

1           So that being the case, my concern  
2           is, if the Bureau has the documents and that  
3           automatically they become the Commission  
4           documents, then the Bureau is getting a most  
5           favored nation status and giving Mr. Havens an  
6           end around the protective order.

7           JUDGE SIPPEL: Well wait a minute,  
8           he kind of wants, first things first, Mr.  
9           Havens has not gotten any of these sensitive  
10          documents, let me put it that way. We call  
11          them sensitive, but I know what you're talking  
12          about. To the extent that the General Counsel  
13          has an obligation under the law to look at a  
14          FOIA request and to understand what is here,  
15          what it has under its, well, I guess you  
16          could, I see what you're saying, this gets to  
17          be a little bit fuzzy here. You're saying  
18          that these documents, because of the nature of  
19          their production and litigation, et cetera,  
20          protective order, they're really not  
21          Commission documents.

22          MR. KELLER: That's exactly it, so

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1 the formal terminology under the FOIA is  
2 Agency record. That's saying they're not  
3 Agency records.

4 MR. PLACHE: Your Honor?

5 JUDGE SIPPEL: Please.

6 MR. PLACHE: On behalf of  
7 Pinnacle, I'm real concerned about this too.  
8 And we did give our discovery response to Mr.  
9 Jackson when he was still representing Havens.

10 JUDGE SIPPEL: Yes.

11 MR. PLACHE: But we followed the  
12 rules and now Mr. Havens is trying to get  
13 copies of these documents and I've had to  
14 spend a lot of time responding to the Office  
15 of General Counsel and billing my client in  
16 it. So that creates a problem.

17 If the Commission hired outside  
18 counsel to represent it in this hearing, then  
19 there would not be any issue here. These  
20 would not even look like Commission documents  
21 because the outside counsel would be subject  
22 to the protective order and couldn't give them

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1 to the Office of General Counsel.

2 I agree that, you know, for this  
3 purpose, trial staff within the Commission  
4 should be treated the same way. And I'm not  
5 looking to say someone's doing something  
6 untoward, I'm just saying that's how it should  
7 be viewed. That's our opinion here. We don't  
8 want to have to, you know, respond to  
9 discovery in good faith, trusting on a  
10 protective order and all of a sudden this huge  
11 problem comes up and one of the parties in  
12 this proceeding is trying to make an end run  
13 around Your Honor's orders.

14 And it's happened not only with  
15 this, it's happened with other orders too, but  
16 this is a big concern. Mr. Havens should not  
17 be getting these documents provided in this  
18 hearing, for purposes of this hearing only.

19 MS. KANE: Your Honor, I will note  
20 that the Bureau has not turned over any  
21 confidential documents to date.

22 JUDGE SIPPEL: Say who, say what?

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1 MS. KANE: The Bureau has not  
2 turned over to the Office of General Counsel  
3 any confidential documents. They may have, I  
4 don't know what they've said to you, but we  
5 have not yet turned over those documents so it  
6 --

7 JUDGE SIPPEL: Not yet, you mean  
8 you intend to?

9 MS. KANE: Well, it was my  
10 understanding that we were required to. But  
11 if that is something that, you know, we  
12 certainly could raise with the Office of  
13 General Counsel about the party status here.  
14 I'm not sure that that is something that has  
15 really been flushed out. But just to note for  
16 the record, we haven't turned over any  
17 confidential information.

18 MR. PLACHE: Could you make an  
19 issue, if you received an order saying that  
20 the documents can't go past the attorneys,  
21 they can't go to another party. And for this  
22 purpose, the Office of General Counsel is a

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1 different party.

2 JUDGE SIPPEL: Well if I issued  
3 that order, would the Bureau feel bound by it?  
4 I don't want to get into one of these --

5 MS. KANE: Would we feel bound by  
6 your order?

7 JUDGE SIPPEL: Yes.

8 MS. KANE: Absolutely we would  
9 feel bound by your order.

10 JUDGE SIPPEL: I would tell you  
11 that you can't give the General Counsel  
12 anything that's confidential that they ask  
13 for, relating to this case.

14 MS. KANE: I think that would  
15 certainly help things going forward, Your  
16 Honor. And, you know, we've said all along  
17 that the Bureau, for the purposes of this  
18 hearing, is not the Commission.

19 JUDGE SIPPEL: No, I understand  
20 that. This is the, you know, law professors  
21 write volumes on this question, you know, it's  
22 become a small industry. But my question is,

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1 oh, let me ask a question this way then.  
2 Supposing I met with the General Counsel, the  
3 head of the General Counsel Unit that's doing  
4 the FOIA review and discussed this problem  
5 with them. Would anybody have an objection to  
6 that?

