New York State
Ethics Commission

Advisory Opinion No. 95-4:	Application of the Public Officers Law §§73 and 74 to employees who would participate in a public authority's proposed joint venture with private sector firms.

INTRODUCTION

The following advisory opinion is issued in response to a request by Robert Bergen, General Counsel to the Metropolitan Transportation Authority ("MTA"), concerning the application of Public Officers Law §§73 and 74 to a proposed public/private joint venture for the further implementation and marketing of an automated fare collection network developed by the Metropolitan Transportation Authority Card Company ("MTACC"), a subsidiary of the MTA.

Pursuant to its authority under Executive Law §94(15), the Commission concludes that a joint venture could be established whereby: (1) salaried and uncompensated members of the MTA board of directors and employees of the MTA Group could serve without compensation on the governing body of the joint venture as long as the joint venture is not a corporation; (2) the two year bar provision of §73(8) would not prohibit MTACC employees from becoming employees of the Venture or appearing before the MTA Group because the functions of MTACC would not be absorbed by the MTA; (3) the lifetime bar of Public Officers Law §73(8) would apply to those MTACC employees who would be rendering services for compensation for the Venture on any matter in which they personally participated or were directly concerned or which they actively considered while an employee of the MTA Group, with individual decisions to be made on a case-by-case basis; and (4) neither §73 nor §74 would prevent the MTA Group from lending employees to the Venture.

BACKGROUND

Development and Marketing of the MetroCard.

In May 1993, the MTA formed as a subsidiary a new public benefit corporation - MTACC - to support an integrated systemwide automated fare collection network for the MTA Group.[(1)] As of March 1, 1994, MTACC had 23 full-time employees.

Under a contract awarded in 1991, the TA's fare collection system, which has consisted of approximately 3,300 token based subway turnstiles and 3,600 bus coin and token accepting fareboxes, will be changed to an automated system that will accept an electronic fare payment card, known as MetroCard. The conversion of the fare collection system began in January 1994, with the first 69 subway stations having become MetroCard functional by April 1994. The TA bus fleet is scheduled to be converted by the end of 1995, and its entire subway system by May 1997.

MTACC was created in May 1993, to support the introduction and operation of the MetroCard system in TA facilities and to consider its expansion to other regional service providers. However, its mission also included developing business opportunities associated with using the MetroCard as a payment device in non-transportation situations, such as payphones, vending machines, etc.

The MTA board has determined that MTACC's effectiveness in pursuing its mission to manage the MetroCard system would be greatly enhanced by establishing a relationship with private firms whose core competencies are in various aspects of the electronic payment industry. The private firms were considered to be better suited to develop the entrepreneurial side of MTACC's mission by their ability to leverage capital investment into commercial opportunity.

MTACC analyzed and evaluated many different structures for its relationship with private firms, including out-sourcing, contracting, licensing and franchising. It rejected these more traditional structures for public-private relationships because they would not give the MTA, MTACC's parent, sufficient control over the transportation applications and they would not be capable of promptly responding to the complex and fluid nature of the competitive environment in which business opportunities must be pursued.

Ultimately, after extensive investigation and consultation with its outside financial advisers, investment bankers and lawyers, the MTA board determined that a joint venture, in which all of the co-venturers own a share of the enterprise and participate in the on-going decision making, was the best structure for MTACC's relationship with private firms. In this manner, according to Bergen, "the relationship between the MTA Group and its co-venturers is a form which enables the MTA Group to take an active, continuing and dynamic role in the enterprise . . ." but "without requiring that the governmental entity cede excessive control to the private sector participants." The Venture "will be an organization in which the MTA Group has a significant ownership interest and over which the MTA Group will have substantial control, particularly in the context of the Venture's transportation related functions."

Bergen expects that the Venture will be a partnership consisting of the MTA and one or more for-profit corporations.[(2)] Each of the co-venturers will have an equity interest in the enterprise. The partnership will have a governing body which will take the form of a management committee on which each partner, including the MTA Group, has representation.

According to Bergen, the contract or partnership agreement establishing the Venture will identify each party's contribution to the enterprise and its respective participation in the profits or losses.[(3)] Elaborate governance and control provisions which recognize the special nature of the enterprise, including the role of each partner's representatives on the governing body, will be negotiated and formalized. The MTA recognizes and assumes that the interest of each of the members of the Venture may differ from the interests of the Venture as a whole.

