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March 9, 2000

The Honorable Richard A. Meserve
Chairman
United States Nuclear Regulatory Commission
Washington, DC 20555

Dear Chairman Meserve:

I am writing to discuss several recent events involving the compliance of the Nuclear Regulatory Commission (NRC) with the requirements of the Government in the Sunshine Act and the openness and transparency of the Commission's regulatory process.

For the NRC to successfully carry out the mission of ensuring the safe operation of nuclear power and nuclear materials licensees, it is essential for the Commission and its staff to gain and maintain a high level of public confidence and trust in the openness, transparency, and fairness of all of its regulatory proceedings. This necessitates ensuring that Commission decisions are openly arrived at through a process which is transparent to all interested parties -- whether they be industry representatives, environmentalists, consumer advocates, or the citizens living near an NRC licensee. I am greatly concerned that some recent actions by current and former staff and Commissioners appear to be aimed at diminishing public access to information about the Commission's proceedings, while simultaneously allowing the nuclear industry's representatives favored access and treatment.

For example, a May 1998 report by the Office of the Inspector General of the NRC (OIG) suggests that NRC Commissioners have met with licensees in secret to discuss pending regulatory matters. As you know, the OIG report was initiated following a March 23, 1998 Wall Street Journal article that described the meetings between a consultant for the licensee of the Millstone Nuclear Power Station with former Chairman Jackson, Commissioner Diaz, and Commissioner McGaffigan. At the time, the Millstone facility had been shut down and listed as a Category 3 -- preventing a restart until improvements to the plant were made. Subsequently the NRC received allegations from certain private law firms and individuals near the Millstone plant that the NRC conducted these discussions in violation of the 1976 Government in the Sunshine Act, which requires Commission meetings of 3 or more Commissioners to be held publicly. The allegations also accused the NRC of violating the ex parte communication rules, which prevent Commissioners from discussing certain proceedings with only one party in a dispute over which the NRC has jurisdiction.

According to the report [case number 98-025, Allegation of Sunshine Act and Ex Parte Communication Violations], while the meetings in question did not transgress the requirements

of the Government in the Sunshine Act, the OIG determined that the NRC was meeting regularly in secret with industry representatives with regulatory matters before the Commission. A technical interpretation involving the definition of a "meeting" exonerated the Commissioners in this case, since only a discussion among three or more Commissioners is considered a meeting under the Sunshine Act and subject to its provisions. In addition, the OIG found that the meetings did not violate the ex parte communication rules, since there were no NRC judicial proceedings in progress at the time.

Nonetheless, the OIG found that industry representatives had considerable access to Commissioners – access which other interested parties do not appear to have had. In fact, the OIG found that the actions of the Commissioners "appear to run counter to the [NRC's established] Principles of Good Regulation regarding Independence and Openness." The OIG noted that these principles direct the NRC to make decisions "based on objective, unbiased assessments of all information, and must be documented with reasons explicitly stated." In addition, the principles demand that nuclear regulation "must be transacted publicly and candidly." Therefore, the OIG concluded that although the meetings did not technically violate the provisions of the Sunshine Act, they did violate the spirit of the NRC's own guidelines which require its business to be conducted openly and transparently.

This finding by the OIG raises serious questions, because it suggests that the nuclear industry and NRC can easily avoid compliance with the requirements of the Sunshine Act by holding meetings with Commissioners one at a time. If these discussions take place with all the Commissioners – one at a time -- the industry representative may achieve the same goal as a meeting with all the Commissioners simultaneously, but without the transparency required by the Sunshine Act. It does not appear that other interested parties are accorded similar treatment. This practice by the NRC is more troubling in light of the decision last year by the Commission to further restrict the types of discussions that are subject to the Sunshine Act meetings provisions by implementing a 1985 rule redefining the concept of a "meeting".

As you may know, I wrote a letter to former Chairman Jackson on June 1, 1999 that expressed my concern over the Commission's decision to make effective a Sunshine Act rule change that had been proposed in 1985 but never implemented due to overwhelming Congressional and public opposition. This rule change would redefine a "meeting" at the NRC to exclude discussions among at least three Commissioners that are preliminary, informal or informational. Since these discussions would not be deemed to constitute a meeting, the provisions of the Government in the Sunshine Act would not apply – in a manner similar to the one-Commissioner discussions involved in the Millstone case. The result of implementing this new interpretation of what constituted a meeting for the purposes of compliance with the Sunshine Act would be the diminished ability of the public to fully understand the basis for NRC decisions (since the preliminary and informational meetings may be instrumental in forming the opinions of the NRC). The NRC and industry demonstrated in the Millstone case that they are able to circumvent the provisions of the stricter Sunshine Act by holding discussions with fewer than three Commissioners. The NRC's apparent response to the concerns raised in the course of the OIG investigation was not to broaden the scope of discussions considered a meeting. Instead, the NRC has attempted to further restrict the types of meetings subject to the Sunshine

Act provisions making it easier for industry representatives to conduct business with the NRC away from the watchful eyes of the public and the Congress.

