

March 27, 1984

(2) Procedures at Commission Level

In re: Policy With Respect to Counting Votes of Departing (and Arriving) Commissioners

Circulated by Chairman Miller.

March 22, 1984 - Background: In memorandum dated December 30, 1983, the General Counsel submitted an analysis, in response to Commissioner Pertschuk's request for an opinion as to whether Commissioner Clanton's vote should count in AMREP, which drew the following conclusions: (a) the law does not prescribe a policy for counting departing or arriving Commissioners' votes; (b) the Commission, therefore, may establish whatever policy it determines appropriate; and (c) the Commission has not established a policy with respect to this matter. The General Counsel recommended that the Commission establish a policy and that, as a matter of policy Commissioner Clanton's vote should be counted in AMREP.

By non-agenda memorandum circulated February 29, 1984, Chairman Miller moved that the Commission establish a formal policy on the votes of departing and arriving Commissioners and provided a discussion of the major issues to be considered.

By non-agenda memorandum of March 14, 1984, Commissioner Pertschuk moved that the Commission adopt the following procedure: the vote of a Commissioner on a matter shall not be counted if voting on the matter has not been completed at the time of the Commissioner's departure. Said motion failed for lack of a majority.

In walk-around memorandum of March 16, 1984, Commissioner Bailey moved that the Commission stay any decision whether to replace the existing practice with the Chairman's proposal (or any other proposal) until the General Counsel's office has reviewed the circumstances in which the proposal would apply, and has determined whether the proposal satisfies the legal requirements for agency action that (1) the deliberative process be completed before agency decisions are considered final; (2) procedural fairness and the due process be accorded respondents; and (3) a quorum be present for the transaction of Commission business. Said motion failed for lack of a majority.

By walk-around matter of March 21, 1984, Chairman Miller circulated a memorandum that he had requested from the General Counsel in response to Commissioner Bailey's motion in her March 19, 1984, memorandum. Chairman Miller also advised that since the deadline for voting on this matter was 5:00 p.m. March 21, he had withdrawn his vote in order to toll the final time for decisionmaking and to give the Commissioners the opportunity to consider the GC's memorandum. Chairman Miller also advised that he would recast his vote at 5:00 p.m. on March 22, at which time the voting will be closed, unless there was another change of vote by a Commissioner who had previously voted in the majority.

By non-agenda matter of March 22, 1984, Commissioner Bailey circulated "For Information" her dissenting statement. Commissioner Bailey requested that her views be reflected in the Commission records pertaining to this matter and should accompany any public dissemination of the new practice.

Commission Action: The Commission formally adopted the policy that

4:103

March 27, 1984

the votes of a departing Commissioner always count, except in instances where they are displaced by the votes of his or her successor.

Commissioner Bailey's Dissenting Statement was referred to the Secretary for placement on the public record.

For the public record, Commissioners Miller, Douglas and Calvani were recorded as voting in the affirmative. Commissioners Pertschuk and Bailey were recorded as voting in the negative.

(3) Testimony/Statements

In re: Statement of Chairman James C. Miller III, Before the Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies of the Committee on Appropriations, U.S. House of Representatives - March 19, 1984

Circulated by Mr. Miller.

March 22, 1984 - Submission: With non-agenda matter of March 16, 1984, Chairman Miller circulated "For Information" his statement before the appropriations committee concerning the Commission's budget for 1985.

Commission Action: The Commission acknowledged receipt of the above statement.

(4) Docket 9017 - Horizon Corporation (Program Code: N06)

Circulated by Ms. Bailey.

March 22, 1984 - Background: On November 22, 1984, the Commission authorized a civil penalty action charging Horizon with violation of the Commission's final order of May 15, 1981, by failing to make a \$2.4 million payment to the consumer redress trust fund that was due June 1, 1983. The proposed complaint, which the Justice Department filed in the District of Arizona on January 27, 1984, sought civil penalties and injunctive relief requiring Horizon to make the June 1, 1983, payment, as well as the interest due on that payment, and all future payments required under the Order.

Submission: In letter dated January 4, 1984, Horizon Corporation proposed to make the debenture payment that was due June 1, 1983, into the Trust Fund on May 15, 1984, plus the applicable interest due for failing to make the payment on time, and as security for the payment to execute a deed of trust covering 225 fully developed lots in the Park Forest subdivision of Waterwood which could be sold if Horizon failed to make the past due payment of \$2,417,000 plus accrued interest.

Staff Recommendation: In memorandum of January 27, 1984, the staff of the Bureau of Consumer Protection, with the Bureau Director's concurrence, recommended that the Commission reject the settlement proposal. Draft letter was submitted.

By non-agenda matter of March 8, 1984, Commissioner Bailey recommended that the Commission reject Horizon's settlement offer and send the letter submitted by staff.

Commission Action: After consideration of Horizon's proposal the Commission found it to be unacceptable.

It was directed that Horizon Corporation be advised that the BCP staff was prepared to discuss with the company and its counsel the specific deficiencies in its proposal. It was further directed that