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MEMORANDUM OF POINTS AND AUTHORITIES

3 **I. INTRODUCTION**

4 The Division anticipates calling Mrs. Aiken Toth as a relevant witness to this hearing as she
5 can provide probative testimony that supports a number of the allegations brought by the Division.
6 Mrs. Aiken Toth is expected to testify briefly regarding key transactions with Respondent Richard
7 Schmerman; however, she is not available to testify in person on the hearing dates currently
8 scheduled. The simple and well-recognized solution to this problem is to allow for telephonic
9 testimony.

10 **II. ARGUMENT**

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

13 In administrative cases like this one, “[t]he fundamental requirement of due process is the
14 opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v.*
15 *Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965).
16 Procedural due process requires confrontation and cross-examination. The courts have
17 acknowledged that telephonic testimony in administrative proceedings is permissible and
18 consistent with the requirements of procedural due process. *See e.g., T.W.M. Custom Framing v.*
19 *Industrial Comm’n of Arizona*, 198 Ariz. 41, 6 P.3d 745 (App. 2000).

20 The courts have also held that the Arizona Rules of Civil Procedure do not necessarily
21 preclude telephonic testimony. *See In re MH 2004-001987*, 211 Ariz. 255, 258-59, 120 P.3d
22 210, 213-14 (App. 2005); *Arizona Dep’t of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d
23 828, 831 (App. 1997) (citing *Murray v. Murray*, 894 P.2d, 607, 608 (Wyo. 1995) (holding an
24 appearance by conference call meets the constitutional requirement of a meaningful opportunity
25 to be heard)). In a civil case, “appearance by telephone is an appropriate alternative to personal
26 appearance.” *Valentine*, 190 Ariz. at 110, 945 P.2d at 831.

1 While the fact-finder's ability to observe the demeanor of the witness is limited, "the fact-
2 finder can at least consider the pacing of the witness's responses and the tenor of his voice" to
3 determine the credibility of the witness. *Sabori v. Kuhn*, 199 Ariz. 330, 332-33, 18 P.3d 124,
4 126-27 (App. 2001); *see also T.W.M. Custom Framing*, 198 Ariz. at 48, 6 P.3d at 752 (noting
5 "the telephonic medium preserves the paralinguistic features such as pitch, intonation, and pauses
6 that may assist [the fact-finder] in making determinations of credibility").

7 The Arizona Corporation Commission promulgated Rules of Practice and Procedure that
8 were intended to "be liberally construed to secure just and speedy determination of all matters
9 presented to the Commission." *See* A.A.C. R14-3-101(B). The rules encompass the use of other
10 forms of testimony during administrative hearings: "In conducting any investigation, inquiry, or
11 hearing, neither the Commission, nor any officer or employee thereof shall be bound by the
12 technical rules of evidence, and no informality in any proceeding or in the manner of taking of
13 testimony shall invalidate any order, decision, rule, or regulation made, approved, or confirmed
14 by the Commission." *See* A.A.C. R14-3-109(K).

15 Permitting the telephonic testimony of these witnesses at the administrative hearing will
16 meet the constitutional requirement of providing Respondents with a meaningful opportunity to
17 be heard. Evidence bearing on the outcome of this hearing will not be barred, and Respondents
18 will still have every opportunity to question the witnesses about their testimony and/or about any
19 exhibits discussed.

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

22 In light of the relaxed evidentiary and procedural rules governing administrative hearings
23 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
24 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
25 telephonic testimony to introduce probative evidence in administrative hearings. *See, e.g., In the
26 matter of Patrick Leonard Shudak, et al.*, Docket No. S-20859A-12-0413; *In the matter of*

1 *Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553; *In the matter of*
2 *Yucatan Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Forex Investment*
3 *Services Corporation et al.*, Docket No. S-03177A-98-0000.

4 Accordingly, granting leave to introduce the telephonic testimony of the Division's
5 prospective witness is consistent with the rules and customary practice in administrative hearings
6 before the Commission.

7 **III. CONCLUSION**

8 By allowing the telephonic testimony of Mrs. Aiken Toth, not only will relevant evidence
9 be preserved and introduced, but all parties will have a full opportunity for questioning - whether
10 by direct or cross-examination. Telephonic testimony will enable the Division to present relevant
11 evidence that is expected to be reliable and probative, and does not compromise Respondents' due
12 process rights. Therefore, the Division respectfully requests that its motion for leave to present
13 such telephonic testimony be granted.

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15 Respectfully submitted this 10th day of September, 2013.

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17 By:



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