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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, June 22, 2006

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

BEFORE:

MICHAEL C. FARRAR, 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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On Behalf of FirstEnergy:

DONALD P. FERRARO, ESQ.

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ALSO PRESENT:

JONATHAN RUND, ASLBP Staff

SPECIAL AGENT SCOTT LANGAN, Office of

Investigations, Region III

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

JUDGE FARRAR: We're here on June 22nd at 10:00 for a conference call in the matter of Dale L. Miller and Stephen P. Moffitt, Enforcement proceeding.

We had called in our April 18th scheduling order for a conference call around this time. I think we had set it for a couple of days ago and had informally changed it to today just to see how the parties are doing.

This is Mike Farrar, I'm the Chairman of the Licensing Board. I'm at Headquarters. With me is my brother Judge Nick Trikouros and our Law Clerk Jon Rund. Our other colleague, Judge Hawkins is on vacation and will not be with us today.

Who do we have for Misters Miller and Moffitt?

MS. PENNY: Jane Penny, Your Honor, from Killian & Gephart.

JUDGE FARRAR: Thank you.

And for the NRC Staff?

MS. BROCK: Sara Brock and Mary Baty.

JUDGE FARRAR: Okay. Thank you, Ms. Brock.

And we had two other people sitting in. Would you identify yourself. First the NRC employee?

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1 SPECIAL AGENT LANGAN: Scott Langan,
2 Special Agent with the Office of Investigations,
3 Region III.

4 JUDGE FARRAR: Thank you, Mr. Langan.
5 We're happy to have you with us.

6 And for the company?

7 MR. FERRARO: This is Don Ferraro, F-E-R-
8 R-A-A-R-O, counsel for FirstEnergy.

9 JUDGE FARRAR: Thank you, Mr. Ferraro.
10 We're pleased to have you with us.

11 Let me ask Ms. Penny, the purpose of this
12 call when we set it two months ago was just to make
13 sure that everything was on target with the scheduling
14 order that we had entered. And can you start and Staff
15 can add on, is everything going smoothly or what's
16 happening?

17 MS. PENNY: Well, Your Honor, this case
18 never goes smoothly simply because of the numbers of
19 documents. But seriously, I have received the
20 documents that Staff provided. I'm reviewing them.
21 We're both now responding to discovery requests. Those
22 are due June 30th. And we're trying to honor our self-
23 imposed discovery deadline of September 15th.

24 JUDGE FARRAR: All right. In responding
25 to each other did you claim any of your documents were

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1 privileged?

2 MS. PENNY: Your Honor, I had very few and
3 I had sent them to Ms. Brock. It was basically
4 correspondence from my clients to me and vice versa.

5 JUDGE FARRAR: Yes.

6 MS. PENNY: There were maybe five or six
7 of them.

8 JUDGE FARRAR: All right.

9 MS. PENNY: For each client.

10 JUDGE FARRAR: Okay. And those were not
11 attorney/client privileged or --

12 MS. PENNY: Yes, I claimed them as
13 attorney/client privilege.

14 JUDGE FARRAR: Okay. Okay. And in terms
15 of your dealing with the Staff privilege logs, is that
16 going smoothly?

17 MS. PENNY: Your Honor, what I did rather
18 than deal with the privilege log, was try to focus on
19 the documents I would need for my clients' defense.
20 I have listed those as document requests. Several of
21 the documents I felt I needed were heavily redacted,
22 and so I have made requests for pages from those
23 documents.

24 JUDGE FARRAR: Is that something that
25 seems like you all can work out yourselves or will the

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1 Board need to be involved?

2 MS. PENNY: Well, Your Honor, I think
3 we're duty bound to try to resolve it ourselves. I
4 don't think any board likes to get involved in
5 discovery disputes. And so I certainly pledge to try
6 to work it out. There are any number of ways. I think
7 the rules provide whether for a protective order or a
8 conference to meet and discuss the issue. And I
9 certainly intend to -- I certainly hope to try to
10 resolve it.