7 MR. KELLER: I certainly don't  
8 have an objection to that, nor do I think it's  
9 legally a problem anyway. I mean, neither one  
10 of you are parties to this proceeding.

11 JUDGE SIPPEL: Well aren't I in  
12 the same boat as Ms. Kane? I'm --

13 MR. KELLER: Well, you're a  
14 decision maker. I mean, obviously it stands  
15 to reason, I'm assuming that Your Honor would  
16 not disclose confidential documents unless  
17 he's --

18 JUDGE SIPPEL: I wouldn't know  
19 know how to, I don't know, I haven't looked at  
20 them yet.

21 MR. KELLER: I think for you to  
22 discuss this with the General Counsel, I don't

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1 have a problem with that. I also think the  
2 order that you just outlined that Ms. Kane  
3 said she would feel bound by would be helpful.  
4 And just to be clear on --

5 MS. KANE: Well, she backed off  
6 that firm, she backed off a bit on that.

7 MR. KELLER: Did she? I thought  
8 you said absolutely.

9 MS. KANE: What? What did I back  
10 out on?

11 JUDGE SIPPEL: If I issued an  
12 order to you --

13 MS. KANE: Yes, go on.

14 JUDGE SIPPEL: -- I mean, it  
15 wouldn't be you personally, madam, but if I  
16 issued an order to the Enforcement Bureau  
17 saying that any confidential documents in EB's  
18 office that has been obtained in connection  
19 with this case cannot leave your possession or  
20 control and cannot be given to the General  
21 Counsel's Office in connection with any FOIA  
22 request, would your Bureau go along with that?

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1 I mean, speaking for the Bureau, I'm not going  
2 to pin you down to it, but what do you think?  
3 I mean I --

4 MS. KANE: I would see no basis  
5 for the Bureau to disregard an order of Your  
6 Honor. So, I mean, if you were to issue an  
7 order, as I said, I think that would go a long  
8 way to the Bureau being able to explain to OGC  
9 when they requested those documents from us,  
10 that we were under court order not to provide  
11 them.

12 JUDGE SIPPEL: You know what the  
13 Wireless Bureau did to me in that Carriage  
14 Case? They yanked the case away from me.

15 MS. KANE: Well, I --

16 JUDGE SIPPEL: They tried to, they  
17 tried to.

18 MS. KANE: -- I don't foresee  
19 anybody trying to do that here, Your Honor.

20 MR. PLACHE: Should we amend a  
21 protective order and have everyone agree  
22 including the Bureau, that the documents are

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1 not subject to FOIA?

2 JUDGE SIPPEL: I'll tell you why,  
3 I don't know how much you want to get involved  
4 in this but, you know, you're on the right  
5 track. Would you submit me a proposed  
6 language to tack on to the protective order?  
7 And maybe we'll just test it out and see where  
8 it goes.

9 MR. PLACHE: And that should  
10 probably be retroactive, I mean, because  
11 that's the understanding we had.

12 JUDGE SIPPEL: Well I bet it is,  
13 yes, well you give me the language, you give  
14 me the language.

15 MR. PLACHE: Okay.

16 JUDGE SIPPEL: I'm not adverse to  
17 it being retroactive to, you know, two  
18 Christmases ago, but I want to just feel  
19 comfortable that this isn't going to be a  
20 waste of time and it's going to end up causing  
21 another dust up with another, you know, part  
22 of the Agency. As far as I know, this is a

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1 case, this is an issue rather of first  
2 impression. I know this has only been an  
3 academic issue, but about the separation of  
4 powers and all that kind of business within  
5 the Agency, but give me the language and I'll  
6 look at it. I'm inclined to do it if I can do  
7 it, if I feel comfortable that I can do it.

8 Now if I say I can do it then it's  
9 not going to cause a big dust up. I don't  
10 want to have another, I'm being kept busy with  
11 an awful lot of things except the merits of  
12 this case. I'd really like to get to that.  
13 So okay, you give it to me as soon as you can.  
14 Yes, but certainly check with Mr. Keller and  
15 check with Ms. Kane and anybody else you want  
16 --

17 MR. PLACHE: It will probably be  
18 early next week probably.

19 JUDGE SIPPEL: That's fine, that's  
20 fine. I draw distinctions on Thanksgiving  
21 Day, I mean, I think that's worthwhile.  
22 That's a meritorious argument. We don't want

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1 to leave this, oh, but I still, I'm not sure  
2 whether I'm wanting to do it but I still want  
3 the option of talking to the, not to have the  
4 General Counsel approve the language on  
5 admitting the particular, but try and get some  
6 kind of a, you know, again try and talk to  
7 General Counsel's Office into seeing it your  
8 way, our way. I've never done that before.  
9 I have no idea. But I'd have to obviously be  
10 to the extent that that's ex parte, I'd be ex  
11 parte. You say I've not been ex parte, I  
12 can't be ex parte because I'm not a party to  
13 be ex parte. And that's fine with me as long  
14 as everybody's satisfied with it.

