UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Interim Rule: 10 C.F.R. Part 9	)	
	)	
Government in the Sunshine Act Regulations	)	Public Comments
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	)	
50 Fed.Reg. 20889 (May 21, 1985)	)	

COMMENTS ON THE INTERIM AMENDMENTS TO THE NUCLEAR REGULATORY COMMISSION'S GOVERNMENT IN THE SUNSHINE ACT REGULATIONS; FILED ON BEHALF OF THE GOVERNMENT ACCOUNTABILITY PROJECT AND TRIAL LAWYERS FOR PUBLIC JUSTICE

The following public comments are submitted regarding an interim rule change of the Nuclear Regulatory Commission (NRC) on the definition of a "meeting" under the Government in the Sunshine Act.[1] For the reasons set forth below the Government Accountability Project (GAP) and Trial Lawyers for Public Justice (TLPJ) believe that the interim rule does not authorize the NRC Commissioners to engage in any meetings or "gatherings" which were prohibited under the language of the old rule. In short, the "gatherings" that the Commission proposes to engage in would be meetings, and therefore subject to the requirements of 5

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[1] On May 21, 1985 (50 Fed.Reg. 20889) the Nuclear Regulatory Commission published the interim rule change which is the subject of these comments. The notice provided a 30-day period for public comment on whether the interim rule change should be made final. On June 19, 1985 Samuel Chilk, the Secretary of the Commission, extended the comment period to July 5, 1985. On the basis that the Government Accountability Project and Trial Lawyers for Public Justice were involved in litigation and NRC-related business during the time period the comments were due, request that these comments be considered.

U.S.C. 552b, the Government in the Sunshine Act (the Act).

Petitioners GAP and TLPJ also submit a proposed amendment to the interim rule which will more fully insure that the intent of the open meetings law, the public interest, and the needs of the NRC are met.[2]

Issues Presented for Consideration

The following issues are presented by the interim rule.

1. Will the proposed implementation of the rule violate the Act by excluding certain gatherings of the NRC Commissioners from the requirements of the Government in the Sunshine Act?

2. Did the Commission violate the Administrative Procedures Act (APA) when it promulgated the interim rule without prior notice and opportunity for public comment?

3. Does the interim rule violate the Sunshine Act by removing any effective remedy for abuses of the Act?

These comments will primarily address only the first issue. (A short statement of position on the second and third issues are presented in Sections V and VI.)

Background of Interim Rule

On May 20, 1985, the NRC published an interim rule change, effective on May 21, 1985. The summary of the action stated that the change was to conform the NRC's definition of a "meeting" under the Government in the Sunshine Act (5 U.S.C. 552b) to the

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[2] The proposed amendment is submitted separately with these comments.

statutory intent, as clarified in a unanimous 1984 decision of the United States Supreme Court.[3]

The interim rule change provoked almost immediate opposition by the public, the press, and Congress.[4]

On June 12, 1985 Representative Dennis E. Eckart (D-Ohio) introduced House Bill 2743 which proposes legislation to repeal the Commission's new Sunshine Act regulations.[5]

Almost the sole focus of the opposition is the announcement by the Commissioners that they will now conduct "gatherings" among themselves which will not be open to the public, and will not be transcribed or recorded in any way. These "gatherings"

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3 The case cited by the Commission was Federal Communications Commission v. ITT World Communications, 52 U.S.L.W. 4507, 104 S.Ct. 1936, 80 L.Ed. 480 (1984).

4 See, generally, the record of the Congressional oversight hearings of the Subcommittee on Energy Conservation and Power of the Committee on Energy and Commerce, May 21, 1985. See also July 5, 1983 letter from Edward J. Markey, Chairman of the Subcommittee to Samuel J. Chilk, Secretary, U.S.N.R.C. attaching public comments in opposition to the rule change and 50 editorials from newspapers across the country opposing the change.

Congressman Markey's letter summarized the strenuous objection in his conclusion:

> "I continue to believe that the Commission should revoke its new regulation and restore the policy that was successfully used for eight years. The Commission has failed to show adequate cause for a rule change, has misinterpreted the law, and has damaged the agency's credibility. This Commission, whose function is to serve the public, should do the public's business in public. It is not too late to let the sun shine on the Nuclear Regulatory Commission by repealing this misguided regulation."

5 House Bill 2743 has been submitted to the House Judiciary Committee for consideration.

will not be subject to the requirements of the open meetings law codified in 1978 and publicly known as the Government in the Sunshine Act.

As of June 6, 1985, the Commission asserted that no such "gatherings" had yet been held,[6] and further committed to provide Congress with a list of any such meetings if they were held.[7]

The NRC's interim rule presents a unique challenge to the Sunshine Act's requirements. The rule adopts the verbatim language from a unanimous Supreme Court decision on what constitutes a meeting of a multi-member agency commission. However, the Commission interprets that decision to authorize "gatherings" which will be exempt from the Sunshine Act.

These comments include a detailed analysis of the legislative history of the Act, interpretive court decisions, scholarly interpretive works and treatises, and the Nuclear Regulatory Commission's own battered history of abuses of the open meetings laws.

The study confirms that the objections of the public have strong footing in the legislative history and court interpretation of this Act.

For the reasons detailed below we urge the NRC to adopt the proposed amendment attached to these comments and dispense with

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6 June 6, 1985 letter from Nunzio J. Palladino to Honorable John Dingell, Chairman, Committee on Energy and Commerce, stated, "No non-Sunshine Act gatherings have yet been held."

7 Id., "The Commission will maintain a record of all informal gatherings not subject to Sunshine Act requirements, and will keep the Congress and the public informed on a monthly basis of the nature of such gatherings...."

the mistaken belief that the U.S. Supreme Court decision authorizes "secret meetings" or "gatherings" of the NRC Commissioners.

I. The Nuclear Regulatory Commission and the Sunshine Act.

The Nuclear Regulatory Commission was established by Congress through the Energy Reorganization Act of 1974, as amended, Pub.L. 93-438, 88 Stat. 1233 (42 U.S.C. 5801). The Act abolished the Atomic Energy Act of 1954, as amended, and entrusted all the licensing and related regulatory functions to the NRC. 10 C.F.R. § 1.1(a).

The Commission is composed of five members. One of the members is designated by the President as the Chairman and is the principal executive officer of the Commission. 10 C.F.R. § 1.10(a).

The purpose of the NRC is to ensure that the public health and safety is protected from the dangers of civilian nuclear power.[8]

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[8] The duties of the Commission are described in NUREG-0325, Revision 7, January 1, 1985, "The U.S. Nuclear Regulatory Commission Functional Organization Charts as:

> The Commission is responsible for licensing and regulating nuclear facilities and materials and for conducting research in support of the licensing and regulatory process, as mandated by the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and the Nuclear Nonproliferation Act of 1978; and in accordance with the National Environmental Policy Act of 1969, as amended, and other applicable statutes. These responsibilities include protecting public health and safety, protecting the environment, protecting and safeguarding materials and plants in the interest of national security; and assuring conformity with antitrust laws. Agency functions are

Like other agencies the NRC has a staff which carries out the day-to-day operations. The staff implements the Commission's directives on the regulation of nuclear power.[9]

A. NRC Procedures Implement the Requirements of the Sunshine Act.

Commission meetings are open to the public, pursuant to 5 U.S.C. 552b, unless they fall within an exemption to the Act "and the Commission also has determined that the public interest requires that those particular meetings be closed." 10 C.F.R. § 1.2(b).

