UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Interim Rule: 10 C.F.R. Part 9	)
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Government in the Sunshine Act Regulations	)
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50 Fed. Reg. 20689 (May 21, 1985)	)
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COMMENTS OF THE JOINT INTERVENORS
TO THE DIABLO CANYON NUCLEAR
POWER PLANT LICENSING PROCEEDINGS

Introduction

The U.S. Nuclear Regulatory Commission ("Commission" or "NRC") has issued for public comment an interim rule that would amend its Government in the Sunshine Act ("Act") regulations by drastically narrowing the scope and nature of the Commission meetings to which the Sunshine Act applies. In so doing, the Commission proposes to limit significantly the types of NRC meetings required to be open to the public and, as an unspoken corollary to that limitation, to dispense with the Act's procedural safeguards of notice, certification, and verbatim transcripts for any meetings falling outside the Commission's redefinition of the Act's scope.[1/]

1/ The Joint Intervenors object to the issuance of the proposed rule change as an immediately effective interim rule. The Commission has offered no evidence of exigency or any other basis upon which to justify its elimination of the usual comment period prior to the effective date of the new rule. Under the circumstances, the Commission's haste simply contributes further to the unavoidable impression that the rule change is motivated primarily by the Commission majority's desire to minimize public oversight of, and participation in, Commission proceedings.

The Joint Intervenors oppose the proposed rule change and urge that it be withdrawn. Although ostensibly justified by the recent decision of the U.S. Supreme Court in FCC v. ITT World Communications, __ U.S. __, 104 S.Ct. 1936 (1984), the proposal is in fact a blatant distortion not only of that decision but of numerous other appellate decisions that have unequivocally adhered to an expansive reading of the Sunshine Act's basic mandate -- that agency meetings shall be open to the public. Rather than a principled application of the Supreme Court's decision, the Commission's proposal is a transparent, even cynical, response to its recent and continuing embarrassment over the Diablo Canyon transcripts and the abuse of its administrative authority that those transcripts document. Under the circumstances, the Commission's action seems less a legitimate attempt to comply with the letter of the law than it is a pragmatic effort to remove itself from the watchful eye of the public and to facilitate thereby its disregard for the health, safety, and procedural rights of the public in the critical area of nuclear safety. If adopted, the proposed rule will effectively gut the Sunshine Act, as it applies to the NRC, and will undermine still further the already strained public confidence in the Commission and the nuclear industry that it is charged to regulate.

I. THE INTERIM RULE IS INCONSISTENT WITH APPLICABLE LAW.

Section 552b(b) of the Sunshine Act mandates that all "meetings" of an agency be open to the public, and § 552b(a)(2)

defines "meetings" 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 of official agency business.

Prior to the issuance of the proposed rule, the NRC's implementing regulations explicitly incorporated the Act's language to create an unequivocal right of public access, except where closure was permitted pursuant to one of the ten statutory exemptions. 10 C.F.R. § 901(c).[2/]

Under the interim rule, however, the NRC's regulations are amended so that the Sunshine Act's provisions will apply only to meetings 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.

50 Fed. Reg. 20891. Under its new regulation, therefore, the Commission can close a meeting simply by asserting that no "sufficiently focused or discrete proposals or issues" will be discussed such that the deliberations are likely to lead to the development of firm positions by any of the Commission members. Because no "meeting" within the scope of the Act is being held, there need be no notice, certification, statement of reasons, or

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2/ Under the Act and the Commission's former implementing regulations, a number of procedural safeguards attach where the Commission seeks to close a meeting based on an exemption, including notice of the meeting, certification of the issues to be discussed, a statement of reasons for closing the meeting, and preparation of a verbatim transcript, with any non-exempt portions to be released to the public.

transcript. And, because there is no transcript, there is no foundation upon which to appeal and no remedy available should an appeal of the Commission's decision to close a meeting be successful. In effect, the Commission has proposed to replace the existing unequivocal statutory guarantee with a vague, wholly subjective standard that will, for all practical purposes, insulate from judicial review the Commission's case-by-case decisions on whether to close its meetings.

