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Official Transcript of Proceedings

**NUCLEAR REGULATORY COMMISSION**

Title: Enforcement Actions in the Matter of  
Dale L. Miller, Stephen P. Moffitt

Docket Number: IA-05-053;  
IA-05-054

DOCKETED  
USNRC

April 17, 2006 (8:16am)

Location: via teleconference

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Date: Thursday, April 13, 2006

Work Order No.: NRC-986

Pages 1-20

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UNITED STATES OF AMERICA

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NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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In the Matters of: ||

DALE L. MILLER ||

Docket No. IA-05-053

STEPHEN P. MOFFITT ||

Docket No. IA-05-054

(Enforcement Actions) ||

\_\_\_\_\_

Thursday, April 13, 2006

The above-entitled teleconference came to order, pursuant to notice, at 10:00 a.m.

BEFORE:

MICHAEL C. FARRAR, ASLBP Administrative Judge

E. ROY HAWKENS, ASLBP Administrative Judge

NICHOLAS G. TRIKOUROS, ASLBP Administrative Judge

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## 1 APPEARANCES:

2 On Behalf of the Nuclear Regulatory Commission3 Staff:

4 MARY C. BATY, ESQ.; and

5 SARA E. BROCK, ESQ.

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11 On Behalf of Dale L. Miller and Stephen P.12 Moffitt:

13 JANE GOWEN PENNY, ESQ.

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## 19 ALSO PRESENT:

20 JONATHAN RUND, ASLBP Staff

21 KAREN VALLOCH, ASLBP Staff

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P-R-O-C-E-E-D-I-N-G-S

(10:00 a.m.)

1  
2  
3 CHAIRMAN FARRAR: Good morning. We are  
4 here today for a conference call in the enforcement  
5 cases involving Dale Miller and Stephen Moffitt. This  
6 is Mike Farrar. I am the Chairman of both of those  
7 Licensing Boards. We are at our chambers at NRC  
8 headquarters.

9 With me are Judges Roy Hawkens and Nick  
10 Trikouros, our law clerk Jonathan Rund and Karen  
11 Valloch, who, once again, has done a good job setting  
12 up these matters.

13 For the staff?

14 MS. BROCK: Sara Brock and Mary Baty.

15 CHAIRMAN FARRAR: Thank you.

16 And for the subjects of the order, Mr.  
17 Miller and Mr. Moffitt?

18 MS. PENNY: Jane Penny from Killian and  
19 Gephart.

20 CHAIRMAN FARRAR: All right. Thank you  
21 all.

22 I think we can make this fairly short.  
23 Under the Commission's rules, we need to do an initial  
24 scheduling order within 25 days of granting the  
25 hearing request, which was March 27th, which I think

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1 would give us a target of April 21st. We appreciate  
2 you all getting your work done so we could meet that  
3 target.

4 We have in front of us the estimate  
5 submitted on behalf of both parties the joint pieces,  
6 joint proposed discovery schedule. And if neither of  
7 you have anything preliminary that we have to go into,  
8 let me go right into that.

9 Any preliminary matters we have to do?

10 MS. PENNY: Jane Penny, Your Honor. I  
11 have none.

12 MS. BROCK: None for the staff.

13 CHAIRMAN FARRAR: Okay. Fine. In the  
14 joint motion, you mention that the milestone is 145  
15 days, but then you very cleverly exceed that time  
16 without saying so explicitly. I assume there is a  
17 good reason for going to the September 15th completion  
18 date, which I think is something like 27 days beyond  
19 the milestone.

20 Ms. Penn, do you want to address why that  
21 is appropriate?

22 MS. PENNY: Your Honor, my concern is  
23 being able to absorb the large amount of material and  
24 making sure I've covered everything I need with my  
25 client. So I asked for some leeway in that scheduling

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1 so I could do an adequate job.

2 CHAIRMAN FARRAR: Okay. And we suspected  
3 as much. I think we put in our earlier order that at  
4 any point where we can -- well, you are entitled  
5 because the orders were immediately effective to  
6 expeditious consideration. So we took that as  
7 meaning, if possible, we would try to do better than  
8 the milestones call for but recognizing that you are  
9 the person who has the burden of the defense, staff  
10 has a several-year head start in terms of their  
11 familiarity with the case. And so we certainly  
12 understand your need for more time.