The NRC's implementing regulations provide for the requirements of the Sunshine Act in 10 C.F.R. Part 9, Subpart C, which provides for "procedures pursuant to which NRC meetings shall be open to public observation...." 10 C.F.R. § 9.100.

The Commission began operating under the Sunshine Act March 7, 1977. 42 Fed.Reg. 12877, March 7, 1977. Pursuant to legislative directives the NRC began noticing all of its meetings, and opening all of its meetings to the public. These meetings include briefings, discussions and deliberations. The Commission also liberally exercised its right to close meetings under one or more exemption, and closed numerous briefings,

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performed through: standards-setting and rule-making; technical reviews and studies; conduct of public hearings; issuance of authorizations; permits and lienses; inspection, investigation and enforcement; evaluation of operating experience, and confirmatory research.

9 See the U.S. Nuclear Regulatory Commission Organizational Chart, Id. at p. 2.

discussions and deliberations on proposed enforcement matters, preliminary staff briefings on technical issues, personnel matters, budget proposals, export of nuclear power components, reviews of administrative opinions and research contracts.[10]

According to a summary prepared by Commissioner James Asselstine's staff for the May 21, 1985 hearing on the interim rule, 1/3 of all Commission meetings were closed in 1984 under various exemptions to the Act.[11] A review of the NRC's annual reports shows that since 1979 1/3 of all meetings of the Commission have been closed. According to the 1979 Annual Report the Commission cited four of the ten exemptions as a basis for closure. (These were 1 (classified information), 2 (internal rules and practices), 6 (personnel), and 10 (adjudicatory/ litigation).)[12]

Some of the closed meetings were challenged by members of the public through various informal administrative channels to the Commission; in some cases the Commission decided to open a meeting. Generally requests by the public to open a meeting have been treated as a request for release of the transcript of the meeting after the fact.[13]

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10 See Volumes I-IV of the NRC Government in the Sunshine Notices.

11 See testimony of James K. Asselstine before the Subcommittee of Energy and the Environment, May 21, 1985 (transcript not yet available).

12 U.S. Nuclear Regulatory Commission, Annual Report (1979).

13 Since many of these requests are telephonic there is no accurate record available of how often a member of the public seeks to have the Commission reconsider a decision to close a meeting, or how frequently the Commission denies or accedes to that request.

B. Nuclear Power Under the Sunshine Act.

The business of regulating nuclear power under the Sunshine Act has had a rocky road at the NRC. Public opinion of nuclear power is at an all time low.[14] The causes for this public rejection is irrelevant for the purposes of these comments, but it is sufficient to note that even the Secretary of Energy considered the "public distrust of nuclear power technology" as a key issue for the Department of Energy's Task Force on Nuclear Power Plant Construction.[15]

In 1984 Congress commissioned a study through the Office of Technology Assessment on the future of nuclear power. The report responded to a request by the House Committee on Science and Technology. The report, "Nuclear Power in an Age of Uncertainty," includes a chapter on "Public Attitudes Toward Nuclear Power." The report, which includes public opinion polls taken between 1976 and 1983, shows that "public attitudes toward nuclear power have become increasingly negative over the past two decades...."[16] One of the report's conclusions is that skepticism of the NRC and the nuclear industry resulted from lack of information or misinformation provided by the industry.

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14 See, James Cook, "Nuclear Follies", Forbes Magazine, Feb. 11, 1985. p. cover, 82.

15 Address by Secretary of Energy Donald Hodel, Nuclear Power Assembly Annual Meeting (May 8, 1984).

16 Nuclear Power In An Age Of Uncertainty (Wash. DC: U.S. Congress, Office of Technology Assessment, OTA-E-216, Feb. 1984), p. 211. (Id. at 220-226)

The lack of confidence is not limited to the public and the Department of Energy. On June 4, 1985, Senator Alan Simpson introduced Senate Bill S. 1235. The purpose of the bill is to abolish the Commission and establish a single-head agency "in order to promote more effective and efficient licensing and regulation."[17]

Ironically, Simpson's bill blames the impotence of the Commission on the failure of the Commissioners to communicate with one another.

> The commissioners just are not able -- physically or legally -- to communicate with one another. As an unfortunate consequence of this failure to communicate, the commission has failed to come to grips with many of the tough major policy issues. Instead of establishing a truly comprehensive and uniform policy on a number of important issues, the commission ends up addressing these serious concerns only in the context of individual adjudicatory proceedings.
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> The current approach and procedure has resulted in a lack of any real responsibility in any single member of the commission to carry out a decision [a]nd there is a corresponding lack of any real accountability by a single individual for the decisions that are made -- or not made. This diffusion of responsibility and accountability, combined with virtually no possibility of "collegial" decision-making, has resulted in the appearance and reality of confusing, indecisive, inefficient, and ineffective

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[17] In the news release announcing the introduction of the bill, Senator Simpson stated:

> I have observed with great interest and increasing concern over the past years that we have actually lost significant ground in the struggle to restore credibility and stability to both the Nuclear Regulatory Commission (NRC) and the nuclear power industry. The public confidence is clearly eroded or entirely absent as it relates to the industry and the commission and we will not succeed in realizing the potential that commercial nuclear power holds for our nation until we make some very fundamental changes in our approach to the regulation of commercial nuclear power."

regulation of this country's commercial nuclear power industry.[18]

Senator Simpson's idea is not new. One of the recommendations of the President's Commission on the Three Mile Island accident was to replace the Commission with a single administrator. NRC Chairman Nunzio Pallidino began publicizing a similar personal opinion about the need for the NRC to be a single-head agency, instead of a multi-member Commission.[19]

There is little doubt about the current lack of credibility of the NRC. However, attempting to improve the credibility of the agency by moving decision-making behind closed doors is a mistake. Congress intended government agencies to be accountable to the public for their actions. If there is already no public confidence or credibility in the agency through an open process, the suspicion and distrust that will accompany closing the doors will erode any hope of salvaging the agency. The NRC's activities have led to a lack of confidence of the public, turning off the light will confirm the public's worst fears.

Contrary to the views of the Commission and Senator Simpson, the experience of the NRC demonstrates that the Sunshine Act works very well, albeit the results have been negative for the agency's integrity. Nonetheless, the public interest has been served by revelations of the NRC's uncertainties, confusion, and the lack of understanding of nuclear power technology. The revelations resulting from compliance with the Sunshine Act

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[18] Id.

[19] Opening statement of Nunzio Pallidino at May 21, 1985 Congressional hearing.

procedures have oftten caused significant embarrassment to individual Commissioners. Nonetheless, the public's knowledge about the decision-making process has been immeasurably heightened. The mysteries of nuclear technology and the failures of regulating the nuclear industry are no longer shrouded in secrecy. The results have been a better educated public, a more informed citizenry, and a far better equipped adversary.

II. The Legislative History of the Government in the Sunshine Act.

In the mid-1960s and 1970s Congress and the States enacted a series of laws and regulatory reform measures which opened up the business of government to the people. One of those laws was "the Sunshine Act."

