



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER WILSON**

**C2023/6925**

**s.739 - Application to deal with a dispute**

**United Firefighters' Union of Australia  
and  
Fire Rescue Victoria  
(C2023/6925)**

**Melbourne**

**10.00 AM, THURSDAY, 8 FEBRUARY 2024**

PN1

THE COMMISSIONER: Good morning, parties. If I can take the appearances, please.

PN2

MR J McKENNA: If it please the Commission, McKenna, initial J, seeking permission to appear on behalf of the UFU.

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THE COMMISSIONER: All right. Thank you, Mr McKenna.

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MR C McDERMOTT: Commissioner, McDermott, first initial C, also seeking permission to appear on behalf of Fire Rescue Victoria, the respondent.

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THE COMMISSIONER: All right. Thank you, Mr McDermott. Mr McKenna and Mr McDermott, in respect of the permission to appear, I give you that permission this morning. However, I would confine it to the mention hearing only. If you seek appearance at a later stage, you will need to provide more detailed submissions on the subject.

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MR McKENNA: If the Commission pleases, I think those matters are already dealt with and the directions made, if it please.

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THE COMMISSIONER: They are indeed. All right. Thank you. Parties, the reason I have called the matter on for a mention hearing has been the correspondence received from solicitors acting for Fire Rescue Victoria. Now there's a presumption in the listing, which probably I should have checked first, but can I just maybe ask you this question, Mr McKenna: do you agree or disagree with the proposal that's been put forward by the respondent?

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MR McKENNA: The UFU agrees with the approach taken by the Commission and the order made by the Commission and would oppose the splitting of the disputes.

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THE COMMISSIONER: Thank you. In that case, what I propose to do is to hear from you first, Mr McDermott, as to the proposal you make and the reasons as to why it might be, and then clearly Mr McKenna would have the right of reply on those matters.

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MR McDERMOTT: Thank you, Commissioner. Commissioner, essentially for the reasons as outlined in the correspondence that you have adverted to from 5 February 2024 - does the Commissioner need me to tender that correspondence for the purposes of today?

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THE COMMISSIONER: Very well. I will mark the correspondence from Lander & Rogers to the Commission dated 5 February 2024 as FRV1.

**EXHIBIT #FRV1 CORRESPONDENCE FROM LANDER & ROGERS TO THE COMMISSION DATED 05/02/2024**

PN12

MR McDERMOTT: Thank you, Commissioner. Essentially, there really is only two aspects to the proposal as to why the jurisdictional objection should be split off or hived off, and I will come to the issue of how that might be practically done, et cetera, at length. From the Bar table, I will state the, hopefully uncontroversial, fact about the numbers of staff involved at FRV. I'm instructed that's approximately just above 3000 operational staff that are covered by what we've termed the operational staff application. Then, in relation to the corporate staff applications, my instructions are it's just under 600 persons.

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Essentially, the differences that we have identified in that correspondence relate to what we have all identified as an essential difference of fact in relation to the relief that's sought. That's identified at paragraph 15 of the letter. We have identified that what we've termed the corporate staff applications, which apply to those 600 or so persons, relates to the requirement for employees to download and use WhatsApp on their personal mobile phones for work purposes and the use of the Microsoft Authenticator application.

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Now, whilst there is a degree of commonality with the use of the Microsoft Authenticator application insofar as the overall use of that particular technology with the organisation in total, and there will be a degree of overlap in relation to some of the communications concerning that use of technology, we apprehend that there's likely to be a difference in relation to how those matters are applied, putting it roughly, between the operational staff on the one hand and then the corporate staff on the other hand. That's one basis for which we say that there is a different factual substratum in relation to the way in which the matter would be determined in relation to the merits.

PN15

More importantly, though, is the issue of the differences between the enterprise agreements and - - -

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THE COMMISSIONER: Before you move to that - maybe I'm missing something in respect of paragraph 15 - but I just don't understand the proposition that you're putting. So what are the different requirements between the operational staff and the corporate staff? I just don't understand it from paragraph 15.

