

ORIGINAL



0000140051

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2012 OCT 16 A 10:48

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

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

In the matter of)
MAGLEV WIND TURBINE)
TECHNOLOGIES, INC., a Nevada)
corporation,)
MAGLEV RENEWABLE ENERGY)
RESOURCES, INC., a Wyoming corporation,)
RENEWABLE ENERGY DEVELOPMENT,)
INC., an Arizona corporation,)
RENEWABLE ENERGY SYSTEMS, INC.,)
an Arizona corporation,)
EDWARD L. MAZUR and JANE DOE)
MAZUR, husband and wife,)
RONNIE WILLIAMS and JANE DOE)
WILLIAMS, husband and wife,)
MAG T INC., a Florida corporation,)
RLGMAN CORP., a Florida corporation,)
STABLE, LLC, an inactive Florida limited)
liability company,)
RICHARD L. GREEN,)
DONALD ANDREW ROTHMAN,)
Respondents.)

DOCKET NO. S-20788A-11-0096

SECURITIES DIVISION'S
MOTION TO ALLOW
TELEPHONIC TESTIMONY

(Assigned to the
Administrative Law Judge Marc E. Stern)

Arizona Corporation Commission
DOCKETED
OCT 16 2012

DOCKETED BY
IM

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present telephonic testimony of prospective Division witnesses during the hearing of the above-referenced matter beginning on December 3, 2012. The following out-of-

1 town witnesses are expected to be called to provide testimony regarding the investment offer and
2 sale, the Respondents' business practices, or related documents:

- 3 1. Craig G. Ongley, Esq., Legal Counsel to Regenedyne, LLC; and
- 4 2. Fredrick R. Swartz, Jr., Investor.

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

8 For this primary reason, and for others addressed in the following Memorandum of Points
9 and Authorities, the Securities Division's Motion to Allow Telephonic Testimony should be
10 granted.

11 Respectfully submitted on October 16, 2012.

12
13 
14 Stephen J. Womack, Esq.
15 Securities Division
16 Arizona Corporation Commission

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. Introduction**

19 The Division anticipates calling Craig G. Ongley ("Mr. Ongley") and Fredrick R.
20 Swartz, Jr. ("Mr. Swartz") as central witnesses to this hearing. The witnesses can provide
21 probative testimony that supports a number of the allegations brought by the Division. The task
22 of traveling down to Phoenix to provide testimony in person, however, is impractical for these
23 witnesses because Mr. Ongley resides in Texas and Mr. Swartz resides in New Jersey. The
24 simple and well-recognized solution to this problem is to permit them to testify telephonically.
25 Through this manner, not only will relevant evidence be preserved and introduced, but all parties
26 will have a full opportunity for questioning, whether by direct or cross-examination.

II. Argument

A. The use of telephonic testimony in administrative hearings is supported by administrative rules and court decisions.

In administrative cases like this one, “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965). Procedural due process requires confrontation and cross-examination. The courts have acknowledged that telephonic testimony in administrative proceedings is permissible and consistent with the requirements of procedural due process. *See e.g., T.W.M. Custom Framing v. Industrial Comm’n of Arizona*, 198 Ariz. 41, 6 P.3d 745 (App. 2000). The courts have also held that the Arizona Rules of Civil Procedure do not necessarily preclude telephonic testimony. *See In re MH 2004-001987*, 211 Ariz. 255, 258-59, 120 P.3d 210, 213-14 (App. 2005); *Arizona Dep’t of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997), citing *Murray v. Murray*, 894 P.2d, 607, 608 (Wyo. 1995) (holding an appearance by conference call meets the constitutional requirement of a meaningful opportunity to be heard); *see also* A.A.C. R14-3-101 and ARIZ. R. CIV. P. 43(f). In a civil case, “appearance by telephone is an appropriate alternative to personal appearance.” *Valentine*, 190 Ariz. at 110, 945 P.2d at 831. While the fact-finder’s ability to observe the demeanor of the witness is limited, “the fact-finder can at least consider the pacing of the witness’s responses and the tenor of his voice” to determine the credibility of the witness. *Sabori v. Kuhn*, 199 Ariz. 330, 332-33, 18 P.3d 124, 126-27 (App. 2001); *see also T.W.M. Custom Framing*, 198 Ariz. at 48, 6 P.3d at 752 (noting “the telephonic medium preserves the paralinguistic features such as pitch, intonation, and pauses that may assist [the fact-finder] in making determinations of credibility”).

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 that could otherwise appear in a Phoenix hearing room without causing undue hardship to the witnesses, the prospective testimony of these witnesses will be “substantial, reliable and probative,” and the use

1 of telephonic testimony will meet all requirements of substantial justice. In other words,
2 evidence bearing on the outcome of this trial will not be barred and respondents will still have
3 every opportunity to question the witnesses about their testimony or about any exhibits discussed.

4 **B. The Arizona Corporation Commission has a well-recognized history of permitting**
5 **telephonic testimony during the course of administrative hearings.**

6 In light of the relaxed evidentiary and procedural rules governing administrative hearings
7 in this state and because telephonic testimony does not jeopardize the fundamental fairness
8 underlying these proceedings, this Commission has repeatedly recognized and approved the use
9 of telephonic testimony in their administrative hearings to introduce probative evidence. *See*
10 A.A.C. R14-3-101(B); A.A.C. R14-3-109(K). This position has been borne out in a number of
11 previous administrative hearings before the Commission. *See, e.g., In the matter of Calumet*
12 *Slag, et al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No.
13 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No. S-03280A-00-
14 0000; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000; and *In the*
15 *Matter of Radical Bunny, LLC, et al.*, Docket No. S-20660A-09-0107.

16 Accordingly, granting leave to introduce the telephonic testimony of the Division's
17 prospective witnesses is consistent with customary practice in administrative hearings before the
18 Commission.

19
20 ...

21 ...

22 ...

23

24

25

26

1 **ORIGINAL** of the foregoing and 8 copies delivered on October 16, 2012, with:

2 Docket Control
3 Arizona Corporation Commission
4 1200 W. Washington St.
Phoenix, AZ 85007

5 **COPY** of the foregoing delivered on October 16, 2012, to:

6 Administrative Law Judge Marc E. Stern
7 Hearing Division
8 Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

9 **COPY** of the foregoing mailed on October 16, 2012, to:

10 Edward L. Mazur
11 6304 E. De Mello St.
12 Hereford, AZ 85615

13 Ronnie Williams
14 3617 Blackbird Dr.
Sierra Vista, AZ 85635

15 Douglas F. Behm, Esq.
16 Douglas F. Behm, PLLC
17 14362 N. Frank Lloyd Wright Blvd., Suite 1000
Scottsdale, AZ 85260

18
19 By: _____

