UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

November 7, 2001

Stephen H. Klitzman
Associate Director
Office of Legislative and
Intergovernmental Affairs
Federal Communications Commission
Room 8C-468
445 12 St., S.W.
Washington, D.C. 20554

Dear Mr. Klitzman:

This responds to your request for information in connection with a project to revise the *Interpretive Guide to the Government in Sunshine Act*. While I have not responded to the survey questions *per se*, I am providing relevant material that should be helpful to you in this endeavor. Copies of the following pertinent documents are enclosed:

A July 14, 2000 decision from the U.S. Court of Appeals for the D.C. Circuit on the Sunshine Act case of Natural Resources Defense Council, Inc., et al., v. NRC;

The NRC's Annual Report on the Government in the Sunshine Act for the Calendar Year 2000;

Federal Register notices of May 10, 1999 and July 22, 1999, announcing NRC's implementation of a final rule under the Government in the Sunshine Act; and

NRC's responses to certain questions from Congressman Edward Markey regarding this agency's compliance with the Sunshine Act's requirements.

I hope you find the enclosed materials to be useful.

Sincerely,

Stephen G. Burns
Deputy General Counsel

Enclosures: As stated

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 8, 2000 Decided July 14, 2000

No. 99-1383

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

On Petition for Review of a Regulation of the Nuclear Regulatory Commission

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David E. Adelman argued the cause for petitioners. With him on the briefs were *Eric R. Glitzenstein* and *Howard Crystal.*

Wendy M. Keats, Attorney, U.S. Department of Justice, argued the cause for respondents. With her on the brief were *David W. Ogden*, Acting Assistant Attorney General,

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Leonard Schaitman, Attorney, and *John F. Cordes*, Solicitor, U.S. Nuclear Regulatory Commission.

Before: EDWARDS, *Chief Judge*, RANDOLPH and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: The National Resources Defense Council, Inc. (NRDC)[1] asks us to vacate a regulation, promulgated by the Nuclear Regulatory Commission, that defines the term "meeting" for purposes of the Government in the Sunshine Act, 5 U.S.C. § 552b. The Sunshine Act requires that gatherings of members of certain agencies be open to the public if they constitute "meetings" under the Act. NRDC argues that the Commission's regulation is inconsistent with the text and legislative history of the statute. It further contends that the regulation is improper because it fails to provide procedural safeguards necessary to facilitate effective relief in the event that a meeting is improperly closed to the public.

We deny the petition for review. We are unable to accept NRDC's first argument because the Commission has done nothing more than adopt, verbatim, the Supreme Court's own interpretation of the meaning of "meeting" under the Act, as set forth in *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984). We are unable to accept the second argument because it conflicts with the Court's injunction against imposing non-statutory procedural requirements on agency decisionmaking, as set forth in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

I

The Sunshine Act provides, with ten specified exemptions, that "every portion of every *meeting of an agency* shall be open to public observation." 5 U.S.C. § 552b(b) (emphasis added). It imposes procedural requirements to ensure, inter alia, that advance notice is given to the public before agency meetings take place. *See id.* § 552b(e). It also imposes procedural requirements an agency must follow before determining that one of the ten exemptions from the openness requirement applies. *See id.* § 552b(d), (f). However, neither the openness requirement, nor the related procedural requirements, are triggered unless the governmental entity at issue is an "agency," and unless the gathering in question is a "meeting" of that agency.

For purposes of the Act, "agency" is defined as an executive branch authority or independent regulatory agency "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate." *Id.* § 552b(a)(1) (cross-referencing 5 U.S.C. § 552(e), subsequently redesignated § 552(f)). In addition, as will become relevant in our later discussion of the *ITT* case, the definition of "agency" extends to "any subdivision thereof authorized to act on behalf of the agency." *Id.* § 552b(a)(1). The Nuclear Regulatory Commission is an agency covered by the Act. *See Philadelphia Newspapers, Inc. v. NRC*, 727 F.2d 1195, 1199–1200 (D.C. Cir. 1984).[2]

The Sunshine Act defines the term "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business...." 5 U.S.C. § 552b(a)(2). The Commission's original Sunshine Act regulation, adopted in 1977, merely reproduced the language of the statutory definition. *See* 42 Fed. Reg. 12,875, 12,877 (1977).[3] It also clarified the kinds of communications not subject to the Act, explicitly excepting only social gatherings,

[1] NRDC is joined by a number of other public interest groups. For ease of reference, this opinion will refer to these parties collectively as "NRDC" or "petitioner."

[2] The Nuclear Regulatory Commission is composed of five members appointed by the President and confirmed by the Senate. *See* 42 U.S.C. § 5841.

[3] The Sunshine Act requires each covered agency to promulgate implementing regulations. *See* 5 U.S.C. § 552b(g).

and briefings of the Commission by outsiders where discussion was informational and without specific reference to pending Commission matters. *See id.* Under the 1977 regulation, the Commission "treated every discussion of agency business by three or more Commissioners, no matter how informal or preliminary it might be, as a 'meeting' for Sunshine Act purposes." 64 Fed. Reg. 24,936, 24,937 (1999).

In 1984, the Supreme Court decided *ITT*. In the course of its opinion, the Court said the following about the term "meeting" under the Act:

> This statutory language contemplates discussions that effectively predetermine official actions. Such discussions must be sufficiently focused on discrete proposals or issues as to cause or to be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.

466 U.S. at 471 (citations and quotation marks omitted). In 1985, noting the decision in *ITT*, the Commission issued an "interim" rule that revised the definition of "meeting" by appending the Supreme Court's definition, verbatim, to the language of the prior regulation. *See* 50 Fed. Reg. 20,889 (1985). The 1985 rule stated:

> "Meeting" means the deliberations of at least a quorum of Commissioners where such deliberations determine or result in the joint conduct or disposition of official Commission business, *that is, where discussions are sufficiently focused on discrete proposals or issues as to cause or to be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.*

Id. at 20,891 (codified at 10 C.F.R. § 9.101(c)) (new language in italics).

The 1985 rule was controversial. In response to criticism, the Commission announced that it would not conduct non-Sunshine Act discussions until it put into place procedures to govern such discussions. Before the Commission completed

those procedures, the American Bar Association's Administrative Law Section announced its intention to consider the issue, and the Commission decided to defer implementation of the 1985 rule pending receipt of the ABA's views. *See* 64 Fed. Reg. at 24,938. In 1987, the ABA issued its recommendations, which urged federal agencies and courts to interpret the term "meeting" as the Commission had proposed in 1985—by using the Supreme Court's language in *ITT*. *See* ABA Section of Administrative Law, Report to House of Delegates (J.A. at 460).[4] Despite the ABA's recommendations, the Commission took no further action. Although the "interim" rule of 1985 remained on the books, the agency continued to apply its pre–1985 regulation.

In May 1999, the Commission published, for notice and comment in the *Federal Register*, its intention to implement the 1985 rule's definition of "meeting." The Commission stated that its purpose was "to bring the NRC's Sunshine Act regulations, and the way they are applied by NRC, into closer conformity with Congressional intent, as set forth in the legislative history of the Sunshine Act and as clarified in [*ITT*]." 64 Fed. Reg. at 24,936. In the Commission's view, Congress had "carefully weighed the competing considerations involved: the public's right of access to significant information, on the one hand, and the agencies' need to be able to function in an efficient and collegial manner on the other." *Id.* at 24,939. "Congress," the Commission said, had "struck a balance: it did not legislate openness to the maximum extent possible, nor did it provide unfettered discretion to agencies to offer only as much public access as they might choose." *Id.* The notice listed a number of examples of topics that might be the subject of non-Sunshine Act discussions under the new rule, "so long as the discussion will not effectively predetermine final agency action." *Id.* at 24,941. The topics included: "How well is the agency functioning, what are our successes and failures, what do we see as major

[4] The Administrative Law Section issued its recommendations in 1986; the ABA adopted them in February 1987. *See* 64 Fed. Reg. at 24,938.

challenges in the next five and ten years, what is the state of our relations with the public, industry, Congress, the press?" *Id.* at 24,941–42.[5] A final order implementing the rule became effective on August 23, 1999. 64 Fed. Reg. 39,393 (1999).

II

This court has authority to set aside agency regulations that are "not in accord with" the requirements of the Sunshine Act. 5 U.S.C. § 552b(g). That, NRDC contends, is how the Commission's definition of "meeting" should be characterized. We consider this contention below.

A

In petitioner's view, the agency's definition of "meeting" is fundamentally inconsistent with both the language and legislative history of the Act. NRDC's argument concerning the statutory language cannot be easily dismissed. The Act states that the term "meeting" means the deliberations of a quorum of an agency, "where such deliberations determine *or* result in the joint conduct *or* disposition of official agency business." 5 U.S.C. § 552b(a)(2) (emphasis added). Selecting from the "or" clauses, the statutory definition of "meeting" would appear to include any deliberations that "result in the joint conduct . . . of official agency business," even if they do not "determine" either the joint conduct or disposition of that business. The Commission's definition, on the other hand, is limited to deliberations that are "likely to cause the individual participating members to form reasonably firm positions regarding" the matter—that is, to deliberations that "effectively predetermine final agency action." 64 Fed. Reg. at 24,941. Indeed, the Commission's examples of what it regards as outside the scope of "meetings" demonstrate the potential divergence between its definition and the literal

[5] The Commission subsequently advised Congress and this court that discussions focused on specific pending matters, such as licensing and restart authorizations, will not take place except in "meetings" covered by the Sunshine Act. *See* NRC Br. at 36; *see also* J.A. at 240, 245, 357 (letters to members of Congress).

statutory language. As NRDC argues, surely formal agency discussions of "how well" the agency is functioning, of its "successes and failures," of its "major challenges in the next five and ten years," and of the state of its "relations with the public, industry, Congress, [or] the press" qualify as the "joint conduct of official agency business," even if they do not predetermine agency decisions.[6]

Nor are NRDC's arguments concerning legislative intent frivolous. As petitioner points out, the Act begins with a declaration of policy that "the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government." Pub. L. No. 94–409, § 2, 90 Stat. 1241, 1241 (1976).[7] In our own decision below in *ITT*, we made the same point. *See* 699 F.2d 1219, 1243 (D.C. Cir. 1983) ("[T]he Act's presumption of openness requires that all doubts be resolved against closure."), *rev'd*, 466 U.S. 463 (1984). NRDC also notes that in an opinion issued prior to the Supreme Court's decision in *ITT*, this court pointed out that the Sunshine Act, unlike the Freedom of Information Act (FOIA), 5 U.S.C. § 552, lacks an express exemption for predecisional matters. *See Common Cause v. NRC*, 674 F.2d 921, 929 (D.C. Cir. 1982); *see also ITT*, 699 F.2d at 1241 ("The broad sweep of the Sunshine Act does not support a distinction between an agency's *predecisional* actions and its *postdecisional* efforts to implement, interpret, and promote

[6] Even on a literal reading, however, it is not enough that discussions constitute joint conduct of official business; to come with the term "meeting," such discussions must be "deliberations" that "result in" such joint conduct. 5 U.S.C. § 552b(a)(2).

[7] *See also* H.R. REP. No. 94–880, pt. 1, at 2 (1976) ("Absent special circumstances, there is no reason why the public should not have the right to observe the agency decisionmaking process first hand."). The Commission notes, however, that the Act's declaration of policy goes on to state that "the purpose of this Act [is] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities." Pub. L. No. 94–409, § 2, 90 Stat. at 1241.

its policies.").[8] And NRDC emphasizes, as we did in the decision reviewed by the Supreme Court in *ITT*, that the examples the legislative history provides of discussions excluded from the Act are largely limited to "passing references to agency business at social gatherings, casual background conversations in offices and corridors, banter at the golf course, and breakfast or luncheon discussions among members about the day's business." 699 F.2d at 1243 (footnotes omitted).[9] All of this, petitioner argues, supports the notion that Congress intended to except only "casual" conversation from the definition of "meeting"—not formal discussions about the agency's business, even if such discussions are not likely to be predeterminative.

NRDC acknowledges that the Senate Report on the Sunshine Act declares that "... the agency must be careful not to cross over the line and engage in discussions which effectively predetermine official actions." S. REP. No. 94-354, at 19 (1975). But petitioner contends that the Commission cites this sentence out of context, as it comes from a passage that discusses the particular problems of three-member agencies,

[8] The Commission argues that "predecisional" is not necessarily synonymous with "predeterminative," the adjective it uses for drawing the line between meetings and nonmeetings. According to the agency, under its definition " 'predecisional' matters fall on both sides of the Sunshine Act divide." NRC Br. at 38 n.18; *see also Common Cause*, 674 F.2d at 930 (" 'The meetings opened by [the Act] are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and *predetermined* their views.' ") (quoting S. REP. No. 94-354, at 18 (1975)) (emphasis added). *Common Cause* did not address the definition of "meeting" under the Act, but rather whether any of the Act's express exemptions authorized the closure of budget discussions that were conceded to be meetings. *See* 674 F.2d at 926.

[9] *See also* S. REP. No. 94-354, at 18 ("[B]rief references to agency business where the Commission members do not give serious attention to the matter do not constitute a meeting."); 122 CONG. REC. 28,474 (Aug. 31, 1976) (remarks of Rep. Fascell) (stating that the definition of "meeting" "is intended to permit casual discussions between agency members that might invoke the bill's requirements under the less formal 'concern' standard").

in which any two members would necessarily constitute a quorum.[10] Indeed, the full sentence begins with the words, "When two members constitute a quorum," which fill the space indicated by the ellipses above. NRDC argues that Congress did not intend the sentence to apply outside the three-member agency context, and that it therefore has no application to the five-member Nuclear Regulatory Commission. *But see infra* note 12.

