

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-371

TITLE FEDERAL COMMUNICATIONS COMMISSION, ET AL., Petitioners
v. ITT WORLD COMMUNICATIONS, INC., ET AL.

PLACE Washington, D. C.

DATE March 21, 1984

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 FEDERAL COMMUNICATIONS COMMISSION, :
4 ET AL., :
5 Petitioners :
6 v. : No. 83-371
7 ITT WORLD COMMUNICATIONS, INC., :
8 ET AL. :
9 - - - - - x
10 Washington, D.C.
11 Wednesday, March 21, 1984
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 1:13 p.m.
15 APPEARANCES:
16 ALBERT G. LAUBER, JR., ESQ., Washington, D.C.;
17 on behalf of Petitioners.
18 GRANT S. LEWIS, ESQ., New York, N.Y.;
19 on behalf of Respondents.
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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Federal Communications Commission against ITT
4 World Communications, Incorporated.

5 Mr. Lauber, I think you may proceed whenever
6 you're ready.

7 CRAL ARGUMENT OF ALBERT G. LAUBER, JR., ESQ.,
8 ON BEHALF OF PETITIONERS

9 MR. LAUBER: Mr. Chief Justice and may it
10 please the Court:

11 This case arose out of a multinational
12 telecommunications conference held in Dublin, Ireland,
13 in 1979. That conference was attended by
14 representatives of six European nations, of Canada, and
15 by three members of our Federal Communications
16 Commission.

17 Respondent ITT believes that the three
18 attending Commissioners had engaged at Dublin in certain
19 discussions that were hurtful to ITT's financial
20 interest. In particular, ITT suspected that the three
21 attending Commissioners had tried to encourage their
22 European counterparts to enter into operating agreements
23 with two American companies that the FCC had recently
24 authorized to compete with ITT in the Atlantic market.

25 Accordingly, ITT launched a three-pronged

1 attack designed to prevent such discussions from
2 happening again. First, it filed a rulemaking petition
3 with the FCC challenging the authority of the attending
4 Commissioners to take part in the kind of discussion
5 held in Dublin and seeking the promulgation of rules to
6 govern any future multinational conferences if any were
7 in fact held.

8 Secondly, ITT filed a complaint in the
9 district court which also challenged the authority of
10 the Commissioners to take part in the kinds of
11 discussions held in Dublin and which sought declaratory
12 and injunctive relief against such asserted ultra vires
13 conduct in the future.

14 And third, in a different count of the
15 district court complaint, ITT contended that the Dublin
16 gathering and other European gatherings were meetings of
17 the FCC within the meaning of the Sunshine Act and that
18 those gatherings therefore had to be open to the
19 European public and be governed by all of the other
20 procedural requirements that the Sunshine Act imposes.

21 The case as it comes here presents two
22 questions. The first concerns the jurisdiction of the
23 district court to entertain ITT's charge that the
24 Commission had engaged in ultra vires conduct. The
25 second question concerns the proper construction of the

1 Sunshine Act.

2 QUESTION: In the range of preliminaries, I
3 understand now from the reply brief that your office
4 filed that the Telecommunications Committee has now been
5 eliminated?

6 MR. LAUBER: It's been disbanded, that's
7 correct.

8 QUESTION: And also, the number of
9 Commissioners has been reduced from seven to five?

10 MR. LAUBER: From seven to five, right.

11 QUESTION: Is there any question of movement
12 now on the Sunshine Act issue?

13 MR. LAUBER: I don't think there is, Justice
14 O'Connor, because the FCC has scheduled additional
15 conferences. There is one meant to be held in Toronto
16 next month, and they plan to attend.

17 QUESTION: At least three of the Commissioners
18 plan to attend?

19 MR. LAUBER: Well, that may depend on what the
20 Court decides, who goes. But since the Commission
21 intends to have future consultations, I think the
22 problem is likely to arise again.

23 I would like to address the jurisdictional
24 question very briefly first. Our position here is that
25 the district court had no jurisdiction to consider IIT's

1 charges of ultra vires conduct by the Commission,
2 because ITT had already submitted that same ultra vires
3 argument to the Commission in its petition for
4 rulemaking.

5 The Commission considered that ultra vires
6 charge in denying the petition for rulemaking. That
7 denial was a final order of the FCC and under Section
8 402(a) of the Communications Act exclusive jurisdiction
9 to review that final order lay in the Court of Appeals.

10 QUESTION: Do you say the district court would
11 have had no jurisdiction, Mr. Lauber, even had the ITT
12 not submitted the matter to the Commission?

13 MR. LAUBER: Well, I guess I have two answers
14 to that. ITT claims both that there is enough
15 difference between the two causes of action to give the
16 district court jurisdiction. We disagree with that
17 because, even if there is some difference, they are
18 similar enough that under this Court's reasoning in
19 Whitney National Bank the district court would still
20 lack jurisdiction.

21 But as a third position we say that, even if
22 they had failed to make the ultra vires claim before the
23 Commission, under the doctrine of primary jurisdiction
24 the district court would have been required to stay its
25 hand until the --

1 QUESTION: That's not quite the same thing as
2 saying they have no jurisdiction.

3 MR. LAUBER: That's correct, that's absolutely
4 correct.

5 We contend, therefore, that because the claim
6 was pending before the FCC the district court lacked
7 jurisdiction to consider what was in effect a collateral
8 attack on the FCC decision and an attempt to evade the
9 statutory review procedures that Congress has mandated.
10 We think that reversal of the Court of Appeals on this
11 issue is required by this Court's decision in Whitney
12 National Bank, a case that ITT has not cited or
13 discussed in either of its briefs in this Court.

14 If there are no further questions, I will now
15 turn to the Sunshine Act issue. The Sunshine Act's open
16 meeting rules apply only to meetings of an agency, as
17 defined in the Act. Under the Act's definitions, a
18 gathering that is attended by members of an agency is a
19 meeting of the agency only if four distinct elements are
20 present --

21 QUESTION: Incidentally, Mr. Lauber, at whose
22 instigation was the Dublin meeting closed? The American
23 Commissioners?

24 MR. LAUBER: I am informed that the way --
25 these date back to 1974, and I understand at the close

1 of every multinational session, as the last item on the
2 agenda, the various foreign participants and the
3 Americans would decide when to have the next meeting and
4 what might usefully be discussed there. Then the staff
5 level people would arrange the detailed agenda, the
6 place to have it, and so forth.

7 So that all the meetings were called by
8 consensus, as it were, and the Dublin session I think
9 was no exception to that rule.

