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COMMENTS ON THE NUCLEAR REGULATORY COMMISSION'S AMENDMENT TO ITS GOVERNMENT IN THE SUNSHINE ACT REGULATIONS

July 3, 1985

On behalf of Public Citizen, Inc., Ralph Nader, the Environmental Task Force, the Critical Mass Energy Project, and the Freedom of Information Clearinghouse, we submit the following comments on the Nuclear Regulatory Commission's interim rule redefining the term "meeting" for purposes of the Government in the Sunshine Act.

For the last eight years, the NRC has operated under a broad interpretation of the term "meeting" which fulfilled the objectives of the Sunshine Act. Without any justification on policy grounds, the NRC has now adopted a far narrower definition of the kinds of meetings which are subject to the Sunshine Act's requirements. This rule effectively forecloses public access to many Commission deliberations, and also effectively prevents judicial review of the Commission's decisions to hold particular meetings in secret. For the reasons which follow, we urge the NRC to abandon its interim rule and return to its policy of open government.

I. The NRC's Rule Violates The Sunshine Act.

The Sunshine Act is predicated on the principle that "the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government." Section 2. In drafting the statute, Congress strove

to "increase the public's faith in the integrity of government, enable the public to better understand the decisions reached by the Government, and better acquaint the public with the process by which agency decisions are reached." Senate Report at 1. More importantly, Congress "moved to ensure that those in government do not forget that they are above all accountable to the people of this nation." Philadelphia Newspapers, Inc. v. Nuclear Regulatory Commission, 727 F.2d 1195, 1203 (D.C. Cir. 1984).

In order to provide the public with the "fullest practicable" access to the deliberations of government agencies, the Sunshine Act contains an extremely broad definition of the kinds of meetings that are covered by the statute. The Act's requirements apply to all meetings of a quorum of agency members where "deliberations determine or result in the joint conduct or disposition of official agency business." Thus, Congress did not intend that the public have access to only meetings at which agency officials actually adopt final decisions, in other words "merely reruns stated for the public after agency members have discussed the issue in private and predetermined their views." Senate Report at 18. Instead, Congress mandated that the "whole decisionmaking process, not merely its results, must be exposed to public scrutiny." Senate Report at 18. The open meeting requirement includes "not just the formal decisionmaking or voting, but all discussion relating to the business of the agency." House Report at 8.

The NRC's new definition of meetings is blatantly inconsistent with the letter and intent of the Sunshine Act. Under the rule, the NRC has indicated that a host of deliberative meetings will no longer be subject to any of the Sunshine Act's requirements, including, at a minimum, the "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." All of these subjects are obviously of crucial interest to the public and all should be covered by the Sunshine Act. In addition, they all involve deliberations which may cause the commissioners to achieve a consensus on particular issues or policies and are, therefore, precisely the kinds of discussions that Congress intended to subject to the Sunshine Act's requirements. Further, "general background briefings" on generic issues are extremely important to the public given the Commission's recent emphasis on standardized nuclear power plant designs.

Moreover, as noted by Commissioner Asselstine, the rule provides no guidance whatsoever as to the other types of meetings that may be brought within its sweep. Since the rule is extraordinarily vague, it can be easily manipulated by the agency to avoid public discussion of all matters that are controversial or embarassing. And, even if the agency is

acting in the best of faith, preliminary discussions will naturally and rapidly lead to formulation of positions by Commissioners on particular issues of public import. In fact, past Commission meetings demonstrate clearly that individual Commissioners can and do adopt firm positions during even the earliest stages of "background discussions." The notion that the Commission will be capable of recognizing the precise point at which Commissioners are starting to formulate firm positions on issues, and will immediately halt "gatherings" at that point, borders on the absurd. It is obvious that, under the NRC's rule, the public will have access to "merely reruns stated for the public after agency members have discussed the issue in private" -- in direct contravention of Congress' intent. Senate Report at 18.

Finally, the NRC's reliance on the Supreme Court's recent decision in FCC v. ITT World Communications, 104 S. Ct. 1936 (1984), as a justification for its rule is seriously misplaced. That decision involved an extremely unusual set of circumstances that has no applicability to the meetings routinely conducted by the NRC. The Supreme Court held that FCC members attending meetings in Europe with their European and Canadian counterparts did not have formally delegated authority to take official action for the agency. In fact, the Court ruled that the meetings were not convened by the FCC and therefore could not be considered "meetings of an agency" within the meaning of the Sunshine Act. Those rulings obvi-

ously have nothing to do with meetings regularly conducted by a quorum of the NRC.

