

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Role and Organization of the Florida Public Service Commission

The Florida Public Service Commission ("PSC" or "commission") is an arm of the legislative branch of government.¹ The role of the PSC is to ensure that Florida's consumers receive some of their most essential services – electric, natural gas, telephone, water, and wastewater – in a safe, affordable, and reliable manner.² In doing so, the PSC exercises regulatory authority over utilities in one or more of three key areas: rate base/economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.³

On its website,⁴ the PSC provides the following overview of its role:

The work of the Florida Public Service Commission is a balancing act. The Commission must balance the needs of a utility and its shareholders with the needs of consumers. Traditionally, the Commission achieved this goal by establishing exclusive utility service territories, regulating the rates and profits of a utility, and placing an affirmative obligation on the utility to provide service to all who requested it. For electric and water customers in the state, many of the Commission's traditional methods for achieving the balance continue today. Legislative action during the 1995 session to open up the local telephone market to increased competition, however, calls for the Commission to facilitate entry of new firms into the local telephone market, while at the same time ensuring that neither the new entrant nor the incumbent local exchange company is unfairly

¹ Section 350.001, F.S.

² <http://www.psc.state.fl.us/about/overview.aspx#one>

³ *Ibid.* During 2009, the PSC regulated five investor-owned electric companies, seven investor-owned natural gas utilities, and more than 160 investor-owned water and/or wastewater utilities. The PSC also has competitive market oversight for more than 1,250 telecommunications companies in the state of Florida. While the PSC does not regulate the rates and service of publicly-owned, municipal or cooperative utilities, it does have jurisdiction, with regard to rate structure, territorial boundaries, bulk power supply operations and planning, over 34 municipally-owned electric systems and 18 rural electric cooperatives. The PSC also has jurisdiction, with regard to territorial boundaries and safety, over 27 municipally-owned natural gas utilities and exercises safety authority over all electric and natural gas systems operating in the state.

⁴ *Ibid.*

advantaged or disadvantaged. Section 364.01(4), F.S., calls for the Commission to exercise its jurisdiction to encourage and promote competition. The Commission's role in the increasingly competitive telephone industry remains one of balance.

In performing this role, the PSC conducts proceedings ranging from workshops and rulemaking to informal "proposed agency action" proceedings and formal evidentiary hearings. Among state agencies in Florida, the PSC is unique with respect to the manner in which it handles formal evidentiary proceedings. Most state agencies refer contested matters to the Division of Administrative Hearings (DOAH) for formal evidentiary hearings and fact finding. Under this process, an administrative law judge (ALJ) is assigned to hear the case, with due regard to the expertise required for the matter.⁵ The agency may participate as a party.⁶ After hearing the evidence and arguments presented by the parties, the ALJ issues a recommended order containing findings of fact, conclusions of law, and recommended disposition of the case.⁷ The ALJ's findings of fact must be based "exclusively on the evidence of record and on matters officially recognized."⁸ Subject to certain requirements, the agency may reject or modify the ALJ's conclusions of law over which the agency has substantive jurisdiction. The agency has limited authority to modify or reject the ALJ's findings of fact.⁹ Although it is authorized to refer matters to DOAH for assignment to an ALJ,¹⁰ the PSC is unique in that it conducts most of its own formal evidentiary hearings. In these hearings, commissioners rule on procedural matters, establish evidence of record, weigh the record evidence, and apply the law to the facts of the case. Thus, in conducting formal hearings, *PSC commissioners essentially serve the role of administrative law judges*. Unlike ALJ's, however, commissioners have the authority to make the final findings of fact and conclusion of law. In proceedings at either DOAH or the PSC, parties and interested persons are prohibited from making ex parte communications with the decision maker concerning the merits of the proceeding.¹¹

The PSC is authorized to employ clerical, technical, and professional personnel reasonably necessary for the performance of its duties, including one or more court reporters.¹² In performing its role, the PSC has authority to access the books and records of regulated entities, including relevant books and records of affiliates,¹³ to require reports,¹⁴ to conduct inquiries,¹⁵ and to perform financial, management, and operations audits of regulated entities.¹⁶ The PSC is authorized to initiate certain types of proceedings within its jurisdiction.¹⁷ The PSC is funded

⁵ Section 120.569(2)(a), F.S. Pursuant to s. 120.65, F.S., administrative law judges must have been a member of The Florida Bar in good standing for the preceding 5 years.

⁶ *Id.*

⁷ Section 120.57(1)(k), F.S.

⁸ Section 120.57(1)(j), F.S. Pursuant to s. 120.57(1)(f), F.S., the record of a proceeding consists only of the following: all notices, pleadings, motions, and intermediate rulings; evidence admitted; those matters officially recognized; proffers of proof and objections and rulings thereon; proposed findings and exceptions; any decision, opinion, order, or report by the presiding officer; all staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records; all matters placed on the record after an ex parte communication; and the official transcript.

⁹ Section 120.57(1)(l), F.S.

¹⁰ Sections 350.125 and 120.569(2), F.S.

¹¹ Sections 120.66(1), F.S., and 350.042(1), F.S.

¹² Section 350.06, F.S.

¹³ See, e.g., ss. 364.183, 366.093, and 367.156, F.S.

¹⁴ See, e.g., s. 350.117, F.S.

¹⁵ Section 350.121, F.S. This authority has not been exercised by the PSC in almost 20 years.

¹⁶ Section 350.117, F.S.