In short, were we authorized to decide the validity of the Commission's definition of "meeting" de novo, NRDC's arguments would give us some pause. NRDC contends that we are in fact so authorized, because courts do not accord deference to an agency's statutory interpretation where the statute at issue, like the Sunshine Act, "impose[s] general obligations on [many] governmental agencies." *NRDC v. Defense Nuclear Facilities Safety Bd.*, 969 F.2d 1248, 1250-51 (D.C. Cir. 1992).[11] But while we may not have to defer to the

[10] The passage reads as follows:

> In three-member agencies, two members will constitute a quorum.... It is not the intent of the bill to prevent any two agency members, regardless of agency size, from engaging in informal background discussions which clarify issues and expose varying views. When two members are less than a quorum, such discussions would not in any event come under the section's open meeting requirements. When two members constitute a quorum, however, the agency must be careful not to cross over the line and engage in discussions which effectively predetermine official actions.

S. REP. No. 94-354, at 19.

[11] *See Reporters' Comm. v. Dep't of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) (applying de novo review to agency interpretation of FOIA), *rev'd on other grounds*, 489 U.S. 749 (1989); *see also Sallch v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996) (declining to accord deference where multiple agencies were granted authority to interpret same statute). The customary deference mandated by *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), would not apply here in any event because, as discussed below, the Supreme Court has already determined the meaning of the term "meeting" under the Act. *See Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116.

views of the Nuclear Regulatory Commission, the views of the Supreme Court are another matter. Because the Commission's definition is taken *in haec verba* from the Court's unanimous opinion in *ITT*, we now turn to an examination of that case.

B

The question before the Court in *ITT* was whether the Sunshine Act applied to informal international conferences attended by members of the Federal Communications Commission (FCC). The conferences, referred to as the Consultative Process, were intended to facilitate joint planning of telecommunications facilities. In the hope of persuading European nations to cooperate with its policy of encouraging competition in overseas telecommunications services, the FCC added the topic of new carriers and services to the agenda. *See* 466 U.S. at 465. ITT, which opposed the entry of new competitors, contended that the Consultative Process sessions constituted "meetings" of the FCC and that the Sunshine Act therefore required that they be held in public. *See id.* at 465–66. This circuit agreed. *See ITT*, 699 F.2d at 1246–50. The Supreme Court, however, reversed, holding that "the participation by FCC members in these sessions constitutes neither a 'meeting' as defined by § 552b(a)(2) nor a meeting 'of the agency' as provided by § 552b(b)." *ITT*, 466 U.S. at 469.

Writing for the Court, Justice Powell undertook an examination of the Sunshine Act's legislative history in order to determine the appropriate definition of the word "meeting." As the Nuclear Regulatory Commission does here, he emphasized those portions of the history suggesting an intent to balance the interest in openness with administrative concerns. "[I]n drafting the Act's definition of 'meeting,'" the Court said, Congress "recognized that the administrative process

131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").

cannot be conducted entirely in the public eye." 466 U.S. at 469. Quoting the Senate Report, the Court continued: "'[I]nformal background discussions [that] clarify issues and expose views' are a necessary part of an agency's work." *Id.* (quoting S. REP. No. 94–354, at 19). Because it believed that applying the Act in such contexts "would prevent such discussions and thereby impair normal agency operations," the Court concluded that the Act's definition did not encompass them. *Id.*

In a footnote, Justice Powell examined the evolution of the statutory language defining the term "meeting." That evolution, he said, "reflects the congressional intent precisely to define the limited scope of the statute's requirements." *Id.* at 470 n.7. In particular, he noted that "the Senate substituted the term 'deliberations' for the previously proposed terms—'assembly or simultaneous communication' or 'gathering'—in order to 'exclude many discussions which are informal in nature.' S. REP. No. 94–354, at 10." *Id.* (other citations omitted). Justice Powell also noted that although "earlier versions of the Act had applied to any agency discussions that 'concer[n] the joint conduct or disposition of agency business,'" the final version applied "only to deliberations that '*determine or result in*' the conduct of '*official* agency business.'" *Id.* (citations omitted). "The intent of the revision," he inferred, "clearly was to permit preliminary discussion among agency members." *Id.* (citations omitted).

Finally, the Court turned to the same passage of the Senate Report that we referred to at the end of Part II.A above—the passage NRDC contends applies only to three-member agencies. Relying on that language, the Court concluded that the statutory definition of "meeting" "contemplates discussions that 'effectively predetermine official actions.'" *Id.* at 471 (quoting S. REP. No. 94–354, at 19). This conclusion was stated without qualification—without any suggestion that it was limited to three-member agencies. To the contrary, the Court went on to endorse a definition of "meetings" recommended for all agencies in the Interpretive Guide published by the Office of the Chairman of the Administrative Conference of the United States (ACUS):

> Such discussions must be "sufficiently focused on discrete proposals or issues as to cause or to be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." R. Berg & S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act 9 (1978).

Id.[12] This is the definition that the Nuclear Regulatory Commission subsequently adopted as its own definition of "meeting," and that NRDC now challenges as unlawful.

Having settled upon a definition of "meeting," *ITT* then applied it to the Consultative Process sessions at issue in the case. The Court noted that the three FCC commissioners who attended those sessions constituted a quorum of the FCC's Telecommunications Committee, to which the Commission had delegated the power to approve applications for common carrier certification. The Committee was therefore a " 'subdivision ... authorized to act on behalf of the agency' " with respect to such applications, and hence was itself an "agency" within the Sunshine Act's definition. 466 U.S. at 470–71 (quoting 5 U.S.C. § 552b(a)(1)). But while the Court found the Committee to be covered by the Act, it concluded that the members had not engaged in discussions that effectively predetermined official actions. The Court noted that ITT had "alleged neither that the Committee formally acted upon applications for certification at the Consultative Process sessions nor that those sessions resulted in firm positions on

[12] The Supreme Court noted that "the Office of the Chairman of the Administrative Conference of the United States prepared the Interpretive Guide at Congress' request, § 552b(g), and after extensive consultation with the affected agencies." 466 U.S. at 471 n.10. The ACUS guide expressly rejected the suggestion that the quotation from the Senate Report was limited to three-member agencies: "[T]he passage necessarily has broader application, since there is nothing in the statute which supports a special definition of 'meeting' for agencies where two members make up a quorum." Interpretive Guide at 6. We agreed with that view in our opinion below in *ITT*. *See* 699 F.2d at 1243 n.163 (quoting Interpretive Guide at 6).

particular matters pending or likely to arise before the Committee." *Id.* at 471. Rather, the Court said, "the sessions provided general background information" and permitted the commissioners to engage in an exchange of views with their foreign counterparts "by which decisions already reached by the Commission could be implemented." *Id.* at 472.

Justice Powell did note that this court had reached a contrary result. He observed, however, that we had done so not by finding that the commissioners were deliberating "upon matters within their formally delegated authority"—i.e., applications for certification—but rather upon matters within some "undisclosed authority, not formally delegated, to engage in discussions on behalf of the Commission." *Id.* at 472. Such deliberations, the Supreme Court said, are not covered by the Sunshine Act at all. Again quoting the definition of "agency" rather than "meeting," the Court noted that the only covered deliberations are those by a " 'subdivision ... authorized to act on behalf of the agency.' " *Id.* at 472 (quoting, without citation, § 552b(a)(1)). The Act only applies, the Court said, "where a subdivision of the agency deliberates upon matters that are within that subdivision's formally delegated authority to take official action for the agency." *Id.* Because "the Telecommunications Committee at the Consultative Process sessions did not consider applications for common carrier certification—its only formally del gated authority— ... the sessions were not 'meetings' within the meaning of the Sunshine Act." *Id.* at 473.

C

On its face, the Supreme Court's decision in *ITT* would appear to end this appeal, as the definition of "meeting" adopted by the Nuclear Regulatory Commission is the same as that endorsed and applied by the Court in that case. NRDC contends, however, that for a number of reasons *ITT* is a much narrower opinion than the Commission believes it to be, and that the decision's definition of "meeting" is at best unauthoritative dictum—unnecessary to its holding and nonbinding upon this court.

NRDC argues, first, that *ITT* involved only the limited question of whether the Sunshine Act applies where fewer than a quorum of the agency's members attend international conferences, and where those members have not been "formally delegated authority to take official action for the agency." NRDC Br. at 25 (quoting *ITT*, 466 U.S. at 472). The Supreme Court's "central rationale," petitioner contends, was that the Act "applies only where a subdivision of the agency deliberates upon matters that are within that subdivision's formally delegated authority." *Id.* (quoting *ITT*, 466 U.S. at 472–73). Because the Telecommunications Committee lacked delegated authority to deliberate on the business discussed at the conferences, the Act did not apply. The Court's other language, petitioner suggests, was simply dictum.

As our description of *ITT* makes clear, however, this was not the central—or even a sufficient—rationale for the Court's decision. Before considering the Committee's discussions on subjects as to which it did not have delegated authority, the Court first addressed those as to which it did: namely, applications for common carrier certification. As to any discussions on that subject, the Court concluded that the Committee had not participated in "meetings" because—in the words of the Interpretive Guide and now of the Commission's rule—such discussions were not "likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." 466 U.S. at 471. It was only when the Court went on to examine the rationale of this court below that it considered the Committee's discussions on subjects as to which it did not have delegated authority, and found those discussions to be outside the Act. Because that finding could not have sufficed to resolve whether discussions as to which the committee *did* have authority constituted meetings, the definition the Court relied upon to decide that question cannot be characterized as dictum.

NRDC also contends that in applying its definition of "meeting," the Court faced only the narrow question of whether discussions on topics that the Commission had already decided were included. Petitioner is correct that the discussions in *ITT* did involve an "exchange of views by which decisions already reached by the Commission could be implemented." *Id.* at 472. But the Court only relied on that fact to conclude that the discussions did not "result[ ] in firm positions on particular matters pending or likely to arise before the Committee"—i.e., that the discussions necessarily could not have "predetermined" official decisions because the decisions had already been made. *Id.* at 471. The Court gave no hint that its opinion was limited to this uniqu situation, and nothing in the Court's definition of "meeting, or in the Interpretive Guide upon which it was based, supports such a reading. Although *ITT* may be factually distinguished from the instant case on this ground, we are not free to turn every factual distinction into a reason for ignoring the Supreme Court's considered guidance.

NRDC does correctly point out that there was a second, truly independent ground for the Court's decision in *ITT*—one to which we have averred, but not yet described. In a single paragraph at the end of the opinion, the Court concluded that not only were the Consultative Process sessions not "meetings" within the meaning of the Sunshine Act, they were also not meetings of an "agency." The international sessions were not meetings of an "agency," the Court said. because the FCC did not convene them and could not unila erally control their procedures. *Id.* at 473.

There is no question that this rationale was an independent basis for the Supreme Court's decision: to come within the Sunshine Act, discussions must be both "meetings" and meetings of an "agency," and the Court concluded that the Consultative Process sessions were neither. *See id.* at 469. Nonetheless, "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter [dictum], but each is the judgment of the court, and of equal validity with the other.'" *Dooling v. Overholser*, 243 F.2d 825, 828 (D.C. Cir. 1957) (quoting *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924)); *see Woods v. Interstate Realty Co.*, 337 U.S. 535,

536 (1948) ("Where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*."). Moreover, even if the Court's reliance on two independent grounds rendered each dictum, we would still be bound by its interpretation of the term "meeting," since " '[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.' " *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (quoting *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856, 861 n.3 (1st Cir. 1993)); *see also Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996). As our above recitation of *ITT* makes clear, the Supreme Court's language was carefully considered, following as it did the Court's detailed review of the Act's legislative history and its adoption of the formulation in ACUS' own detailed guide.

Finally, NRDC contends that the Commission's definition will undermine the purposes of the Act. Petitioner argues that the Commission's definition should be vacated because it eliminates an "objective" rule and replaces it with a "vague, wholly subjective standard" that, if permitted to stand, "will fatally undermine the Sunshine Act" and "make abuse inevitable." NRDC Br. at 11, 23. It is impossible to conceive, NRDC argues, that the kinds of discussions the Commission describes as non-meetings could occur without at least one commissioner formulating a reasonably firm position on a matter before the agency. Thus, petitioner urges, the Commission's rule "is contrary to the Act." *Id.* at 24.

In many ways, NRDC's argument echoes points made by this court in its decision below in *ITT*. *See* 699 F.2d at 1244. In its own decision, however, the Supreme Court instructed that the definition now adopted by the Commission is the one that Congress itself intended. Because the Commission's definition is therefore that of the Act itself, it neither can be contrary to the Act nor can it fatally undermine it.[13]

[13] For like reasons, we reject NRDC's suggestion that we vacate the Commission's definition because "there is no prospect that it will solve the NRC's purported 'collegiality' deficit, which is the ostensible rationale for the rulemaking." NRDC Br. at 28.

III

In the alternative, NRDC argues that even if the Commission's rule is consistent with the statutory definition, we should "find it illegal for the NRC to implement the rule without minimal procedural safeguards," such as maintaining complete records of all closed, non-Sunshine Act discussions. NRDC Br. at 13. Such procedures are necessary, petitioner maintains, because the Commission cannot be trusted "to determine unilaterally when they are starting to form 'reasonably firm positions'—and hence when public access is required." *Id.* Without a contemporaneous written record, judicial review of whether the agency is improperly closing meetings will assertedly not be possible.

NRDC does not argue that its proposed procedures are required by the Sunshine Act itself, and they plainly are not. As the Senate Report made clear: "Any meeting falling outside the definition [in § 552b(a)] is not subject to any of the other provisions of the bill." S. REP. No. 94-354, at 19. This dooms petitioner's challenge because, under the Supreme Court's decision in *Vermont Yankee*, " 'absent constitutional constraints or extremely compelling circumstances' courts are *never* free to impose on the NRC (or any other agency) a procedural requirement not provided for by Congress." *Union of Concerned Scientists v. NRC*, 920 F.2d 50 53 (D.C. Cir. 1990) (quoting *Vermont Yankee*, 435 U.S. at 543); *see also Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 78 (D.C. Cir. 1999). The Commission is, of course, at liberty to adopt additional procedures in the exercise of its discretion, *see Vermont Yankee*, 435 U.S. at 524, and in this case it has done so: The agency has undertaken to keep a record of the date, subject, and participants for any scheduled non-Sunshine Act discussions among a quorum of commissioners for an initial six month period, and has stated that it will not discontinue this practice without advance notice to the public. *See* 64 Fed. Reg. at 39,395; *see also* 64 Fed. Reg. at 24,942. We, however, are without authority to impose such procedural requirements against the Commission's will.

