



The Florida Senate

Interim Project Summary 2005-115

November 2004

Committee on Communications and Public Utilities

Senator Lee Constantine, Chair

FLORIDA PUBLIC SERVICE COMMISSION, REVIEW OF CHAPTER 350, F.S.

SUMMARY

Chapter 350, F.S., creates three entities, the Florida Public Service Commission, the Florida Public Service Commission Nominating Council, and the Public Counsel. All three are legislative entities. The last comprehensive legislative review of chapter 350 and these entities was in 1990. The purpose of this project was to determine whether any statutory changes are needed to ensure proper legislative oversight of these legislative entities.

Staff recommends several changes to the statutes, including changing the process by which Public Service Commission members are selected and disciplined, changing the process by which the Public Counsel is selected, codifying the independence of the Commission and the Public Counsel, removing the Commission budget from the Governor's budgeting process, clarifying the gift prohibition statute, creating a penalty for an individual involved in giving a prohibited gift or engaging in prohibited ex parte communications with a commissioner, creating new conduct requirements for commissioners, and authorizing the Public Service Nominating Council to spend money to advertise vacancies on the Council.

BACKGROUND

Chapter 350 of the Florida Statutes creates three entities, the Florida Public Service Commission (PSC or commission), the Public Counsel (OPC), and the Florida Public Service Commission Nominating Council (nominating council or council). The statutes expressly provide that all three are legislative entities.

In general, the functions of the PSC include: ratemaking; regulation of service quality; planning; adjudication, including resolving disputes between regulated companies; ensuring public safety; and consumer services. The PSC is composed of five commissioners. Commissioners must meet statutory

qualifications and abide by statutory standards of conduct and prohibitions on certain communications, discussed below where relevant. The Commission on Ethics investigates any alleged violations and reports its findings and recommendations to the Governor for enforcement. Among the disciplinary penalties available to the Governor is removal from office.

The nominating council reviews applications to fill vacancies on the PSC and selects the most qualified applicants to interview, interviews these applicants, and provides to the Governor a list of no fewer than three nominees per vacancy, from which the Governor appoints a commissioner, subject to confirmation by the Senate.

The Public Counsel provides legal representation for the people of the state, primarily in proceedings before the commission. The Public Counsel is appointed by a majority vote of the members of the Florida Legislature's Joint Legislative Auditing Committee, and serves at the pleasure of the committee, subject to annual reappointment. The Public Counsel's budget is exempt from the Governor's budgeting and planning authority and neither the Governor nor the Department of Management Services has any authority over OPC employees.

The last comprehensive legislative review of chapter 350 and these entities was in 1990. The purpose of this project was to review the operations of these three entities, the current statutes, and recent developments to determine whether further statutory changes are needed to ensure proper legislative oversight of these legislative entities.

METHODOLOGY

Staff reviewed the 1990 report by the Senate Committee on Economic, Professional, and Utility Regulation, reviewed statutory changes and other developments since that report, prepared a list of relevant issues, and researched laws in other states for guidance as to how these states have addressed these

issues. Staff also discussed background information and issues with Public Service Commission staff, the Public Counsel, and the Chair of the Nominating Council.

FINDINGS

A. PSC

This report examines a variety of issues relating to the PSC. Many of the recent reported complaints and proposals appear to be aimed at a general goal of establishing accountability for actions of the PSC or individual commissioners and establishing a method for the public to voice concerns in a meaningful way. There appears to be a frustration with the lack of a single entity to complain to about PSC actions. Both the Legislature and the Governor are involved in selecting commissioners, but the PSC is independent and neither entity has direct authority over commissioners or the PSC's operations and decisions. Additionally, the only remedial actions available are the appeal of the PSC's quasi-judicial decisions to an appellate court and the filing of a complaint with the Commission on Ethics if a commissioner violates a code of conduct.