This proposed rule change violates not only the letter but the spirit of the Sunshine Act as well. First, the Sunshine Act is premised on the broad policy that "the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government,"[3/] and any exemptions from disclosure are to be narrowly construed. Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921, 929 n.18, 934 (D.C. Cir. 1982). By requiring that "every portion of every meeting of an agency shall be open to public observation," 5 U.S.C. § 552b(b), Congress

> sought to make government more fully accountable to the people. In keeping with the premise that "government should conduct the public's business in public," the Act established a general presumption that agency meetings should be held in the open. Once a person has challenged an agency's decision to close a meeting, the agency bears the burden of proof. Even if exempt subjects are discussed in one portion of a meeting, the remainder must be held in open session.

Common Cause v. Nuclear Regulatory Commission, 674 F.2d at 928-29

3/ Sunshine Act, ch. 409, 90 Stat. 1241 (1976) (declaration of policy).

(D.C. Cir. 1982) (emphasis added) (footnotes omitted).[4/] In contrast to the Freedom of Information Act, there is no exemption from disclosure for "predecisional" discussions or deliberations; indeed, the Sunshine Act "was designed to open the predecisional processes in multi-member agencies to the public," id. at 929, and Congress specifically rejected the suggestion of several agencies -- including the NRC -- that an exemption for predecisional discussions or deliberations should be added to the Act. Id. at 929 n.23. Through the interim rule, the Commission is seeking to promulgate precisely the type of exemption rejected by Congress.

Second, by redefining the term "meeting" to limit its scope and thereby circumventing the need to rely on an exemption, the Commission has nullified the procedural requirements associated with an exemption -- i.e., notice, statement of reasons, transcripts, etc. -- and has eliminated the central remedy

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4/ The special importance of the Sunshine Act in the area of nuclear energy was recognized only last year by the U.S. Court of Appeals for the D.C. Circuit in Philadelphia Newspapers, Inc. v. NRC, 727 F.2d 1195, 1203 (D.C. Cir. 1984):

> A decade ago revelations of secret abuse of official power shocked this nation and seared in our minds a lesson vital to the health of a democratic polity: government should not conduct the public's business in private. In the Sunshine Act Congress moved to ensure that those in government do not forget that they are above all accountable to the people of this nation. Nowhere is the need for accountability more acute than in the Commission's handling of the Three Mile Island controversy. Without a doubt, Congress intended that the Sunshine Act would guarantee public accountability on what is one of the most sensitive and difficult issues of our time: the safety of nuclear power. (Emphasis added.)

for a violation of the Sunshine Act -- i.e., public release of transcripts of the improperly closed meeting. See, e.g., Braniff Master Executive Council v. C.A.B., 693 F.2d 220, 226 (D.C.Cir. 1982) (recognizing the importance of transcripts as principal remedy); Pan American World Airways, Inc. v. C.A.B., 684 F.2d 31, 36 (D.C.Cir. 1982) (same); Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921, 938-939 (D.C.Cir. 1982) (same). Indeed, the legislative history of the Act makes clear that the purpose of the transcript requirement "is to assure that a citizen has a meaningful remedy when a meeting has been illegally closed, namely the release by the court of the transcript of the illegally closed portion." H.R. Rep. No. 94-880, 94th Cong., 2d Sess., 7 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 2183, 2184.[5/] Because this essential safeguard has been circumvented by the Commission through the interim rule, the courts will in many cases have no transcript to review in determining whether a meeting has been closed consistent with the Act, and the public will have no effective remedy if the court nonetheless finds that the Act has been violated.

Third, and perhaps most germane to the Commission's expressed rationale for the rule change, the recent decision of the Supreme Court in FCC v. ITT World Communications, supra ("ITT"), plainly does not, as the Commission contends, provide a legal basis for its sweeping interim rule. In that case, the

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5/ "One reason for having a transcript . . . is that once a closed meeting is actually held, most or all of it may turn out to be non-exempt." H.R. Rep. No. 94-880, 94th Cong., 2d Sess., 7 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 2183, 2197.

