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

OFFICE OF THE
COMMISSIONER

May 1, 1985

MEMORANDUM TO: Samuel J. Chilk, Secy

FROM: James K. Asselstine

SUBJECT: SEPARATE VIEWS ON PROPOSED SUNSHINE RULE

Attached are my separate views on the proposed rule to change the Commission's sunshine regulations. Please send them to the Federal Register with the proposed rule.

cc: Chairman Palladino
Commissioner Roberts
Commissioner Bernthal
Commissioner Zech
OGC
OPE

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SEPARATE VIEWS OF COMMISSIONER ASSELSTINE

I approved publication of the proposed changes to our rule implementing the Sunshine Act only 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. I particularly invite comment on the concerns expressed below.

The Sunshine Act is not an easy act to interpret or to apply. This is the primary reason the Commission's present 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 may have given up some flexibility when it set up that bright line standard, it did so with 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 have made it easier for the Commission to misapply the Act inadvertently in a particular case.

The standard in the proposed rule suffers from just these 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. And, if the Commission guesses wrong, there is no remedy because if there is no "meeting" there will be no notice, no transcript, and no minutes.

If the Commission insists on going forward with the proposed rule, it should at least have made clear in the statement of considerations what change to present practice the rule is intended to effect. The Commission should have explained, with concrete examples, exactly what kind of meetings now held by the Commission will be treated as "gatherings" under the proposed rule. Or, if the intent is to create a new type of meeting not now held by the Commission, that should have been made clear.

I also cannot support the Commission's decision to make this rule immediately effective by applying it while the comment period runs. A rule changing the manner in which the Commission implements the Government in the Sunshine Act, an act the purpose of which was to provide the public with "the fullest practicable information regarding the decisionmaking processes of the Federal Government" (P.L. No. 94-409 §2), is clearly a rule in which the public has an interest. The Commission should await public comment before putting the rule into effect. The Commission has operated under its present rule for eight years without catastrophe. Waiting thirty more days for public comment hardly seems to be an onerous burden.