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BEFORE THE ARIZONA CORPORATION COMMISSION

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JEFF HATCH-MILLER, Chairman
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AZ CORP COMMISSION
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In the matter of:

DOCKET NO. S-03550A-04-0000

ARTHUR B. COOPER
CRD #1856331
8025 E. Redwing
Scottsdale, Arizona 85250

SECURITIES DIVISION'S
MOTION TO ALLOW
TELEPHONIC TESTIMONY

LINDA EBINGER-COOPER
CRD # 1353173
8025 E. Redwing
Scottsdale, Arizona 85250

Respondents.

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witness Brandon Lee during the hearing of the above-referenced matter beginning on December 5, 2005. This request is submitted on the grounds that, although this individual can provide testimony that will provide key information at this administrative hearing, special circumstances prevent his actual appearance in Phoenix, Arizona during the course of this proceeding.

For this primary reason, and for others addressed in the following Memorandum of Points and Authorities, the Division's Motion to Allow Telephonic Testimony should be allowed.

Respectfully submitted this 17th day of November, 2005.

By Wendy Coy
Wendy Coy
Attorney for the Securities Division of the
Arizona Corporation Commission

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The Division anticipates calling Brandon Lee ("Lee") as a central witness to this hearing. Lee can offer probative testimony as to this case. In so doing, he can provide evidence supporting a number of the allegations brought by the Division in this case. Lee frequently travels out of town on business. As such, the burdensome task of traveling down to Phoenix to provide testimony in person is impractical for this witness.

The prospective witness above can offer highly probative evidence in this matter, yet faces one or more obstacles that prevent his appearance at this hearing. The simple and well-recognized solution to this problem is to allow for telephonic testimony; through this manner, not only will relevant evidence be preserved and introduced, but all parties will have a full opportunity for questioning - whether by direct or cross-examination.

II. ARGUMENT**A. *Telephonic Testimony in Administrative Hearings is Supported Both Under Applicable Administrative Rules and through Court Decisions***

The purpose of administrative proceedings is to provide for the fair, speedy and cost effective resolution of administratively justiciable matters. To effectuate that purpose, the legislature provided for streamlined proceedings and relaxed application of the formal rules of evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of contested administrative cases. The evidence submitted in an administrative hearing need not rise to the level of formality required in a judicial proceeding, as long as it is "substantial, reliable and probative." In addition, the Commission promulgated rules of practice and procedure to ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,* A.A.C. R14-3-101(B); R14-3-109(K). Allowing Lee to testify by telephone retains all indicia of reliability and preserves Respondents' right to cross-examination.

Consistent with these administrative rules, courts have routinely acknowledged that

1 telephonic testimony in administrative proceedings is permissible and consistent with the
2 requirements of procedural due process. In *T.W.M. Custom Framing v. Industrial Commission of*
3 *Arizona*, 198 Ariz. 41 (2000), for instance, the appellant challenged an validity of an ALJ's
4 judgment, partly on the fact that the ALJ had allowed two of the Industrial Commission's
5 witnesses to appear telephonically. The Court initially noted that telephonic testimony was
6 superior to a mere transcription of testimony because the telephonic medium "preserves
7 paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in making
8 determinations of credibility." See *T.M.W. Custom Framing*, 198 Ariz. at 48. The court then
9 went on to recognize that "ALJs are not bound by formal rules of evidence or procedure and are
10 charged with conducting the hearing in a manner that achieves substantial justice." *Id.* at 48,
11 citing A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic
12 testimony offered in this case was fully consistent with the requirement of "substantial justice."

13 Other courts have reached similar conclusions with respect to the use of telephonic
14 testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of Industrial*
15 *Relations*, 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was asked to
16 review a trial court's determination that a hearing officer's admittance of an inspector's
17 telephonic testimony violated C & C's due process rights and prejudiced C & C by preventing it
18 from cross-examining the inspector's notes. The appellate court rejected the trial court's
19 conclusions, holding that 1) cross-examination was available to C & C; and 2) that administrative
20 hearing of this nature need not be conducted according to the technical rules relating to evidence
21 and witnesses. *C & C Partners*, 70 Cal.App.4th at 612. In making this determination, the court
22 in *C & C Partners* found particularly instructive a passage from *Slattery v. Unemployment Ins.*
23 *Appeals Bd.*, 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976), another matter involving the
24 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings
25 involving telephonic testimony as:

1 “a pragmatic solution, made possible by modern technology, which
2 attempts to reconcile the problem of geographically separated adversaries
3 with the core elements of a fair adversary hearing: the opportunity to
4 cross-examine adverse witnesses and to rebut or explain unfavorable
5 evidence.”

