

BRAC/GC/dch  
May 19, 2005MEMORANDUM FOR THE COMMISSIONERS  
BASE CLOSURE AND REALIGNMENT COMMISSIONSubj: PROCEDURAL RULES OF THE 2005 DEFENSE BASE CLOSURE AND  
REALIGNMENT COMMISSION

Encl: (1) Subject rules (proposed)

1. The enclosed procedural rules have been modified from the rules used by prior BRACs to include the most recent statutory changes, specifically the seven vote requirement to 1) consider adding an installation to the Secretary's list of installations recommended for closure or realignment and 2) actually place a proposed installation on the list to the President. The rules will at the direction of the Chairman be presented for adoption by the Commission at the administrative meeting to be conducted at the conclusion of the Thursday morning hearing.

2. The rules are brief and straightforward. This memorandum discusses several key points about them.

**a. Quorums**

For hearings held to receive public comment, a quorum shall consist of one or more members designated by the Chairman.

When the Commission meets to consider:

- the recommendations of the Secretary of Defense
- the Commission's report to the President, or
- a revised list of recommendations for closures and realignments (except "additions" discussed below)

a quorum shall consist of a majority of members serving at that time.

**Discussion**

One or more Commissioners can hold a hearing, but at least five (5) of nine (9) Commissioners must be present for the Commission to consider and act on any closure or realignment recommendation, except for "additions." An "addition" to the Secretary's list is the closure of an installation not recommended by the Secretary for such action or the realignment of an installation that would result in a reduction in the force structure of that installation that was not recommended by the Secretary. In such cases, a quorum shall consist of seven (7) of the members then serving.

**b. Voting**

The rules require that when the Commission meets to consider:

- the recommendations of the Secretary of Defense

- the Commission's report to the President, or
- a revised list of recommendations for closures and realignments

Once a quorum has been established, "a vote shall be required of the Commission to dispense with any of the above responsibilities or to ratify any actions of the Commission."

The rules continue to provide that any action taken by the Commission concerning these three areas of the Commission responsibilities "will be by a majority vote of the Commission serving at that time." (Except as discussed above for "additions.")

The rules allow for any other issues that may arise during Commission meetings or hearings to be resolved by a "simple majority of Commissioners present."

The rules allow for Commissioner to vote in person or by proxy. (See discussion on proxies below.)

#### Discussion

The votes of a majority of the Commissioners are required to make any changes to the Secretary's list, except "additions," for which seven (7) votes are required. A tie vote on a motion to drop an installation from the Secretary's list or otherwise change his recommendations means that the motion would fail, and the Secretary's recommendations would prevail.

#### **c. Proxies**

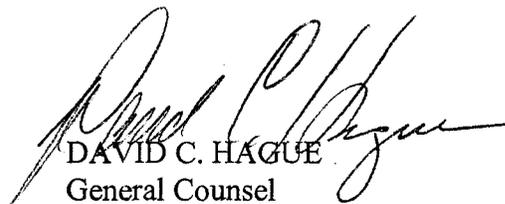
The rules allow proxy voting.

Under Rule 9, a Commissioner may designate another member to vote and otherwise act for the first member when he or she will be absent. However, the absent Commissioner must "issue a written proxy stating the specific or limited purposes for which the proxy can be exercised." Rule 9 also provides that "Where the margin of decision would be supplied by proxy vote, the proxy shall be considered invalid and the matter under consideration shall be considered to have failed."

#### Discussion

The rule on proxy voting allows a Commissioner who might be ill or for other compelling reasons unable to attend a meeting to cast a vote. There is no indication in BRAC records that proxy votes have ever been cast.

Blanket proxies are not allowed. The rule requires "a written proxy stating the specific or limited purpose for which the proxy can be exercised." An absent Commissioner cannot give to another Commissioner the ability to vote a proxy on an issue in any way the Commissioner determines appropriate at the time.

  
DAVID C. HAGUE  
General Counsel

## **ADDING INSTALLATIONS TO THE SECRETARY'S LIST FOR CONSIDERATION AND REVIEW**

The steps below apply to changes by the Commission to the Secretary of Defense's list of military installations recommended for closure or realignment that would add an installation for closure and/or realignment or expand the extent of a realignment already recommended by the Secretary.

If, after review and analysis of certified data received from the Department of Defense, information obtained during base visits and regional hearings, and other public input, and consideration of the Comptroller General's report submitted on 1 July, there are quantifiable reasons that the Commission wants to consider and review making changes in the recommendations of the Secretary of Defense that would add military installations to the Secretary's list of installations recommended for closure or realignment, then, according to controlling law:

- The Secretary of Defense is notified of the possible additions to his list and is given 15 days to submit an explanation why the installations were not on it.
- Commissioners vote in public session after receiving input from the Secretary of Defense and if seven commissioners vote to add installations then they are added to the Secretary's list.
- Notice of proposed additions to the Secretary's list is published in the Federal Register at least 45 days before 8 Sep 2005.
- At least two commissioners conduct installation visits and public hearings on the proposed additions.

Then the Commission must, in order to actually place the proposed additions on the list to the President:

Determine that the Secretary deviated substantially from the force-structure plan and final selection criteria, and

Determine that the additions being considered are consistent with the force-structure plan and final selection criteria.

Furthermore, the following applies:

- Commissioners vote in final deliberations on each installation, including additions.
- Seven commissioners must agree on additions.
- Only a simple majority (of the members serving) is required for approval and disapproval of closures and realignments recommended by the Secretary.
- A quorum (that is the number of commissioners required to be present for the Commission to vote and transact other business) is five commissioners.

BRAC/GC/dch  
June 17, 2005

MEMORANDUM FOR THE CHAIRMAN AND COMMISSIONERS  
DEFENSE BASE CLOSURE AND REALIGNMENT (BRAC) COMMISSION

Sub: COMMISSIONER PARTICIPATION IN DELIBERATIONS, REGIONAL AND  
OTHER HEARINGS, AND SITE VISITS

Ref: (a) Defense Base Closure and Realignment Act of 1990 (as  
amended)

Encl: (1) Procedural Rules of the 2005 Defense Base Closure and  
Realignment Commission  
(2) Memorandum to Commissioners of May 19, 2005  
(3) Adding Installations to the Secretary's List for  
Consideration and Review  
(4) BRAC definitions  
(5) Partial transcript of Commission May 19, 2005 hearing  
(6) Ethics agreement signed by all commissioners

1. The following discussion is provided to assist in a  
more complete and common understanding of the roles and  
responsibilities of the commissioners in the BRAC process.