1. Commissioner ethics, gifts and conferences

Section 350.041(2)(a), F.S., provides that "a commissioner may not accept anything from any business entity which, either directly or indirectly, owns or controls any public utility regulated by the commission, from any public utility regulated by the commission, or from any business entity which, either directly or indirectly, is an affiliate or subsidiary of any public utility regulated by the commission." This prohibition is as strict as any of the statutes in those states responding to the questionnaire from NRRI.¹ Common Cause came to the same conclusion, stating

¹ As it is difficult to comprehensively locate all relevant law in all states, staff used as a research tool the Profiles of Regulatory Agencies of the United States and Canada, published by the National Regulatory Research Institute (NRRI), the official research arm of the National Association of Regulatory Utility Commissioners (NARUC). The last publication of this report was in 1995, leaving the information outdated. The NRRI is in the process of updating the report, but currently only 24 states have responded, including Florida. However, as this is the most recent compilation of information on state regulatory bodies, this is primarily what was used to determine law in other states, supplemented by online research.

"[w]hen comparing the gifts limit for Public Service Commissioners in Florida to regulators in other states, we found that Florida's rules were comparably strict."²

There are, however, issues relating to the gift prohibition, primarily relating to commissioner attendance at conferences. In general, travel to conferences could involve a risk of improper influence. But the risk associated solely with attendance at the conference and at meals and events generally available to all conference participants without payment of any fees in addition to the conference fee is low. The risk lies more with participation at other meals and events paid for by a utility, which are not a part of the program fee and are not available to other conference participants, and with potential interaction with utility representatives while there. Additionally, any benefit to attending these meals and events is questionable. As such, the Legislature should clarify that commissioners are authorized to attend conferences and meals and events generally available to all conference participants without payment of any fees in addition to the conference fee. Participation in other meals and events paid for by a utility would not be allowed.

There is also an issue as to whether under s. 350.041, F.S., it constitutes a gift to a commissioner who attends a conference for a regulated utility to pay a higher, differential registration fee or to sponsor, co-sponsor, or otherwise assist in direct payment of expenses of the conference or of meals or events generally available to all conference participants without payment of any fees in addition to the conference fee. Differential registration fees do not appear to be unusual. They are used by entities such as the National Conference of State Legislatures and the Florida Bar. Additionally, any benefit of a conference fee that is lower than it otherwise might without differential pricing or utility sponsorship flows to the state, which ultimately pays such fees, not to the commissioner. As such, this does not appear problematic and the Legislature should clarify that it does not constitute a gift to a commissioner who attends a conference for a regulated utility to pay a higher, differential registration fee or to sponsor, co-sponsor, or otherwise assist in direct payment of expenses of the conference or of meals or

² Common Cause, A state agency in need of reform: Florida's Public Service Commission Report #2: The influence of campaign contributions from Florida's utilities on legislators, state regulators and public policy (2004). This report is available at the website for the Consumer Federation of the Southeast, <http://www.consumerfedse.com/>.

events included as a part of the conference program and part of the registration fee.

A final issue relating to the gift prohibition statute is whether a penalty should be created for a person giving a prohibited gift. The penalty that best fits within the existing disciplinary process would be to provide that if in the course of determining that a commissioner accepted a prohibited gift the Commission on Ethics makes a finding as to who gave that gift, that person would be prohibited from appearing before the commission or otherwise representing anyone before the commission for a period of two years.

2. Commissioner ethics, ex parte communications

Section 350.042, F.S., contains the restrictions on ex parte communications.³ It prohibits a commissioner from initiating or considering ex parte communications relating to a proceeding in front of the PSC. If a commissioner does knowingly receive an ex parte communication relating to a proceeding, he or she must place on the record of the proceeding copies of all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received and all oral responses made. No individual is to 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. Any commissioner who knowingly fails to place on the record any such communications within 15 days of the date of the communication is subject to removal and may be assessed a civil penalty not to exceed \$5,000. There is no penalty for the individual involved in the ex parte communication.

