DOCKET NUMBER PROPOSED RULE PR-9 (50 FR 20889) (6)

STATE OF ILLINOIS

DEPARTMENT OF NUCLEAR SAFETY

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June 17, 1985

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

Attn: Docketing and Service Branch

Re: Proposed Interim Rule - Government in the Sunshine Act Regulations (10 C.F.R. 9.101(c), published May 21, 1985 at 50 F.R. 20889)

Dear Sir:

The Illinois Department of Nuclear Safety objects to the above-identified interim and proposed rule pertaining to the conduct of Commission meetings. The Commission is proposing a substantial change in this rule to provide that background briefings and generalized discussions of agency business are not "meetings" and therefore need not be held in public. The Commission is implementing the change on an interim basis and will adopt the rule permanently, pending receipt and consideration of public comment.

The Department of Nuclear Safety objects to the rule change because the Department believes that the change establishes a vague and indefinite standard, overreaches the intent of the Supreme Court case which is the stated source of support, is inconsistent with the letter and spirit of the Government in the Sunshine Act, and is unnecessary.

The previous rule of the Commission was:

> "(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, but does not include deliberations required or permitted by subsections 9.105, 9.106, or 9.108(c), gatherings of a social or ceremonial nature, or briefings of the Commission by representatives of other agencies or departments of the United States government, or representatives of foreign governments or international bodies where such briefings or discussions are informational in nature and are not conducted with specific reference to any particular matter then pending before the Commission."

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add: Pete Clare, H-1035
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The Commission proposes to delete the exclusions and to insert instead language which is taken directly from a recent U.S. Supreme Court Opinion (Federal Communications Commission v. ITT World Communications, 80 L.Ed.2d 480, 104 S.Ct. _____ (1984)). Quoting directly from the Supreme Court's opinion, the Commission's proposed and interim rule is:

> "(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 subsections 9.105, 9.106, or 9.108(c) do not constitute 'meetings' within this definition."

This language, when taken out of the context of the Supreme Court case, is an inappropriate standard to incorporate verbatim in the Commission's rules. In Federal Communications Commission v. ITT World Communications, the Supreme Court considered whether members of a subcommittee of the Federal Communications Commission (FCC) who met with foreign officials to plan joint telecommunications projects should have been held in public. The Court held that such meetings need not conform to the provisions of the Government in the Sunshine Act (5 U.S.C. 552b). The Commission would now modify its rules purportedly to conform to the Supreme Court's decision. However, the rule change is unnecessary since the pre-existing NRC rule would appear to have addressed analogous situations as relates to Commission meetings, i.e., the rule included among its specific exemptions:

> "briefings of the Commission by...representatives of foreign governments or international bodies where such briefings or discussions are informational in nature and are not conducted with specific reference to any matter then pending before the Commission."

Further, the modified rule construes the Supreme Court's opinion too broadly. The case concerned only a subdivision of the FCC and not meetings of the public body as a whole; the gathering at issue was not convened by the FCC but by another entity or entities; and the gathering was outside the subdivision's delegated authority, i.e., the subdivision could not take any official action or make official recommendations to the FCC concerning the subject matter of the gathering. The NRC would give the Supreme Court's decision broad application to apply to virtually any general deliberation or briefing session of the Commission. The NRC would give the case application not only to gatherings of a subdivision of Commission members but to gatherings of the Commission as a whole; not only to meetings called by other entities and attended by Commission members but to meetings convened by and for the Commission; and not only to meetings whose subject matter is outside of the Commission's specific authority but to informational and briefing sessions which are directly related to the Commission's official business.

The Supreme Court's Opinion was not intended to have such broad application. The Commission's interim and proposed rule extends beyond the Supreme Court's intent and is inconsistent with the Government in the Sunshine Act. That Act is intended to assure that the public has the opportunity to be present at meetings in which public officials engage in deliberations pertaining to business within the authority of that entity. The public is entitled to have access to information pertaining to the Commission's decisionmaking process as well as to its actual decisions. For reasons of good public policy, deliberations and briefing sessions of the Commission should and we believe legally must be held in public sessions. We also agree with the stated views of Commissioner Asselstine that the interim and proposed rule has inherent problems with regard to its prospective application in given circumstances and that the standard established by this rule is vague and subjective and will be difficult to apply in individual cases.

For these reasons, the Illinois Department of Nuclear Safety requests the Commission to reconsider this rule change and reinstate the original rule.