Because I believe implementing this rule could diminish public confidence in the NRC as an independent regulatory agency, I sponsored an amendment to the NRC Authorization Act to prevent this rule from taking effect. The amendment was adopted by a voice vote by the Energy and Power Subcommittee, approved by the full Commerce Committee in its mark-up session and is included in the version of the act that will be considered by the full House of Representatives.

Unfortunately, in the process of gathering information about the facts and circumstances surrounding the NRC's Sunshine Act rule implementation, I became aware of another incident in which the NRC may have provided preferential access to NRC documents to the nuclear industry at the expense of the general public. In the June 1, 1999 letter that I submitted to the NRC on the Sunshine Act rule implementation, I questioned whether a draft of SECY-99-143 was released to a Nuclear Energy Institute (NEI) representative before it was released to the public. Because of my concern that the NRC response (made in a July 18, 1999 letter) may have been misleading, I requested an OIG investigation (case number 99-31D) to determine whether the NRC provided an inaccurate account of the release. The results of the report were troubling for several reasons.

The OIG found not only that the NRC's response to my question was misleading, but that the draft document was in fact made available to NEI more than two weeks before it was made available to the public document room. This suggests that staff at the NRC are not taking the necessary steps to ensure that the regulation of the nation's commercial nuclear power plants is conducted in a transparent and open manner by providing equal access to the public and industry representatives of draft NRC documents. To make matters worse, the NRC staff compounded the error by providing a misleading response to a Congressional inquiry on the subject. I find it troubling when the NRC provides preferential access to industry representatives. I find it completely unacceptable when the NRC compounds that poor judgment by misleading a Member of Congress.

Based on these and other developments, I can only conclude that the NRC appears to be moving away from a policy of openness in conducting its meetings and regulatory activities. This is regrettable, for unless steps are taken to correct these problems, I fear the NRC will lose public trust and confidence.

In order to better understand the basis for the NRC's actions in these matters, and the NRC's current policies and practices regarding openness and transparency, I request your assistance and cooperation in responding to the following questions:

1. In the Millstone case, the OIG found that the discussions with industry representatives did not violate the Sunshine Act, since the discussion never constituted a "meeting". A meeting is defined in 10 CFR 9.101 to require a quorum (three) of Commissioners. Has the NRC ever considered discussions with fewer than three Commissioners "meetings"? Why does the NRC believe only discussions with a quorum constitute a meeting when this may run counter to the Principles of Good Regulation?

2. In the Millstone case, the OIG found that "the public had limited opportunity for direct access to individual Commissioners...due to a lack of Commission invitations and requests by the public for such meetings." What steps does the NRC plan to take to ensure public participation in future discussions? What steps will the NRC take to inform and encourage the public to initiate meetings with the Commissioners?
3. Apart from the federal standards for public access to NRC meetings, the NRC has guidelines for openness described in the Principles of Good Regulation. How does the NRC ensure that the Commission and its staff are complying with these principles? Are there other NRC guidelines which govern behavior of NRC Commissioners and staff regarding openness and transparency?
4. Before implementing the new Sunshine Act rule restricting the types of meetings that were subject to its provisions, the NRC applied the Sunshine Act requirements to all meetings with a quorum of Commissioners. Is the NRC currently using the more or less restrictive definition of a meeting? If the more restrictive definition is being used, will the NRC continue with this policy in light of the Commerce Committee's approval of legislation to block the NRC effort to exempt additional meetings from Sunshine Act openness requirements? In addition, if the more restrictive definition is being used, how many NRC closed discussions have taken place that would have been subject to the Sunshine Act meeting requirements under the less restrictive definition of a meeting? What subjects were discussed in these meetings and who participated in them? Were any transcripts, minutes, or other records of these discussions kept?
5. The NRC is beginning a new document access program known as the Agencywide Document Access and Management Systems (ADAMS). What is the status of this system? Have there been problems accessing the system? If so, what actions has the NRC taken to correct these problems? What other actions has the NRC considered to ensure the problems related to the release of draft SECY-99-143 to the public document room will not be repeated?
6. In the release of SECY-99-143, the OIG report indicated that "none of the drafters of the response to question 7...were given the opportunity to review the final version of the July 19, 1999, letter". What procedures does NRC follow to allow an original drafter to review the final version of any written records that person may have produced? Will the NRC make changes in this procedure as a result of the OIG report on the subject?

Maintaining the trust and confidence of the American people is crucial to successful regulation of the nation's commercial nuclear power plants. Providing an open, transparent environment is essential to achieving this objective. As I know these issues are also important to the NRC, I look forward to your response. I am hopeful that the NRC will take the necessary steps to correct these problems and improve the access of the public to the activities and decisions of the NRC.

Thank you again for your assistance and cooperation in this matter. I request that a response to this inquiry be provided within 15 working days, or no later than March 31, 2000. Should you or your staff have any questions about this inquiry, please contact Dr. Gregory Jaczko or Mr. Jeffrey Duncan of my staff at (202)-225-2836.

Sincerely,

Edward J. Markey

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