Although Florida law is, in general, similar to that in other states, there are potential issues with Florida's statute. The first issue is whether additional standards should be applied to commissioners relating to ex parte communications. One possibility would be expand the statute, either to absolutely prohibit any communication involving PSC matters between a utility representative and a commissioner, or to require disclosure of all communications relating to PSC matters, even if there is no open proceeding on the matter discussed. Neither of these approaches appears workable. Commissioners get many communications from utility representatives each day on matters that do not relate to an open case,

³ An ex parte communication is defined as "on one side only; by or for one party; done for, in behalf of, or on the application of, one party only." Blacks Law Dictionary (Revised Fourth Edition West 1968).

such as fuel price trends, industry-related developments in other states, and, recently, many updates on the progress on hurricane damage repair. Such communications are essential for commissioners to be sufficiently informed to perform their duties. Additionally, if every communication a commissioner had that related to PSC subject matter had to be recorded, the index to this recording system would become so cumbersome that no one would be able to do effective research.

Another alternative is to apply another code of conduct to commissioners. It has been suggested that commissioners be made Administrative Law Judges.⁴ The explanation was that this "would allow commissioners to act more impartially and likely reduce ex parte communications with utilities during proceedings." Administrative Law Judges are to "be guided, where applicable, by the Florida Bar's Code of Judicial Conduct."⁵ The 1990 legislative report recommended that the Code of Judicial Conduct be made applicable to commissioners.⁶ The report states that the PSC's Code of Conduct for Public Service Commissioners is insufficient both because it is voluntary and because it fails to provide commissioners with sufficient guidance as to what activities are and are not appropriate under the Code's standard of appearance of impropriety. The Code of Judicial Conduct, on the other hand, has commentary that judges can use for guidance.

For example, Canon 3 of the Code of Judicial Conduct prohibits ex parte communications and provides more detailed guidance as to what a judge may and may not do than the PSC ex parte statute. However, the Canon also provides a good example of the danger of simply requiring that commissioners comply with the Code. It expressly allows judges to confer with each other, which conflicts with existing law as to commissioners. Commissioners are prohibited from doing this under the open public meetings law, s. 286.011, F.S., and it is best in light of the strong public policy in favor of open meetings to preserve this prohibition.

⁴ Letter from Ben Wilcox, Executive Director of Common Cause Florida to Diana Caldwell, Staff Director, Senate Communications and Public Utilities Committee (July 21, 2004).

⁵ Section 3G-Ethical Standards, Administrative Law Judge Reference Manual.

⁶ A Review of the Florida Public Service Commission and the Process for Nominating Public Service Commissioners, Staff of the Senate Committee on Economic, Professional and Utility Regulation, p. 49 April 1990.

Additionally, there are other provisions in the Canons that should not be applied to the commissioners, but that do not as clearly conflict with other current law. An example is Canon 4, which prohibits a judge from appearing at a public hearing before, or otherwise consulting with, and executive or legislative body or official except on specified types of matters, and impliedly prohibits a judge from serving as a member, officer, director, trustee or non-legal advisor of a organization or governmental agency that is not devoted to specified matters. PSC commissioners have appeared before Congress, the Federal Communications Commission, the Federal Energy Regulatory Commission, and committees of the Florida Senate and House of Representatives. They have been members of state study commissions and federal and regional bodies such as the National Association of Regulatory Utility Commissioners and the Southeastern Association of Regulatory Utility Commissioners. These activities are all a part of the lawful duties of being a commissioner and are beneficial to the citizens of the State of Florida.

Given potential conflicts and problems such as these, the Code of Judicial Conduct should be applied to commissioners only where relevant, where not in conflict with other law, and where not in conflict with the lawful duties of a commissioner.

The final issue relating to ex parte is what penalty should apply to the individual involved in the ex parte communication. Again, the simplest and most direct method would be to provide that if in the course of determining that a commissioner engaged in a prohibited ex parte communications the Commission on Ethics makes a finding as to what individual engaged in the prohibited communication with the commissioner, that person would be prohibited from appearing before the commission or otherwise representing anyone before the commission for a period of two years.

3. Commissioner ethics, post-PSC employment

Another potential ethics-related issue involves the statutory limitations on commissioner employment after leaving the commission. Section 350.0605, F.S., contains two restrictions on post-commission employment. The first prohibits a former commissioner from appearing before the commission representing any client or any industry regulated by the PSC for a period of two years following termination of service on the commission. The second prohibits, for a period of two years following termination of service on the

commission, a former commissioner from accepting employment by or compensation from a business entity which is regulated by the commission or has specified relationships to such a business..