¹⁷ See s. 364.15, F.S. (compelling repairs and improvements to telecommunications facilities); s. 364.335, F.S. (granting certificates to construct, operate, or control telecommunications facilities); s. 364.3381, F.S. (investigation of anticompetitive behavior); s. ss. 366.06, 366.07, 366.071, and 366.076, F.S. (setting rates for public utilities); s. 367.045, F.S. (amending, revoking, and suspending certificates of authorization to provide water or wastewater service); ss. 367.081, 367.082, 367.0822, 367.083, and 367.101, F.S. (setting rates for water and wastewater utilities); s. 367.0817, F.S. (relating to reuse projects); s. 368.061, F.S. (compelling compliance with gas safety laws); ss. 368.106 and 368.107, F.S. (approving rates for

primarily through regulatory assessment fees imposed on regulated entities and deposited into the Florida Public Service Regulatory Trust Fund.¹⁸

As set forth in its most recent Statement of Agency Organization & Operations, the PSC carries out its work primarily through two offices: the Office of the Executive Director and the Office of the General Counsel.¹⁹

The Office of the Executive Director is responsible for directing, planning, and administering the overall activities of the commission staff with the exception of the Office of the General Counsel. The Executive Director, who is selected by the commission, consults with and advises the commissioners on regulatory, internal management, and budgetary matters and acts as an interagency liaison. Various divisions under the Office of Executive Director include those responsible for administration (including accounting, budgeting, human resources, purchasing, and facility management), clerk's duties (including maintaining case files and records and issuing orders and notices), information technology services, and public information (including serving as liaison to the public and media). In addition, the Office of Executive Director oversees the technical divisions involved directly in the substantive issues within the PSC's jurisdiction.

The Office of the General Counsel provides legal counsel to the commission on all matters under its jurisdiction. This office also supervises the procedural and legal aspects of all cases before the commission. In cases involving evidentiary hearings before the commission, the office is responsible for conducting discovery, presenting staff positions and testimony, and cross-examining other parties' witnesses. In conjunction with the appropriate technical staff, the office prepares recommendations to the commission and prepares written commission orders. The office is also responsible for defending commission orders on appeal, for defending commission rules challenged before the Division of Administrative Hearings, and for representing the commission before state and federal courts.

Prior to 1979, three commissioners were elected to the PSC in a statewide election. In 1978, the Legislature changed the commission to a five-member board,²⁰ with members appointed to staggered 4-year terms.²¹ This structure remains today. A Chair is selected by majority vote of the commissioners to serve a two-year term.²² The Chair is the chief administrative officer of the PSC, presiding at all hearings and conferences when present, setting PSC hearings, and performing those duties prescribed by law.²³

Public Service Commissioners – Appointment & Qualifications

Although the PSC is an arm of the legislative branch of government, the Legislature has delegated to the Governor a "limited authority with respect to the Public Service Commission by authorizing him or her to participate in the selection of members" in a specific manner²⁴: commissioners are appointed by the Governor from a slate of nominees selected by the Public

intrastate natural gas transmission pipelines); and ss. 403.519, 403.537, and 403.9422, F.S. (determining need for electrical power plants and transmission lines and natural gas transmission pipelines).

¹⁸ Section 350.113, F.S.

¹⁹ *Florida Public Service Commission, Statement of Agency Organization & Operations*, February 2010.

<http://www.psc.state.fl.us/home/files/SAOO.pdf>

²⁰ <http://www.psc.state.fl.us/about/overview.aspx#one>

²¹ Section 350.01, F.S.

²² *Id.*

²³ *Id.* See also, <http://www.psc.state.fl.us/about/overview.aspx#one>

²⁴ Section 350.001, F.S.

Service Commission Nominating Council²⁵ (PSC Nominating Council), and the Governor's appointments must be confirmed by the Senate.²⁶

Before nominating a person to the Governor for appointment, the PSC Nominating Council must determine that the person is competent and knowledgeable in one or more fields, including but not limited to: public affairs, law, economics, accounting, engineering, finance, natural resource conservation, energy, or "another field substantially related to the duties and functions of the commission." The law requires that the commission fairly represent these fields.²⁷ Currently, commissioners are appointed at a salary of \$130,036 per year.²⁸

Public Service Commissioners – Standards of Conduct

The PSC is required to perform its duties independently.²⁹ Part III of Chapter 112, F.S., establishes a code of ethics for public officers and employees, which includes Public Service Commissioners. Generally, this code prohibits public officers, including commissioners, from soliciting or accepting anything of value to influence a vote or official action, using their official position to secure a special benefit, disclosing or using non-public information for personal benefit, soliciting gifts from lobbyists, and soliciting an honorarium from anyone or accepting an honorarium from a lobbyist. This code also establishes restrictions on public officers, including commissioners, from doing business with one's own agency, having outside employment or contractual relationships that conflict with public duties, representing any party before one's agency for compensation for two years after leaving office, and employing relatives in the agency. Finally, this code requires that public officers, including commissioners, disclose voting conflicts when a vote would result in a special private gain or loss, file quarterly reports for gifts over \$100 from persons not lobbyists or relatives, file quarterly reports for receipt of honorarium-related expenses from lobbyists, and disclose certain financial interests.

In addition to the provisions of part III of chapter 112, public service commissioners are subject to more stringent requirements in s. 350.041, F.S. In the event of a conflict between part III of chapter 112 and s. 350.041, F.S., the more restrictive provision applies.³⁰ Section 350.041, F.S., provides the following standards of conduct:

- A commissioner may not accept anything from a regulated public utility (or a business entity that owns or controls the utility or an affiliate or subsidiary of the utility).
- A commissioner may not accept anything from a party in a proceeding currently pending before the commission.
- A commissioner may not accept any form of employment with, or engage in any business activity with, a regulated public utility (or a business entity that owns or controls the utility or an affiliate or subsidiary of the utility).
- A commissioner may not have any financial interest in a regulated public utility (or a business entity that owns or controls the utility or an affiliate or subsidiary of the utility), except for shares in a mutual fund.
- A commissioner may not serve as the representative of, or serve as an executive officer or employee of, a political party; campaign for any candidate for public office; or become a candidate for any public office without first resigning.
- A commissioner, during his or her term of office, may not make any public comment on the merits of a formal proceeding in which a person's substantial interests are determined.

²⁵ Pursuant to s. 350.031, F.S., the PSC Nominating Council consists of 12 members, with six appointed by the President of the Senate and six appointed by the Speaker of the House of Representatives. The President and the Speaker must each appoint three members from their own chamber, including one member from the minority party, and three nonmembers.

²⁶ Section 350.031, F.S.

²⁷ Section 350.031, F.S.

²⁸ http://www.flsenate.gov/data/pscnc/position_description.pdf

²⁹ Section 350.001, F.S.

³⁰ Section 350.041(1), F.S.

