

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION
DOCKET CONTROL

COMMISSIONERS

2013 DEC 5 AM 9 13

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

In the matter of:

JONATHON JAMES MURRAY and
WENDY LYNN MURRAY, husband and
wife;

Respondents.

DOCKET NO. S-20883A-13-0112

SECURITIES DIVISION'S MOTION TO
ALLOW TELEPHONIC TESTIMONY

The Securities Division of the Arizona Corporation Commission requests leave to present the telephonic testimony of Nischal Ram, John Collins, Randall Flowerdew, and/or Brian Guenther during the hearing in the above-referenced matter. Each prospective witness possesses knowledge relevant to matters in dispute. All of the witnesses reside outside the state; specifically, in Canada. Requiring them to appear in Phoenix, Arizona, would be prohibitively burdensome. Permitting these prospective witnesses to appear and give testimony telephonically solves this problem while facilitating the preservation and introduction of relevant information and a full opportunity for questioning by all parties. Accordingly, good cause exists for granting such leave and doing so would not infringe upon the Respondents' procedural due process rights. For these reasons, which are more thoroughly addressed in the following Memorandum of Points and Authorities, this motion should be granted.

RESPECTFULLY SUBMITTED this 5th day of December, 2013.

Arizona Corporation Commission
DOCKETED
DEC 05 2013 .

Stacy L. Luedtke, Staff Attorney for the Securities
Division

DOCKETED BY

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

The Securities Division (“Division”) of the Arizona Corporation Commission (“Commission”) anticipates calling Nischal Ram, John Collins, Randall Flowerdew, and/or Brian Guenther as a central witnesses during the hearing in this matter. These individuals are investors in the investments referenced in the Notice, and can provide probative testimony that supports a number of the allegations brought by the Division. Respondent Jon Murray primarily solicited and sold securities in or from Arizona to Canadian citizens. The burden of traveling to Phoenix to provide testimony in person, however, is impractical for these witnesses because they reside in Canada. The simple and well-recognized solution to this problem is to permit them to testify telephonically. Through this manner, not only will relevant evidence be preserved and may be introduced, but all parties will have a full opportunity for questioning, whether by direct or cross-examination of these witnesses.

II. Argument**A. Good cause exists for permitting telephonic testimony.**

“When considering telephonic testimony, the initial inquiry should be whether good cause has been shown for its use.” *In re HM-2008-000867*, 225 Ariz. 178, 182, 236 P.3d 405, 409 (2010). “In determining whether good cause has been demonstrated, the court may consider whether the hearing can conveniently be continued to allow in-person testimony.” *In re HM*, 225 Ariz. at 181 n.4, 236 P.3d at 408 n.4. “It may also consider the costs of bringing experts or other witnesses to court...” *Id.* In the instant case, the above witnesses possess relevant knowledge of the subject investment offer and sale, the Respondent Jon Murray’s business practices, and related documents, but, because they reside in Canada, they are practically unavailable for in-person testimony.

These witnesses are not merely out of town on the dates set for hearing, but live in Canada and were Canadian residents at the time Respondent Jon Murray solicited them for the investments

1 at issue. They would be unavailable to testify in person even on a rescheduled hearing date.
2 Additionally, the cost of bringing the witnesses to Phoenix would be prohibitively expensive for
3 the Division. Moreover, it is anticipated that the above witnesses would testify under direct
4 examination for less than an hour each. Given this amount of testimony, traveling from Canada is
5 all the more impractical. Permitting the witnesses to appear telephonically would greatly reduce
6 the burden of presenting their testimony on both the witnesses and the Division.

7 Therefore, good cause exists for permitting the above-referenced witnesses to testify by
8 telephone.

9 **B. Permitting telephonic testimony does not infringe upon the Respondent's procedural**
10 **due process rights and is within the Commission's administrative rules and practice.**

11 Upon finding good cause for using telephonic testimony, consideration should be given to
12 "whether admission of telephonic testimony comported with due process." *In re HM*, 225 Ariz. at
13 182, 236 P.3d at 409. What constitutes due process "is not a technical conception with a fixed
14 content unrelated to time, place and circumstances," but, rather, takes into account "such
15 procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319,
16 334 (1976) (internal quotations omitted). In a civil administrative proceeding, procedural due
17 process requires balancing: (1) the individual's interests; (2) government's interests; and (3) the
18 "likely impact of telephonic testimony on the accuracy and fairness of the process." *In re HM*, 225
19 Ariz. at 182, 236 P.3d at 409.