The legislative history of the Act contains a recitation of the legislative process of opening government decision-making up to the public. The history identifies the progress of the Freedom of Information Act, codified in 1966 and strengthened in 1974; the Federal Advisory Committee Act of 1972; and the opening of the House of Representative and Senate committee meetings.[20]

In August 1972 legislation was introduced which would open the meetings of agencies in the executive branch. (H.R. 16450, 92d Cong., 2d Sess.). It was introduced again the following session, and ultimately submitted with eighty-five co-sponsors in the 94th Congress.

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[20] H.R. Rep. No. 94-880 (Part I), U.S. Code Cong. & Ad. News 2186.

A similar piece of legislation was introduced in the Senate and was passed on November 6, 1975 with a vote of 94-0. Prior to passage, the bill was in committee in the House for three years, during which time numerous hearings were held, state sunshine laws were reviewed, federal agencies were contacted for comment, the United States Administrative Conference provided comments and analyses, the American Bar Association's House of Delegates endorsed the legislation, and other interested groups provided comments.[21]

After several floor debates in the House, and one in the Senate, the bill was passed and sent for markup. The substitute bill was then passed and enacted.

A. The Purpose of the Sunshine Act

The purpose of the Sunshine Act was in the best tradition of American democracy, that is, the notion that the business of the public should be done in public. A reading of the congressional record of the floor debate on the Sunshine Act makes it unmistakably clear that the purpose of the legislation is to give the public an inside view of how the Government conducts the public's business.

The legislative history of the House bill (H.R. 11656) describes the premise of the Sunshine legislation with this phrase:

> Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf. (U.S. Code Cong. & Admin. News, p. 2184)

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21 Congressional Record, November 6, 1975, p. 35321.

The history also includes the illuminating statement taken from the testimony of F.C.C. Commissioner Glen O. Robinson, who testified before the Government Information and Individual Rights Subcommittee on the legislation:

> Chief among the benefits [of the legislation] is increasing public understanding of administrative decision-making processes. *** I do not know whether that understanding will lead to greater confidence in administrative decisionmaking. *** Quite possibly, it could lead to less confidence. But either of these outcomes *** can be beneficial: if, in the light of sunshine a Government agency shows itself to be deserving of trust, then by all means it should have it; conversely, if that same sunlight reveals an agency to be inept, inefficient, and not in pursuit of the public interest, then obviously that agency does not deserve, and should not have, public trust. (Hearings on H.R. 10315 and H.R. 9869, p. 98.)22

Numerous statements were read into the record by supporters of the Sunshine Act. Over and over again members of Congress echoed the sentiment of Senator Lawton Chiles, original sponsor of the bill, expressed in his opening statement:

> I think we all know of the increasing feeling in the United States among all citizens, from the affluent businessman to the welfare recipient that Government has become too big, too bureaucratic, too unresponsive and too unwieldy for the public to understand.
>
> 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.23

Senator Abraham Ribicoff summarized the purpose of the Act by delineating the following anticipated results:

1. The Act will reassure the public about the honesty and integrity of most Government officials.

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22 H.R. Rep. No. 94-880 (Part I), U.S. Code Cong. & Ad. News 2184.

23 Congressional Record, November 6, 1975, p. 35321 (Statement of Lawton Chiles).

2. The Act will remove distrust of agency action because it was taken behind closed doors.

3. The Act will promote the quality of Commission work by encouraging Commission members to be prepared and to attend meetings regularly.

4. The Act will improve the quality of decision-making by improving public debate through knowledge, improving cooperation and confidence.

5. The Act will give every member of the public equal access to information.[24]

Senator Roth, another co-sponsor, summarized the purpose of the Senate Bill as (1) increasing the contact between citizen and the bureaucracy, (2) increasing the credibility and accountability of agency employees, and (3) giving the public the fullest possible access to meetings.[25]

B. The Sunshine Act's Applicability

The Act applies only to specific Federal agencies which are headed by a collegial body composed of two or more members. The definition of agency does not include agencies with a single head, usually an Administrator or a Secretary. It does cover a subdivision of an agency which is authorized to act on behalf of the agency, also panels and/or regional boards, even if their actions are not final, but only if their actions are on behalf of the agency.[26]

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[24] Summarized from remarks of Senator Ribicoff, Congressional Record, November 6, 1975, p. 33322.

[25] Congressional Record, November 6, 1975, p. 35323 (Statement of Senator Roth).

[26] H.R. Rep. No. 94-880 (Part I), U.S. Code Cong. & Ad. News 2189.

A list of agencies to which the Act applied on the date of enactment is contained on p. 2223 of the U.S. Code Cong. & Ad. News.

The list includes the Nuclear Regulatory Commission.[27]

C. The Legislative Intent of the Sunshine Act

The House Conference Report (No. 94-1441) declares that:

> [I]t is the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government, and that it is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.[28]

There was extensive discussion on the floor of the House and Senate about striking a balance between the right of the public to know what its Government is doing and to protect the rights of individual citizens and to assure that the Government's ability to function is not impaired.

Congressman Jack Brooks, the Chairman of the Committee on Government Operations, and the Manager of the bill on the part of the House summarized the intent of the bill and the objectives undertaken by Congress in passing it:

> When Government actions are taken in secret behind closed door, we not only undermine public confidence in Government, but we can wind up pretty far off target and without the public support our Government needs if it is going to stay in business.
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> [H.R. 11656] should help avoid those possibilities. By

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[27] H.R. Rep. No. 94-880 (Part II), U.S. Code Cong. & Ad. News 2223.

[28] H.Conf. Rep. No. 94-1441, U.S. Code Cong. & Ad. News 2245.

opening up the meetings of some 50 Federal agencies, it will assure there is public understanding of the actions of those agencies.

If the public understands and sees what goes on, it is more likely to accept and have confidence in our actions. Opening up those meetings will also assure that the officials of those agencies are accountable for their actions. That is what government of the people, by the people, and for the people is all about.

Certainly there are occasions when meetings should not be open. H.R. 11656 recognizes this and provides for closing them in those situations. It affords protection for trade secrets and information that could be damaging to financial institutions or to stock exchanges. It prevents invasions of personal privacy and guards against disclosure of crime investigation records. National security is also protected. Those safeguards that are needed are provided.

But what H.R. 11656 really safeguards is the public interest. It reinforces the basic constitutional premise that this is a government of the people, and that those who serve it should be fully accountable for their actions.