- A commissioner may not conduct himself or herself in an unprofessional manner during the performance of official duties.
- A commissioner must avoid impropriety in all activities and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the commission.
- A Commissioner may not directly or indirectly, through staff or other means, solicit anything of value from a regulated public utility, an affiliate or subsidiary of the utility, or any party appearing in a proceeding considered by the Commission in the last 2 years.

Ex Parte Communications

Commissioners are prohibited from engaging in certain ex parte communications with persons who are “legally interested in a proceeding” before the commission.³¹ This prohibition applies only to communications concerning “the merits, threat, or offer of reward” in a proceeding, and thus does not include discussions on procedural issues.³² This prohibition does not preclude ex parte communications in all proceedings: rulemaking, declaratory statements, workshops, and internal affairs meetings are specifically excluded.³³ Thus, the prohibition applies to proceedings in which the substantial interests of a person are determined, including proposed agency action proceedings and formal hearings under ss. 120.569 and 120.57, F.S. This prohibition prohibits an individual from discussing ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days.³⁴ The prohibition does not apply to commission staff.³⁵ The law does not define ex parte communications.

If a commissioner receives a prohibited ex parte communication, he or she must: place on the record of the proceeding a copy of any written correspondence or a memo stating the substance of any oral communication; provide written notice to all parties to the proceeding; and provide all parties the opportunity to respond to the ex parte communication. The commissioner may choose to withdraw from the proceeding if he or she believes it is necessary to do so to eliminate the effect of having received the communication.³⁶ Any individual other than a commissioner that makes a prohibited ex parte communication must submit to the commission: a written statement describing the nature of the communication; copies of all written communications made and written responses received; and a memorandum stating the substance of all oral communications made and oral responses received. The commission must place this information on the record of the relevant proceeding.³⁷

The penalties for failing to timely place a prohibited ex parte communication on the record depend on the party involved. A commissioner who fails to place the communication on the record within 15 days is subject to removal and a civil penalty of up to \$5,000.³⁸ Any other person who participated in the communication faces a 2-year ban on practice before the PSC.³⁹

Post-Employment Restrictions on Public Service Commissioners and Staff

For the first two years after leaving office, a former commissioner may not appear before the PSC representing any client or industry regulated by the PSC.⁴⁰ Further, during those first two years, a former commissioner may not accept employment or compensation from a regulated

³¹ Section 350.042(1), F.S. The law does not define “ex parte communications” for purposes of this section. The law also does not define what persons are “legally interested in a proceeding.”

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Section 350.042(4), F.S.

³⁷ Section 350.042(5), F.S.

³⁸ Section 350.042(6), F.S.

³⁹ Section 350.042(7)(d), F.S.

⁴⁰ Section 350.0605, F.S.

public utility, related business entities, business competitors of local telephone companies, or any entity that was a party to a commission proceeding in the prior two years.⁴¹

A former PSC employee cannot appear before the commission on behalf of a regulated entity in any matter that the employee worked on and that was pending at the time the employee left.⁴² In addition, a former PSC employee cannot personally represent anyone before the commission for a period of two years after leaving the commission.⁴³

Committee on Public Counsel Oversight

In 2005, the Legislature created the Committee on Public Service Commission Oversight in s. 350.012, F.S. The committee, comprised of 12 members (6 Senate members appointed by the President of the Senate and 6 House members appointed by the Speaker of the House of Representatives), was created to appoint a public counsel and to screen persons nominated by the PSC Nominating Council for the Governor's consideration for appointment.⁴⁴

In 2008, the Legislature removed the committee's role in the commissioner selection process. The committee was renamed the Committee on Public Counsel Oversight.⁴⁵ Its only remaining duty is to appoint a Public Counsel.

Recent Issues Surrounding the Public Service Commission

The PSC came under intense scrutiny in 2009 as a result of several allegations of unethical behavior. Some of these allegations were formalized and investigated by various entities, including the Leon County State Attorney's Office, the Florida Department of Law Enforcement (FDLE), the Florida Commission on Ethics, and the PSC's Inspector General. Each of the formal allegations, and the resulting findings, are summarized below.

- In August 2009, a PSC staff member informed commissioners that he had attended a party at the home of a vice president of a regulated utility company and later resigned. An investigation by the PSC's Inspector General concluded that the employee's attendance at the party, "although not specifically prohibited by rule or law, constituted poor judgment and could create negative perceptions . . ." ⁴⁶
- In August 2009, FDLE, at the request of the State Attorney's Office, investigated a complaint from a PSC commissioner concerning the exchange of Blackberry personal identification numbers between some commissioners' aides and a utility company's representatives to determine whether these activities facilitated public records law violations or prohibited ex parte communications. After review of sworn testimony from various PSC commissioners and their aides and Blackberry messages retrieved from the PSC, the State Attorney's Office found that there did not appear to be any criminal activity facilitated by PSC commissioners or their staff which violated Florida statute. The FDLE report noted that the complainant presented no specific information that identified any criminal act.⁴⁷
- In 2009, a complaint was filed at the Commission on Ethics alleging a prohibited ex parte communication between a PSC commissioner and an attorney of a regulated utility company, facilitated by the commissioner's aide. The Florida Commission on Ethics dismissed the complaint after determining that the communication was not prohibited because it involved procedural matters.⁴⁸ A new complaint concerning the same event

⁴¹ *Id.*

⁴² *Id.*

⁴³ Section 112.313(9), F.S.

⁴⁴ Chapter 2005-132, L.O.F.

⁴⁵ Chapter 2008-227, L.O.F.

⁴⁶ *Memorandum re Review of SGA Director's attendance at FPL employee's social function* (OIG #09/10-15), September 2, 2009.

⁴⁷ Florida Department of Law Enforcement Investigative Report, Case No. EI-73-8488.