In response to the obstacle posed by *Vermont Yankee*, NRDC makes two arguments based on analogies to litigation under FOIA. First, it notes that when an agency claims that documents are not covered by FOIA, a court may conduct an *in camera* review to assess the validity of the agency's claims. *See, e.g., Spirko v. United States Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998). The distinctions between *in camera* review and the procedures requested by NRDC, however, are plain. *In camera* review is expressly authorized by FOIA, *see* 5 U.S.C. § 552(a)(4)(B),[14] as it is by the Sunshine Act, *see id.* § 552b(h)(1). Moreover, *in camera* review of an agency's records does not require the agency to add any administrative procedures or create any new documents; requiring the Commission to keep minutes of its non-Sunshine Act discussions would do both.

Second, NRDC points out that in FOIA litigation, this circuit requires an agency to provide a plaintiff with a "*Vaughn* index," a description of and detailed justification for the non-disclosure of each withheld document. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *see also Spirko*, 147 F.3d at 997–98. But while this judicial rule does require an agency to create a document (the index) that would not otherwise exist, it is a rule that governs litigation in court and not proceedings before the agency. In particular, it is a rule the circuit imposed because FOIA itself places the burden on the agency to sustain the lawfulness of specific withholdings in litigation. *See Vaughn*, 484 F.2d at 825–26, 828; *see also* 5 U.S.C. § 552(a)(4)(B). The Sunshine Act likewise imposes the burden of justifying specific closures on the agency, and expressly authorizes the court to "take such additional evidence as it deems necessary" to decide such cases. 5 U.S.C.

[14] The express authorization was not added to FOIA until 1974. *See* Pub. L. No. 93-502, § B(2), 88 Stat. 1561, 1561–62 (1974) (codified in relevant part at 5 U.S.C. § 552(a)(4)(B)). Previously, trial courts conducted such reviews on the rationale noted in the text below: i.e., in their role as triers of fact endeavoring to determine whether the government had met its burden of justifying specific nondisclosures. *See Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973).

§ 552b(h)(1). But this authorization, like the analogous one in FOIA, applies only to suits charging violations of the Act with respect to specific agency meetings[15]—not to petitions like this one, which challenge an agency's implementing regulations on their face.[16] Neither *Vaughn*, nor the Sunshine Act, authorizes this court to impose additional procedures on the conduct of administrative rather than judicial proceedings.

IV

Because the Supreme Court's decision in *ITT* renders petitioner's challenge to the Commission's definition of "meeting" unavailing, and because the Court's decision in *Vermont Yankee* bars us from imposing the additional procedural requirements NRDC seeks, the petition for review is denied.

[15] Section 552b(h)(1) grants district courts jurisdiction over actions "to enforce the requirements" of the Act. "Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises...." 5 U.S.C. § 552b(h)(1). In such cases, the "burden is on the defendant to sustain his action," and the court may make *in camera* examinations "and may take such additional evidence as it deems necessary." *Id.*

[16] *See* 5 U.S.C. § 552b(g). This section authorizes any person to "bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations" promulgated to implement the requirements of the Act.

February 14, 2001

The Honorable Richard B. Cheney
President of the United States Senate
Washington, D.C. 20510

Dear Mr. President:

In accordance with Public Laws 94-409 and 104-66 (5 U.S.C. §552b(j)), I enclose the U.S. Nuclear Regulatory Commission's Annual Report of the Administration of the Government in the Sunshine Act for Calendar Year 2000.

Sincerely,

/RA/

Richard A. Meserve

Enclosure: As stated

February 14, 2001

The Honorable J. Dennis Hastert
Speaker of the United States
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

In accordance with Public Laws 94-409 and 104-66 (5 U.S.C. §552b(j)), I enclose the U.S. Nuclear Regulatory Commission's Annual Report of the Administration of the Government in the Sunshine Act for Calendar Year 2000.

Sincerely,

/RA/

Richard A. Meserve

Enclosure: As stated

ANNUAL REPORT

GOVERNMENT IN THE SUNSHINE ACT

1. AGENCY NAME: U.S. Nuclear Regulatory Commission

2. CALENDAR YEAR: 2000

3. CHANGES IN POLICIES AND PROCEDURES DURING PAST YEAR

No changes occurred during CY 2000. The Commission last changed its rules in July 1999, when it issued a Federal Register notice stating that it would implement a rule published in 1985, to amend its regulations applying the Sunshine Act. The amendment changed the definition of "meeting" to incorporate the Supreme Court's verbatim definition from FCC v. ITT World Communications, 466 U.S. 364 (1984), to permit certain non-Sunshine Act discussions which had been foreclosed previously by the NRC's unduly restrictive interpretation of the Sunshine Act.

4. MEETINGS: (January 1, 2000 through December 31, 2000)

A.	Total Number of Open	58 (75%)
B.	Total Number of Closed	19 (25%)
C.	Total Number of Partially Open/Closed	0 (0%)
	Total Number of Meetings	77

The above meetings are counted by the number of separate agenda topics discussed as described in Appendix A. Appendix B contains a tabulation of open and closed meetings per month for CY 2000. Throughout this report, meeting numbers quoted are counts of individual items.

5. EXEMPTIONS USED FOR CLOSING OR PARTIALLY CLOSING MEETINGS:

	Number of Times Used
Exemption 1	5
Exemption 1 & 9	1
Exemption 2	1
Exemption 2 & 6	3
Exemption 4 & 9	3
Exemption 9	6
Total	19

6. DESCRIPTION OF LITIGATION AND FORMAL COMPLAINTS

A Sunshine Act Lawsuit was filed in the U.S. Court of Appeals for the D.C. Circuit in September 1999 by the Natural Resources Defense Council, Inc., et al. The court ruled for the NRC on July 14, 2000. The lawsuit had challenged the Commission's decision to implement its 1985 rule changing the definition of "meeting." Following oral argument in May 2000, the court issued an opinion supporting the NRC's actions and an order denying the petition for review. Natural Resources Defense Council, et al. v. NRC, 216 F.3d 1180 (D.C. Cir. 2000).

7. ADDITIONAL INFORMATION:

This report was prepared in the Office of the Secretary, U.S. Nuclear Regulatory Commission. Comments or inquiries on this report or related matters should be addressed to:

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Telephone inquiries can be made to the Office of the Secretary by dialing (301) 415-1968.

APPENDICES:

A. Definition of Meetings
B. Tabulation of Open and Closed Meetings by Month
C. Tabulation of Meetings by Days' Notice

ATTACHMENT:

A. FEDERAL REGISTER NOTICE - DATED MAY 10, 1999, GOVERNMENT IN SUNSHINE ACT REGULATIONS
B. FEDERAL REGISTER NOTICE - DATED JULY 22, 1999, GOVERNMENT IN SUNSHINE ACT REGULATIONS

APPENDIX A

Definition of Meeting

NRC's Statutory Meeting Requirement

The Nuclear Regulatory Commission is a five-member independent regulatory commission established by the Energy Reorganization Act of 1974 (P.L. 93-408). It is responsible for ensuring the protection of the public health and safety through the licensing and regulation of the uses of nuclear materials. Section 201(a)(1) of the Energy Reorganization Act, 42 U.S.C. §5841 (a)(1), provides that "[a]ction of the Commission shall be determined by a majority vote of the members present." In order to conduct meetings under the Government in the Sunshine Act, a quorum must be present.

Meetings Defined by Sunshine Act

On May 10, 1999, the Commission issued a notice of its intent to implement a 1985 rule amending its regulations on the definition of "meeting" to incorporate the Supreme Court's verbatim definition from FCC v. ITT World Communications, 466 U.S. 364 (1984). See Attachment A. This would permit certain non-Sunshine Act discussions previously foreclosed by the NRC's unduly restrictive interpretation of the Sunshine Act. "Meeting" is defined as:

> the deliberations of at least a quorum of Commissioners where such deliberations determine or result in the joint conduct or disposition of official Commission business, that is, where discussions are sufficiently focused on discrete proposals or issues as to cause or to be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency. Deliberations required or permitted by §§9.105, 9.106, or 9.108(c) do not constitute 'meetings' within this definition.

10 CFR §9.101(c), Government in Sunshine Act Regulations. This definition would properly allow some discussions among three or more Commissioners to be held in a non-public setting. The 1985 rule proved controversial, however, and, since both the former Administrative Conference of the United States (ACUS) and the American Bar Association (ABA) had conducted studies on the Sunshine Act and the FCC decision, the Commission decided to withhold action on the matter and defer actual implementation until it had an opportunity to assess these views.

For CY 1999, the Commission had asked the NRC Office of the General Counsel to prepare a notice of intent to implement the 1985 Sunshine Act rule. Public comments were received and analyzed and on July 22, 1999, the Commission issued a Federal Register notice announcing its decision to implement the 1985 rule commencing in July 1999. See Attachment B.

Under current Commission procedures, generally one agenda item is scheduled for each Commission meeting or briefing. Accordingly, for the purpose of tabulating meetings in this report, each session is counted as a separate meeting even if several sessions or briefings occur on the same day. Appendix B contains meeting statistics reported using the above definition and methods.

APPENDIX B

TABULATION OF OPEN AND CLOSED MEETINGS BY MONTH

CY 2000	Open	Closed	Open/Closed	Total
Jan	4	3	0	7
Feb	6	5	0	11
Mar	8	3	0	11
Apr	0	1	0	1
May	9	1	0	10
Jun	8	1	0	9
Jul	3	1	0	4
Aug	5	1	0	6
Sep	2	1	0	3
Oct	3	0	0	3
Nov	4	1	0	5
Dec	6	1	0	7
Year to Date	58	19	0	77

APPENDIX C

TABULATION OF MEETINGS
BY DAYS' NOTICE

January 1, 2000 - December 31, 2000

DAYS' NOTICE	OPEN	CLOSED	OPEN/CLOSED	TOTAL
12 or more	36	8	0	44
11	0	2	0	2
10	1	0	0	1
9	0	0	0	0
8	0	0	0	0
7	1	0	0	1
Subtotal	38	10	0	48
6	0	0	0	0
5	0	0	0	0
4	0	0	0	0
3	0	0	0	0
2	0	0	0	0
1	0	0	0	0
Less than 1	20	9	0	29
Subtotal	20	9	0	29
GRAND TOTAL	**58**	**19**	**0**	**77**

(2) Totaling the eligible cwt (not to exceed 26,000 cwt) of milk marketed commercially during the base period from all approved applications; and

(3) Dividing the amount available for Dairy Market Loss Assistance Program by the total eligible cwt submitted and approved for payment.

(b) Each dairy operation payment will be calculated by multiplying the payment rate determined in paragraph (a) (3) of this section by the dairy operation's eligible production.

(c) In the event that approval of all eligible applications would result in expenditures in excess of the amount available, CCC shall reduce the payment rate in such manner as CCC, in its sole discretion, finds fair and reasonable.

§ 1430.507 Misrepresentation and scheme or device.

(a) A dairy operation shall be ineligible to receive assistance under program if it is determined by the e committee or the county committee to have:

(1) Adopted any scheme or device which tends to defeat the purpose of this program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this part to a dairy operation engaged in a misrepresentation, scheme, or device, or to any other person as a result of the dairy operation's actions, shall be refunded with interest together with such other sums as may become due. Any dairy operation or person engaged in acts prohibited by this section and any dairy operation or person receiving ment under this subpart shall be ntly and severally liable for any refund due under this section and for related charges. The remedies provided in this subpart shall be in addition to other civil, criminal, or administrative remedies which may apply.

§ 1430.508 Maintaining records.

Dairy operations making application for benefits under this program must maintain accurate records and accounts that will document that they meet all eligibility requirements specified in this subpart and the pounds of milk marketed commercially during the fourth quarter of 1998 and the base period. Such records and accounts must be retained for at least three years after the date of the cash payment to dairy operations under this program.

§ 1430.509 Refunds; joint and several liability.

(a) In the event there is a failure to comply with any term, requirement, or condition for payment arising under the application, or this subpart, and if any refund of a payment to CCC shall otherwise become due in connection with the application, or this subpart, all payments made under this subpart to any dairy operation shall be refunded to CCC together with interest as determined in accordance with paragraph (c) of this section and late-payment charges as provided for in part 1403 of this chapter.

(b) All persons listed on a dairy operation's application shall be jointly and severally liable for any refund, including related charges, which is determined to be due for any reason under the terms and conditions of the application or this subpart.

(c) Interest shall be applicable to refunds required of the dairy operation if CCC determines that payments or other assistance were provided to the producer was not eligible for such assistance. Such interest shall be charged at the rate of interest which the United States Treasury charges CCC for funds, as of the date CCC made such benefits available. Such interest shall accrue from the date such benefits were made available to the date of repayment or the date interest increases as determined in accordance with applicable regulations. CCC may waive the accrual of interest if CCC determines that the cause of the erroneous determination was not due to any action of the dairy operation.

(d) Interest determined in accordance with paragraph (c) of this section may be waived by CCC with respect to refunds required of the dairy operation because of unintentional misaction on the part of the dairy operation, as determined by CCC.

(e) Late payment interest shall be assessed on all refunds in accordance with the provisions of, and subject to the rates prescribed in 7 CFR part 1403.

(f) Dairy operations must refund to CCC any excess payments made by CCC with respect to such application.

(g) In the event that a benefit under this subpart was provided as the result of erroneous information provided by any person, the benefit must be repaid with any applicable interest.

Signed at Washington, D.C., on April 30, 1999.