Currently, MTACC is involved in a solicitation process to find the best private sector firms with which to establish the MetroCard Venture. Once the Venture is formed, it will take over responsibility for the MetroCard system. It will contract with all of the users of the MetroCard network, including those operating agencies within the MTA Group, such as the TA, that utilize

its the system. As an example, Bergen states that the TA will enter into an operating and service agreement with the Venture that will define all the parameters of this out-sourcing arrangement.

Staffing of the Venture.

Bergen states that MTACC's research has shown that the Venture would be most successful if it had its own employees whose loyalty is to the Venture and not to one of Venture's owners. He contemplates that the co-venturers will seek those individuals most qualified to fill the ranks of the Venture, including current MTACC employees and individuals from the private sector. Salaries for Venture employees would reflect private sector pay scales and not necessarily those of public service.

MTA wants those MTACC employees needed by the Venture to be able to join the Venture. If they did, they would become private sector employees. For purposes of this opinion, Bergen asks that the Commission assume (1) that such employees currently work exclusively on MTACC matters and do not manage significant matters involving other MTA entities, and (2) that these employees would resign from MTACC and be immediately hired by the Venture. MTACC would then be dissolved as an entity.

For those current MTACC employees not retained by the Venture, the MTA Group would attempt to reassign such employees to other MTA Group positions. Such reassigned employees would not be performing the same responsibilities they had at MTACC, as all of MTACC's functions would be assumed by the Venture.

APPLICABLE STATUTES

The following provisions of Public Officers Law §§73 and 74 will be discussed herein:

Public Officers Law §73.

Public Officers Law §73(4)(a) provides, in relevant part, that:

No . . . state officer or employee . . . or firm or association of which such person is a member, or corporation, ten per centum or more of the stock of which is owned or controlled directly or indirectly by such person, shall (i) sell any goods or services having a value in excess of twenty-five dollars to any state agency, or (ii) contract for or provide such goods or services with or to any private entity where the power to contract, appoint or retain on behalf of such private entity is exercised, directly or indirectly, by a state agency or officer thereof, unless such goods or services are provided pursuant to an award or contract let after public notice and competitive bidding.

Public Officers Law §73(7)(a) provides, in relevant part, that:

No . . . state officer or employee, other than in the proper discharge of official duties . . . shall receive, directly or indirectly, or enter into any agreement express or implied for, any compensation, in whatever form, for the appearance or rendition of services by himself or

another in relation to any case, proceeding, application or other matter before a state agency where such appearance or rendition of services is in connection with:

(i) the purchase, sale, rental or lease of real property, goods or services, or a contract therefor, from to or with any such agency;

. . . .

(iv) the obtaining of grants of money or loans;

(v) licensing; or

. . . .

Public Officers Law §73(8)(a) provides:

No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency.

Public Officers Law §73(8)(b) provides:

No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case proceeding application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.

Public Officers Law §74.

The Rule with respect to conflicts of interest, as contained in Public Officers Law §74(2), provides the following:

No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Public Officers Law §74(3) contains standards which further define the Rule. In particular, §74(3)(f) and (h) include the following language: (f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can

improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

(h) An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

DISCUSSION

1. Whether it is a violation of Public Officers Law §74 for compensated and uncompensated members of the MTA board and employees of the MTA Group to serve as uncompensated members of the governing board of the MetroCard Venture as an appointee of the MTA Group.

Bergen states that the proposed Venture will serve the MTA Group's interests only if the MTA can establish and exercise appropriate control and governance rights. Therefore, the MTA must have representation on the governing body of the Venture by persons who are loyal to and knowledgeable about the MTA Group and its operations, its culture and its unique requirements as a public authority. Bergen states that the individuals best positioned to represent the MTA Group on the governing body of the Venture are MTA board members and MTA Group employees.[(4)]

For purposes of the request, Bergen states that the Commission should assume that any participation by MTA board members or MTA Group employees on the governing board of the Venture will be uncompensated, that any individuals appointed by the MTA to the Venture's governing board will be designated by the MTA as policymakers, and that the Venture will not be set up as a corporation.[(5)]