**KEY STATUTORY PROVISIONS**

2. Principal guidance for BRAC proceedings is contained in  
reference (a), which provides, relevant to this discussion, the  
following:

- The Commission shall be composed of nine members (the 1988  
BRAC Commission had 12 members; other BRAC Commissions had  
eight members).
- The Commission may make changes in any of the recommenda-  
tions made by the Secretary if the Commission determines  
that the Secretary deviated substantially from the force-  
structure plan and final criteria in making his  
recommendations.
- The Commission may not consider making a change in the  
recommendations of the Secretary that would add a military  
installation to the Secretary's list of installations  
recommended for closure or realignment unless . . . the  
decision to add the installation for Commission

consideration is supported by at least seven members of the Commission.

- The Commission may not make a change in the recommendations of the Secretary that would close a military installation not recommended for closure by the Secretary, would realign a military installation not recommended for closure or realignment by the Secretary, or would expand the extent of the realignment of a military installation recommended for realignment by the Secretary unless the decision of the Commission to make the change . . . is supported by at least seven members of the Commission.

#### VOTING

3. With the exception of the seven-of-nine vote requirement (unique to the 2005 BRAC), no guidance is provided in the statute for voting - what constitutes a quorum, majority, etc. At its May 19, 2005 hearing, the 2005 BRAC Commission, following the practice of prior BRAC Commissions, adopted the procedural rules contained at enclosure (1). The rules have changed very little in the succession of BRAC Commissions. Addition of the seven-of-nine vote requirement to consider and add bases to the Secretary's list has been the only significant modification to the rules.

a. Highlights of the rules are:

- The Commission can meet at the call of the chairman or at the request of a "majority of the commissioners then serving."
- One or more commissioners can hold a public hearing, but five of nine "commissioners serving at that time" would have to be present to act on any closure or realignment recommendation.
- Seven of nine "commissioners serving at that time" would have to be present to consider and act to close an installation not recommended for closure by the Secretary, realign an installation not recommended for closure or realignment by the Secretary, or expand the extent of the realignment of an installation recommended for realignment by the Secretary.

- Any other issues that may arise during Commission meetings or hearings (motion to adjourn, extend time, etc.) are resolved "by a simple majority of commissioners present."

b. The first three situations described above specify that the number of commissioners required to act is:

- a "majority of the commissioners then serving" or
- five of nine "commissioners serving at that time" or
- seven of nine "commissioners serving at that time."

The fourth situation described above requires "a simple majority of commissioners present."

c. "Majority of the commissioners then serving" and "commissioners serving at that time" can only be understood to mean the full complement of commissioners, which is nine commissioners. Accordingly, so long as there are nine commissioners serving (the number eligible to vote is not relevant), the votes of at least five commissioners are always required to approve or disapprove recommendations by the Secretary or Commission.

d. If there is not a vote of five commissioners to approve a Secretary or Commission recommendation, the recommendation does not go forward to the President. A synopsis of the rules provided to the commissioners prior to their adoption at the Commission hearing of May 19, 2005 is contained at enclosure (2).

4. The seven-of-nine vote requirement only applies to "adds." "Adds" are additions to the Secretary's list of recommendations for closure or realignment, not changes to the recommendations that result in additions to the manpower, materiel or missions of an installation.

5. The seven-of-nine vote requirement comes into play only when the Commission recommends a greater loss (including closure) to a given installation than the Secretary recommended. (Those are "adds" in the statutory parlance.) That is, seven of nine votes are required when:

- closing an installation not recommended for closure by the Secretary,
- reducing the operations on a given base to a greater extent than was recommended by the Secretary, or

- reducing operations at a given base that was not recommended for reduction by the Secretary.

6. An installation involved in the "adds" process that is not recommended for either closure or realignment - but is in fact a "gainer," requires only five, not seven of nine votes. A summary of the "adds" process is contained at enclosure (3).

7. Certain actions that were either taken or considered in the past that no longer have relevance to the BRAC process include: disestablishment, redirection, relocation, reopening and moth-balling. These and other words important to understanding past and present BRAC processes are defined in enclosure (4).

#### **RECUSALS**

8. To avoid even the appearance of lack of impartiality and enhance the public's confidence in the BRAC process, four of our nine commissions have disqualified themselves by reason of real or perceived prejudice or conflict of interest from deliberating and voting on matters directly relating to installations in their home states.

9. Commissioners Bilbray, Coyle, Gehman, and Hansen recused themselves at the Commission's May 19, 2005 hearing in order to place the impartiality of the Commission beyond question. (The applicable portion of the transcript from the hearing is contained at enclosure (5).) Commissioners Bilbray and Hansen recused themselves for reasons identical to those that prompted Senator Dixon to recuse himself in 1995 when he served as Chairman of that BRAC Commission. Commissioners Coyle and Gehman recused themselves as a consequence of a binding ethics agreement that all commissioners signed during the vetting process associated with their nominations. A copy of the agreement is contained at enclosure (6).

10. Commissioners Coyle and Gehman recused themselves because of their participation in BRAC-related activity in California and Virginia respectively. Commissioners Bilbray and Hansen recused themselves because of their long-time representation in the Congress and other public offices of Nevada and Utah respectively. As a result of their recusals, the commissioners cannot deliberate or vote on matters relating to installations in their home states or to installations in others states that are substantially affected by closures and realignments of installations in their home states.

11. Adopting a policy that controlled in past BRACs, the Chairman has determined that:

"When it is determined by the Commission's General Counsel that a commissioner has a potential conflict of interest and the recommended remedial measure is recusal in regards to a base, to avoid a conflict of interest or perception of a conflict, the Commission will adopt the following policy: the commissioners shall be prohibited from participation in any and all discussions, debate and actions regarding the base in question. Additionally, commissioners will not participate in any discussions, debate or actions involving bases that are being considered as substitutes to the first base in question. The prohibition regarding substitute bases will take effect the moment the additional base(s) is/are being considered as substitute(s) to the original base."

12. The Chairman has also determined as a matter of policy that we will make the greatest reasonable effort to minimize the number of direct and indirect conflicts but permit conflicted commissioners as necessary to participate in regional hearings (and site visits when the conflicted commissioner is not the only commissioner visiting). Participation is allowed even though the recused commissioners will be unable to deliberate and vote on all of the installations discussed at the hearings (site visits). Their direct exposure to as much information and as many concerned citizens as possible is recognized as being vitally important to the completion of the Commission task of open, fair, and comprehensive consideration of the final selection criteria, force-structure plan, and worldwide infrastructure inventory. Other commissioners at the hearing and staff will also gather data, so there is no real possibility that the recused commissioner(s) could be seen as filtering the Commission's view of an installation.