10 The four requirements of a meeting of the
11 agency under the Act are:

12 First, that the members who attend must be a
13 quorum of the full agency or a quorum of a subdivision
14 authorized to act on behalf of the agency;

15 Second, the attending members must engage in
16 deliberations;

17 Third, those deliberations must determine or
18 result in joint conduct or disposition of official
19 agency business;

20 And finally, if those three things are met,
21 the meeting, if such it is, must be a meeting of the
22 agency.

23 If any one of these four definitional
24 components is absent, the Sunshine Act can have no
25 application. We contend that, with respect to the

1 multinational gatherings involved here, all four
2 elements were missing. But today I'd like to focus on
3 just two of the definitional components: the first
4 component, that is, a requirement of authorization to
5 act on behalf of the agency; and the fourth element,
6 that is, the requirement that the meeting be a meeting
7 of the agency.

8 In our view, upon a proper construction of the
9 Sunshine Act the district court was required as a matter
10 of law to award summary judgment to the FCC on either of
11 these two independently sufficient grounds.

12 First, then, as to the authorization to act
13 requirement. All parties here agree that the members
14 who attended these European gatherings were not a quorum
15 of the full Commission. At all relevant times, the
16 Commission had seven members, so a quorum was four.
17 However, at no time did more than three members of the
18 Commission attend the consultative process.

19 However, those three attending members were
20 members and a quorum of a subdivision of the Commission,
21 that is, the Telecommunications Committee. The question
22 therefore is whether that committee, those three
23 attending members, were authorized to act on behalf of
24 the Commission at the European sessions.

25 QUESTION: So as to bind all seven, or a

1 majority of seven, is that what you mean?

2 MR. LAUBER: Well, whatever the term
3 "authorization" means, and I will now explain what we
4 think it means. We think it must be interpreted to
5 involve some kind of power to bind the others. We think
6 that was absent here.

7 Now, in order to define whether or not the
8 three attending members were in fact authorized to act
9 on behalf of the entire body in Europe, one must turn to
10 the organic statute that created the FCC, the
11 Communications Act. That statute, like most such
12 statutes, has a provision which empowers the FCC to
13 delegate its authority, either to panels of
14 Commissioners, to individual Commissioners, to boards of
15 employees, or to single employees.

16 The Communications Act provides that such a
17 delegation of authority can be made only by published
18 rule or by order. It further provides that such a rule
19 or order can be adopted, modified, or rescinded only by
20 a majority vote of the full Commission.

21 Now, in fact the FCC by rule has delegated a
22 great deal of authority to various groups and
23 individuals within the Commission. These delegation
24 orders occupy some 20 pages in 47 CFR Subpart F. Now,
25 among these many delegation orders, only one delegates

1 authority to the Telecommunications Committee as it
2 formerly was. That delegation order formerly authorized
3 the committee to act upon applications for certificates
4 of public convenience and necessity filed by common
5 carriers under Section 214 of the Act above a certain
6 dollar range.

7 Now, Section 214 applications are required to
8 be filed by common carriers before they can acquire
9 facilities to initiate new service. Section 214
10 applications are handled in a relatively formal
11 proceeding where the applicant submits a brief in
12 support of his application, opponents, typically
13 competitors, file opposing briefs, called petitions to
14 deny, and the applicant then submits a reply brief. On
15 the basis of the pleadings, the committee or the full
16 Commission will then either grant or deny the
17 application.

18 Neither court below found or even suggested
19 that the three attending Commissioners were acting on
20 Section 214 applications in Europe. Moreover, those
21 three attending Commissioners of that committee had
22 received no other delegation of authority from the FCC
23 to act on behalf of the Commission in Europe or anywhere
24 else.

25 Accordingly, in our view it's perfectly plain

1 that those European -- because the Commissioners had not
2 been authorized to act on behalf of the FCC, those
3 gatherings were not meetings of the FCC as a matter of
4 law, and that's the end of the case.

5 Now, the Court of Appeals agreed that the
6 three attending Commissioners had received no formal
7 delegation of authority from the full FCC. Rather, the
8 D.C. Circuit hypothesized that the FCC, in violation of
9 the Communications Act, had made a sub rosa delegation
10 of authority, not evidenced by a published rule or
11 order, to the three attending Commissioners.

12 The court below based this hypothesis entirely
13 upon inference, an inference it drew from the facts that
14 the attending Commissioners went to Europe in their
15 official rules and that they there discussed matters
16 that were important to the FCC.

17 In our view, this reasoning is just plain
18 wrong. First of all, we know of no authority for the
19 proposition that an agency, in the face of an explicit
20 delegations of powers provision in its statute, can
21 somehow delegate authority in any other way.

22 QUESTION: Is there any authority to hold
23 meetings outside of the continental limits of the United
24 States? Is there anything, as with courts, that fixes
25 the place that they must meet?

1 MR. LAUBER: I'm not sure, Mr. Chief Justice.
2 I believe that there is something in the statute of the
3 FCC which requires that it normally meet in Washington,
4 D.C. I'm not aware if panels could conduct activities
5 elsewhere.

6 QUESTION: It would be somewhat unusual, would
7 it not, for a regulatory agency to hold meetings to take
8 action in Dublin or Paris or Rome?

9 MR. LAUBER: I think it would be unusual, but
10 I am not sure whether there is any express provision
11 mandating that they hold meetings in the continental
12 U.S. But we will try and find out before the reply.

13 Secondly, the second reason the unofficial
14 delegation theory will not work, is that the assumption
15 of an illegal delegation by the court below was wholly
16 contrary to the presumption of regularity that normally
17 is accorded administrative action.

18 Thirdly, the Court of Appeals' theory we think
19 proves too much. It has no limiting principle. If
20 unofficial delegation can be inferred in the absence of
21 an explicit delegation, a meeting could be held to be
22 held whenever members of an agency go somewhere in their
23 official roles and talk about important business. It
24 would apply to seminars, lectures, trade group meetings,
25 and all the rest of it.

1 QUESTION: Mr. Lauber, what does it mean when
2 you use the term "go somewhere in their official role"?
3 Does that mean they're getting paid for transportation
4 and per diem?

5 MR. LAUBER: Well, I think that's what the
6 Court of Appeals must have meant, that they were going
7 on Government time; they were being invited because of
8 who they were, i.e., Commissioners, not tourists or the
9 like; and that they were there because they were
10 Commissioners.

11 The Europeans wanted them there as
12 Commissioners. The whole process grew out of
13 misunderstanding by the Europeans, who are accustomed
14 to --

15 QUESTION: Well, what does it mean to be
16 somewhere as a Commissioner?

17 MR. LAUBER: I guess it means to be somewhere
18 and be able to speak with some authority about the
19 Commission's interests and objectives, what it hopes to
20 accomplish. The Court of Appeals -- we agreed below
21 that they were attending in their official roles. No
22 one said what that meant.

23 QUESTION: Well then, why did you agree to
24 it?

25 MR. LAUBER: Well, because we agreed --

1 QUESTION: If you didn't know what it meant?

2 MR. LAUBER: -- that the whole -- it wasn't
3 down there, but --

4 (Laughter.)

