

Florida Public Service Commission, Review of Chapter 350, F.S.

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Table of Contents

Summary.....	1
Background	1
A. Florida Public Service Commission	2
B. Florida Public Service Commission Nominating Council	10
C. Public Counsel	12
Methodology.....	13
Findings.....	14
A. Florida Public Service Commission	14
1. Commissioner ethics, gifts and conferences.....	14
2. Commissioner ethics, ex parte communications.....	17
3. Commissioner ethics, post-PSC employment.....	21
4. Commissioner selection, oversight, and discipline.....	23
5. Miscellaneous issues	28
B. Nominating Council	30
C. Office of Public Counsel	31
Recommendations	32

Summary

Chapter 350 of the Florida Statutes 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. This project will determine whether any statutory changes are needed to ensure proper legislative oversight of these legislative entities.

Staff reviewed the 1990 report, reviewed the statutes, researched laws in other states, reviewed recent developments and reports relating to the three entities, and spoke with PSC staff, the Public Counsel, and the Chair of the Nominating Council.

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). Speaking very broadly, the PSC regulates specified utility activities; the OPC represents the consumers' interests relating to this regulation; and the nominating council nominates a list of persons from which the Governor selects in appointing PSC commissioners. The statutes expressly provide that all three are legislative entities.

The last comprehensive legislative review of chapter 350 and these entities was in 1990. That review involved issues that are integral to the functioning of these entities and that continue to be important today, including the proper location of the PSC within the legislative and executive branches of state government; the proper oversight of the commission; the proper means of selecting commissioners; and the proper regulation of the conduct of commissioners, including regulation of commissioner ethics. Many of the recommendations made in the report of that review were enacted by the Legislature. This project will review the operations of these three entities under the revised statutes and determine whether further statutory changes are needed to ensure proper legislative oversight of these legislative entities.

A. Florida Public Service Commission

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 who are appointed as discussed below in the section on the nominating council. Vacancies on the commission are filled for the unexpired portion of the term in the same manner as original appointments. Commissioners serve staggered four-year terms and select a member to serve as chair for a term of two years.

Commissioners must meet statutory qualifications and abide by statutory standards of conduct. Under s. 350.031, F.S., they must be competent and knowledgeable in one or more fields substantially related to the duties and functions of the commission, including, but not limited to: public affairs, law, economics, accounting, engineering, finance, natural resource conservation, and energy. Section 350.04, F.S., prohibits a commissioner from, at the time of appointment or during his or her term of office, having any financial interest in, or being employed by or engaged in any business activity with, any business entity which, either directly or indirectly, is a public utility regulated by the commission, owns or controls any public utility regulated by the commission, or is, either directly or indirectly, an affiliate or subsidiary of any public utility regulated by the commission.

The statutory codes of conduct with which the commissioners must comply are set forth in two chapters. First, commissioners must comply with the standards of conduct for all public officials and employees set forth in Part III of Chapter 112, F.S. Second, they must comply with the standard of conduct set out in s. 350.041, F.S. This section states that its standards of conduct are cumulative to those set out in part III of chapter 112; that it is not to be construed to contravene chapter 112, but may be more restrictive than that chapter; and that in the event of a conflict between this section and part III of chapter 112, the more restrictive provision applies.

Section 350.041, F.S., provides for commission standards of conduct and contains the following restrictions:

- A commissioner may not accept anything from any business entity which, either directly or indirectly, is a public utility regulated by the commission, owns or controls any public utility regulated by the commission, or is an affiliate or subsidiary of any public utility regulated by the commission.