11 JUDGE FARRAR: Well, I don't think you've
12 practiced before us before, but you've read the
13 Board's mind exactly correctly in terms of, you know,
14 we will get involved if we need to, but our view is
15 usually that you all can come to a more sensible
16 conclusion more quickly than we can. So we encourage
17 those efforts.

18 Ms. Brock, Ms. Baty, anything in terms of
19 the questions we've asked Ms. Penny; anything you'd
20 like to add in or confirm?

21 MS. BROCK: No. I think we can work out
22 most of our potential disputes we're -- I mean, where
23 not trying to answer all the interrogatories and
24 document requests by next Friday.

25 We may end up where we need to have a

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1 protective order entered on some privacy documents,
2 but I'm sure if we do we will come to a joint
3 agreement on what it should say.

4 JUDGE FARRAR: All right. Anything else in
5 terms of where discovery is now? I mean I take it
6 your view of the working relationship with opposing
7 counsel is the same as Ms. Penny described?

8 MS. BROCK: Yes. I mean, there may be some
9 things that we don't end up reaching agreement on, but
10 that's sort of the nature of reality, a lack of
11 working it out.

12 We probably will be coming to the Board
13 for some subpoenas for deposition within the next few
14 weeks for those individuals who are not -- since Ms.
15 Penny only represents her clients, other individuals
16 who we may wish to depose in the proceedings.

17 JUDGE FARRAR: Okay. When I got into the
18 private fuel storage case we were passed the discovery
19 phase, so I was never involved in those. Do you
20 always need a subpoena or can you invite them to
21 attend and they say fine, and then you don't bother to
22 subpoena them or do you like to subpoena them just to
23 make sure that at the last minute they don't get cold
24 feet and not show up?

25 MS. BROCK: Well, I wouldn't normally

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1 subpoena anyone who was a represented party. We would
2 just reach agreement. And I think in terms of the
3 FENOC employees we may also be able to reach an
4 agreement.

5 The advantage of having a subpoena is that
6 then they can receive a witness fee.

7 JUDGE FARRAR: Oh, okay.

8 MS. BROCK: And I'm not sure. I don't
9 think they can if we don't have a subpoena.

10 JUDGE FARRAR: All right.

11 MS. BROCK: I would have to confirm that.
12 But that's one reason to go ahead and go that route.

13 JUDGE FARRAR: All right. Well, you know
14 when the time comes let us know.

15 And when we have those, Ms. Penny, is it
16 likely you would consent, you wouldn't be opposing
17 subpoenas for depositions, I wouldn't imagine?

18 MS. PENNY: No, Your Honor. In fact, I'm
19 the one who probably came up with the names.

20 JUDGE FARRAR: Okay. So if it's
21 noncontroversial, we could move quickly on it. And
22 let us know if it is controversial and we'll decide
23 what we to do.

24 So when are you looking at the time frame
25 for depositions?

1 MS. BROCK: The month of July and August.
2 We'll try to -- I mean, for anyone actually, I would
3 try to contact them first and have an agreeable date
4 before we went to the Board for a subpoena.

5 JUDGE FARRAR: All right. But if you're
6 looking at July and August time frame, then our
7 September 15th date for the end of discovery looks
8 pretty good?

9 MS. BROCK: From the perspective of the
10 Staff, yes.

11 JUDGE FARRAR: I missed that. Say that
12 again.

13 MS. BROCK: From the perspective of the
14 Staff, yes.

15 JUDGE FARRAR: Okay. Ms. Penny, that
16 looking --

17 MS. PENNY: I'm trying to comply with it
18 too, Your Honor.

19 JUDGE FARRAR: Okay. If we do meet that
20 deadline or only have to extend it slightly, what are
21 we looking at in terms of hearing dates? Have you all
22 talked about that at all?

23 MS. BROCK: We have not discussed it. When
24 I charted out the model schedule, it sort of depends
25 on the summary judgment. If we end up doing summary

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1 judgment motions and how long the Board wants to rule
2 on those.

