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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

JUN 29 2011

COMMISSIONERS

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

DOCKETED BY

In the matter of:
JOSEPH COSENZA and ANDREA BENSON, husband and wife;
U.S. MEDIA TEAM, LLC, an Arizona limited liability company;
THOMAS BRANDON and DIANE M. BRANDON, husband and wife;
CELL WIRELESS CORPORATION, a Nevada corporation, formerly known as U.S. SOCIAL SCENE, a Nevada corporation;
DAVID SHOREY and MARY JANE SHOREY, husband and wife;
Respondents.

DOCKET NO. S-20763A-10-0430

SECURITIES DIVISION'S MOTION TO ALLOW TELEPHONIC TESTIMONY

Hearing Dates: July 19-21, 2011

(Assigned to the Hon. Marc E. Stern)

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AZ CORP COMMISSION
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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 during the hearing of the above-referenced matter beginning on July 19, 2011. The following out of town witnesses are expected to be called to provide testimony regarding their investment with the Respondents:

- 1. Cindy Atkinson, Illinois
- 2. Randy Atkinson, Illinois
- 3. Terry Benson, Minnesota

1 4. Betty Benson, Minnesota

2 5. Josh Benson, Minnesota

3 This request is submitted on the grounds that, although these individuals can provide testimony
4 that will provide relevant information at this administrative hearing, special circumstances
5 prevent their actual appearance in Phoenix, Arizona during the course of this proceeding.

6 For this primary reason, and for others addressed in the following Memorandum of Points
7 and Authorities, the Division's Motion to Allow Telephonic Testimony should be allowed.

8
9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. INTRODUCTION**

11 The Division anticipates calling Cindy Atkinson, Randy Atkinson, Terry Benson, Betty
12 Benson, and Josh Benson (collectively, "witnesses") as central witnesses to this hearing. The
13 witnesses can offer probative testimony as to this case. In so doing, they can provide evidence
14 supporting a number of the allegations brought by the Division in this case. The witnesses reside in
15 Illinois and Minnesota. As such, the burdensome task of traveling down to Phoenix to provide
16 testimony in person is impractical for these witnesses.

17 The prospective witnesses above can offer highly probative evidence in this matter, yet
18 they face one or more obstacles that prevent their appearance at this hearing. The simple and
19 well-recognized solution to this problem is to allow for telephonic testimony; through this
20 manner, not only will relevant evidence be preserved and introduced, but all parties will have a
21 full opportunity for questioning - whether by direct or cross-examination.

22 **II. ARGUMENT**

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

25 The purpose of administrative proceedings is to provide for the fair, speedy and cost
26 effective resolution of administratively justiciable matters. To effectuate that purpose, the
legislature provided for streamlined proceedings and relaxed application of the formal rules of

1 evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of
2 contested administrative cases. The evidence submitted in an administrative hearing need not
3 rise to the level of formality required in a judicial proceeding, as long as it is “substantial, reliable
4 and probative.” In addition, the Commission promulgated rules of practice and procedure to
5 ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,*
6 A.A.C. R14-3-101(B); R14-3-109(K).

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

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

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

14 "a pragmatic solution, made possible by modern technology, which
15 attempts to reconcile the problem of geographically separated adversaries
16 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.

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

26 The telephonic testimony request in the present case fits squarely within the tenor of these

1 holdings. The Division is seeking to introduce the telephonic testimony of witnesses that could
 2 not otherwise appear in a Phoenix hearing room without causing undue hardship to the witnesses;
 3 the prospective testimony of these witnesses will be “substantial, reliable and probative,” and
 4 will meet all requirements of substantial justice. In other words, evidence bearing on the
 5 outcome of this hearing will not be barred, and respondents will still have every opportunity to
 6 question the witnesses about their testimony and/or about any exhibits discussed.

7 **B. *The Arizona Corporation Commission has a Well-recognized History of***
 8 ***Permitting Telephonic Testimony During the Course of Administrative***
 9 ***Hearings***

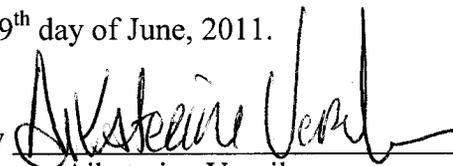
10 In light of the relaxed evidentiary and procedural rules governing administrative hearings
 11 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
 12 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
 13 telephonic testimony in their administrative hearings to introduce probative evidence. *See, e.g.,*
 14 *In the Matter of Theodore J. Hogan & Associates, LLC et al.*, Docket No. S-20714A-09-0553, *In*
 15 *the Matter of Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the Matter of Yucatan*
 16 *Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the Matter of Forex Investment Services*
 17 *Corporation, et al.*, Docket No. S-03177A-98-0000.

18 **III. CONCLUSION**

19 Permitting Cindy Atkinson, Randy Atkinson, Terry Benson, Betty Benson, and Josh
 20 Benson to testify telephonically at the upcoming administrative hearing allows the Division to
 21 present relevant witness evidence that is expected to be reliable and probative, is fundamentally
 22 fair, and does not compromise Respondents’ due process rights. Therefore, the Division
 23 respectfully requests that its motion for leave to present such telephonic testimony be granted.

24 RESPECTFULLY SUBMITTED this 29th day of June, 2011.

25 By



Aikaterine Vervilos

Attorney for the Securities Division of the
 Arizona Corporation Commission

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