These restrictions are virtually identical to those for other Florida officials as to representation, and more restrictive as to other employment. They are more restrictive than the law in other states. As such, the law should not be made more restrictive absent any changes to the law for other Florida officials.

4. Commissioner selection, oversight, and discipline

Two proposals have been reported that would make changes to the process of selection of commissioners. The first proposal is that commissioners be subjected to merit retention.⁷ There are problems with this proposal. Under a merit retention system, the person remains in office until voted out by the electors. This may result in longer terms for commissioners than the current system, which likely is not the intent of the proposal. For comparison purposes, no judge or justice in Florida has ever been voted out of office on a merit retention vote.⁸

Additionally, this proposal was considered and rejected in the 1990 report for reasons that remain valid today. Merit retention would be inappropriate for commissioners because very few voters know the specific professional experience, qualifications, and actions of a particular commissioner, and, as a result, the public's merit retention vote could be based upon factors that are beyond the control of one individual commissioner, such as whether utility rates increased or decreased. Subjecting commissioners to merit retention could also inject some of the potential shortcomings of electing commissioners in general, including a lack of any means of ensuring professional qualifications and a system that encourages commissioners to focus their attention on making popular short-term decisions that are not in the long-term best interests of the public.

The second proposal is to have the commissioners appointed directly by the Governor, without any Nominating Council, and presumably without Senate

⁷ Letter from Ben Wilcox, Executive Director of Common Cause Florida to Diana Caldwell, Staff Director, Senate Communications and Public Utilities Committee (July 21, 2004).

⁸ Department of Public Information and Bar Services, The Florida Bar, Merit Selection and Retention (September 2004).

confirmation. The stated reason for this is that the commissioners “should be accountable to the public when the regulatory body does not act in the public’s best interest.”⁹ Assuming that this statement means that the Governor could effect some remedy other than refusing to reappoint a commissioner, which he can do now, presumably the Governor would determine when the PSC was not acting in the public’s best interest and somehow remedy the situation.

A grant of such broad power to the Governor would be subject to a challenge that it encroaches upon both judicial and legislative powers and thereby violates the separation of powers provision of the state constitution. Under our three-branch system of government, the legislature enacts laws that determine public policy and the public’s best interest, and the courts, in resolving disputes concerning these laws, determine whether parties, including the PSC, have followed the relevant law, or put another way, whether they have acted in the public’s best interest as established by that law. If a party has not followed the law, the courts determine how to remedy the violations of law. To give the Governor the power proposed arguably usurps the judicial power by placing the Governor in the position of determining whether the law has been violated and how to remedy the violation. As to the legislature, the PSC is a legislative entity under both Florida Supreme Court holdings and statute.¹⁰ The Court has specifically rejected claims that the PSC is a part of the executive branch.¹¹ As such, it would be inappropriate for the Governor to substitute his or her judgment of what is in the public’s best interest for that of a legislative entity and then to order that legislative entity to revise actions it had previously taken.

As to the more narrow issue of having only one of the two appointing entities, the Governor or the Legislature, involved in selecting commissioners, this may be a good suggestion. There are reasons for concern about accountability for the actions of

commissioners. In addition to the ethics-related complaints discussed above, other incidents have occurred that cause concern about commissioners.

- In a case involving the amount a utility should refund to its customers, two commissioners instructed staff to draft alternative recommendations to include lower amounts than staff originally recommended.¹² Later, allegations were made that the two commissioners received documents from a representative of the utility that related to the refund case.¹³ The commissioners said they never received the documents.¹⁴ The documents were found only in the offices of these two commissioners,¹⁵ and the utility representative stated that the documents were not delivered to any other commissioners’ offices.¹⁶ The Attorney General announced that he was reviewing the matter for possible violations of law.¹⁷
- Two commissioners are members of a newly-created national organization named the Federation for Economically Rational Utility Policy (FERUP).¹⁸ FERUP “supports policies that encourage market dynamism and consumer empowerment, while recognizing the difficulties of transitioning from regulated monopoly to competitive markets.”¹⁹ One of the Florida commissioners is co-chair.²⁰ In Colorado, questions have been raised about a Colorado Public Utility Commission member who is a member of FERUP and a potential conflict of interest if he sits on the commission during cases involving utilities that are contributors to another organization that provided startup money and expense money to FERUP.²¹ One Colorado consumer advocate called for the commissioner to recuse himself from any such cases.²² Questions were also