13 If I remember correctly, we have an April  
14 26th date for the staff's initial discovery or initial  
15 disclosure. Ms. Baty, are you planning to meet that?

16 MS. BATY: Yes. We anticipate that we  
17 will meet that deadline. We're working hard to meet  
18 that.

19 CHAIRMAN FARRAR: Do you have any idea?  
20 The number 19,000 was thrown about a while ago. Is  
21 that still how many documents you -- do you have any  
22 idea how many you will actually be disclosing?

23 MS. BATY: It is going to be very close to  
24 that.

25 CHAIRMAN FARRAR: Okay. Ms. Penny, you

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1 have not seen any of those yet?

2 MS. PENNY: Your Honor, I saw my client's  
3 transcript approximately two years ago when I was  
4 allowed to read them. And I presume I have also seen  
5 material that FirstEnergy was required to obtain from  
6 my clients and turn over in response to a subpoena.  
7 So I have seen some portion of this, nowhere close to  
8 19,000 documents, however.

9 CHAIRMAN FARRAR: Okay. Then --

10 MS. BROCK: Your Honor, this is Sara Brock  
11 for the staff. It's a joint disclosure deadline.

12 MS. PENNY: Correct.

13 MS. BROCK: Both parties have a disclosure  
14 obligation on the 26th.

15 CHAIRMAN FARRAR: All right. Thank you  
16 for reminding me of that.

17 Ms. Penny, you will be able to meet that?

18 MS. PENNY: Yes with the expectation that  
19 I may have to amend after I receive the staff's  
20 documents.

21 CHAIRMAN FARRAR: Okay. Well, then, with  
22 the concurrence of my brother judges, we will approve  
23 this discovery schedule, giving you to September 15th.

24 Tell me where in that, even though that's  
25 something like 27 days in excess of the milestones --

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1 but I think the preamble to the milestones indicates  
2 that in establishing a schedule we use those as a  
3 starting point, making appropriate modifications based  
4 on all relevant information, including complexity of  
5 the issues and so forth.

6 And I think the size of the document  
7 disclosure -- Ms. Penny, your representations about  
8 that certainly justify an extent going beyond the  
9 milestones. And maybe we can make up that time later  
10 on.

11 Tell me where in your discovery schedule  
12 you contemplate depositions being taken. And do you  
13 have any idea how many depositions that would be?

14 MS. BROCK: This is Sara for the staff.  
15 I think we had discussed them happening in the months  
16 of July and August and the beginning of September, but  
17 we had intentionally left it somewhat indeterminate  
18 without knowing exactly what would be happening with  
19 the criminal trial or how recalcitrant either party  
20 may find witnesses that they are attempting to depose.

21 CHAIRMAN FARRAR: Now, we have some sort  
22 of subpoena power, don't we? I've never been involved  
23 in it, but don't we?

24 MS. BROCK: Yes, you do.

25 CHAIRMAN FARRAR: I've never had to do

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1 that. The major case I had was Private Fuel Storage.  
2 And those were basically expert witnesses, and there  
3 was no problem with depositions. But if you have  
4 recalcitrant people, please come to us right away.  
5 And we will do everything we can to move that long.

6 So, in effect, that item number 3, where  
7 you have "Replies to written discovery by June 15th,"  
8 then without limiting you, you essentially would start  
9 on depositions thereafter. You have three months for  
10 depositions.

11 MS. BROCK: Yes, if Ms. Penny is in  
12 agreement.

13 MS. PENNY: Oh, yes, I'm in agreement.

14 CHAIRMAN FARRAR: Okay. Ms. Penny, just  
15 out of curiosity, you're in Harrisburg. Do your  
16 clients live near you or --

17 MS. PENNY: No, Your Honor, they don't.  
18 And I presume I would travel to be close to the  
19 witnesses. I would be inconvenienced, rather than  
20 they.

21 CHAIRMAN FARRAR: Okay. Now, the  
22 witnesses are basically former employees of  
23 Davis-Besse and members of the staff? I mean,  
24 speaking generally, is that correct?

25 MS. PENNY: Speaking generally, correct.

1 Some are in Ohio. Some are in other locations.

2 CHAIRMAN FARRAR: Right. Okay. Does it  
3 matter where your clients now live? Are they still  
4 around Ohio or if you don't want to say, that's fine.