DAVID C. HAGUE  
General Counsel

## Procedural Rules of the 2005 Defense Base Closure and Realignment Commission

Rule 1. The Defense Base Closure and Realignment Commission (“Commission”) was established by the Defense Base Closure and Realignment Act of 1990, Part A of Title XXIX of Public Law 101-510, as amended by Title XXX of the National Defense Authorization Act for Fiscal Year 2002, Public Law 107-107, and further amended by Section 2822, Subtitle C, Title XXVIII, Division B, of Public Law 108-136 (“Act”). The Commission’s operations shall comply with that Act, as amended, and with these Procedural Rules.

Rule 2. The Commission’s meetings, other than meetings in which classified information is to be discussed, shall be open to the public. In other respects, the Commission shall comply with the Federal Advisory Committee Act, Title 5, United States Code, Appendix 2, and the Federal Advisory Committee Management Final Rule, 41 Code of Federal Regulations Parts 101-6 and 102-3.

Rule 3. The Commission shall meet only during calendar years 2005 and 2006.

Rule 4. The Commission shall meet at the call of the Chairman or the request of a majority of the Commissioners serving at that time.

Rule 5. When the Commission meets to consider (a) the recommendations of the Secretary of Defense (“Secretary”) submitted to the Commission in accordance with the Act, (b) the Commission’s report to the President in accordance with the Act, or (c) a revised list of recommendations in accordance with the Act, a quorum shall consist of a majority of the members then serving. When the Commission meets to consider the closure of an installation not recommended by the Secretary for such action, or to consider the realignment of an installation that would result in a reduction in the force structure at that installation that was not recommended by the Secretary, a quorum shall consist of seven of the members then serving. When the Commission meets to conduct public hearings to receive public comment on the recommendations of the Secretary or the proceedings of the Commission, a quorum shall consist of one or more members designated by the Chairman.

Rule 6. When the Commission meets to consider (a) the recommendations of the Secretary submitted to the Commission in accordance with the Act, (b) the Commission’s report to the President in accordance with the Act, or (c) a revised list of recommendations in accordance with the Act, and a quorum is present, a vote shall be required of the Commission to dispense with any of the above responsibilities or to ratify any acts of the Commission. The adoption of any action taken by the Commission with regard to (a) the recommendations of the Secretary submitted to the Commission in accordance with the Act, (b) the Commission’s report to the President in accordance with the Act, or (c) a revised list of recommendations in accordance with the Act, will be by a majority of the members serving at that time. In the event of a tie vote on the adoption of any such action, the motion fails for lack of a majority. The adoption of any action taken by the Commission with regard to the closure of an installation not recommended by the Secretary for such action, or to consider the realignment of an installation that would

result in a reduction in the force structure at that installation that was not recommended by the Secretary, will be by seven of the members then serving. The resolution of all other issues arising in the normal course of Commission meetings or hearings shall be by a simple majority of Commissioners present. The Commissioners shall vote in person, except when a proxy is exercised under Rule 9.

Rule 7. The Chairman shall preside at meetings and public hearings of the Commission when he is present. In the Chairman's absence, he or she shall designate another member of the Commission to preside.

Rule 8. The Chairman, or in his absence, the presiding Commissioner, shall have the authority to ensure the orderly conduct of the Commission's business. This power includes, without limitation, recognizing members of the public to speak, imposing reasonable limitations on the length of time a speaker may hold the floor, determining the order in which members of the Commission may question witnesses, conducting votes of members of the Commission, and designating Commissioners for the conduct of public hearings.

Rule 9. One Commissioner may designate another Commissioner to vote and otherwise act for the first member when he or she will be absent, but only where the first Commissioner has previously issued a written proxy to the second stating the specific, limited purpose for which the proxy is to be exercised. Where the margin of decision would be supplied by a proxy vote, the proxy shall be considered invalid and the matter under consideration shall be considered to have failed.

Rule 10. These rules may be amended by a majority vote of the Commissioners serving at the time.

BRAC/GC/dch  
May 14, 2005

MEMORANDUM FOR THE CHAIRMAN

Via: DIRECTOR OF STAFF

Subj: PROCEDURAL RULES OF THE 2005 DEFENSE BASE CLOSURE AND  
REALIGNMENT COMMISSION

Encl: (1) Subject rules

1. The enclosed procedural rules have been modified from the rules used by prior BRACs to include the most recent statutory changes, specifically the seven vote requirement to consider adding an installation to the Secretary's list of installation recommended for closure or realignment and to actually place a proposed installation on the list to the President. In 1993 and 1995, the procedural rules were adopted at the end of the first day of hearings. These rules can be adopted at any time early in the Commission schedule, possibly when travel assignments and related matters are discussed at the conclusion of the hearings on Thursday, May 19.
2. I recommend consideration of these rules for adoption by the Commission and propose to provide them to the Commissioners early next week with a memorandum that will discuss key points about them.

DAVID C. HAGUE  
General Counsel

Director of Staff:      Concur \_\_\_\_\_      Nonconcur \_\_\_\_\_

Chairman:              Approve \_\_\_\_\_

February 11, 1995

**MEMO TO SENATOR DIXON**

**From: Madelyn and David**

**RE: Commission Rules of Procedure**

This folder contains the Rules of Procedure that were adopted by the 1993 Commission at a brief business meeting at the end of their first day of hearings.

We recommend a similar business meeting at the end of our first day of hearings on March 1.

We think these Rules can be used by the 1995 Commission without change. The Rules are brief and straightforward, but we want to make sure that you are familiar and comfortable with them.

This memo discusses several key points about the Rules.

**1. Quorums**

For public hearings, a quorum shall consist of one or more members designated by the Chairman.

When the Commission meets to consider:

1. the recommendations of the Secretary of Defense;
2. the Commission's report to the President; or
3. a revised list of recommendations for closures and realignments

a quorum shall consist of a majority of members serving at that time.

**Discussion**

One or more Commissioners can hold a hearing, but at least 5 of 8 Commissioners would have to be present for the Commission to consider and act on any closure or realignment recommendation, including any decision to add a base to the Secretary's list for consideration.