- A commissioner may not accept any form of employment with or engage in any business activity with any such business entity.
- A commissioner may not have any financial interest, other than shares in a mutual fund, in any such business entity. If a commissioner acquires any such prohibited financial interest during his or her term of office as a result of events or actions beyond the commissioner's control, he or she must immediately sell the financial interest or place it in a blind trust at a financial institution. A commissioner may not attempt to influence, or exercise any control over, decisions regarding the blind trust.
- A commissioner may not accept anything from a party in a proceeding currently pending before the commission.
- A commissioner may not hold specified positions with a political party, receive remuneration for activities on behalf of any candidate for public office, engage on behalf of any candidate for public office in the solicitation of votes or other activities on behalf of such candidacy, or become a candidate for election to any public office without first resigning from office.
- A commissioner, during his or her term of office, may not make any public comment regarding the merits of any proceeding determining the substantial interests of any party currently pending before the commission.
- A commissioner may not conduct himself or herself in an unprofessional manner at any time during the performance of his or her official duties.

The section provides that the Commission on Ethics is to investigate any alleged violations of this section and provide the Governor and the nominating council with a report of its findings and recommendations. The Governor is authorized to enforce the findings and recommendations of the Commission on Ethics, pursuant to part III of chapter 112.

Commissioners also must comply with the restrictions on ex parte communications set forth in section 350.042, F.S.¹ A commissioner is prohibited from initiating or considering ex parte communications concerning the merits, threat, or offer of reward in any proceeding, other than a proceeding under s.120.54 (regarding rulemaking) or s. 120.565 (regarding agency declaratory statements), workshops, or internal affairs meetings. Individuals are also prohibited 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.² These prohibitions do not apply to commission staff. The ex parte prohibitions also do not prohibit an individual residential ratepayer from communicating with a

¹ 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).

² There is no penalty for an individual who violates this prohibition.

commissioner, provided that the ratepayer is representing only himself or herself without compensation.

If a commissioner knowingly receives a prohibited ex parte communication relative to a proceeding to which he or she is assigned, 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, and give written notice to all parties to the communication that such matters have been placed on the record. Any party who desires to respond to an ex parte communication may do so. The response must be received by the commission within 10 days after receiving notice that the ex parte communication has been placed on the record. The commissioner may, if he or she deems it necessary to eliminate the effect of an ex parte communication received by him or her, withdraw from the proceeding, in which case the chair will substitute another commissioner for the proceeding.

Additionally, any individual who makes an ex parte communication must submit to the commission a written statement describing the nature of such communication, to include the name of the person making the communication, the name of the commissioner or commissioners receiving the communication, copies of all written communications made, all written responses to such communications, and a memorandum stating the substance of all oral communications received and all oral responses made. The commission is to place on the record of a proceeding all such communications.

Any commissioner who knowingly fails to place on the record any such communications within 15 days of the date of such communication is subject to removal and may be assessed a civil penalty not to exceed \$5,000. The Commission on Ethics is to investigate sworn complaints of violations of the ex parte statute. If the Commission on Ethics finds that there has been a violation by a commissioner, it is to report its findings and recommendations to the Governor and the nominating council. The Governor is authorized to enforce the findings and recommendations as provided in part III of chapter 112, the statutes on ethics for public officials.

Finally, commissioners must abide by the restrictions on representation and employment after leaving the PSC, which are set forth in section 350.0605, F.S. A former commissioner is prohibited from appearing before the PSC representing any client or any industry regulated by the PSC for a period of two years following termination of service on the commission. Additionally, for a period of two years following termination of service on the commission, a former member may not accept employment by or compensation from the following entities:

- a business entity which, directly or indirectly, owns or controls a public utility regulated by the commission,
- a public utility regulated by the commission,
- a business entity which, directly or indirectly, is an affiliate or subsidiary of a public utility regulated by the commission,
- a business entity which is an actual business competitor of a local exchange company or public utility regulated by the commission and is otherwise exempt from regulation by the commission, or
- a business entity or trade association that has been a party to a commission proceeding within the 2 years preceding the member's termination of service on the commission.