5 MR. LAUBER: Because it was clear that the
6 Europeans wanted the Commissioners there because they
7 were Commissioners and because they had some kind of
8 authority to speak about what was important. They
9 weren't just commentators or lecturers or scholars.
10 They were part of the American Government bureaucracy.
11 And the Europeans in the past have been frustrated
12 because they would cut a deal with a carrier and the
13 Commission would come in and veto it, and they didn't
14 like not knowing what was going on.

15 They wanted to meet the Commissioners and talk
16 to them personally.

17 QUESTION: And cut a deal with them, too.

18 (Laughter.)

19 MR. LAUBER: A fourth problem with the Court
20 of Appeals' theory we think is that it will make it
21 impossible to administer the Sunshine Act as Congress
22 intended. The Act's rules operate generally
23 prospectively. That is, if an agency plans to hold a
24 meeting it must announce the time of the meeting, the
25 place, agenda, in advance of the meeting. It must also

1 announce in advance whether or not the meeting will be
2 open or closed to the public.

3 Congress therefore, we think, must clearly
4 have presumed that --

5 QUESTION: Mr. Lauber, that's the question I
6 really wanted to get at. Who makes that determination
7 as to whether it will be open or closed to the public?

8 MR. LAUBER: Well, under the Sunshine Act it
9 requires the agency to vote by a majority vote whether
10 or not to close the meeting under one of the ten
11 exceptions under the Sunshine Act, and they must record
12 those votes, publish who voted how on the record within
13 a week, I think, after the votes are taken.

14 QUESTION: But in these European meetings, who
15 makes the determination?

16 MR. LAUBER: Well, they've never really been
17 forced to face the issue until this lawsuit began. I
18 assume it would have to be done by some kind of
19 consensus. There were people from seven or eight
20 European nations and from the United States, and if it
21 were simply a majority vote --

22 QUESTION: At least the record, then, does not
23 show that the American representatives requested and
24 obtained the closed --

25 MR. LAUBER: Oh, no, I'm sorry. That's not

1 correct. I think the record does show that it was the
2 FCC that requested that the Dublin session be closed
3 when discussion came around to the issue of new carriers
4 and services, and that the Europeans went along with
5 that.

6 But what I'm talking about is the power to
7 effect this. Congress clearly presumed that an agency
8 would be able to know ahead of time whether it was going
9 to have a meeting or not, and if the status of a
10 gathering as a meeting depends not on an objective
11 indicia of a delegation of authority by statute, but on
12 some appellate court's inference about whether
13 delegation had been illegally conferred, the agency can
14 never know ahead of time whether a gathering will be a
15 meeting or not.

16 Finally, we think that the Court of Appeals
17 theory would facilitate a great deal of harassment of
18 regulatory bodies by those who wish to frustrate the
19 administrative process. If authority to act can be
20 inferred in the absence of an explicit delegation of
21 power, people can go around filing lawsuits challenging
22 almost any discussions members have as putative meetings
23 under the Sunshine Act.

24 Such litigants would typically demand the
25 right to have discovery as to all items, all information

1 that might bear upon the existence vel non of a sub rosa
2 illegal delegation. And we think this would convert the
3 Sunshine Act into just another weapon that litigants can
4 use to stifle administrative action they don't want to
5 see happen.

6 So for all these reasons, it is our contention
7 that the Court of Appeals was wrong in believing that
8 authorization to act on behalf of an agency can be
9 inferred in the absence of an explicit delegation of
10 authority made pursuant to statute. Accordingly,
11 because there was no official delegation made here,
12 summary judgment was dictated in favor of the
13 Commission.

14 I would like to pass over the next two
15 components of the definition and go to the fourth one,
16 that is, the requirement that the meeting be a meeting
17 of the agency. It is our position that even if one
18 could infer authorization to act here, the European
19 gatherings would not be covered by the Act, because even
20 if meetings, they were not meetings of the FCC.

21 Now, requiring that a meeting be an agency
22 meeting, Congress we think clearly intended that the
23 meeting must be run by and under the control of the
24 agency in question.

25 QUESTION: May I interrupt just to ask, what

1 statutory language do you rely on for this fourth
2 requirement? I don't see this requirement there in so
3 many words.

4 MR. LAUBER: Well, it's the prepositional
5 phrase "of the agency" and then the line in subsection
6 (b) of "agency meeting".

7 QUESTION: But it's "take action on behalf of
8 the agency." That's where the "of" appears.

9 MR. LAUBER: Right, but I think there's a
10 section --

11 QUESTION: I thought you relied on the joint
12 conduct. You don't rely on the joint conduct language?

13 MR. LAUBER: Well, we do rely upon that, but
14 only on the briefs. I'm not going to address that
15 orally now. We do rely upon the other two, the
16 deliberations requirement and the joint conduct
17 requirement.

18 QUESTION: But I'm still -- I must confess, I
19 have the statute in front of me; I don't know what
20 language you say requires that it be a meeting of the
21 agency. I guess it would be helpful to me to be able to
22 know.

23 We're talking about, I take it, 552(b)(A)(2),
24 the definition of the term "meeting"?

25 MR. LAUBER: I think what I'm talking about is

1 subsection 552(b)(B). It says at the end there, the
2 bottom of page 1A of the appendix: "Except as provided,
3 every portion of every meeting of an agency shall be
4 open to public observation." That's where the public
5 observation requirement comes in.

6 QUESTION: Thank you. Okay, I was lost. I'm
7 sorry.

8 MR. LAUBER: So that's our fourth test, that
9 the meeting must be a meeting of the agency, and we
10 think that Congress meant that that implied the meeting
11 be run by, under the control of, the agency. Otherwise,
12 clearly the agency could not ensure that the Act's
13 various rules were complied with.

14 In fact, the statute uniformly presupposes
15 that the agency will be in control of the meeting. For
16 example, it presumes that the agency can set the time,
17 place and agenda of the meeting unilaterally. The Act
18 presumes that the agency can issue rules that will
19 govern the meeting and bind all concerned. And the Act
20 assumes that the presiding officer of the meeting will
21 be a member of the agency.

22 Here we think the multinational gatherings
23 held in Europe were plainly not under the control of or
24 run by the members of the FCC who attended.

25 QUESTION: Would you say there was no meeting

1 that took place if there had been an explicit delegation
2 to the people who attended this international meeting
3 with authority to vote in favor of a certain resolution
4 in a way that would bind, would purport to bind the
5 agency?

6 MR. LAUBER: We would contend that, because
7 even then --

8 QUESTION: It still wouldn't be a meeting?

9 MR. LAUBER: It would not be a meeting of the
10 agency.

11 QUESTION: Even if that action was within the
12 scope of the authority and would bind the agency?

13 MR. LAUBER: That's our position, because even
14 if they had authority to take action, they could not
15 control the meeting so as to ensure the Act was complied
16 with.

