June 29, 1999 SECY-99-166

FOR: The Commission

FROM: Karen D. Cyr /s/
General Counsel

SUBJECT: COMMENTS ON NRC'S SUNSHINE ACT NOTICE

PURPOSE:

To provide the Commission with an analysis of the comments received on the NRC's May 10, 1999, Federal Register notice regarding the agency's Sunshine Act practices.

DISCUSSION:

The opportunity for public comment on the NRC's Sunshine Act notice resulted in only nine comments, all but one of which expressed disapproval of the NRC's action. (The lone exception was the Nuclear Energy Institute, which said that it endorsed the NRC's action for the reasons stated in the Federal Register notice.) The negative comments were for the most part along the lines that we had expected, and had therefore tried to anticipate in the May 10 Federal Register notice. The comments were both on legal and policy grounds. The primarily legal arguments included the following: (a) the legislative history of the Sunshine Act makes clear Congress's intent that there should be openness to the maximum extent practicable; (b) the Commission's action is thus antithetical to the letter and spirit of the Act; (c) the Supreme Court's decision in *FCC v. ITT World Communications*, 466 U.S. 463 (1984), involved unique circumstances and is not relevant to the issue before the NRC; (d) the Commission disregarded such court decisions as that of the U.S. Court of Appeals for the D.C. Circuit in *Philadelphia Newspapers v. NRC*, 727 F.2d 1195 (1984); (e) the criteria adopted by the Commission are too vague to be workable, inasmuch as they require the Commission to predict the course that discussions will take; and (f) the Commission's action, by providing for minimal recordkeeping, possibly to be discontinued after six months, will preclude meaningful judicial review.

Policy arguments included these: (a) even if the rule can be justified legally, it represents a retreat from openness and will diminish public confidence in the Commission; (b) the NRC has failed to show that collegiality has been impaired by the Sunshine Act; (c) the examples of

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topics that the Commission has cited as examples of possible non-Sunshine Act discussions are too trivial to warrant changing a rule that has served well for 20 years; (d) the Commission failed to follow the recommendations of the American Bar Association with respect to

recordkeeping; (e) no harm could come to the Commission's processes if general background briefings were held in open session; (f) the NRC's role as regulator of a technically complex industry calls for maximum openness; and (g) nothing in the rule prevents the Commission from holding off-the-record discussions with representatives of the regulated industry.

Of the critical comments received, the most detailed came from Representative Edward J. Markey, the Natural Resources Defense Council, and Public Citizen. So many of the legal and policy arguments were raised in the letter from Rep. Markey, and addressed in OGC's proposed reply to him, that we have appended the incoming letter, as Attachment A, and the proposed response, as Attachment B.

As the proposed reply to Rep. Markey indicates, the legal arguments against the Commission's rule can be disposed of in fairly short order. The central point in everything that the Commission has said on the subject of the Sunshine Act since 1984 is that its purpose has been to bring itself into conformity with a unanimous Supreme Court decision that interpreted the Act and that went out of its way to provide clear guidance as to the meaning of the statutory term "meeting." (The NRC's original Sunshine Act regulations had been based in part on Justice Department guidance that proved to be erroneous.) There could be no stronger legal underpinning for a Commission action. Much of the quarrel of the critics seems to be less with what the Commission has done, but with the statute itself, as passed by the Congress and interpreted by the Supreme Court.[1]

The argument that the NRC should ignore the Supreme Court interpretation of "meeting," in favor of the expansive interpretation applied by the D.C. Circuit in cases decided before the Supreme Court ruled, is legally untenable. There is no way to rationalize the Supreme Court's decision out of existence; the efforts to do so (e.g., by arguing that the decision should be limited to its facts, or that because it was not necessary for the Court to go into such detail about the definition of "meeting," that portion of the opinion can be ignored) were thoroughly and firmly squelched by the American Bar Association in its report. The bottom line is that the NRC does not have the liberty to disregard Supreme Court decisions.

What the Supreme Court explained in detail is that the definition of "meeting" was an issue to which Congress paid extremely close attention, with changes introduced late in the legislative process. The bill in its final form therefore differed significantly from what some of its supporters (including its chief sponsor, the late Senator Lawton Chiles) desired. As a result, Committee reports describing earlier, more expansive versions of the legislation are of slight significance compared to the Supreme Court's parsing of the statute that Congress actually passed. Most of the commenters are in effect asking the NRC to join in rewriting history so that the narrowing of the scope of "meetings" -- proposed by Representative Pete McCloskey, enacted over the opposition of Senator Chiles and others, and elucidated by the Supreme Court -- is made to disappear from the record. This the NRC cannot do.