**2. Voting**

The Rules require that when the Commission meets to consider:

1. the recommendations of the Secretary of Defense;
2. the Commission's report to the President; or
3. a revised list of recommendations for closures and realignments

once a quorum has been established, "a vote shall be required of the Commission to dispense with any of the above responsibilities or to ratify any actions of the Commission."

The Rules go on to state that any action taken by the Commission concerning these three areas of the Commission's responsibilities "will be by a majority vote of the Commission members serving at that time."

The Rules allow for Commissioners to vote in person or by proxy. (See discussion on proxies below.)

The Rules allow for any other issues that may arise during Commission meetings or hearings to be resolved "by a simple majority of Commissioners present."

### Discussion

Under the Defense Base Closure and Realignment Act of 1990, as amended, the Commission is charged with reviewing the closures and realignments recommended by the Secretary of Defense. The Commission is authorized to make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary "deviated substantially" from the force structure plan or selection criteria.

The Secretary's recommendations become the baseline for the Commission's actions. In other words, the burden of proof rests with those wishing to change the Secretary's recommendations. This gives the Secretary's list a certain parliamentary advantage, because the votes of a majority of the Commissioners would be required to make any changes to the Secretary's list. A tie vote on a motion to change the Secretary's recommendations means that the motion would fail, and the Secretary's recommendations would prevail.

For example, at least 5 of the 8 Commissioners would have to vote in favor of a motion:

- to remove a base from the Secretary's list;
- to change one of the recommendations on the Secretary's list; or
- to add a base for consideration to the Secretary's list.

In each of these cases, a tie vote would mean that the motion fails, and the Secretary's recommendation stands.

### 3. Proxies

The Rules allow proxy voting.

Under Rule 9, a Commissioner may designate another member to vote and otherwise act for the first member when he or she will be absent. However, the absent Commissioner must "issue a written proxy stating the specific or limited purpose for which the proxy can be exercised."

#### Discussion

The Rule on proxy voting was put in to allow a Commissioner who might be ill or running late from the airport to cast a vote. Our understanding is that proxy votes were never used.

There is no requirement in the Rule that a Commissioner's proxy be voted by the Chairman. The Rule simply says that "A member of the Commission may designate another member..." -- presumably any other member -- to vote the proxy.

Note that the Rule requires "a written proxy stating the specific or limited purpose for which the proxy can be exercised." There is no definition of "specific or limited", but it is clear that the intent of the Rule is not to allow a blanket proxy. An absent Commissioner cannot give to another Commissioner the ability to vote a proxy on an issue in any way that the Commissioner determines appropriate at the time.

Given the public scrutiny of all of the votes which the Commission will take, we think it is unlikely that proxies will be needed or used, but we have no objection to leaving the Rule as it is.

However, we recommend that it be made clear that proxies must be given in writing for a specific and limited purpose in much the same way that absentee ballots are cast. This could be done orally as an explanation of "specific or limited" when the Rules are adopted by the Commission.

*Matt*

Here is a copy of the Rules, as amended 4/26/91, for your information.

*Bob Moore*

## **PROCEDURAL RULES OF THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION**

Rule 1. The Defense Base Closure and Realignment Commission ("Commission") was established in Title XXIX of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510. The Commission's operations shall comply with that Act and with these Procedural Rules.

Rule 2. The Commission's meetings, other than meetings in which classified information is to be discussed, shall be open to the public. In other respects, the Commission shall comply with the Federal Advisory Committee Act, as amended, 5 U.S.C. app2.

Rule 3. The Commission shall meet only during calendar years 1991, 1993, and 1995.

Rule 4. The Commission shall meet at the call of the Chairman or at the request of a majority of members of the Commission serving at that time.

Rule 5. When the Commission meets to consider (a) the recommendations of the Secretary of Defense ("Secretary") submitted under section 2903 (c) of Pub. L. No. 101-510, (b) the Commission's report to the President under section 2903 (d) including the Commission's recommendations for closures and realignments of military installations, or (c) a revised list of recommendations for the closure or realignment of military installations under section 2903 (e), a quorum shall consist of a majority of the Commission members serving at that time. When the Commission conducts public hearings on the Secretary's recommendations under section 2903 (d) (1), a quorum shall consist of one or more members designated by the Chairman.

Rule 6. When the Commission meets to consider (a) the recommendations of the Secretary of Defense (Secretary) submitted under section 2903 (c) of Public Law No. 101-510, (b) the Commission's report to the President under section 2903(d), or (c) a revised list of recommendations for the closure or realignment of military

installations under Section 2903 (e) and a QUORUM has been established, a vote shall be required of the Commission to dispense with any of the above responsibilities or to ratify any actions of the Commission. The adoption of any action taken by the Commission with regard to responsibilities (a,) (b) or (c) stated above will be by a majority vote of the Commission Members serving at that time. Commissioners may vote in person . The resolution of all other issues arising in the normal course of Commission meetings or hearings, etc. will be by a simple majority of Commissioners present.

**Rule 7.** The Chairman shall preside at meetings and public hearings of the Commission when he or she is present. In the Chairman's absence, he or she shall designate another member of the Commission to preside.

**Rule 8.** The Chairman (or another member of the Commission presiding in the Chairman's absence) shall have the authority to ensure the orderly conduct of the Commission's business. This power includes, without limitation, recognizing members of the Commission and members of the public to speak, imposing reasonable limitations on the length of time a speaker may hold the floor, determining the order in which members of the Commission may question witnesses, conducting votes of members of the Commission, and designating Commission members for the conduct of public hearings under section 2903 (d) (1).

**Rule 9.** A member of the Commission may designate another member to vote and otherwise act for the first member when he or she will be absent. The first member shall issue a written proxy stating the specific or limited purpose for which the proxy can be exercised.

**Rule 10.** These Rules may be amended by the majority vote of the members of the Commission serving at that time.



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301-1600

14 JAN 1991

The Honorable Jim Courter  
Courter, Robert  
Attorneys at Law  
1001 Route 517  
Hacketstown, NJ 07840

Dear Mr. Courter:

At your request, we have prepared the enclosed draft procedural rules of the Defense Base Closure and Realignment Commission for your consideration. In preparing these rules, we have tried to include basic guidance that will speed the Commission's work, while avoiding cumbersome technical procedural requirements.

My staff and I, as well as Doc Cooke and his organization, remain available to continue to assist you and your associates in the important work of the Commission. Please let Paul Koffsky, of my staff, know if you desire further refinements in the draft rules or if my office can be of other help. Paul can be reached on 703-695-3657.