17 QUESTION: Well, there were just two meetings
18 going on at the same time. They certainly were in
19 control of their part of the meeting. They voted.

20 MR. LAUBER: But all they could do would be to
21 leave.

22 QUESTION: They voted in accordance with their
23 instructions.

24 MR. LAUBER: And our position --

25 QUESTION: They were in complete charge of

1 their part of the meeting.

2 MR. LAUBER: They were, but they could not
3 force the other attendees to let the public come in and
4 see them vote. All they could do would be to walk out
5 of the meeting. And our position is that --

6 QUESTION: Well, couldn't it be kind of like a
7 caucus within the meeting? I mean, the three of them
8 caucusing among themselves to react to whatever was
9 going on at the larger meeting, and it's a meeting
10 within the meeting sort of thing.

11 MR. LAUBER: Well, I don't know how that would
12 -- how you could administer that in the real world. I
13 guess it's possible in some way to excise the --

14 QUESTION: Well, in the real world that
15 happens all the time in big meetings.

16 (Laughter.)

17 QUESTION: Is it correct -- may I ask this,
18 just as I am sorting it out -- that you don't deny that
19 it's a meeting for this argument? You're just saying
20 it's not a meeting that must be open to the public?

21 MR. LAUBER: Right. The delegation argument
22 is entirely separate.

23 QUESTION: I understand.

24 MR. LAUBER: We're now saying that, even if
25 you say it's a meeting, they have authority to do

1 something, still it would not be a meeting of the FCC
2 that they could control and open up to the public if
3 they didn't run it.

4 QUESTION: Well, the statute doesn't require
5 that it be open to the public unless it's a meeting of
6 the agency.

7 MR. LAUBER: Right, that's correct.

8 QUESTION: Even though it is a meeting.

9 MR. LAUBER: Now, here the meetings, if such
10 they were, were held on foreign soil, they were hosted
11 by foreign governments, they were chaired by foreign
12 officials, they were attended by foreign representatives
13 of foreign governments who outnumbered the attending
14 Commissioners and equaled them in rank.

15 We think it is quite clear here that the
16 attending Commissioners were in no position to decree
17 that the meetings be governed by U.S. law or be open to
18 the public. And if the Europeans objected to having the
19 meetings open to the public and governed by U.S. law, as
20 well they might, the Commissioners would be forced to
21 have in effect a Hobson's choice: Either not to go to
22 the meeting or to go and violate the Sunshine Act.

23 QUESTION: What are the sanctions for a
24 violation of the Sunshine Act?

25 MR. LAUBER: I believe, Justice Rehnquist,

1 they're all prospective. The Act provides that you
2 cannot invalidate something that was done at an
3 improperly closed meeting.

4 QUESTION: But you have to appear before the
5 Supreme Court.

6 (Laughter.)

7 MR. LAUBER: What the remedies are, in
8 district court you can get an injunction enjoining
9 compliance with the Act in the future, and you can get
10 release of a transcript which would be required to be
11 made of a closed meeting if the Act were applicable.

12 And we think that to require the Commissioners
13 to either forego the meeting or go and violate the law
14 was not what Congress would have intended when it
15 enacted the statute, because the Act was meant to impose
16 procedural restraints on existing meetings, not to
17 impose substantive restrictions on agency action.

18 Therefore, again, even if one were to assume
19 these were meetings, they were not meetings of the
20 agency because they were not controlled by the agency,
21 and therefore on that separate ground summary judgment
22 was dictated in favor of the Commission.

23 If there are no further questions, I'll
24 reserve the balance of my time.

25 CHIEF JUSTICE BURGER: Mr. Lewis.

1 ORAL ARGUMENT OF GRANT S. LEWIS, ESQ.,
2 ON BEHALF OF RESPONDENTS

3 MR. LEWIS: Mr. Chief Justice, may it please
4 the Court:

5 Before addressing the FCC's legal arguments,
6 there are a number of additional facts that I think
7 should be called to the Court's attention to put this
8 litigation in its proper context.

9 In the mid-1970's there was a significant
10 disagreement between the FCC and representatives of
11 European governments as to the nature of the facilities
12 that should be constructed to handle the increasing
13 trans-Atlantic communications traffic. Basically, the
14 FCC favored use of satellites, the European governments
15 favored the use of cable.

16 As a result of the give and take of the
17 consultative process, meetings which had been going on,
18 the FCC basically agreed to defer to the Europeans and
19 authorized the construction of so-called TAT, for
20 trans-Atlantic, 7, the TAT-7 cable.

21 Now, at about the same time the FCC, which of
22 course for many years has sought to foster domestic
23 competition in the provision of communications services,
24 also sought to apply these policies to the international
25 arena and, in a significant departure from prior

1 practice, it authorized a number of new companies to
2 provide international service, even though they had
3 never entered into agreements with the European
4 governments with which they would have to deal.

5 At about the time -- and this is about the
6 same time. At the time of the TAT-7 decision,
7 authorizing TAT-7, Commissioner Fogerty, a key member of
8 the Telecommunications Committee of the Commission, the
9 committee charged with its express delegation of
10 authority with authorizing construction of major new
11 facilities, issued a concurring opinion. He stated that
12 the FCC was deferring to the European governments even
13 though he didn't believe that a new cable was
14 appropriate.

15 But he went on to say, we expect the tit for
16 the TAT, and specifically threatened that unless the
17 European governments agreed to deal with the new
18 American carriers the FCC would not listen to them in
19 the future. This is October 1978. The text is set
20 forth in paragraph 8 of our complaint.

21 In March '79 at a consultative process
22 meeting, Commissioner Fogerty again made a speech seeing
23 the tit for TAT, the quid pro quo, and making it clear
24 he is not just speaking for himself but for the full
25 FCC. In May of 1979, Chairman Ferris of the Commission,

1 and of course a member of the Telecommunications
2 Committee, testified before Congress that the Commission
3 was in the process of trying to apply leverage on the
4 European governments.

5 But despite all this, when it came time for
6 the October 1979 consultative process meeting in Dublin,
7 not a single European government had backed down, not a
8 single European government had acceded to the FCC
9 demands.

10 It's at this point that the FCC convened the
11 closed meeting from which representatives of the
12 American carriers were excluded. This was a basic
13 departure from past consultative process meetings, which
14 were open to all interested parties.

15 There's no question that this was done at the
16 instance of the FCC. The FCC so admitted in its answer
17 to interrogatories that we served, which are contained
18 in joint appendix page 116. They also admitted so in
19 their brief to the Court of Appeals, as the Court of
20 Appeals' decision memorializes on page 6 of that
21 decision.

22 The FCC then called this special meeting. I
23 would also point out that there were nine
24 representatives of the FCC, three Commissioners, six
25 members of Commission staff, at the meeting, as compared

1 to single representatives of six of the foreign
2 governments. That's in an interrogatory answer at joint
3 appendix 108, 109.