⁴⁸ <http://blogs.tampabay.com/buzz/2009/09/ethics-commission-dismisses-complaint-against-pscs-edgar.html>

was reportedly filed with the Commission on Ethics in 2010 but has not yet been resolved.⁴⁹ In addition, FDLE is reportedly reviewing information presented by the PSC to determine whether an inquiry would be appropriate.⁵⁰

Other allegations and suggestions of impropriety were made by commissioners at public meetings and by other sources through various media outlets, but none of these were formally made to, or investigated by, any entity charged with addressing such matters. Though none of the allegations have yet resulted in a finding that any PSC commissioner or staff member violated any ethical standard established by statute or PSC rule, this string of allegations has cast the PSC in a negative light and has heightened public distrust of the agency.

By letter to the Senate President, the Speaker of the House of Representatives, the Governor, and the Attorney General, dated September 28, 2009, Adora Obi Nweze, President of the Florida State Conference of Branches of the NAACP, requested that the Legislature and the Governor address these issues through “constructive investigation and open dialogue among all concerned parties” to develop “an updated code of conduct that provides all stakeholders with clarity and certainty.” While supporting a review of the allegations made to date, the letter expressed the belief that “the impetus for making the allegations arise from interested parties on both sides who are trying to use the current ethics process as a tool to distract the Commission from the work at hand and perhaps make it impossible to render impartial decisions.”

In addition, recent events surrounding the PSC have created uncertainty in Florida’s regulatory environment. In October 2009, Moody’s Investors Service, which provides credit ratings and research covering debt instruments and securities,⁵¹ issued the following statement:

Moody's Views Politicized Florida Rate Cases as Credit Negative

Moody's views the highly politicized atmosphere surrounding the base rate proceedings of Florida Power & Light Company (FPL, A1 Issuer Rating) and Progress Energy Florida, Inc. (PEF, A3 Issuer Rating) as negative to the credit quality of both utilities and an indication that the political and regulatory environment for investor-owned utilities in Florida may be deteriorating. These base rate increases were filed during a period of challenging economic conditions in the state, which has recently begun to lose population, contributing to weak sales volumes at both utilities. Rate relief that is insufficient to maintain cash flow coverage metrics at or close to historical levels could pressure the credit ratings of both utilities.

Over the last several weeks, the governor of Florida has become increasingly vocal in expressing his opposition to the utility rate requests, appointed two new commissioners to the Florida Public Service Commission (FPSC), and requested that the FPSC delay action on the rate cases until these new commissioners are in place in January. On October 5, one of the sitting commissioners that had been expected to vote on the pending rate cases resigned from the FPSC effective immediately, temporarily leaving the Commission with four sitting members. On October 6, the four remaining FPSC members unanimously denied FPL's petition of need for the construction of a new underground natural gas pipeline in Florida, indicating that FPL did not prove that the pipeline was the most cost-effective alternative and ordering the company to rebid the project.

Moody's views political intervention in the utility regulatory process as detrimental to credit quality, sometimes resulting in adverse rate case outcomes. In some cases, this has led to multi-notch credit rating downgrades of utilities in states

⁴⁹ <http://miamiherald.typepad.com/nakedpolitics/2010/01/new-ethics-complaint-filed-against-pscs-edgar.html>

⁵⁰ <http://www.tampabay.com/news/politics/stateroundup/psc-inspector-general-requests-fdle-investigation/1078578>

⁵¹ <http://v3.moody.com/Pages/atc.aspx>

where this has occurred, most notably Illinois and Maryland in recent years. Moody's notes that such intervention is highly unusual for the state of Florida, which has traditionally been one of the more constructive utility regulatory jurisdictions in the nation, characterized by fair and balanced regulatory proceedings with little to no political interference or controversy.

Moreover, the turnover of commissioners at state utility regulatory bodies heightens the level of uncertainty surrounding utility rate proceedings because of the lack of an established track record, the limited experience of new commissioners, and the challenges that many new commissioners face in quickly coming up to speed on often complicated utility rate matters. The replacement of experienced and seasoned commissioners on the FPSC with newcomers well after the rate proceedings have begun and most hearings have been completed increases the possibility of a rate case outcome that is negative to utility credit quality.⁵²

On November 4, 2009, the Energy & Utilities Policy Committee of the Florida House of Representatives heard from its staff concerning the current standards of conduct, rules on ex parte communications, and other standards applicable to PSC commissioners and staff. The committee also took testimony from the executive director of the PSC concerning steps taken since the early 1990s to address concerns about ex parte communications, including the development of rules and ethics training, and the PSC's plans to address the recent events through a series of workshops. The committee also took testimony from the Public Counsel concerning its role in the PSC's proceedings and from the general counsel of the Office of Legislative Services concerning the selection process for commissioners. The committee also took testimony and written comments from Mr. David Honig, Special Counsel for Civil Rights for the Florida State Conference of Branches of the NAACP. While elaborating on suggestions made in the September 28 letter provided by his organization, as noted above, Mr. Honig made the following observation about these issues:

How do we avoid *ad hominem* attacks on individuals engaged in lawful conduct but conduct that is nonetheless "not liked" by interested parties or others? This last aspect is important – the toxic climate created by such allegations impedes morale at state agencies and discourages many of the best and brightest young people from considering careers in public service. I would venture to guess that there are bright accountants, economists, lawyers, and other subject-matter experts who have been deterred from seeking employment at the Florida PSC because of the vitriolic mudslinging that has characterized the agency over the last year.

On November 24, 2009, the PSC conducted a workshop seeking input from the public on how to enhance the integrity of the commission's regulatory processes. At the workshop, the Office of Public Counsel, the state's consumer advocate in proceedings before the PSC, presented various recommendations, including some "outside the box" suggestions "to improve both the perception and the integrity" of the commission's hearing process and "to restore the public trust and public confidence."⁵³ These suggestions included the concept of separating and keeping clear "lines of demarcation" between "trial staff" and the commission's "advisory staff." Under this proposal, the commission's trial staff would participate like any other party in a commission proceeding. The trial staff would submit positions on issues, present witnesses, cross-examine witnesses, and submit post-hearing briefs – with no more or less weight than that afforded to the briefs of any other party – for the commission to consider. The advisory staff would prepare legal and evidentiary analysis for the commissioners. Under this scheme, the trial staff would be subject to the same rules on ex parte communications as other parties, and the advisory