3 JUDGE FARRAR: All right. And I take it
4 until you're further along in discovery you can't
5 really make any predictions about how big a role
6 summary judgment will play?

7 MS. PENNY: That's certainly the case on
8 my part, Your Honor. I'm not sure yet, however it
9 appears as though there are many factual disputes
10 here.

11 MS. BROCK: I would be inclined to agree
12 with that. I think it's unlikely that the Staff would
13 be filing a summary judgment motion. partially because
14 it's our burden.

15 JUDGE FARRAR: Right. Okay. And I
16 suppose to help your thinking we're not inclined to
17 grant summary disposition unless things are really
18 clear-cut. We've had a couple of cases on battles of
19 experts where we've said -- now this is, of course,
20 not experts, but battles of experts where we say
21 summary deposition isn't the way to handle them. And
22 I think rather than spend a lot of time on opinions
23 with lengthy denials of summary disposition if we
24 think the motions aren't well taken, we may just issue
25 very summary orders denying them rather than waste a

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1 lot of time with our lengthy reasoning with these at
2 all is simply a factual dispute. So keep us posted on
3 that.

4 On a related subject would you instead of
5 summary disposition be looking at stipulations on
6 certain issues? I mean I'd assume we'd never have
7 full summary disposition, could we have partial
8 summary disposition or better yet stipulations? Have
9 you been able to talk about stipulations yet?

10 MS. BROCK: We haven't discussed
11 stipulations. I think especially after we enter the
12 interrogatories both sides had several admissions,
13 we'll have a much better sense of what stipulations we
14 can reach.

15 JUDGE FARRAR: All right.

16 MS. PENNY: I agree with that, Your Honor.

17 JUDGE FARRAR: Okay. Well then there may
18 not be a lot more progress or a lot more business
19 today to conduct. Again, we wanted to have this
20 conference just to make sure there weren't some
21 problems getting in the way of things. But it sounds
22 like you all are on target and working together as
23 well as might be expected.

24 So let me ask counsel for the company, are
25 in house or outside counsel?

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1 MR. FERRARO: Outside counsel, Your Honor.

2 JUDGE FARRAR: With whom?

3 MR. FERRARO: Morgan Lewis.

4 JUDGE FARRAR: Anything? Even though
5 you're not a party here, any comment you'd like to
6 make on what we've just talked about?

7 MR. FERRARO: No, sir. We have nothing to
8 add at this time.

9 JUDGE FARRAR: Then do either counsel for
10 the parties have any other business you'd like to
11 conduct today?

12 MS. PENNY: Your Honor, I do not.

13 JUDGE FARRAR: Ms. Baty?

14 MS. BROCK: No. It's Ms. Brock. No, we
15 don't have any other business.

16 JUDGE FARRAR: All right. Then why don't
17 we set another conference call for after discovery
18 concludes. And, again, just pencil it in. How's
19 Wednesday, September 20th look?

20 MS. BROCK: Well, that's fine with the
21 Staff.

22 MS. PENNY: That's fine with me as well,
23 Your Honor.

24 JUDGE FARRAR: All right. Let's
25 tentatively set that for 10:00 on Wednesday the 20th.

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1 If, of course, you don't complete discovery, then
2 we'll just scrub that date. And, of course, we're
3 available at your call. If you have some disputes that
4 either we need a mini oral argument on a motion or
5 it's something you want to discuss with us to see if
6 we can hammer it out together, feel free to call us
7 even on short notice and we'll try to help resolve it.

8 MS. BROCK: Would you like us, Your Honor,
9 to come up also with some time in middle of September
10 work on a joint schedule for going forward post-
11 discovery or is that something that the Board wants to
12 decide?

13 JUDGE FARRAR: Oh, no. That would be fine.
14 In other words, under the Commission's rules this is
15 supposed to be an expeditious hearing that's limited,
16 of course as Ms. Penny has mentioned, by the volume of
17 documents involved. And so we're ready as soon as you
18 are. And so as you near the end of discovery if you
19 all can come up with even a tentative schedule, maybe
20 that's something that you could put in front of us for
21 that September 20th or thereabouts conference call and
22 we would like to have that. We don't want to force you
23 to hearing before you're ready, but by the same token
24 if you come up with a schedule that makes sense, put
25 it in front of us and we'll go ahead.

