UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
COMMISSIONER

February 25, 1985

MEMORANDUM FOR: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Zech

FROM: Frederick Bernthal

SUBJECT: SUNSHINE ACT

The recent round of public meetings on the budget, and the Commission's subsequent frustrating attempts to meet on a number of management issues more or less related to implementing budgetary and management efficiencies raises again a question which I believe is long overdue for careful Commission consideration.

Specifically, as I have argued for more than a year, I am not at all convinced that the Commission is taking advantage of the latitude intended by Congress, and provided by the Sunshine Act and its legislative history, regarding our duty and right to gather as a collegial body without all such gatherings being held in public. The recent Supreme Court decision in FCC v. ITT World Communications, Inc. reinforces my feeling that the discretion of the Commission to conduct informal discussions and carry out certain other business without public attendance was recognized by the Congress to be in the public interest of efficient and effective governance, and should be reviewed anew by the Commission.

While the Commission has spent its time considering whether it could legally close various Commission gatherings under one of the ten exemptions in the Sunshine Act, the most important initial question has never been seriously considered. That question is whether these gatherings are "meetings" at all for purposes of the Act. If there is no meeting, there is no reason to discuss exemptions; the five of us may converse freely in private on certain matters.

The definition of a meeting pursuant to the Sunshine Act is, in pertinent part:

> "...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 or disposition of official agency business...." (5 U.S.C.§552b(a)(2))

It follows from this definition that not all deliberations among the five Commissioners are prohibited. Only deliberations which "determine or result in the joint conduct or disposition of official agency business" are enjoined from being held in private. The Senate Report indicates that the discussions which may not be held in private are those which

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"effectively predetermine official actions" (p. 19). As the U.S. Administrative Conference Interpretive Guide to the Government in the Sunshine Act indicates, this language means that "briefings and exploratory or tentative discussions" would not fall within the definition of "meeting." (Interpretive Guide, p. 6)

While any gathering which is either intended to or likely to result in members of the Commission adopting reasonably firm positions on discrete proposals or issues would be within the ambit of the term "meeting," gatherings which are not decision oriented, but which instead are intended for information gathering, exchanging preliminary observations, discussing possibilities, or brainstorming do not appear to rise to the level of Sunshine Act "meetings" (Id, pp. 9-10).

This view has now been reinforced by the Supreme Court in the FCC decision. The Court noted that the original statutory language had prohibited private discussions of a collegial body which "concern" agency business. However, this was changed in the final language only to proscribe private collegial discussions that "determine or result in" the conduct of "official agency business." The Court stated that the "intent of the revision was clearly to permit preliminary discussion among agency members." (FCC v. ITT, 52 USLW at 4509, n. 7) The Court specifically endorsed the views of the authors of the Interpretive Guide cited above, noting that these views had been published at the request of Congress and after extensive consultation with affected agencies. (52 USLW at 4510; Id, n. 10)

While it is clear that many of our discussions must and should be conducted in public meetings, it appears equally clear that many discussions which are held in Commission meetings (or, unfortunately for the public interest, have never been held at all) have been the sort of "preliminary" exchange of views and observations, "background," "brainstorming" gatherings that need not be termed "meetings" at all for purposes of the Sunshine Act. The uncommonly prohibitive reading of the Sunshine Act adopted by this agency has effectively precluded Commissioners having any idea of the views and merits thereof of their fellow Commissioners in many important matters, and in my judgment has powerfully detracted from wise decision-making.

Beyond the above considerations, however, there is a second class of collegial gathering now treated as a meeting, either closed or public, which I believe clearly need not be so treated. Specifically, the Senate Report 94-354, which accompanied the Senate bill, indicated that where a function is vested in the Chairman of a collegial agency, the seeking of informal advice from his colleagues would not constitute a meeting for purposes of the Sunshine Act (p. 17)[1].

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1 The Senate Report is cited because it is the most authoritative Congressional Report regarding the definition of the term "meeting." This is because the Conference Report indicates that the Senate's definition of meeting "as explained in the Senate Report" was the basis for the final language.

The Interpretive Guide suggests that such vesting of authority can be evidenced by "delegation from the agency, or in a statute or reorganization plan..." (p. 11). For example, reorganization Plan #1 of 1980 clearly delegates to the Chairman the task of preparing the budget (which is further delegated to the EDO). Therefore, the legislative history and the Interpretive Guide would appear to support the proposition that a gathering at which advice regarding the budget is sought by the Chairman from the rest of us does not constitute a meeting.

This conclusion is not contradicted by the Common Cause decision so often cited by OGC, since the focus of that decision (and presumably the argument) in that case was whether one of the exemptions of the Sunshine Act could be applied to close a meeting. To my knowledge, the Court never addressed, nor did anyone attempt to argue the proposition that the gathering to provide Commission input to assist the Chairman in the preparation of his budget proposal was not a meeting in the first place.

The budget is not the only area where the legislative history and the Interpretive Guide might be applied to afford the Commission wider latitude to gather for discussion of certain matters, and thereby expedite Commission understanding and the Chairman's disposition of such matters. For example, the Chairman clearly has the responsibility to correspond with Congress: ["The Chairman shall be the official spokesman for the Commission...."] Applying the principle cited above, I have long argued that the five Commissioners should be able to gather in the same room for the purpose of providing informal advice to the Chairman regarding responses to Congressional inquiries. I am sure other similar examples of tasks delegated to the Chairman can be cited regarding which the Commission could meet as a group within the law.