In Advisory Opinion No. 91-3, the Commission concluded that officials of the New York State Department of Health ("DOH") could not serve as members of the board of directors of a for-profit corporation established jointly by DOH's closely affiliated not-for-profit research corporation and a French pharmaceutical corporation. In that case, the Commission held that the DOH officials could not serve the corporation's best interests, as required under the New York Business Corporation Law, and the interests of the State agency without the appearance of a conflict of interest. There would be divided loyalties between the corporation and DOH. In that opinion, the Commission cited several examples, such as a buy-out arrangement and the pricing and marketing of certain products, where the interests of the for-profit corporation could conflict with the interests of DOH.

Bergen distinguishes that opinion from the instant case and notes that the MetroCard Venture will not be a corporation. He argues that the members of its governing body will not be subject to the fiduciary and loyalty obligations imposed upon a member of the board of directors of a corporation organized under the Business Corporation Law. Rather, the agreement establishing the Venture will address in detail the issues that will arise within a structure in which the members of the governing body will be expected to represent both the interests of their constituent entity and the Venture. Members of the governing body will be expressly authorized to represent the interests of the entity that appointed them.

The Commission agrees that under this proposed arrangement, Public Officers Law §74 would be satisfied as long as the MTA Group's representatives on the governing board of the Venture act at all times in the MTA Group's best interests and not necessarily those of the Venture.[(6)] The concerns that were present in Advisory Opinion No. 91-3 are not present here because the members of the Venture's governing board would not have a fiduciary obligation to the Venture; rather, their first loyalty would be to the co-venturer they represent. Presumably, the Venture would be dissolved if, at some time in the future, it no longer served the purposes of the MTA Group. Thus, the MTA board members and the MTA Group employees would not have an obligation to serve the interests of the Venture should they conflict with the interests of the entity that they represent.

2. Whether it is a violation of Public Officers Law §73(8) for a current employee of MTACC to resign or retire from his or her current position to be employed by the Venture and work on Venture business, including participation in the Venture's relationship with the MTA Group.

A. The two-year bar.

Public Officers Law §73(8)(a) imposes a blanket two-year bar on former State employees from appearing, practicing or rendering services for compensation in any matter before their former State agency. The first inquiry that the Commission must make is to determine whether MTACC or the MTA would be the former agency for employees of the joint venture.

Bergen, citing a previous informal opinion of the Commission, dated May 27, 1993, argues that MTACC should be considered an "agency" separate from the MTA for purposes of applying the two year bar. In that previous informal opinion, the Commission held that this bar does not prevent most former officers and employees of the MTA or its subsidiaries or affiliates from appearing or practicing before an agency within the MTA Group other than his or her prior employing agency. Thus, a former employee of a particular MTA Group affiliate usually may appear before a different MTA affiliate during the two year post-employment period without violating the two year bar. However, this conclusion does not apply to certain officers of the MTA and heads of MTA departments whose responsibilities routinely involve management of significant matters involving one or more MTA affiliates or subsidiaries. In the case of MTACC, the Commission would have to consider which high ranking MTACC employees would have an MTA Group-wide two-year revolving door.

The determination here, however, is complicated, as the MTA proposes that MTACC will be abolished upon the Venture's assuming authority over the MetroCard enterprise. With MTACC abolished, it would be impossible for its former employees to appear, practice or render services for compensation before that agency. However, if the MTA were the former agency, then the former MTACC employees now employed by the Venture, could not so appear, practice or render services before the MTA for the two-year post-employment period.

In Advisory Opinion No. 93-11, the Commission considered the situation in which the Division of Substance Abuse Services ("DSAS") was abolished, and its powers, duties, responsibilities, rights and liabilities were assumed by the Office of Alcoholism and Substance Abuse Services

("OASAS"). The Commission held that OASAS was to be considered the former agency of DSAS employees transferred to OASAS for purposes of applying Public Officers Law §73(8).