Sincerely,

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*Terrence P. O'Donnell*  
Terrence P. O'Donnell

Enclosure

cc (with enclosure): Mr. D.O. Cooke  
Director, Administration & Management, OSD

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Procedural Rules of the Defense Base Closure  
and Realignment Commission

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Rule 2. The Commission's meetings, other than meetings in which classified information is to be discussed, shall be open to the public. In other respects, the Commission shall comply with the Federal Advisory Committee Act, as amended, 5 U.S.C. app. 2.

Rule 3. The Commission shall meet only during calendar years 1991, 1993, and 1995.

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Rule 5. When the Commission meets to consider (a) the recommendations of the Secretary of Defense ("Secretary") submitted under section 2903(c) of Pub. L. No. 101-510, (b) the Commission's report to the President under section 2903(d) including the Commission's recommendations for closures and realignments of military installations), or (c) a revised list of recommendations for the closure or realignment of military installations under section 2903(e), a quorum shall consist of a majority of the commission members serving at that time. <sup>and a binding vote shall be</sup> When <sup>by a majority of</sup> the Commission conducts public hearings on the Secretary's <sup>Commission Members serving</sup> recommendations under section 2903(d) (1), <sup>and for all other purposes</sup> a quorum shall consist of one or more members designated by the Chairman.

*Rule on Vote:*

Rule 6. The Chairman shall preside at meetings and public hearings of the Commission when he or she is present. In the Chairman's absence, he or she shall designate another member of the Commission to preside.

Rule 7. The Chairman (or another member of the Commission presiding in the Chairman's absence) shall have the authority to ensure the orderly conduct of the Commission's business. This power includes without limitation recognizing members of the Commission and members of the public to speak, imposing reasonable limitations on the length of time a speaker may hold

the floor, determining the order in which members of the Commission may question witnesses, conducting votes of members of the Commission, and designating commission members for the conduct of public hearings under section 2903(d) (1).

Rule 8. A member of the Commission may designate, by written proxy, another member to vote and otherwise act for the first member when he or she will be absent.

Rule 9. These Rules may be amended by the majority vote of the members of the Commission serving at that time.

*Matt*

Here is a copy of the Rules, as amended 4/26/91, for your information.

*Bob Moore*

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Rule 5. When the Commission meets to consider (a) the recommendations of the Secretary of Defense ("Secretary") submitted under section 2903 (c) of Pub. L. No. 101-510, (b) the Commission's report to the President under section 2903 (d) including the Commission's recommendations for closures and realignments of military installations, or (c) a revised list of recommendations for the closure or realignment of military installations under section 2903 (e), a quorum shall consist of a majority of the Commission members serving at that time. When the Commission conducts public hearings on the Secretary's recommendations under section 2903 (d) (1), a quorum shall consist of one or more members designated by the Chairman.

Rule 6. When the Commission meets to consider (a) the recommendations of the Secretary of Defense (Secretary) submitted under section 2903 (c) of Public Law No. 101-510, (b) the Commission's report to the President under section 2903(d), or (c) a revised list of recommendations for the closure or realignment of military

installations under Section 2903 (e) and a QUORUM has been established, a vote shall be required of the Commission to dispense with any of the above responsibilities or to ratify any actions of the Commission. The adoption of any action taken by the Commission with regard to responsibilities (a,) (b) or (c) stated above will be by a majority vote of the Commission Members serving at that time. Commissioners may vote in person . The resolution of all other issues arising in the normal course of Commission meetings or hearings, etc. will be by a simple majority of Commissioners present.

**Rule 7.** The Chairman shall preside at meetings and public hearings of the Commission when he or she is present. In the Chairman's absence, he or she shall designate another member of the Commission to preside.

**Rule 8.** The Chairman (or another member of the Commission presiding in the Chairman's absence) shall have the authority to ensure the orderly conduct of the Commission's business. This power includes, without limitation, recognizing members of the Commission and members of the public to speak, imposing reasonable limitations on the length of time a speaker may hold the floor, determining the order in which members of the Commission may question witnesses, conducting votes of members of the Commission, and designating Commission members for the conduct of public hearings under section 2903 (d) (1).

**Rule 9.** A member of the Commission may designate another member to vote and otherwise act for the first member when he or she will be absent. The first member shall issue a written proxy stating the specific or limited purpose for which the proxy can be exercised.

**Rule 10.** These Rules may be amended by the majority vote of the members of the Commission serving at that time.



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301-1600

14 JAN 1991

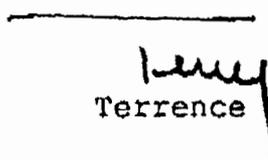
The Honorable Jim Courter  
Courter, Robert  
Attorneys at Law  
1001 Route 517  
Hackettstown, NJ 07840

Dear Mr. Courter:

At your request, we have prepared the enclosed draft procedural rules of the Defense Base Closure and Realignment Commission for your consideration. In preparing these rules, we have tried to include basic guidance that will speed the Commission's work, while avoiding cumbersome technical procedural requirements.

My staff and I, as well as Doc Cooke and his organization, remain available to continue to assist you and your associates in the important work of the Commission. Please let Paul Koffsky, of my staff, know if you desire further refinements in the draft rules or if my office can be of other help. Paul can be reached on 703-695-3657.

Sincerely,

  
Terrence P'Donnell

Enclosure

cc (with enclosure): Mr. D.O. Cooke  
Director, Administration & Management, OSD

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Procedural Rules of the Defense Base Closure  
and Realignment Commission

Rule 1. The Defense Base Closure and Realignment Commission ("Commission") was established in Title XXIX of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510. The Commission's operations shall comply with that Act and with these Procedural Rules.

Rule 2. The Commission's meetings, other than meetings in which classified information is to be discussed, shall be open to the public. In other respects, the Commission shall comply with the Federal Advisory Committee Act, as amended, 5 U.S.C. app. 2.

Rule 3. The Commission shall meet only during calendar years 1991, 1993, and 1995.

Rule 4. The Commission shall meet at the call of the Chairman or at the request of a majority of members of the Commission serving at that time.

