Corrected

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR PART 9

Government in the Sunshine Act Regulations

AGENCY: Nuclear Regulatory Commission

ACTION: Interim rule with request for comments

SUMMARY: The Nuclear Regulatory Commission is making an interim rule change to conform its definition of a "meeting" under the Government in the Sunshine Act (5 U.S.C. 552b) to the statutory intent, as clarified in the unanimous 1984 decision of the United States Supreme Court in Federal Communications Commission v. ITT World Communications, ___ U.S. ___, 104 S.Ct. 1936. The Commission believes that this change would serve to effectuate the Congressional intent that background briefings and generalized discussions of agency business not be considered "meetings" for Sunshine Act purposes, and that adherence to statutory standards will help assure both fuller information for the Commissioners and greater collegiality in their performance of their duties. The rule change will be applied on an interim basis, pending submission and evaluation of comments and publication of a final rule.

EFFECTIVE DATE: The rule change will be effective on an interim basis on May 21, 1985. Comments on whether the interim rule change should be made final must be received on or before June 20, 1985. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: Interested persons are invited to send written comments or suggestions to the Secretary of the Commission, U.S. Nuclear Regulatory Commission,

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add: Peter Crane
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Washington, D.C. 20555, Attention: Docketing and Service Branch. Comments may also be delivered to Room 1121, 1717 H Street, N.W., Washington, D.C. between 8:15 a.m. and 5:00 p.m. Copies of any documents received may be examined at the NRC Public Document Room, 1717 H Street, N.W., Washington, D.C. 20555.

FOR FURTHER INFORMATION CONTACT: Peter Crane, Office of General Counsel, United States Nuclear Regulatory Commission, Washington, DC 20555, telephone: 202-634-1465.

I.

SUPPLEMENTARY INFORMATION: The NRC's current Sunshine Act regulations (10 CFR § 9.100-109), define a "meeting" as follows, 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 business, but does not include deliberations required or permitted by §§ 9.105, 9.106, or 9.108(c),[1] 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.

It will at once be noticed that the only type of briefing which is explicitly exempted from the definition of "meeting" is a briefing by a representative of another agency or department or a foreign or international body. Likewise, the only type of "gathering" of Commissioners which is expressly

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[1]These three sections definition refer to procedures for implementing the Sunshine Act itself, and have no bearing on the Commission's conduct of its everyday duties under the Atomic Energy Act, Energy Reorganization Act, and other statutes.

exempted from the definition is one of a "social or ceremonial nature." Thus under the NRC's regulations, the following types of meetings would all be subject to the Sunshine Act's meeting requirements: a general background briefing by the NRC staff on a technical issue common to a number of plants; informal discussion of problems likely to face the agency in the coming year; a discussion of the effectiveness of a particular office in meeting the Commission's needs; and a discussion of the state of relations between the Commission and its oversight committees, or with other government agencies. It is the Commission's view that the Supreme Court's 1984 decision in FCC v. ITT World Communications, ___ U.S. ___, 104 S.Ct. 1936, strongly suggests that none of these topics necessarily falls within the class of discussions that triggers the "meeting" requirement of the Sunshine Act.

In 1984, the Supreme Court provided its first guidance on the Sunshine Act. FCC v. ITT World Communications, ___ U.S. ___, 104 S.Ct. 1936, was decided by a unanimous Court on April 30, 1984. The case arose when three members of the FCC, constituting a quorum of the agency's Telecommunications Committee (a subdivision to which decisionmaking power had been delegated) traveled to Europe to take part in an international conference of telecommunications regulators. An American company, aware that the FCC Commissioners planned to use the conference to argue for increased competition in the provision of telecommunications services, filed suit in District Court, charging among other things that the presence of a sufficient number of Commissioners to decide agency business rendered the international conference a Commission "meeting" under the Sunshine Act, and that the meeting was required to be held in the open. The District Court ruled for the company, as did the D.C. Circuit Court of Appeals, in a decision written by Judge Bazelon.