Former President Harry Truman is justly noted for saying, "If you can't stand the heat, get out of the kitchen." I would add that if you cannot stand the light, get out of the Government.29

D. Congress Recognized the Need for Agencies to Have Closed Meetings

The Act recognizes the need for agencies to have closed meetings. In order to accommodate those needs Congress adopted ten specific exemptions to the open meeting requirements. Those exemptions are:

Subsection (c) of 5 U.S.C. 552b, as included in the House amendment, provided that except in a case where the agency finds that the public interest requires otherwise, the open meeting requirement of subsection (b) shall not apply to any portion of an agency meeting, and the informational and disclosure requirements of subsections (d) and (e) shall not apply to any information pertaining to

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29 House Record, July 28, 1976, p. 2419 (Statement of Jack Brooks).

such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to --

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of the agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of title 5, United States Code), provided that such statute (a) require that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establish particular criteria for withholding or refer to particular types of information to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency

responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would --

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that exemption (9)(B) would not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency, unless the agency is required by law to make such disclosure prior to taking final agency action on such proposal or after the agency publishes or serves a substantive rule pursuant to section 553(d) of title 5, United States Code; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing.[30]

These exemptions were included after lengthy consideration by the Congress. That consideration excluded requests, pleas, and doomsday warnings of many of the Federal agencies for exceptions, special provisions, special agency protections, and recognition of informal gatherings.[31]

E. The Definition of a "Meeting"

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[30] From text of the Sunshine Act.

[31] See Legislative History of the Sunshine Act.

Finally, even after the exemptions were adopted, Congress spent significant time and effort debating the definition of a "meeting" and the need for transcripts of all meetings.[32] The debate over what constituted a meeting produced a clear set of options from which the Congress fashioned its definition.

Initially the language of the bill described a meeting as "deliberations" which concern the joint conduct or discussion of agency business. It included conference calls and a series of two-party calls. H.R. Report 94-880 - Part I states that within the definition of "meeting" the terminology "conduct of agency business" was intended "to include not just formal decision-making or voting, but all discussion relating to the business of the agency."[33] (Emphasis in original.)

A concern was raised that the definition was so imprecise as to make it "difficult to identify a meeting in advance of that meeting, or to determine whether the 'meeting' was covered [by the Act]."[34] Comments by eight Congressmen voiced a concern that the meeting definition implied that the initial House bill's definition "would apply even to casual or social encounters which were not gatherings for the purpose of acting in behalf of the agency."[35] The subcommittee proposed clarifying language, and

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32 H.R. Rep. No. 94-880, Part 2 at 14.

33 H.R. Rep. No. 94-880, Part 1 at 8.

34 Id.

35 Additional views of Hon. Frank Horton, et al., included in H.R. Rep. No. 94-880, Part 1 at 33; and Additional views of Hon. Carlos J. Moorhead, et al., H.R. Rep. No. 94-880, Part II at 37-39.

added the notice requirement. The language was further modified by the Full Committee and changed to the definition of a meeting as "an assembly or simultaneous communication concerning the joint conduct or disposition of agency business..."[36]

The Senate initially used the term "gathering,"[37] and both the House and the Senate used the term "agency discussions" for awhile. Ultimately, the definition now in use was adopted by the conference committee.[38]

Representative Fascell's explanation of the intention of the conference committee language change is illuminating. He said:

> On the issue of the definition of a "meeting", the conference report accepts the Senate wording except that deliberations would have to "determine or result in" the joint conduct or disposition of agency business, rather than merely "concern" such activities. This language is intended to permit casual discussions between agency members that might invoke the bill's requirements under the less formal "concern" standard. (Emphasis added)[39]

The casual discussions permitted through compromise by the

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[36] H.R. Rep. No. 94-880, Part II at 3-4. Specifically the new section 552b prohibited the evasion of the Act's provisions by barring the conduct or disposition of agency business other than through the subsections of the Act.

> This provision will bar any effort of the number of members necessary for agency action to deliberate, discuss, conduct, or dispose of agency business other than in an open meeting as provided in new section 552b or in a closed portion authorized by the exceptions in that section.

[37] Senate 5, 94th Cong., 1st Sess, §201(a) (1976).

[38] The definition of "meeting" is:

> 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.

[39] Comments of the Representative Fascell, 121 Cong. Rec. 28474 (1976).

Conference Committee report did not assuage the fears of the bill's opponents. Their concerns about the failure to provide for closed deliberations are evidence that, at least in their view, the permissible casual discussions were not substantive conversations.[40]

Congress grappled with the exact question the NRC's interim rule now raises, and they chose the prudent approach of a presumption for openness. Proponents of the bill always believed that the definition of "meetings" should be very broad. Representative Bella Abzug, the Chairman of the House Committee which considered the bill, explained the House's position in her summary of the major provisions of the bill:

> Meetings covered under the bill include not only sessions at which formal agency action is taken, but also those at which a quorum of members assembles to discuss the conduct or disposition of agency business. A chance encounter would not be a meeting within the meaning of the bill so long as no agency business is conducted or disposed of. (Emphasis added) 122 Cong. Rec. 24,181 (1976).

It is significant to note that the Senate Report cited by the Supreme Court in its FCC decision precedes both Representative Abzug's comments and the compromise reached between the differing views in Congress. (Compare S.Rep. No. 94-354 (1975) to H.Conf.Rep. No. 94-1441 (1976) and S.Conf.Rep. 94-1178 (1976).)

The NRC's reliance on the Supreme Court's reference, discussed above, as a basis to legitimize engaging in informal discussions, briefings, sessions, etc. would be improper. At

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[40] See comments of Representatives Moorehead and Kindness, Id.

most the FCC decision articulates that casual discussions about general matters among agency members are permissible. (See, 122 Cong. Rec. 28474 (1976)). The comments of Mr. Fascell, cited by the Court, carry little weight. They were, in fact, only commentary in the context of the delivery of the Conference Report to the House. Even Representative Horton, the ranking republican member of the Committee on Government Operations and the most vocal critic of the definition of "meeting", delivered the compromised language to the full House. (122 Cong. Rec. 28472 (1976)). The Supreme Court's citation to Mr. Fascell's remarks appears to only support the Court's observation that some meetings may be closed.

Ultimately, the Conference Committee's bill was passed 384-0, with 47 members not voting on August 31, 1976 after the closing comments of Representative Gilman.

> This act is an important legislative reform which merits our support and merits implementation in the executive agencies as soon as possible. The opening of executive meetings to the public is a gesture which will encourage trust in these agencies and in the Government itself, a trust which has been diminished by an ever-growing and all pervasive bureaucracy.
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> It is imperative that Government be "conducted in the sunshine" because, in the words of the Government Operations Committee from which this bill originated, "the public is entitled to complete information concerning its decision-making processes, as long as individual rights are protected and the Government's ability to carry its responsibilities is not impaired." Indeed, such "sunshine" will enhance the Government's ability to carry out its responsibilities, since the Government's primary responsibility is to the public, of whom it is truly representative and in whom its power truly lies.41

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41 Id.

III. The Commission's Interpretation of a Gathering Is not Consistent With the TYpe of Gathering Permitted by the FCC Decision; Therefore The Proposed Implementation of the Interim Rule Will Violate the Sunshine Act.

As demonstrated by the legislative history of the Act, supra, the intent of Congress was to insure that the public's business is conducted in public. The NRC has opposed the opening of any type of predecisional meetings from the first hint of this law.[42] Through the intended implementation of this rule the NRC continues its tradition of resistance to Congressional directives. The analysis of the FCC v. ITT decision demonstrates that the Supreme Court does not authorize the new private meetings proposed by the Commission. Further, the litigation history of the Sunshine Act gives ample instruction to agencies, including the NRC, not to abuse the Act by being overly broad in classifying meetings as "closed" to the public.

The question facing the Commission now is how to validly implement the new rule in a manner consistent with legislative and judicial instructions.

