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BEFORE THE ARIZONA CORPORATION COMMISSION

28

COMMISSIONERS:
JEFF HATCH-MILLER - Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG

Arizona Corporation Commission

2006 OCT 30 P 4: 38

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OCT 30 2006

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Docket No. S-20437A-05-0925

In the matter of:

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

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

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

Respondents.

RESPONDENTS' RESPONSE TO THE
SECURITIES DIVISION'S MOTION
TO ALLOW TELEPHONIC
TESTIMONY AND, IN THE
ALTERNATIVE, MOTION FOR
CONTINUANCE

NOW COME the Respondents, Allen Stout, Sr., Eugenia Stout, Allen Stout, Jr. and Reserve Oil & Gas, Inc. and files this, their Response to the Securities Division's Motion to Allow Telephonic Testimony and, in the alternative, Motion for Continuance and, in support thereof, respectfully show the Hearing Officer as follows:

PRELIMINARY STATEMENT

The Division's request to present the testimony of Bill Smith ("Smith") telephonically ignores relevant precedent and seeks to mislead this tribunal about the supposed hardship faced by Smith. As demonstrated below, the Division cannot establish that appearing in person will cause Smith an "undue hardship," further, allowing the telephonic testimony of Smith will cause undue prejudice to Respondents. See A.A.C. R2-19-114, see also, *In re MH*, 211 Ariz. 255, 120 P.3d 210 (App. 2005). Respondents, therefore, request that the Division's Motion be denied. In the alternative, Respondents request that the hearing of this matter be continued for a minimum of thirty (30) days so that Smith's deposition may be taken by Respondents' counsel.

I.

**THE DIVISION CANNOT ESTABLISH THAT REQUIRING SMITH TO TESTIFY
IN PERSON WILL PRESENT AN UNDUE HARDSHIP, FURTHER,
ALLOWING TELEPHONIC TESTIMONY OF SMITH WILL RESULT
IN UNDUE PREJUDICE TO RESPONDENTS**

The Division clearly believes that the testimony of Smith is important to its case. This is apparently so because the only actual investor witness identified on the Division's List of Witnesses and Exhibits is now deceased, and the admission of any hearsay testimony related to that witness should be excluded.¹ In fact, the Division's Motion is replete with references to the importance of Smith's testimony: "[t]he Division anticipates calling [Smith] as a central witness to this hearing. [] [Smith] can offer highly probative evidence"²

In an attempt to secure the telephonic testimony of this witness, the Division ignores relevant Arizona authority, and attempts to mislead this tribunal by misstating the holdings of cases cited by the Division.

Although telephonic testimony is sometimes allowed in administrative proceedings, it is not the Division's right to do so. The Division must demonstrate that requiring Smith to testify in person will cause an undue hardship for Smith. In addition, the Division must also show that telephonic testimony of Smith will not cause Respondents undue prejudice. *See*, A.A.C. R2-19-114. Finally, the Division must show that denial of face-to-face testimony 1) furthers an important public policy and 2) that the testimony is otherwise reliable.

In its attempt to show that live testimony in Phoenix will cause Smith an undue hardship, the Division relies on two factors: (1) that the 4-hour distance from Montrose to Denver will require Smith to spend a substantial amount of time traveling, and (2) that Smith will need to make arrangements for the care of his two year old child.

¹ *See*, Division's List of Witnesses and Exhibits as amended by letter dated October 26, 2006. *See also*, Respondents' pending Motion to Preclude and Memorandum of Law in Support of Exclusion of Hearsay Testimony.

² *See*, Motion at p.2.

1 Obviously, the hearing is in Phoenix. If the Division's mention of Denver was meant to
2 suggest that Smith would have to drive to Denver to catch a flight to Phoenix, that is completely
3 misleading and incorrect. Montrose has an airport that offers service to Phoenix. One of the
4 carriers that services Montrose has no fewer than five (5) flights per day from Montrose to Phoenix.
5 A flight schedule for November 6 and 7, 2006 is attached hereto as Exhibit "A."

6 A quick review of the flights from this one carrier shows that Smith could actually leave
7 Montrose, testify, and return to Montrose in just over twenty-four (24) hours suggesting that Smith
8 would likely miss one day of work. See, Exhibit "A." If Smith were allowed to testify
9 telephonically, he would likely miss work for one day.

10 With respect to Smith's two-year old child, the Division has presented no argument or
11 evidence as to the difficulty of obtaining care for Smith's child. There is no suggestion that Smith
12 has even inquired as to the possibility of obtaining care for the child.

13 In addition, allowing Smith to testify telephonically will prejudice Respondents. The
14 Division has indicated that Smith is likely to be a pivotal witness in this case. Respondents'
15 counsel has not had an opportunity to interview or depose Smith. Preventing Respondents counsel
16 from questioning or examining the witness in person is an unnecessary and prejudicial restriction
17 on Respondents' right to cross-examine and confront witnesses who will testify against them.
18 Particularly, where Respondents face the potential of a substantial deprivation of property in this
19 proceeding.

20 II.

21 **TELEPHONIC TESTIMONY IS NOT APPROPRIATE IN THIS CASE**

22 The Division relies heavily on *T.W.M. Custom Framing v. Indus. Comm. of Arizona*, 198
23 Ariz. 41 (App. 2000) (which the Division mistakenly cites as an Arizona Supreme Court case) to
24 bolster its position that telephonic testimony is appropriate in this matter. The Court did not pass
25 on the appropriateness of telephonic testimony in general. The issue before the Court was whether
26 the Court of Appeals could review independently the factual findings of the ALJ since one witness
27

1 testified by telephone and another by deposition. At least nine (9) other witnesses testified in
2 person. *See, T.W.M.*, 198 Ariz. at 47-48.