5 MS. PENNY: My clients told me they will  
6 be very flexible about this. And some of it will  
7 depend upon their work schedules, whether they can be  
8 present or not. But I will try to accommodate all of  
9 the witnesses. I think that is only prudent.

10 CHAIRMAN FARRAR: All right. Well, when  
11 we get to the depositions and whether anyone is  
12 recalcitrant or not, we will have researched by then  
13 exactly how our powers work in that regard. But we  
14 will be certainly happy to be on standby at a moment's  
15 notice to help you solve any of those problems.

16 Why don't we set a status conference for  
17 a couple of months from now? And, again, you know, if  
18 anything happens -- again, my experience in PFS was if  
19 you have a problem that you can't -- our preference is  
20 that you solve it yourselves.

21 You know how boards and judges operate  
22 and, particularly in discovery, solutions you come up  
23 with among yourselves are usually better than any we  
24 impose because you know a lot of details and  
25 logistical things that we don't know. But if you come

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1 to an impasse, please get us involved right away. We  
2 can set up a conference call as soon as we can all be  
3 gotten together.

4 And on procedural matters, the Board  
5 chairman is allowed to act for the Board. And instead  
6 of having two technical members, in this particular  
7 case we happen to have another legal member, Judge  
8 Hawkens, along with Judge Trikouros.

9 And he is in the words of the statute also  
10 "qualified in the conduct of administrative  
11 proceedings" or at least I would hope he would be by  
12 this time. And so if I'm not available, he could  
13 certainly serve as chairman pro tem. So if I am  
14 unavailable for some reason, you need a quick ruling,  
15 just go to him. And he can do that.

16 Judge Trikouros is technical and new with  
17 us but has gotten quite involved in some of the legal  
18 issues. But he is probably not yet qualified. So you  
19 will need one of us.

20 Let's tentatively set a status conference  
21 for Tuesday, June 20th. And if that date doesn't work  
22 for anybody at that time, we can switch that. But  
23 that's basically a couple of months from the time we  
24 will be issuing our initial scheduling order. And  
25 that will help keep us on target.

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1 If that date turns out not to work, we can  
2 change it, but at least we want to have something out  
3 there so we don't lose track of this. We probably  
4 would do it the same time of day, you know, 10:00 in  
5 the morning but, again, subject to change, as people's  
6 schedules develop between now and then.

7 MS. PENNY: Your Honor, your voice faded.  
8 This is Jane Penny. You said Tuesday, June 20th?

9 CHAIRMAN FARRAR: Yes, at 10:00 in the  
10 morning.

11 MS. PENNY: Fine.

12 CHAIRMAN FARRAR: And, again, if between  
13 now and then either set of counsel or the Board has  
14 some conflict, we can easily change it. But I just  
15 want to have something for us to shoot at. But,  
16 again, I encourage you. If there is any problem, you  
17 know, don't wait until then. Give us a call.

18 Any questions about anything we have said  
19 so far?

20 MS. PENNY: None from me, Your Honor.

21 MS. BROCK: None from the staff.

22 CHAIRMAN FARRAR: Okay. Thank you.

23 In your joint motion, you talked about  
24 suspending the schedule if the Geisen case went to the  
25 trial in federal district court. Why would you need

1 to suspend?

2 MS. PENNY: Your Honor, this is Jane  
3 Penny. I can address that. Both my clients are  
4 concerned that they may be subpoenaed as trial  
5 witnesses. So they had asked me to bring that up to  
6 staff so that we could have some scheduling awareness  
7 of that factor. I'm speculating wildly. I hope that  
8 is not the case. But I had requested that staff put  
9 some consideration to scheduling in that in case they  
10 are called to testify.

11 I presume their subpoenas will issue  
12 approximately 30 days prior to trial. I don't know if  
13 they will be asked to come to Toledo to be prepared or  
14 to be brought up to speed on the nature of the  
15 questions they will be asked.

16 Again, I'm speculating, but I did want  
17 that built in just in case.

18 CHAIRMAN FARRAR: Okay. The way you  
19 stated that, it's not just a matter of convenience?  
20 It's a matter of if they have to be somewhere paying  
21 strict attention to something else, then they're not  
22 handy for you to help you work your way through what  
23 you would be doing. Is that?