⁹ Letter from Ben Wilcox, Executive Director of Common Cause Florida to Diana Caldwell, Staff Director, Senate Communications and Public Utilities Committee (July 21, 2004).

¹⁰ Chiles v. Public Service Commission Nominating Council, 573 So.2d 829 (Fla. 1991), Commission on Ethics v. Sullivan, 489 So.2d 10 (Fla.1986), and Florida Motor Lines, Inc. v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930), and ss. 350.001 and 350.041, F.S..

¹¹ Chiles v. Public Service Commission Nominating Council, 573 So.2d 829 (Fla. 1991), and In re Advisory Opinion to the Governor, 223 So.2d 35 (Fla.1969).

¹² The Tampa Tribune online edition, May 24, 2003.

¹³ The Tampa Tribune online edition, May 24, 2003.

¹⁴ St. Petersburg Times online edition, April 17, 2004.

¹⁵ The Tampa Tribune online edition, May 30, 2003.

¹⁶ The Tampa Tribune online edition, May 24, 2003.

¹⁷ The Tampa Tribune online edition, May 30, 2003.

¹⁸ St. Petersburg Times online edition, September 15, 2004.

¹⁹ Federation for Economically Rational Utility Policy Mission Statement webpage, <http://www.ferup.org/about/>.

²⁰ Federation for Economically Rational Utility Policy Executive Committee webpage <http://www.ferup.org/>.

²¹ The Denver Post online edition, October 24, 2004.

²² The Denver Post online edition, October 24, 2004.

raised about the objectivity of the members of FERUP because of the acceptance of money from an organization with a broad deregulation agenda.²³

- In a complaint previously filed with the Commission on Ethics, evidence included emails between the commissioner who was then chair of the PSC and the Governor's staff.²⁴ The Advocate for the Commission on Ethics found that the communications related to procedural matters or general information and not to the merits of a pending proceeding, and the Commission found that there was no probable cause to believe that there was a violation of the ex parte prohibition. The communications do, however, raise questions about the relationship between the commissioner and the Governor and the potential influence of the Governor on PSC actions and the impact on the independence of the PSC and the objectivity of the commissioner.

These incidents raise concerns about some commissioners' view of their role as commissioners and about their ability to impartially and satisfactorily perform their statutory duties. Commissioners are to regulate utilities as provided in the statutes, not to "attempt to promote the development of competitive markets."²⁵ If they have concerns about Florida's public policy as established in these regulatory statutes, they should work with the Florida Legislature to address these concerns. They should not participate in creation and operation of an organization to indirectly change the statutes they are charged with enforcing. Nor should they attempt to change these statutes by assisting the Governor's legislative efforts.

Actions such as these, while not illegal, cause public concern and lessen public confidence in the PSC. Based on proposals such as those discussed above, reports such as those of Common Cause, and newspaper articles, it appears that citizens want accountability for actions by commissioners and want a method for public participation in decisions involving the PSC. Both of these goals could be achieved by having the nominating council's recommendations go not to the Governor, but to a joint legislative committee, which would hold a public meeting or

meetings to interview the nominated applicants and select an appointee to the commission.²⁶ This would also avoid any potential separation of powers issues and would be consistent with existing statutes, which provide that commissioners are full-time employees of the legislative branch.²⁷

To increase the accountability and public participation, the Legislature should be authorized to remove or otherwise discipline a commissioner, again through a public meeting or meetings of a joint legislative committee. Additionally, section 350.041, F.S., the standards of conduct for commissioners, should be amended as discussed above relating to the application of the Code of Judicial Conduct, or, alternatively, to require that commissioners must at all times avoid impropriety and the appearance of impropriety and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the PSC. Sections 350.03 and 350.043, F.S., should be amended to provide that it is to be the Legislature that removes or disciplines a commissioner, not the Governor.