⁵² As presented as Moody's full report at <http://miamiherald.typepad.com/nakedpolitics/2009/10/investment-advisors-warn-of-pscs-politicized-atmosphere.html>

⁵³ Transcript, p.11, Undocketed Rule Development Workshop, Public Service Commission, November 24, 2009.

staff would be prohibited from engaging in ex parte communications.⁵⁴ The Office of Public Counsel also proposed that the commissioners themselves should be treated and should behave more like the judiciary branch, and that the PSC should look to the procedures that govern hearings at DOAH.^{55,56} The PSC also heard from Mr. Jon Moyle and the AARP concerning expansion of the current prohibitions on ex parte communications.⁵⁷

On February 17, 2009, the Energy & Utilities Policy Committee heard a Public Service Commission proposal that the Legislature: apply the Code of Judicial Conduct to commissioners; expand the prohibition on ex parte communications to more types of proceedings, persons, and matters; expand penalties for prohibited ex parte communications; and double the current amount of time that former commissioners and staff must wait before being permitted to represent regulated entities and certain other entities with interests in PSC proceedings.

Effect of Proposed Changes

Expanding on the suggestions presented by the Public Counsel at the PSC's November 24, 2009, workshop, HB 7209 creates a clear separation between the commission's advisory staff and a separate advocacy staff and treats the latter like any other party to a commission proceeding. The bill reorganizes the PSC into two structurally separate entities: the Public Service Commission, whose primary role will be to serve as an independent and impartial decision maker with the assistance of professional and technical advisory staff; and the Office of Regulatory Staff ("office"), whose primary role is to employ the services of professional and technical staff to advocate for the public interest in proceedings before the PSC and proceedings related to matters within the PSC's jurisdiction. The bill establishes and distinguishes the decision-making and advocacy roles assigned to these two entities, allowing the PSC to satisfy the requirement that it perform its official duties without bias or prejudice, as set forth in the standards of conduct discussed below. The bill also expands the current prohibition on ex parte communications and adopts specific standards from the Code of Judicial Conduct.

Office of Regulatory Staff

The bill creates the Office of Regulatory Staff as an independent office within the Financial Services Commission, which is comprised of the Governor, the Chief Financial Officer, the Attorney General, and the Commissioner of Agriculture.⁵⁸ The bill states that the office shall be considered a party of record in all commission proceedings. The bill requires that all documents initiating a commission proceeding be provided to the office.

The bill provides that the office shall represent the public interest with respect to matters in the commission's jurisdiction, and it defines the public interest as a balancing of:

⁵⁴ *Id.*, at pp.12-17.

⁵⁵ *Id.*, at p. 8.

⁵⁶ According to information gathered by the Office of Public Counsel from 25 states that returned a survey, 11 of those states have created at least a functional separation between their public service commission's advisory staff and an advocacy staff. In 6 of those states, the separation is structural rather than just functional; separate organizations exist to serve the separate purposes. According to OPC's survey, these six include South Carolina, Iowa, Minnesota, Utah, Tennessee, and Indiana. In all of the states with some form of separation, the advocacy staff sponsors witnesses, conducts discovery, cross-examines witnesses, and takes positions and files briefs on the issues in PSC proceedings. In 10 of these states, the advocacy staff is prohibited from ex parte communications with commissioners and their advisory staff, and in all 11 states, advisory staff are prohibited from ex parte communications with parties. In all of these states, advocacy staff may communicate freely with other parties, as they are removed from their advisory roles and close relationship with commissioners.

⁵⁷ Transcript pp. 27-40, Undocketed Rule Development Workshop, Public Service Commission, November 24, 2009.

⁵⁸ The Financial Services Commission also houses the Office of Insurance Regulation and the Office of Financial Regulation.

- Concerns of the using and consuming public, regardless of customer class, with respect to services provided by any company subject to the jurisdiction of the commission pursuant to any provision of law;
- Preservation of the financial integrity of the state's regulated public utilities and continued investment in and maintenance of facilities in order to provide reliable utility services at fair, just, and reasonable rates; and
- Promotion of fair competition in telecommunications markets.

The bill makes the office subject to the same requirements that other parties face with respect to ex parte communications with the commission and the manner in which it participates in proceedings, thus placing the office on the same legal footing as other parties advocating positions in PSC proceedings.

The bill provides for administration of the office through an executive director, who serves as the head of the office for the purposes of employing staff, setting compensation, supervising staff, and preparing a budget. The bill provides for the independence of the office from the supervision, direction, or control of the commission. The bill requires the office to maintain offices in Leon County at a place convenient to the offices of the PSC and to establish procedures governing its internal administration and operations.

The bill provides that the executive director of the office will be appointed by the Financial Services Commission, subject to Senate confirmation, for a 4-year term beginning January 2, 2011. Pursuant to s. 20.121(3)(d), F.S., appointment or removal by the Financial Services Commission requires a majority vote consisting of at least three affirmative votes, with both the Governor and the Chief Financial Officer on the prevailing side. The Financial Services Commission also sets the executive director's salary. The bill requires the appointee to perform the functions of the executive director until such time as he or she is confirmed. Currently, appointment or termination of the PSC's executive director requires a majority vote of the five appointed commissioners.

The bill requires that the executive director satisfy the minimum qualifications established for commissioners, discussed below, and have 12 years of professional experience in one or more of the fields that commissioners are required to have experience in. The bill also requires the executive director to take the oath required of state officers by the Constitution and subjects the executive director to all but one of the standards of conduct currently applicable to commissioners. This exception is a standard that requires commissioners to act at all times in a manner that promotes confidence in the integrity and impartiality of the commission. The bill also subjects the executive director to a new standard which requires that he or she not be swayed by partisan interests, public clamor, or fear of criticism.

The bill authorizes the office to petition the commission to initiate proceedings, if it believes it is necessary to do so to protect the public interest. It also removes the commission's authority to initiate several types of proceedings on its own motion, including rate cases and power plant need determination proceedings, and replaces it with the authority of the Office of Regulatory Staff to do so.⁵⁹ The bill authorizes the office to request judicial review of commission orders and to participate in any civil proceeding that involves review or enforcement of commission action that the executive director determines may substantially affect the public interest.