Keith Kelly,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 99-11596 Filed 5-7-99; 8:45 am]

BILLING CODE 3410-05-P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

RIN 3150-AB94

Government in the Sunshine Act Regulations

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule: Notice of intent to implement currently effective rule and request for comments.

SUMMARY: The Nuclear Regulatory Commission (Commission) is announcing its intent to implement a final rule, published and made effective in 1985, that amended its regulations applying the Government in the Sunshine Act. The Commission is taking this action to provide an opportunity for public comment on its intent because of the time that has passed since the Commission last addressed this issue. This action is necessary to complete resolution of this issue.

DATES: The May 21, 1985, interim rule became effective May 21, 1985. Submit comments by June 9, 1999. Unless the Commission takes further action, non-Sunshine Act discussions may be held beginning June 1, 1999.

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

FOR FURTHER INFORMATION CONTACT: Trip Rothschild, Assistant General Counsel, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, (301) 415-1607.

SUPPLEMENTARY INFORMATION: The Commission, through this notice of the Commission's intent to implement a rule published and made effective in 1985, seeks to bring closure to a rulemaking that amended the NRC's regulations applying the Government in the Sunshine Act. Because of the years that have elapsed, the Commission is providing this notice of its intent to implement this rule and is providing an opportunity for additional public comment on the Commission's proposal to implement.

The purpose of the rule is to bring the NRC's Sunshine Act regulations, and the way they are applied by NRC, into closer conformity with Congressional intent, as set forth in the legislative history of the Sunshine Act and as clarified in a unanimous Supreme Court decision, *FCC* v. *ITT World*

Communications, 466 U.S. 463 (1984). The NRC's original Sunshine Act regulations, adopted in 1977, treated every discussion of agency business by three or more Commissioners, no matter how informal or preliminary it might be, as a "meeting" for Sunshine Act purposes. As the 1984 Supreme Court decision made clear, however, "meetings," to which the Act's procedural requirements apply, were never intended to include casual, general, informational, or preliminary discussions, so long as the discussions do not effectively predetermine final agency action. These kinds of "non-Sunshine Act discussions," which can be an important part of the work of a multi-member agency, had been precluded at NRC since 1977 by the agency's unduly restrictive interpretation of the Sunshine Act.

In response to the Supreme Court's clarification of the law, the Commission in 1985 issued an immediately effective rule that revised the definition of "meeting" in the NRC's Sunshine Act regulations. To ensure strict conformity with the law, the new NRC rule incorporated verbatim the Supreme Court's definition of "meeting." The rule change drew criticism, however, much of it directed at the fact that it was made immediately effective, with an opportunity to comment only after the fact. To address some of the concerns raised, the NRC informed the Congress that it would not implement the rule until procedures were in place to monitor and keep minutes of all non-Sunshine Act discussions among three or more Commissioners. No such procedures were ever adopted, however, nor was the rule itself implemented, and the issue remained pending from 1985 on.

The Commission believes that it is time to bring the issue of the NRC's Sunshine Act rules to a resolution. As noted, because of the many years that have passed since the Commission last addressed this issue, the NRC is providing this notice of its intent finally to implement and use the 1985 rule, and providing 30 days for public comment on the Commission's proposal to implement. The Commission will not modify its current practices, under which no non-Sunshine Act discussions take place, until it has had the opportunity to consider any comments received.

I. Background

On April 30, 1984, the United States Supreme Court issued its first decision interpreting the Government in the Sunshine Act, *Federal Communications Commission* v. *ITT World Communications*, 466 U.S. 463. Though the case could have been decided on narrow, fact-specific grounds, the Court used the opportunity to offer guidance on what leading commentators have described as "one of the most troublesome problems in interpreting the Sunshine Act": the definition of "meeting" as that term is used in the Act. R. Berg and S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act (1978), at 3. The Court rejected the broad view of the term "meeting" that the U.S. Court of Appeals for the District of Columbia Circuit had taken. It declared that the statutory definition of a "meeting" contemplated "discussions that 'effectively predetermine official actions.'" The Court went on:

> Such discussions must be "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." 466 U.S. at 471.

The Court reviewed the legislative history, demonstrating how in the process of revising the original bill, Congress had narrowed the Act's scope. In the Court's words, "the intent of the revision clearly was to permit preliminary discussion among agency members." *Id.* at 471, n.7. The Court explained Congress's reasons for limiting the reach of the Sunshine Act:

> Congress in drafting the Act's definition of "meeting" recognized that the administrative process cannot be conducted entirely in the public eye. "[I]nformal background discussions [that] clarify issues and expose varying views" are a necessary part of an agency's work. [Citation omitted.] The Act's procedural requirements effectively would prevent such discussions and thereby impair normal agency operations without achieving significant public benefit. Section 552b(a)(2) therefore limits the Act's application. * * *

Id. at 469–70.

At the time the Supreme Court handed down the ITT decision, the Nuclear Regulatory Commission had for almost eight years applied the Government in the Sunshine Act as though it required every discussion of agency business to be conducted as a "meeting." Recognizing that the Supreme Court's guidance indicated that the NRC's interpretation of "meeting" had been unduly broad, the NRC's Office of the General Counsel (OGC) advised the Commissioners in May 1984 that the decision seemed significant: the decision was unanimous and it was the first time that the Supreme Court had addressed the Act. OGC suggested that revisions in the NRC's regulations might be appropriate to bring the NRC into line with Congressional intent.

Soon after that, in August 1984, the Administrative Conference of the United States (a body, since abolished, to which the Sunshine Act assigned a special role in the implementation of the Act by federal agencies) issued Recommendation 84–3, based upon an extensive study of the Sunshine Act. The Administrative Conference was troubled by what it saw as one harmful effect of the Act on the functioning of the multi-member agencies. Commenting that "one of the clearest and most significant results of the Government in the Sunshine Act is to diminish the collegial character of the agency decision making process," the Administrative Conference recommended that Congress consider whether the Act should be revised. The Conference observed:

> Although the legislative history indicates Congress believed that, after the initial period of adjustment, Sunshine would not have a significant inhibiting effect on collegial exchanges, unfortunately this has not been the case.

If Congress decided that revisions were in order, the Conference said, it recommended that agency members be permitted to discuss "the broad outlines of agency policies and priorities" in closed meetings. The Administrative Conference did not address the distinction between "meetings" and those discussions that are outside the scope of the Act.

II. The NRC's 1985 Rule

On May 21, 1985 (50 FR 20889), the Nuclear Regulatory Commission issued new regulations implementing the Government in the Sunshine Act. As a legal matter, the NRC could have continued to use the language of its existing regulations, and reinterpreted them in accordance with the Supreme Court's decision. However, the NRC decided that in the interest of openness, it should declare explicitly that its view of the Act's requirements had changed in light of the Court's ruling.

The revised rule conforms the definition of "meeting" in the Commission's rules to the guidance provided by the Supreme Court by incorporating the very language of the Court's decision into its revised definition. Specifically, it provides, at 10 CFR 9.101(c):

> Meeting means the deliberations of at least a quorum of Commissioners where such deliberations determine or result in the joint conduct or disposition of official Commission business, that is, where discussions are sufficiently focused on discrete proposals or issues as to cause or to

be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency. Deliberations required or permitted by §§ 9.105, 9.106, or 9.108(c) do not constitute "meetings" within this definition.

Under the rule, which was adopted as an immediately effective "interim" rule (it was characterized as "interim" to reflect the fact that it was being made effective before any comments were received and addressed), with an opportunity for public comment, briefings were excluded from the category of "meetings." In the NRC's pre-1985 regulations, by contrast, briefings were treated as meetings, as a matter of policy.

The NRC's 1985 rule proved controversial. In response to ngressional criticism, much of it icted at the Commission's decision to ke the rule immediately effective, the Commission assured the Congress that it would conduct no non-Sunshine Act discussions until procedures were in place to govern such discussions.

In December 1985, the NRC's Office of the General Counsel forwarded a final rulemaking paper in which comments on the interim rule were analyzed and responded to. However, by the time that the Commission was briefed on the comments, the American Bar Association had announced its intention to address Sunshine Act issues, including matters directly related to the NRC's rulemaking. The Commission therefore decided to withhold action on e matter and to defer actual plementation and use of the 1985 rule ending receipt of the ABA's views.

III. The American Bar Association Acts

In the fall of 1985, William Murane, Chairman of the Administrative Law Section of the American Bar Association, announced that the Council of the Administrative Law Section had decided to involve itself in the controversy over the Sunshine Act and its effect on the collegial character of agency decision making. Administrative Law Review, Fall 1985, Vol. 37, No. 4, at p. v. The Task Force established by the Administrative Law Section ultimately focused on a single issue: the definition of "meeting" under the Sunshine Act. Its report and recommendations were accepted by the Administrative Law Section in April 1986 and by the full American Bar Association in February 1987.

The ABA's recommendation and report confirmed that the Commission's reading of the Sunshine Act, as interpreted by the Supreme Court in the ITT decision, was legally correct. Moreover, the legal standard set forth in the ABA recommendation incorporated the identical language from the Supreme Court opinion which the NRC had included in its 1985 rule: i.e., the provision stating that for a discussion to be exempt from the definition of "meeting," it must be "[not] sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating [agency] members to form reasonably firm positions regarding matters pending or likely to arise before the agency." Subject to that qualification, the ABA guidelines provide that the definition of "meeting" does not include:

(a) Spontaneous casual discussions among agency members of a subject of common interest; (b) Briefings of agency members by staff or outsiders. A key element would be that the agency members be primarily receptors of information or views and only incidentally exchange views with one another; (c) General discussions of subjects which are relevant to an agency's responsibilities but which do not pose specific problems for agency resolution; and (d) Exploratory discussions, so long as they are preliminary in nature, there are no pending proposals for agency action, and the merits of any proposed agency action would be open to full consideration at a later time.[1]

The ABA report disposed of the suggestion, advanced by some critics of the NRC's interim rule, "that the Supreme Court's opinion should be limited to the facts before the Court." While it recognized that the case could have been decided on fact-specific grounds, the report observed that:

[I]t cannot be assumed that the Supreme Court got carried away or that it was unaware that the definition of "meeting" was controversial and "one of the most troublesome problems in interpreting the Sunshine Act." [Interpretive Guide 3.] We concluded therefore, that the Supreme Court meant what it said in ITT World Communications, and that it intended to provide guidance to agencies and the courts in applying the definition of "meeting." Report at 7.

The ABA report also rejected the argument that because of the "difficulty of specifying in advance those characteristics of a particular discussion which will cause it to fall short of becoming a meeting," the Supreme Court's view of the Act should not become part of agency practice. [Emphasis in the original.] The logic of this argument, said the ABA report, would permit no discussion whatever of agency business except in "meetings," a result which "seems clearly to us not to have been intended by Congress." Report at 8. The report noted that this argument in essence was a claim that agencies should apply a different standard from the one specified by Congress for distinguishing "meetings" from discussions that are not "meetings." The ABA explained:

• • • Congress can hardly have gone to such pains to articulate a narrower standard had it not expected the agencies to use the leeway such a standard provides, and if they are to do so, they must attempt to set out in advance, whether by regulation or internal guidelines, the elements or characteristics of a discussion which will cause it to fall short of being a meeting. Report at 8, fn. 9.

The ABA report's conclusion was a measured endorsement of the value of non-Sunshine Act discussions. After stressing that its purpose was not to urge agencies to close discussions now held in open session, the report made clear that its focus, rather, was on the discussions which, because of the Sunshine Act, are never initiated in the first place. It said:

But the fact is that the Sunshine Act has had an inhibiting effect on the initiation of discussions among agency members. This is the conclusion of the Welborn report [to the Administrative Conference], and it is confirmed by our meeting with agency general counsels • • • [T]he Act has made difficult if not impossible the maintenance of close day-to-day working relationships in [five-member and three-member] agencies. • • • We believe that a sensible and sensitive application of the principles announced in the ITT case can ease the somewhat stilted relationships that exist in some agencies. Report at 11–12. [Emphasis in the original.]

The ABA report made clear that it did not regard the opportunity for non-Sunshine Act discussions as a panacea for the Sunshine-caused loss of collegiality which the Administrative Conference had identified, and which the ABA's own inquiry had confirmed. The Report concluded that the impact of loosened restrictions was likely to be "slight," though it saw "some tendency to increase collegiality • • • to the extent that it would contribute to more normal interpersonal relationships among agency members." Report at 12. The Report also observed that collegiality is most important in group decision-making sessions, where the Act's "meeting" requirements clearly apply.

The ABA report recommended that agencies follow procedures for the monitoring and memorialization of non-Sunshine Act discussions to give assurance to the public that they are staying within the law. The ABA made clear that this was a policy recommendation, not a matter of legal obligation. (The report noted at one

[1] A fuller description of the types of discussions fitting in these four categories may be found at pages 9 to 11 of the ABA report.

point that if a discussion "is not a 'meeting,' no announcement or procedures are required because the Act has no application." Report at 6.) The ABA recommended that General Counsels brief agency members in advance on the requirements of the law, to assure their familiarity with the restrictions on non-Sunshine Act discussions, and that non-Sunshine Act discussions (other than "spontaneous casual discussions of a subject of common interest") be monitored, either by the General Counsel or other agency representatives, and memorialized through notes, minutes, or recordings.

IV. Further Developments

On August 5, 1987, an amendment was offered to the NRC authorization to bar the Commission from using funds in fiscal year 1988 or 1989 "to hold any Nuclear Regulatory Commission meeting in accordance with the interim [Sunshine Act] rule [published in] the Federal Register on May 21, 1985." 133 Cong. Rec. H7178 (Aug. 5, 1987).[2] As Chairman Philip Sharp of the Subcommittee on Energy and Power of the House Committee on Energy and Commerce explained, the amendment "simply neutralizes a rule change." The amendment, passed by a voice vote, was not passed by the Senate and thus was not enacted into law.

