

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 the 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:

26 "a pragmatic solution, made possible by modern technology, which

1 attempts to reconcile the problem of geographically separated adversaries
2 with the core elements of a fair adversary hearing: the opportunity to
cross-examine adverse witnesses and to rebut or explain unfavorable
evidence.”

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

3
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 In the instant case, the Division’s telephonic testimony request fits squarely within the
14 tenor of these holdings. The Division is seeking to introduce the telephonic testimony of
15 witnesses that could otherwise not testify. Furthermore, the prospective testimony of these
16 witnesses will be “substantial, reliable and probative,” and will meet all requirements of
17 substantial justice. In other words, evidence bearing on the outcome of this trial will not be
18 barred, and Respondents will still have every opportunity to question the witnesses about their
19 testimony and any exhibits discussed.

20 **B. *The Arizona Corporation Commission Has A Well-recognized History of***
21 ***Permitting Telephonic Testimony During The Course of Administrative***
Hearings

22 In light of the relaxed evidentiary and procedural rules governing administrative hearings
23 in this state and because telephonic testimony does not jeopardize the fundamental fairness
24 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
25 telephonic testimony for its administrative hearings to introduce probative evidence. This
26 position has been borne out in a number of previous hearings. *See, e.g., In the matter of Calumet*

1 *Slag, et al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No.
2 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No. S-03280A-00-
3 0000; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000.

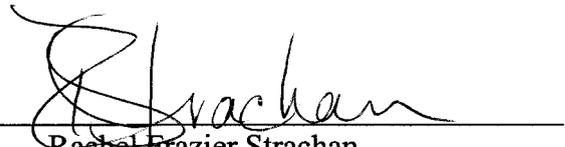
4 Only where telephonic testimony is the only option available does the Division seek leave
5 to offer this form of testimony. Consistent with past determinations in this forum, the State
6 believes that leave to permit the prospective central witnesses to testify telephonically is
7 warranted.

8 **III. CONCLUSION**

9 Permitting Ben Page, Mark W. Ricchiuto and Chris J. Ricchiuto to testify telephonically at
10 the upcoming administrative hearing allows the Division to present relevant witness evidence
11 which is reliable and probative. This request is fundamentally fair and does not compromise
12 Respondents' due process rights. Therefore, the Division respectfully requests that its motion for
13 leave to present telephonic testimony be granted.

14 RESPECTFULLY SUBMITTED this 17th day of March, 2006.

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17 By



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