Rule 5. When the Commission meets to consider (a) the recommendations of the Secretary of Defense ("Secretary") submitted under section 2903(c) of Pub. L. No. 101-510, (b) the Commission's report to the President under section 2903(d) including the Commission's recommendations for closures and realignments of military installations), or (c) a revised list of recommendations for the closure or realignment of military installations under section 2903(e), a quorum shall consist of a majority of the commission members serving at that time. *and a quorum vote shall be taken by a majority of Commission Members serving at that time.* When the Commission conducts public hearings on the Secretary's recommendations under section 2903(d) (1), *and for all other purposes* a quorum shall consist of one or more members designated by the Chairman.

*Rule on Vote:*

Rule 6. The Chairman shall preside at meetings and public hearings of the Commission when he or she is present. In the Chairman's absence, he or she shall designate another member of the Commission to preside.

Rule 7. The Chairman (or another member of the Commission presiding in the Chairman's absence) shall have the authority to ensure the orderly conduct of the Commission's business. This power includes without limitation recognizing members of the Commission and members of the public to speak, imposing reasonable limitations on the length of time a speaker may hold

the floor, determining the order in which members of the Commission may question witnesses, conducting votes of members of the Commission, and designating commission members for the conduct of public hearings under section 2903(d)(1).

Rule 8. A member of the Commission may designate, by written proxy, another member to vote and otherwise act for the first member when he or she will be absent.

Rule 9. These Rules may be amended by the majority vote of the members of the Commission serving at that time.



Office of the  
General Counsel

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

February 22, 1995

Elizabeth King, Esquire  
Defense Base Closure and Realignment  
Commission  
1700 North Moore Street, Suite 1425  
Arlington, Virginia 22209

Dear Ms. King:

This is in response to your letter dated February 6, 1995, addressed to Mr. Benjamin Berman, requesting copies of any written documentation regarding procedures for proxy voting by Commissioners of the Federal Trade Commission. Your letter was subsequently forwarded to this office for appropriate action. I have determined as an exercise of discretion to grant you access to the responsive information with no restrictions on its use.

The responsive information is enclosed.

Sincerely,

  
Jay C. Shaffer  
Acting General Counsel

Enclosure

MEMORANDUM

TO: David Lyles  
Madelyn Creedon

FROM: Elizabeth King

SUBJECT: Proxy rules for commissioners at other commissions

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All of the following commissions have internal procedures regarding proxy voting by commissioners. None have published statutory requirements or regulations. Because the guidelines at these commissions are internal, no one with whom I spoke would send me a copy of their procedures. However, below is a summary of what I learned in telephone conversations.

In my conversations, I defined proxy voting as an absent commissioner giving a commissioner who would be present at a meeting the power to vote, without telling the commissioner which way to cast the vote.

Federal Election Commission

Contact: Marjorie Emmons 202-219-4145  
Works in the commissioners' office

Number needed to vote: 4 out of 6, a majority required by statute

Voting procedure:

Commissioners receive most matters for decision in the mail. If all commissioners agree, the decision is made on paper and no meeting is required. If one commissioner objects to an action, a meeting is held to discuss and vote on the matter. No proxy voting is allowed at these meetings. If a commissioner does not attend, he cannot vote.

Federal Energy Regulatory Commission

Contact: Michael Schots 202-208-0597  
Office of General Counsel

Two voting procedures:

1. Notation process: Commissioners receive information on matters for decision in the mail and they return their votes by mail.

2. Sunshine meetings: Commissioners gather in person to vote on an issue. Proxy voting is not allowed. If a commissioner does not attend, she cannot vote.

Federal Communications Commission

Contact: Sheldon Gutmann 202-418-1720  
Office of General Counsel

Number needed for a vote:

FCC has five commissioners. Only requires a majority of a quorum, or two, to decide an issue. The majority of a quorum rule may have resulted because the FCC continued for a long period with two vacant commissioner seats.

Two voting procedures:

1. Notation process: Commissioners receive information in mail. Each must approve with signature before action is taken.

2. Agenda meetings: Commissioners gather to vote. FCC allows an absent commissioner to leave their vote on paper with a commissioner present at the agenda meeting. However, at least a quorum, or three, commissioners must be physically present at a meeting to allow the remaining commissioners to leave paper votes.

Mr. Gutmann said that he considered leaving a paper vote proxy voting. When I explained my definition of a proxy vote as simply the power to cast another's vote, Mr. Gutmann said that the FCC had not focused on that distinction but he was fairly certain the FCC would not allow that type of proxy voting.

Defense Nuclear Facilities Safety Board

Contact: Andy Anderson            202-208-6400  
          General Counsel

Number needed to vote:

Three commissioners, so a majority equals a quorum

Voting procedure:

Commissioners vote on all decisions in person. An absentee commissioner may vote by paper. Mr. Anderson says they usually fax a ballot to the commissioner asking him to vote and make comments. Proxy voting, or leaving the power to vote with an attending commissioner, is not allowed.

Federal Trade Commission

Contact: Benjamin Berman        202-326-2513  
          Office of the Secretary

Number needed to vote:

Five commissioners. Need majority of a quorum to vote on a decision.

Two procedures for voting:

1. Notation voting: Commissioners receive information on matters for voting by mail and return their votes by mail.

2. Sunshine meetings: Commissioners gather to vote on an issue. Absent commissioners may send a representative to cast her vote but must tell the representative which way to vote, not simply give the power to vote. FTC allows commissioners to attend these meetings by telephone. One commissioner present at the meeting, one commissioner on the telephone, and one representative of an absent commissioner is a valid quorum.

In either of these procedures, if only four commissioners vote and they are evenly divided, FTC considers the tie vote as "no decision".

#### IV. MOTIONS, CIRCULATIONS, AND VOTING PROCEDURES

##### A. Overview

Rule 4.14 of the Commission Rules of Practice prescribes the procedures by which the Commission makes decisions. By its terms,

[m]atters before the Commission for consideration may be resolved either at a meeting under § 4.15 or by written circulation.<sup>36</sup>

The decisionmaking vehicle is the motion, and a Commissioner may at any time propose a course of action in that form. The Commissioners vote on motions either at a Commission meeting or on a written notation basis.

Rule 4.14(c) provides that "any Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners . . ."<sup>37</sup> Rule 4.14(b) provides that "a majority of the members of the Commission constitutes a quorum for the transaction of business."<sup>38</sup> Thus, when the Commission has four or five members, at least three Commissioners must participate in the decision on any given motion, by voting "yes," "no," or "abstain." The motion is approved only if a majority of the participating Commissioners votes "yes;" otherwise, it fails "for lack of a majority" or "for lack of a second [vote]."