The Commission took no further action regarding the Sunshine Act after 1985, and the issue was allowed to become dormant. While the "interim" rule of 1985 has remained in effect and on the books, at 10 Code of Federal Regulations, Part 9, the Commission has continued to apply its pre-1985 rules. Accordingly, all discussions of business by three or more Commissioners have continued to be treated as "meetings," whether formal or informal, deliberative or informational, decision-oriented or preliminary, planned or spontaneous. No non-Sunshine Act discussions of any kind have been held. In the meantime, some other agencies adopted and implemented rules that permit informal discussions that clarify issues and expose varying views but do not effectively predetermine official actions, discussions of the sort that the Court's ITT decision said are a "necessary part of an agency's work." 466 U.S. at 469–70. See, for example, the Occupational Safety and Health Review Commission's (OSHRC) and Defense Nuclear Facility Safety Board's (DNFSB) definitions of "meeting", at 29 CFR 2203.2(d) (50 FR 51679; 1985) and 10 CFR 1704.2(d)(5) (56 FR 9609; 1991), respectively.

In February 1995, Commissioner Steven M.H. Wallman of the Securities and Exchange Commission, joined by twelve other Commissioners or former Commissioners of four independent regulatory agencies (the Securities and Exchange Commission, Federal Communications Commission, Commodity Futures Trading Commission, Federal Trade Commission), wrote to the Administrative Conference of the United States to urge a reevaluation of the Sunshine Act. The group expressed strong support for the Act's objective of ensuring greater public access to agency decision-making, but questioned whether the Act, as currently structured and interpreted, was achieving those goals. The group said that the Act has a "chilling effect on the willingness and ability of agency members to engage in an open and creative discussion of issues." It continued:

> In almost all cases, agency members operating under the Act come to a conclusion about a matter * * * without the benefit of any collective deliberations. [Footnote omitted.] This is directly in conflict with the free exchange of views that we believe is necessary to enable an agency member to fulfill adequately his or her delegated duties, and to be held accountable for his or her actions.
>
> We are also of the view that the Act is at odds with the underlying principles of multi-headed agencies. These agencies were created to provide a number of benefits, including collegial decision making where the collective thought process of a number of tenured, independent appointees would be better than one. Unfortunately, the Act often turns that goal on its head, resulting in greater miscommunication and poorer decision making by precluding, as a matter of fact, the members from engaging in decision making in a collegial way. As a result, the Act inadvertently transforms multi-headed agencies into bodies headed by a number of individually acting members. [Footnote omitted.]

The group identified as one problem the issue confronted by the NRC's 1985 rulemaking: that "many agencies" avoided the problem of distinguishing between "preliminary conversations, which are outside of the Act, and deliberations, which trigger the Act," by a blanket prohibition, as a matter of general policy, against any conversation among a quorum of agency members, except in "meetings" under the Sunshine Act. While such bright-line policies were easy to apply and effective, the letter said, they were often over-inclusive, barring discussion of even the most preliminary views and often impeding the process of agency decision-making.

The Administrative Conference, then soon to be abolished, took up the group's challenge, assembled a special committee to study the Sunshine Act, and convened a meeting in September, 1995, to discuss the Act, its problems, and possible remedies. The Conference appeared to be looking for some compromise, acceptable both to the Federal agencies and to representatives of the media, that would acknowledge the Act's impairment of the collegial process and try to remedy that by giving greater flexibility to agencies in applying the Act. No consensus developed, however. The Administrative Conference, apparently recognizing that there would be no meeting of the minds between critics and defenders of the Sunshine Act, did not pursue its efforts to find common ground.

V. Conclusions

The Commission has taken into account information from a number of quarters, as well as its own experience in implementing the Sunshine Act. It has considered, among other things, the language of the statute and its legislative history; the Supreme Court's decision in the ITT case; Recommendation 84–3 of the Administrative Conference of the United States; the findings of the American Bar Association; actual practice at other federal agencies, including the DNFSB and OSHRC; and the advice letter from numerous Commissioners and former Commissioners of four other independent regulatory agencies.

Based on all of these, the Commission believes that while the Sunshine Act's objectives, which include increasing agency openness and fostering public understanding of how the multi-member agencies do business, are laudable, it is important to recognize exactly what it was that Congress legislated. The legislative history, as the Supreme Court explained, shows that Congress carefully weighed the competing considerations involved: the public's right of access to significant information, on the one hand, and the agencies' need to be able to function in an efficient and collegial manner on the other. Congress struck a balance: it did not legislate openness to the maximum extent possible, nor did it provide unfettered discretion to agencies to offer only as much public access as they might choose. Rather, it crafted a system in which the Sunshine Act would apply only to "meetings," a term carefully defined to exclude preliminary, informal, and informational discussions, and then provided a series of exemptions to permit closure of certain

[2] The text of the amendment and the colloquy surrounding its adoption by the House of Representatives are also reprinted in full in SECY-88-25

categories of "meetings." Unfortunately, in part because of advice from the Justice Department in 1977 that later proved to be erroneous, the Commission's original Sunshine Act regulations did not give due recognition to the balance contemplated by Congress. Rather, the regulations mistakenly took the approach that every discussion among three or more Commissioners, no matter how far removed from being "discussions that effectively predetermine official actions," in the Supreme Court's words, should be considered a "meeting." 466 U.S. at 471.

At the time that the Commission changed its Sunshine Act rules in 1985, many of its critics appeared to believe that if the rule change were implemented, numerous discussions currently held in public session would instead be held behind closed doors. This was a misapprehension. Indeed, if there is one point that needs to be emphasized above any other, it is that the objective of the 1985 rule is not that discussions heretofore held in public session should become non-Sunshine Act discussions; rather, the focus of the 1985 rule is on the discussions that currently do not take place at all. This was also the focus of the American Bar Association and the authors of the 1995 letter to the Administrative Conference.

The Commission believes that non-Sunshine Act discussions can benefit the agency and thereby benefit the public which the NRC serves. This view did not originate with the Commission by any means. On the contrary, as described above, the starting point of the Commission's analysis is Congress's recognition that "'informal background discussions [that] clarify issues and expose varying views' are a necessary part of an agency's work," and that to apply the Act's requirements to them would, in the words of the Supreme Court, "impair normal agency operations without achieving significant public benefit." 466 U.S. 463, 469.

For convenience, the currently effective (but not implemented) 1985 rule is included in this notice and the Commission is providing 30 days for public comment on its stated intent to implement the 1985 rule. No non-Sunshine Act discussions will be held during the period for public comment and for a 21-day period following close of the comment period to allow the Commission to consider the public comments. Absent further action by the Commission, non-Sunshine Act discussions may be held commencing 21 days after the close of the comment period.

From previous comments, the following are possible questions about the 1985 rule, and the Commission's responses to those questions.

1. What types of discussions does the Commission have in mind, and what does it seek to accomplish with this rule?

Answer: First and foremost, the Commission would like to be able to get together as a body with no fixed agenda other than to ask such questions as: "How is the Commission functioning as an agency? How has it performed over the past year? What have been its major successes and failures? What do we see coming in the next year? In the next five years, and ten years? How well are our components serving us? Are we getting our message to the industry we regulate and to the public? Are we working effectively with the Congress?" This kind of "big picture" discussion can be invaluable. One of the regrettable effects of the Sunshine Act, as documented as long ago as 1984, in Administrative Conference Recommendation 84-3, has been the loss of collective responsibility at the agencies, and the shift of authority from Presidentially appointed and accountable agency members to the agencies' staffs. The Commission believes that "big picture" discussions served a valuable function in pre-Sunshine Act days at NRC and can do so again, helping to assure that the Commissioners serve the public with maximum effectiveness and accountability.

The Commission believes that some kinds of general, exploratory discussions can be useful in generating ideas. Such ideas, if developed into more specific proposals, will become the subject of subsequent "meetings." The Commission recognizes that it would be incumbent on the participants in such non-Sunshine Act discussions to assure that they remain preliminary and do not effectively predetermine final agency action. The Commission believes that the guidelines proposed by the American Bar Association are the most suitable criteria for assuring compliance with the Act's requirements.

The Commission also believes that spontaneous casual discussions of matters of mutual interest—for example, a recent news story relating to nuclear regulation—can be beneficial, helping both to ensure that Commissioners are informed of matters relevant to their duties and to promote sound working relationships among Commissioners.

2. Is it really clear that the law permits non-Sunshine Act discussions?

Answer: Yes, beyond any reasonable doubt. Congress so provided, a unanimous Supreme Court has so found, the American Bar Association Task Force on the Sunshine Act agreed, the Council of the Administrative Law Section of the American Bar Association adopted the Task Force's views, and the ABA's full House of Delegates accepted the Administrative Law Section's report and recommendation.

3. Didn't the ITT case involve a trip to Europe by less than a quorum of FCC members, and couldn't the case be viewed as relating to those specific facts?

Answer: The case was resolved on two separate grounds. Although the Supreme Court did not have to reach the issue of what constitutes a "meeting" under the Sunshine Act, it did so, in order (so the ABA report concluded) to provide guidance to agencies and the courts on a difficult aspect of Sunshine Act law. In addressing the ambiguity in the definition of "meeting" and thus the uncertainty as to the Act's scope, the Supreme Court was acting to resolve a problem that had been apparent literally from the day of its enactment into law, as President Ford's statement in signing the bill, on September 13, 1976, makes clear. He wrote:

> I wholeheartedly support the objective of government in the sunshine. I am concerned, however, that in a few instances unnecessarily ambiguous and perhaps harmful provisions were included in S.5. • • • The ambiguous definition of the meetings covered by this act, the unnecessary rigidity of the act's procedures, and the potentially burdensome requirement for the maintenance of transcripts are provisions which may require modification.
> Government in the Sunshine Act—S.5 (P.L. 94-409), Source Book: Legislative History, Text, and Other Documents (1976), at 832.

4. On the meaning of "meeting" as used in the Sunshine Act, aren't the views of Congressional sponsors of the legislation entitled to consideration?

Answer: Yes, when they appear in the pre-enactment legislative history. In the present case, for example, the Supreme Court cited the remarks of the House sponsor of the Sunshine Act, Representative Dante Fascell, who introduced the report of the Conference Committee to the House. He explained to his colleagues that the conferees had narrowed the Senate's definition of "meeting" in order "to permit casual discussions between agency members that might invoke the bill's requirements" under the Senate's approach. 122 Cong. Rec. 28474 (1976), cited at 466 U.S. 463, 470 n.7. Likewise, Senator Chiles, the Senate sponsor of the bill, described the definition of "meeting" in the final bill as a "compromise version." 122 Cong. Rec. S15043 (Aug. 31, 1976), reprinted in

Government in the Sunshine Act Source Book. In any case, however, once the Supreme Court has declared what the law requires, federal agencies are bound to follow its guidance.

5. Is there any basis in the legislative history for the notion that non-Sunshine Act discussions are not only permissible, but useful?

Answer: Yes. The point was made forcefully by Professor Jerre Williams (subsequently a judge on the Fifth Circuit Court of Appeals), presenting the views of the American Bar Association. He testified, in Congressional hearings on the bill:

> One of the most critical facets of the American Bar Association view has to do with the definition of "meeting." The ABA agrees that policy must not be ned by informal closed-door caucuses ance of open meetings. On the other hand, however, the ABA believes it important that "chance encounters and informational or exploratory discussions" by agency members should not constitute meetings unless such discussions are "relatively formal" and "predetermine" agency action.
>
> It should be a matter of concern to all those interested in good government that agency members be allowed to engage in informal work sessions at which they may "brainstorm" and discuss various innovative proposals without public evaluation or censorship of their search for new and creative solutions in ...portant policy areas.
>
> All persons who have engaged in policymaking have participated in such informal sessions. Sometimes outlandish tions are advanced, hopefully ous suggestions abound. But out of all may come a new, creative, important idea. There is time enough to expose that idea to public scrutiny once it has been adequately evaluated as a viable alternative which ought to be seriously considered. [Emphasis added.] Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, 94th Cong., First Session (Nov. 6 and 12, 1975), at 114–15.

6. Why is the NRC paying so much attention to the ITT case and ignoring the Philadelphia Newspapers case which dealt specifically with NRC?

Answer: First of all, the ITT case dealt with the issue of what is a "meeting," whereas *Philadelphia Newspapers, Inc.* v. *NRC*, 727 F.2d 1195 (D.C. Cir. 1984), dealt with an unrelated issue: whether a particular "meeting" could be closed under the Sunshine Act. Secondly, the ITT case was decided by the Supreme Court, and as such would be entitled to greater weight than the decision of one panel of a Court of Appeals, even if they were on the same issue. Thirdly, the full D.C. Circuit, sitting *en banc*, has severely criticized the Philadelphia Newspapers decision for digressing from Congressional intent and thereby reaching an "untoward result." *Clark-Cowlitz Joint Operating Agency* v. *FERC*, 798 F.2d 499, 503 n.5 (D.C. Cir. 1984).

7. If it is so clear that non-Sunshine Act discussions are permissible, why did the NRC interpret the Act differently for so many years?

Answer: In part, the answer lies in the fact that the Justice Department, in the years 1977 to 1981, took an expansive view of the definition of "meeting." (See the letter from Assistant Attorney General Barbara A. Babcock reprinted in the Interpretive Guide at p. 120.) In contrast, Berg and Klitzman, the authors of the Interpretive Guide, believed that Congress had consciously narrowed the definition. (See the Interpretive Guide at 6–7.) Because the Justice Department defends Sunshine Act suits in the courts, its view of the law's requirements carried considerable weight. The Supreme Court's decision in the ITT case resolved the issue definitively.

8. Didn't the NRC acknowledge in its 1977 rulemaking that it was going beyond the law's requirements in the interest of the Act's "presumption in favor of opening agency business to public observation"? Why isn't that rationale still applicable today?

