BEFORE THE
NUCLEAR REGULATORY COMMISSION

COMMENTS OF COMMON CAUSE
AND THE HONORABLE LAWTON CHILES

on Interim Rule 10 CFR 9.101(c)
concerning the definition
of "meeting" under the
Government in the Sunshine Act



June 28, 1985



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add: Peter Cleve, H-1035

COMMENTS OF COMMON CAUSE
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These comments are submitted on behalf of Common Cause, a non-partisan citizens' lobbying organization with over 250,000 members and Senator Lawton Chiles (D-Fla.), in response to the NRC's promulgation of interim rule 10 CFR 9.101(c) concerning the definition of "meeting" under the Government in the Sunshine Act.

In its Federal Register Notice of May 21, 1985, the Commission issued a new, more restrictive definition of the term "meeting" under the Government in the Sunshine Act, gave specific examples of Commission "gatherings" that, under the new definition, would no longer be considered Sunshine Act meetings, and made the definition effective immediately.

We urge the Commission to stay this regulation and reinstate its original regulatory definition of "meeting" because the interim regulation is fundamentally subversive of the Sunshine Act in that it eliminates from the Act coverage of meetings that Congress clearly intended to be covered. Common Cause and Senator Chiles also oppose this regulation because it constitutes a vague, impractical, non-operational definition; because the particular gatherings listed in the Notice that are not covered by the new regulation were clearly intended to be subject to the Act; and finally, because the regulation, which is not merely interpretive or procedural, should have been published as a

proposed rule in accordance with the requirements of the Administrative Procedure Act.

Under the NRC's new definition, meetings of the Commissioners that are not "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" are no longer considered meetings under the Act. But the definition of meeting in the statute is not limited to "focused" discussions on "discrete" proposals or issues where members form "firm" positions. Rather, the statutory term "meeting" encompasses "deliberations [that] determine or result in the ... disposition of official agency business" as well as the "joint conduct" of agency business. NRC's definition would completely read out of the statute meetings that, though not precisely focused, clearly constitute the conduct of agency work. The report of the House Government Operations Committee, in discussing the definition of meeting, said, "[t]he conduct of agency business is intended to include not just the formal decisionmaking or voting, but all discussion relating to the business of the agency." H. Rep. I, 8. ("The whole decisionmaking process, not merely its results, must be exposed to public scrutiny." S. Rep., 18.)

The specific examples given by the Commission of meetings that would no longer be subject to the Act illustrate precisely the kind of meetings Congress intended to be covered. The new definition, as explained in the Notice, would no longer cover

meetings in which the Commissioners were briefed on technical issues common to a range of plants. Yet, these meetings would naturally include discussions among Commissioners focused on the technical issues presented that would often undoubtedly lead to rulemaking and policy decisions with broad impact.

The new definition also excludes meetings focused on problems likely to face the agency in the coming year, even though such meetings would generate the agenda for the coming year's activities. But it is the purpose of the Sunshine Act to increase the accountability of agencies by exposing these kinds of policy discussions to public scrutiny. As the Senate Report on the law said:

> (O]penness will better demonstrate what facts and policy considerations the agency found important in reaching its decision, and what alternatives it considered and rejected. As citizens listen to debate between the heads of an agency, they will be able to identify precisely the issues that are of most concern to the agency ... [A]s all elements of the public gain an equal opportunity to learn about the issues and problems confronting agencies, wider and more informed public debate of the agency's policies becomes possible. Increased public interest and discussion cannot help but contribute to improve decisionmaking process.
> (S. Rep. No. 94-354, at 5-6; see also H. Rep. No. 94-880, at 2 (1976).)

Not only are these specific examples clearly covered by the Act, by all appearances, they are covered by the Commission's new definition of meeting as well. For example, the excluded briefings are "focused" on a specific technical issue and presumably useful briefings and discussions are likely to cause members to form "reasonably firm" positions regarding matters likely to arise before the agency. That the Commission offers these meetings as examples of the kinds of gatherings that are

being excluded under the new rule only serves to demonstrate how impractical, non-operational, and subject to abuse the new definition is. In fact, even if we believed that the NRC's definition of meeting did not misinterpret the scope of the statutory term, we would oppose its adoption as a regulatory definition. The definition is not sufficiently objective to be fairly implemented.

We also believe that the Commission's reliance on FCC v. ITT World Communications, 104 S.Ct. 1936 (1984) is misplaced. The Supreme Court in that case was not attempting to craft a generic, operational definition of "meeting." Under the quite peculiar facts of this case, it held that a quorum of an agency subcommittee at a foreign conference was not a meeting under the Act because it was not acting under formally delegated authority. The Commission should not wrench that holding out of context to establish a more limited definition of meeting.

The Commission's new definition is fundamentally subversive to the Sunshine Act because it undermines the very procedural protections which Congress carefully crafted in order for the public to be assured that agency discussions were not taking place in unnecessary and illegal secrecy. The Commission's prior regulations afforded agencies ample latitude to close appropriate meetings under ten statutory exemptions -- but with public notice and public explanation as to why the meeting was being closed. This allowed both public and judicial oversight of the agency's decisions to conduct business behind closed doors, as contemplated by Congress.

Under the Commission's new rule, meetings can be closed with no notice and no explanation to the public -- a fundamental contradiction to the process protected by Congress. In issuing the new rule, what the Commission really seeks is not only the right to close meetings that it can not legally do, but the right to hide from the public its decisions about which meetings it closes, how often, and why. It thus flees from accountability for the decision it makes under a statute designed to make agencies accountable for their decisions and undermines procedural protections of the Act.

The Commission has explained its rule change as furthering its "ability to hold free-flowing discussions of a variety of problems likely to face the agency ...." 50 Fed. Reg. at 20890. But these are precisely the kind of agency discussions Congress intended to open to public view. As Senator Chiles, the bill's sponsor, said on the floor:

> A major step in the area of regulatory reform would be to let all of us watch the agency decisionmaking process in action to know what the considerations are and to see what these agencies actually do. (121 Cong. Rec. 35321 (1975))

And as the United States Court of Appeals for the District of Columbia Circuit wrote in Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921 (1982),

> Congress enacted the Sunshine Act to open the deliberations of multi-member federal agencies to public view. It believed that increased openness would enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it 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." [Footnotes omitted.]

As the federal agency responsible for protecting the public from the risks of nuclear energy, the Commission has a serious responsibility to allow the public to observe as it does the public's business.

We strongly urge the Commission to stay its regulation, 10 CFR §9.101(c) and reinstate its original regulatory definition of "meeting" under the Act.

Respectfully submitted,

Lawton Chiles
U.S. Senate

Fred Wertheimer
President, Common Cause

Dated: June 28, 1985