

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Rules Committee

BILL: CS/SB 1034

INTRODUCER: Rules Committee and Senator Fasano

SUBJECT: Public Service Commission

DATE: February 16, 2010      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Caldwell	Caldwell	CU	<b>Fav/1 amendment</b>
2.	Caldwell (CU)	Coburn	RC	<b>Fav/CS</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

The committee substitute (CS) for SB 1034 requires Public Service Commission members to abide by the Code of Judicial Conduct adopted by the Florida Supreme Court.

The CS changes the term “ex parte” to “prohibited” and applies the provision to commissioners and their direct reporting staff, defines the terms “legally interested person,” “prohibited communication,” and “commissioner’s direct reporting staff,” and expands the types of communications that would be considered prohibited communications. The CS requires the Public Service Commission (PSC or commission) to publish on its web site notice to the public of any oral or written communication between a commissioner or a commissioner’s direct reporting staff and a regulated utility representative. The CS also requires the commission to publish on its web site notice of all communications it receives, with the exception of certain communications related to audits, and prescribed procedures for such notice. The CS expands the exemption from prohibited communications to include all individual ratepayers rather than individual residential ratepayers.

The CS expands the provision prohibiting certain employment of former commissioners. The CS further prohibits commissioners and their direct reporting staff who are appointed or hired after

July 1, 2010, from lobbying the legislative or executive branches of state government for four years after termination of employment. The CS expands to commissioners' direct reporting staff hired after July 1, 2010, a four year prohibition from accepting employment from regulated companies or companies with a certain nexus thereto.

The CS amends s. 360.061, F.S., by extending reconfirmation intervals for the Public Counsel to four years from biennially.

The CS provides an effective date of July 1, 2010.

This CS substantially amends sections 350.041, 350.042, 350.0605, and 350.061 of the Florida Statutes.

## II. Present Situation:

### Code of Conduct

Section 350.041, F. S., provides for standards of conduct for commissioners. Subsection (1), provides that commissioners are subject to the provisions of part III of ch. 112, F.S., by virtue of being public officers and full-time employees of the legislative branch of government. In addition, the provisions of this section also apply to commissioners and are not to be construed to contravene the restrictions of part III of ch. 112. Where there is conflict between the two provisions, the more restrictive provision applies.

Subsection (2) provides for standards of conduct.

- Paragraph (a) prohibits commissioners from accepting anything from certain business entities that are directly or indirectly regulated by the commission. This paragraph also limits and specifies what associations are acceptable. The Commission on Ethics is authorized to investigate alleged violations according to prescribed procedures. A person determined by the Commission on Ethics to have provided a gift may not appear or represent anyone before the PSC for a period of two years.
- Paragraph (b) prohibits certain employment.
- Paragraph (c) prohibits commissioners from having any financial interest in companies that are regulated by the PCS.
- Paragraph (d) prohibits commissioners from accepting anything from a party in a proceeding currently pending before the commission. The Ethics Commission is charged with investigation. Persons who gave or provided a prohibited gift may not appear before or otherwise represent anyone before the commission for a period of two years.
- Paragraph (e) prohibits a commissioner from associating with a political body and prescribes the circumstances.
- Paragraph (f) prohibits commissioners from making any public comment regarding the merits of certain proceedings currently pending before the PSC.
- Paragraph (g) requires a commissioner to conduct himself or herself in a professional manner at all times during the performance of his or her duties.
- Paragraph (h) requires a commissioner to avoid impropriety in all of his or her activities and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the PSC.

- Paragraph (i) prohibits a commissioner from soliciting either directly or indirectly anything of value from a public utility regulated by the commission, or from any business entity that is affiliated with or is a subsidiary of any public utility, or from any party appearing in a proceeding considered by the commission in the last two years.

Subsection (3) requires the Commission on Ethics to accept and investigate any alleged violations of this section. The subsection provides for the reporting of the Commission's findings; authorizes the governor to enforce the Commission's findings and recommendations; and allows the Commission to issue advisory opinions regarding standards of conduct and prohibitions under this section.

### Ex Parte Communications

The term "ex parte" is not defined in statute but according to *Black's Law Dictionary* means "on one side only, by or for one party, done for, in behalf of, or on the application of, one party only." According to the *American Heritage Dictionary*, the term means "from or on one side only; one sided, partisan." Under the U. S. and Florida Constitutions<sup>1</sup>, government is restricted from engaging in arbitrary action which deprives persons of life, liberty or property. Due Process requires adequate notice and an opportunity to be heard. Ex parte communications deprive a person of the ability to meaningfully participate in a proceeding that could affect that person's rights.

