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PROCUREMENT APPEALS

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Attorneys for Appellant
GlidePath Marianas Operations Inc.

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

In the Appeal of

GlidePath Marianas Operations Inc.,

Appellant.

DOCKET NOS. OPA-PA-19-010
OPA-PA-20-001

**MOTION TO ALLOW EXPERT
WITNESSES TO HEAR TRIAL
TESTIMONY FROM OTHER
WITNESSES AT TRIAL**

Appellant, GlidePath Marianas Operations Inc., hereby files this Motion to Allow its Expert Witnesses to Hear Trial Testimony from Other Witnesses at Trial. This Motion is filed pursuant to Guam Rule of Evidence 615 and is supported by the appended Memorandum in Support of Motion, all the files in this case, and any argument the Agency will hear on the Motion.

MEMORANDUM IN SUPPORT OF MOTION

I. Legal Standard

Guam Rule of Evidence 615 states

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.¹

¹ Although this rule is usually invoked by the party seeking to exclude a witness from hearing the testimony of other witnesses, courts do entertain a motion to allow an expert to listen to the testimony of other witnesses at trial. See e.g., *U.S. v. Cline*, 188 F.Supp.2d 1287, 1299 (D.Kan. 2002) (addressing government's motion to allow case agents

The party moving for an exception to the sequestration rule “bears the burden of showing an exception is warranted.” *U.S. v. Forehand*, 943 F.Supp.2d 1329, 1331 (M.D.Ala. 2013). Courts consider various factors such as “the nature of the witness’s testimony (for example, whether the witness will testify to facts or opinions); whether the case is simple or complex; whether the trial is short or long; whether, unless the witness is present during the testimony of one or more other witnesses, he will be able to provide his testimony in a reasonable and fair way; and whether, unless the witness is present during the testimony of one or more other witnesses, the court will be able to exercise effectively its umpire function in making sure that the case is presented to the jury in an orderly, efficient, and fair way.” *Id.*

Courts generally find that expert witnesses fall within the third exception of Rule 615 because they are an “essential party.” See e.g., *Kennis v. Metropolitan West Asset Management, LLC*, No. CV 15-8162-GW(FMX), 2018 WL 9440483, at *4 (C.D. Cal. Nov. 29, 2018) (““Expert witnesses are often ‘essential’ for the presentation of a party’s case. Indeed, the ‘essential witness’ exception is most often applied in cases where the sequestered witness is an expert (rather than a fact witness whose recollection might be ‘colored’ by accounts of other witnesses).”) (internal citations and quotations omitted); *U.S. v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002) (“In many circumstances, a potential expert witness will be an “essential party” within the meaning of Rule 615(3). The Advisory Committee Notes to Rule 615(3) contemplate as much, stating that the exception includes “an expert needed to advise counsel in the management of litigation.”); *Morvant v. Construction Aggregates Corp.*, 570 F.2d 626, 629 (6th

to be excused from sequestration under federal rule of evidence 615); *Brown v. Brown*, No. 02A01-9108CV00168, 1992 WL 5243, at *4 (Tenn. Ct. App. Jan. 16, 1992) (addressing motion to allow financial expert to be in courtroom while opposing party’s expert testified). Moreover, the rules of evidence do not necessarily apply at an OPA hearing. 2 G.A.R. § 12108(d) (“Hearings shall be as informal as may be reasonable and appropriate under the circumstances and shall not be bound by statutory rules of evidence....”).

Cir. 1978) (“We perceive little, if any, reason for sequestering a witness who will testify in an expert capacity only and not to the facts of the case.”). If a party meets an exception to Rule 615, “exclusion is not authorize[d].” *Seschillie*, 310 F.3d at 1214 (citing Rule 615) (alteration in original).

II. Argument

Expert Witnesses Vince Maione and Expert Witness Robert P. Charles of Sargent & Lundy are essential to the presentation of Appellant’s case. This appeal centers on the incredibly complex and technical requirements of a multi-million dollar procurement of solar panels issued by the Guam Power Authority. This case is complex, and most of the testimony that will be presented in this case will be in the form of opinions from experts as to the complex and technical requirements of the Invitation for Bid (“IFB”) and its more than 20 amendments. The input of both experts is essential for Appellant’s counsel to manage and navigate the complex and technical nature of this appeal. *See Kennis*, 2018 WL 9440483, at *4 (“allowing Defendant’s experts in the courtroom is essential to its ability to present a defense, rather than merely beneficial. The Court finds persuasive that Defendant’s experts are necessary to defense counsel’s navigation of complex subjects (*i.e.* with the process of cross-examining opposing experts) that would invariably affect trial strategy.”). All parties shall have at least one engineering expert some of whom will testify in various languages.

Appellant’s experts also will not proffer factual testimony but will instead assume facts to proffer opinions. They will only provide expert opinions as to the technical and complex requirements of the procurement. This renders void the need for sequestration. *See Seschillie*, 310 F.3d at 1213 (holding that “although an expert witness does not normally testify to facts, thereby nullifying the need for sequestration, there are circumstances in which an expert may

also give factual testimony.”). Moreover, allowing the experts to hear the testimony of the fact witnesses will allow the experts to opine and to develop facts in the case and opine on what actually happened as opposed to hypotheticals. This clarity will greatly assist the OPA and speed up the hearing tremendously. The result will better inform the Public Auditor to review the appeal by hearing from experts who provide testimony informed by the other witnesses.²

III. Conclusion

For the foregoing reasons, Appellant requests the OPA to allow its expert witnesses and the experts of the other parties to listen and hear the other fact and expert witnesses at the trial. Alternatively, the experts should be allowed to be in the courtroom for the testimony of other expert witnesses to assist the attorneys with the trial and cross-examination.

Respectfully submitted this 2nd day of July, 2020.

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By: 
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² Indeed, the Guam Rules of Evidence implies experts will be present in courtrooms because they base their opinions or inferences on facts or data “perceived by or made known to him at or before the hearing.” Guam Rule of Evidence 703; *see also Morvant*, 570 F.2d at 630 (“Certainly an expert who intends to base his opinion on facts or data in a particular case (Rule 703) will be unable to testify if he has been excluded (from the courtroom by an order under Rule 615).”) (internal quotations omitted).