24 MS. PENNY: Correct. I was concerned.  
25 And with the jury trial in Toledo, I think the

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1 scheduling will be difficult. It is very hard to  
2 predict when a witness will start his testimony. So  
3 I was concerned about that interfering with the course  
4 of the criminal trial.

5 MS. BROCK: Your Honor, from the staff's  
6 perspective, the Department of Justice had asked for  
7 us to insert that type of condition into the  
8 scheduling order.

9 CHAIRMAN FARRAR: Same kind of deal so  
10 that your people would be available to them and not  
11 distracted by having to do discovery in this case?

12 MS. BROCK: Yes. And they were concerned  
13 that new evidence continuing to come out in these  
14 proceedings could end up continuing to delay the start  
15 of the criminal trial, which would be alleviated by  
16 suspending discovery 30 days before the scheduled  
17 start.

18 CHAIRMAN FARRAR: All right. Why don't we  
19 do this. We I think understand what you are trying to  
20 accomplish with this the way you have both just  
21 explained it and I think generally concur, but it may  
22 be that the Geisen case doesn't move quickly enough.  
23 As we learned the other day, they still have motions  
24 to file and the disclosure documents and so forth. So  
25 we may not come to that.

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1 If we do come to it, if you all would file  
2 a joint motion going into more particulars, not at  
3 great length but putting on the record exactly where  
4 that stands and why you need time off from this case?

5 So we'll give you the general blessing  
6 today but also ask you to ask for a specific blessing  
7 later on. Is that okay?

8 MS. PENNY: Your Honor, that will be very  
9 easy to comply with because it does sound as though  
10 this will proceed much faster.

11 MS. BROCK: Yes. That's true from our  
12 perspective, too.

13 CHAIRMAN FARRAR: Okay. Good. We had  
14 talked looking ahead on the schedule. And I'm not  
15 inclined to set -- I know the Commission's rule had  
16 asked for an initial scheduling order, but I think  
17 when you have discovery that is taking five months, it  
18 doesn't make a whole lot of sense to try to set what  
19 the next phases will be after discovery other than to  
20 say we will move as quickly as the parties are ready  
21 to. But we had mentioned earlier the next stage after  
22 discovery would be the opportunity to file summary  
23 disposition motions.

24 And we don't want to, either the parties  
25 or us, waste resources and time on those. If it's the

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1 kind of case where there are conflicting factual  
2 accounts, then the short answer is we're going to  
3 trial.

4 In the Private Fuel Storage case, we had  
5 conflicting expert accounts. And we found the  
6 principle that the battles of the experts cannot be  
7 resolved on summary disposition.

8 Ms. Penny, when we brought this up last  
9 time, you had indicated you didn't want to give up the  
10 right to have that option remain on the table. Is  
11 that still your position at this point?

12 MS. PENNY: That's still my position, Your  
13 Honor, until I see the discovery documents.

14 CHAIRMAN FARRAR: Okay.

15 MS. PENNY: I may be able to change it  
16 quickly at that point, but I just don't know yet.

17 CHAIRMAN FARRAR: Okay. Then why don't we  
18 -- does the staff have a view on that they want to say  
19 anything about now?

20 MS. BROCK: I would agree with Ms. Penny.  
21 I am hoping that through the process of discovery, we  
22 can substantially narrow the issues for hearing.

23 CHAIRMAN FARRAR: By stipulations about  
24 documents and --

25 MS. BROCK: Either by stipulations about

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1 documents or by narrowing and bringing more focus to  
2 exactly which issues are in dispute. And some of  
3 those may be served by summary judgment motions. I  
4 think we will have a better idea of that toward the  
5 end of discovery.

6 CHAIRMAN FARRAR: Oh. So we would be  
7 looking at stipulations, summary disposition addressed  
8 to particular matters?

9 MS. BROCK: Right, rather than addressed  
10 to the entire --

11 CHAIRMAN FARRAR: Yes. Okay. That kind  
12 of summary disposition motion may serve us all very  
13 well. Even if you can't resolve the whole case  
14 papers, the more you can narrow it, the better things  
15 might go. So let's certainly preserve that option.