Section 350.042, F. S., governs ex parte communications. Subsection (1) provides that a commissioner should accord to every person who is legally interested in a proceeding full right to be heard according to law, and except as authorized by law, shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under s. 120.54, F. S., (rulemaking) or 120.565, F.S., (declaratory statements by agencies), workshops, or internal affairs meetings. No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days. The subsection does not apply to commission staff.

Individual residential ratepayers are allowed to communicate with a commissioner, provided that the ratepayer is representing only himself or herself and without compensation. In addition, the section does not apply to oral communications or discussions in scheduled and noticed open public meetings of educational programs of a conference or other meeting of an association of regulatory agencies.

Subsection (4) provides that if a commissioner knowingly receives an ex parte communication relative to certain proceedings, the commissioner must place on the record of the proceedings copies of all written communications made and received, or a memorandum stating the substance of all oral communications made and received and must give written notice to all parties. Any party may respond to the ex parte communication within 10 days after receiving the notice. Finally, the commissioner may withdraw from the proceeding, if he or she deems it necessary to eliminate the effect of an ex parte communication received.

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<sup>1</sup> Amendment XIV, section I; Article I, section 9, respectively.

Subsection (5) prescribes actions individuals who make ex parte communications must take. Subsection (6) provides that any commissioner who knowingly fails to place on the record any such communications within 15 days of the date of such communications is in violation of the section and is subject to removal and may be assessed a civil penalty not to exceed \$5,000.

Subsection (7) requires the Commission on Ethics to receive and investigate sworn complaints of violations. If the Ethics Commission finds a violation by a public service commissioner, it shall provide the Governor and the PSC Nominating Council with a report of its findings and recommendations. The Governor is authorized to enforce the findings and recommendations under part III of chapter 112. The Ethics Commission may enforce an unpaid assessed penalty in circuit court. If, during an investigation by the Ethics Commission into an alleged violation, allegations are made as to the identity of the person who participated in the ex parte communications, that person must be given notice and an opportunity to participate in the investigation and relevant proceedings to present a defense. If that person is determined to have participated in the ex parte communication, the person may not appear before the PSC or otherwise represent anyone before the commission for a period of two years.

In addition to the statute, in 1993 the PSC adopted rule 25-22.033, F.A.C., relating to communications between commission employees and parties. In the rule, the commission recognizes that its employees must exchange information with parties who have an interest in its proceedings. It also recognizes that all parties to adjudicatory proceedings need to be notified and given an opportunity to participate in certain communications. The rule is not intended to prevent or hinder the exchange of information, but to provide all parties to adjudicatory proceedings notification of and the opportunity to participate in certain communications.

Subsection (1) of the rule states that the rule governs communications between employees and parties to docketed proceedings before the commission. The rule does not apply in rulemaking, declaratory statements by agency, staff assistance in changing rates and charges, interim rates, proposed agency action (PAA) proceedings before the commission has voted to issue a PAA order, non-rate case tariffs, workshops, or internal affairs meetings. The rule also exempts docketed and undocketed audits, telephone service evaluations, and electric and gas safety inspections. The rule is not intended to modify or supersede the procedural requirements for formal discovery under commission rules or the Florida Rules of Civil Procedure, or affect communications regarding discovery request, procedure, or other matters not concerned with the merits of the case.

Subsection (2) of the rule states that notice of any written communication between commission employees and parties shall be transmitted to all other parties at the same time as the written communication, whether by U.S. Mail or other means. Subsection (3) provides that all parties to the proceeding shall be given reasonable notice of the time and place of any scheduled meeting or conference call<sup>2</sup> between employees and parties. Subsection (4) allows any party to a proceeding to prepare a written response to any communication between a commission employee and another party. Notice of any such response shall be transmitted to all parties.

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<sup>2</sup> A conference call is defined as a telephone call involving three or more persons.

Finally, subsection (5) provides that no commission employee shall directly or indirectly relay to a commissioner any communication from a party or an interested person which would otherwise be a prohibited ex parte communication. However, non-testifying advisory staff members may discuss the merits of a pending case with a commissioner, provided the communication is not otherwise prohibited by law. Staff members who testify in a case are prohibited from discussing the merits of that case with any commissioner during the pendency of that case.