Bergen argues that the instant case is distinguishable because "MTACC's powers, duties, responsibilities, rights and liabilities will be transferred to and assumed by the Venture and no express or implied corporate succession upon the dissolution of MTACC is expected." Since the Venture, a private entity, will assume virtually all of MTACC's prior functions, the Commission concludes that the MTA should not be considered the former State agency of MTACC employees who are transferred. Unlike OASAS, the MTA is not assuming the former functions of the agency that was abolished. Therefore, the Commission concludes that the two year bar provision of Public Officers Law §73(8) would not prevent MTACC employees from appearing, practicing or rendering services for compensation before the MTA as long as MTACC is disbanded. Until it is disbanded, the two-year bar applies to appearances before MTACC and the rendering of services on matters before MTACC.

B. The lifetime bar.

Public Officers Law §73(8)(b) imposes a lifetime bar on appearing, practicing, communicating or otherwise rendering services before any State agency or receiving compensation for any such services on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application, or transaction with respect to which such employee was directly concerned and in which he or she personally participated during the period of his service or employment, or which was under his or her active consideration.

The Commission determines whether the lifetime bar applies on a case-by-case basis. In the instant case, the former MTACC employees to be retained by the Venture will be receiving compensation from Venture. Therefore, the Commission must determine whether they would be performing functions for the Venture which constitute the same transactions on which they worked while at MTACC.

Bergen argues that the solicitation and formation phase of the Venture (which he calls "Phase I") and the implementation and operations phase of the Venture (which he calls "Phase II") are not the same transaction for purposes of the lifetime bar. He argues that Phase I and Phase II are each intended to accomplish a distinct purpose. Phase I constituted the initial start-up, conceptualization, organization and development of the Venture and has been entirely achieved within the constraints of the current organizational structure of MTACC. During Phase I, MTACC employees have been working to structure the basic business and then negotiating with numerous Venture proposers in crafting the financial, structural, governance and legal issues associated with the Venture itself.

Bergen characterizes Phase II as the implementation of the entrepreneurial and operating missions of the Venture. Once the Venture is operational, Venture employees will be dealing with the business of actually operating the Venture, including meeting customer and merchant needs, promoting the expanded utility of the MetroCard, addressing the concerns that arise in response to competition and the technology evolution, managing contractor and supplier

contracts, addressing security issues and undertaking similar operational tasks. According to Bergen, these functions are inherently different transactions from the Phase I activities.

Bergen also argues that the parties involved in Phase I and Phase II are different. During Phase I, the parties with whom current MTACC employees are negotiating include numerous Venture proposers and advisors involved in the negotiation and formulation of the ultimate structure of the Venture. During Phase II, Venture employees will interface largely with fellow Venture employees and with the merchant's customers, contractors, and suppliers.

While conceptually Phase I and Phase II might be distinct, the Commission finds that the actual activities of the MetroCard system will mostly be enhanced and expanded when the system is transferred from MTACC to the Venture. For example, the Venture will have to renew an agreement with the TA. This agreement currently exists, and is between MTACC and the TA. Furthermore, MTACC has already begun to implement the MetroCard system and market the card. This will be continued and expanded by the Venture. Thus, an activity previously begun will be continued. Other endeavors of the Venture are likely to be based on proposals and planning conducted by MTACC. Therefore, the Commission finds that under its precedents the enhancement and expansion of the MetroCard system is one transaction subject to the lifetime bar.

In Advisory Opinions Nos. 92-10, 93-2 and 93-13, the Commission considered whether there was a lifetime barred transaction with respect to two different pieces of legislation. The Commission found it relevant that both pieces had the "same subject and purpose, parties interested and affected, and the ultimate goal of the legislation remained fairly constant." It therefore found a lifetime bar. Similarly, in the instant case, the subject (an automated fare system), the purpose (fullest practical use possible), and parties interested and affected (the MTA Group) remain fairly constant even though the system will be expanded and more parties will become interested and affected.

Bergen cites Advisory Opinion No. 93-13 in support of his argument that Phase I and Phase II are different transactions. In that opinion, the Commission stated:

The seeking of grant money under the law [on which the individual in question worked on while in State service] is a different transaction.

However, in considering whether the individual, who was permitted to seek grant money, could engage in activities to change the same law's structure and formula, the Commission concluded that the transaction was the same.

While the instant case does not involve a law, it does involve the continued implementation of the MetroCard system and the expansion of that system. This is all part of the same transaction.