15 MR. KELLER: Right. I think the  
16 ex parte rules preclude you from having ex  
17 parte communications with parties. And so GC  
18 is not a party, I don't see a problem on that.

19 JUDGE SIPPEL: Well I've been  
20 right on that anyway. Okay. Is that okay?

21 MR. KELLER: Yes, I would also say  
22 it might be helpful too because, well let me

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1 just ask one to be on the record, if I sounded  
2 like I did, I was not accusing the Bureau of  
3 having done anything improper --

4 JUDGE SIPPEL: I understand that.

5 MR. KELLER: Ms. Kane said a  
6 moment ago she didn't know what I was  
7 referring to because they have these  
8 documents. Just for the record, what I'm  
9 referring to is the OGC issued a letter last  
10 week taking a sua sponte ten day extension for  
11 itself to respond to the request. And in  
12 response to a query from Mr. Havens about what  
13 that was about, they're statement was they  
14 needed the additional time to review the  
15 confidentiality of the documents.

16 That raised concern on my part  
17 because that may have just been buzz language,  
18 but it could be attributed as meaning they've  
19 got the documents now and they're reviewing  
20 them and that was the basis for my statement  
21 concerning that.

22 JUDGE SIPPEL: All right, well I

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1 certainly can, as I say, informally raise that  
2 concern right away.

3 MR. KELLER: But Ms. Kane just  
4 said she hasn't produced them anybody and I  
5 appreciate that representation and, you know,  
6 I take that --

7 JUDGE SIPPEL: Well, I mean, I  
8 will independently see what the situation is.

9 MR. PLACHE: And they're acting  
10 when?

11 MR. KELLER: Yes, I don't know,  
12 it's going to be up to them, Mr. Havens, well,  
13 it's definitely going to be on the second  
14 request so I don't know.

15 MR. PLACHE: Okay.

16 MR. KELLER: They said ten days  
17 last week so --

18 MR. PLACHE: It might be more now.

19 JUDGE SIPPEL: So are you getting  
20 close to the ten days?

21 MR. KELLER: Getting close to the  
22 ten days.

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1                   MR. PLACHE: Well Mr. Havens just  
2 got an extension to respond.

3                   MR. KELLER: But was that on the  
4 first one or was that the one that we reposed?  
5 I think it was. If it has then they won't do  
6 anything before he responds.

7                   MR. PLACHE: He couldn't respond  
8 until Friday.

9                   MR. KELLER: Right.

10                  JUDGE SIPPEL: Well this is as  
11 much as we can do on it today.

12                  MS. KANE: Well, it would seem to  
13 me that OGC cannot act on anything unless we  
14 were to provide them with the documents. And  
15 with our understanding that Your Honor may be  
16 issuing an order with regard to that, we don't  
17 have to produce those documents right now. So  
18 I mean --

19                  JUDGE SIPPEL: Have they been  
20 asked for?

21                  MS. KANE: They have been  
22 requested but obviously, much like Your Honor,

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1 I've been kept very busy on other matters for  
2 this case other than trying to get together  
3 the confidential documents for our Office of  
4 General Counsel.

5 JUDGE SIPPEL: Okay, well right  
6 now I'm issuing a bench order that you hold  
7 onto those documents until further advised.

8 MS. KANE: Okay.

9 JUDGE SIPPEL: For now. Oh, I  
10 know, the last thing I wanted to say on this  
11 so that we can move to another subject is, Mr.  
12 Chen, I'll address this to you, Mr. Chen, but  
13 I'm obviously talking to Mr. Havens. Could  
14 this discussion possibly alter your client's  
15 views with respect to pursuing this FOIA?

16 MR. CHEN: Well, I have not had an  
17 opportunity to discuss this particular issue  
18 with Mr. Havens. I mean, my own view of the  
19 discussion that just transpired is that  
20 there's an incredible amount of inherent  
21 distrust being expressed of the General  
22 Counsel's Office.