According to the Act, meetings must be held in public except in 10 narrowly tailored situations detailed in the exemptions to the Act.

The term "meeting" itself has a notable history in connection with this rule. Ultimately Section 552b(a)(2) of the Act defined "meetings" as:

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42 Testimony of William Anders, Chairman of the NRC before the House Subcommittee on Government Operations hearings on H.R. 10315 and H.R. 9869, 94th Cong., 1st Sess. 443, 445 (1975).

> "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.

The NRC's previous implementing regulation, 10 C.F.R. § 901(c), defined a meeting as follows:

> "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 §§ 9.1005, 9.106, or 9.108(c) (footnote omitted), 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 pending before the Commission."

Under the interim rule the NRC's regulations are now amended so that the definition of a meeting is:

> "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, 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.

30 Fed. Reg. 20891.

There is no dispute that in order to have a "meeting" there must be at least a quorum, or three of the five Commissioners, present. The corollary of that is that there is no "meeting," regardless of the substance of the discussion, if only two Commissioners are together.

It is the substance and process of work-related conversations and discussions among three Commissioners that is now subject to scrutiny. Simply put, the four Commissioners who

supported the interim rule believe that the new definition of meeting gives them a greater freedom to get together and discuss business without being subjected to the various procedural trappings of the Sunshine Act (i.e., notice, transcript, etc.). Opponents to the interim rule, including one Commissioner, believe that the Sunshine Act does apply to all types of meetings, gatherings, etc. held by the Commission because any gathering of two or more Commissioners discussing any aspect of their responsibilities will actually be a meeting.

It would be much easier to analyze the propriety of the proposed gatherings if the interim rule had detailed specific examples of the subject and content of the proposed new gatherings; unfortunately, the interim rule provides little detail about what now constitutes a meeting for the purpose of the Sunshine Act. Some light was shed on the subject during a May 21, 1985 hearing before the Subcommittee of Energy, Commerce and Power of the Committee on Energy and Commerce (transcripts not yet published).[43]

During the hearing Chairman Nunzio Pallidino explained potential agendas for "gatherings." According to the Chairman's interpretation of the new rule the change would allow the Commission to hold "informal preliminary briefings", "free-flowing discussions of a variety of problems", "get togethers to foster brainstorming sessions", and "discussions on such things as where is this agency going." (Unofficial transcript)

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[43] Transcripts of the hearing will be published after the record is closed. The unofficial transcript can be reviewed by permission of the staff of the Subcommittee.

The supplementary information to the rule change also gives some suggestions of meetings whose topics would apparently not now "trigger the 'meeting' requirement of the Sunshine Act;"[44]

> "... 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 years; 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 committee, or with other government agencies." Id.

None of the Commissioners offered a concrete set of circumstances which would lead to a gathering. However, the Commissioners' inability to present a specific example of a gathering which would not be covered by the Sunshine Act is instructive. After a review of the Commission's practices, meeting notices, and agency interaction, it is virtually impossible to conjure up a scenario of three or more Commissioners getting together to discuss issues which do not "determine or result in the joint conduct of official agency business." Certainly all of the examples given would be challengeable in court if the Commission engaged in them without complying with the requirements of the Act.

It is possible however to scrutinize the categories of meetings which the Commission has provided as examples and test the logic of the analysis used to reach the exclusion. If the analysis fails at this stage, it should raise serious questions about the interpretation the Commission has credited to the recent Supreme Court decision.

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[44] 50 Fed.Reg. 20689 (1985).

As discussed previously the Commission is a five-member body responsible for insuring the safe use of nuclear power through regulation. The Commissioners' duties include administration of the agency (i.e. budget, personnel, congressional affairs, etc.) and regulation of the numerous uses of nuclear power, from hospital radiation centers to nuclear power plants. The Commission supervises a fairly small agency, by government standards, through the Executive Director of Operations (EDO) and with the assistance of the Commissions' personal staff, the Office of General Counsel, and a number of other offices which answer directly to the Commission.[45]

The types of gatherings or meetings proposed by the Commissioners fall into four general categories. Each category, reviewed below, is now permitted under the Act and can be held, but is subject to the notice and transcript requirements.

1) Preliminary briefings

A preliminary briefing of the Commission by members of the staff could be on either internal or external matters. In the past the Commission has received preliminary briefings by the staff on the status of the details of a technical problem, the status of an ongoing investigation, the status of an ongoing internal investigation into employee misconduct, and preliminary information about accidents.[46]

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45 10 C.F.R. § 1.100.

46 See, generally, Volumes 1, 2 and 3 of the Sunshine Act, Federal Register Notices and Commission Meetings, covering January 1977 through December 31, 1984, in the Public Document

The most notable preliminary briefings in recent years were those the Commission received during the Three Mile Island (TMI) incident.[47] Those briefings were closed under exemptions of the Sunshine Act, however they were transcribed and subsequently released. The transcripts of those preliminary briefings revealed the depth of ignorance and confusion that surrounded the event.

During the recent subcommittee hearing the benefit of having the TMI preliminary briefings transcribed was questioned by the four Commissioners. Apparently, under the current interpretation of the Act the briefing would now be exempt from Sunshine Act requirements.[48]

Since these preliminary briefings were informational, and not decision oriented, they would not now be classified as subject to the requirements of the Sunshine Act because they would not initially have been "sufficiently focused on discrete proposals or issues to cause or likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." Yet, TMI preliminary briefings were ultimately released after a review for

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Room of the Nuclear Regulatory Commission at 1717 H Street, N.W., Washington, D.C. 20555.

47 For a complete summary of information available to the NRC during the TMI incident see U.S. Nuclear Regulatory Commission Investigation Into Information Flow During The Accident At Three Mile Island, NUREG 0760, 1981, pp. 35-42.

48 Hearings on Interim Rule Before the Subcommittee on Energy, Conservation and Power, 99th Cong., 1st Sess. (May 21, 1985) (Comments of Chairman Palladino).

closure indicated they should be disclosed, and the information contained therein has subsequently been used by the Commissioners, Congress, and the public to form opinions and ultimately make decisions on the need for a much more strenuous inspection and enforcement program at nuclear plants under construction.[49]

Other preliminary briefings have recently been held on such topics as the earliest known information on generic technical problems, such as the Transamerican Delavel International (TDI) generators, equipment qualification failures, and the phenomena of a loss of coolant accident (LOCA).[50]

Similarly, the preliminary briefings described above may initially be considered general and unfocused, but they may also ultimately contribute to an understanding of the progressing levels of information regarding that occurrence and contribute to a decision unanticipated at the time of the preliminary briefing.

Such preliminary briefings are already permitted under the Act, and can be legitimately closed under several exemptions. The significant difference for preliminary briefings between the interpretation of the Act under the old rule and the interim rule is that there would be no notice of these briefings so that affected parties could not challenge the closure before hand, and no record of the meeting so there would be no way that affected parties could have access to the transcript if the court decided that the meeting, or portions of it, should have been open. In fact, under the interim rule, affected parties will not even

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[49] See recommendations of NUREG 0760, pp. 10-12.

[50] Sunshine Act Notices, at Vol. 3.

know when preliminary briefings take place.