This does not mean however, that every function performed by every former MTACC employee for the Venture is barred. The Commission would have to analyze each employee's former activities and his or her activities with the Venture to determine how the lifetime bar should be applied. Bergen has suggested that current MTACC employees should be split into three

categories: employees who have no part in the MetroCard solicitation process and whose principal job is to perform ongoing functions, such as clerical services, customer services and merchant relations; employees who supervise the first category of employees and who have marginal involvement either in the MetroCard Venture solicitation or the establishment of policies and procedures that will be carried over from MTACC into the Venture and concern relationships with other MTA Group agencies; and employees, including senior MTACC staff, who have been directly involved and personally participated in the planning, negotiation and formation of the MetroCard Venture or the development and negotiations of the terms of the relationship with the MTA Group agencies that will become customers of the MetroCard Venture.

For the first category of employees, the Commission concludes that the lifetime bar would apply only to bar them from handling, after they moved to the Venture, the same matters they had been handling for a specific MetroCard customer or vendor. Although the former MTACC employees would be performing for the Venture the same kind of generic tasks they performed for MTACC, the Commission would view each particular customer or vendor with which they would be dealing as different for the purposes of defining a lifetime barred transaction.

Similarly, as Venture employees, they could deal with the same customer or vendor they dealt with at MTACC if the matter were new. For example, if a customer has a billing problem, an MTACC employee who dealt with that problem could not continue to handle it as a Venture employee. However, as a Venture employee, the individual could handle a new and different billing problem with a former customer--or any problem with a new customer.

The Commission also concludes that the second category of employees, those supervising employees in the first category, would be subject to similar constraints because they are supervising employees who are constantly dealing with new customers and new merchants. This conclusion is based on Bergen's assertions "that the level of involvement by these second category employees with the MetroCard Venture solicitation or the establishment of the policies and procedures governing the relationships with the other MTA Group agencies is *de minimis*."

With respect to the third category of employees, Bergen admits:

. . . there is little doubt that they personally participate in the solicitation and formation stages of the MetroCard Venture transaction. They also personally participate in the establishment of policies and procedures and other relationship with MTA Group agencies that will be carried over into the MetroCard Venture.

Notwithstanding the recognition that certain former MTACC employees would be involved in lifetime barred transactions, Bergen argues that "it is indisputable that the policy rationale underlying the lifetime bar - protection against 'leveraging' abuses - is not violated here."

Whatever the merits of Bergen's arguments, the Commission must decide matters on the statute enacted by the Legislature. It cannot ignore the plain language of the law to exempt otherwise prohibited activities, even if the Commission believes that these activities are of value to the State. The Legislature can and has enacted provisions exempting certain activities from the

"revolving door" [See Public Officers Law §§73(8)(f) and 73(8-a)]. This is within its authority and not that of the Commission. Thus, Bergen's arguments are properly addressed to the Legislature.

In addition, the Commission cannot overlook the fact that former MTACC employees, and particularly those whose activities may be subject to the lifetime bar, most likely will personally benefit financially as Venture employees because their salaries are expected to reflect private sector, not public sector, pay scales. The same employees who have developed MTACC would be in an excellent position to privately profit from the arrangement they are proposing should they move from MTACC to the Venture. This type of personal, financial benefit, based on State agency experience, was one of the reasons for the enactment of Public Officers Law §73(8).

Therefore, for the third category of employees, the lifetime bar would severely restrict their ability to function as employees of the MetroCard Venture.

3. Whether it is a violation of the Public Officers Law for MTA Group employees to be loaned to the MetroCard Venture.

As an alternative to the proposed transfer of MTACC employees to the Venture, Bergen suggests that certain MTA Group employees could be loaned to the Venture for a period of service. For purposes of this request, Bergen asks that: the Commission assume that any loaned employees would continue to be on the MTA Group payroll and receive all MTA group employee benefits (although salary and benefit costs would be reimbursed by the Venture and be an operating expense of the Venture); the positions with the Venture would be rated and their compensation determined based on the MTA's methodology; all loaned employees would be designated by the MTA as serving in policymaking positions; and that the MetroCard Venture would not be operated as a corporation.

Bergen states that the loaned MTA employees would serve in appropriate positions within the Venture's organizational structure. If the services of a loaned MTA Group employee were no longer required by the Venture (as determined either by the Venture's management or by the MTA Group), the employee would be relieved of his or her Venture duties and return to the MTA Group for reassignment.