4 ITT, being excluded from this meeting for the
5 first time, it's correct, tried to find out what
6 happened. It served a Freedom of Information Act
7 request asking for documents about the meeting. And it
8 also filed a petition for rulemaking, basically
9 questioning the wisdom and propriety of what the FCC was
10 doing, but saying that at the very least the Commission
11 should define what its representatives would be doing
12 and establish some procedural safeguards for the
13 future.

14 The Commission took no action. The FOIA
15 request was denied in principal part by the Common
16 Carrier Bureau. We appealed to the full Commission.
17 The Commission did not act within the time required by
18 statute.

19 The Commission took no action on the petition
20 for rulemaking that we filed. They did, however,
21 announce that there was going to be another closed
22 meeting in England, this time in Ascot. And at this
23 point ITT filed the lawsuit that gives rise to the
24 argument today.

25 Unlike ITT's petition for rulemaking, which

1 focused on the future, basically calling on the FCC to
2 establish some rules for the future, ITT basically bit
3 the bullet and challenged the past propriety of what the
4 Commission had been doing.

5 We specifically quoted what Commissioner
6 Fogerty had said about threatening the European
7 governments. We urged and alleged that such conduct on
8 behalf of an American administrative agency is ultra
9 vires, that negotiations with foreign governments is the
10 province of the State Department, not a regulatory
11 agency, and we asked that that conduct be enjoined. We
12 also stated that the conduct involving the joint conduct
13 of agency business was subject to the Sunshine Act.

14 There was some preliminary discovery and a
15 motion to dismiss was filed by the Commission. We
16 cross-moved for summary judgment. Pursuant to the local
17 rule, we identified eight statements of the Commission,
18 of its -- of Commissioners and of its general counsel,
19 which described what the Commission was doing at
20 consultative process meetings, what it proposed to do.

21 QUESTION: Mr. Lewis, let me go back just a
22 minute with you if I may.

23 MR. LEWIS: Certainly, sir.

24 QUESTION: The general provision for review of
25 actions of the Federal Communications Commission

1 provides that review lies with the Court of Appeals,
2 doesn't it?

3 MR. LEWIS: Justice Rehnquist, review of FCC
4 orders lies with the Court of Appeals. Review of
5 administrative agency action would lie in the district
6 court.

7 We did take an appeal when they denied our
8 petition -- they ultimately, after the lawsuit was
9 filed, they denied our petition for rulemaking, and we
10 did take an appeal from that. But the order dealt with
11 whether the Commission would establish rules for the
12 future. It did not involve in any way an adjudication
13 of the propriety of its past conduct.

14 QUESTION: Well, did you get into the district
15 court under the Administrative Procedure Act?

16 MR. LEWIS: We get into the district court --
17 the Administrative Procedure Act provides for review of
18 agency action that's not otherwise subject to review,
19 which would be the basis for going to the district court
20 rather than the Court of Appeals where we're challenging
21 an action rather than an agency order.

22 QUESTION: And is that distinction well
23 established in the cases?

24 MR. LEWIS: We believe it is, sir, yes. I
25 will return to that in a moment, but basically there are

1 many doctrines that narrow the jurisdiction of the
2 district court where there will subsequently be a remedy
3 if you just wait and abide the administrative
4 proceeding. But the district court jurisdiction is
5 residual.

6 The FCC basically elected not to join issue
7 with us on our statement of undisputed facts. They
8 specifically represented to the court that there were no
9 material facts in dispute in the case, and that's the
10 posture then in which the case arose and in which
11 summary judgment was granted.

12 The statements that we called to the court's
13 attention, the district court and Court of Appeals, did
14 not show general informal discussions, as the Commission
15 states in the question that it presented to this Court
16 when it asked that certiorari be granted. Rather, the
17 statements clearly establish, to quote them, that the
18 Commission was in a negotiating stance, was seeking a
19 tit for TAT or a quid pro quo, that the Commission was
20 applying leverage on the European governments. And
21 basically, at one point Commission Fogerty said: Well,
22 we're going to go overseas and show we really mean
23 business.

24 These are simply not informal discussions
25 involving general exchange of information.

1 With that background, I'd like to respond,
2 then, obviously, to the FCC's arguments as to why the
3 Sunshine Act they claim should not apply. We of course
4 urge that it has been correctly applied, recognizing
5 that the legislative history shows that there is to be a
6 presumption of openness in government and that the
7 burden of proof is on the administrative agency to
8 justify departure from those principles.

9 The first point the FCC argues is that, and we
10 all admit, no question, that there was not a quorum of
11 the FCC as it then existed, although in all likelihood
12 there will now -- any future meeting involving the same
13 three Commissioners will of course involve a quorum of
14 the Commission as it now exists.

15 The Sunshine Act is clear that the FCC applies
16 -- excuse me, the Act applies, not only to meetings of
17 an agency, but to subdivisions of an agency that are
18 authorized to act on behalf of the agency. Now, the
19 Commission's argument before this Court is that because
20 the Telecommunications Committee was not expressly
21 authorized to participate in consultative process
22 meetings and because its authority was limited to
23 passing on applications for construction of major new
24 facilities, whatever it did was unauthorized and
25 therefore the Sunshine Act can't be applicable.

1 Now, we'd submit there can be no serious
2 question as to the applicability of the Act. We alleged
3 in paragraph 10 of our complaint, joint appendix page
4 64, for several years representatives of the FCC,
5 through its Telephone and Telegraph Committee and staff,
6 as it was then called, have met with the Canadian and
7 European telecommunications administrations to discuss
8 facility planning.

9 The FCC's answer to our complaint, set forth
10 at joint appendix 73: "Defendant admits that meetings
11 of the type described in paragraph 10 have occurred."

12 In its order denying our petition for
13 rulemaking, one of the statements on which we relied in
14 support of our motion for summary judgment, set forth at
15 page 165 of the joint appendix, this was the
16 Commission's statement, the Commission: "We have
17 undertaken to have Commission representatives meet face
18 to face with them" -- that is, representatives of the
19 foreign governments -- "to discuss mutual present and
20 future telecommunications needs."

21 I might add, to the extent there is any
22 question, Commissioner Fogerty had no doubt about his
23 authority when he addressed the consultative process
24 meeting in Montreal. At joint appendix page 165: "I
25 think the Commission," he said -- "I can speak for

1 myself and I'm sure for the Chairman and Mr. Lee" --
2 he's the third member of the committee -- "and for the
3 other Commissioners who are not present. We want to
4 meet you halfway, but we do request, I think, that the
5 quid pro quo would be".