Moreover, even if the Commission's action were consistent with the ITT decision, that alone provides no justification for the agency's rule. The mere fact that an action is legally permissible does not mean that it is wise policy. As we next demonstrate, the Commission has articulated no rational basis for abandoning its eight-year-old definition of meetings subject to the Sunshine Act.

II. Policy Considerations Favor Reinstatement of the Former Rule.

The Commission has articulated no rationale whatsoever for severly limiting the public's access to its meetings. While the Commission speaks in general terms of promoting "collegiality" in the agency, it conspicuously fails to point to any present deficiency in collegiality or, more importantly, to any adverse effects on agency decisionmaking. Indeed, it is impossible to imagine how general background briefings -- supposedly the focus of the Commission's rule -- could be stymied if open to the public. This suggests that the Commission is either planning to apply the new rule to far more controversial subjects than it has thus far acknowledged, or that there is absolutely no policy rationale for the rule. In either case, the rule should be abandoned by the Commission.

On the other hand, there are compelling reasons why the NRC should retain its broad definition of meetings. The NRC is charged by Congress with a unique duty to prevent nuclear

power plant disasters of potentially unprecedented scope. Because of the extraordinary consequences of such a disaster and the concomitant public interest in all nuclear industry activities, the NRC's doors should remain open to the public to the maximum extent feasible.

Unfortunately, rather than solicit public input and involvement in its activities, as it should, the Commission's redefinition of meetings is yet one more in a series of actions by the Commission designed to reduce public awareness of, and input into, the agency's decisionmaking process. Recently, the Commission was investigated by the General Accounting Office for flagrant violations of the FOIA, including the destruction of agency records, the removal of documents from the agency to avoid compliance with FOIA requests, and the abuse of Exemption 5 of the FOIA to avoid disclosure of documents explaining agency decisions and policies. The Commission is currently litigating a suit challenging the agency's refusal to disclose safety reports prepared by an industry group, the Institute for Nuclear Power Operations, as well as the refusal to open its meetings with INPO to the public, as required by the Federal Advisory Committee Act. Critical Mass Energy Project v. NRC, Civ. No. 84-1943 (D.D.C.).

Likewise, the Commission has routinely acted to prevent the public from having input into crucial matters under consideration by the Commission. For example, the NRC has adopted rules

which effectively preclude the public from demonstrating that particular applicants for licenses to operate nuclear facilities are financially unable to do so safely. 49 Fed. Reg. 35747 (Sept. 12, 1984). Similarly, the agency adopted a rule providing that nuclear preparedness issues could be resolved by the Commission without providing for public input in individual licensing hearings. The rule was declared illegal and set aside by the Court of Appeals. Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

When considered together, these actions allow for only one conclusion -- the NRC has decided that public knowledge of, and input into, its programs are expendable, and it has set out to exclude the public from its deliberations and decisions. The amendment of the agency's Sunshine Act rules constitutes just one more example of that policy. The Commission's abandonment of its interim rule and reinstatement of its prior definition of meetings would signal a welcome departure from the Commission's policy of secret government and would go a long way towards restoring public trust in the agency.

III. Minimum Safeguards Should Be Adopted by the NRC.

Assuming that the NRC decides to retain its interim rule, it should adopt certain minimal procedures that are crucial to the public's right to learn about how the Commission is applying its new definition of meetings. First, the Commission should prepare transcripts for every "gathering" attended by a quorum of the agency. Otherwise, the Commis-

sion's determination not to subject a particular meeting to the Sunshine Act can never be remedied and cannot be effectively challenged in court.

Additionally, the NRC should provide advance notice in the Federal Register of all "gatherings" determined to be outside the scope of the Sunshine Act. The notice should provide a description of the matters to be discussed and a detailed explanation for the Commission's finding that the meeting is not subject to the Sunshine Act. Such a procedure is analogous to that employed in the context of FOIA exemption claims. Just as the government explains why requested documents are not "agency records" within the coverage of the FOIA, so should the NRC be required to explain why particular Commission discussions are not considered "meetings" within the coverage of the Sunshine Act. Such advance notice will ensure that the public is informed about how the Commission is applying its new definition of meetings but will involve little, if any, cost to the Commission.

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