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1 MS. BROCK: Yes. Well, I guess the thought
2 on the part of the Staff is just with potentially
3 having multiple witnesses and needing a fair amount of
4 time for the hearing to get that on the calendar so
5 that we can make sure that we have all of our
6 witnesses available. And so that it doesn't start
7 being delayed by kind of late scheduling would be to
8 an advantage. And I think we'll be in a position to
9 do that.

10 MS. PENNY: I think so, too, Your Honor.

11 JUDGE FARRAR: Good. Well, that can then
12 be a principal order of business on September 20th to
13 do that.

14 At this point I don't suppose you have any
15 idea how many days or weeks of hearing we need? MS.
16 BROCK: I have a few budget estimates, so I have some
17 thoughts on it. This is a guess assuming a certain
18 number of stipulations and if we proceed with prefiled
19 direct testimony --

20 JUDGE FARRAR: Yes.

21 MS. BROCK: -- I think we would need
22 about a week of hearing for each case. If we do lie
23 direct testimony, I think that will extend
24 considerably.

25 JUDGE FARRAR: Okay. I found nothing

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1 against you now, Ms. Baty --

2 MS. BROCK: That was Ms. Brock.

3 JUDGE FARRAR: Nothing against you, Ms.
4 Brock, but I found in the PFS case the Staff lawyers
5 and every lawyer's estimates to be off by about a
6 factor of three.

7 MS. BROCK: That's fine.

8 MS. PENNY: Oh, good heavens.

9 MS. BROCK: Yes.

10 JUDGE FARRAR: So thank you for that
11 guess. We'll give it the value it's worth.

12 Ms. Penny, but are those thoughts
13 consistent with yours?

14 MS. PENNY: Your Honor, yes. And all along
15 I have been considering that Ms. Miller's hearing will
16 take less time than Mr. Moffitt's.

17 MS. BROCK: I think that's true.

18 MS. PENNY: Mr. Miller's may indeed be a
19 week at most.

20 JUDGE FARRAR: Okay.

21 MS. PENNY: It's a limited period of time
22 and far fewer witnesses.

23 JUDGE FARRAR: Are there any parts of the
24 two gentleman's hearings that we would do together or
25 --

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1 MS. PENNY: I wish I could say that, Your
2 Honor, but their issues are so different. They pick
3 up at different periods of time, unfortunately, but
4 we'll certainly keep an eye on it.

5 JUDGE FARRAR: Will any of the witnesses
6 be the same?

7 MS. PENNY: Very few.

8 JUDGE FARRAR: Oh, okay. All right. I
9 suppose to the extent any are, whichever hearing goes
10 first, if you all are satisfied with what happens we
11 could just adopt the particular witness' testimony as
12 given in one hearing and put it the other. But I'll
13 leave that to you to work out.

14 Let me ask my colleague, Judge Trikouros
15 if he has anything to add?

16 JUDGE TRIKOUROS: No.

17 JUDGE FARRAR: Okay. Is there any other
18 business that needs to come before us today?

19 MS. BROCK: The Staff doesn't have
20 anything.

21 MS. PENNY: And neither do Mr. Miller or
22 Mr. Moffitt.

23 JUDGE FARRAR: Okay. Thank you, Ms.
24 Brock, Ms. Penny and Mr. Ferraro. Good to have you
25 with us. Mr. Langan, thank you for sitting in.

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1 And with that, then we will adjourn the
2 conference call with a plan for a September 20th call,
3 but the Board is ready to be called in if you all need
4 us before then.

5 Thank you very much.

6 MS. PENNY: Thank you.

7 MS. BROCK: Thank you.

8 (Whereupon, at 10:20 a.m. the conference
9 call was adjourned.)

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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 and

Stephen P. Moffitt

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

Location: Via teleconference

were held as herein appears, and that this is the
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