6 He clearly advises the European
7 representatives he is speaking for the entire
8 Commission.

9 QUESTION: Do you say that's decisionmaking?

10 MR. LEWIS: That speech obviously is not
11 decisionmaking.

12 QUESTION: My question is, do you say that is
13 decisionmaking or not?

14 MR. LEWIS: We are saying that he is
15 participating in a meeting. When he delivered the
16 speech he was not involved in decisionmaking. I am
17 really simply addressing the fact that he recognized his
18 authority, and the Commission has consistently
19 recognized the authority of the Telecommunications
20 Committee; that as indicated, they represented to the
21 Court of Appeals, they stated that Commissioners were
22 participating in their official capacity, in their
23 official role and qua the Telecommunications Committee.

24 QUESTION: But are you going to at some point
25 tell us what decisions were made in Dublin?

1 MR. LEWIS: We don't know what decisions were
2 made in Dublin. We were excluded from the meeting. We
3 do know, and we have set forth in our statement of
4 undisputed facts, what the Commission said it would be
5 trying to do in Dublin.

6 It would be seeking a tit for tat.
7 Commissioner Fogerty was planning to go and show we
8 really mean business, to basically engage in the conduct
9 of the business of the agency.

10 QUESTION: Mr. Lewis, do you think that simply
11 implementing a decision previously reached by an agency
12 would constitute -- would fall under the Sunshine Act,
13 and that the deliberations or the actions resulting in
14 joint conduct? I mean, if you have a situation, maybe
15 apart from yours, where a decision has already been made
16 and the agency just sends somebody out to implement it,
17 does that invoke, the implementation part, invoke the
18 Sunshine Act?

19 MR. LEWIS: Justice C'Connor, when the agency
20 sends someone out the answer is no. When they send a
21 group of Commissioners out to see to it that the
22 decision is implemented, they are then involved in the
23 joint conduct of agency business.

24 QUESTION: But perhaps not deliberations. If
25 they're just sent out to implement something, I'm not

1 sure that it meets all the requirements of the Sunshine
2 Act, if that's the fact.

3 MR. LEWIS: This is basically -- where the
4 Court of Appeals went is exactly where I believe Your
5 Honor is going. Namely, it concluded its analysis on
6 the question of authority, whatever the scope of the
7 Commission's endeavors, which is what I think you're
8 addressing, there's no question that they're undertaken
9 on behalf of the Commission.

10 Let's then go to the question, what were they
11 doing at these meetings, something that the FCC is
12 avoiding mentioning today before this Court. That's
13 something they've said they'd rather not argue, which we
14 can understand given the undisputed statements that were
15 made below as to the scope of the activities.

16 QUESTION: Explain to me just simply, what
17 authority does Congress have over Dublin?

18 MR. LEWIS: Your Honor, Congress is not
19 seeking to subject Dublin or any foreign administration
20 to the scope of the Sunshine Act. All that Congress has
21 done is said that when the FCC engages in agency
22 business that it doesn't matter where they do it. The
23 policies favoring openness in government are as
24 applicable in Dublin, if that's where the Commission
25 goes to do its business and to get its business done.

1 I agree, we're dealing with a very unusual
2 situation.

3 QUESTION: But I mean, how can the Commission
4 or anybody else in the United States make Dublin do
5 anything?

6 MR. LEWIS: Nobody -- the only thing Congress
7 is doing is telling the Commission what to do.
8 Normally, of course, dealings with foreign governments
9 --

10 QUESTION: Well, what could the Commission do
11 to make the meeting in Dublin public?

12 MR. LEWIS: Your Honor, the Commission closed
13 the meeting. It's indisputed that the only reason the
14 American carriers were excluded from the meeting was
15 because the FCC asked that that be done. There's no
16 question that this was totally the doing of the
17 Commission.

18 Interested American parties have been
19 participating in open meetings for five years, and it's
20 only when the Commission, unable to persuade the
21 Europeans to do what it wanted to have done in the open,
22 that they then sought to go into the dark and to exclude
23 the Americans.

24 This is precisely the kind of conduct that
25 Congress sought to expose to the sunlight when it

1 enacted the Sunshine Act.

2 QUESTION: I agree fully with what you say.

3 But my point is, I am as certain as I am sitting here
4 that Congress didn't intend to move in a situation like
5 this in a foreign country.

6 MR. LEWIS: Your Honor, I'm equally sure that
7 Congress didn't intend for representatives --

8 QUESTION: Yes, but I mean, you agree with
9 that, don't you?

10 MR. LEWIS: Congress certainly did not intend
11 -- the legislative history is clear that the question is
12 what is the agency doing, not where is it being done?

13 QUESTION: I mean, when we're negotiating the
14 arms agreement, has he got to be public?

15 MR. LEWIS: No, Your Honor. That's exactly --
16 that's not the province of a regulatory agency. That's
17 going to be done by agencies that are not subject to the
18 Sunshine Act. Dealings with foreign governments is not
19 the province of an administrative agency. That's our
20 ultra vires count, and we ultimately expect to establish
21 that the FCC has done what we've alleged, namely engaged
22 in ultra vires negotiations.

23 But if they're not, if what they're doing is
24 proper, then they're still engaged in agency business
25 which is subject to the Sunshine Act.

1 QUESTION: But the use of the word "business"
2 troubles me a little bit, in view of the precise
3 requirements of the statute. And to try to bring you
4 back to the question which still isn't answered, how
5 does implementation of a prior decision constitute a
6 deliberation?

7 MR. LEWIS: Justice C'Connor, the word
8 "deliberation" -- I think the legislative history on
9 this is clear that deliberations simply meant, that
10 phrase was used simply to exclude totally informal
11 contacts. And the examples that are given in the
12 legislative history are casual conversations on the golf
13 course or at the lunch table.

14 The key phrase is the joint conduct or
15 disposition of agency business, and if the agency is
16 involved in decisionmaking -- I don't believe the
17 Commission disagrees with this. If the agency is
18 actually involved in decisionmaking, then it should be
19 done in the public or not at all.

20 The FCC's proposed --

21 QUESTION: Well, if the decision has already
22 been made and they are just implementing it, then does
23 that fall within the Sunshine Act?

24 MR. LEWIS: The FCC -- agencies normally don't
25 implement decisions. I mean, agencies write decisions,

1 they publish them, and the decisions speak for
2 themselves. When the FCC goes overseas to try to bang
3 heads --

4 QUESTION: Well, but you are saying that in
5 this instance the agency was trying to implement its
6 decision --

7 MR. LEWIS: Yes, it was trying --

8 QUESTION: -- as I understand your claim.

9 MR. LEWIS: The only thing the agency
10 authorized was Grafnet and Telenet to engage in
11 international operations. Now, the policies underlying
12 that were policies that the agency sought to foster.

13 We believe the history is clear that any time
14 an agency is engaged in action in furtherance of the
15 business that it's to be done in the sunshine. The only
16 things to be excluded are casual conversations and the
17 like.

18 When they went -- as I say, the fact that they
19 went overseas is unusual, because regulatory agencies
20 typically don't get involved trying to negotiate with
21 foreign governments. But when they do that, then it's
22 agency business subject to the Act.