The bill provides a specific list of the office's responsibilities, which include:

- Reviewing and investigating the rates charged or proposed to be charged, and the service furnished or proposed to be furnished, by any public utility or regulated company;
- Inspecting, auditing, and examining public utilities and regulated companies regarding matters within the PSC's jurisdiction;

⁵⁹ See footnote 17 for a list of the types of proceedings that the commission is currently authorized to initiate.

- Investigating complaints made in connection with matters under the PSC's jurisdiction;
- Assisting consumers in the informal resolution of complaints regarding the rates or service of public utilities and regulated companies;
- Providing legal representation of the public interest before other state and federal agencies and courts; and
- Educating the public on matters within the PSC's jurisdiction that are of special interest to consumers.

The bill provides that the commission may request, either in writing or at a noticed public meeting, that the office provide information and reports on matters within the PSC's jurisdiction, assist in the preparation of reports that the commission is required by law to produce,⁶⁰ and conduct audits, inspections, and examinations of public utilities and regulated companies. This will allow the commission to continue to utilize the auditing and information gathering capabilities of the regulatory staff, provided that the commission may not require the office to participate as a party, sponsor witnesses, or provide testimony in any proceeding. Further, the bill requires that the commission and the office establish a mutually acceptable procedure under which the office may elect not to participate in noncontroversial matters. The bill requires that the office provide an annual report to the legislature.

The bill authorizes the office to access or require production of books and records as provided by law and as specified in ss. 364.183, 366.093, 367.156, and 368.108, F.S. In essence, the bill provides the office the same authority that the commission currently has to access books and records. The bill provides that records received by the office which are claimed to be confidential by the provider of the information (for purposes of Chapter 364, F.S.) or which are found by the commission to be confidential (for purposes of Chapters 366, 367, and 368, F.S.) shall be exempt from disclosure under Florida's public records laws. The bill also provides the office the authority to assess regulated entities for travel costs associated with reviewing records kept out of state.

The bill applies post-employment restrictions to the executive director that are identical to those currently imposed on commissioners, and applies post-employment restrictions to the staff of the office that are identical to those currently imposed on commission staff.

The bill provides that the office will be funded through the existing Florida Public Service Regulatory Trust Fund that currently funds the PSC and would continue to do so. This trust fund is currently funded primarily through regulatory assessment fees imposed on regulated entities.

Public Service Commission

While the bill does not change the commission's subject matter jurisdiction, it changes the commission's role in the process. The bill provides legislative intent that, in addition to performing its duties independently, the commission shall perform those duties impartially, professionally, honorably, and without undue influence from any person. Many of the remaining provisions in the bill related to the commission address this theme.

The bill also provides that the commission, in exercising its jurisdiction, shall not establish or implement any policy that is contrary to or an expansion of the authority granted by the legislature. This language appears to restate but emphasize existing law with respect to the delegation of authority to an agency.

The bill makes several changes to the commission's role under the new structure. First, it specifies that the commissioners shall not supervise, direct, or control persons employed by the

⁶⁰ For example, the commission is required by statute to produce annual reports concerning the status of competition in telecommunications markets, the status of Lifeline and Link-Up programs, the status of energy conservation programs, and a handful of other reports related to matters within its jurisdiction.

Office of Regulatory Staff. Second, it removes the auditing and inspection function from the commission and places it in the Office of Regulatory Staff. Third, it provides that the commission's staff may no longer appear as a party or testify in commission proceedings or conduct discovery. These changes reflect the transfer of any "advocacy" role to the Office of Regulatory Staff and more clearly establish the commission's role as an independent and impartial decision maker.

Public Service Commissioners – Appointment & Qualifications

The bill maintains the current process for selecting commissioners, though it adds new minimum qualifications. The bill also eliminates obsolete language concerning appointment of members to the Public Service Commission Nominating Council.

The bill requires that applicants for Public Service Commissioner meet certain qualifications before they can be nominated to the Governor for appointment. The bill requires that each applicant have a bachelor's degree, or a more advanced degree, from an accredited institution of higher learning. If the applicant has a bachelor's degree, he or she must also have at least 10 years or professional experience in one or more of eight specific fields. Those fields include: energy or electrical industry issues; telecommunications issues; water and sewer industry issues; finance; economics; accounting; engineering; or law. If the applicant has an advanced degree, he or she must have at least 6 years of professional experience in one or more of these fields.

The bill also provides initial and continuing training and education requirements for commissioners. The bill requires that a person appointed to the commission must complete a comprehensive study course before voting on any matter. This course would cover substantive matters within the commission's jurisdiction, relevant aspects of administrative law, and ethical standards of conduct. In addition, the bill requires annual ethics training for commissioners, their staff, and staff of the Office of Regulatory Staff. The bill requires the executive director and general counsel of the Office of Regulatory Staff to develop these training courses. The bill also requires that each commissioner complete at least 10 hours of continuing professional education each year related to substantive matters within the PSC's jurisdiction.

Public Service Commissioners – Standards of Conduct

The bill adopts new provisions into the standards of conduct applicable to commissioners. Specifically, the bill adds a statement of intent which provides:

Professional, impartial, and honorable commissioners are indispensable to the effective performance of the commission's duties. A commissioner shall maintain high standards of conduct and shall personally observe those standards so that the integrity and impartiality of the commission may be preserved.

This provision is an adaptation of the first Canon of the Code of Judicial Conduct.⁶¹

The bill adopts additional new standards, again adapted from the Code of Judicial Conduct, to reflect that they are being applied to Public Service Commissioners rather than members of the judicial branch. These standards provide:

- The chair, or the presiding commissioner in the chair's absence, shall require order and decorum in commission proceedings.

⁶¹ The Code of Judicial Conduct is established and may be amended by the Florida Supreme Court. Accordingly, adoption of the code by reference and without specific guidelines for establishment of the code may constitute an unlawful delegation of legislative authority.