Section 350.043, F.S., provides penalties for violation of any of these provisions. Any violation of s. 350.031 (the nominating council statute), s. 350.04 (the PSC commissioner qualifications statute), s. 350.041 (the PSC standard of conduct statute), s. 350.042 (the PSC ex parte communication statute), or s. 350.0605 (the employment restrictions on former commissioner statute) by a commissioner, former commissioner, former employee, or nominating council member is punishable as provided in ss. 112.317 (the penalties section of the public officials' code of ethics)³ and 112.324 (the section of the code of ethics laying out the procedure for investigating and resolving complaints under the code). The Commission on Ethics is authorized to investigate complaints of violation of chapter 350 in the manner provided in part III of chapter 112, as if this section were included in that part. A commissioner may request an advisory opinion from the Commission on Ethics.

Section 350.03, F.S., specifically grants the Governor the same power to remove or suspend a commissioner as in other offices.⁴

Commission staff is organized into two functional units, the Office of the Executive Director and the Office of the General Counsel.⁵ The Office of the Executive Director advises the commission on all technical and policy matters

³ Penalties range from public censure and reprimand to removal of office, a civil penalty not to exceed \$10,000, or forfeiture of no more than one-third of the person's salary for no more than 12 months.

⁴ Under the Florida Constitution, by executive order stating the grounds and filed with the custodian of state records, the governor may suspend from office any state officer not subject to impeachment, any officer of the militia not in the active service of the United States, or any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony. Art. IV, s. 7, Fla. Const. The statutes provide more specific types of grounds for removal or suspension, including violation of the code of ethics for public officials (s. 112.317, F.S.).

⁵ Organizational information comes from the website <http://www.psc.state.fl.us/general/saoo.pdf>.

under the commission's jurisdiction and, in coordination with the Office of the General Counsel, serves as the commission's liaison with federal and state agencies as well as the Florida Legislature. The office is comprised of eight divisions and offices, set forth below.

- The Division of the Commission Clerk and Administrative Services accepts official filings, maintains the official case files, coordinates the commission's records management program, and issues all commission orders and notices. The division also oversees all financial transactions and maintains the commission's accounting records. It also provides administrative support services such as human resource programs; budget management; mail processing; computer network, hardware, and applications support; staff training; and purchasing.
- The Division of Competitive Markets and Enforcement oversees the development of competitive markets and has responsibility for the issues associated with emerging competitive telecommunications markets. The division participates in formal and informal proceedings involving appropriate area code relief and number conservation plans and establishes policies and procedures governing intercompany contracts, arbitration of terms of intercompany contracts, and resolution of issues of contract interpretation. The division also resolves conflicts arising from changes in service providers. In addition, it evaluates the quality of service provided by telecommunications companies and conducts periodic on-site inspections of telecommunications facilities. The division is also responsible for issues involving conservation, tariff filings and territorial disputes in the natural gas industry. Finally, it conducts investigations to ensure compliance with applicable rules, tariffs, procedures, and laws and to identify and address anti-competitive activities.
- The Division of Economic Regulation participates in formal and informal proceedings relating to the rates and earnings of rate base regulated companies in the electric, natural gas, water, wastewater, and telecommunications industries. The division has primary responsibility for processing rate changes and for conducting earnings surveillance to ensure that regulated utilities are not exceeding their authorized rates of return. The division is the official custodian for electric and water and wastewater tariffs and administers tariff processing for the two industries. The division receives and maintains copies of annual financial reports and periodic surveillance reports for rate base regulated companies. The division also participates in formal and informal proceedings relating to long-range electric utility bulk power supply operations and planning; electric utility territorial matters; power plant and transmission line siting, including the siting of power plants owned by nontraditional generating entities; service quality, including complaints; electric utility conservation

