ [EFF. SEP 07 1982]
(Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-11, 91-12)


§13-1-42 Appeals. Parties to proceedings who are aggrieved by the decision of the board may obtain judicial review thereof in the manner set forth in section 91-14, Hawaii Revised Statutes, provided that the court may also reverse or modify a finding of the board if such finding appears to be contrary to the clear preponderance of the evidence. (Eff. SEP 07 1982 (Auth: HRS §§91-2, 91-14) (Imp: HRS §§91-14, 91-15)."

30 days
after
service

DEPARTMENT OF LAND AND NATURAL RESOURCES

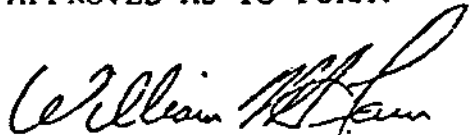
The rules amending section 13-1-2 entitled "Definitions" and adopting subchapter 4 entitled "Contested Case Hearings", both of Title 13, Chapter 1, Rules of Practice and Procedure before the Board of Land and Natural Resources on the Summary Page dated August 27, 1982, were adopted on August 27, 1982, by the Board of Land and Natural Resources following public hearings on August 5, 1982, after public notice was given in the Honolulu Star-Bulletin, Honolulu Advertiser, Garden Island News, Hawaii Tribune Herald and the Maui News on July 16, 1982.

These rules shall take effect ten days after filing with the Office of the Lieutenant Governor.


Chairperson and Member
Board of Land and
Natural Resources


Member
Board of Land and
Natural Resources

APPROVED AS TO FORM:


Deputy Attorney General


Governor

Date Filed

REC'D. BY

1982 AUG 27 PM 1 41

LT GOVERNOR'S OFFICE

DEPARTMENT OF LAND AND NATURAL RESOURCES

Amendments to Chapters 13-1 and 13-2
Hawaii Administrative Rules
August 23, 1985

SUMMARY

1. Section 13-1-31(d) is amended
2. Section 13-2-9 is amended

Section 13-1-31 Parties. ***

(d) Where a contested case hearing has been scheduled, any other interested person who qualifies to be a party under subsection (a) may apply to participate, in accordance with this subchapter, by filing a written application with the board not later than ten days before the scheduled contested case hearing or at an earlier date as established by the board. Except for good cause shown, late filings shall not be permitted.

[Eff. 9/7/82; am NOV 1 1985] (Auth: HRS Sec. 91-2, 171-6) (Imp: HRS Sec. 91-9, 91-9.5)

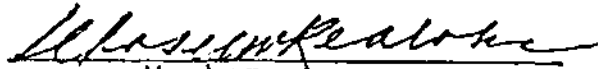
DEPARTMENT OF LAND AND NATURAL RESOURCES

The amendments to sections 13-1-31(d), and 13-2-9 were adopted on August 23, 1985 by the Board of Land and Natural Resources following public hearings held on July 16, 1985 after public notice was given in the Honolulu Star-Bulletin, Honolulu Advertiser, Garden Isle, Maui News, Hawaii Tribune Herald, on June 25, 1985.

These amendments to sections 13-1-31(d), and 13-2-9 shall take effect ten days after filing with the Office of the Lieutenant Governor.



Chairperson and Member
Board of Land and
Natural Resources



Member
Board of Land and
Natural Resources

APPROVED AS TO FORM:


Deputy Attorney General
George R. Ariyoshi
Governor
State of Hawaii

Date: 10-18-85

Filed