Sincerely yours,

Terry R. Lash
Director

TRL:sp

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(50 FR 20889) (5)

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OFFICE OF SECRETARY
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BRANCH

Samuel Chilk
Secretary
USNRC
Attn. Docketing and Service Branch, 50 FR 20889
Washington DC 20555

Dear NRC,

The N.C. Public Interest Research Group takes strong exception to the changes in NRC's compliance with the Government in the Sunshine Act, and also with the silly action of making the rule immediately effective with no compelling cause or need (much less one affecting protection of the public health and safety) whatsoever.

Using a Supreme Court decision that exempts a trip to an international conference from the definition of "meeting" to reduce the records kept of the NRC's internal discussions and plans is outrageous. NRC shows no such willingness to quickly comply with direct action by the Courts affecting its own rules when NRC actions are appealed, viz. the "Financial No-Qualifications Rule" for electric utilities, where after the courts voided the rule, the NRC did the same thing again, on inconsistent grounds.

It appears that NRC intends to muddle and sabotage the record-keeping requirements of the Sunshine Act on purpose. One must then ask, what does the NRC have to hide? An example that readily comes to mind is the Diablo Canyon secret meeting transcripts, which NRC refused to release until they were obtained by the news media. The least one can say about these transcripts is that they put NRC in a bad light, but it is important to remember that it is the words of the Commissioners, and not the action of having them transcribed or released, that are the source of the problem. This transcript reveals an agency that overall is much more concerned with the economics of nuclear electricity and nuclear plant construction (not part of NRC's statutory job) than with the health and safety of the public, which NRC by law must protect. The extreme vagueness of the proposed (and implemented, without comment) "standard", "where discussions are 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", invites abuse. It is a piece of gobbledegook that a panel of rabbis and lawyers probably couldn't make sense out of

Since a majority of Commissioners proposed this abuse-inviting language in place of a former much clearer and simpler rule, it makes sense to ask, are they intentionally providing for abuses? If not, the Commissioners are incompetent and should rescind the rule for lack of any good reason to have it changed. If so, the Commissioners should rescind the rule, or be considered to be openly proclaiming their intent to abuse secrecy, by not keeping records of "gatherings" at which discussions like those in the Diablo transcripts occurred, by excluding Staff briefings (which the Commission routinely relies on in forming positions and making decisions) from public view,

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by creating a"rule" that is subject to varying and arbitrary interpretation by the Commissioners themselves (e.g. are their opinions affected by what went on), again often without transcription, so that these arbitrary interpretations cannot be reviewed.

Particularly in light of the very serious responsibilities of the NRC, it should err, if it errs in administering the Sunshine Act, on the side of extra sunshine. To keep decisionmaking secret, to hide discussions and briefings, to avoid having transcripts, is just the opposite of what the Commission should do. Remember, people's health, safety, quite possibly their lives and those of future generations are at stake here, in what this Commission does. When the NRC is publicly suggesting that the change of a fullscale meltdown is one in 3333 reactor years (at least 40% in the next 20 years), and that the change of another Three Mile Island (partial meltdown or severe core damage) is about ten times that (1 in 333 reactor years, or a reasonable chance of it happening every 5 years), it is irresponsible to suggest any lowering of public insight into the Commission's actions. For the Commission itself to suggest a reduction of public oversight is especially irresponsible.

Interestingly, the Commission appears to have never even given a suggestion of how the public interest or the Commissions responsibilities are served by this rule change, before implementing it without any chance for public comment. It is fair to assume there are no good reasons for the change, since even the Commission didn't give any besides possible conformity to a Supreme Court decision on a most different case. The Commission gives the impression of searching eagerly for ways to avoid public scrutiny, both in its meetings and in its rulemakings (why, else, implement the rule without comment periods beforehand?). If the Commission wanted to convince the public, and Congress, that it seeks to hide what it is doing and to avoid accountability to the public, it could hardly have done better, although this is a bumbling, "Inspector Clouseau" type of rule, suggesting less competence in the Commission than the public has any reason to be comfortable with.

In sum, this rule should be immediately repealed. If the Commission has any need to change the Sunshine Act implementation to improve its ability to protect the public health and safety, it can issue an Advance Notice of Proposed Rulemaking and go forward with full sunshine on its actions. If the Commission wishes to express contempt and fear of the public, it may as well let the rule stand, but it should not expect the public to accept it. The logical inference from letting the rule stand, would be that the Commission has something to hide, and wants to avoid getting caught as it did in Diablo.

Finally, NC PIRG wishes to note the refreshing sense and sanity of Commissioner Asselstine's views. It is unfortunate that his views are an "exception to the rule" at the NRC in this and many other matters.

NC PIRG

Wells Eddleman

Wells Eddleman
Staff Scientist