- goals and programs; emergencies due to operational events or weather; and fuel, conservation, and environmental cost recovery.
- The Division of Regulatory Compliance and Consumer Assistance is responsible for evaluating electric and gas safety, conducting audits and reviews in all industries, responding to consumer complaints and conducting consumer outreach. Auditing and safety operations are operated from four district offices: Tallahassee, Orlando, Miami, and Tampa. The types of audits and reviews the division performs include financial, compliance, billing, and verification. The safety function involves safety evaluations of natural gas pipeline operations and new electric construction in the state of Florida. The safety function is also the lead contact for the commission's participation in the State's Emergency Operations Center activities. The consumer complaint bureau receives, processes, and resolves complaints and facilitates resolution of informal disputes between consumers and utilities. Customers may file complaints through a toll-free telephone number to the bureau's call center or by mail, facsimile, or email. The consumer outreach functions include compiling and relaying information about the commission's regulatory decisions to utility customers and consumer groups. Outreach duties include informing utility customers of their rights, available assistance, and of how they can participate in customer service hearings and other forums to have their views heard by commissioners.
 - The Office of Federal and Legislative Liaison serves as the commission's liaison to the Legislature and to other state and federal agencies. This office provides the primary technical interface with federal agencies and the Legislature on regulatory matters, in coordination with and assistance from the technical divisions, the Office of the General Counsel, and the Office of the Chairman. This office is also responsible for facilitating collaborative working relationships with the federal agencies whose regulatory actions can affect Florida citizens and will respond to requests for information from federal agencies and Congress.
 - The Office of Market Monitoring and Strategic Analysis is responsible for monitoring and evaluating the impact of commission decisions on market development in the energy, telecommunications, and water and wastewater industries. The office is also responsible for identifying and analyzing issues, strategies, and new technologies that will assist and enhance competitive market development. The office routinely reviews and assesses market activity in the affected industries and periodically reports their findings to the commissioners. An annual report to the Legislature on the status of the development of competition in the telecommunications industry is prepared by this office.
 - The Office of Public Information functions as the commission's liaison with the media and the public. The office monitors the daily reporting activities of dozens of state, regional and national media outlets to ensure

that timely, accurate information regarding commission decisions is disseminated to consumers. In this capacity, the office sustains a familiarity on a broad array of dockets and related activities affecting ratepayers or issues that have currency with the media.

- The Office of Standards Control and Reporting provides oversight of commission processes and reports in order to keep consistency of those processes and reports at a high level. The office assists in responding to surveys and questionnaires from governmental bodies and others and prepares periodic reports as needed. The office coordinates the content and format of the commission's website. Duties also include production of the commission's many informational brochures and other presentations.

The Office of the General Counsel provides legal counsel to the commission on all matters under the commission's jurisdiction and, in coordination with the Office of the Executive Director, serves as the commission's liaison with federal and state agencies as well as the Florida Legislature and political subdivisions of the state. In the course of evidentiary proceedings before the commission, the Office of the General Counsel and its sections are responsible for presentations of staff positions in the proceedings including cross examination of witnesses and presentation of staff testimony where offered. The Office of the General Counsel consists of three sections, set forth below.

- The Appeals, Rules and Mediation Section has responsibility for rulemaking, mediation, and defending commission orders on appeal or otherwise challenged before state and federal courts. The section also provides legal counsel to the commission and to the commissioners including the preparation of notices, recommendations and orders. This section attends and conducts public hearings at the commission's request; represents the commission before state and federal courts; and advises in the promulgation of rules. The section reviews procurement contracts and provides counsel to the commission on personnel, contracts and other administrative legal matters.
- The Economic Regulation Section has responsibility for the procedural and legal aspects of rate cases and other formal proceedings before the commission or the Division of Administrative Hearings and for proceedings in civil courts on behalf of the commission. This section prepares recommendations to the commission in conjunction with technical staff and prepares commission orders with the assistance of technical staff.
- The Competitive Markets and Enforcement Section has responsibility for the procedural and legal aspects of cases related to the development of competitive markets and other formal proceedings before the commission or the Division of Administrative Hearings and for proceedings in civil

courts on behalf of the commission. This section prepares recommendations to the commission in conjunction with technical staff and prepares commission orders with the assistance of technical staff.