To further bolster public confidence in the PSC, the independence of the PSC should be preserved and expressly codified to ensure that the PSC continues to act independent of interference. This would be similar to the statutory provision that the Auditor General is to perform his or her duties independently.²⁸

To further clarify accountability, the PSC's budget should be removed from the Governor's planning and budgeting control and should be submitted directly to the Legislature. This also would be consistent with the legislative nature of the PSC and with the budgeting process for other legislative bodies, including the OPC, the Auditor General, and the Commission on Ethics, which has been held to be a legislative entity.²⁹ This should be done, as with the OPC, with the corresponding statement that neither the Governor nor the Department of Management Services has any authority over the PSC employees.³⁰

²³ The Denver Post online edition, October 24, 2004.

²⁴ Commission on Ethics complaint number 02-118.

²⁵ Florida Public Service Commission Mission Statement, <http://www.psc.state.fl.us/>.

²⁶ This stage in the process would be similar to the current process for selection of the Public Counsel under s. 350.061, F.S.

²⁷ s. 350.041(1), F.S.

²⁸ s. 11.45(2), F.S.

²⁹ ss. 350.0614, 11.42, and 112.321 F.S. and Commission on Ethics v. Sullivan, 489 So.2d 10 (Fla.1986).

³⁰ s. 350.0614(3), F.S.

5. Miscellaneous issue

A final issue is whether the PSC should have a more active role in projecting and planning for future and in advising the Legislature. The commission staff has a lot of expertise and experience. They have produced good reports based on specific legislative directives in the past, such as the renewable energy report and the annual telecommunications competition report. The Legislature should make better use of the asset this staff provides.

B. Nominating Council

The nominating council consists of nine members, three appointed by the Speaker of the House of Representatives, three appointed by the President of the Senate, and the remaining three selected by a majority vote of the other six members of the council. The council does not have express statutory authority to advertise vacancies on the council. As such, it does not get many applicants for the final three positions that are filled by selection by the first six members.³¹

There are issues with advertising these vacancies. Attempting to advertise in all areas of the state would be cost prohibitive. Advertising in less than all areas of the state leaves the council subject to allegations of attempting to control the selection of the final three members by selectively advertising the vacancies. Despite these potential difficulties, the council should be expressly authorized to spend \$5,000 to \$10,000 to advertise vacancies, with the funds coming from the Public Service Regulatory Trust Fund, the source of the nominating council's other expense money.

C. Office of Public Counsel

Common Cause has suggested that the Office of the Public Counsel be moved to the Office of the Attorney General.³² The rationale is that the OPC would be less susceptible to political pressures if it was placed under the Attorney General. Common Cause argues that the Public Counsel cannot be expected to fight zealously for the rights of consumers when he must be

affirmatively reappointed by the Legislature each year, can be fired by the Joint Legislative Management Committee any day, and has to be afraid that the utilities will lobby against him with the members of the Legislature, to whom the utilities are very active in making campaign contributions.

Moving the OPC to the Office of the Attorney General would intensify political impacts, not reducing them. The utilities would make similar contributions to candidates for Attorney General and any politics involved in oversight of the OPC would shift from 160 elected legislators to one elected Attorney General. And the Public Counsel and all related attorneys presumably would be in the Select Exempt class with all other attorneys and subject to dismissal at any time, so the potential consequences for the Public Counsel and attorneys remain.

Leaving the oversight of the OPC unchanged is also consistent with other states. While there are other states that have the Attorney General represent consumers in utility matters, they are a minority. Using the NRRI responses supplemented by information and links from the National Association of State Utility Consumer Advocates,³³ staff was able to determine for 44 states, not including Florida, which state entity other than the regulatory agency could represent consumers' interests. Of these states, 16 have an independent agency representing consumer interests, 15 have the Attorney General, 7 have another executive agency, and 6 either state that the PSC represents consumer interests or state that no state entity other than the PSC entity does.

