

April 19, 1999

MEMORANDUM TO: Karen D. Cyr  
General Counsel

FROM: Annette L. Vietti-Cook, Secretary /s/

SUBJECT: STAFF REQUIREMENTS - COMSECY-99-006 - DRAFT FEDERAL REGISTER NOTICE  
ANNOUNCING INTENT TO IMPLEMENT SUNSHINE ACT RULES

The Commission has approved publication of the notice in the Federal Register (FRN) and dispatch of the letters to Congress. The changes provided in the attachment should be incorporated in the FRN prior to publication.

Attachment: As stated

cc: Chairman Jackson  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
OGC  
CIO  
CFO  
OCA  
OIG

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#### Changes to the FRN

1. ~~On page 2, add to the end of the 2<sup>nd</sup> paragraph ", and to respond to them in a Federal Register notice."~~

1. On page 9, under the heading, "Further Developments", add the following to the 2<sup>nd</sup> paragraph:

"In the meantime, some other agencies adopted and implemented rules that permit informal discussions that clarify issues and expose varying views but do not effectively predetermine official actions, discussions of the sort that the Court's *ITT* decision said are a "necessary part of an agency's work." 466 U.S. at 469-70. See, for example, the Occupational Safety and Health Review Commission's (OSHRC) and Defense Nuclear Facility Defense Board's (DNFSB) definitions of "meeting", at 29 CFR 2203.2(d) (50 Fed. Reg. 51679, 1985) and 10 CFR 1704.2(d)(5) (56 Fed. Reg. 9609, 1991), respectively."

2. On page 11, paragraph 1 of the "Conclusions", after the semicolon on the 5th line, add "actual practice at other federal agencies, including the DNFSB and OSHRC;".

3. On page 13, the last sentence of the first full paragraph should read: "No non-Sunshine Act discussions will be held during the period for public comment and for a 21 day period following close of the comment period to allow the Commission to consider the public comments. ~~consideration of those comments~~ Absent further action by the Commission, non-sunshine Act discussions may be held commencing 21 days after the close of the comment period."

4. On page 18, at the end of the answer to question 9, add a new sentence as follows: "As we have emphasized above, the Commission is not proposing to close any meetings currently held as open public meetings."

5. On page 18, change question 10 to read: "How does the Commission intend to differentiate between "meetings" and non-Sunshine Act discussions?"

6. On page 18, the response to Question 10 should be revised as follows:

The Commission intends to abide by the ~~guidelines adopted by the American Bar Association~~ guidance provided by the Court in *FCC v. ITT World Communications* and contained in our regulations, in differentiating between "meetings" and non-Sunshine Act discussions. Applying this guidance, the Commission may consider conducting a non-Sunshine Act discussion when the discussion will be casual, general, informational, or preliminary, so long as the discussion will not effectively predetermine final agency action. Whenever the Commission anticipates that a discussion seems likely to be "sufficiently focused on discreet proposals or issues as to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency," the Commission will treat those discussions as "meetings." See *id.* at

471.

Further, to ensure that we appropriately implement the Supreme Court guidance in differentiating between non-Sunshine Act discussions and meetings, the Commission will consider the ABA's remarks on the seriousness of this task. For instance, the ABA cautioned that a non-Sunshine Act discussion "does not pose specific problems for agency resolution" and agency "members are not deliberating in the sense of confronting and weighing choices." Report at 9-11.

The remainder of the response to question 10 should be deleted. The response to question 11 should be combined with the new text in response to question 10. The lead in sentence should begin "Some specific examples of the kinds of topics that might be the subject of non-Sunshine Act discussions would include .... " The text of the response to question 11 should be slightly reworded.