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1           The General Counsel does have a  
2           legal obligation to respect a protective  
3           order. And it sounds as if Your Honor does  
4           intend to clarify informally what the General  
5           Counsel's Office. And I have every confidence  
6           that that will result in a proper handling of  
7           the matter consistent with both the protective  
8           order and with FOIA.

9           And I haven't had a chance to  
10          discuss the matter at all, let alone to any  
11          adequate degree with Mr. Havens. That said,  
12          Mr. Havens is participating on this call and  
13          with Your Honor's permission --

14                 JUDGE SIPPEL: I see.

15                 MR. CHEN: -- I would invite him  
16          to express his view, emphasizing of course,  
17          that he has not had the opportunity to discuss  
18          it with me, nor have I had an opportunity to  
19          advise him.

20                 JUDGE SIPPEL: Yes, that's why I'm  
21          addressing it to you. I would rather not  
22          pursue it that way. I'll ask you --

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1 MR. CHEN: Okay.

2 JUDGE SIPPEL: -- I give you the  
3 opportunity to get a little bit better focus  
4 on this question and talk to him about it.  
5 I'm just hoping that --

6 MR. CHEN: I would very much  
7 appreciate that.

8 JUDGE SIPPEL: Yes. I'm just  
9 hoping that you will appreciate the niceties  
10 of what we're talking about here and how I'm  
11 trying to avoid, you know, a confrontation  
12 with any other part of the Commission that's  
13 going to slow this, that could possibly slow  
14 this down.

15 MR. CHEN: I wholeheartedly agree  
16 that the expeditious and correct evolutions of  
17 the matter on the merits would be in  
18 everyone's interest.

19 JUDGE SIPPEL: Music to my ears.  
20 Okay, so --

21 MR. HAVENS: Your Honor --

22 JUDGE SIPPEL: Oh boy.

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1 MR. HAVENS: -- if I could add --

2 JUDGE SIPPEL: Yes, sir.

3 MR. HAVENS: -- I would be, of  
4 course I will talk to Mr. Chen about this  
5 matter, and I've been attempting to, and I  
6 have been regularly communicating with the  
7 Enforcement Bureau on matters of the hearing.  
8 And I'd be happy to talk to Mr. Keller and  
9 then opposing counsel, along with Mr. Chen, in  
10 order to attempt to minimize any disruption,  
11 they seem to be expressing regarding FOIA  
12 requests, somehow delaying the hearing. So I  
13 think it's a matter of discussion. I mean,  
14 what I heard today and regularly over and over  
15 is Havens' trying to do an end run, Havens is  
16 violating judge's order --

17 JUDGE SIPPEL: Well I stopped them  
18 with that one now.

19 MR. HAVENS: Well I appreciate  
20 that.

21 JUDGE SIPPEL: Okay.

22 MR. HAVENS: But all I'm saying is

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1 that I have in the past, and still am willing,  
2 and I hope the Enforcement Bureau and  
3 attorneys for Maritime and Pinnacle will see  
4 fit to discuss with Mr. Chen and myself, the  
5 matters that you have gone over regarding the  
6 FOIA requests and how to minimize any  
7 disruption in the hearing.

8 JUDGE SIPPEL: Okay, well as they  
9 say, yes, as the saying goes, let's leave it  
10 to the lawyers. And this is exactly what I'm  
11 trying to avoid is excessive discussion on  
12 something that really doesn't relate to the  
13 case. But it is very, very important.

14 And again, I am not convinced as I  
15 sit here, Mr. Chen saying, acknowledging the  
16 merits and the capabilities of the General  
17 Counsel Office which I wholeheartedly concur  
18 in. But this is a question of whether or not  
19 the Commission has authority over its  
20 operating Bureau who's acting in a, you know,  
21 in an attorney capacity. And is that attorney  
22 relationship supposed to get different

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1 treatment than the other parties do in terms  
2 of the control of these confidential  
3 documents?

4 That's got really nothing to do in  
5 terms of what the General Counsel Office might  
6 do with those documents if they had them. But  
7 the question here now is should they have  
8 them? And should the Bureau be bound by the  
9 order like the rest of the attorneys in this  
10 case are? Now that's point number one.

11 Point number two is that now that  
12 you have counsel, he's going to have the same,  
13 you're going to have the same, well, if you  
14 call it that way, you're going to have the  
15 same benefit as other parties in this case.  
16 He's going to sign onto the protective order,  
17 he's going to get the documents, and he's  
18 going to make these decisions on your behalf.  
19 And you're not going to get access to  
20 confidential information that would be, you  
21 know, would be unfair to your competitors. So  
22 that's the way it's supposed to work anyway.