Under this arrangement, the loaned MTA Group employees would be considered MTA employees for purposes of the Public Officers Law throughout their assignment to the Venture. Bergen asks whether this proposed arrangement might lead to violations of Public Officers Law §§73(4)(a), 73(7)(a) or 74.

Public Officers Law §73(4)(a) prohibits State officers and employees from selling goods or services in excess of $75 to any State agency unless there is public notice and competitive bidding. In the instant case, the loaned employees would not be selling their services to a State agency. Rather, they would be assigned by their public employer within the context of their public duties to perform services for the Venture, a private entity in which the public employer has a significant and contractual interest. It is expected that the salaries and benefits of such loaned employees would be at the public service pay rate. Thus, there would be no violation.

Likewise, the Commission does not find Public Officers Law §73(7)(a) to be a problem. This section basically prohibits State employees from appearing or rendering certain services for compensation before a State agency in specified circumstances. The loaned employees would not be appearing or rendering services for compensation before any State agency. Furthermore, Public Officers Law §73(7)(a) does not prohibit State officers and employees from acting "in the proper discharge of official duties."

Public Officers Law §74 is always at issue whenever a State officer or employee has official dealings with a private entity. In the instant case, the primary loyalty of the loaned employees would have to be to their employer, the MTA Group. Their actions on behalf of the Venture should not conflict with this obligation provided that the MTA guarantees that its interest is protected. All other provisions of Public Officers Law §§73 and 74 would remain applicable to these loaned employees throughout their assignment to the Venture, as they would remain MTA Group employees.

CONCLUSION

As noted above, the Commission does not have before it a final joint venture agreement and cannot, therefore, reach any conclusion with respect to a specific arrangement. However, based on the descriptions given and the assumptions noted, the Commission concludes that a joint venture could be established whereby: (1) salaried and uncompensated members of the MTA board of directors and employees of the MTA Group could serve without compensation on the governing body of the joint venture as long as the joint venture is not a corporation; (2) the two year bar provision of §73(8) would not prohibit MTACC employees from becoming employees of the Venture or appearing before the MTA Group; (3) the lifetime bar of Public Officers Law §73(8) would apply to those MTACC employees who would be rendering services for compensation for the Venture on any matter in which they personally participated, were directly concerned or actively considered while an employee of the MTA Group with individual decisions to be made on a case by case basis; and (4) neither §73 nor §74 would prevent the MTA Group from lending employees to the Venture.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding unless material facts were omitted or misstated in the request for opinion or related supporting documentation.

Concur:

Joseph M. Bress, Chair

Barbara A. Black,
Angelo A. Costanza,
Donald A. Odell, Members

Dissent:

Robert E. Eggenschiller, Member

Dated: January 17, 1995

Endnotes

1. As used in Bergen's request letter, the MTA Group means the MTA and its subsidiaries and affiliates whose board members are the MTA board members serving *ex officio*. These include the Long Island Rail Road, Metro-North Commuter Railroad Company, Metropolitan Suburban Bus Authority, MTACC, Staten Island Rapid Transit Operation Authority, New York City Transit Authority ("TA"), and its subsidiary, Manhattan and Bronx Surface Transit Operation Authority, and the Triborough Bridge and Tunnel Authority.

2. Bergen, in his letter, states that he expects MTACC to be a partner in the Venture, but later in his letter he states that the MTA will abolish MTACC when its functions are assumed by the Venture. The Commission assumes that the MTA, and not MTACC, will be a partner in the Venture.

3. There is not yet an agreement. Therefore, the Commission is in a position only to consider conceptual issues. It cannot reach any conclusions as to the final arrangement unless and until the final documents are submitted for its consideration.

4. It is the Commission's understanding that only certain members of the MTA board would be assigned to the Venture's governing board.

5. As service on the governing board of the Venture will be uncompensated, the Commission need not discuss the provisions of Public Officers Law §73(4) and (7). Both prohibit only non-State related activities from which compensation is received.

6. At this time the Commission is unable to reach a final determination as to the Venture, since the agreement has not been negotiated. The Commission strongly recommends that MTA submit the final Venture agreement for its review to determine whether the Public Officers Law concerns have been met.