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MR McDERMOTT: It is difficult, Commissioner, because you don't have much of an evidentiary base before you, other than the - - -

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THE COMMISSIONER: I agree, and that's an invitation for you to flesh it out for me.

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MR McDERMOTT: Yes. Really the difference is - and I'm putting this from the Bar table in circumstances where - - -

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THE COMMISSIONER: Yes, I agree.

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MR McDERMOTT: - - - it's not fully before you in an evidentiary format. The staff involved in relation to what I call the corporate staff cohort, the dispute concerns whether or not there is a direction in relation to their use of the app called WhatsApp, which is a communication tool, and also the same overlapping use of the multifactorial authentication technology, which I'm not sure, Commissioner, if you had some involvement in this matter previously in relation to that particular element of the dispute, which is the use of the technology which enables you to access the various systems.

PN22

Really the headline point that I'm saying is that there's going to be likely a difference between how corporate staff use that technology and need to access that technology compared to how operational staff use that technology, and the WhatsApp communication tool is not a part of the ambit of the dispute in relation to the operational staff cohort.

PN23

So essentially, whilst there will be an overlap in relation to the overarching use of the multifactorial authentication tool, how it is then accessed by different staff at different times of the day and the requirements associated there is likely to be a different evidentiary basis.

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I don't think I'm going to be able to fairly take that much further having regard to the instructions and the evidence that I have available today. That's that first point.

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The second point is really - the nub of the jurisdictional objection is the differences in terms between the corporate staff enterprise agreements, which contain a no extra claims clause in each of them, with the operational staff enterprise agreement, which does not. So there is not going to be a jurisdictional objection taken insofar as the operational staff enterprise agreement pertains, but, in relation to the corporate staff enterprise agreements, we will say that the particular relief that's sought in relation to corporate staff applications is caught by the no extra claims provision in each of the enterprise agreements, such that the Commission would not be able to - if that's accepted, if that proposition is accepted, it would not be caught - sorry, it would be caught by the operation of the clause such that you wouldn't be able to grant any relief.

PN26

That seems to us to be a matter that can be determined separately, and should be determined separately, because if it's all dealt with in the one day on 9 April, under the current directions, effectively my client then has to prepare on the assumption that it may not be successful at the same time in relation to the jurisdictional objection, that is, putting on evidence as to the substantive merits, assuming the jurisdictional objection is not accepted by the Commission, if that makes sense.

PN27

THE COMMISSIONER: But that's not unusual, is it? It's certainly not in the directions that I give. The directions I normally give, which you have received, stipulate that if a party has a jurisdictional objection, then they can raise that, and, unless it's so profound that I consider it needs to be dealt with separately, then it's dealt with at the same time as the evidence.

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MR McDERMOTT: Yes, I accept it's not uncommon, Commissioner. The only point that I'd make in relation to it is that if it's determined likely at an earlier point in relation to what is largely a crisp legal issue, either it will or won't fall within the scope of that particular provision.

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THE COMMISSIONER: So that applies to the corporate staff agreements but not to the operational staff?

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MR McDERMOTT: Exactly. That's right. So there will be no jurisdictional objection in relation to the operational staff agreement. That might then be dispositive of the matter.

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THE COMMISSIONER: And the jurisdictional argument in respect of the corporate staff applications is confined to the view that the no extra claims provision prevents the application being made?

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MR McDERMOTT: Precisely. That's it. And, if that is dispositive and it's potentially capable of being dealt with with a very limited evidentiary basis - and of course my learned friend might have something to say about that - that seems to us to be a more sensible approach in relation to that being ruled on first, and we either succeed or we don't, and then we can catch up in relation to putting on the evidence about that matter before 9 April. That is the primary position in relation to it.