Public Service Commission 10-Year Historical Budget/Actual Analysis			
Fiscal Year	FTEs ⁶	Approved Budget ⁷	Actual Expenditures ⁸
1994-95	408	23,285,780	22,648,877
1995-96	389	23,639,747	23,244,859
1996-97	380	23,469,582	23,422,208
1997-98	380	24,772,861	24,632,913
1998-99	387	27,098,315	26,547,111
1999-00 ⁹	401	30,101,131	28,271,317
2000-01	399	27,505,898	26,664,627
2001-02	386	26,698,532	26,332,419
2002-03	386	27,160,931	26,753,122
2003-04	379.5	27,895,108	26,623,364

As of 12/31/03, the PSC had 379.5 Authorized Positions (FTEs) as follows:

Organizational Division	Number of staff
Commissioners (5) and Staff	17
Executive Director (1) and Staff	3
Deputy Executive Director (1) and staff	2
Inspector General (1) and staff	2
General Counsel (1) and staff	35.5
Auditing and Safety	51
Commission Clerk and Administrative Services	58
Competitive Markets and Enforcement	63
Consumer Affairs	35
Economic Regulation	73
External Affairs	17
Market Monitoring and Strategic Analysis	19
Public Information	4

⁶ “Actual Prior Year” Column in the LAS/PBS Exhibit B (Appropriation Category Summary).

⁷ “Approved Budget” column in the LAS/PBS Appropriation Ledger Detail. Report by Fund/Category. Only normal operating categories are included.

⁸ “Actual Prior Year” column in the LAS/PBS Exhibit B (Appropriation Category Summary). Only normal operating categories are included.

⁹ Funds and FTE include the Integrated Financial Management System pilot project.

For Fiscal Year 2004-05, the PSC has 361.5 FTEs.

B. Florida Public Service Commission Nominating Council

Section 350.031, F.S., creates the Florida Public Service Commission Nominating Council. The 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.¹⁰

The nominating council consists of nine members, at least one of whom must be 60 years of age or older. The President of the Senate and the Speaker of the House of Representatives each appoint three members, including one member of the presiding officer's house of the Legislature. These six members then select and appoint the remaining three members by a majority vote. Council members appointed by the President or Speaker serve at the pleasure of the appointing officer. Any council member may be removed by the President and the Speaker upon a finding by them that the council member has violated the qualifications portion of the statute, discussed immediately below, or for other good cause.

No council member or spouse of a council member may:

- be the holder of the stocks or bonds of any company, other than through ownership of shares in a mutual fund, regulated by the commission, or any affiliated company of any company regulated by the commission, or
- be an agent or employee of, or have any interest in, any company regulated by the commission or any affiliated company of any company regulated by the commission, or in any firm which represents in any capacity either companies which are regulated by the commission or affiliates of companies regulated by the commission.

Members serve four-year terms, except the members of the House and Senate, who serve two-year terms concurrent with the two-year elected terms of House

¹⁰ This appointment process was created in 1978. Prior to that time, PSC commissioners were elected in statewide elections. Section 350.001, F.S., provides that it is the desire of the Legislature that the Governor participate in the appointment process of commissioners, and "accordingly delegates 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 only from the list provided by the Florida Public Service Commission Nominating Council in the manner prescribed by s. 350.031."

members. Vacancies on the council are filled for the unexpired portion of the term in the same manner as original appointments to the council. With two exceptions, a member may not be reappointed to the council. The first exception is for a member of the House of Representatives or the Senate, who may be appointed to two two-year terms. The second exception is for a person who is appointed to fill the remaining portion of an unexpired term.

A majority of the membership of the council may conduct any business before the council. All meetings and proceedings of the council are staffed by the Office of Legislative Services and are subject to the public records and public meetings provisions of ss. 119.07 and 286.011, F.S., respectively.