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<sup>36</sup> 16 C.F.R. § 4.14(a).

<sup>37</sup> *Id.* § 4.14(c). Exceptions include instances where a greater majority is required by statute or rule, or where the action involved is taken by a single Commissioner pursuant to a valid delegation of authority. *Id.*

<sup>38</sup> *Id.* § 4.14(b).

## B. Agenda Matters, Motions, and Voting Procedures

Matters that warrant face-to-face discussion by the Commissioners are handled as "agenda matters" at open or closed Commission meetings.<sup>39</sup> In practice, the Commission has ordinarily discussed at such meetings matters in which an administrative or federal district court complaint is not accompanied by a consent agreement or decree. Under the Sunshine Act, a "meeting" is defined, with certain exceptions, as

the deliberations of at least the number of individual agency members required to take action . . . where such deliberations determine or result in the joint conduct or disposition of official agency business. . .<sup>40</sup>

The Rules of Practice provide that "Commission meetings shall be open to public observation unless the Commission determines that portions may be closed pursuant to 5 U.S.C. § 552b(c)."<sup>41</sup> The matters most frequently discussed at open meetings are trade regulation rules; guides and trade practice rules; and policy issues not implicating particular nonpublic enforcement efforts.<sup>42</sup> The Rules of Practice also provide that the

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<sup>39</sup> Commission Minutes, Volume 123, at 277 (October 13, 1971).

<sup>40</sup> 5 U.S.C. § 552b(a)(2); 16 C.F.R. § 4.15(a)(1). A quorum of Commissioners is required to take action at a Commission meeting. However, a Commissioner who is not physically present may authorize a member of his or her staff to report the Commissioner's vote, and thereby count toward a quorum for the purpose of taking action. 16 C.F.R. § 4.14(c). Commissioners participating in a meeting by telephone of course also may be counted toward a quorum for the purpose of taking action.

<sup>41</sup> 16 C.F.R. § 4.15(b)(1).

<sup>42</sup> Any person whose interest may be directly affected if a portion of a meeting is open may request, in writing, that the Commission close that portion for any of the reasons described in the exemptions portion of the Sunshine Act. The Commission "shall vote on such requests if at least one member desires to do so." 16 C.F.R. § 4.15(b)(2).

Commissioner to whom a particular open meeting matter has been assigned

shall have the authority to make available to the public, prior to consideration of the matter at an open meeting, material sufficient to inform the public of the issues likely to be discussed in connection with that matter.<sup>43</sup>

In practice, however, most Commission meetings are closed, because most matters forwarded to the Commission involve nonpublic investigations, and therefore satisfy one or more of the exemptions from the open meeting requirements of the Sunshine Act.<sup>44</sup> The Commission's practice has been to make certain kinds of determinations only at or after a closed meeting. In particular, the Commission typically convenes a closed meeting to consider any nonadjudicative matter in which the staff have recommended an administrative or federal district court complaint, and the prospective respondents or defendants have not signed a consent agreement or consent decree. All Commission employees may attend nonadjudicative closed meetings.<sup>45</sup> In addition, the Commission discusses adjudicative matters at one of two different types of closed adjudicative meetings. In the first type, the general adjudicative meeting, attendance is limited to the Commissioners, their personal staffs, the General Counsel and his or her staff, and the Secretary and his or her staff.<sup>46</sup> In the second type -- called an "executive session," and typically held after an oral argument -- the Commission has followed the practice of having only the Commissioners attend,

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<sup>43</sup> 16 C.F.R. § 4.15(b)(3).

<sup>44</sup> See 5 U.S.C. § 552b(c).

<sup>45</sup> The Rules of Practice provide that "[a]ll Commission employees and consultants [and "[s]tenographers or court reporters"] may attend nonadjudicative portions of any closed meeting . . ." 16 C.F.R. § 4.15(c)(1).

<sup>46</sup> See 16 C.F.R. § 4.15(c)(1).

with an attorney or economist advisor to the assigned Commissioner in attendance for the purpose of taking minutes.<sup>47</sup>

The Chairman -- and in his or her absence the most senior Commissioner present -- acts as the presiding official at Commission meetings, and the Commissioner assigned to each matter at a particular meeting moderates the discussion of that matter.<sup>48</sup> Any Commissioner may make a motion concerning such a matter at any time during the meeting. If the motion is seconded, it is discussed, and the presiding official then secures the vote of each Commissioner on the motion.<sup>49</sup> After the motion has been seconded, any Commissioner may move to amend it. If the motion to amend is seconded, it is discussed. Thereafter, the presiding official first secures the vote of each Commissioner on the motion to amend, and then secures the vote of each Commissioner on the underlying motion, as (or as not) amended.

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<sup>47</sup> After the minutes have been approved by the Commission -- pursuant to an adjudicative motion circulated by the assigned Commissioner only to the Commissioners themselves -- they are sealed in an envelope and stored in the safe in the Minutes Section. Commission Minutes, Volume 133, at 372 (November 25, 1979). Executive session minutes are not placed in the minutes books, and are accessible only to Commissioners and their staffs. See 16 C.F.R. § 4.15(c)(3).

<sup>48</sup> The Rules of Practice provide that the "presiding officer shall be responsible for preserving order and decorum at meetings and shall have all powers necessary to that end." 16 C.F.R. § 4.15(d).

<sup>49</sup> If the motion is not seconded, it is recorded in the minutes of the meeting as having failed for lack of a second.



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of the Secretary

October 12, 1994

**MEMORANDUM**

To: Commission

From: Donald S. Clark *DSC*  
Secretary

Subject: Office of the Secretary Procedures Manual  
1994 Edition

I am forwarding with this memorandum the 1994 edition of the Office of the Secretary Procedures Manual -- the SOS Manual -- which describes the procedures our office follows in executing its responsibilities for the Commission decisionmaking process. As you may know, Ben Berman in our office drafted the 1984 edition of the SOS Manual, and it has proven to be a very valuable summary of our procedures. The 1994 edition covers the same areas addressed by the 1984 edition, and in addition includes new discussions of the procedures the Commission has more recently approved. I would like to thank Jay Shaffer, Bonnie Jansen, Ben, Bruce Freedman, and Landis Plummer for their very helpful comments on this edition. I would also like to thank the staff in our office for their consistently excellent work in implementing the procedures described in the manual. I should note that, like the 1984 edition, the 1994 edition is intended for internal use by the Commission and the Commission staff. I would of course be happy to receive any comments you or your advisors may have on any aspect of this edition; it will be updated as necessary to account for those comments and for future changes in procedures.