Based on this information, the Public Counsel should remain a separate entity as it is now. The Legislature should, however, codify the independence of the Public Counsel.

It is also recommended that the selection of the Public Counsel be moved from the Joint Legislative Auditing Committee to the joint legislative committee that selects commissioners. The current selection process appears to be working well, but using the new joint committee would be a more appropriate mechanism than the auditing committee, which has nothing to do with the Public Counsel or any related matter. Also, as the Public Counsel would continue to serve at the pleasure of the appointing committee, annual reappointment by the committee appears to be unnecessary. Reappointment should be done on a

³¹ Interview with Greg Krasovsky, Chair, Florida Public Service Commission Nominating Council (November 8, 2004).

³² Common Cause, A state agency in need of reform: Florida's Public Service Commission Report #3: Building a new PSC and Office of the Public Counsel (2004). This report is available at the website for the Consumer Federation of the Southeast, <http://www.consumerfedse.com/>.

³³ The Association information is at <http://www.nasuca.org/>.

biennial basis by each newly appointed committee.

RECOMMENDATIONS

A new joint legislative committee should be created to do only appointments and discipline of PSC commissioners and selection of the Public Counsel, no substantive matters. The committee should be staffed on an ad hoc basis, using existing legislative staff. The nominating council's list of recommended applicants should be forwarded to the joint legislative committee for selection of an appointee, not to the Governor.

Similarly, the committee would replace the Joint Legislative Auditing Committee for purposes of selecting the Public Counsel. As the Public Counsel would continue to serve at the pleasure of the appointing committee, reappointment should be done on a biennial basis.

Additionally, the committee should replace the Governor in the process of discipline of commissioners. Complaints about commissioners should still be filed with the Commission on Ethics, but the joint committee should be authorized to file a complaint so that an investigation into a commissioner's actions could be initiated by the Legislature. The Commission could make recommendations to the Legislature as to penalties, similar to s. 112.324(4), F.S., for investigations involving legislators. The penalty should be determined and assessed by the Legislature.

The independence of the PSC and the Public Counsel should be codified. The PSC's budget should be removed from the Governor's planning and budgeting control, with a statutory provision that neither the Governor nor the Department of Management Services has any authority over the PSC's employees.

The gift prohibition statute should be clarified to authorize commissioners to attend conferences and associated meals and events generally available to all conference participants without payment of any fees in addition to the conference fee. The statute should be further clarified to provide that it does not constitute a gift to a commissioner who attends a conference for a regulated utility to pay a higher differential registration fee or to sponsor, co-sponsor, or otherwise assist in direct payment of expenses of the conference or of meals or events generally available to all conference participants without payment of any fees in addition to the conference fee. Finally, the statute should be amended to create a penalty for the individual giving

the prohibited gift by providing that if in the course of determining that a commissioner accepted a prohibited gift the Commission on Ethics makes a finding as to who gave that gift, that person would be prohibited from appearing before the commission or otherwise representing anyone before the commission for a period of two years.

To address ex parte concerns and other concerns about commissioner conduct, the statute on the commissioners code of conduct should be amended either to provide that the Code of Judicial Conduct is applicable to commissioners where relevant, where not in conflict with other law, and where not in conflict with the lawful duties of a commissioner, or alternatively, to create a requirement that commissioners must at all times avoid impropriety and the appearance of impropriety and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the PSC. The ex parte statute should be amended to create a penalty for the individual participating in the ex parte communication with the commissioner by providing that if in the course of determining that a commissioner engaged in a prohibited ex parte communications the Commission on Ethics makes a finding as to what individual engaged in the prohibited communication with the commissioner, that person would be prohibited from appearing before the commission or otherwise representing anyone before the commission for a period of two years.

The nominating council should be authorized to spend \$5,000 to \$10,000 to advertise vacancies on the council.

The Legislature should make better use of PSC staff to do analysis and provide information by doing studies and reports.

The Legislature should not apply a merit retention system to the PSC commissioners.

The Office of the Public Counsel should not be moved to the Office of the Attorney General.