3 Important to the Court of Appeals decision was the fact that, “only two of the witnesses
4 failed to personally appear before the ALJ and in neither of those instances did TWM’s counsel
5 object to the proffered testimony.” *See id.* at p. 48. The Court concluded that it would not conduct
6 a de novo factual review, instead concluding that “substantial justice” had resulted in the case.
7 Contrary to the Division’s representation in its motion, the Court conducted no due process review.
8 Presumably because there was no objection to the admission of the testimony by TWM’s counsel.

9 The Division then relies on several out-of-state cases purporting to stand for the proposition
10 that telephonic testimony is permissible and consistent with the requirements of procedural due
11 process. However, the Division ignores the most recent Arizona Court of Appeals decision which
12 deals with this issue, *In re MH*, 211 Ariz. 255, 120 P.3d 210 (App. 2005).

13 In *MH*, the Court confronted the issue of telephonic testimony in the context of a
14 commitment hearing. The Court reviewed numerous cases with divergent outcomes regarding the
15 appropriateness of telephonic testimony. *MH*, 211 Ariz. at 259-60 (collecting cases). The Court
16 quoting from the United States Supreme Court noted that: “[in] almost every setting where
17 important decisions turn on questions of fact, due process requires an opportunity to confront and
18 cross-examine adverse witnesses.” *MH*, 211 Ariz. at 260, (quoting, *Goldberg v. Kelly*, 397 U.S.
19 254, 269, 90 S.Ct. 1011, (1970). After concluding that the Sixth Amendment does not guarantee a
20 right to cross-examination and confrontation in and of itself, the Court concluded that to deny
21 face-to-face confrontation, the proponent of telephonic testimony must show:

22 The denial of face-to-face confrontation was “[1] necessary to further an important
23 public policy and . . . [2] the reliability of the testimony was otherwise assured.
24 [citation omitted] These two factors represent the appropriate constitutional test
for evaluating the telephonic testimony permitted here.

25 *MH*, 211 Ariz. at 260. The Court ultimately concluded that due to the truncated timeline under
26 which commitment hearings are conducted, the important public policy of providing health care
27 treatment where necessary, and the truly expedited nature of the proceeding such that the witness

1 did not have time to arrange travel to testify in person, that the first element of this test was met.
2 The Court also concluded that there were sufficient indications that the testimony was reliable in
3 satisfaction of the second element of this test.

4 Here, however, there is no important public policy that would excuse Smith from testifying
5 in person, as opposed to telephonically. Certainly, a short time frame would not provide sufficient
6 excuse. The Division and presumably its witness, Smith, have known about the date of this hearing
7 for months. There is simply no justification for allowing telephonic testimony. And Smith should
8 be required to travel in person to provide testimony.

9 III.

10 **IN THE ALTERNATIVE, THE HEARING SHOULD BE CONTINUED**
11 **TO ALLOW THE DEPOSITION OF SMITH**

12 Should the motion to require Smith to testify in person be denied, Respondents request, in
13 the alternative, that the hearing be continued and that they be allowed to take the flight to Montrose
14 to depose Smith in person. There is no need to rush this hearing. The TC&D is in effect and there
15 is no activity on-going with respect to the Respondents in this matter. Continuing the hearing for a
16 short time will not result in any prejudice to the Division and will allow Respondents the right to
17 confront Smith face-to-face.

18 IV.

19 **CONCLUSION**

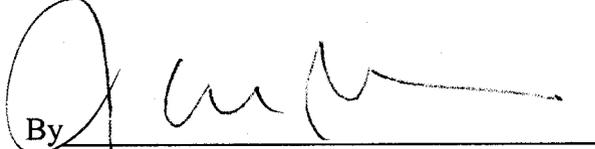
20 For each of the foregoing reasons, Respondents respectfully request that Smith be required
21 to appear in person to provide testimony at the hearing of this matter. In the alternative,
22 Respondents request that the hearing be continued for a minimum of thirty (30) days to allow
23 Respondents the opportunity to take the deposition of Smith in Montrose, Colorado.

24
25 ...
26 ...
27 ...

ROSKA DeWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 RESPECTFULLY SUBMITTED this 30th day of October, 2006.

2 ROSKA DeWULF & PATTEN, PLC

3
4 By 

5 Paul J. Roshka, Jr., Esq.
6 James M. McGuire, Esq.
7 One Arizona Center
8 400 East Van Buren Street, Suite 800
9 Phoenix, Arizona 85004
10 602-256-6100 (telephone)
11 602-256-6800 (facsimile)
12 Attorneys for Respondents

13 ORIGINAL and thirteen copies of the foregoing
14 filed this 30th day of October, 2006 with:

15 Docket Control
16 Arizona Corporation Commission
17 1200 West Washington Street
18 Phoenix, Arizona 85007

19 Copy of the foregoing hand-delivered
20 this 30th day of October, 2006 to:

21 Marc E. Stern, Hearing Officer
22 Hearing Division
23 Arizona Corporation Commission
24 1200 West Washington Street
25 Phoenix, Arizona 85007

26 Shoshana O. Epstein
27 Securities Division
Arizona Corporation Commission
1300 West Washington Street, 3rd Floor
Phoenix, Arizona 85007

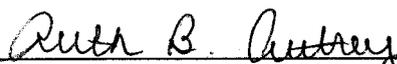
28 
29 Stout.ACC/pld/Response to Division's MO Allow Telephonic Testimony.doc

Exhibit A

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<input type="radio"/> Coach: \$242 <input type="radio"/> First: N/A	6:30 AM Montrose, CO	10:22 AM Phoenix, AZ	7660 / 6115 Stops: DEN	Detail 3 h 5:	
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Depart

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