2) Brainstorming Sessions

"Brainstorming" is a technique through which a group of individuals toss around thoughts and ideas in an attempt to find creative solutions to a problem.

Webster's New World Dictionary, Second Edition, defines brainstorming as:

> "the unrestrained offering of ideas or suggestions by all members of a conference to seek solutions to problems." (p. 171)

A search of the meeting notices of the Commission since the Act was enforced in the Agency reveals no meetings called for the purpose of "brainstorming". If the Commission had desired to do so it would certainly have been able to do so, and probably could have had such a session behind closed doors by claiming an applicable exemption. However, the session would have been, and still would be, required to be noticed, transcribed and probably released to the public.

The FCC v. ITT Supreme Court decision does not change the Sunshine Act requirements or applicability to meetings, the purpose of which is a "brainstorm session". Congress has mandated that the public is entitled to know such things as the types of solutions to problems, including those rejected and the basis for the rejection.

According to Commissioner Zech, brainstorming sessions in the past have been prevented by a fear of public scrutiny of

these types of discussions which caused a "chilling effect."[51] Such an argument has already been specifically rejected by Congress and the courts. Id.

Brainstorming sessions are by their very nature focussed on a particular problem or problems. The purpose of brainstorming is to come up with numerous solutions to the problem. The steps of problem solving between "brainstorming" and choosing a final solution are testing the solutions and eliminating those solutions which do not adequately address the problem. That is specifically the conduct of the public's business that Congress wanted open.

The Commission also does not provide an explanation as to when a brainstorming session would terminate, and a meeting would begin. Allegedly they would be different sessions. However, the reality of brainstorming sessions make such a separation difficult to conceive, and impossible to enforce. In short, it is unlikely a workable criteria for separation could reasonably be developed.

The ability to hold "brainstorming sessions" such as those suggested by the Commission is available now; but such a session would certainly fall within the definition of "meeting" in the Act, and still therefore be subject to the requirements of the same.

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51 May 21, 1985 Subcommittee hearing transcript (not yet published).

3) Discussions (i.e., on where the agency is going, problems likely to face the agency in the coming year, the effectiveness of a particular office in meeting the Commission's needs, or the state of relations between the Commission and its oversight committee or with other government agencies).

The Commission has engaged in discussions such as those identified continuously since the Act was enforced at the NRC. As a matter of regular practice the Commission has closed these meetings to the public under exemption. On several occasions recently the transcripts of these closed meetings have been "leaked" to the media, the citizen intervenors, and members of Congress. The results of the releases have often been embarrassing to the Commission, but they have provided the type of "check and balance" on the Commission that Congress intended.[52]

For example, the Commission has recently been involved in the consideration of the effectiveness of the Office of Investigations (OI).[53] The meetings on this have been closed to the public under exemption 6.[54] No one has challenged the

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52 121 Cong. Rec. 35321 (1975) (Statement of Senator Lawton Chiles).

53 See meeting notices for December 1984 and March 1985 in Volumes 3 and 4 of the Sunshine Act Notices.

54 Id.

Commission's claim in court, although the materials have been sought and denied under the Freedom of Information Act (FOIA), 5 U.S.C. 552.[55]

Nonetheless the public, Congress, and other government agencies have provided information for the Commission's consideration regarding the effectiveness of OI.[56] Presumably the opinions of Congress, the Department of Justice, the nuclear industry and the general public is helpful in consideration of the effectiveness of the office. If the meetings had never been noticed the various interested members of the public would never have known about the Commission's discussions and no comments would have been generated.

Likewise, the Commission's discussions about its relationship to the Department of Energy, the various congressional oversight committees and individual Congressmen and Senators have been recent topics of closed Commission discussions which ultimately entered the public domain. The transcripts reveal discussions which have ranged from benign to near slanderous.

Although some portions of the transcripts may have embarrassed individual Commissioners because it exposed their lack of

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55 Letter from J. Felton, Director of Rules and Regulations to Billie Garde (April __, 1985) (denying the Commission documents, including the transcripts of the closed commission meeting).

56 Letter from Stephen S. Trott, Assistant Attorney General, Criminal Division, U.S. Department of Justice to Nunzio Pallidino (March 18, 1985) (regarding the organizational change of the Office of Investigation).

tact or ignorance on a particular subject, the transcripts do capture the essence of government decisionmaking. That is the purpose of the Act.

Thus when the Commission as a body has a meeting, or three Commissioners as a quorum decide to have a gathering to discuss, for example, "where the agency is going", the public has a right to know about that meeting. And, if the public doesn't think the agency is doing what it should be doing, or is not going the direction Congress intended it to go, the people have a right -- created through the Sunshine Act -- to get to the bottom of the problem. One of the ways Congress has provided for this public accountability is by insuring that transcripts are kept of all meetings. Discussions by three or more members of the Commission on where the agency is going, the successes or failures of a particular office, are definitely meetings under the Act, and subject to all of the requirements of the same.

4) General Background Briefing by the NRC Staff on a Technical Issue Common to a Number of Plants

Since the Commission was required to start keeping records of all meetings the great majority of them are described as general background briefings by the Staff.[57] The purpose of these briefings have been to insure that the Commissioners are informed on technical issues common to a number of plants. These briefings are extremely important in the nuclear industry where groups of plants across the country share similar designs, components, specifications, procedures, etc. In general, the purpose

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[57] Sunshine Act Notices, id.

of the briefings is to provide the Commissioners with background information about generic problems or issues of the industry in order that they are informed and able to responsibly carry out their job.

Through the requirement of public notice the briefings also identify to the public common technical issues which may affect the interests of a particular citizen or a group of citizens, or a nuclear industry manufacturer, supplier, contractor, or operator.

The notice requirement for these and other meetings insures that affected persons will have knowledge that their interests are being discussed. Such briefings would provide information upon which the Commission would have to make on-the-spot decisions and provide direction to the staff. Even if the briefing sought no guidance the Commissioners themselves would have to make the judgment call on whether or not the staff was adequately addressing the problem. In other words, a lack of action or decision on a technical issue is itself a decision by the Commission that the staff's handling is acceptable. If the Commission participates in the briefing through offering suggestions, asking questions, probing the staff's analysis of an issue, then they have entered into a meeting as defined by the Act and subjected to the requirements of the Act which insure that the affected and interested public are aware of the issue, and that the Commission is accountable to the public.

IV. The Courts Have Consistently Insisted That The Sunshine Act Be Viewed With The Presumption Of Openness: The FCC v. ITT Decision Does Not Alter That Interpretation

A. Appellate Courts Have Insisted That Agencies Justify Closed Meetings Under One of the Exemptions to the Act

Since the passage of the Sunshine Act there have been relatively few federal court challenges brought under the Act, and only one U.S. Supreme Court case has been heard. Of these an even smaller number address the issue of what is a meeting. The majority of cases considered a challenge to a specific meeting which was closed under a specific exemption. Interestingly, although not specifically on point, a significant number of the courts challenges under the Act have been against the NRC.

