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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

In the matter of:

EDWARD A. PURVIS and MAUREEN H. PURVIS, husband and wife
2131 W. Shannon
Chandler, Arizona 85224

GREGG L. WOLFE and ALLISON A. WOLFE, husband and wife
2092 W. Dublin Lane
Chandler, Arizona 85224

NAKAMI CHI GROUP MINISTRIES INTERNATIONAL, (a/k/a NCGMI), a Nevada corporation sole
4400 N. Scottsdale Road, Suite 9-231
Scottsdale, Arizona 85251

JAMES W. KEATON, Jr. and JENNIFER KEATON, husband and wife
11398 E. Whitehorn Drive, Apt. D
Scottsdale, Arizona 85255

ACI HOLDINGS, INC., a Nevada corporation
17650 N. 25th Avenue
Phoenix, Arizona 85023

Respondents.

DOCKET NO. S-20482A-06-0631

SECURITIES DIVISION'S MOTION TO ALLOW TELEPHONIC TESTIMONY

Arizona Corporation Commission
DOCKETED
MAY 16 2007
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The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witnesses Catherine Barnowsky, Janet Holt, Ralph Holt, Michael Buktas and JoAnn Brundege during the hearing of the above-referenced matter beginning on June 11, 2007. This request is submitted on the grounds that, although these individuals can provide testimony that will provide key information at this administrative hearing, special circumstances prevent their 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 16th day of May, 2007.

By _____
Rachel Frazier Strachan
Attorney for the Securities Division of the
Arizona Corporation Commission

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Division anticipates calling Cathy Barnowsky ("Barnowsky"), Janet and Ralph Holt (the "Holts"), Michael Buktas ("Buktas") and JoAnn Brundege ("Brundege") as central witnesses to this hearing. These witnesses can offer probative testimony as to this case, and, in so doing, they can provide evidence supporting a number of the allegations brought by the Division in this case. Cathy Barnowsky lives out of state in Wisconsin. The Holts live out of state in Montana. Michael Buktas is currently serving as a missionary in South America. JoAnn Brundege lives out of state in Washington. As such, the burdensome task of traveling to Phoenix to provide testimony in person is impractical.

These prospective witnesses offer highly probative evidence in this matter, yet face one or more obstacles that prevent their 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 the Holts, Barnowsky, Buktas and Brundege 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 telephonic testimony in administrative proceedings is permissible and consistent with the requirements of procedural due process. In *T.W.M. Custom Framing v. Industrial Commission of Arizona*, 198 Ariz. 41 (2000), for instance, the appellant challenged an validity of an ALJ's judgment, partly on the fact that the ALJ had allowed an Industrial Commission witness to appear telephonically. The Court initially noted that telephonic testimony was superior to a mere transcription of testimony because the telephonic medium "preserves paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in making determinations of credibility." *See T.M.W. Custom Framing,* 198 Ariz. at 48. The court then went on to recognize that "ALJs

are not bound by formal rules of evidence or procedure and are charged with conducting the 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."

Other courts have reached similar conclusions with respect to the use of telephonic testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of Industrial Relations,* 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was asked to review a trial court's determination that a hearing officer's admittance of an inspector's telephonic testimony violated C & C's due process rights and prejudiced C & C by preventing it from cross-examining the inspector's notes. The appellate court rejected the trial court's conclusions, holding that 1) cross-examination was available to C & C; and 2) that administrative hearing of this nature need not be conducted according to the technical rules relating to evidence and witnesses. *C & C Partners, 70 Cal.App.4th at* 612. In making this determination, the court 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:

> "a pragmatic solution, made possible by modern technology, which attempts to reconcile the problem of geographically separated adversaries 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.*

Based on similar reasoning, a number of other state courts have recognized that, in the case of administrative and sometimes civil proceedings, telephonic testimony is permissible and consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment Division*, 72 Or. App. 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division's procedure to conduct entire hearing telephonically; court found telephonic hearing fair if 1) parties have adequate opportunity to present and discuss evidence; 2) to cross-examine witnesses;

and 3) the demeanor and credibility of the witnesses can be adequately judged.); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238, 369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing). Ultimately, courts considering this issue have reached the conclusion that, at least in the case of administrative hearings, "fundamental fairness" is not compromised by permitting telephonic testimony.

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

B. *The Arizona Corporation Commission Has a Well-Recognized History of Permitting Telephonic Testimony during the Course of Administrative Hearings.*

In light of the relaxed evidentiary and procedural rules governing administrative hearings in this state, and because telephonic testimony does not jeopardize the fundamental fairness underlying these proceedings, this tribunal has repeatedly recognized and approved the use of telephonic testimony in administrative hearings to introduce probative evidence. This position has been borne out of a number of previous hearings. *See, e.g., In the matter of Calumet Slag, et al.,* Docket No. S-03361A-00-0000*; In the matter of Chamber Group, et al.,* Docket No. 03438A-00-0000*; In the matter of Joseph Michael Guess, Sr., et al., Docket No. S-03280A-00-0000; In the matter of Forex Investment Services,* Docket No. S-03177A-98-000.

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

III. CONCLUSION

Permitting Cathy Barnowsky, Janet Holt, Ralph Holt, Michael Buktas and JoAnn Brundege to testify telephonically at the upcoming administrative hearing allows the Division to present relevant witness evidence that is expected to be reliable and probative, is fundamentally fair, 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 16th day of May, 2007.

By _____
Rachel Frazier Strachan
Attorney for the Securities Division of the
Arizona Corporation Commission

ORIGINAL AND THIRTEEN (13) COPIES of the foregoing filed this 16th day of May, 2007, with

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