Answer: There are at least three factors today that were not present in 1977: (1) the Supreme Court's ITT decision, which makes clear that Congress gave the agencies authority to hold such discussions because it thought they were an important part of doing the public's business; (2) the Administrative Conference recommendation stating that the Sunshine Act has had a much more deleterious effect on the collegial nature of agency decision making than had been foreseen; and (3) the American Bar Association report stating that Congress gave the agencies the latitude to hold non-Sunshine Act discussions in the expectation they would use it, and suggesting that the use of such discussions might help alleviate some of the problems caused by the Sunshine Act. Moreover, the Commission has had the benefit of its own and other agencies' experience under the Act. It should be emphasized that the Commission, by implementing this rule, is not implicitly or explicitly urging that the Sunshine Act be altered; rather, it is saying that the Sunshine Act should not be applied even more restrictively than Congress intended when it enacted the statute.

9. Why does the NRC put such reliance on the ABA report, when the ABA made a point of saying that it was not urging the closing of any meetings now open?

Answer: The question misses the point of the ABA comment. In the context in which the comment appears in the ABA report, it is clear that the ABA was expressing its concern for the discussions that currently do not happen at all, either in open or in closed session, because the Sunshine Act inhibits the initiation of discussions. Its point was similar to that made by Professor Williams in the hearings on the bill in 1975, when he urged that agency members not be deprived of the opportunity to generate ideas in "brainstorming sessions"—ideas which may subsequently be the subject of "meetings" if they turn out to warrant formal consideration. As we have emphasized above, the Commission is not proposing to close any meetings currently held as open public meetings.

10. How does the Commission intend to differentiate between "meetings" and "non-Sunshine Act discussions"?

Answer: The Commission intends to abide by the guidance provided by the Court in *FCC* v. *ITT World Communications* and contained in our regulations, in differentiating between "meetings" and non-Sunshine Act discussions. Applying this guidance, the Commission may consider conducting a non-Sunshine Act discussion when the discussion will be casual, general, informational, or preliminary, so long as the discussion will not effectively predetermine final agency action. Whenever the Commission anticipates that a discussion seems likely to be "sufficiently focused on discreet proposals or issues as to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency," the Commission will treat those discussions as "meetings." See id. at 471.

Further, to ensure that we appropriately implement the Supreme Court guidance in differentiating between non-Sunshine Act discussions and meetings, the Commission will consider the ABA's remarks on the seriousness of this task. For instance, the ABA cautioned that a non-Sunshine Act discussion "does not pose specific problems for agency resolution" and agency "members are not deliberating in the sense of confronting and weighing choices." Report at 9–11.

Some specific examples of the kinds of topics that might be the subject of non-Sunshine Act discussions would include generalized "big picture" discussions on such matters as the following: "How well is the agency functioning, what are our successes and

failures, what do we see as major challenges in the next five and ten years, what is the state of our relations with the public, industry, Congress, the press?'

Preliminary, exploratory discussions that generate ideas might include, for example, "Is there more that we could be doing through the Internet to inform the public and receive public input? How does our use of the Internet compare with what other agencies are doing?" Such ideas, if followed up with specific proposals, would become the subject of later "meetings" within the meaning of the Sunshine Act.

Spontaneous, casual discussions of matters of mutual interest could include discussions of a recent news story relating to NRC-licensed activities, or a Commissioner's insights and personal impressions from a visit to a licensed facility or other travel. Under this heading, three Commissioners would be permitted to have a cup of coffee together and to talk informally about matters that include business-related topics. Under the Commission's pre-1985 rule, such informal get-togethers were precluded.

Briefings in which Commissioners are provided information but do not themselves deliberate on any proposal for action could include routine status updates from the staff.

Discussions of business-related matters not linked to any particular proposal for Commission action might include an upcoming Congressional oversight hearing or a planned all-hands meeting for employees.

11. Apart from the issue of the definition of "meeting," are there other changes that the interested public should be aware of?

Answer: Yes, one minor procedural point. The 1985 rule includes a provision stating that transcripts of closed Commission meetings will be reviewed for releasability only when there is a request from a member of the public for the transcript. Reviewing transcripts for releasability when no one is interested in reading them would be a waste of agency resources and thus of the public's money.

12. Will the Commission adopt any particular internal procedures for its non-Sunshine Act discussions?

Answer: For an initial 6-month period of non-Sunshine Act discussions, the Commission will maintain a record of the date and subject of, and participants in, any scheduled non-Sunshine Act discussions that three or more Commissioners attend. After the six-month period, the Commission will revisit the usefulness of the record-keeping practice.

List of Subjects in 10 CFR Part 9

Criminal penalties, Freedom of information, Privacy, Reporting and recordkeeping requirements, Sunshine Act.

The May 21, 1985 (50 FR 20863), rule is currently effective but has never been implemented. For the convenience of the reader, the Commission is republishing the text of that rule.

PART 9—PUBLIC RECORDS

1. The authority citation for part 9 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Subpart A is also issued 5 U.S.C. ; 31 U.S.C 9701; Pub. L. 99-570. Subpart B is also issued under 5 U.S.C. 552a. Subpart C is also issued under 5 U.S.C. 552b.

2. In § 9.101, paragraph (c) is republished for the convenience of the reader as follows:

§ 9.101 Definitions.

* * * * *

(c) Meeting means the deliberations of at least a quorum of Commissioners where such deliberations determine or result in the joint conduct or disposition of official Commission business, that is, where discussions are sufficiently focused on discrete proposals or issues as to cause or to be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency. Deliberations required or permitted by §§ 9.105, 9.106, or 9.108(c), do not constitute "meetings" within this definition.

* * * * *

3. In § 9.108, paragraph (c) is republished for the convenience of the reader as follows:

§ 9.108 Certification, transcripts, recordings and minutes

* * * * *

(c) In the case of any meeting closed pursuant to § 9.104, the Secretary of the Commission, upon the advice of the General Counsel and after consultation with the Commission, shall determine which, if any, portions of the electronic recording, transcript or minutes and which, if any, items of information withheld pursuant to § 9.105(c) contain information which should be withheld pursuant to § 9.104, in the event that a request for the recording, transcript, or minutes is received within the period during which the recording, transcript, or minutes must be retained, under paragraph (b) of this section.

* * * * *

Dated at Rockville, Maryland, this 4th day of May, 1999.

For the Nuclear Regulatory Commission.

Annetta Vietti-Cook,

Secretary of the Commission.

[FR Doc. 99-11669 Filed 5-7-99; 8:45 am]

BILLING CODE 7590-01-P

DEPARTMENT OF COMMERCE

Bureau of the Census

15 CFR Part 30

[Docket No. 990416099-9099-01]

RIN 0607-AA32

New Canadian Province Import Code for Territory of Nunavut

AGENCY: Bureau of the Census, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of the Census is amending the Foreign Trade Statistics Regulations (FTSR), to add a new Canadian Province/Territory code for the Territory of Nunavut. This Canadian Territory code is being added to the existing Canadian Province/Territory codes used for reporting Canadian Province of Origin information on Customs Entry Records.

EFFECTIVE DATE: The provisions of this rule are effective April 1, 1999.

FOR FURTHER INFORMATION CONTACT: C. Harvey Monk, Jr., Chief, Foreign Trade Division, Bureau of the Census, Room 2104, Federal Building 3, Washington, DC 20233-6700, by telephone on (301) 457-2255, by fax on (301) 457-2645, or by e-mail at c.h.monk.jr@ccmail.census.gov. For information on the specific Customs reporting requirements contact: Dave Kahne, U.S. Customs Service, Room 5.2C, 1300 Pennsylvania Avenue, NW, Washington, DC 20229, by telephone on (202) 927-0159 or by fax on (202) 927-1096.

SUPPLEMENTARY INFORMATION:

Background Information

On November 29, 1996, the U.S. Bureau of the Census (Census Bureau), Department of Commerce, and the U.S. Customs Service (Customs), Department of the Treasury, announced the implementation of the requirements for collecting Canadian Province of Origin information on Customs Entry Records in the Federal Register (61 FR 60531). The Supplementary Information contained in that notice fully recounts the development of the program for collecting Canadian Province of Origin information on Customs import

Corrections

Federal Register
Vol. 64, No. 95
Tuesday, May 18, 1999

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

CENTRAL INTELLIGENCE AGENCY

32 CFR Part 1903

Security Protective Service

Correction

In rule document 98–22354, beginning on page 44785 in the issue of Friday, August 21, 1998, make the following correction:

§ 1903.4 [Corrected]

On page 44786, in the third column, in § 1903.4(a)(3)(ii), in the first line, the paragraph designation "(iii)" should read "(ii)".

[FR Doc. C8–22354 Filed 5–17–99; 8:45 am]
BILLING CODE 1505–01–D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of As-Built Exhibit A, F, and G and Soliciting Comments, Motions to Intervene, and Protests

Correction

In notice document 99–11765, beginning on page 25316 in the issue of Tuesday, May 11, 1999, make the following correction:

On page 25316, in the second column, in paragraph b. *Project No.*, "5876-038" should read "5867-000".

[FR Doc. C9–11765 Filed 5–17–99; 8:45 am]
BILLING CODE 1505–01–D

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

RIN 3150-AB94

Government in the Sunshine Act Regulations

Correction

In rule document 99–11669 beginning on page 24936 in the issue of Monday, May 10, 1999, make the following correction:

On page 24936, in the third column, under **DATES**, in the last line "June 1, 1999" should read "July 1, 1999".

[FR Doc. C9–11669 Filed 5–17–99; 8:45 am]
BILLING CODE 1505–01–D

Rules and Regulations

Federal Register
Vol. 64, No. 140
Thursday, July 22, 1999

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

RIN 3150–AB94

Government in the Sunshine Act Regulations

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule: Notice of intent to implement currently effective rule; response to comments.

SUMMARY: The Nuclear Regulatory Commission, having considered the comments received on the May 10, 1999, document declaring its intent to begin implementing a final rule published and made effective in 1985, has decided to proceed with implementation of the rule, 30 days from the date of publication of this document.

DATES: The May 21, 1985, interim rule became effective May 21, 1985. The Commission will begin holding non-Sunshine Act discussions no sooner than August 23, 1999.

FOR FURTHER INFORMATION CONTACT: Peter Crane, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 415–1622.

SUPPLEMENTARY INFORMATION: On May 10, 1999 (64 FR 24936), the Nuclear Regulatory Commission noticed in the **Federal Register** of its intention to begin implementing its regulations, promulgated in 1985, applying the Government in the Sunshine Act. The Commission provided a period for public comment, ending June 9, 1999, and stated that no non-Sunshine Act discussions would be held before July 1, 1999, to give the Commission an opportunity to consider the comments. The Commission stated that non-Sunshine Act discussions could begin on July 1, unless it took further action. Finding that the comments do in fact warrant discussion, the Commission provides this additional document that responds to the issues raised by the commenters. During the period of its review of the comments, the Commission has not held any non-Sunshine Act discussions and has decided not to hold any such discussions until, at the earliest, 30 days from the date of publication of this document.

Nine comments were received on the May 10 notice, all but one of which expressed disapproval of the NRC's action. (The lone exception was a comment from a nuclear industry group, the Nuclear Energy Institute, which said that it endorsed the NRC's action for the reasons stated in the May 10, 1999, document.) Of the critical comments received, the most detailed came from a Member of the United States House of Representatives, Edward J. Markey, and from two public interest organizations, the Natural Resources Defense Council and Public Citizen. The negative comments were mostly (but as will be seen, not exclusively) along the lines that the Commission had tried to anticipate in its detailed document of May 10.

The comments were both on legal and policy grounds. The primarily legal arguments included the following:

(a) The legislative history of the Sunshine Act makes clear Congress's intent that there should be openness to the maximum extent practicable;

(b) The Commission's action is thus antithetical to the letter and spirit of the Act;

(c) The Supreme Court's decision in *FCC* v. *ITT World Communications*, 466 U.S. 463 (1984), involved unique circumstances and is not relevant to the issue before the NRC;

(d) The Commission disregarded such court decisions as that of the U.S. Court of Appeals for the D.C. Circuit in *Philadelphia Newspapers* v. *NRC*, 727 F.2d 1195 (1984);

(e) The criteria adopted by the Commission are too vague to be workable, inasmuch as they require the Commission to predict the course that discussions will take; and

(f) The Commission's action, by providing for minimal recordkeeping, possibly to be discontinued after six months, will preclude meaningful judicial review.

Policy arguments included these:

(a) Even if the rule can be justified legally, it represents a retreat from openness and will diminish public confidence in the Commission;

(b) The NRC has failed to show that collegiality has been impaired by the Sunshine Act;

(c) The examples of topics that the Commission has cited as examples of possible non-Sunshine Act discussions are too trivial to warrant changing a rule that has served well for 20 years;

(d) The Commission failed to follow the recommendations of the American Bar Association with respect to record keeping;

(e) No harm could come to the Commission's processes if general background briefings were held in open session;

(f) The NRC's role as regulator of a technically complex industry calls for maximum openness; and

(g) Nothing in the rule prevents the Commission from holding off-the-record discussions with representatives of the regulated industry.

In the interest of clarity, we will address the comments in a comment-and-response format. Some comments were dealt with in sufficient detail in the May 10, 1999, document that it would serve no useful purpose to repeat here the Commission's position with regard to them.

A. *Comment:* One of the critical commenters quoted at length from the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Philadelphia Newspapers* v. *NRC*, 727 F.2d 1195 (1984), in which the court declared that "Government should conduct the public's business in public." The commenter opined that Congress undoubtedly intended that the Government in the Sunshine Act "would guarantee public accountability" on the safety of nuclear power.

Response: Undeniably, the *Philadelphia Newspapers* decision represented an expansive view of the Sunshine Act on the part of that panel of the D.C. Circuit. Only a few months later, however, the Supreme Court provided sharply different guidance in the first (and to date only) Government in the Sunshine Act case to reach the Court: *FCC* v. *ITT World*

Communications, 466 U.S. 463 (1984). *ITT World Communications* resembled *Philadelphia Newspapers* in that it also involved an expansive interpretation of the Sunshine Act by the D.C. Circuit. Resoundingly, in a unanimous decision, the Supreme Court overturned the D.C. Circuit's ruling, and it used the opportunity to give guidance on the proper interpretation of the Sunshine Act. It said, among other things:

> Congress in drafting the Act's definition of "meeting" recognized that the administrative process cannot be conducted entirely in the public eye. "(I)nformal background discussions (that) clarify issues and expose varying views" are a necessary part of an agency's work. (Citation omitted.) The Act's procedural requirements effectively would prevent such discussions and thereby impair normal agency operations without achieving significant public benefit. Section 552b(a)(2) therefore limits the Act's application. * * *

Id. at 469–70.

