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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2010 JUN 21 P 2: 55

Arizona Corporation Commission

DOCKETED

JUN 21 2010

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

AZ CORP COMMISSION  
DOCKET CONTROL

DOCKETED BY	<i>[Signature]</i>
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n the matter of:

FIVE STAR TREE SERVICE AND  
LANDSCAPING, LLC, an Arizona limited  
liability company,

RICHARD MCCULLUM, JR., a married man

and

LEAH ATWOOD, a married woman

Respondents.

DOCKET NO. S-20715A-09-0564

SECURITIES DIVISION'S MOTION TO  
ALLOW TELEPHONIC TESTIMONY

Hearing Dates: June 29 - 30, 2010

(Assigned to the Hon. Marc E. Stern)

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witnesses during the hearing of the above-referenced matter beginning on June 29, 2010. The following out of town witnesses are expected to be called to provide testimony regarding the investment offer and/or sale and related documents:

1. Bruce Wring, Memphis, Tennessee
2. Michael R. Wickens, Albuquerque, New Mexico

This request is submitted on the grounds that, although these individuals can provide testimony that will provide relevant 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.

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**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

The Division anticipates calling Bruce Wring (“Mr. Wring”) and Michael R. Wickens (“Mr. Wickens”) as investor witnesses to this hearing. The witnesses will offer probative testimony as to this case. In so doing, they can provide evidence supporting a number of the allegations brought by the Division in this case. Mr. Wring is located in Memphis Tennessee and Mr. Wickens resides in Albuquerque, New Mexico. As such, the burdensome task of traveling to Phoenix to provide testimony in person is impractical for these witnesses.

The prospective witnesses above can offer highly probative evidence in this matter, yet faces 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).

...

1 Pursuant to A.A.C. R2-19-114, an administrative law judge (“ALJ”) may grant a motion  
2 for telephonic testimony if 1) personal attendance by a witness will present an undue hardship; 2)  
3 telephonic testimony will not cause undue prejudice to any party; and 3) the proponent of the  
4 telephonic testimony pays for the cost of obtaining the testimony telephonically. Allowing Mr.  
5 Wring and Mr. Wickens to testify by telephone does not provide any undue prejudice to any  
6 party and retains all indicia of reliability and preserves Respondents’ right to cross-examination.

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

20 Other courts have reached similar conclusions with respect to the use of telephonic  
21 testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of*  
22 *Industrial Relations*, 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was  
23 asked to review a trial court’s determination that a hearing officer’s admittance of an inspector’s  
24 telephonic testimony violated C & C’s due process rights and prejudiced C & C by preventing it  
25 from cross-examining the inspector’s notes. The appellate court rejected the trial court’s  
26 conclusions, holding that 1) cross-examination was available to C & C; and 2) that administrative

1 hearing of this nature need not be conducted according to the technical rules relating to evidence  
2 and witnesses. *C & C Partners, 70 Cal.App.4th at 612*. In making this determination, the court  
3 in *C & C Partners* found particularly instructive a passage from *Slattery v. Unemployment Ins.*  
4 *Appeals Bd., 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976)*, another matter involving the  
5 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings  
6 involving telephonic testimony as:

7           “a pragmatic solution, made possible by modern technology, which  
8           attempts to reconcile the problem of geographically separated adversaries  
9           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*.

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

19           The telephonic testimony request in the present case fits squarely within the tenor of these  
20 holdings. The Division is seeking to introduce the telephonic testimony of witnesses that could  
21 otherwise appear in a Phoenix hearing room without causing undue hardship to the witnesses; the  
22 prospective testimony of these witnesses will be “substantial, reliable and probative,” and will  
23 meet all requirements of substantial justice. In other words, evidence bearing on the outcome of  
24 this trial will not be barred, and respondents will still have every opportunity to question the  
25 witnesses about their testimony and/or about any exhibits discussed.

26 ...



1 ORIGINAL AND EIGHT (8) COPIES of the foregoing  
2 filed this 21<sup>st</sup> day of June, 2010, with

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington  
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered this  
8 21<sup>st</sup> day of June, 2010, to:

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