The Supreme Court, in a 9-0 decision written by Justice Powell, reversed the D.C. Circuit's holding. Its discussion of the meaning of "meeting" under the Sunshine Act is worth quoting at some length.

> 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. See S. Rep. No. 94-354, at 19 (1975). 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 to meetings "where at least a quorum of the agency's members ... conduct or dispose of official agency business." S. Rep. No. 94-354, at 2.

In a footnote, the Court reviewed the pertinent legislative history:

> The evolution of the statutory language reflects the congressional intent precisely to define the limited scope of the statute's requirements. See generally, H.R. Rep. No. 94-880, Part 2, at 14 (1976). For example, the Senate substituted the term "deliberations" for the previously proposed terms -- "assembly or simultaneous communication," H.R. 11656, 94th Cong., 2d Sess. § 552b(a)(2) or "gathering," S. 5, 94th Cong., 1st Sess. § 201(a) (1976) -- in order to "exclude many discussions which are informal in nature." S. Rep. 94-354, at 10; see id., at 18. Similarly, earlier versions of the Act had applied to any agency discussions that "concern[] the joint conduct or disposition of agency business," H.R. 11656, supra, § 552b(a)(2). The Act now applies only to deliberations that "determine or result in" the conduct of "official agency business." The intent of the revision clearly was to permit preliminary discussion among agency members. See 122 Cong. Rec. 28474 (1976) (remarks of Rep. Fascell).

The Court then explained that though the FCC's Telecommunications Committee was subject to the Sunshine Act (since it could act on behalf of the agency, under a delegation of authority from the Commission as a whole), it did not appear that the Committee had, by participating in the international conference, engaged in "deliberations [that] determine or result in the joint conduct or disposition of official agency business." The Court offered a definition of this by no means self-explanatory language:

> This statutory language contemplates discussions that "effectively predetermine official actions." See S. Rep. No. 95-354, at 19; accord id., at 18. 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." R. Berg and S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act 9 (1978) (hereinafter Interpretive Guide).

The Court noted that ITT had not alleged that the Conference sessions included formal action on applications before the FCC, nor that the sessions "resulted in firm positions on particular matters pending or likely to arise before the Committee." Rather, the conference sessions "provided general background information to the Commissioners and permitted them to engage with their foreign counterparts in an exchange of views by which decisions already reached by the Commission could be implemented." The Court added: "As we have noted, Congress did not intend the Sunshine Act to encompass such discussions."

The Court observed that the D.C. Circuit had not found that the FCC Commissioners at the conference were actually deliberating on matters within their formally delegated authority; rather, the lower court had inferred an authority, not formally delegated, to engage in discussions on behalf of the Commission. The lower court "then concluded that these discussions were deliberations that resulted in the conduct of official agency business, as the discussions 'play[ed] an integral role in the Commission's policy-making processes.' [citation omitted]"

The Court categorically rejected the Court of Appeals' reasoning:

> We view the Act differently. ... Under the reasoning of the Court of Appeals, any group of members who exchange views or gathered information on agency business apparently could be viewed as a "subdivision ... authorized to act on behalf of the agency." ... Moreover, the more expansive view of the term "subdivision" adopted by the Court of Appeals would require public attendance at a host of informal

conversations of the type Congress understood to be necessary for the effective conduct of agency business.

The interim rule incorporates verbatim the Supreme Court's language in the ITT decision. The exceptions for "social and ceremonial" gatherings and for informational briefings by other agencies or international organizations are dropped, since under the proposed rule they would be redundant. The Commission believes, based on almost eight years of operation under the current rules, that a decision to conform its regulations to the literal requirements of the statute as interpreted by the Supreme Court will improve its ability to do the public's business. The ability to hold informal preliminary briefings can help assure that Commissioners are well informed about subject areas well before any particularized proposal reaches them for consideration. The ability to hold free-flowing discussions of a variety of problems likely to face the agency, or to get together for "brainstorming sessions," can foster both collegiality and sound management. It is through such generalized background discussions that Commissioners can decide what topics should become the subject of more particularized proposals, discussions of which would fall within the Act's definition of "meeting."