Court held only that a gathering in Europe of three FCC members and their European and Canadian counterparts at an international conference conducted pursuant to procedures not subject to the FCC's control and concerning matters unrelated to their official delegated authority did not constitute a "meeting" within the scope of the Sunshine Act. The two-pronged rationale for the Court's decision is instructive here:

> [The Act] applies only 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. 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." The term "subdivision" itself indicates agency members who have been authorized to exercise formally delegated authority. See Interpretive Guide 23. 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. In any event, it is clear that the Sunshine Act does not extend to deliberations of a quorum of the subdivision upon matters not within the subdivision's formally delegated authority. Such deliberations lawfully could not "determine or result in the joint conduct or disposition of official agency business" within the meaning of the Act. As the Telecommunications Committee at the Consultative Process sessions did not consider or act upon applications for common carrier certification -- its only formally delegated authority -- we conclude that the sessions were not "meetings" within the meaning of the Sunshine Act.
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> The Consultative Process was not convened by the FCC and its procedures were not subject to the FCC's unilateral control. The sessions of the Consultative Process therefore are not meetings "of an agency" within the meaning of

> § 552b(b) of the Sunshine Act. The Act prescribes procedures for the agency to follow when it holds meetings and particularly when it chooses to close a meeting. See supra, note 6. These provisions presuppose that the Act applies only to meetings that the agency has the power to conduct according to these procedures. And application of the Act to meetings not under agency control would restrict the types of meetings that agency members could attend. It is apparent that Congress, in enacting requirements for the agency's conduct of its own meetings, did not contemplate as well such a broad substantive restraint upon agency processes. See S. Rep. No. 95-354, at 1.

104 S.Ct. at 1941-42 (emphasis added) (footnotes omitted). Thus, the Court in ITT held only that the Sunshine Act did not apply because the Act does not extend to (1) deliberations on matters not within the agency's authority and (2) meetings not subject to the agency's procedural control.

In light of these circumstances, there can be little doubt that the Court's holding is a limited one, circumscribed by the unique facts of the case. At best, it provides a very tenuous basis for the sweeping revision by the Commission of its Sunshine Act regulations.[6/] Although the revised rule focuses on

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6/ As an illustration of the range of meetings that it contends may properly be closed under the interim rule, the Commission listed the following:

> 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.

50 Fed. Reg. 20689. Significantly, none of these types of meetings meets either of the two criteria relied upon by the Supreme Court in ITT.

whether discussions concern proposals or issues sufficiently precise or specific to determine official agency actions, the Court's opinion in ITT makes clear that the FCC committee there in issue failed to discuss any issues falling within its area of delegated authority. Therefore, the meeting by definition could not have determined or resulted in the "joint conduct or disposition of official [agency] business," no matter how advanced or focused were the issues being discussed, and hence the Sunshine Act was plainly inapplicable. By simply inserting in its interim rule language taken out of context from the Court's opinion without regard to the unique circumstances of the case, the Commission has distorted the specific holding and general implications of the ITT decision.[7/]

The interim rule will ensure only the evisceration of the Sunshine Act as applied to NRC proceedings. The Commission's proposal contravenes years of judicial precedent and distorts the very court decision out of which it allegedly arose. Accordingly, the proposal should be withdrawn.

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7/ It is important to note in this connection that the Court in ITT decided the case retrospectively, examining one particular meeting in light of its specific circumstances. By contrast, the Commission seeks to promulgate a broad standard to be applied before the fact to all future agency meetings. In most instances, the standard will be unmanageable, because the Court's decision in ITT grew out of the special circumstances there in issue. Moreover, the absence of a transcript will effectively insulate the Commission from serious judicial scrutiny and will deprive the public of a meaningful remedy because there will be no verbatim record of the discussions that actually took place.

II. PRUDENTIAL CONSIDERATIONS OF PUBLIC TRUST AND CONFIDENCE MILITATE STRONGLY AGAINST ADOPTION OF THE PROPOSED RULE.

In addition to questions of its legality, the proposed rule change raises a number of important prudential considerations of public trust and confidence, each of which requires rejection of the proposal. Whether or not the rule is ultimately found to be consistent with the ITT decision, it has already contributed to the further deterioration of the Commission's credibility as the agency principally responsible for ensuring that nuclear energy is safe. That credibility can only be restored by more, not less, public access to Commission proceedings.