PN33

The difficulty, I suppose, is you might end up having to consider evidence which is not necessarily of any great moment, if you ultimately accept our jurisdictional objection, and it then means that we potentially run the risk of how long it goes on that particular day, having regard to additional evidence about the substantive - those issues I've raised.

PN34

That's really the nub of it, Commissioner, and I don't have anything further to say, other than the correspondence that we have put before you.

PN35

THE COMMISSIONER: Can I turn to the proposition you were just putting, which is the evidence that has to be called and the length of the proceedings. Can you give me some indication as to the evidence that would be called?

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MR McDERMOTT: At this stage, not yet, Commissioner. I do apologise, but I anticipate that it's likely that there will be a degree of overlap in relation to the overarching communications throughout the organisation, and it may be that some of the way that the technology works evidence would be entirely overlapping in terms of the multifactorial - I'm most certain that's correct in relation to the multifactorial - - -

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THE COMMISSIONER: All right. You can assume I know how Microsoft Authenticator works.

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MR McDERMOTT: Indeed.

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THE COMMISSIONER: I don't think I need a lot of evidence on that subject.

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MR McDERMOTT: No, I'm sure that's right, Commissioner. All I was saying is there's likely to be the same evidence on that point between the two matters.

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THE COMMISSIONER: Sure, but you alluded to evidence about how the technology works.

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MR McDERMOTT: And how it is used in relation to those particular - I just don't know how much additional evidence on the ground there might be on the difference between the two. Thank you, Commissioner.

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THE COMMISSIONER: All right. Thank you. Yes, Mr McKenna.

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MR McKENNA: If the Commission pleases, can I just start by making some observations about the nature of the three enterprise agreements that underpin the three disputes. The Commission will be familiar with each of them, but each of them are agreements that are transferable instruments by reason of the transmission of business from CFA and MFB to FRV. Each of the agreements was varied by Gostencnik DP pursuant to section 320 of the Act.

PN45

Each of the agreements involves a dispute resolution process that extends to matters pertaining to the employment relationship, that is, each of them - none of them are limited to matters arising under the NES or matters arising under the agreement. Each of them contains a no extra claims clause in the operational agreement, one in each division, and each of the agreements have passed their nominal expiry dates.

PN46

Turning to the dispute, or disputes, the union's position is that each of them arises out of precisely the same factual substratum. I will come to the issue of WhatsApp in a moment, but, in essence, the background to the grievances, as identified in the notices filed 11 August 2023, is in largely the same terms. It primarily relates to the requirement for employees to use their personal mobile phones to provide multifactorial authentication. I understand really the essence of this dispute has followed the cyber attack on FRV, which changed the practices of the organisation in requiring multifactorial authentication.

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In respect of the requirement, or the alleged requirement, for some employees to download and use WhatsApp, as presently instructed, I don't understand that to be a key part of the dispute. It is mentioned in the dispute notification - I accept that. It may be - and the Commission has made orders for the union to propose questions for determination.

PN48

That hasn't been done, so, in a sense, it's difficult to make submissions now and for the Commission to make any determinations regarding what the dispute is precisely about, but it may be that that is something that does not feature at all in the questions posed by the union, the draft questions posed by the union to the Commission. As I understand it, it is a slightly different issue to the multifactorial authentication.

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With that caveat about the specific questions not having yet been finalised, if I can just provide an overview as to how I see the main issues in dispute - and I say that this is really, unfortunately without any detailed instructions - the union has been ordered to, and will, crystallise the questions by 26 February - but, in terms of the main elements, the first is, of course, the use of personal mobile devices to provide multifactorial authentication, and whether FRV must, or should, provide compensation for that.

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Now that arises in various ways under the different agreements. As has been identified by my learned friend, the operational agreement has a number of clauses that specifically provide for arbitration of disputes about allowances, and it's said that no jurisdictional objection is taken to that dispute being before the Commission.