In so changing its rules, the Commission would in no sense be seeking to evade the Sunshine Act's requirements. Rather, it would be giving belated recognition to the fact -- understood by the Congress and reaffirmed by the Supreme Court -- that some types of informal discussions, necessary for sound agency functioning, do not belong within the purview of the Sunshine Act.

II.

In one other respect, the Commission placed on itself a restriction that other agencies did not see fit to adopt. The NRC's rules provide that when a meeting is closed, one of the following two alternatives must be adopted: either (1) the Commission itself, as the last item of business in the meeting, reviews the course of the meeting and decides which portions of the transcript or recording can be withheld, or (2) the Secretary, "upon the advice of the Office of General Counsel and after consulting with the Commission, shall make such determinations." These rules apply whether or not anyone has evinced any interest in learning the nature of the Commission's discussions.

Other agencies have taken the common-sense view that they will review the transcripts if and when someone asks for them. The Federal Communications Commission, in promulgating its Sunshine Act regulations in 1977, dismissed the suggestion that every transcript of every closed meeting should be reviewed as a matter of course (and later re-reviewed if any portions continued to be withheld). The FCC said:

> We reject the proposition that the transcript of each closed meeting should be reviewed regularly to determine whether it can be made available to the public. The proposition is impracticable. ... Many of the matters acted on by the Commission in closed meetings should be of little or no interest to the general public and should rarely be made the subject of requests for transcripts. A periodic review of such transcripts would be a waste of time and public funds. Transcripts may be placed in the public file just after the meeting is held, but otherwise will be reviewed only when requests for copies are received. 42 Fed. Reg. 12867 (March 7, 1977).

In addition, in the interest of the efficient use of resources, the Commission is amending its rules to clarify that Sunshine Act recordings, transcripts, and minutes of closed Commission meetings will be reviewed for "closability" only when a request is received. The Commission agrees with the position taken

in this regard by the Federal Communications Commission, which likewise found that it would be a waste of public funds to review transcripts in which no one has evinced any interest. Moreover, since the Commission's present rules require the Commissioners themselves to be consulted on these reviews, the present rule is an unnecessary burden on the time of the Commissioners. As revised, the relevant subsection provides that the review will take place if requested within the period during which the recording, transcript, or minutes must be retained. The provision for review by the Commissioners at the end of the meeting itself is dropped from the rule, as this provision is impracticable and is not currently used.

The Commission has decided to make the rule effective on publication on an interim basis pending submission and evaluation of comments, and publication of a final rule. It is authorized to do so because the change to 10 CFR § 9.101(c) is both an interpretative rule and a rule of agency procedure, and the changes to 10 CFR § 9.108(c) is a rule of agency procedure. Such rule changes are exempt from proposed rulemaking and deferred effectiveness under 5 U.S.C. § 553 of the Administrative Procedure Act. The change to 10 CFR § 9.101(c) is interpretative because it merely specifies the Commission's interpretation of the term "meeting" in the Sunshine Act, Batterton v. Marshall, 648 F.2d 694, 705 (D.C. Cir. 1980). The changes to 10 CFR 9.101(c) and 10 CFR 9.108(c) are rules of agency procedure because they govern how the Commission conducts its business and do not in any way alter the substantive rights or interests of persons affected by Commission action, Batterton v. Marshall, supra at 707.

Making the rule change effective on an interim basis will not only improve the conduct of Commission business in the interim by facilitating the flow of information to the Commission and fostering collegiality, but will also enable

the Commission to gain some limited experience with the rule change before making any decision on the final rule. However, in this interim period the Commission will not be using the new definition of meeting to permit private Commission discussions in any briefings or other Commission sessions devoted to specific initial licensing cases or the TMI-1 restart case. In this interim period initial licensing and TMI-1 restart will, as a matter of policy, be governed by the "old" expansive definition of "meeting".