The most recent case considered by the courts was Philadelphia Newspapers v. NRC, 727 F.2d 1195 (D.C. Cir. 1984). The case considered the propriety of the Commission's decision to exclude the public from a meeting involving discussion of whether to restart the undamaged reactor at Three Mile Island. The Commission had closed the entire meeting under exemption 6 of the Sunshine Act. The court ordered the transcript of all but one item released. In its opinion the court recognized the significant public concern and controversy over Three Mile Island, and that factor weighed in favor of disclosure. The Commissioners' initial decision to close the TMI I meeting ignored Congressional instruction. As the court observed:

> The Commission's decision to close [the meeting] can be squared with neither the specific commands of the Sunshine Act nor the principle of broad public accountability that undergirds the Act. Id. at 1197.

The Philadelphia Newspapers case followed the admonitions of the D.C. Court of Appeals in two previous cases that it expected "all multi-member agencies to take seriously the Act's command that every portion of every meeting ... be open to public observation." Id. at 1199-1200.

The opinion confirms that the courts will view with disfavor any back door attempt by the Commission to close meetings, regardless of what they are called to the public.

It is notable that in each challenge under the Act judicial review has encompassed inspecting the subject matter of the meeting in question. The courts obviously intend to insure that the Sunshine Act's instruction for review of specific items of business be followed. (See Common Cause v. NRC, at 932.)

In Pan American World Airways, Inc. v. CAB, 684 F.2d 31, D.C. Ct.App. 1982, the court addressed the issue of informal discussions in dicta. The court observed that the respondent's brief argued "there is considerable give and take in the deliberative process that is not reflected in the meeting transcript." (Respondent's Brief at 15, n.13.) The court observed that this comment suggested the Board may have engaged in further violations of the Sunshine Act. Id. at 36. Since the court did not probe further into what the respondents referred to by their comment no conclusions can be drawn. The clear inference however is that "give and take" discussions should be conducted under the Sunshine Act.

The California Supreme Court, in considering a challenge to informal discussions, addressed the question in Sacramento Newspapers Guild v. Sacramento County Board of Supervisors,

69 Cal.Rptr. 480 (1968):

> An informal conference or caucus permits crystalization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a non-public pre-meeting conference except to conduct some part of the decisional process behind closed doors. (p. 487)

In meeting the Commission's responsibilities under the law "gatherings" must be strenuously scrutinized to determine whether they are in fact a meeting.

B. The NRC's Historical Resistance to the Sunshine Act and the Freedom of Information Act Cast the New Rule in a Negative Light.

Unfortunately for the NRC its accountability record has been dismal. The accident at Three Mile Island, the extensive cost overruns, the numerous delay in construction and revelations of quality assurance breakdowns have contributed to a loss of public confidence in the ability of the agency, the Commission, and the Staff to do its job.

The NRC's attempt to "close ranks" by eliminating the public's oversight of a significant portion of its work will not serve the public, only the Commission.

As The Birmingham News commented in the June 1 editorial:

> There are so many groundless fears about the nuclear power industry, one would think that holding all of its meetings in public would be in the NRC's best interests. Meeting behind closed doors has never been a very good way to establish an agency's credibility.
>
> The danger is that if the NCR gets away with this legerdemain other federal agencies may also see the commissioners' approach as a good way to keep the public out of the public's business. When that happens, the public will know only what the federal bureaucrats want it to know.
>
> That can't happen. If the courts don't set the NRC straight, Congress ought to.

The general feeling that the NRC has already abandoned its responsibilities to the public has substantially contributed to the belief that the Commissioners will abuse the new rule by engaging in "secret gatherings" for the purpose of planning how to facilitate the salvage effort of nuclear power, instead of enforcing the regulations of nuclear power.

Public distrust of the Commission's true intent behind this rule is well-grounded. In 1975 the NRC strenuously opposed the Sunshine Act.[58] Once implemented, the NRC's compliance has been

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58 The NRC was one of the agencies Senator Weicker referred to in his remarks, 121 Cong. Rec. 35331 (1975).

> We have heard all the arguments against the bill from the commissions and agencies whose operations this bill would bring to light. The points they raise run the gamut from; the bill would unnecessarily inhibit the efficient conduct of agency business to beliefs that this bill would not allow a free and open exchange of ideas and candid opinions. What they seem to forget is the overriding responsibility to allow the public, in order for them to participate in the decisionmaking process, to have an unfettered access to information on how their Government operates.
>
> Many of these agency heads do not give the public enough credit to be able to view their proceedings and make competent judgments as to how they perform their duties.

Also, as noted in Common Cause v. NRC, 674 F.2d 921, 929, n.23 (D.C. Cir. 1982):

> The Nuclear Regulatory Commission was one of the federal agencies which criticized the legislation during the committee stage because the bill did not provide any exemption for pre-decisional deliberations. William Anders, then chairman of the Commission, wrote to Representative Bella Abzug, chairman of the House subcommittee responsible for the Sunshine Act, urging that an exemption similar to FOIA's Exemption 5 should be included in order to protect preparation of budget requests and other matters. Government in the Sunshine Act: Hearings on H.R. 10315 and H.R. 9868 Before Subcommittee of the House Committee on Government Operations, 94th Cong., 1st Sess. 443, 445 (1975) (hereinafter cited as Government in the Sunshine Act: Hearings).

challenged on several occasions.

In 1982 Common Cause, a national public interest government watchdog, challenged the NRC's closing of budget deliberations meetings. The D.C. Circuit overruled the NRC and admonished the Commission to narrowly construe any exemptions from disclosure. Common Cause v. Nuclear Regulatory Commission, 674 F.2d 921 (D.C. Cir. 1982).

In 1983, under a FOIA challenge in Applegate v. NRC, No. 82-1829 (D. D.C. May 24, 1983), the district court found that:

> It is disturbing to this Court that unbeknownst to agency management, an office in the NRC was able to design a filing and oral search system which could frustrate the clear and express purposes of FOIA. The assertion of an exemption is one thing, avoidance borders on dishonesty. (Emphasis added)

In 1984 the U.S. Court of Appeals required the NRC to open all but one portion of a meeting regarding the Three Mile Island restart. Philadelphia Newspapers, Inc. v. NRC, 727 F.2d 1195, 1203 (D.C. Cir. 1984).

The Court's admonition to the NRC was crystal clear:

> 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.)

In the past year two more "secret meeting" controversies have again shaken the public's confidence in the NRC. In the Fall of 1984 the Commission conducted a closed meeting regarding the Shoreham nuclear power plant. The transcript, which was

subsequently obtained, revealed embarrassing discussions about the Commission's lack of respect of Congressional oversight. Soon thereafter the Commission conducted a closed meeting to discuss reopening the record of the Diablo Canyon case. That transcript was ultimately obtained by the intervenors and submitted as "new information" to the D.C. Court of Appeals in consideration of a pending appeal. That transcript revealed that the Commission purposely disregarded the advice of the General Counsel regarding the legality of denying the motion to reopen the record about construction problems at Diablo Canyon.

These examples are indicative of the reasons behind public dismay at the interim rule. Congressman Markey described it at the May 21, 1985 hearing, "... not as a question of trust but one of accountability." We believe it is both.