- A commissioner shall be patient, dignified, and courteous to litigants, other commissioners, witnesses, lawyers, commission staff, staff of the Office of Regulatory Staff, and others with whom the commissioner deals in an official capacity.
- A commissioner shall perform official duties without bias or prejudice.
- A commissioner shall not, with respect to parties or classes of parties, cases, controversies, or issues likely to come before the commission, make pledges, promises, or commitments that are inconsistent with the impartial performance of the commissioner's official duties.
- A commissioner shall not be swayed by partisan interests, public clamor, or fear of criticism.

Any alleged violation of these standards would continue to be accepted and investigated by the Commission on Ethics, with any findings and recommendations sent to the Governor and the PSC Nominating Council. The Governor would continue to have authority to enforce these findings.

Ex Parte Communications

The bill establishes a definition of ex parte communications as any communication that, if written or in electronic form, is not served on all parties to a proceeding or, if oral, is made without adequate notice to the parties and an opportunity for the parties to be present and heard.

The bill applies the prohibition on ex parte communications to both the commissioners and their advisory staff under the new structure. This provision is intended to ensure that the commission's advisory staff, who currently are not subject to statutory limits on ex parte communications, do not serve, intentionally or unintentionally, as a conduit for ex parte communications to commissioners.

The bill extends the prohibition on ex parte communications to cover both the merits and procedural issues in pending proposed agency action proceedings, formal hearing proceedings under ss. 120.569 and 120.57, F.S., and proceedings on declaratory statements under s. 120.565, F.S. With respect to certain procedural issues, the bill allows ex parte communications only if the commissioner or commission employee reasonably believes that no party will gain a procedural or tactical advantage and notifies other parties so that they have an opportunity to respond. This provision is adopted from the Code of Judicial Conduct applicable to judges.

The bill prohibits an individual from discussing ex parte with a commissioner the merits of any issue that the individual knows will be filed with the commission within 180 days. This provision doubles the time frame in the current prohibition on such communications.

The bill authorizes up to a \$5,000 civil penalty for individuals other than commissioners and commission staff who knowingly fail to comply with the ex parte laws. This is the same monetary penalty that commissioners and their staff are subject to.

Prohibited Influence on Commissioners

The bill creates a new provision which states that neither the Governor, the House Speaker, the Senate President, nor any member of the PSC Nominating Council shall attempt to sway the independent judgment of the commission by bringing pressure to bear upon a commissioner through that person's role in the selection or reconfirmation process. The bill authorizes the Commission on Ethics to investigate sworn complaints of violations.

Testimony in Commission Proceedings

The bill creates provisions that require each person offering testimony in a commission proceeding to disclose, at the time the testimony is offered, any financial or fiduciary relationship between the person and any party to the proceeding. The bill provides that a determination by the commission that a person has knowingly violated this requirement constitutes agency action upon which a hearing may be sought under Chapter 120, F.S.

Public Counsel

The bill moves the Office of Public Counsel from the Legislature to the Attorney General's office. To effect this change, the bill provides that the Public Counsel shall be appointed by, and serve at the pleasure of, the Attorney General. The bill also provides that the Attorney General may authorize the Public Counsel to employ personnel and retain experts. The bill provides that the Attorney General shall allocate salaries and expenses of the Public Counsel and his or her employees from funds appropriated by the Legislature. To reflect the transfer of the Public Counsel out of the Legislature, the bill eliminates the Committee on Public Counsel Oversight through the repeal of s. 350.012, F.S.

Miscellaneous Provisions

The bill defines "office" as the Office of Regulatory Staff for purposes of Chapters 364, 366, 367, and 368, F.S.

The bill authorizes the office to perform certain functions currently performed by commission staff. These functions include: making a preliminary study of electric utilities' ten-year site plans under s. 186.801, F.S.; conducting compliance investigations of operator services under s. 364.3376, F.S.; conducting meter tests pursuant to ss. 366.05 and 367.122, F.S.; and conducting staff-assisted rate cases for eligible small water and wastewater utilities under s. 367.0814, F.S.

The bill repeals s. 350.121, F.S., related to commission inquiries. It appears that this provision has not been used in almost 20 years and that the investigatory powers set forth in the provision are largely duplicative of the commission's authority to access records of regulated entities.

The bill conforms cross-references to reflect changes made by the bill.

B. SECTION DIRECTORY:

Section 1. Amends s. 20.121, F.S., relating to the Department of Financial Services.

Section 2. Amends s. 112.324, F.S., relating to procedures on complaints of ethics violations.

Section 3. Amends s. 186.801, F.S., relating to ten-year site plans.

Section 4. Amends s. 350.001, F.S., providing legislative intent with respect to the Florida Public Service Commission (PSC).

Section 5. Amends s. 350.011, F.S., relating to the power and duties of the PSC.

Section 6. Repeals s. 350.012, F.S., relating to the Committee on Public Counsel Oversight.

Section 7. Amends s. 350.031, F.S., relating to the Florida Public Service Commission Nominating Council.

Section 8. Creates s. 350.035, F.S., relating to prohibited influence on PSC commissioners.

Section 9. Amends s. 350.04, F.S., relating to qualifications, training, and continuing education of PSC commissioners.

Section 10. Amends s. 350.041, F.S., relating to PSC commissioner standards of conduct.

Section 11. Amends s. 350.042, F.S., relating to ex parte communications.

Section 12. Amends s. 350.06, F.S., relating to the PSC place of meeting, expenditures, and employment of personnel.

Section 13. Amends s. 350.0605, F.S., relating to post-employment restrictions for PSC commissioners and staff.

Section 14. Amends s. 350.061, F.S., relating appointment of the Public Counsel.

Section 15. Amends s. 350.0613, F.S., relating to employees of the Public Counsel.

Section 16. Amends s. 350.0614, F.S., relating to compensation and expenses of the Public Counsel.

Section 17. Creates s. 350.071, F.S., relating to the creation, purpose, and party status of the Office of Regulatory Staff.

Section 18. Creates s. 350.072, F.S., relating to administration of the Office of Regulatory Staff.

Section 19. Creates s. 350.073, F.S., relating to the executive director of the Office of Regulatory Staff.

Section 20. Creates s. 350.074, F.S., relating to the duties of the Office of Regulatory Staff.

Section 21. Creates s. 350.075, F.S., relating to access to records by the Office of Regulatory Staff.

