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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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COMMISSIONERS

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ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL

GARY PIERCE, Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

DOCKETED BY

In the matter of: )  
 )  
David E. Walsh and Lorene Walsh, )  
respondent and spouse, doing business as New )  
York Networks, Inc., a dissolved Delaware )  
corporation formerly known as Jubilee )  
Acquisition Corporation and as Caliper )  
Acquisition Corporation, The New York Network, )  
Inc., a revoked Nevada corporation, and The New )  
York Networks, Inc., an entity of unknown origin, )  
 )  
Christopher A. Jensen and Julie Shayne Jensen, )  
respondent and spouse, )  
 )  
Rodolfo Preciado and Jane Doe Preciado )  
respondent and spouse,, )  
 )  
Respondents. )

DOCKET NO. S-20726A-10-0062

SECURITIES DIVISION'S MOTION  
TO ALLOW TELEPHONIC TESTIMONY

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witness Tona Bowen during the hearing of the above-referenced matter scheduled to begin on April 4, 2011. Ms. Bowen resides outside the state of Arizona and is expected to be called to provide testimony regarding her investment with the Respondents.

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 prevent her 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 granted.

1

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 The Division anticipates calling Tona Bowen (“Ms. Bowen”) as a central witness to this  
5 hearing. The witness can offer probative testimony as to this case. In so doing, she can provide  
6 evidence supporting a number of the allegations brought by the Division in this case. Ms. Bowen  
7 resides in California and the burdensome task of traveling to Phoenix to provide testimony in person  
8 is impractical for this witness.

9 The prospective witness above can offer highly probative evidence in this matter, yet she  
10 faces one or more obstacles that prevent her appearance at this hearing. The simple and well-  
11 recognized solution to this problem is to allow for telephonic testimony. Through this manner,  
12 not only will relevant evidence be preserved and introduced, but all parties will have a full  
13 opportunity for questioning - whether by direct or cross-examination.

14 **II. ARGUMENT**

15 **A. *Telephonic Testimony in Administrative Hearings is Supported Both***  
16 ***Under Applicable Administrative Rules and through Court Decisions***

17 The purpose of administrative proceedings is to provide for the fair, speedy and cost  
18 effective resolution of administratively justiciable matters. To effectuate that purpose, the  
19 legislature provided for streamlined proceedings and relaxed application of the formal rules of  
20 evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of  
21 contested administrative cases. The evidence submitted in an administrative hearing need not  
22 rise to the level of formality required in a judicial proceeding, as long as it is “substantial, reliable  
23 and probative.” In addition, the Commission promulgated rules of practice and procedure to  
24 ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,*  
25 A.A.C. R14-3-101(B); R14-3-109(K).

26 Pursuant to A.A.C. R2-19-114, an administrative law judge (“ALJ”) may grant a motion

1 for telephonic testimony if 1) personal attendance by a witness will present an undue hardship; 2)  
2 telephonic testimony will not cause undue prejudice to any party; and 3) the proponent of the  
3 telephonic testimony pays for the cost of obtaining the testimony telephonically. Allowing Ms.  
4 Bowen to testify by telephone does not provide any undue prejudice to any party, retains all  
5 indicia of reliability and preserves 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 consistent with the  
8 requirements of procedural due process. *See* A.A.C. R2-19-114. In *T.W.M. Custom Framing v.*  
9 *Industrial Commission of Arizona*, 198 Ariz. 41 (2000), the appellant challenged the validity of  
10 an ALJ's judgment, partly based on the fact that the ALJ had allowed two of the Industrial  
11 Commission's witnesses to appear telephonically. The Court initially noted that telephonic  
12 testimony was superior to a mere transcription of testimony because the telephonic medium  
13 "preserves paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in  
14 making determinations of credibility." *See T.M.W. Custom Framing*, 198 Ariz. at 48. The court  
15 then went on to recognize that "ALJs are not bound by formal rules of evidence or procedure and  
16 are charged with conducting the hearing in a manner that achieves substantial justice." *Id.* at 48,  
17 *citing* A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic  
18 testimony offered in this case was fully consistent with the requirement of "substantial  
19 justice." *Id.*

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



1 COPY of the foregoing hand-delivered  
2 this 24<sup>th</sup> day of March, 2011 to:

3 Administrative Law Judge Marc Stern  
4 Arizona Corporation Commission  
5 Hearing Division  
6 1200 West Washington  
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8 COPY of the foregoing mailed and e-mailed  
9 this 24<sup>th</sup> day of March, 2011 to:

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