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[1]For instance, Public Citizen writes in its comments: "The Commission claims that 'The Act's procedural requirements effectively would prevent such discussions and thereby impair normal agency operations without achieving significant public benefit.'" The sentence attributed to the Commission is in fact a quotation from the Supreme Court's opinion. *FCC v. ITT World Communications*, 466 U.S. 463, 469-70.

Contrary to the views of some of the commenters, the Sunshine Act did not decree openness to the maximum extent practicable. Instead, it struck a balance between the public's right to know and the agencies' need to function efficiently in order to get the public's business done. To the concern that the standards for determining what is a non-Sunshine Act discussion are too vague, we can only reply that the Supreme Court thought otherwise, for the standard came directly from the Court's opinion. Nor is it correct to say that the standard requires "divination" of what will happen in a discussion; what the rule contemplates is that if a discussion begins to evolve from the preliminary exchange of views that the Commission contemplated into something so particularized that it may "effectively predetermine" agency action if it continues, the Commission will cease the discussion.[2]

On the issues of policy, we agree that an argument can be made that because of the special sensitivity and public interest in issues of nuclear safety, the NRC should continue to apply the law more stringently than is required. But that argument cuts both ways. It could equally well be argued that the special sensitivity and public interest in issues of nuclear safety make efficiency and collegiality particularly important, in order to maximize the quality of Commission decisionmaking, and that the Congressional balance between openness and efficiency should therefore be adhered to strictly.

On the question of whether the NRC's action will diminish public confidence in the Commission, this possibility cannot be ruled out, although to date, the adverse reaction has been comparatively mild. The Commission was of course aware, at the time it issued the May 10 notice, that negative public reaction was a possible consequence. It is also possible that the potential enhancement of collegiality and the potential improvement in Commission decision-making that could result from non-Sunshine Act discussions will ultimately increase the public's confidence in the Commission's actions. At this point, the Commission needs to consider whether the potential negative impact on public perception is so serious as to outweigh the expected benefits in collegiality and efficiency. This is the Commission's call to make; for its part, OGC does not see reason to change course on this account.

It is true that the Commission did not follow the American Bar Association's recommendations with respect to record-keeping. However, those recommendations were prudential, not based on legal requirements. The ABA recognized that as a legal matter, if a discussion is not a "meeting," no procedural requirements apply at all. The Commission's May 10 notice reflected a judgment that Congress would not have given agencies latitude to hold this type of discussion free of elaborate and burdensome procedures if it had not viewed such procedures as undesirable.

On the question of whether any harm could result from holding briefings in public session, arguments can go either way. At the time that the Commission first put its Sunshine Act rules into place, it acknowledged that briefings might be exempt from the Sunshine Act's scope, but said that the Commission did so much of its important work in briefings that as a policy matter,

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[2] Every Commissioner who meets one-on-one with agency stakeholders has to be prepared to cut off discussions that threaten to stray into impermissible areas, such as those covered by the Commission's *ex parte* regulations. There seems no reason why Commissioners could not equally well halt discussions among themselves that seem likely to cross the line separating non-Sunshine Act discussions from "meetings."

it believed these should be open to the public. This argument could still be made today. On the other hand, the counter-argument can be made that two decades of implementing the Sunshine Act, with its procedural burdens and its tendency to inhibit the free flow of discussion, have persuaded the Commission that Congress's original judgment was well-founded, and that the Act should not be applied beyond the bounds set by Congress. In addition, as noted in the proposed reply to Representative Markey, there is one court decision holding that an agency exceeded its legal authority when it adopted a definition of "meeting" broader than what Congress had legislated. *WATCH v. FCC*, 665 F.2d 1664 (D.C. Cir. 1981).

Finally, there is one point, noted by Representative Markey in his letter, on which the Commission's Federal Register notice was not clear: whether there is anything in the rule to prevent the Commission from meeting in non-Sunshine Act discussions with a representative of the Nuclear Energy Institute. We believe that the proper response is that the Commission's contemplation throughout has been that non-Sunshine Act discussions generally would be limited to NRC or other federal agency personnel, with limited exceptions, such as the representative of a foreign regulatory body or a state regulator, who would not be regulated entities or who could not be considered interested parties to Commission adjudicatory or rulemaking proceedings.

CONCLUSION:

OGC believes, based on its review of the comments received on the May 10 Federal Register notice, that none of them indicates a need to revise the approach taken by the Commission. The Commission may proceed to implement its Sunshine Act rules as it proposed in the May 10 Notice. If the Commission wishes to formally respond to the comments beyond what will be done in response to Congressman Markey's letter, we could prepare an appropriate document quickly.

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Attachments:
1. Letter from Representative Edward J. Markey, June 1, 1999
2. OGC's proposed reply to Representative Markey