The Commission's rulemaking has been grounded from the start in this definitive Supreme Court guidance. The rule itself includes a definition of "meeting" taken verbatim from the Court's opinion. The American Bar Association confirmed that the NRC's approach was consistent with Congressional intent and the Supreme Court's interpretation. To the extent that the commenter was urging the NRC to follow the approach of the Court of Appeals and disregard the contrary guidance of the Supreme Court, the NRC cannot agree. Even if the Commission believed as a matter of policy that such a course was desirable, the NRC is not at liberty to ignore Supreme Court decisions interpreting the statutes that govern its operations.[1]

B. *Comment:* The NRC's action, even if some legal arguments could be made for it, is contrary to the Congress's intent, documented in the legislative history, that Federal agencies were intended to practice openness to the maximum extent possible.

Response: Congress made a deliberate decision to limit the applicability of the Sunshine Act to "meetings." As the Supreme Court explained in detail, the definition of "meeting" was an issue to which Congress paid extremely close attention, with changes introduced late in the process. The bill in its final form therefore differed significantly from what some of its supporters (including its chief sponsor, the late Senator Lawton Chiles) desired. As a result, Committee reports describing earlier, more expansive versions of the legislation bills are of slight significance compared to the Supreme Court's parsing of the statute that Congress actually passed. Some commenters are in effect asking the NRC to join in rewriting history so that the narrowing of the scope of "meetings"—proposed by then-Representative Pete McCloskey, enacted over the opposition of Senator Chiles and others, and elucidated by the Supreme Court—is made to disappear from the record. The reality, contrary to the views of some commenters, is that the Sunshine Act did not decree openness to the maximum extent practicable. Instead, it struck a balance between the public's right to know and the agencies' need to function efficiently in order to get the public's business done.

C. *Comment:* A commenter asserted that the NRC had failed to offer examples of the types of "non-Sunshine Act discussions" that it contemplated holding.

Response: The commenter is in error, as may be seen from the section of the NRC's May 10, 1999, document on page 24942 that begins, "Some specific examples of the kinds of topics that might be the subject of non-Sunshine Act discussions would include. * * *" Nor was this the first time that the NRC had offered such examples. It has done so repeatedly, beginning in 1985. Indeed, the American Bar Association task force that studied the Sunshine Act quoted, with approval and at considerable length, the examples of possible non-Sunshine Act discussions included in a memorandum to the Commission from the NRC General Counsel.

D. *Comment:* A commenter asserted that "no detailed analysis or specific example has been provided of problems with the current rule or of the need for changes."

Response: The Commission disagrees with this comment. As long ago as 1984, the Administrative Conference of the United States, in Recommendation 84–3, was commenting that the Sunshine Act had had the unintended effect of diminishing collegiality at multi-member agencies and shifting power from the collegium to the Chairman and staff. Analyses by the NRC, the American Bar Association, and the Administrative Conference all provide factual support for the proposition that there are problems associated with the Act. Again, this topic was covered in detail in the Commission's May 10, 1999, document.

E. *Comment:* One commenter observed that "[t]here is no apparent requirement to keep any tape or transcript of non-Sunshine Act discussions."

Response: This comment is correct, for that is the way that Congress enacted the statute. (The May 10, 1999, document quoted the legal judgment reflected in the ABA report that if a discussion "is not a 'meeting,' no announcement or procedures are required because the Act has no application.") As a matter of policy discretion, however, the NRC has decided to maintain a record of the date and subject of, and participants in, any scheduled non-Sunshine Act discussions that three or more Commissioners attend, for *at least* the initial six-month period of implementing the rule. This will assist the Commission in determining whether thereafter, recordkeeping should be maintained, increased, or eliminated. No final decision has been made at this time. The Commission will not discontinue its practice of keeping such records without advance notice to the public.

F. *Comment:* The NRC should make clear whether or not it intends that discussions now held as "meetings" can henceforth be held as non-Sunshine Act discussions. The Commissioners whose proposal initiated the Commission's action seem to have contemplated transforming current "meetings" into non-Sunshine Act discussions, but the Commission's May 10, 1999, document denies this intent.

Response: The May 10, 1999, document made clear that the objective is not to turn discussions now held as "meetings" into non-Sunshine Act discussions, but rather to enable the Commission to hold, as non-Sunshine Act discussions, the kind of informal, preliminary, and "big picture" discussions that currently are not held at all. As is sometimes the case, the final Commission action differed in this

[1] It is worth noting that on the precise legal point in dispute here—the definition of a "meeting" under the Sunshine Act—one D.C. Circuit decision held that an agency is legally prohibited from interpreting the law more restrictively than Congress provided. In *WATCH* v. *FCC*, 665 F.2d 1264 (D.C. Cir. 1981), the court sharply chastised an agency which had adopted a definition of "meeting" that included types of discussions that Congress had not included within the statutory scope. The court declared that the agency was "supposed to track" the statutory definition when it defined a "meeting" in its regulations. Because it had failed to do so, and instead included types of discussions not intended by Congress to fall within the statutory scope, the agency had written an "impermissibly broad" definition which could not legally be sustained. The court said:

> Indeed, we are unable to discern any reason for the breadth of the agency's definition of "meeting"—apart from shoddy draftsmanship, perhaps. While we recognize that an agency generally is free to shoulder burdens more onerous than those specifically imposed by statute, the regulation at issue here is in excess of the Commission's rulemaking discretion under 47 U.S.C. 154(1) (1976). Consequently, we set it aside to the extent that its definition of "meeting" is more inclusive than the one contained in the Sunshine Act. 665 F.2d 1264, 1272.

instance from the proposal that set the action in motion.

G. *Comment:* The memorandum from two Commissioners that initiated the Commission's action said that one reason to act was that the primary opponent of the Commission's 1985 action was no longer in Congress. This suggests that the Commission's action was motivated by political considerations, rather than actual need.

Response: The cited memorandum did indeed include an allusion to a former Representative. Read fairly and in its totality, it makes clear that the two Commissioners' proposal was motivated by concerns of good government and legal correctness, not politics. At the same time, they offered their candid view that concern about the proposal might be less intense than it had been in 1985. There was nothing inappropriate about making this observation. The Commission's decision to take action with regard to the Sunshine Act was a reflection of its longstanding efforts to increase the collegiality of the Commission process, to ensure that its procedures and practices are in conformity with current law, and to reach closure on outstanding items.

H. *Comment:* The May 10, 1999, document is not clear as to whether there is anything in the rule that would prevent the full Commission from meeting off-the-record with representatives of a licensee or the Nuclear Energy Institute in non-Sunshine Act discussions.

Response: The commenter's point is well taken; the notice did not address this question. The Commission's intent is that non-Sunshine Act discussions would be limited to NRC or other federal agency personnel, with limited exceptions for persons (e.g. representatives of the regulatory body of a foreign nation, or a state regulator) who would not be regulated entities or who could not be considered interested parties to Commission adjudicatory or rulemaking proceedings. The Commission is committed to implementing this intent; the non-Sunshine Act discussions will not include discussions with representatives of licensees or of organizations who could be considered interested parties to NRC adjudications, rulemakings, or development of guidance.

I. *Comment:* The NRC's standards for determining when a discussion can be held as a non-Sunshine Act discussion is impermissibly vague, requiring "divination" on the part of the participants.

Response: The standards for determining what is a non-Sunshine Act discussion were taken verbatim from the decision of a unanimous Supreme Court. Moreover, it is not correct to say that the standard requires "divination" of what will happen in a discussion. Rather, what the rule envisions is that if a discussion begins to evolve from the preliminary exchange of views that the Commission contemplated into something so particularized that it may "effectively predetermine" agency action if it continues, the Commission will cease the discussion.[2]

J. *Comment:* Because of the special sensitivity and public interest in issues of nuclear safety, the NRC should continue to apply the law more stringently than is required.

Response: That argument may have some force, but it cuts both ways. By the same token, it can be argued that the special sensitivity and public interest in issues of nuclear safety make it essential that the Commission remove barriers to efficiency and collegiality, so as to maximize the quality of Commission decision-making, and that the Congressional balance between openness and efficiency should therefore be adhered to strictly. The NRC believes that the latter interest should predominate.

K. *Comment:* Whether or not legally justifiable, the NRC's action will diminish public confidence in the Commission.

Response: The Commission was aware of this possibility at the time it issued the May 10, 1999, document, but it believes that the legal and policy reasons for its action—compliance with the Supreme Court's guidance, and the expected benefits in collegiality and efficiency, make this a desirable course of action, even if—despite the Commission's best efforts to explain its reasoning—some persons misunderstand or disapprove of the Commission's action. It is also possible that the potential enhancement of collegiality and the potential improvement in Commission decision-making that may result from non-Sunshine Act discussions will ultimately increase the public's confidence in the Commission's actions.

L. *Comment:* The NRC did not follow the recordkeeping recommendations of the American Bar Association.

Response: It is true that the Commission did not follow the American Bar Association's recommendations with respect to recordkeeping. However, those recommendations were prudential, not based on legal requirements. The ABA recognized that as a legal matter, if a discussion is not a "meeting," no procedural requirements apply at all. The Commission's May 10, 1999, document reflected a judgment that Congress would not have given agencies latitude to hold this type of discussion free of elaborate and burdensome procedures if it had not viewed such procedures as undesirable. Nonetheless, as described in the response to Comment E above, the Commission has decided to maintain a record of the date, participants in, and subject matter of all non-Sunshine Act discussions for at least the first six months in which the rule is implemented, and it will not discontinue the practice thereafter without advance notice to the public.

M. *Comment:* No harm could result from holding briefings in public session, and doing so would benefit public understanding.

Response: On this point, arguments can go either way. At the time that the Commission first put its Sunshine Act rules into place, it acknowledged that briefings might be exempt from the Sunshine Act's scope, but said that the Commission did so much of its important work in briefings that as a policy matter, it believed these should be open to the public. This argument is not insubstantial. In part for that reason, the Commission affirms once again what it said in its May 10, 1999, document and earlier in this present document, namely, that its objective is not to turn discussions now held as "meetings" into non-Sunshine Act discussions. Rather, the intent is to ensure that the Commission is not categorically required to apply the Sunshine Act's procedural requirements to *every* briefing, including such things as routine status updates, where the benefit to the public would be small compared to the administrative burden and loss of efficiency in doing day-to-day business.

In sum, the NRC believes, based on its review of the comments received on the May 10, 1999, document, that the general approach taken by the Commission in that notice remains a desirable course of action. Accordingly, the NRC intends to implement its 1985 Sunshine Act rules and to begin holding non-Sunshine Act discussions, subject

[2] Every Commissioner who meets one-on-one with an interested party to a matter before the Commission has to be prepared to cut off discussions that threaten to stray into impermissible areas, as provided, for example, by the NRC's *ex parte* rules. There seems no reason why Commissioners could not equally well halt discussions among themselves that seem likely to cross the line separating non-Sunshine Act discussions from "meetings."

to the conditions outlined in the May 10, 1999, document, and as further clarified in the present document, 30 days from the date of this notice.

Dated at Rockville, Md., this 16th day of July, 1999.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 99-18724 Filed 7-21-99; 8:45 am]

BILLING CODE 7590-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98-NM-350-AD; Amendment 39-11232; AD 99-15-12]

RIN 2120-AA64

Airworthiness Directives; Saab Model SAAB 2000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Saab Model SAAB 2000 series airplanes. This action requires repetitive detailed inspections to detect looseness or gap of the press fit bushing installation of the actuator fittings of the aileron trim tabs, and eventual replacement of the bushings with new, staked bushings. Accomplishment of such replacement terminates the repetitive inspections. This action also provides for an optional temporary preventive action, which, if accomplished, would terminate the repetitive inspections until the terminating action is accomplished. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified in this AD are intended to prevent looseness or gap of the bushings. In the event of failure of the redundant trim tab actuator, such looseness or gap of the bushings could lead to trim tab flutter and consequent structural failure of the trim tab and reduced controllability of the airplane.

DATES: Effective August 6, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 6, 1999.

Comments for inclusion in the Rules Docket must be received on or before August 23, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 98-NM-350-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

The service information referenced in this AD may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S-581.88, Linköping, Sweden. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM-116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2110; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION:

Discussion

The Luftfartsverket (LFV), which is the airworthiness authority for Sweden, notified the FAA that an unsafe condition may exist on certain Saab Model SAAB 2000 series airplanes. The LFV advises that a failure of a bushing of the flap support fitting occurred during a fatigue test. The bushing installation of the flap support fitting is similar to the bushing installation of the actuator fittings of the aileron trim tabs. In the event of failure of the redundant trim tab actuator, such a failure of the bushing could lead to trim tab flutter and consequent structural failure of the trim tab and reduced controllability of the airplane.

Explanation of Relevant Service Information

Saab has issued Service Bulletin 2000-57-011, dated October 1, 1998, which describes procedures for repetitive visual inspections to detect looseness or gap of the press fit bushing installation of the actuation fittings of the aileron trim tabs. In addition, the service bulletin describes procedures for eventual replacement of existing bushings with new, staked bushings in the fittings. Such replacement when accomplished, eliminates the need for the repetitive inspections. The service bulletin also describes procedures for an optional temporary preventive action that involves the installation of washers on the bushings of the actuator fittings of the aileron trim tabs. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

The LFV classified this service bulletin as mandatory and issued Swedish airworthiness directive (SAD) No. 1-132, dated October 8, 1998, in order to assure the continued airworthiness of these airplanes in Sweden.

