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AGENDA ITEM
For Meeting of: 8-23-01

SUBMITTED LATE

MEMORANDUM

DATE: August 22, 2001

TO: Commissioners
Office of General Counsel

FROM: Commissioner Darryl R. Wold *DRW*

RE: AO 2001-11

I have told Jonathan Levin that I would vote to approve the draft of this AO in Agenda Document No. 01-46, notwithstanding some concerns I have with the language, because I agree with the result. If it is adopted without change, I would file a separate statement of reasons to express my basis for approving it.

I approve of the result in part because I do not attach any substantive importance to the time deadline for making transfers from a non-Federal account to a Federal account. That time deadline appears on brief review to be a vestige of the previous system which permitted transfers from the Federal account to the non-Federal account, and the Commission's interest in achieving prompt reimbursement from the Federal account for Federal activity. I am not suggesting, however, that this basis for my agreement with the result should be included in the AO.

This memorandum explains the concerns I have with the language and suggests changes in the draft to address those concerns.

The concern I have is that the AO does not sufficiently express our reliance on the sworn declaration of Alan Moore that he sent the fax to the bank, and thought that it had been received. Footnote 4, and other language, seems to suggest that we accept that the bank received the request but failed to act on it. We have no competent evidence of that, and I am not willing to expressly assume that happened.

I suggest the following changes:

- On page 1, line 29, insert a new sentence as the first sentence in the paragraph that now begins "On June 18 . . ." as follows:

[¶] The advisory opinion request and materials submitted with it describe the State Party's attempt to timely, but unsuccessfully, make one such transfer.

- On page 3, delete the sentence on lines 19-21 and footnote 4, and substitute the following sentence as the first sentence of that paragraph:

[¶] The Commission relies upon the representations in the advisory opinion request, and in particular on the declaration under penalty of perjury by Alan Moore that he sent the written request attached to the declaration by facsimile transmission to the Bank, as truthful descriptions of the State Party's actions to effect a timely transfer of funds.

- On page 4, delete the sentence on lines 14-17 beginning "Just as the failure . . .", without any substitute language. For the sake of style, I would move the preceding sentence on line 14, "The situation you present . . .", from its position as the first sentence of this paragraph, to make it the closing sentence of the previous paragraph, and begin this paragraph with the next sentence presently beginning on line 17, "It is significant . . .".