The fact that the Congress took pains to define the term "meeting", and indeed, to revise its initial definition of the term, suggests that Congress fully intended to preserve the option of confidentiality when Commissioners' ideas are in a formative stage; thus also did Congress intend to preserve the essence of collegiality, viz. that five heads should be better than one in the development of ideas. Such preliminary collegial discussions are the ultimate justification for decision-making by a collegial body in the first place. Without them, there is little hope of reaching a collegial, let alone fully informed, decision in any sense beyond the mere registering of five independent opinions. I do not believe the latter is what Congress intended, nor do I believe the public is well-served when decision-making by a "collegial" body comes to such a pass.

Implicit in the above comments is the view critics outside the agency long have argued, that the NRC has for years adopted the most stringent and restrictive of all interpretations of the Sunshine Act. The recent Supreme Court decision would appear to lend strong support to the contention that, whatever generic problems the Sunshine Act may hold for all collegial bodies, the NRC has adopted an interpretation never intended by the Congress.

I understand that OGC has now prepared a review of the above points. The Commission should further consider what measures may be taken to obtain a court ruling, if necessary, in seeking to bring our interpretation of the Sunshine Act more into line with that of other agencies and the apparent intent of Congress.

cc: SECY
OGC
OPE

NOTATION VOTE

RESPONSE SHEET

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER ASSELSTINE

SUBJECT: SECY-85-67 - NRC SUNSHINE ACT REGULATIONS

APPROVED for publication only DISAPPROVED_____ ABSTAIN_____

NOT PARTICIPATING_____ REQUEST DISCUSSION_____

COMMENTS:

See attached.

Thomas M. Roberts
SIGNATURE

3-22-85
DATE

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.

NRC-SECY FORM DEC. 80

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PROPOSED SUNSHINE RULE

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

The Sunshine Act is not an easy Act to interpret or to apply. This is the primary reason the Commission's regulation was written as it was. The Commission's regulation sets up a bright line for determining what constitutes a meeting and what does not. While the Commission gave up some flexibility when it set up that bright line standard, it did not do so without a reason. A standard which provided more flexibility would, of necessity, have been less certain and would have created problems of interpretation. Adopting a more flexible standard would also have made it easier for the Commission inadvertently to misapply the Act in a particular case.

The standard suggested by OGC in the proposed rule suffers from these same problems. Because the standard is vague and subjective, it will be much more difficult to administer than the present standard. Predicting whether a particular meeting will consist of discussions "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm

positions regarding matters pending or likely to arise before the agency" will require nothing short of divination on the part of OGC.

I suggest that we try to make the standard a little more clear by describing in the statement of considerations, with somewhat more concrete examples, exactly what kind of "non-meetings" we have in mind. It would also be helpful to describe how the proposed rule would change our present approach--that is, what types of meetings, if any, now held by the Commission would be treated as non-meetings under the rule. I also suggest that when we have these "gatherings" we make it a practice either to keep a tape or have someone present to keep minutes so that if we guess wrong beforehand, and it turns out that our gathering should really have been a meeting there will be some record of what occurred at the meeting, no matter how inadequate.

I think the Commission should also consider the usefulness of having a record of staff briefings. The proposed rule would permit the Commission to have briefings by the staff without maintaining any record of what the Commission is told during those briefings. I think that that could be unfortunate in some cases. Transcripts provide a clear record of exactly when and in what detail the Commission is informed on various issues. Given the number of inquiries that we receive from Congress and others on such issues, it would be a mistake to have to rely on our memories alone as a basis for our response to inquiries. And, I often find transcripts of such briefings useful to refresh my

recollection about what various staff members have told us before I make a decision.

The substitution of minutes for verbatim transcripts of closed meetings held under certain exemptions has also been suggested. I do not believe that this is a good idea. I am particularly troubled by the idea of maintaining only minutes of meetings at which we discuss issues in closed session under exemption 10. Issues decided in matters of adjudication and litigation are important enough that we ought to have a verbatim record of what occurs. Minutes are not an adequate substitute for a verbatim transcript. I personally do not feel constrained by the presence of a reporter or a tape recorder at our meetings, and I think that the problems associated with using minutes rather that transcripts outweigh any problems some Commissioners see with maintaining verbatim transcripts. Minutes do not reflect the details of what occurred during a meeting, and the person who prepares them determines how to characterize what various participants say and what is worthy of noting. I suspect that the use of minutes only will lead to each Commissioner madly scribbling notes during the meetings rather than thinking about what is being said during the discussion. This is likely to be both an annoyance and a distraction. Further, verbatim transcripts have another advantage in addition to those I have already mentioned. Transcripts of meetings make it much easier after memories fade to reconstruct what the position of each Commissioner was on the issues. I would remind you of the management meeting we had last year on the operation of OIA where only a few days after the meeting we could not reconstruct whether there

had been a majority vote for any particular course of action. We had to have the tape of the meeting transcribed in order to determine what took place. I gather that this reconstruction problem was a serious one in the early days of the Commission and that this was a key factor in the Commission's decision to keep transcripts or tapes of meetings.

In sum, while I approve of publication of the proposed rule, I hope the Commission will give some thought to the problems I have raised before going forward with the proposed rule.