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Commissioner, as I indicated, the ops agreement, of course, the dispute resolution clause extends to matters pertaining, so it would be open, in my submission, to the

union to bring that dispute under the ops agreement as a matter pertaining, and that is in parallel with a claim for a new allowance under the specific clauses. If that were done, then the jurisdictional objection that has been foreshadowed for corporate employees would, presumably, be precisely the same for operational employees, and so there would be no utility in hiving that part or any division.

PN52

For the corporate tech employees, the former MFB employees, there is a specific clause in the agreement that provides for telecommunication devices that has been raised in the course of the dispute, and I anticipate that that will form a part of the dispute, such that it's not limited to a matter pertaining outside the agreement. I haven't been able to identify any such clause for former CFA/PTA employees, and so, presumably, the dispute there would simply be brought as a matter pertaining outside the parameters of the enterprise agreement.

PN53

I won't weigh in in any detail now into the union's position in response to a jurisdictional objection based on the no extra claims clause, save to say that it's a matter that the Commission, as currently constituted, has visited in the past and had regard to agreements that have passed their nominal expiry date and the work that a no extra claims clause would do in those circumstances, but I anticipate that those are matters that would be ventilated if a jurisdictional objection were brought.

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The second broad part of the dispute is regarding a failure to consult on the roll out of tokens. Each of the enterprise agreements has consultation obligations. They are in different terms, but, to the extent that the dispute covers that topic, it is precisely the same factual substratum.

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Then the third element, or potential element, is a failure to provide training regarding the roll out of tokens and, again, each agreement has different clauses about where and how training is required to be provided. Those clauses are in different terms, but they apply to the same factual substratum.

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So far as I can see, leaving the WhatsApp issue to one side, which is yet to be determined, there is a complete overlap of evidence that would be required, or that would arise, for the three applications.

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The Commission has made orders for the matters to be heard concurrently. That, in my submission, is something that is squarely within the powers of the Commission under section 598(1), and, having regard to the factors in 557 and 578, that order is supported by the UFU, and the basis for that support is first, second and third efficiency. The union wants to have this matter heard and determined as efficiently as possible without any unnecessary and undue delay.

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The orders that have been made identify, or provide for, the parties to raise jurisdictional objections. If the nature of that jurisdictional objection is something that really must be dealt with first, then the provisional view that's expressed in the orders is something that the Commission can revisit, and either party could make an application at that point, but, at the moment, in my submission, it really is premature to be ordering any division of the proceeding.

PN59

I had a look for authority in this Commission as to when the consolidation of trials or a splitting of trials should occur. I couldn't find anything directly on point. There is a lot of authority on this in the courts - and perhaps if I hand up one authority in a minute - but the starting point, as identified by Austin J in *Ghose v CX Reinsurance Company Ltd* [2010] NSWCA 10 at 27, is that:

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*The court's essential task is to work out pragmatically whether the most efficient course, consistent with requirements of fairness, would be consolidation, a joint hearing, immediately sequential hearings, entirely separate hearings, or something else.*

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In my submission, that is entirely consistent with the considerations under 577, which I will assume are well familiar to the Commission.

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In the Federal Court jurisdiction, there is a list of factors that have been considered time and time again, and I don't propose to spend a great deal of time on this, but if I could provide the Commission with a copy of the authority. It's just for the purpose of a list that's there, to the extent that that would provide guidance to the Commission. It's a judgment of Besanko J in *Humphries v Newport Quays*. At paragraph 8 - sorry, paragraph 11 - starting on page 6 and over the page, there's a list of nine factors.

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THE COMMISSIONER: Paragraph 11, you said?

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MR McKENNA: Paragraph 11, starting on page 6, but the nine numbered factors are on page 7. I won't go through them now. In my submission, every single one of those factors supports the order that has been made and the union's position, save perhaps for item 4, which really doesn't have any relevance.

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THE COMMISSIONER: All right. Thank you.

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MR McKENNA: Your Honour, subject to any questions, or any further instructions I may have, those are the submissions for the union.

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THE COMMISSIONER: Are you able to shed some light as to the sort of witnesses you would be calling?