FAA's Conclusions

This airplane model is manufactured in Sweden and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.19) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the LFV has kept the FAA informed of the situation described above. The FAA has examined the findings of the LFV, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent looseness or gap of the press fit bushing installation of the actuator fittings of the aileron trim tabs. This AD requires accomplishment of the actions specified in the service bulletin described previously, except as discussed below.

Differences Between this AD and Service Bulletin

Operators should note that, although the service bulletin specifies that the manufacturer may be contacted for disposition of a certain repair condition, this AD requires the repair of that condition to be accomplished in accordance with a method approved by the FAA, or the LFV (or its delegated agent).

Cost Impact

None of the airplanes affected by this action are on the U.S. Register. All airplanes included in the applicability of this rule currently are operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, the FAA considers that this rule is necessary to ensure that the unsafe condition is addressed in the event that any of these subject airplanes are imported and placed on the U.S. Register in the future.

PDR

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

April 17, 2000

CHAIRMAN

The Honorable Edward J. Markey
U.S. House of Representatives
Washington, D.C. 20515–2107

Dear Congressman Markey:

I am responding to your letter of March 9, 2000, concerning Nuclear Regulatory Commission (NRC) compliance with requirements of the Government in the Sunshine Act and the openness and transparency of the Commission's regulatory process. The Commission appreciates your concern about and interest in maintaining public trust and confidence in the NRC. Our responses to your specific questions are enclosed.

Your letter raises several questions stemming from an inadvertent set of circumstances in which the Nuclear Energy Institute (NEI) was given a draft of SECY-99-143, "Revisions to Generic Communications Program," about two weeks before it was available to the public through the NRC's Public Document Room (PDR). There was no intent to mislead or deceive you about the information provided in response to your earlier inquiry on this matter. This was confirmed by the NRC Inspector General's Report (Case No. 99-31D, 10/25/99) in its investigation of this matter (initiated at your request). That report explains that the error was the result of certain of the NRC staff's misunderstanding of PDR procedures. Nonetheless, as the attached December 20, 1999 memorandum from the NRC's Executive Director for Operations (EDO) indicates, the EDO has reemphasized the importance of clear and accurate communication to the staff, and the EDO has issued guidance to all office directors and regional administrators on timely availability of public documents. The Commission regrets that the response to your earlier question on this matter contained inaccuracies.

You also expressed concern about the openness with which the NRC conducts its business, particularly in those areas involving discussions between individual Commissioners and industry representatives. Historically, Commissioners have met with interested persons or organizations requesting a meeting with individual Commissioners, provided that such meetings would not violate the agency's ex parte rules. Representatives of public interest organizations are welcomed to the same extent as industry representatives. For example, one or more of the Commissioners have met with representatives from organizations including Public Citizens (PC), Nuclear Control Institute (NCI), Union of Concerned Scientists (UCS), National Congress of American Indians, Nuclear Information and Resource Services (NIRS), Natural Resources Defense Council (NRDC), and West Valley Coalition Citizens Task Force. In addition, the Commission as a whole frequently meets with representatives of public interest groups. In the past year, representatives of states, local governments and tribal organizations as well as public interest organizations, have participated in public Commission meetings; participation included representatives of Public Citizen, the Union of Concerned Scientists, Friends of the

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Coast/New England Coalition on Nuclear Pollution, the National Congress of American Indians, the Nuclear Information Resource Service, the Nuclear Control Institute, Standing for Truth About Radiation (STAR), the Citizens Regulatory Commission, Friends of a Safe Millstone, the Millstone Ad-Hoc Employees Group, and Fish Unlimited, among others. Individual Commissioners also meet with public interest groups in the Regions, such as occurred in a recent trip to Yucca Mountain and during visits to Millstone in the period of extended shutdown.

In recent years, the Commission has made substantial efforts to broaden the scope and depth of its interaction with all stakeholders, whether from industry, public interest groups, the Congress or the States. We have sought stakeholder involvement at both staff and Commission levels in many different areas, such as agency strategic planning, redesigning the oversight process for reactors, rewriting our rules on the use of radioactive materials in medicine, revising our regulations on fuel cycle facilities, reexamining the NRC hearing process and establishing the decommissioning requirements for the West Valley Demonstration Project. I believe that each of these efforts is evidence of the Commission's desire to enhance its openness and to reach out to the public.

The Commission is committed to improving interactions with all of its stakeholders and in enhancing public trust and confidence in the agency. We will continue our efforts to improve in this area.

Sincerely,

Richard A. Meserve

Enclosures:
1. Responses to Questions
2. December 20, 1999 Memorandum

RESPONSES TO QUESTIONS

QUESTION I. In the Millstone case, the OIG found that the discussions with industry representatives did not violate the Sunshine Act, since the discussion never constituted a "meeting." A meeting is defined in 10 CFR 9.101 to require a quorum (three) of Commissioners. Has the NRC ever considered discussions with fewer than three Commissioners "meetings?" Why does the NRC believe only discussions with a quorum constitute a meeting when this may run counter to the Principles of Good Regulation?

ANSWER.

The NRC has never considered a discussion with fewer than three Commissioners to be a "meeting" under the Sunshine Act. In the case of the NRC, the Energy Reorganization Act of 1974 specifies that a "quorum for the transaction of business shall consist of at least three members present." 42 U.S.C. 5841 (a)(1). And the Sunshine Act defines a "meeting" to refer to deliberations of "at least the number of individual agency members required to take action on behalf of the agency." 5 U.S.C. 552b (a)(2). The NRC does not believe that this statutory definition runs counter to the Principles of Good Regulation, which provide for independence, openness, efficiency, clarity and reliability.

QUESTION 2. In the Millstone case, the OIG found that "the public had limited opportunity for direct access to individual Commissioners...due to a lack of Commission invitations and requests by the public for such meetings." What steps will the NRC take to ensure public participation in future discussions? What steps will the NRC take to inform and encourage the public to initiate meetings with the Commissioners?

ANSWER.

The Commission is receptive to requests for meetings from all interested stakeholders, and it already has taken the initiative to ensure public participation in discussions through very active efforts to engage stakeholders in its activities. The NRC regularly solicits public comments on regulatory policy proposals, outside the rulemaking process, through notices in the Federal Register on policy statements, regulatory guides, and standard review plans. It conducts frequent public meetings to invite all interested parties to get involved in the process, such as through public workshops on proposed rules, regulatory guidance, and industry voluntary initiatives to address specific technical issues. In addition, the Commission recently instituted a procedure aimed at obtaining more balanced stakeholder participation in its meetings. The Commission has incorporated guidelines for this process in its Internal Procedures, which are publicly available on the agency's website.

QUESTION 3. Apart from the federal standards for public access to NRC meetings, the NRC has guidelines for openness described in the Principles of Good Regulation. How does the NRC ensure that the Commission and its staff are complying with these principles? Are there other NRC guidelines which govern behavior of NRC Commissioners and staff regarding openness and transparency?

ANSWER.

The Principles of Good Regulation are featured prominently in agency policy and planning papers, such as in its annual Strategic Plan, and in its Mission Statement posted on the NRC website. The Commission and its staff are mindful of these principles in conducting their daily affairs. NRC Management Directives provide guidance and directives for the NRC staff on public attendance at agency meetings and on release of information to the public. These are designed to ensure that the public has a full and fair opportunity to understand the agency's regulatory process and that documents are not provided to a particular licensee or individual unless they can be made publicly available. The Commission also has issued regulations on ex parte communications which apply in agency adjudications. These regulations are scrupulously adhered to and ensure that no outside party to an agency adjudication can engage in "secret" communications with the Commission on matters relevant to an agency adjudication.

QUESTION 4. Before implementing the new Sunshine Act rule restricting the types of meetings that were subject to its provisions, the NRC applied the Sunshine Act requirements to all meetings with a quorum of Commissioners. Is the NRC currently using the more or less restrictive definition of a meeting? If the more restrictive definition is being used, will the NRC continue with this policy in light of the Commerce Committee's approval of legislation to block the NRC effort to exempt additional meetings from the Sunshine Act openness requirements? In addition, if the more restrictive definition is being used, how many NRC closed discussions have taken place that would have been subject to the Sunshine Act meeting requirements under the less restrictive definition of a meeting? What subjects were discussed in these meetings and who participated in them? Were any transcripts, minutes, or other records of these discussions kept?

ANSWER.

The Commission currently is using the definition of meeting that excludes certain discussions by a quorum of agency members from the definition of "meeting" under the Sunshine Act, in conformance with Congressional intent, as confirmed by the Supreme Court in FCC v. ITT World Communications, 466 U.S. 463 (1984). NRC is defending its Sunshine Act rule in the U.S. Court of Appeals for the District of Columbia Circuit, and the agency intends to continue to operate under this definition of meeting pending the outcome of the case, absent the enactment of legislation barring non-Sunshine Act discussions. To date, four such discussions have been held under the revised definition:

1.	September 15, 1999	3:00 - 3:40 p.m.	Hurricane Preparedness Activities (information briefing)
2.	September 22, 1999	1:05 - 1:35 p.m.	Media Streaming (information briefing)
3.	February 18, 2000	2:00 - 3:30 p.m.	Indian Point 2 Steam Generator Tube Leak (event briefing)
4.	March 1, 2000	10:30 - 11:30 a.m.	NRC's Y2K Program Lessons Learned (information briefing)

There were no transcripts kept for these discussions, but a record form was prepared for each. The record forms, which include attendance information, the subject matter and pertinent briefing material associated with these discussions, are attached.

Attachments: Records of Non-Sunshine Act Discussions

QUESTION 5. The NRC is beginning a new document access program known as the Agencywide Document Access and Management System (ADAMS). What is the status of this system? Have there been problems accessing the system? If so, what actions has the NRC taken to correct these problems? What other actions has the NRC considered to ensure the problems related to the release of draft SECY-99-143 to the public document room will not be repeated?

ANSWER.

ADAMS is a multipurpose electronic document management and record keeping system which provides for the electronic filing, distribution, and storage of NRC documents, including most of those which are made publicly available. Because of size or organization, some documents cannot be electronically filed or adequately retrieved. ADAMS is intended to provide for search and retrieval in electronic form of agency public documents released since November 1, 1999. When fully implemented, it will also provide access to information presently stored in the Bibliographic Retrieval System (BRS) and the Nuclear Documents System (NUDOCS). ADAMS is accessible via NRC's public website.

The ADAMS system is being implemented in phases. Beginning November 1, NRC began to centrally capture electronic images of newly-released publicly available documents and make them available to the public in ADAMS via our public website. During the period January 1 through March 31, NRC phased in direct electronic entry of certain documents into ADAMS by the staff. On April 1 ADAMS became the agency's official recordkeeping system and the vast majority of internally-generated documents are being directly entered by the staff. Externally-

generated documents will be entered at a few centralized capture stations at Headquarters and the Regions.

Although there have been a number of difficulties associated with the transition from a centralized, paper-based system to a more decentralized electronic one, ADAMS is intended to make documents available to the public more quickly than under the previous systems. Also, the public now will have electronic access to the majority of publicly available NRC documents in full text, whereas the earlier electronic systems provided this feature for only about 10% of the documents. ADAMS also offers the public the option of downloading and/or printing documents at their local computers, thereby avoiding the cost of ordering paper copies from the PDR (at 10 cents per page).

We are aware that some public users in organizations utilizing firewalls as a network security measure have been unable to access publicly available documents in ADAMS. Whenever NRC has been notified of these situations, we have assisted the organization, if requested, to address the technical problems it may be having. Alternatively, several organizations have opted to use standalone internet access rather than access ADAMS through their Local Area Networks. We also have worked with users to resolve local printing problems. The agency follows a procedure for identifying the problems, prioritizing them for resolution, and tracking the progress of efforts to resolve them. In the event there are problems with public access to the system, the PDR staff can use the internal system to answer queries and continue to provide document reproduction services. These services have not been eliminated.

The ADAMS system was not yet in place at the time when draft SECY-99-143 was released. At that time, it generally took 2 working weeks for most publicly available documents to reach the NRC Public Document Room and 3 weeks for microfiche to reach the local public document rooms. As is the case today, staff was instructed to send advance copies of certain high-interest documents directly to the Public Document Room. Under ADAMS, NRC's goal is to release most internally-generated documents within five working days after they are finalized and dated. The general policy, which was recently revised, states that:

1. Newly received documents from external entities shall be released 5 working days after they are added to the ADAMS Main Library.

2. Documents produced by the staff addressed to external entities shall be released 5 working days after the date of the document.

3. Documents produced by NRC staff addressed to other internal addressees (or documents with no specific addressees) shall be released 5 working days after the date of the document.

There are a number of exceptions to this policy. For example, the agency recognizes that for some documents, such as press releases or documents distributed at public meetings, release should be immediate. Other documents, such as those that contain confidential information, may never be publicly released. Therefore, ADAMS provides the capability to set release dates that may be earlier or later than 5 days after the date the document was finalized.

To ensure that NRC staff is familiar with the capabilities of ADAMS, and the new document release policies that have been adopted by the NRC, all staff attended formal ADAMS training programs, and detailed agencywide policy and procedures have been updated and issued. Periodically, network announcements are issued to further communicate and expand on specific implementation aspects of the new policies and procedures. We anticipate that there will be a learning curve and occasional instances when the agency's new and aggressive release timing goals may not be met, especially during the current transition period. Even considering these occasional instances, the current ADAMS environment is capable of delivering NRC information to the public considerably faster than the previous approaches and should therefore help to avoid some of the issues surrounding the release of draft SECY-99-143.

QUESTION 6. In the release of SECY-99-143, the OIG report indicated that "none of the drafters of the response to question 7... were given the opportunity to review the final version of the July 19, 1999 letter". What procedures does NRC follow to allow an original drafter to review the final version of any written records that person may have produced? Will the NRC make changes in this procedure as a result of the OIG report on the subject?

ANSWER.

There is no NRC procedure that requires the original drafter to be given the opportunity to review the final version of any document that person originated. There are no current plans to develop such a procedure.