Section 22. Amends s. 350.113, F.S., relating to the Florida Public Service Regulatory Trust Fund.

Section 23. Amends s. 350.117, F.S., relating to reports and audits.

Section 24. Repeals s. 350.121, F.S., relating to commission inquiries.

Section 25. Creates s. 350.122, F.S., relating to disclosure of certain affiliations upon providing testimony before the commission.

Section 26. Amends s. 364.016, F.S., relating to travel costs.

Section 27. Amends s.. 364.02, F.S., providing definitions for purposes of Chapter 364, F.S.

Section 28. Amends s. 364.15, F.S., relating to compelling repairs, improvements, changes, additions, or extensions of telecommunications facilities.

Section 29. Amends s. 364.183, F.S., relating to access to telecommunications company records.

Section 30. Amends s. 364.185, F.S., relating to investigations and inspections of telecommunications companies.

- Section 31.** Amends s. 364.335, F.S., relating to applications for certificates.
- Section 32.** Amends s. 364.3376, F.S., relating to operator services.
- Section 33.** Amends s. 364.3381, F.S., relating to cross-subsidization.
- Section 34.** Amends s. 364.37, F.S., relating to controversies surrounding territory to be served.
- Section 35.** Amends s. 366.02, F.S., providing definitions for purposes of Chapter 366, F.S.
- Section 36.** Amends s. 366.05, F.S., relating to the powers of the PSC.
- Section 37.** Amends s. 366.06, F.S., relating to the procedures for fixing and changing rates.
- Section 38.** Amends s. 366.07, F.S., relating to adjustment of rates.
- Section 39.** Amends s. 366.071, F.S., relating to interim rates procedures.
- Section 40.** Amends s. 366.076, F.S., relating to limited proceedings.
- Section 41.** Amends s. 366.08, F.S., relating to investigations and inspections of public utilities.
- Section 42.** Amends s. 366.093, F.S., relating to public utility records.
- Section 43.** Amends s. 366.82, F.S., relating to conservation goals for utilities.
- Section 44.** Amends s. 367.021, F.S., providing definitions for purposes of Chapter 367, F.S.
- Section 45.** Amends s. 367.045, F.S., relating to application procedures for certificates of authorization for water and wastewater utilities.
- Section 46.** Amends s. 367.081, F.S., relating to procedures for fixing and changing rates.
- Section 47.** Amends s. 367.0814, F.S., relating to staff-assisted rate cases.
- Section 48.** Amends s. 367.0817, F.S., relating to reuse projects.
- Section 49.** Amends s. 367.082, F.S., relating to interim rates procedures.
- Section 50.** Amends s. 367.0822, F.S., relating to limited proceedings.
- Section 51.** Amends s. 367.083, F.S., relating to determination of official date of filing of a rate proceeding.
- Section 52.** Amends s. 367.101, F.S., relating to charges for service availability.
- Section 53.** Amends s. 367.121, F.S., relating to power of the commission.
- Section 54.** Amends s. 367.122, F.S., relating to examination and testing of meters.
- Section 55.** Amends s. 367.145, F.S., relating to regulatory assessment and application fees.
- Section 56.** Amends s. 367.156, F.S., relating to public utility records.
- Section 57.** Amends s. 367.171, F.S., relating to effectiveness of Chapter 367, F.S.

- Section 58.** Amends s. 368.05, F.S., relating to commission jurisdiction and rules.
- Section 59.** Amends s. 368.061, F.S., relating to penalties.
- Section 60.** Amends s. 368.103, F.S., providing definitions.
- Section 61.** Amends s. 368.106, F.S., relating to changes in rates for intrastate natural gas transmission.
- Section 62.** Amends s. 368.107, F.S., relating to unreasonable or violative existing rates and services.
- Section 63.** Amends s. 368.108, F.S., relating to confidentiality and discovery.
- Section 64.** Amends s. 368.1085, F.S., relating to travel costs.
- Section 65.** Amends s. 368.109, F.S., relating to regulatory assessment fees.
- Section 66.** Amends s. 403.519, F.S., relating to electrical power plant need determinations.
- Section 67.** Amends s. 403.537, F.S., relating to transmission line need determinations.
- Section 68.** Amends s. 403.9422, F.S., relating to natural gas transmission pipeline need determinations.
- Section 69.** Amends s. 196.012, F.S., to conform cross-references.
- Section 70.** Amends s. 199.183, F.S., to conform cross-references.
- Section 71.** Amends s. 212.08, F.S., to conform cross-references.
- Section 72.** Amends s. 288.0655, F.S., to conform cross-references.
- Section 73.** Amends s. 290.007, F.S., to conform cross-references.
- Section 74.** Amends s. 364.602, F.S., to conform cross-references.
- Section 75.** Amends s. 489.103, F.S., to conform cross-references.
- Section 76.** Amends s. 624.105, F.S., to conform cross-references.
- Section 77.** Provides an effective date of October 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None.
2. Expenditures:
See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Public Service Commission is provided spending authority within a single budget entity from the Regulatory Trust Fund and has within its base budget \$28 million and 328 full time positions for the 2010-11 fiscal year. The bill amends the organizational structure of the commission and creates the Office of Regulatory Staff within the Financial Services Commission to represent the public interest with respect to matters within the jurisdiction of the Public Service Commission. The office is required to be a separate budget entity apart from the Public Service Commission and is required to perform its duties independently. Therefore, the bill requires an organizational structure consisting of two separate budget entities for commission operations: the Public Service Commission and the Office of Regulatory Staff.

It is unclear what specific operational duties and responsibilities will be assigned to the commission or transferred to the newly established Office of Regulatory Staff. These decisions will have a direct impact on staff assignments and operational systems and processes for the two entities. As a result, a fiscal impact is indeterminate. However, it is anticipated that staff assignments and any expenditure of funds resulting from the reorganization will be done within existing resources.

The bill transfers the Office of Public Counsel from the legislative branch to the Office of Attorney General. The base budget for the counsel is \$2.5 million and 16.5 full time positions for the 2010-11 fiscal year. The Committee on Public Counsel Oversight is eliminated.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES