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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

In the Appeal of)	Docket No. OPA-PA-19-010
)	OPA-PA-20-001
GlidePath Marianas Operations, Inc.)	
)	ENGIE SOLAR'S OPPOSITION TO
Appellant.)	MOTION FOR DISCOVERY OF
)	GLIDEPATH MARIANAS
)	OPERATIONS, INC.
)	

Interested Party **ENGIE SOLAR** (“ENGIE”) hereby submits its opposition to the Motion for Discovery filed by Appellant **GLIDEPATH MARIANAS OPERATIONS, INC.** (“GlidePath”) on February 5, 2020. ENGIE opposes GlidePath’s Motion for Discovery on grounds that GlidePath has met none of the requirements a party must meet to petition an agency to order that a deposition be taken under 5 GCA § 9218 of the Administrative Adjudication Law.

BACKGROUND

During the Second Scheduling Conference held on January 29, 2020, the Public Auditor provided GlidePath the opportunity to file a motion justifying its request for discovery, noting that he would consider the request if it would save time in the presentation of the case. See Audio Transcript of Second Scheduling Conference January 29, 2020 from 7:55 to 8:26 (Available at: <http://www.opaguam.org/procurement-appeals/search-procurement-appeals#9688>) (“But if you

can make a good presentation on how it would save us time in the presenting of this case, we would consider it. Alright, by the fifth then?”).

ARGUMENT

A. 5 GCA § 9218 DOES NOT AUTHORIZE DEPOSITIONS FOR DISCOVERY PURPOSES.

GlidePath’s reliance on 5 GCA § 9218 is misplaced, as that statute does not authorize depositions for discovery purposes. In 1952, 5 GCA § 9218 was made a part of Guam law when it was copied verbatim from California Government Code § 11511 and codified as Guam Gov. Code § 24118. Guam Gov. Code § 24118 was amended once to replace the reference from “District Court” to “Superior Court” by reason of P.L. 12-85, the Court Reorganization Act. *See* Compiler’s Note to 5 GCA § 9218. Guam Gov. Code § 24118 was moved to 5 GCA § 9218. By contrast, since 1952, the language of California Government Code § 11511 has been amended three times, in 1995, 1997, and 2004, with none of those amendments substantially changing the statute.¹

¹ The current version of the California statute, in its entirety, provides that:

On verified petition of any party, an administrative law judge or, if an administrative law judge has not been appointed, an agency may order that the testimony of any material witness residing within or without the state be taken by deposition in the manner prescribed by law for depositions in civil actions under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of the testimony; a showing that the witness will be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. The petitioner shall serve notice of hearing and a copy of the petition on the other parties at least 10 days before the hearing. Where the witness resides outside the state and where the administrative law judge or agency has ordered the taking of the testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189.

California court decisions interpreting California laws adopted verbatim by Guam are persuasive authority. *Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8 ¶ 6 (“[S]ince Guam's mandamus statutes were adopted from the California Civil Code, California cases applying the mandamus standard are persuasive authority.”). In 1966, the Supreme Court of California considered whether California Government Code § 11511 permitted pre-hearing depositions. In so ruling, the Court noted that “[t]he Administrative Procedure Act (Gov.Code, ss 11501—11524), which was adopted in 1945 before pretrial discovery became a legal norm, contains no express provisions authorizing prehearing discovery in administrative proceedings.” *Shively v. Stewart*, 421 P.2d 65, 67 (Cal. 1966). The Court went on to state that “in authorizing the taking of depositions when the witness will be unable to or cannot be compelled to attend, **section 11511 provides for depositions, not for the purpose of discovery, but to secure evidence for use at the hearing.**” *Id.* (emphasis added).²

The Guam rule prohibiting discovery depositions, like the California rule, is consistent with the policy determination of the Guam Legislature that administrative proceedings should not be converted to full-scale trials and litigation. That is particularly true here, where the OPA proceedings are intended to be summary and expedited in order to promote expeditious procurement appeals. Allowing discovery depositions would convert this case to a mini-trial. Later California cases stuck to the general rule that Government Code § 11511 “permits the taking of depositions, but limits their availability to witnesses whose testimony is material and who are

² While the Supreme Court of California ultimately allowed a deposition on very narrow grounds in *Shively*, the Court only made this exception because the proceeding was quasi-criminal in nature: “Petitioners have been charged with crimes and should have the same opportunity as in criminal prosecutions to prepare their defense.” *Shively v. Stewart*, 421 P.2d at 68. Further, *Shively* involved the medical board, who was prosecuting the action, using the resources of the state to potentially deprive the petitioners of their ability to practice their profession. The nature of this procurement appeal is about as far removed as possible from a quasi-criminal disciplinary proceeding. Thus, the narrow exception afforded in *Shively* does not apply here.

unable or cannot be compelled to attend.” *Kenneally v. Med. Bd.*, 32 Cal. Rptr. 2d 504, 509 (1994), *as modified on denial of reh'g* (Aug. 23, 1994). GlidePath failed to cite any authority allowing a deposition for discovery purposes. Its motion should be denied.