Commissioner Zech was correct when he observed that the real issue behind the interim rule's controversy is whether or not there is "trust and confidence" in the Commission's decisions. (May 21, 1985 hearing unofficial transcript)

To be sure there is very little public trust or confidence that the Commission will do what is best for public health and safety instead of what is best for the survival of nuclear power. The Sunshine Act was born when a similar lack of trust and confidence existed by the public of the entire bureaucracy. The interim rule takes a step backwards. It insults Congress and the courts by trying to follow the letter of a Supreme Court decision in an attempt to accomplish what would be illegitimate if the spirit of the law was followed. The interim rule insults the

public by expecting them to trust a Commission that has abused, ignored, and violated their right to information. Finally, the interim rule confirms what the public, the press, and the courts have come to believe about the management of the NRC: the Commissioners either don't know what is going on about a particular issue or problem -- and want to appear informed and in control, or they do know what's going on, but don't want the public to know.

C. The FCC Decision Cannot Be Interpreted to Permit Gatherings of the Commission, Not Subject to the Act's Requirements Which Consider Business of the Commission

The Commission expressly contended in its rationale for the rule change that the action was to bring the NRC regulations into compliance with the Supreme Court decision, FCC v. ITT World Communications.[59] That statement is misleading because it implies that the regulations are being narrowly tailored to fit the four corners of the FCC decision. In fact, the Commission's interim rule is an overly expansive interpretation of that decision. Scrutiny of the facts and circumstances behind the FCC decision do not provide the asserted legal basis for the NRC's sweeping interpretation and proposed implementation.

There are three significant distinctions between the FCC case and the scenario now permitted the Commission.

1) The FCC case did not deal with a "meeting" as defined by § 552b(a)(2).

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[59] FCC v. ITT World Communications, supra.

2) The FCC case did not deal with a meeting "of the agency" as provided by § 552b(b).

3) The decision did not deal with matters related to public health and safety concerns.

The FCC decision was reached after consideration of an appeal by the FCC of a D.C. Court of Appeals decision written by Judge Bazelon. That ruling determined the participation of three members of a subdivision of the FCC in a European conference convened by their European counterparts should have been conducted pursuant to the Sunshine Act.

The Supreme Court's rationale in overturning the Appellate Court is illuminating:

> [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 of 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 2-3. 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.

* * *

> 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 § 552(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).

1. The FCC Case Did Not Deal With a "Meeting" As Defined by the Act.

The FCC case concerned a meeting called by an international contingency of government communications experts, referred to as the Consultative Process session. The Supreme Court's opinion holds that the participation by FCC members in the Consultative Process session does not "constitute a meeting as defined by (the Act) ..." (Id. at 1940) and therefore the Sunshine Act does not require that the sessions be held in public. (Central to their reasoning was also that the meeting was not "of the agency", discussed below.)

The Court's application of the "meeting" definition is in three steps. First, the Court conceded that the necessary quorum of agency commissioners, albeit a subdivision, were in attendance to constitute a meeting. Second, the Court reasoned that the sessions were not deliberations that "determined or resulted in the joint conduct or disposition of official agency business."

Their conclusion was based on accepting respondent's argument that Congress did not intend the Sunshine Act to encompass an exchange of views with foreign counterparts "by which decisions already reached by the Commission could be implemented," and provided the Commissioners with general background information.

Third, the Court concluded that since the quorum did not consider or act upon issues under its formally delegated authority that the sessions were not "'meetings' within the meaning of the Act." Id. at 1942.

The NRC has now adopted the language of the interpretative guide of the Chairman of the Administrative Conference of the United States, cited in the Supreme Court decision, which interprets the definition of "meeting" in the Act.

The proposed implementation of the NRC's rule narrows the definition of "deliberations" applied to the FCC case to exclude general agency background discussions (i.e., preliminary briefings, free-flowing discussions, brainstorming sessions) from the Act.

In taking this step the NRC explains:

> 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.

Unfortunately, the Commission's proposed implementation does seek to evade and avoid the Sunshine Act requirements, and replaces Congressional wisdom with agency experience by giving the FCC decision a literal reading, that is, by divorcing the facts and circumstances of the FCC case from the language of the opinion while ignoring the extensive legislative history and judicial instruction available to the NRC.

2. The FCC Case Did Not Deal With a Meeting "Of the Agency" as Provided by § 552b(b)

The Supreme Court concluded that the sessions of the Consultative Process was not a meeting "of an agency" within the meaning of the Act. The opinion simply points out that (1) the international meeting was not convened by the FCC, and that (2) the procedures governing the meeting were not subject to the unilateral control of the FCC.

The NRC rule however specifically applies to the agency's conduct of its own meetings and agency procedures, therefore the Act applies -- not an attenuated extension of the FCC case into internal NRC agency meetings.

3. The Decision Did Not Deal With Matters Related To Public Health and Safety Concerns.

There is little similarity between the economic fortunes of ITT and the public health and safety. The FCC decision dealt with consideration of matters which had or could have an effect on the economics of a major corporation, ITT. The subject of the meeting was the implementation of certain goals which involved international cooperation. Although ITT's interests were undoubtedly affected by the results of the consultative process, the interests of individual citizens, whose health and safety are at risk, deserve greater weight.

As noted above, in the recent Philadelphia Newspapers case, "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: nuclear power."

There is nothing in the FCC decision to indicate that the Supreme Court intended to change its position that issues involving the public health and safety are of greater concern.

V. Did the Commission Violate the Administrative Procedures Act (APA) When it Promulgated the Interim Rule Without Prior Notice and Opportunity for Public Comment?

The significance of the failure to keep a transcript of the "gatherings" is that the public would have no effective remedy if it became apparent that an illegal meeting had occurred.

The NRC's former implementing regulations provided for notice, certification by the General Counsel that the topics to be discussed had been reviewed for authorized closure as pre-

meeting safeguards. These safeguards permitted members of the public to protest a closed meeting if they believed that the General Counsel had been overly broad in authorizing closure. That is exactly what happened in the Philadelphia Newspapers case. There were also two post-meeting safeguards -- the preparation of a verbatim transcript and review of the transcript with disclosure of all non-exempt portions of the meeting. 10 C.F.R. § 906(c). The new rule eliminates all four safeguards.

Now the Commission claims it will rely on the advice of the General Counsel to determine whether a gathering should be noticed as a meeting. Such reliance on the OGC as a watchdog for the public is misplaced, particularly in light of the Commission's obvious willingness to reject the General Counsel's advice.

Since the new rule does not provide for either pre-meeting notice or certification or the preparation of transcripts of gatherings, the public will not even know about such sessions much less be able to challenge them.

Chairman Palladino stated at the May 21, 1985 hearings that the public would know if an illegal gathering had occurred by [the NRC's] actions. Such shallow respect for legislated instruction is intolerable.

An old adage is "if it isn't broken, don't fix it." The old rule in place for eight years was working. Except for several losses in court the Commission has operated with about 2/3 of its business being done in public. The interim rule provision to do away with transcripts eliminates accountability.

VI. Does the Interim Rule Violate the Sunshine Act by Removing any Effective Remedy for Abuses of the Act?

On the issue of immediate adoption of the interim rule we agree with Chairman Pallidino's dissent. Nothing has been accomplished by the adoption of the rule except to further erode public confidence in the Commission.

CONCLUSION

In conclusion the Commission should amend the interim rule to clarify the difference between meetings and gatherings, and maintain transcripts of both.

Respectfully submitted,

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