

f - 1

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11465

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
July 23, 2004

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

JUL 26 2004

FIRST CLASS

In the Matter of	:	
	:	
PUBLIC FINANCE	:	
CONSULTANTS, INC.,	:	ORDER
ROBERT D. FOWLER,	:	
DOLPHIN AND BRADBURY	:	
INCORPORATED,	:	
and ROBERT J. BRADBURY	:	
	:	

The Securities and Exchange Commission (Commission) issued its Order Instituting Proceedings on April 26, 2004. Respondents filed their Answers on May 24, 2004. At a prehearing conference two days later, all parties agreed to a schedule leading to the commencement of a hearing on August 16, 2004.

The Scheduling Order of May 27, 2004, and the Revised Scheduling Order of June 8, 2004, required the Division of Enforcement (Division) to identify its proposed expert witness by June 14, 2004, and to submit the direct written testimony of its proposed expert witness by July 19, 2004. The Division complied with these deadlines. The Scheduling Order and the Revised Scheduling Order also required Respondents to identify their proposed expert witnesses by June 21, 2004, and to submit the direct written testimony of their proposed expert witnesses by August 3, 2004. Respondents Dolphin and Bradbury, Inc., and Robert J. Bradbury identified their expert witness on June 21. Respondents Public Finance Consultants, Inc. (PFC), and Robert D. Fowler (Fowler) did not. At a prehearing conference on June 23, 2004, PFC and Fowler confirmed that they would not present expert testimony in this proceeding.

On July 20, 2004—shortly after they received the thirty-one-page direct testimony of the Division’s expert—PFC and Fowler moved to amend the Revised Scheduling Order to permit late identification of an expert witness. The moving Respondents also sought permission to submit the proposed expert’s written direct testimony by August 3, 2004.

As grounds for relief, PFC and Fowler state that prior counsel “made a strategic decision” to proceed without an expert in view of the uncertainty of insurance coverage and the

unavailability of insurance funds for expert witnesses.¹ PFC and Fowler further state that the insurer made a favorable decision on July 9, 2004, and the insurer (as opposed to PFC and Fowler) retained substitute counsel. Substitute counsel entered their appearance on July 15, 2004.²

On July 22, 2004, the Division filed its Opposition to the Motion and a supporting Declaration. Among other things, the Division argues that PFC and Fowler have failed to show that their defense would be substantially prejudiced in the absence of expert testimony.³ The Division also argues that it would be prejudiced if PFC and Fowler are allowed to identify an expert witness and the issues on which he would opine long after the deadline for doing so.

Later that same day, PFC and Fowler filed and served a letter in which they name their proposed expert and provide a copy of his resumé. PFC and Fowler also identify a single proceeding in which the proposed expert has previously offered expert testimony, and list the subjects that the proposed expert intends to address in this proceeding. PFC and Fowler promise to provide a list of the proposed expert's publications today.

The character of the relief sought has changed from July 20 to today. Previously, PFC and Fowler were requesting a "blank check," by which the identity and qualifications of the proposed expert, and the content of his testimony, would remain undisclosed until August 3. As matters now stand, PFC and Fowler are seeking more modest relief: a five-week nunc pro tunc enlargement of time (from June 21 to July 23) to identify their expert witness and provide the information required by Rule 222(a)(4) and (b) of the Commission's Rules of Practice. PFC and Fowler state that their proposed expert witness is aware that he must file his direct testimony in writing by August 3, and they further state that he "expects to be able to meet that deadline."

The Division observes that it would be prejudiced because PFC and Fowler have effectively deprived it of five weeks it should have had to research the qualifications of the proposed witness, his prior experience as an expert, his relevant writings, and the issues on which he proposes to opine.

¹ PFC and Fowler are fully responsible for any "strategic decisions" that their prior attorney made on their behalf. I reject any suggestion that PFC and Fowler are passive observers, who are at the mercy of decisions made by their prior attorney and their insurance defense carrier. I also note that the motion fails to specify the date on which PFC and Fowler first gave the insurer notice of the underlying investigation and notice of the Commission's decision to authorize an enforcement proceeding.

² I have previously denied substitute counsel's motion to postpone the hearing for sixty days (Order of July 19, 2004).


³ The Division does not necessarily prevail in an administrative proceeding merely because it has an expert witness and a respondent does not. See Robert Setteducati, 78 SEC Docket 909 (Aug. 9, 2002), aff'd, 81 SEC Docket 2223 (Nov. 7, 2003).

The appropriate relief here is not to curtail the defense unnecessarily, but to ensure that any prejudice suffered by the Division is minimized or eliminated. To that end, I will grant the motion and permit PFC and Fowler to offer the testimony of the expert they have identified. This grant of relief is subject to the following conditions:

1. PFC and Fowler must provide the Division with a list of the proposed expert's relevant publications by the close of business today;
2. The direct written testimony of the proposed expert must be filed and served by August 3, 2004;
3. The proposed expert's direct written testimony will not be accepted into the record until after the Division has had a full opportunity to cross-examine him. If the Division is not prepared to cross-examine the proposed expert between August 16 and August 27 because of insufficient time to prepare, the Division will be granted a reasonable amount of additional hearing time for that purpose; and
4. The decision to grant this motion is not intended, and shall not be cited, as precedent for any additional motions in which PFC and Fowler belatedly seek to expand their list of fact witnesses and their list of proposed exhibits, or to postpone the due date of their prehearing brief. Any such motions will be viewed with disfavor.

The parties are advised that, if the Division needs any additional days of hearing to cross-examine the proposed expert, that hearing is likely to take place in Washington, D.C., in early September 2004. The parties are further advised that any such additional hearing days will be limited to the cross-examination of PFC's and Fowler's proposed expert by the Division. It is not intended to afford PFC and Fowler an opportunity to present additional witnesses or exhibits, not previously identified, as a part of their case-in-chief.

SO ORDERED.



James T. Kelly
Administrative Law Judge