23 We don't understand the FCC to deny that if
24 the Commission is -- and I think their brief is clear on
25 this -- if they're doing what they said they're doing in

1 the undisputed statements of fact, that that conduct is
2 subject, is within the definition of "meeting" -- the
3 joint deliberations involving the joint conduct or
4 disposition of agency business.

5 They do reserve their point in the reply
6 brief, which I think is what they're saying here, that
7 even if they are involved in the joint conduct or
8 disposition of agency business, the Sunshine Act is not
9 applicable, either on the one hand because whatever they
10 did was unauthorized or on the other because whatever
11 they did they didn't do at meetings of the FCC in
12 Washington.

13 But we don't understand them to deny that if
14 in fact they were in a negotiating stance, as they
15 admitted, if they were seeking a quid pro quo, that the
16 Act would be applicable.

17 We point out that they proposed -- when you
18 get away from decision, formal decisionmaking itself,
19 they've proposed a standard based on Bergen Klitzman's
20 Interpretive Guide to the Sunshine Act. As we indicate
21 in our brief, we fully accept that standard and we
22 believe that on the undisputed facts we come within it.

23 With respect to the question, the final
24 question which is put, their final point, which is the
25 question, are these meetings of the FCC? The Senate

1 report with respect to what is a meeting makes it clear,
2 and I quote from page 19: "The test is what the
3 discussion involves, not where or now it is conducted."

4 Now, yes, it's unusual, as we say, to have the
5 Sunshine Act applied overseas, but that's only because
6 of the wholly unusual nature of the conduct. When the
7 agency is involved, as seems admitted virtually here, in
8 the joint conduct of agency business, then the fact that
9 the Act is being applied in some place other than the
10 United States simply is not relevant.

11 The meetings here were called by the FCC,
12 there's no question of that. The closed meeting in
13 Dublin was called by the Commission. The American
14 carriers were excluded by the Commission.

15 Again, the question as to whether, Justice
16 Stevens, are these meetings of the FCC. We'd invite the
17 Court's attention to joint appendix page 171, our
18 statement of material facts not in dispute: "On
19 February 20-21, 1980, the Telecommunications Committee
20 of the FCC and other FCC representatives again conducted
21 a closed and off the record meeting in Ascot."

22 The FCC replied on joint appendix page 173:
23 "No objection." In the Court of Appeals the FCC --

24 QUESTION: Read the full sentence: conducted
25 a meeting with representatives of these European --

1 MR. LEWIS: Yes, that they conducted the
2 meeting --

3 QUESTION: Does the FCC normally conduct
4 meetings within the meaning of this provision with
5 representatives of other --

6 MR. LEWIS: The Sunshine Act is clear that the
7 fact that representatives even of the public are there
8 does not affect the question of whether these are in
9 fact meetings of the Commission. If joint conduct of
10 business is involved, the fact that others are there
11 still makes it subject to the coverage of the Act.

12 QUESTION: It still makes it subject to the
13 coverage, but his point is that the requirement that it
14 be open doesn't apply unless it's a meeting of a
15 agency.

16 MR. LEWIS: What he is citing from, sir, is
17 not the definition either of meeting or the definition
18 of agency --

19 QUESTION: No, it's not the definition. It's
20 the requirement that the meeting be open.

21 MR. LEWIS: And we think it's clear that if
22 there is a meeting as defined of the agency as defined,
23 that the use of the preposition "of" and argument about
24 that does not excuse compliance. If it's an agency
25 involved and if there's a meeting involved, we think

1 that's --

2 QUESTION: So you say there are really only
3 three requirements?

4 MR. LEWIS: We would actually say that there
5 are two. There are two definitions at issue here, sir.
6 One is the meaning of the word "agency"; the other is
7 the meaning of the word "meeting".

8 We invite the Court's attention to an
9 affidavit submitted by the FCC in the Court of Appeals.
10 Now, it's an affidavit that's entitled to very little
11 weight. They offered it to support an application for a
12 stay. We asked to take the deposition of the affiant.
13 The FCC refused to produce the affiant, and then the
14 Court of Appeals denied the stay.

15 So but even there, when he's explaining his
16 expertise -- this is joint appendix 177, Mr. Demerie.
17 This is speaking now about the closed meetings. Mr.
18 Demerie is Assistant Bureau Chief of the Commission.

19 "I organize and coordinate these meetings, and
20 have also overseen the Commission's efforts to expand
21 the consultative process dialogue to include discussions
22 of non-facilities communications issues."

23 We believe this is a kind of conduct that
24 Congress sought to expose to the sunshine.

25 Now, with respect to the question of the

1 Court's jurisdiction. As you recognized, Justice
2 Rehnquist, it's generally recognized that appeals from
3 agency orders go to the Court of Appeals.

4 QUESTION: And it's also generally recognized,
5 isn't it, Mr. Lewis, under cases like Myers against
6 Bethlehem Shipbuilding, that the appellate court or any
7 sort of reviewing court just doesn't step right into the
8 middle of an agency proceeding? You wait 'til the
9 agency's done what it's going to do.

10 MR. LEWIS: That's precisely correct, sir, and
11 therefore there are many doctrines -- exhaustion as
12 articulated in Myers, finality, ripeness -- which all
13 stand for the proposition that premature interruption of
14 an ongoing agency proceeding is inappropriate, assuming
15 the plaintiff is not prejudiced by the delay.

16 Now, we believe that even those doctrines have
17 a very important exception, namely the Litem v. Kine
18 exception for patently ultra vires conduct such as we
19 allege here. But this isn't that kind of a case. We're
20 not waiting for some future FCC order that will then be
21 appealable.

22 If the FCC achieves everything it sets out to
23 do, if it persuades the French to deal with Graphnet or
24 Telenet, to give it the quid pro quo or the tit for tat,
25 then there's nothing more for the Commission to do.

1 That action's going to be taken in Europe, in France,
2 and all that will happen is that Graphnet or Telenet
3 will be authorized by the French Government. This is
4 not a case --

5 QUESTION: Well, why isn't that damnum absque
6 inuria so far as you're concerned?

7 MR. LEWIS: We believe we have a right to
8 challenge ultra -- the standing issue is -- they argued
9 that --

10 QUESTION: Well, what right do you have to
11 challenge ultra vires, if it isn't going to result in
12 any Commission order that would affect you?

13 MR. LEWIS: It's the Commission action. We
14 have a right to challenge ultra vires Commission
15 action.

16 QUESTION: Why do you say that?

17 MR. LEWIS: That's I believe set forth in the
18 Administrative Procedure Act. That's not disputed by
19 the Commission. They didn't raise that argument here.
20 The Court of Appeals addresses standing.

21 QUESTION: Yes, but you can't just walk in off
22 the street and say that the Commission is about to do
23 something in the future that might affect my client.
24 You've got to point to an order of the Commission.