#### Employment

Section 350.0605, F.S., relates to former commissioners and employees and representation of clients before the commission. Subsection (1) prohibits any former commissioner from appearing before the commission representing any client or any industry regulated by the commission for a period of two years following termination of service. Subsection (2) prohibits any former employees from appearing before the commission representing any client regulated by the commission on any matter which was pending at the time of termination and in which such former employee had participated. Subsection (3) provides that for a period of two years following termination of service, a former member may not accept employment by or compensation from a business entity which, directly or indirectly, owns or controls a public utility regulated by the commission, from a public utility regulated by the commission, from a business entity which, directly or indirectly, is an affiliate or subsidiary of a public utility regulated by the commission or is an actual business competitor of a local exchange company or public utility regulated by the commission and is otherwise exempt from regulation by the commission under ss. 364.02(14), F.S., (wholesale telecommunications companies, mobile service providers, fax service providers, private data network providers, cable companies, and intrastate long distance telecommunications providers) and 366.02(1), (public utilities) F.S., or from a business entity or trade association that has been a party to a commission proceeding within the two years preceding the member's termination of service on the commission.

#### Public Counsel

Section 350.061, F.S., provides for the appointment of the Public Counsel who represents Florida's citizens in proceedings before the Public Service Commission. The Public Counsel, who is appointed by majority vote of the Committee on Public Counsel Oversight, serves at the pleasure of the committee, subject to biennial reconfirmation by the committee.

### **III. Effect of Proposed Changes:**

#### Code of Conduct

Section 1 amends s. 350.041, F.S., to add paragraph (j). This paragraph requires commissioners to observe and abide by the Code of Judicial Conduct as adopted by the Florida Supreme Court in docketed proceedings. If any canon is in direct conflict with a statutory provision that applies to the commissioners or commission, the statutory provisions control. Any material violation of the Code, excluding any canon preempted by a conflicting statutory provision, is grounds for suspension or removal of a commissioner by the Governor.

The Code of Judicial Conduct consists of a preamble, definitions, seven canons, and application. The Canons are:

1. A Judge shall uphold the integrity and independence of the Judiciary.
2. A Judge shall avoid impropriety and the appearance of impropriety in all of the Judge's activities.
3. A Judge shall perform the duties of judicial office impartially and diligently.
4. A judge is encouraged to engage in activities to improve the law, the legal system, and the administration of justice.
5. A judge shall regulate extrajudicial activities to minimize the risk of conflict with judicial duties.
6. Fiscal matters of a judge shall be conducted in a manner that does not give the appearance of influence or impropriety; a judge shall regularly file public reports as required by Article II, Section 8, of the Constitution of Florida; and shall publicly report gifts; additional financial information shall be filed with the judicial Qualifications Commission to ensure full financial disclosure.
7. A judge or candidate for judicial office shall refrain from inappropriate political activity.

The Code was adopted by the Florida Supreme Court and describes how judges are to conduct themselves. The preamble describes the purpose of the Code and discusses how the canons should be interpreted. Each canon has additional provisions and commentary. The canons express the exemplary behavior sought of judges, and under the bill, commissioners will now be held to the same standards. Canons 2, 3, and 7 are already reflected in paragraphs (2)(h) and (2)(e) respectively. Some of the canons appear to support commissioner activity that has been criticized in the past. For example, canon 4B encourages judges to speak, write, lecture, and teach concerning the law, and canon 4D encourages judges to serve as a member, officer, or director of an organization or government entity devoted to the improvement of the law. In 2003, issues arose concerning the membership of two PSC commissioners in a national organization whose goal was to shift law and policy away from regulation and toward competitive markets, calling into question these commissioners' objectivity and willingness to following existing law.

#### Ex Parte Communications

Section 2 amends s. 350.042, F.S., relating to ex parte communications to broaden its scope to govern prohibited communications. The section governs communications made by or directly to commissioners and their direct reporting staff which concern proceedings before the PSC (Subsection (1)). The purpose of this section is to ensure the fairness of the PSC's proceedings by assuring the public that the decisions by the commission are not influenced by prohibited communications between commissioners and legally interested persons. Legislative intent requires the commission to afford to every person who is legally interested in a proceeding, or their attorney or qualified representative, the full right to be heard according to law except as otherwise prohibited (Paragraph (1)(a)).

Three terms are defined:

1. "Legally interested person" means any party to a proceeding before the commission, or a representative of a party to a proceeding pending before the commission, and includes

corporations, partnerships, limited liability companies, elected or appointed officials of state government, and other public and elected officials.

2. "Prohibited communication" means any communication regarding a docketed matter that if written, is not served on all the parties to a proceeding and, if oral, is made without adequate notice to the parties and an opportunity for them to be present and heard.
3. "Commissioner's direct reporting staff" means a commissioner's chief advisor and executive assistant (Paragraph (1)(b)).