Id. at 251, 131 Cal.Rptr. at 422.

4 Based on similar reasoning, a number of other state courts have recognized that, in the
5 case of administrative and sometimes civil proceedings, telephonic testimony is permissible and
6 consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment*
7 *Division, 72 Or. App. 486, 696 P.2d 19 (1985)* (court approved Oregon Employment Division’s
8 procedure to conduct entire hearing telephonically); *W.J.C. v. County of Vilas, 124 Wis. 2d 238,*
9 *369 N.W. 2d 162 (1985)* (court permitted telephonic expert testimony in commitment hearing).
10 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of
11 administrative hearings, “fundamental fairness” is not compromised through the allowance of
12 telephonic testimony.

13 The telephonic testimony request in the present case fits squarely within the tenor of these
14 holdings. The Division is seeking to introduce the telephonic testimony of witnesses that could
15 otherwise not testify; the prospective testimony of these witnesses will be “substantial, reliable
16 and probative,” and will meet all requirements of substantial justice. In other words, evidence
17 bearing on the outcome of this trial will not be barred, and respondents will still have every
18 opportunity to question the witnesses about their testimony and/or about any exhibits discussed.

19 **B. *The Arizona Corporation Commission has a well-recognized History of***
20 ***Permitting Telephonic Testimony during the Course of Administrative Hearings***

21 In light of the relaxed evidentiary and procedural rules governing administrative hearings
22 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
23 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
24 telephonic testimony in their administrative hearings to introduce probative evidence. This
25 position has been borne out in a number of previous hearings. *See, e.g., In the matter of Calumet*
26 *Slag, et al., Docket No. S-03361A-00-0000; In the matter of Chamber Group, et al., Docket No.*

1 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al., Docket No. S-03280A-00-*
2 *0000; In the matter of Forex Investment Services, Docket No. S-03177A-98-000.*

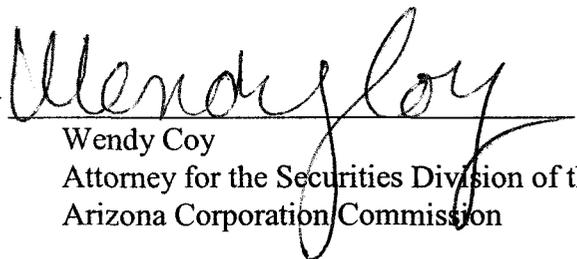
3 Only where telephonic testimony is the only option available does the Division seek leave
4 to offer this form of testimony. Consistent with past determinations in this forum, leave to
5 introduce the telephonic testimony of this prospective witness is warranted.

6 III. CONCLUSION

7 Permitting Brandon Lee to testify telephonically at the upcoming administrative hearing
8 allows the Division to present relevant witness evidence that is expected to be reliable and
9 probative, is fundamentally fair, and does not compromise Respondents' due process rights.
10 Therefore, the Division respectfully requests that its motion for leave to present such telephonic
11 testimony be granted.

12 RESPECTFULLY SUBMITTED this 17th day of November, 2005.

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By 
Wendy Coy
Attorney for the Securities Division of the
Arizona Corporation Commission

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 17th day of November, 2005, with

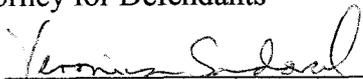
3 Docket Control
4 Arizona Corporation Commission
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7 COPY of the foregoing hand-delivered this
8 17th day of November, 2005, to:

9 ALJ Marc Stern
10 Arizona Corporation Commission/Hearing Division
11 1200 West Washington
12 Phoenix, AZ 85007

13 COPY of the foregoing mailed
14 this 17th day of November, 2005, to:

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