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1                   Now why you want to pursue a FOIA  
2 request in light of that, I can't, as I say,  
3 I can't stop you or hinder you from doing  
4 that, to the extent that it's, you know, it's  
5 your right. But that's not, because you can  
6 see, Mr. Chen can think about this and talk  
7 about it, this is not helping things. It's  
8 not helping things one bit. And it's got  
9 people concerned. And we have spent, God  
10 knows, half an hour, 45 minutes on this which  
11 we shouldn't have to. But I don't want to say  
12 anything about your rights, you know, the  
13 rules are the rules and you proceed as  
14 accordingly, but please consult counsel  
15 carefully before you do.

16                   Now let's leave it at that. I  
17 want to move on to another point, please,  
18 we'll never get through this. We now have  
19 the, that takes care, now do you need more  
20 time, let me ask, I'm sorry, Ms. Kane, do you  
21 need more time for discovery?

22                   MS. KANE: What we would like is

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1 six, we would like an order that says that  
2 from the last date of the last deposition, we  
3 would have six weeks left in the discovery  
4 period.

5 JUDGE SIPPEL: Does anybody have  
6 an objection to that?

7 MR. KELLER: Your Honor, we're a  
8 little reluctant to go along with extending  
9 the already lengthy period for discovery in  
10 this case anyway. But what we would propose  
11 is this, subject to a resolution of the FOIA  
12 matter, we would schedule depositions for Mr.  
13 and Mrs. DePriest, they were noticed and were  
14 supposed to have taken place prior to the  
15 deadline. Ms. Kane is concerned that she  
16 might want to do some subsequent written  
17 discovery after --

18 JUDGE SIPPEL: To clarify what  
19 she's claiming is a confusion.

20 MR. KELLER: -- what I can  
21 represent at this point, and I'm not expecting  
22 Ms. Kane to just accept this and therefore say

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1 all hunky dory, is keep in mind under Issue G,  
2 which has to do with the construction and  
3 operation of these facilities, certainly as to  
4 the construction, that was something that  
5 occurred before Maritime ever acquired the  
6 site-based licenses, and as to operation,  
7 neither of the DePriests are involved in the  
8 day to day operations. So I don't know that  
9 there's going to be a whole lot of necessary  
10 information.

11 But what I would be willing to do,  
12 rather than extend the date out into the  
13 future to extend discovery, is to say that we  
14 would, subject to resolving the FOIA,  
15 coordinate with the Bureau and make the  
16 DePriests available for deposition. And then  
17 we would have no objection to written  
18 discovery being provided after that if  
19 necessary. But I don't know that we need to  
20 open it up for six weeks or something like  
21 that. In other words, all that's going to  
22 happen is two depositions and any needed

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1 follow-up, interrogatories, or document  
2 requests following those depositions.

3 JUDGE SIPPEL: Well I, you know,  
4 there's an element of equitable really, here  
5 in the sense of, which hurricane was it, Sandy  
6 or --

7 MR. KELLER: Sandy.

8 MS. KANE: Sandy.

9 JUDGE SIPPEL: Well that was a bad  
10 one. The other one was, what was the name of  
11 the other one? There was one before Sandy.

12 MR. KELLER: There was one a few  
13 months before but I don't remember it. How  
14 soon we forget.

15 JUDGE SIPPEL: Yes. But anyway, I  
16 mean, that was a mess. And --

17 MR. KELLER: In other words, the  
18 Bureau --

19 JUDGE SIPPEL: -- so this, I mean  
20 that's a good reason why she couldn't pursue  
21 the discovery.

22 MR. KELLER: No, I understand

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1 that.

2 JUDGE SIPPEL: And then we've got,  
3 but now you've got holidays coming up and all  
4 kinds of things.

5 MR. KELLER: No, I'm just saying  
6 look, we'll give the depositions and we have  
7 no problem with one round of follow-up written  
8 discovery after that. But I'm thinking it  
9 should be limited to that and then we're done.

10 JUDGE SIPPEL: Well we've got to  
11 give a time frame. We've got to have a cutoff  
12 date though.

13 MR. KELLER: Well, we can have a  
14 cut-off date by the time, what I'm saying is  
15 rather than have a date for completion of  
16 discovery, and we've defined what completion  
17 of discovery means. It means deposing the  
18 DePriests and filing any needed --

19 JUDGE SIPPEL: We can't even get a  
20 definition constructed. How are you going to  
21 get a definition of that?

22 MR. KELLER: Any needed follow-up

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