A brief overview of commission organization, practice, and procedure may be instructive in interpreting the bill. The commission suite consists of the five commissioners, their chief advisors, and executive assistants. Under current ex parte provisions, the chief advisors and executive assistants may receive ex parte communications but are prohibited from passing the communication along to commissioners.

The technical staff is overseen by the Executive Director. Technical staff typically consists of accountants, economists, engineers, attorneys, and their support staff. This staff is generally not a party to a proceeding, but manages the proceedings and provides technical analyses. This staff does, however, send out interrogatories and discovery requests. Technical staff coordinates with the prehearing officer (a commissioner appointed by the chair) and the commissioners as a body. Technical staff is currently not subject to ex parte restrictions. However, in docketed matters, technical staff, through the attorneys, generally notify all parties (and others who register as wanting to be included) of meetings or procedural matters. Docketed matters result from a petition or filing by a party or recommended to be filed by commission staff or the commissioners themselves, for a finding or an action to be made or taken by the commission. Rulemaking and declaratory statements are governed under ch. 120, F.S., and have generally been considered a legislative function. The current ex parte prohibitions have not applied to rulemaking or a declaratory statement, which is consistent with all state administrative practice.

The Commission also interacts with the general public or customers and companies to resolve customer complaints, to assist in customer's general education, and with government programs like Lifeline and Link-up. Finally, the commission also interacts with companies it regulates to audit those companies or check safety standards. Sometimes these interactions result in a docketed matter.

In the bill, a prohibited communication appears to require three elements: a docketed matter (and the relevant proceedings thereto), made without notice to parties, and no opportunity for parties to be present or heard (an opportunity to respond). The bill prohibits communications related to any proceeding other than an undocketed workshop or an internal affairs meeting. In addition, an individual shall not discuss any matter with a commissioner or the commissioner's direct reporting staff which the individual reasonably foresees will be filed with the commission (Paragraph (1)(d)). This provision appears overly broad in that it could result in problematic enforcement. Moreover, it appears to cover discussions by non-parties on subjects that do not pertain to the merits of a docketed matter and are not meant to influence a commissioner, such as a reporter asking a commissioner or chief advisor about a matter that is rumored to be filed or a reporter asking a Legislator or the Governor a question about a docketed matter. The bill also provides that the restrictions on prohibited communications as provided in this section shall apply to communications made by or directed to commissioners or commissioners' direct

reporting staff to or from the Governor, a member of the Cabinet, or a member of the Legislature (Subsection (4)).

A commissioner or commissioner's direct reporting staff is not authorized to discuss matters with any party or legally interested person to a proceeding at scheduled and noticed open meetings of public education programs or conferences or other meetings of an association of regulatory agencies (Subsection (5)).

The bill requires special treatment of certain communications between commissioners or commissioners' direct reporting staff and representatives of entities regulated by the commission.

- Any oral or written communication not prohibited in subsection (1) must be made available to the public, which is done by posting the written communication or a summary of the oral communication on the PSC's website within 72 hours of receipt (Paragraph (2)(c)).
- Any meeting, telephone conference call, or written communication shall be noticed by posting on the PSC website 72 hours before made. Public Counsel may participate in any such noticed meeting, telephone conference call or written communication (Paragraph (2)(d)).

It is unclear how the Public Counsel can participate in a written communication. In addition, specific provisions supersede general provisions according to statutory interpretation. In communications between a commissioner or commissioner's direct reporting staff and a representative of entities regulated by the commission only the Public Counsel may participate. It appears that other legally interested persons are not given the same opportunity.

The bill creates certain exceptions to prohibited communications.

- Commission staff or representatives of a regulated utility who are required to initiate or receive brief, unscheduled communications for the purpose of obtaining additional information that may be needed after the completion of an audit (Paragraph (2)(e)).
- Individual ratepayers may communicate with a commissioner or a commissioner's direct reporting staff if the ratepayer is representing himself or herself without compensation (Subsection (3)).
- Any written or oral communication from the Governor, a member of the Cabinet, or a member of the Legislature which is only a status inquiry and does not address the merits of a proceeding (Subsection (4)).
- Oral commission discussions in scheduled and noticed open public meetings of educational programs or of a conference or other meeting of an association of regulatory agencies (Subsection (5)).

The bill also requires the commission to make public by posting on its website certain communications that are not prohibited communications.

- Any written communication received by the commission must be posted by close of business the next day (Paragraph (2)(c)).
- Written summaries of documented emergencies or a brief, unscheduled follow-up to a previously scheduled meeting or telephone conference call must be posted within 72 hours (Paragraph (2)(d)).



