



Federal Communications Commission
Washington, D.C. 20554

February 2, 2005

The Honorable Ted Stevens
Chairman
Committee on Commerce, Science and Transportation
United States Senate
508 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Stevens:

As Congress contemplates revision of the nation's telecommunications laws, we write regarding a proposal that enjoys bipartisan support among the Commissioners of the Federal Communications Commission: reform of the open meeting requirement of the Government in Sunshine Act ("Sunshine Act" or "Act"). We fully support the Act's goal of informing the public about the decision making processes of multi-member agencies. However, we believe amendments to the Act could enhance the efficiency and soundness of the process. At the same time, safeguards could be devised that would ensure that the goal of open government is not jeopardized.

The open-meeting provision of the Sunshine Act currently requires every portion of every meeting not falling within an exception to be open to public observation when at least a quorum of Commissioners jointly conducts or disposes of official agency business.¹ Both Republican and Democratic Commissioners are on record in recent testimony before Congress that the Commission's decisional processes are impaired by this requirement, and their conclusions about the detrimental effects of the open meeting requirement are echoed by a substantial body of scholarship.²

¹ See 5 U.S.C. § 552b; 47 C.F.R. §§ 0.601-0.607.

² See, e.g., Randolph May, *Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415 (1997) ("there appears to be a fairly widespread consensus that the Sunshine Act is not achieving its principal -- and obviously salutary -- goal of enhancing public knowledge and understanding of agency decisionmaking"); James H. Cawley, *Sunshine Law Overexposure and the Demise of Independent Agency Collegiality*, 1 WIDENER J. PUB. L. 43 (1992). These conclusions were also echoed by the Administrative Conference of the United States ("ACUS") -- a body of experts established to advise Congress on administrative law. See David M. Welborn

We note initially that the Act is not necessary to the goal of ensuring that federal agencies explain their actions to the public. Judicial review statutes like the Administrative Procedure Act (“APA”) impose “a general ‘procedural’ requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation . . . [of its] rationale at the time of decision.” *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).

Nor has the open-meeting requirement generally achieved its goal of having Commissioners help shape each other’s views in the course of public deliberations. In fact, this requirement is a barrier to the substantive exchange of ideas among Commissioners, hampering our abilities to obtain the benefit of each other’s views, input, or comments, and hampering efforts to maximize consensus on the complex issues before us. Due to the prohibition on private collective deliberations, we rely on written communications, staff, or one-on-one meetings with each other. These indirect methods of communicating clearly do not foster frank, open discussion, and they are less efficient than in-person interchange among three or more Commissioners would be. Finally, and perhaps most significantly, Commission decisions are in some cases less well informed and well explained than they would be if we each had the benefit of the others’ expertise and perspective.³

For these reasons, we urge amending the open meeting provision of the Sunshine Act to permit closed deliberations among Commissioners in appropriate circumstances. Scholars and other agency heads have suggested various modification models,⁴ some of which include safeguards that may be desirable. For example, some models include a requirement that brief summaries of topics discussed at meetings between all decision makers be recorded and placed in relevant administrative records.

In closing, we want to stress that we are in complete agreement with the Sunshine Act’s goal of providing the public with reliable information about the basis for Commission decisions. We support amendment of the Act because we have learned from 28 years experience that we can satisfy this goal through other means that better serve the public interest by promoting bi-partisan deliberation and more efficient decision-making.

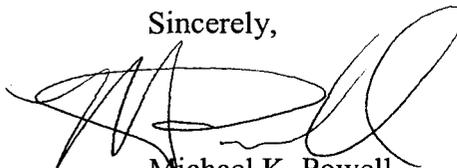
et al., IMPLEMENTATION AND EFFECTS OF THE FEDERAL GOVERNMENT IN THE SUNSHINE ACT, IN ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATION AND REPORTS (1984). The ACUS ceased operations in 1995 because Congress eliminated funding, but many of its proposals have been implemented, and scholars such as those listed here still cite its conclusions about the Sunshine Act.

³ Scholars and other agencies agree. See, e.g., May, *supra* note 2; *Federal Trade Commission Prepared Statement Before the Special Committee to Review the Government In the Sunshine Act, Administrative Conference of the United States, 1995 WL 540529* (1995).

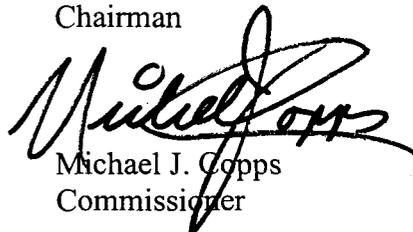
⁴ See, e.g., *id.*; Cawley, *supra* note 2.

We look forward to working with the Committee Chairman, Ranking, and Members of the Committee to resolve this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Powell", with a large, sweeping flourish at the end.

Michael K. Powell
Chairman

A handwritten signature in black ink, appearing to read "Michael J. Copps", with a large, sweeping flourish at the end.

Michael J. Copps
Commissioner