ENVIRONMENTAL IMPACT - CATEGORICAL EXCLUSION

The amendments amend the Commission's rules relating to the Sunshine Act codified in 10 CFR Part 9 and therefore meet the eligibility criteria for the categorical exclusion set forth in 10 CFR 51.22(c)(1). Accordingly, pursuant 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the issuance of the amendments.

PAPERWORK REDUCTION ACT STATEMENT

The rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. §§ 3501 et seq.).

LIST OF SUBJECTS IN 10 CFR PART 9

Freedom of information, penalty, privacy, reporting and recordkeeping requirements, Sunshine Act.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, on an interim basis, the NRC is adopting the

following amendments to 10 CFR Part 9. As noted, public comment is solicited on whether they should be made final.

PART 9 - PUBLIC RECORDS

1. The authority citation for Part 9 is revised 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 also issued under 5 U.S.C. 552 and 31 U.S.C. 9701. Subpart B also issued under 5 U.S.C. 552a. Subpart C also issued under 5 U.S.C. 552b.

2. In Subpart C, § 9.101, paragraph (c) is revised to read 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.

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3. In Subpart C, § 9.108, paragraph (c) is revised to read 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 subsection (b) of this section.

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Dated at Washington, D.C. this 14 day of May, 1985.

For the U.S. Nuclear Regulatory Commission

Samuel J. Chilk
Secretary of the Commission

SEPARATE STATEMENT OF CHAIRMAN PALLADINO
SUNSHINE ACT RULEMAKING

I fully support the proposal set forth in this notice of rulemaking to change the Commission's Sunshine Act rules. However, I disagree with the policy decision to use the revised definition of a "meeting" during the interim period during which public comments are received and a final rule is published.

I doubt the usefulness of such interim application. If, on the one hand, the Commission applies the new definition narrowly -- that is, if it exempts from the definition of "meeting" only the clearest of cases -- then it will not gain much of value from interim application. If, on the other hand, the Commission applies the new definition broadly, then it risks potentially counter-productive consequences for its overall objective to conform its rules to the Sunshine Act.

SEPARATE VIEWS OF COMMISSIONER ASSELSTINE

I approved publication of the proposed changes to our rule implementing the Sunshine Act only in order to obtain comment on those changes. However, I have significant concerns about the difficulty of administering the proposed standard which make it impossible for me to endorse the proposed rule. I particularly invite comment on the concerns expressed below.

The Sunshine Act is not an easy act to interpret or to apply. This is the primary reason the Commission's present regulation was written as it was. The Commission's regulation sets up a bright line for determining what constitutes a meeting and what does not. While the Commission may have given up some flexibility when it set up that bright line standard, it did so with a reason. A standard which provided more flexibility would, of necessity, have been less certain and would have created problems of interpretation. Adopting a more flexible standard would have made it easier for the Commission to misapply the Act inadvertently in a particular case.

The standard in the proposed rule suffers from just these problems. Because the standard is vague and subjective, it will be much more difficult to administer than the present standard. Predicting whether a particular meeting will consist of discussions "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" will require nothing short of divination. And, if the Commission guesses wrong, there is no remedy because if there is no "meeting" there will be no notice, no transcript, and no minutes.

If the Commission insists on going forward with the proposed rule, it should at least have made clear in the statement of considerations what change to present practice the rule is intended to effect. The Commission should have explained, with concrete examples, exactly what kind of meetings now held by the Commission will be treated as "gatherings" under the proposed rule. Or, if the intent is to create a new type of meeting not now held by the Commission, that should have been made clear.

I also cannot support the Commission's decision to make this rule immediately effective by applying it while the comment period runs. A rule changing the manner in which the Commission implements the Government in the Sunshine Act, an act the purpose of which was to provide the public with "the fullest practicable information regarding the decisionmaking processes of the Federal Government" (P.L. No. 94-409 §2), is clearly a rule in which the public has an interest. The Commission should await public comment before putting the rule into effect. The Commission has operated under its present rule for eight years without catastrophe. Waiting thirty more days for public comment hardly seems to be an onerous burden.