The bill requires written communications from the Governor, a member of the Cabinet, or a member of the Legislature who attaches or forwards a constituent's correspondence concerning the merits of a docketed proceeding be placed in the commission's docket files (Subsection (4)).

Changes to subsections (3) through (8) conform the remaining provisions of the section to include the term "commissioner's direct reporting staff," with one exception. If the Commission on Ethics determines that a person participated in a prohibited communication, a civil penalty not to exceed \$5,000 is added to the current penalty of not appearing before the commission for two years. The regulated entity represented by the person, if applicable, may also be assessed a penalty of up to one-tenth of 1 percent of the entity's annual operating revenue for the most recent calendar year.

### Employment

Section 3 amends s. 350.0605, F.S., relating to former commissioners and employees representation of clients before the commission. The bill prohibits any former commissioner from lobbying the legislative or executive branch of state government for a period of four years following termination of service with the commission. This provision applies to commissioners prospectively (appointments or reappointments after July 1, 2010). The bill further prohibits any former commissioner's direct reporting staff from appearing before the commission representing any client or industry regulated by the commission or from lobbying the legislative or executive branch of state government for a period of four years following termination of employment. This provision applies to commissioner's direct reporting staff who are hired by the commission on or after July 1, 2010. The term "commissioner's direct reporting staff" is defined for the purposes of this section. The bill removes the current prohibition that former employees cannot appear before the commission representing any client regulated by the commission on any matter which was pending at the time of termination and in which the former employee participated.

### Public Counsel

Section 4 amends s. 350.061, F.S., to extend reconfirmation intervals for the Public Counsel to four years from biennially.

Section 5 provides an effective date of July 1, 2010.

### **Other Potential Implications:**

In Section 1, the bill makes "any material violation of the Code of Judicial Conduct" by a commissioner grounds for suspension or removal by the Governor. However, the bill does not provide who will determine whether a material violation has been committed or what standard will be used for whether a violation is "material."

In Section 2, the term "legally interested" includes elected or appointed officials of state government and other public elected officials. However, Subsection (4) refers only to the Governor, Cabinet, and members of the Legislature.

The bill would prohibit all communications in any proceeding as ex parte, not just those concerning “the merits, threat, or offer of reward.” This may prohibit mundane communications such as those relating to filing or scheduling.

The bill prohibits any representation by commissioners’ direct reporting staff before the PSC for four years but also prohibits lobbying either the legislative or executive branch. The connection between PSC employment and lobbying an entity with which the employee most likely had no employment contact is unclear, as is the purpose of the prohibition. According to the commission, the prohibition of a former employee from lobbying the legislative or executive branch of state government may preclude an individual from lobbying on his or her own behalf on issues of personal interest or welfare, and could potentially create a First Amendment concern.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public will have access to all communications between commissioners and his or her direct reporting staff and representatives of certain utilities.

C. Government Sector Impact:

The posting and noticing requirements may create a delaying effect on commission functions.

#### **VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Rules on February 16, 2010:**

The committee substitute (CS) for SB 1034 amends s. 350.041, F.S., to require commissioners to observe and abide by the Code of Judicial Conduct adopted by the Florida Supreme Court and provides for a penalty of suspension or removal by the Governor for any material violation.

The CS amends s. 350.042, F.S., to broaden the scope of ex parte communications to govern prohibited communications. A stated purpose and legislative intent are added to ensure fairness of commission proceedings and afford every person the full right to be heard according to law.

The CS defines the terms “legally interested person,” “prohibited communication,” and “commissioner’s direct reporting staff.” The CS replaces the term “commission staff” with “commissioner’s direct reporting staff” throughout the bill.

The CS extends certain time limitations within which the commission must post specified communications to its website. A new provision is added to prohibit or limit certain communications between commissioners and commissioners’ direct reporting staff and the Governor, a member of the Cabinet, or a member of the Legislature.

The CS clarifies that the exemption allowing oral communications or discussions in certain scheduled and noticed open public meetings does not authorize a commissioner or commissioner’s direct reporting staff to discuss matters subject to a proceeding with any party or legally interested person.

The CS adds a civil penalty of \$5,000 to be assessed to a person determined by the Ethics Commission to have participated in a prohibited communication. Also, the regulated entity represented by that person is subject to a penalty of up to one-tenth of 1 percent of its annual operating revenue for the most recent calendar year.

The CS limits the staff employment restrictions to only a commissioner’s direct reporting staff. The employment prohibition is extended to four years from two years and affects commissioners who are appointed and commissioners’ direct reporting staff who are hired after July 1, 2010.

The CS does not amend s. 350.183, F.S., relating to access to records.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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