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BEFORE THE ARIZONA CORPORATION COMMISSION

2006 OCT 23 A 11: 32

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
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AZ CORP COMMISSION
DOCUMENT CONTROL

In the matter of:

Docket No. S-20437A-05-0925

Reserve Oil & Gas, Inc., a Nevada Corporation
3507 North Central Avenue, Suite 503
Phoenix, Arizona 85012

SECURITY DIVISION'S MOTION TO
ALLOW TELEPHONIC TESTIMONY

Allen and Jane Doe Stout, Sr. husband and wife
1309 West Portland Street
Phoenix, Arizona 85007-2102

Arizona Corporation Commission
DOCKETED

OCT 23 2006

Allen and Jane Doe Stout, Jr., husband and wife
1309 West Portland Street
Phoenix, Arizona 85007-2102

DOCKETED BY

Respondents.

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witness Bill Smith during the hearing of the above-referenced matter beginning on November 7, 2006. 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 impede 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.

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MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

The Division anticipates calling Bill Smith ("Smith") as a central witness to this hearing. Smith is former investigator for the Securities Division who was assigned to this case. Smith can provide key information concerning investments in Reserve Oil and Gas and was a prospective investor in Reserve Oil and Gas. As a prospective investor, Smith had communications with both Allen Stout, Sr. and Allen Stout, Jr. A transcript and a recording made of a meeting between Allen Stout, Sr. and Allen Stout, Jr. has been disclosed to opposing counsel in this proceeding. Smith's testimony will provide evidence central to a number of the Division's allegations against the respondents in this case.

The physical appearance of Smith, however, is complicated by the fact that he is a father, who is solely responsible for the full-time care of his two year old child, while working full-time. Smith now resides in Montrose, Colorado. Montrose is four hours away from Denver. Appearing at this hearing in person would require Smith to miss at least two days of work, for which he will not be compensated, and to make child care arrangements for his young child. Traveling to Phoenix would create a hardship for Smith. Accordingly, Smith has asked that he be allowed to testify telephonically.

This prospective witness can offer highly probative evidence in this matter, yet faces economic obstacles in addition to job and child care concerns that hinder his ability to appear in Phoenix to assist this tribunal. The simple and well-recognized solution to this problem is to allow for his telephonic testimony. 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, without unduly burdening the witness.

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. For 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

1 administrative cases. The evidence submitted in an administrative hearing need not rise to the
2 level of formality required in a judicial proceeding, as long as it is “substantial, reliable and
3 probative.” In addition, the Commission promulgated rules of practice and procedure to ensure
4 just and speedy determination of all matters presented to it for consideration. *See, e.g.*, A.A.C.
5 R14-3-101(B); R14-3-109(K). Allowing Smith to testify by telephone will provide reliable
testimony and preserve Respondents’ right to cross-examination.

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

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

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

7 Based on similar reasoning, a number of other state courts have recognized that, in the
8 case of administrative and sometimes civil proceedings, telephonic testimony is permissible and
9 consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment*
10 *Division, 72 Or. App. 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division’s*
11 *procedure to conduct entire hearing telephonically); W.J.C. v. County of Vilas, 124 Wis. 2d 238,*
12 *369 N.W. 2d 162 (1985), review denied by 125 Wis.2d 583, 375 N.W.2d 215 (1985) (court*
13 *permitted telephonic expert testimony in commitment hearing). Ultimately, courts considering*
14 *this issue have reached the conclusion that, at least in the case of administrative hearings,*
15 *“fundamental fairness” is not compromised through the allowance of telephonic testimony.*

16 The telephonic testimony requested in the present case fits squarely within the intent of
17 these holdings. The prospective testimony of Smith will be “substantial, reliable and probative,”
18 and will meet all requirements of substantial justice. In other words, evidence bearing on the
19 outcome of this trial will not be barred, and respondents will still have every opportunity to
20 question the witness about his or her testimony and/or about any exhibits they discuss.

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

23 In light of the relaxed evidentiary and procedural rules governing administrative hearings
24 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
25 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
26 telephonic testimony in their administrative hearings to introduce probative evidence. This
27 position has been borne out in a number of previous hearings. *See, e.g., In the matter of Yucatan*
28 *Resorts, Inc. et al., Docket No. S-03539A-03-0000; In the matter of Chamber Group, et al.,*
29 *Docket No. 03438A-00-0000; In the matter of Joseph Michael Guess, Sr., et al., Docket No.*
30 *S-03280A-00-0000; In the matter of Forex Investment Services, Docket No. S-03177A-98-000.*

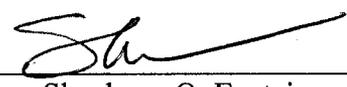
31 The Division is seeking permission to introduce the telephonic testimony of only one
32 witness, on whom it would create a substantial burden to appear in person. Consistent with past
33 determinations in this forum, leave to introduce the telephonic testimony of this prospective

witness is warranted.

III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 19th day of October, 2006.

By 
Shoshana O. Epstein
Staff Attorney, Arizona Corporation
Commission Securities Division

ORIGINAL AND THIRTEEN (13) COPIES of the foregoing filed this 23 day of October, 2006, with

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