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BEFORE THE ARIZONA CORPORATION COMMISSION

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2010 MAY 25 P 4: 42

KRISTIN K. MAYES, Chairman  
GARY PIERCE  
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SANDRA D. KENNEDY  
BOB STUMP

SECURITIES DIVISION  
DOCKET CONTROL

In the matter of:  
MARK W. BOSWORTH and LISA A. BOSWORTH, husband and wife;  
STEPHEN G. VAN CAMPEN and DIANE V. VAN CAMPEN, husband and wife;  
MICHAEL J. SARGENT and PEGGY L. SARGENT, husband and wife;  
ROBERT BORNHOLDT and JANE DOE BORNHOLDT, husband and wife;  
MARK BOSWORTH & ASSOCIATES, L.L.C., an Arizona limited liability company;  
3 GRINGOS MEXICAN INVESTMENTS, L.L.C., an Arizona limited liability company;  
Respondents.

DOCKET NO. S-20600A-08-0340

SECURITIES DIVISION'S MOTION TO ALLOW TELEPHONIC TESTIMONY

(Assigned to the Honorable Marc E. Stern)

Arizona Corporation Commission

DOCKETED

MAY 25 2010

DOCKETED BY [Signature]

The Securities Division ("the Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of out-of-town witness Robert Bornholdt during the hearing of this matter beginning on June 7, 2010. Mr. Bornholdt can and will provide relevant testimony at the hearing; however, special circumstances prevent his actual, physical appearance in Phoenix, Arizona at that time. For this reason and others addressed in the following Memorandum of Points and Authorities, the Division's Motion to Allow Telephonic Testimony should be granted.



1 Bornholdt to testify by telephone will not cause undue prejudice to any party as it retains all indicia  
2 of reliability and preserves Respondents' right to cross-examination.

3 Consistent with these administrative rules, courts have routinely acknowledged that  
4 telephonic testimony in administrative proceedings is permissible and consistent with the  
5 requirements of procedural due process. See A.A.C. R2-19-114. In *T.W.M. Custom Framing v.*  
6 *Industrial Commission of Arizona*, 198 Ariz. 41 (2000), for instance, the appellant challenged the  
7 validity of an ALJ's judgment partly on the fact that the ALJ had allowed two of the Industrial  
8 Commission's witnesses to appear telephonically. The Court initially noted that telephonic  
9 testimony was superior to a mere transcription of testimony because the telephonic medium  
10 "preserves paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in  
11 making determinations of credibility." See *T.M.W. Custom Framing*, 198 Ariz. at 48. The court  
12 then went on to recognize that "ALJs are not bound by formal rules of evidence or procedure and  
13 are charged with conducting the hearing in a manner that achieves substantial justice." *Id.* at 48,  
14 citing A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic  
15 testimony offered in this case was fully consistent with the requirement of "substantial justice."

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

1 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings  
2 involving telephonic testimony as:

3  
4 “a pragmatic solution, made possible by modern technology, which  
5 attempts to reconcile the problem of geographically separated adversaries  
6 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.*

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) (court permitted telephonic expert testimony in commitment hearing).  
13 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of  
14 administrative hearings, “fundamental fairness” is not compromised through the allowance of  
15 telephonic testimony.

16 The telephonic testimony request in the present case fits squarely within the tenor of these  
17 holdings. The Division is seeking to introduce the telephonic testimony of a witness that, absent  
18 undue hardship, could and would appear in a Phoenix hearing room. The prospective testimony of  
19 this witness will be “substantial, reliable and probative,” and it will meet all requirements of  
20 substantial justice. In other words, evidence bearing on the outcome of this trial will not be barred  
21 and Respondents will still have every opportunity to question the witness about his testimony  
22 and/or about any exhibits discussed.

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

25 In light of the relaxed evidentiary and procedural rules governing administrative hearings  
26 in this state and because telephonic testimony does not jeopardize the fundamental fairness

1 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of  
2 telephonic testimony in its administrative hearings to introduce probative evidence. This position  
3 has been borne out in a number of previous hearings. *See, e.g., In the matter of Calumet Slag, et*  
4 *al.,* Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.,* Docket No.  
5 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.,* Docket No. S-03280A-00-  
6 0000; *In the matter of Forex Investment Services,* Docket No. S-03177A-98-000.

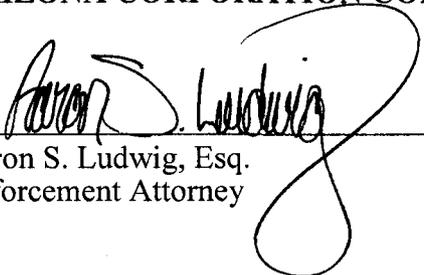
7 Consistent with past determinations in this forum, leave to introduce the telephonic  
8 testimony of this prospective witness is warranted.

9 **III. CONCLUSION**

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

15 RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of May 2010.

16  
17 **SECURITIES DIVISION of the**  
**ARIZONA CORPORATION COMMISSION**

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Aaron S. Ludwig, Esq.  
Enforcement Attorney

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23 **ORIGINAL and 8 COPIES** of the foregoing filed  
this 25<sup>th</sup> day of May 2010 with:

24 Docket Control  
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26 Phoenix, AZ 85007

1 **COPY** of the foregoing mailed/delivered  
this 25<sup>th</sup> day of May 2010 to:

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