16 And maybe in the next status conference or  
17 the one after that, we can begin to map out timing.  
18 It may be the next step after discovery would be time  
19 to reach stipulations, time to file partial summary  
20 disposition motions, and so forth.

21 So let's hold that as a topic for the next  
22 status conference and then really zero in on the  
23 status conference after that, which would be probably  
24 sometime I guess before or just after you complete  
25 discovery.

1 Let me ask my colleagues if they had any  
2 questions they wanted to ask, topics to bring up at  
3 this point.

4 (No response.)

5 CHAIRMAN FARRAR: None from them.  
6 Anything from the staff or Mr. Miller, Mr. Moffitt  
7 that we need to cover today?

8 MS. BROCK: Your Honor, just we need --  
9 this is Sara Brock for the staff -- the proprietary  
10 protective order in place in order to disclose that  
11 set of documents.

12 CHAIRMAN FARRAR: That was included --

13 MS. BROCK: With our filing.

14 CHAIRMAN FARRAR: -- with your filing.  
15 And so all you need us to do is sign that?

16 MS. BROCK: Yes.

17 CHAIRMAN FARRAR: All right. And there is  
18 no controversy whatsoever between the two sides on the  
19 nature of that order?

20 MS. PENNY: No, Your Honor. This is Jane  
21 Penny.

22 Obviously I will have to sign the  
23 disclosure form in the back and have my client sign it  
24 as well and the other members of my law firm.

25 CHAIRMAN FARRAR: All right. Then why

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1 don't you proceed on the assumption we are going to  
2 sign that. What we will try to do is get an order out  
3 Monday which would recite what happened here today,  
4 you have the scheduling order, and have it attached to  
5 this nondisclosure declaration.

6 Is there something you would do in the  
7 next day or two before Monday that would advance it?  
8 I would rather have it be part of a package, but if we  
9 had to sign it separately, we could.

10 MS. BROCK: No. That's fine, Your Honor.  
11 We just need it in place by April 26th, when we do the  
12 document disclosure.

13 CHAIRMAN FARRAR: Okay. Fine. Then we  
14 will do that Monday. And, at the very latest,  
15 Tuesday, you will have the initial scheduling order  
16 and a summary of what happened here. And we will go  
17 from there. Thank you for reminding me of that.

18 Let's see. I don't think I have anything  
19 else. No. Anything from either of you?

20 MS. BROCK: None from the staff.

21 MS. PENNY: None from me, Your Honor.

22 CHAIRMAN FARRAR: All right. I think we  
23 all accomplished some work here in world record time.  
24 I appreciate you all making yourselves available and  
25 appreciate the work you have done together to get us

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1 to this point.

2 Again, staff from seeing us in action in  
3 other cases and, Ms. Penny, you from your work through  
4 your career know how these things work. And, again,  
5 let me stress that any problems that arise, you all  
6 can come to better solutions working together than we  
7 can imposing them.

8 So I encourage you to. Notwithstanding  
9 how strongly each side believes in the merits of its  
10 case, that's no reason that counsel can't work  
11 together to further the interests of justice and move  
12 this along quickly.

13 But if, at any time, as I said, you are at  
14 an impasse, just let us know. And we will jump right  
15 in and try to solve things and keep them moving.

16 We do intend to keep this case moving, as  
17 the rules require. So you can count on us to do that.  
18 And we appreciate the good work you all have done so  
19 far.

20 If there is nothing further, then we will  
21 terminate the call and go off the record. Mr.  
22 Reporter, do you need them to stay on the line to give  
23 you any information?

24 THE REPORTER: Yes, please, just for a  
25 moment.

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1 CHAIRMAN FARRAR: All right. Then we will  
2 sign off. And you all can stay on. Thank you very  
3 much.

4 (Whereupon, the foregoing matter was  
5 concluded at 10:25 a.m.)  
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CERTIFICATE

This is to certify that the attached proceedings  
before the United States Nuclear Regulatory Commission  
in the matter of:

Name of Proceeding: Dale L. Miller & Stephen  
Moffitt Enforcement  
Proceedings

Docket Number: IA-05-053; IA-05-054

Location: via teleconference

were held as herein appears, and that this is the  
original transcript thereof for the file of the United  
States Nuclear Regulatory Commission taken by me and,  
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*Charles Morrison*

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