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MR McKENNA: I don't anticipate that there is going to be a substantial factual dispute. There will have to be evidence - assuming that we proceed on those three broad topics, there will have to be evidence about what has happened with requests or a requirement for using personal devices, who that applies to. I understand it's the position, at least of FRV, that some employees operational in corporate will have their own mobile phones, so I anticipate there will have to be evidence about who does not, who is using their mobile phones, what that involves, and so forth. There will necessarily be some evidence about what consultation has and has not occurred and what training has and has not occurred. I don't anticipate that there will be a large volume of contested evidence.

PN69

I say all those things, Commissioner, without instructions, so the position of the union will obviously be much clearer on 26 February, when the material will be filed in accordance with the orders.

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THE COMMISSIONER: All right. Thank you. Just one moment, Mr McDermott. All right, thank you.

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MR McDERMOTT: Just very briefly, Commissioner, in reply, as I examine the F10s, I think there is a difference in relation to the consultation (indistinct). It's a feature of the operational staff applications, but it's not a feature of the corporate staff applications, i.e., the issue of what consultation has or has not been undertaken by reference to those enterprise agreements is not before the Commission presently in relation to the corporate staff applications, but it is - - -

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THE COMMISSIONER: Sorry, what's not before the Commission?

PN73

MR McDERMOTT: The consultation, the compliance with the requirements of consultation, how that is to be done under the corporate staff applications, it's not a feature in the F10s, in contrast to the operational staff.

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THE COMMISSIONER: All right. I see.

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MR McDERMOTT: Thank you.

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THE COMMISSIONER: Parties, I am reluctant to split the matters. Having said that, I can hear what Mr McDermott is saying. I think the best way forward is this. The directions which have been given obviously are in respect of each of the

matters. You can deal with those directions as you see fit and respond to them as you see fit. What I would propose to do is to maintain the directions which are set out at paragraph 2 and 3 of the directions, that is, to require the union to file its material by Wednesday 26 February 2024, and then to require the respondent to file its material by Wednesday 18 March 2024.

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What I think I should then do is to consider in more detail the application which has been made, which, as I understand it, is whether or not there's a single hearing. I would expect to do that in the week after 18 March, and to confirm or otherwise to you in writing at some point whether or not I am disposed to proceed with 9 April or not.

PN78

I think the other thing which should occur around about that time is that there's a further conciliation on the subject, that there is, I would have thought, the capacity, or even desirability, of you reaching agreement. In industrial terms, the dispute to me doesn't look much different from the disputes that arose weekly in the eighties concerning electronic funds transfer. On the other hand, it doesn't look particularly different from the allowances which have been paid to workers for the use of their vehicles for business use, probably since the 1950s. Bearing those things in mind, the dispute should be capable of resolution. It does not need, in my opinion, to be arbitrated.

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What I will do is, once we have received the material from the respondent on 18 March, we will convene a conciliation conference for that purpose. Does that suit you both?

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MR McDERMOTT: Yes, it does. You might need to give both Mr McKenna and I an education on other matters in the eighties. We were both born in the eighties.

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THE COMMISSIONER: I'm sure you were.

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MR McKENNA: I wasn't. I was born before the eighties.

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MR McDERMOTT: There we are.

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MR McKENNA: I'm Gen X.

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THE COMMISSIONER: He's being complimentary. Anyway, you get the point. Is there anything further? Mr Marshall looked as though he wanted to say something.

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MR MARSHALL: I've got a separate matter. If I could have some time, just five minutes, please. Nothing to do with the matter that's going on.

PN87

THE COMMISSIONER: All right. We will make sure that occurs.

PN88

All right, thank you very much. We stand adjourned.

**ADJOURNED INDEFINITELY**

**[10.34 AM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #FRV1 CORRESPONDENCE FROM LANDER & ROGERS TO  
THE COMMISSION DATED 05/02/2024.....PN11**