First, the rule change has been proposed within just three weeks of a 9-1 vote by the U.S. Court of Appeals for the D.C. Circuit to rehear the Diablo Canyon licensing appeal. That vote was in part the result of recently disclosed transcripts of closed Commission meetings -- meetings that the Joint Intervenors have contended were illegally closed in violation of the Sunshine Act. Totally apart from the propriety of the Commission's discussions during those meetings, its decision to close them, followed by legal challenge and ultimately an overwhelming decision of the full court of appeals to rehear the case based on a review of the meeting transcripts, give credence to the suspicion that the proposal by the Commission to narrow significantly its Sunshine Act regulations -- including eliminating the transcript requirement for a wide range of meetings -- is premised not on the NRC's asserted desire to foster free and open discussion, but on a patently improper motive of facilitating illegal agency conduct. Rather than promulgating a significant limitation of the Sunshine

Act's application to NRC proceedings, the Commission would be better advised to strengthen the right of public access in order to repair the damage to public confidence caused by those events. Following so closely the controversy surrounding the release of the Diablo Canyon transcripts, the Commission's interim rule -- with its stated purpose of improving the Commission's ability to "do the public's business," 50 Fed. Reg. 20890 -- appears simply disingenuous; in fact, the most obvious purpose and effect of the rule will be to enable the Commission to exclude the public from matters of the highest public concern, in clear violation of the explicit admonition of the D.C. Circuit in Philadelphia Newspapers.[8/]

Second, in place of the clear statutory presumption in favor of open meetings, the interim rule establishes a vague, subjective, and essentially unreviewable test for application of the Sunshine Act. As a practical matter, it will simply be impossible to ascertain in advance of a given meeting whether the deliberations are likely to lead any members to develop firm positions on present or future issues. Moreover, an understanding of the state of mind of each Commission member before and during each meeting will be necessary to an accurate application of the proposed standard. Indeed, even individual Commissioners may not be certain as to the precise point at which a discussion will lead them to a "reasonably firm position regarding matters pending or likely to arise before the agency." As Commissioner Asselstine

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8/ See note 4 supra.

observed, "[p]redicting whether a particular meeting will consist of [such deliberations] will require nothing short of divination." 50 Fed. Reg. 20892.

Third, the fundamental purpose of the Sunshine Act is to ensure that all exchanges concerning agency business are open to the public. Although the Commission claims that the new standard will promote freer and more collegial exchanges among the Commission members, the ten exemptions set forth in the Act allow the closing of meetings covering all situations where some competing interest of confidentiality or privacy outweigh the public's right to know. Closure based on these competing interests, which the Commission must identify before it closes a meeting and which are judicially reviewable, may be consistent with the Act under appropriate circumstances. However, the authority to close a meeting without providing a specific reason and then to conduct the meeting without making a record of what transpired is clearly inconsistent with the Act and will, in all likelihood, lead to abuses that could severely impair the public's access to the agency's decision-making process. Thus, the proposed rule change undercuts the central purposes of the Sunshine Act -- to make government agencies accountable to the public and to foster public trust of the decision-making process of government. A commission making sensitive decisions on a matter as important and controversial as nuclear power simply cannot afford to arrogate to itself virtually unlimited power to exclude the public from its decision-making process.

Finally, the Commission has failed to offer any factual basis to support its conclusion that the proposed rule change is

necessary. Although the Commission bases its action on "almost eight years of operation under the current rules," 50 Fed. Reg. 20890, the Commission does not offer even one concrete example drawn from that experience to support its interim rule. Instead of the empirical evidence implied by its reference to such experience, the Commission relies on self-serving statements about "brainstorming sessions," "sound management," and "collegiality," none of which is predicated on substantial evidence of actual instances in which a policy of openness to the public -- subject to specific statutory exemptions -- has in any way precluded such goals. To the contrary, the developments in the Diablo Canyon proceeding during the past year -- discussed supra -- suggest the dismaying conclusion that the Commission has yet to recognize the benefits of, or its obligations under, the Sunshine Act.

For all of these reasons, the proposed rule should be withdrawn.

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Respectfully submitted,

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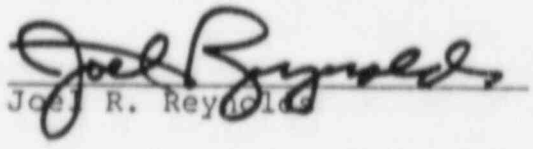
By 
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