25 MR. LEWIS: No, the Commission is taking

1 action. It's really the question --

2 QUESTION: Not official action.

3 MR. LEWIS: When it goes overseas and urges
4 the French Government to grant an operating agreement to
5 our competitors, and when the French Government only
6 wishes to deal with a limited number of American
7 carriers -- I think all that is undisputed -- we are
8 threatened with immediate danger if the Commission
9 enters - if the French Government acts.

10 Our right to standing was litigated by the
11 Commission below. They lost in the Court of Appeals.
12 The Court of Appeals decision on this I think
13 establishes our standing.

14 QUESTION: Well, unless it's wrong.

15 MR. LEWIS: As a competitor of the company
16 that they've authorized, we believe we've got standing.
17 The Commission's not -- that's not dispositive, I
18 recognize, before this Court. But the residual
19 jurisdiction of the Court to review wrongful
20 administrative agency action is something that I think
21 is generally recognized.

22 Now, the only question -- and as I say, the
23 standing of a competitor to complain. We will be hurt
24 very definitely if the French Government knuckles under
25 to the Commission. That's why we're in court. The

1 cases that say that a competitor has standing to
2 challenge ultra vires action --

3 QUESTION: Are you in court for that? I
4 thought you were in court because you weren't allowed at
5 the meeting?

6 MR. LEWIS: Your Honor, we've got two
7 complaints. We're in court because we were excluded
8 from the meeting.

9 QUESTION: As you answered the Chief Justice's
10 question, you don't know what was decided.

11 MR. LEWIS: Pardon me?

12 QUESTION: You don't know what the decision
13 was. At least that's what you said.

14 MR. LEWIS: We know what the Government set
15 out to do, because they've stated that.

16 QUESTION: Well, didn't you tell the Chief
17 Justice you didn't know what the decisions were?

18 MR. LEWIS: That's correct. We do not know.

19 QUESTION: Well, why don't you find out?

20 MR. LEWIS: That's why we're -- the Government
21 in the Sunshine Act --

22 QUESTION: If we say the Sunshine Act should
23 have been, that won't tell you what the decisions are.

24 MR. LEWIS: Well, that will give us
25 perspective of --

1 QUESTION: Is there some form of action where
2 you can get the decisions?

3 MR. LEWIS: The only way to find out what
4 happened is in discovery in the district court. I mean,
5 I think it's recognized --

6 QUESTION: Well, you have to have a case
7 before you can get discovery, don't you?

8 MR. LEWIS: We filed one, sir.

9 QUESTION: Yes, but you want a case to have an
10 open hearing.

11 MR. LEWIS: No, we have two claims for
12 relief. One is that in the future the meetings should
13 be subject to the Sunshine Act.

14 QUESTION: I guess I know, nowadays you can
15 file conflicting causes of action. But this is the
16 biggest conflict I've seen in a long time.

17 MR. LEWIS: Justice Marshall, that's not --
18 I'd like to change your mind about that, because the
19 Sunshine Act claim looks to the future and wants to get
20 these meetings open for the future.

21 The first claim for relief, challenging ultra
22 vires conduct, is looking to the past. We're seeking an
23 adjudication after discovery of the Commission, what
24 they've done in Dublin -- that's the only way for us to
25 find out -- and then such relief as is appropriate.

1 Thank you.

2 CHIEF JUSTICE BURGER: Do you have anything
3 further, Mr. Lauber?

4 REBUTTAL ARGUMENT OF ALBERT G. LAUBER, ESQ.,
5 ON BEHALF OF PETITIONERS

6 MR. LAUBER: I have two brief points.

7 On the authorization to act requirement, ITT
8 would interpret the words "authorization to act on
9 behalf of the agency" to mean something like "allowed to
10 be there." We're not contending that the three
11 Commissioners were acting illegally or improperly in
12 going to Europe. Our contention is they were not
13 authorized to act on behalf of the FCC in Europe because
14 they had no official delegation of authority.

15 Secondly, apropos of Justice Marshall's
16 question, if it were held that the Act applied to these
17 European gatherings, that would require the FCC not only
18 to dictate the open or closed nature of the meeting, but
19 also to dictate the time, the place, the agenda, and all
20 the rest of it. Congress could not possibly have
21 intended that.

22 QUESTION: But the fact that you won't tell
23 them what the decisions were does lend credit to his
24 position that you shouldn't have had a closed meeting.

25 MR. LAUBER: Justice Marshall --

1 QUESTION: Am I right on that?

2 MR. LAUBER: I think the way that ITT should
3 have dealt with that is -- they presented their argument
4 to the FCC in a rulemaking petition that the
5 Commissioners were doing bad stuff over in Dublin. Now,
6 if they had wanted to get the fullest possible
7 evidentiary investigation of the ultra vires charges,
8 what they should have done was file a motion for a
9 declaratory ruling with the Commission.

10 That's an adjudicatory proceeding. There
11 would have been an ALJ appointed by the Commission. He
12 could have investigated the entire question. He could
13 have taken evidence, heard witnesses, and all the rest
14 of it.

15 They went into a notice and comment proceeding
16 instead. That was their fault. They had within the FCC
17 a mechanism to have a full flushing out of what happened
18 at those European meetings.

19 QUESTION: It's sort of one-sided, though,
20 isn't it?

21 MR. LAUBER: Well, no more one-sided than a
22 contested radio broadcast --

23 QUESTION: It's more one-sided than a
24 courtroom.

25 MR. LAUBER: Well, I wouldn't agree with that,

1 Justice Marshall. I mean --

2 QUESTION: Well, which one-sided court are you
3 talking about?

4 (Laughter.)

5 MR. LAUBER: What I'm saying is, in any kind
6 of contested --

7 QUESTION: I don't think you realize what you
8 said.

9 MR. LAUBER: True, the opponent in the
10 proceeding would be the FCC, not a competitor. But I
11 think they could have hoped to get fair relief within
12 the Commission, subject to review by the Court of
13 Appeals.

14 Thank you.

15 CHIEF JUSTICE BURGER: Thank you, gentlemen.
16 The case is submitted.

17 (Whereupon, at 2:12 p.m., argument in the
18 above-entitled case was submitted.)

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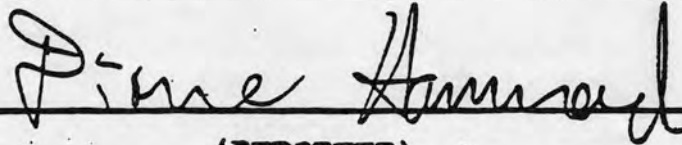
CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#83-371 - FEDERAL COMMUNICATIONS COMMISSION, ET AL., Petitioner v.
ITT WORLD COMMUNICATIONS, INC., ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pina Amador", is written over a horizontal line.

(REPORTER)

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