

October 6, 1978

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY
IN WHICH COMMISSIONER JAMES H. QUELLO JOINS
DISSENTING IN PART; CONCURRING IN PART

In Re: Letter to Department of Defense on Proposed Briefing Regarding
International Facilities Planning, Docket No. 18875.

I dissent to that portion of the Commission's letter which requires DOD to submit statistical information, and a legal brief, as conditions to our accepting its offer of a classified briefing on interception of secure satellite transmissions. I concur with paragraph 2 of the letter, which requests information necessary to allow us to comply with the Sunshine Act.

We are scheduled to rule upon petitions for reconsideration in the Docket No. 18875 proceeding on October 25, merely two weeks from now. DOD's offer to give us a briefing came at oral argument on August 7, more than two months ago. Yet, we are requiring this extensive information and legal brief at this late date as preconditions to accepting DOD's offer. We may reasonably ask the questions which the letter poses, and DOD can be requested to answer them at the briefing or by separate letter, but making DOD respond before we decide if we should have the briefing seems, to me, improper.

The Commission is obligated to base its decision on all relevant information. While DOD may have been derelict in not providing us at an earlier stage in this proceeding with material which it considered relevant, this does not relieve the Commission of its obligation to accept its offer. Instead, we should accept DOD's offer of a classified briefing (if DOD submits information to show it is properly classified) and request submission, into the public record if possible, of relevant statistical data. Additionally, we should request all parties, not just DOD, to inform us of precedents on the use of national security information in administrative

154

proceedings. This will assist us at decision time to determine what use we can make of relevant material from the briefing. Finally, we should place any non-classified information disclosed at the briefing into the public record and request DOD to assist us to isolate classified and non-classified material in the structuring of its presentation, if possible.