20 The competing interests are protected by procedural safeguards inherent in telephonic
21 testimony. Individuals have an interest in due process, property and liberty. Government interests
22 typically include, among other things, protecting the public from harm (*id.*) and in "conserving
23 fiscal and administrative resources." *Mathews*, 424 U.S. at 347-48. Witnesses appearing by
24 telephone are subject to cross examination. *In re HM*, 225 Ariz. at 182, 236 P.3d at 409.
25 Moreover, telephonic testimony "preserves paralinguistic features such as pitch, intonation, and
26 pauses that may assist an ALJ in making determinations of credibility." *T.W.M. Custom Framing*
v. Indus. Comm'n of Ariz., 198 Ariz. 41, 48, 6 P.3d 745, 752 (App. 2000). At the same time,

1 appearing telephonically preserves state resources that would otherwise have to be spent on travel
2 and accommodations. Accordingly, telephonic testimony “does not significantly increase the risks
3 of an erroneous deprivation.” *In re HM*, 225 Ariz. at 182, 236 P.3d at 409 .

4 Permitting telephonic testimony would have minimal negative impact on the accuracy and
5 fairness of the evidentiary process. The witnesses at issue, though appearing by telephone, would
6 be still be subject to cross examination by Respondents and the Court could still make
7 determinations of credibility based the manner in which the witnesses testify. Furthermore,
8 permitting telephonic testimony would enable the Division to present evidence that furthers the
9 Commission’s interests in protecting the public from the harm allegedly committed by the
10 Respondent Jon Murray and in conserving its financial and administrative resources. Therefore,
11 permitting the above witnesses to testify by telephone does not infringe upon Respondents’
12 procedural due process rights.

13 In addition, the Arizona Corporation Commission promulgated the Commission’s Rules of
14 Practice and Procedure that are intended to “be liberally construed to secure just and speedy
15 determination of all matters presented to the Commission.” *See* A.A.C. R14-3-101(B). They
16 encompass the use of other forms of testimony during administrative hearings. More specifically,
17 Rule R14-3-109 states, “In conducting any investigation, inquiry, or *hearing*, neither the
18 Commission, nor any officer or employee thereof shall be bound by the technical rules of
19 evidence, and no informality in any proceeding or *in the manner of taking of testimony* shall
20 invalidate any order, decision, rule, or regulation made, approved, or confirmed by the
21 Commission.” *See* A.A.C. R14-3-109(K) (emphasis added).

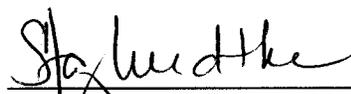
22 In light of the relaxed evidentiary and procedural rules governing administrative hearings
23 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
24 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
25 telephonic testimony in its administrative hearings to introduce probative evidence. *See, e.g., In*
26 *the matter of Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553, *In the*

1 *matter of Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of Yucatan*
2 *Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Tri-Core Companies, LLC, et*
3 *al.*, Docket No. S-20867A-12-0459. Therefore, permitting the above witnesses to testify by
4 telephone is consistent with the rules and customary practice in administrative hearings before the
5 Commission.

6 **III. Conclusion**

7 Permitting Nischal Ram, John Collins, Randall Flowerdew, and/or Brian Guenther to
8 testify telephonically at the upcoming administrative hearing allows the Division to present
9 relevant witness evidence that is expected to be reliable and probative, is fundamentally fair, and
10 does not compromise Respondents' due process rights. Therefore, the Division respectfully
11 requests that its motion for leave to present such telephonic testimony be granted.

12 RESPECTFULLY SUBMITTED this 5th day of December, 2013.

13 
14 Stacy L. Luedtke, Staff Attorney for the Securities
15 Division

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18 ORIGINAL and 9 copies of the foregoing
19 filed this 5th day of December, 2013 with:

20 Docket Control
21 Arizona Corporation Commission
22 1200 W. Washington St.
23 Phoenix, AZ 85007

24 COPY of the foregoing hand-delivered
25 this 5th day of December, 2013, to:

26 The Honorable Marc E. Stern
Administrative Law Judge
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

1 COPY of the foregoing mailed
2 this 5th day of December, 2013, to:

3 Jonathon Murray & Wendy Murray
4 10632 N Scottsdale Rd., #673
5 Scottsdale, Arizona 85254
6 *Respondents*

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