

ADMINISTRATIVE PROCEEDING
FILE NO. 3-12064

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 20, 2005

In the Matter of :
 :
GREGORY M. DEARLOVE, CPA : ORDER ON MOTION TO
 : POSTPONE HEARING
 :

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings (OIP) on September 30, 2005. Respondent Gregory M. Dearlove, CPA (Dearlove), formerly a partner with Deloitte & Touche LLP (Deloitte), served as the engagement partner on Deloitte's audit of the financial statements of Adelphia Communications Corporation (Adelphia) for the year ended December 31, 2000 (Answer). At issue is whether Adelphia's 2000 financial statements were materially false and misleading and failed to comply with Generally Accepted Accounting Principles and whether Dearlove knew or should have known that the audit he planned, directed, and supervised of Adelphia's 2000 financial statements was not conducted in accordance with Generally Accepted Auditing Standards (OIP at 1-2). The hearing is scheduled to begin on January 23, 2006.

Dearlove moves to postpone the start of the hearing for sixty days. Among other things, he cites the complexity and breadth of the accounting issues raised in the fifteen-page OIP; the size of the Division's investigative file (which he estimates at well over one million pages, if not several million pages when electronic data are included); and the manpower his attorneys have already expended reviewing the investigative file. Dearlove characterizes the 2000 Adelphia audit as "highly complex," and represents that it involved thirty accounting professionals from Deloitte. He claims that he would be substantially prejudiced in his ability to defend himself against the allegations in the OIP if he has to go forward to the hearing on January 23, 2006. He argues that requiring him to do so would violate due process and principles of basic fairness.

The Division objects to any delay in the start of the hearing. It acknowledges that Adelphia's corporate structure was complex, its transactions myriad, and its management aggressive in its positions on proper accounting. The Division nonetheless asserts that Dearlove is attempting to shift the focus of the proceeding by raising extraneous defenses that implicate audit years other than 2000. It also emphasizes that it has complied with its prehearing obligations under the Commission's Rules of Practice.

In reply to the Division's opposition, Dearlove notes that the Division does not challenge his assertions regarding the magnitude of the materials in its investigative file and the substantial efforts made by his counsel to review such material. Dearlove also asserts that his preparation for the hearing has been adversely impacted by the unsatisfactory witness and exhibit lists initially produced by the Division.¹

Under Rule 161(a) of the Commission's Rules of Practice, an administrative law judge (ALJ) may, for good cause shown, postpone or adjourn any hearing, consistent with Rule 161(b) of the Commission's Rules of Practice. Under Rule 161(b)(1), an ALJ must adhere to a policy of strongly disfavoring motions for postponement, except in circumstances where the requesting party makes a strong showing that the denial of the motion would substantially prejudice its case. In determining whether to grant any such motion, the ALJ should consider, in addition to any other relevant factors: (1) the length of the proceeding to date; (2) the number of postponements, adjournments, or extensions already granted; (3) the stage of the proceedings at the time of the request; (4) the impact of the request on the ALJ's ability to complete the proceeding in the time specified by the Commission; and (5) any other such matters as justice may require.

The proceeding is less than three months old. No prior postponements or adjournments have been granted. Two weeks have been lost because the Division had to amend its privilege log, and its witness and exhibit lists, but those issues have now been resolved. The hearing is scheduled to begin on January 23, 2006, and to end by February 3, 2006. These dates are consistent with the Commission's requirement that an ALJ shall issue an order providing that there shall be approximately four months from the OIP to the hearing. See Rule 360(a)(2) of the Commission's Rules of Practice.

It is now thirty-four days before the scheduled start of the hearing.² The Division has made its investigative file available to Dearlove for inspection and copying. It has also prepared a revised privilege log that identifies 457 documents withheld from inspection and copying. The Division has filed an amended witness list naming fifteen individuals it intends to call during its case-in-chief. It has also submitted a sixty-eight-page report as the direct testimony of its proposed expert witness. Finally, the Division has prepared a revised exhibit list with 229 proposed exhibits.

As matters now stand, Dearlove is not required to identify his proposed witnesses and exhibits until January 11, 2006. He is not required to file the direct testimony of his proposed expert witness until January 13, 2006. The delays that Dearlove is encountering in obtaining documents subpoenaed from third parties were foreseeable. For that reason, I strongly

¹ The Division's initial witness and exhibit lists were the subject of a prehearing conference held on December 7, 2005. I required the Division to revise its witness and exhibit lists (Order Following Prehearing Conference, dated Dec. 9, 2005). I also granted Dearlove's motion to require the Division to revise its initial privilege log (Order dated Dec. 5, 2005). The Division has now made the revised filings required by these Orders.

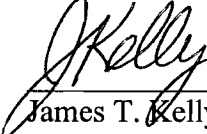
² Three of those thirty-four days are federal holidays.

encouraged Dearlove to submit his applications for document subpoenas at an early date (Prehearing Conference of Oct. 28, 2005, at 12, 51-52).

It is undisputed that the Division's investigative file is massive. I am satisfied that Dearlove and his attorneys have been diligent in preparing for the hearing. I am not aware of any other matters that justice requires me to consider.

If I were to grant Dearlove's motion to postpone the hearing, I do not believe it would be possible to issue an initial decision within 300 days, as the Commission has directed in the OIP.³ After weighing all the relevant factors, I conclude that Dearlove has failed to make the required strong showing of substantial prejudice. Accordingly, no postponement is warranted.

IT IS ORDERED THAT Dearlove's motion for a sixty-day postponement of the hearing is denied. IT IS FURTHER ORDERED THAT a shorter postponement of less than sixty days is also denied.⁴


James T. Kelly
Administrative Law Judge

³ The parties have not waived the preparation of an initial decision. See Rule 360(a)(1) of the Commission's Rules of Practice. Initial decisions are traditionally required in enforcement and disciplinary cases. See Rule 202(a)(1) of the Commission's Rules of Practice. However, a party is free to ask the Commission to waive Rule 202(a)(1) in a given proceeding, if it chooses to do so. See Rule 100(c) of the Commission's Rules of Practice; cf. Crouse Corp. v. ICC, 781 F.2d 1176, 1191-92 & nn.3-4 (6th Cir. 1986) (affirming an agency's determination to waive an initial decision in a proceeding that did not involve rulemaking or initial licensing, and determining that witness credibility was not an important consideration in the circumstances presented).

⁴ I decline to certify this ruling for interlocutory review. See Rule 400(c)(2) of the Commission's Rules of Practice. My ruling does not involve a controlling question of law as to which there is substantial ground for difference of opinion. Immediate review of my ruling would not materially advance the completion of the proceeding. I also decline to stay the Scheduling Order dated November 1, 2005, as modified by the Order Following Prehearing Conference dated December 9, 2005, at 2 n.2. See Rule 400(d) of the Commission's Rules of Practice.