

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3804/April 25, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17172

In the Matter of

BARRY B. CLARE

ORDER FOLLOWING PREHEARING
CONFERENCE AND SETTING
PROCEDURAL SCHEDULE

The Securities and Exchange Commission instituted this proceeding on March 15, 2016. A telephonic prehearing conference was held on April 21, 2016. The following schedule confirms the schedule discussed during the conference and submitted by the parties.

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| June 28, 2016: | Parties exchange and file their witness lists. Expert reports, if any, are due. |
| July 22, 2016: | Parties exchange and file their exhibit lists and exchange exhibits (other than hearing demonstratives). Rebuttal expert reports, if any, are due. |
| August 15, 2015: | Prehearing briefs are due. Motions in limine and objections to exhibits and witnesses are due. |
| August 22, 2016: | Oppositions to motions in limine and oppositions to objections to exhibits and witnesses are due. Stipulations, requests for official notice, and admissions of fact are due. |
| August 24, 2016: | The parties will participate in a telephonic prehearing conference, at a time to be determined. |
| August 29, 2016: | The hearing will begin at 9:30 a.m. EDT at the Commission's regional office in New York, New York. ¹ |

¹ While administrative hearings are generally held in neutral locations, I confirmed with Respondent's counsel, during the prehearing conference that Respondent affirmatively prefers to hold the hearing at the Commission's New York office because the Division of Enforcement has agreed to accommodate counsel's request for workspace during the hearing.

The parties are reminded that all filings must be filed in hard copy with the Office of the Secretary. See 17 C.F.R. §§ 201.151, .152. They are asked to always email courtesy copies of filings to alj@sec.gov in Word and in PDF text-searchable format. Electronic copies of exhibits should not be combined into a single PDF file, but sent as separate attachments, and should be provided in text-searchable format whenever practicable.

Hearing Guidelines

I will follow the general guidelines described below during these proceedings. The parties should review what follows *and promptly raise any objections they may have to the application of these guidelines in this matter.*

1. Subpoenas. A party's motion to quash a subpoena will be due within five business days of the submission of the subpoena for signing. Any opposition to the motion to quash will be due within five business days thereafter.
2. Exhibits. The parties shall confer and attempt to stipulate to the admissibility of exhibits. In order to avoid duplication of exhibits, the parties should identify joint exhibits. Exhibits are not filed with the Office of the Secretary until the close of the hearing at my instruction.
3. Exhibit lists. A comprehensive exhibit list prevents other parties from being surprised in the middle of the hearing. Given this fact, exhibit lists shall be exchanged among the parties and should include all documents that a party expects to use in the hearing for any purpose. This includes documents that are relevant only for impeachment purposes or which are presumptively inadmissible. The parties should serve their opponents with any amendments to their individual exhibit list. Because I rely on the parties' exhibit lists, the parties should provide me with a paper copy of their final exhibit lists at the beginning of the hearing. There is no need in the interim to submit exhibit lists or amendments to my office. Following the hearing, I will issue a separate order directing the parties to file a list of all exhibits, admitted and offered but not admitted, together with citations to the record indicating when each exhibit was admitted.
4. Expert reports and testimony. Expert witness disclosures must, at minimum, comply with Rule 222(b), including the provision of a "brief summary" of an expert's expected testimony. 17 C.F.R. § 201.222(a)(4), (b). Expert reports should be as specific and detailed as those presented under Federal Rule of Civil Procedure 26(a)(2). Failure to comply with these requirements may result in the striking of an expert's report. Cf. Fed. R. Civ. P. 37(c). The filing of the expert's report according to the prehearing schedule essentially constitutes the filing of the expert's direct testimony. During the hearing, the expert will not be subject to direct examination, and will simply be sworn in and proffered for cross-examination. On request, however, a party may conduct a brief direct examination of the party's expert.
5. Hearing schedule. The first day of the proceeding will begin at 9:30 a.m. Unless circumstances require a different schedule, we will begin each subsequent day at 9:00 a.m. Each day of the proceeding should last until at least 5:15 p.m. I generally take one break in the morning, lasting about 15 minutes, and at least one break in the afternoon. I generally break for lunch between noon and 12:30 p.m., for about one hour.

6. Hearing issues.

A. Examination.

i) In general, the Division presents its case first, because it has the burden of proof. Respondent then presents his case. If necessary, the parties may agree to proceed in some other order and may take witnesses out of order.

ii) If the Division calls a non-party witness that Respondent also wishes to call as a witness, Respondent should cross-examine the witness as if he were calling the witness in his own case. This means that cross-examination may exceed the scope of direct examination. This will avoid the need to recall a witness just so the witness can testify for Respondent's case.

iii) I am flexible regarding the manner of presenting the testimony of Respondent, so long as the parties agree on it. By way of example, if the Division calls Respondent as its last witness, the parties may agree that Respondent's counsel will conduct the direct examination, followed by the Division's cross-examination, which may exceed the scope of direct. In the absence of any agreement, Respondent's testimony will proceed in the usual manner, *i.e.*, Respondent will be called as a witness and examined potentially multiple times. If the Division calls Respondent as a witness and Respondent later testifies as part of his own case, the Division's cross-examination during Respondent's case will be limited to the scope of the direct examination.

iv) In general, cross-examination may be conducted by leading questions, even as to Division witnesses that Respondent wishes to call in his own case. Counsel may not lead his client, however. As a result, if Respondent is called as a witness in the Division's case, Respondent's counsel may not ask leading questions on cross-examination. Similarly, if a Commission employee is called as a witness for Respondent, the Division may not ask leading questions on cross-examination.

B. Other hearing issues.

i) Avoid leading questions on direct examination. Leading questions during direct examination of a non-hostile witness are objectionable. Repeatedly having to rephrase leading questions slows down the hearing.

ii) Hit the high points on cross-examination. It is a waste of time to wade into every bit of minutiae that is related to your case. Cross-examination is more effective and less stultifying if you emphasize the strong points and address tangential points quickly, if at all.

7. Pleadings. Prehearing and post-hearing briefs are limited to 14,000 words. *Cf.* 17 C.F.R. § 201.450(c) (imposing a word-limit for briefs filed before the Commission). Parties may seek leave to exceed this limit through a motion filed seven days in advance of the relevant briefing deadline. To enhance the readability of pleadings, I urge counsel to limit the use of acronyms to those that are widely known. *See* Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 120-22 (2008); *see also Del. Riverkeeper Network v. FERC*, 753 F.3d 1304,

1320-21 (D.C. Cir. 2014) (Silberman, J., concurring). For the same reason, I ask that counsel use the same font size in footnotes as that used in the body of a pleading.

James E. Grimes
Administrative Law Judge