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BEFORE THE ARIZONA CORPORATION COMMISSION

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2014 JUN 30 P 2:20

AZ CORP COMMISSION
DOCKET CONTROL

In the matter of
BRIAN C. HAGEMAN, an unmarried man,
DELUGE, INC., a dissolved Delaware
corporation,
HYDROTHERM POWER
CORPORATION, a dissolved Delaware
corporation,
Respondents. **ORIGINAL**

DOCKET NO. S-20896A-13-0378

MOTION FOR TELEPHONIC TESTIMONY

Arizona Corporation Commission
DOCKETED

JUN 30 2014

DOCKETED BY

The Securities Division of the Arizona Corporation Commission requests leave to present the telephonic testimony of Leslie Jorgensen, an investor, during the hearing in the above-referenced matter. Ms. Jorgensen possesses knowledge relevant to matters in dispute. Ms. Jorgensen resides in Wyoming. Requiring her to appear in Phoenix, Arizona, would be prohibitively burdensome. Permitting Ms. Jorgensen 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 30th day of June, 2014.

Wendy Coy, Staff Attorney for the Securities
Division

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The Securities Division (“Division”) of the Arizona Corporation Commission (“Commission”) anticipates calling Leslie Jorgensen as an investor witness during the hearing in this matter. She can provide probative testimony that supports a number of the allegations brought by the Division. The burden of traveling to Phoenix to provide testimony in person, however, is impractical for this witness because she resides in Wyoming. The simple and well-recognized solution to this problem is to permit her 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 this witness.

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 witness possesses relevant knowledge of the subject investment offer and sale, the Respondents’ business practices, and related documents, but, because she resides in another state, she is unavailable for in-person testimony.

This witness is not merely out of town on the dates set for hearing, but lives out of state. She would be unavailable to testify in person even on a rescheduled hearing date. Additionally, the cost of bringing the witness to Phoenix would be prohibitively expensive for the Division. Permitting the witness to appear telephonically would greatly reduce the burden of presenting her testimony on both the witness and the Division.

1 Therefore, good cause exists for permitting the above-referenced witness to testify by
2 telephone.

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

5 Upon finding good cause for using telephonic testimony, consideration should be given to
6 "whether admission of telephonic testimony comported with due process." *In re HM*, 225 Ariz. at
7 182, 236 P.3d at 409. What constitutes due process "is not a technical conception with a fixed
8 content unrelated to time, place and circumstances," but, rather, takes into account "such
9 procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319,
10 334 (1976) (internal quotations omitted). In a civil administrative proceeding, procedural due
11 process requires balancing: (1) the individual's interests; (2) government's interests; and (3) the
12 "likely impact of telephonic testimony on the accuracy and fairness of the process." *In re HM*, 225
13 Ariz. at 182, 236 P.3d at 409.

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

25 Permitting telephonic testimony would have minimal negative impact on the accuracy and
26 fairness of the evidentiary process. The witness at issue, though appearing by telephone, would be
still be subject to cross examination by the Respondents and the Court could still make

1 determinations of credibility based the manner in which the witnesses testify. Furthermore,
2 permitting telephonic testimony would enable the Division to present evidence that furthers the
3 Commission's interests in protecting the public from the harm allegedly committed by the
4 Respondents and in conserving its financial and administrative resources. Therefore, permitting
5 the above witness to testify by telephone does not infringe upon the Respondents' procedural due
6 process rights.

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

16 In light of the relaxed evidentiary and procedural rules governing administrative hearings
17 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
18 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
19 telephonic testimony in its administrative hearings to introduce probative evidence. See, e.g., *In*
20 *the matter of Tri-Core Companies, L.L.C.*, S-20867A-12-0459, *In the matter of Theodore J. Hogan*
21 *and Associates, et al.*, Docket No. S-20714A-09-0553, *In the matter of Edward A. Purvis, et al.*,
22 Docket No. S-20482A-06-0631; *In the matter of Yucatan Resorts, Inc., et al.*, Docket No. S-
23 03539A-03-0000; *In the matter of Forex Investment Services Corporation et al.*, Docket No. S-
24 03177A-98-0000. Therefore, permitting the above witness to testify by telephone is consistent
25 with the rules and customary practice in administrative hearings before the Commission.

26 . . .

1 SERVICE LIST FOR: BRIAN C. HAGEMAN, DELUGE, INC. and HYDROTHERM
2 POWER CORPORATION

3 ORIGINAL and 8 copies of the foregoing
4 filed this 30th day of June, 2014, with:

5 Docket Control
6 Arizona Corporation Commission
7 1200 W. Washington St.
8 Phoenix, AZ 85007

9 COPY of the foregoing hand-delivered
10 this 30th day of June, 2014, to:

11 The Honorable Marc E. Stern
12 Administrative Law Judge
13 Arizona Corporation Commission
14 1200 W. Washington St.
15 Phoenix, AZ 85007

16 COPY of the foregoing mailed
17 this 9th day of May, 2014, to:

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