Part I of the manual summarizes the functions of our office and its organization. Part II provides a summary of the Commission decisionmaking process, including the basic types of Commission matters; the usual chronology such matters follow; and the mechanics by which decisions are made at Commission meetings and through the notational voting process. Parts III and IV provide a more detailed discussion of the decisionmaking process, including assignments; the approval and use of compulsory process; interlocutory motions; Commission meetings; written circulations and notational voting; public record votes; actions taken pursuant to delegated authority; and our normal document processing schedule. Parts V through VII describe the computer reports we provide to your offices; the electronic and paper storage of Commission minutes; the preparation of Commission Opinions and Final Orders; and office terminology.

The manual also contains four appendices. The first describes how the Office of Public Affairs and our office coordinate the public release of official documents, and reflects some procedural modifications developed over the last four years. The second appendix describes the OSCAR.COM computer system, while the third provides an expanded list of types of Commission documents that follows the organization of the Commission Rules of Practice. The fourth appendix includes the public record Notices describing the two sets of procedures the Commission adopted on April 7, 1994.

I hope that the 1994 edition will be of use to you. Please let me know if you have any questions or comments. Thank you for your assistance!

## BRAC DEFINITIONS

Closure -- defined by DoD as "All missions of the installation have ceased or have been relocated; personnel positions (military, civilian and contractor) have either eliminated or relocated, except for personnel required for caretaking, conducting any ongoing environmental cleanup, and disposal of the base, or personnel remaining in authorized enclaves." In a closure, all missions carried out at a base either cease or relocate.

Realignments -- defined in the BRAC statute as "includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." In realignment, a base remains open but loses and sometimes gains mission.

Disestablishments and relocations refer to missions; those disestablished cease operations, while those relocated are moved to another base.

Redirections refer to cases in which the BRAC Commission changes the recommendation of a previous commission. (Unlikely with us, since the last commission was in 1995.)

# An Evaluation of the Proposed Change to the Commission's Dispositive Voting Rule

Attorney Work Product -  
Predecisional Advice

# Proposed Change to the Voting Rule

- A proposal has been made for the Commission to adopt a recusal-based rule, where “Commissioners who have recused themselves from a particular matter would be deemed to be *not serving with respect to that matter.*”

# Existing Bright-Line Voting Rule

- For dispositive action, “a majority of the members ... serving” must vote
- Contained in procedural rules adopted by the Commission
- The “majority of the members ... serving” rule
  - Has remained unchanged since 1991
  - Has been consistently interpreted since 1991
  - Has effectively required 5 votes since 1991

# Dispositive Action (Less “Adds”)

- Action on

- “(a) the recommendations of the Secretary submitted to the Commission in accordance with the Act,
- “(b) the Commission's report to the President in accordance with the Act, or
- “(c) a revised list of recommendations in accordance with the Act”

# Statutory Revisions for 2005

- The Defense Base Closure and Realignment Act of 1990 was amended for the 2005 Commission to require:
  - 9 rather than 8 commissioners
  - 7 of 9 votes to “add” a closure or realignment
- The Act was not amended to alter the bright-line “majority of the members ... serving” rule requiring 5 votes for dispositive action in effect since 1991

# Effect of Statutory Revisions I

- Introduction of the “7 of 9” “add” rule
  - Without 7 votes, there is no “add”
  - Admits no exceptions regardless of absences, recusals, or attrition of Commissioners
  - Consistent with the bright-line “majority of the members ... serving” rule that had been present in the Commission rules since 1991, which admitted no exception other than attrition

# Effect of Statutory Revisions II

- Expansion from 8 to 9 Commissioners:
  - Diminished the “parliamentary advantage” enjoyed by the Department of Defense recommendations in a body of 8
    - 5 of 9 votes is easier to obtain than 5 of 8
  - Reduced the likelihood of a tie vote
    - Tie votes (4 to 4) resulted in failure of motion
- Under expanded 9-member Commission, 5 votes are still required to carry a motion

# Comparison of Bright-Line Rule to Recusal-Based Rule

Voting Members	9	8	7	6	5
“Adds” under Statute	7	7	7	7	7
Proposed Change	7	7	7	7	7
Bright-Line Rule	5	5	5	5	5
Proposed Change	5	5	4	4	3
Difference in Votes			1	1	2

# Incidence of Recusals Correlated with Voting Rule Comparison

Voting Members	9	8	7	6	5
Incidence	100	67	18	5	0
“Adds” under Statute	7	7	7	7	7
Proposed Change	7	7	7	7	7
Bright-Line Rule	5	5	5	5	5
Proposed Change	5	5	4	4	3

Attorney Work Product -  
Predecisional Advice

# Change

- **Must be justified in context**
  - Current bright-line rule is consistent with expectation established by past practice
  - Current rule is consistent with bright-line “7 of 9” statute rule
  - Proposed recusal-based change would please some stakeholders by improving their perceived position, but displease others by degrading their perceived position

# Advantages of Bright-Line Rule

- “Majority” is determined by an unchanging, objectively established count, not by shifting, subjectively established recusals
  - Later legal challenges will find no traction attacking the bright-line rule, but may make headway against the subjective judgment of individual recusals
- “Substantial participation” need not be defined

# Drawbacks of Recusal-Based Rule

- Recusals will become determinative of the entire Commission's threshold of action
- As the number of recusals increase, the size of the majority will decrease
  - With 3 recusals, "4 of 9" would constitute a majority
  - With 4 recusals, "3 of 9" would constitute a majority

# Drawbacks of Recusal-Based Rule

- Political pressure on individual Commissioners to exercise or withdraw recusals in particular cases will escalate dramatically
  - Exposure to potential criminal liability
  - Perceptions of political manipulation of what was designed to be an objective process

# Drawbacks of Recusal-Based Rule

- Intemperate statements by individual Commissioners will have greater impact on the legitimacy of the Commission's work as whole
  - Receive greater scrutiny
  - Provide basis for recusal and legal challenge
  - Rejoinders and rebuttals will increase perception of political manipulation

# Drawbacks of Recusal-Based Rule

- “Substantial participation” will become a matter of interminable public debate

# Recommendation

- Make no change to the existing bright-line rule
- Provide Senators Warner and Stevens with this brief via counsel
- Respond to Senators Warner and Stevens via public letter reassuring them and the public that the Commission will not be hobbled by multiple recusals