B. GLIDEPATH’S MOTION DOES NOT MEET THE REQUIREMENTS OF 5 GCA § 9218.

Guam’s procurement law and regulations do not explicitly allow parties to conduct depositions. The procurement regulations provide that “[w]here not otherwise provide for by these rules and regulations or statute, and where not inconsistent herewith, hearings shall be conducted in accordance with the Administrative Adjudication Law (AAL).” 2 GAR § 12108(d). Under the AAL, an agency may only order a deposition upon a verified petition filed by the party seeking the deposition. *See* 5 GCA § 9218.

Under section 9218³, an agency *may* order the taking of testimony of a material witness only if the party seeking the deposition files a verified petition meeting the following requirements:

1. The nature of the pending proceedings,
2. The name and address of the witness whose testimony is desired,
3. A showing of the materiality of the witness’s testimony,
4. A showing that the witness will be unable or cannot be compelled to attend, and
5. A request for an order requiring the witness to appear and testify before an officer named in the petition for that purpose.

³ In its entirety, 5 GCA § 9218 provides that:

§ 9218. Depositions.

On the verified petition of any party, an agency may order that the testimony of any material witness residing within or without the territory of Guam be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceedings; the name and address of the witness whose testimony is desired, a showing of the materiality of his testimony, a showing that the witness will be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. Where the witness resides outside the territory of Guam and where the agency has ordered the taking of his testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the Superior Court.

This is a conjunctive test, meaning that in order for the agency to allow a deposition, GlidePath must file a verified petition that includes all of the information required in 5 GCA § 9218. GlidePath failed to comply with section 9218.

1. GLIDEPATH DID NOT FILE A VERIFIED PETITION.

5 GCA § 9218 provides that “[o]n the verified petition of any party, an agency may order that the testimony of any material witness residing within or without the territory of Guam be taken by deposition in the manner prescribed by law for depositions in civil actions.” GlidePath did not file a verified petition requesting the deposition it seeks. GlidePath’s Motion for Discovery cannot be substituted for a petition because it is not verified.⁴

Guam Civ. Proc. Code § 446 sets forth a form and manner of verification. A second manner of verification is permitted by 6 GCA § 4308, through a declaration filed under penalty of perjury. GlidePath failed to comply with either Section 446 or Section 4308.

The Declaration of Joshua D. Walsh in Support of Motion for Discovery attests only to the authenticity of emails between counsel for GlidePath and counsel for the Guam Power Authority (“GPA”). None of those emails provides any information regarding the nature of the pending proceedings, the name and address of the witness whose testimony is desired, a showing of the materiality of the witness’s testimony, a showing that the witness will be unable or cannot be compelled to attend, or a request for an order requiring the witness to appear and testify before an officer named in the petition for that purpose. In short, the Declaration of Joshua D. Walsh does not satisfy the verification or other requirements of 5 GCA § 9218.

⁴ Black’s Law Dictionary defines the term “verify” to mean “1. To prove to be true; to confirm or establish the truth or truthfulness of; to authenticate. 2. To confirm or substantiate by oath or affidavit; to swear to the truth of.” VERIFY, Black’s Law Dictionary (11th ed. 2019).

2. GLIDEPATH DOES NOT IDENTIFY THE PROPOSED DEPONENT

A verified petition for deposition before an agency “shall set forth . . . the name and address of the witness whose testimony is desired.” 5 GCA § 9218. GlidePath’s motion does not name the individual whose testimony it wishes to take nor does it provide that person’s address. GlidePath’s motion should be denied.

3. THERE IS NO SHOWING THAT THE UNIDENTIFIED DEPONENT CANNOT ATTEND THE HEARING

GlidePath must also make “a showing that the witness will be unable or cannot be compelled to attend.” 5 GCA § 9218. GlidePath made no such showing: there is no identification of the deponent, no efforts made to contact the deponent, no evidence that the deponent is beyond the reach of the subpoena power of the OPA, and no other showing that the witness is unable to attend the hearing or cannot be compelled to attend the hearing. On this basis alone, the motion should be denied.

C. **GLIDEPATH DOES NOT SHOW THAT ITS PROPOSED DEPOSITION WOULD SAVE TIME IN THE PREPARATION OF ITS CASE**

Contrary to the Public Auditor’s explicit instruction, GlidePath failed to explain how the deposition of an unidentified witness, with no known material testimony, and who has not been shown to be unable to attend the hearing, would save time at the hearing. GlidePath’s motion for discovery appears to be a fishing expedition in the search for evidence to support its appeals. Further, allowing the deposition would likely require additional time given that GlidePath is also asking that the Public Auditor compel GPA “to nominate a competent representative to provide deposition testimony.” *See* GlidePath Motion for Discovery at 3-4. Setting up a process by which GPA is to nominate a “competent representative” simply opens the door to objections by GlidePath

to the competency of any representative nominated by GPA and the possibility of GlidePath requesting yet further depositions.


CONCLUSION

5 GCA § 9218 does not authorize depositions for discovery purposes in administrative actions, only for the purpose of submitting testimony at trial when a witness is unable or cannot be compelled to attend. GlidePath failed to comply with the requirements set forth in 5 GCA § 9218 to petition an agency for a deposition. It did not file a verified petition, nor did it state the requisite information required by the statute. Lastly, the Public Auditor specifically instructed that GlidePath show how allowing the deposition would save time. GlidePath failed to do so.

For these reasons, ENGIE Solar respectfully requests that the Office of Public Accountability deny GlidePath's Motion for Discovery.

DATED: this 18th day of February, 2020.

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