Members of the council are entitled to receive per diem and travel expenses, and applicants invited for interviews before the council may, in the discretion of the council, receive per diem and travel expenses. All such expenses are funded by the Florida Public Service Regulatory Trust Fund.¹¹

The council may not nominate a person until it has determined 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 commission must fairly represent the above-stated fields. Nominations must be nonpartisan.

The council must nominate to the Governor not fewer than three persons for each vacancy occurring on the PSC. The council must submit the recommendations to the Governor by October 1 of those years in which the terms are to begin the following January, or within 60 days after a vacancy occurs for any reason other than the expiration of the term.

Before appointing an applicant, the Governor must have the Florida Department of Law Enforcement conduct a background investigation of that applicant.

If the Governor has not made an appointment by December 1 to fill a vacancy for a term to begin the following January, then the council, by majority vote, shall appoint by December 31 one person from the applicants previously nominated to the Governor to fill the vacancy. If the Governor has not made the appointment to fill a vacancy occurring for any reason other than the expiration of the term by the sixtieth day following receipt of the nominations of the council, the council by majority vote shall appoint within 30 days thereafter one person from the applicants previously nominated to the Governor to fill the vacancy.

¹¹ The Florida Public Service Regulatory Trust Fund is created in s. 350.113, F.S. The fund consists of deposits of regulatory assessment fees and filing and recording fees collected by the PSC.

Each appointment to the PSC is subject to confirmation by the Senate. If the Senate refuses to confirm or rejects the Governor's appointment, the council must initiate the nominating process within 30 days.

C. Public Counsel

Section 350.0611, F.S., sets out the duties of the Public Counsel. The Public Counsel is to provide legal representation for the people of the state in proceedings before the commission and in proceedings before counties pursuant to s. 367.171(8) (relating to water/wastewater issues where a county has jurisdiction over the utility instead of the PSC). The Public Counsel is given all powers as are necessary to carry out the duties of his or her office, including, but not limited to, the following specific powers:

- to recommend to the commission or the counties, by petition, the commencement of any proceeding or action, or to appear, in the name of the state or its citizens, in any proceeding or action before the commission or the counties and urge therein any position which he or she deems to be in the public interest, whether consistent or inconsistent with positions previously adopted by the commission or the counties, and utilize therein all forms of discovery available to attorneys in civil actions generally,
- to have access to and use of all files, records, and data of the commission or the counties available to any other attorney representing parties in a proceeding before the commission or the counties,
- in any proceeding in which he or she has participated as a party, to seek review of any determination, finding, or order of the commission or the counties, or of any hearing examiner designated by the commission or the counties, in the name of the state or its citizens,
- to prepare and issue reports, recommendations, and proposed orders to the commission, the Governor, and the Legislature on any matter or subject within the jurisdiction of the commission, and to make such recommendations as he or she deems appropriate for legislation relative to commission procedures, rules, jurisdiction, personnel, and functions, and
- to appear before other state agencies, federal agencies, and state and federal courts in connection with matters under the jurisdiction of the commission, in the name of the state or its citizens.

In addition to these statutory duties, the Public Counsel also assists people in signing up for reduced-cost telephone (the Lifeline program) and electric (the Low-Income Home Energy Assistance Program, or LIHEAP program) services.

Under s. 350.061, F.S., the Public Counsel is appointed by a majority vote of the members of the Florida Legislature's Joint Legislative Auditing Committee. The

Public Counsel must be an attorney admitted to practice before the Florida Supreme Court. He or she serves at the pleasure of the Joint Legislative Auditing Committee, subject to annual reappointment by the committee. Vacancies in the office are to be filled in the same manner as the original appointment.

The section also creates employment restrictions on the Public Counsel and his or her employees. No officer or full-time employee of the Public Counsel may:

- actively engage in any other business or profession,
- serve as the representative of any political party or on any executive committee or other governing body thereof,
- serve as an executive, officer, or employee of any political party, committee, organization, or association,
- receive remuneration for activities on behalf of any candidate for public office,
- engage on behalf of any candidate for public office in the solicitation of votes or other activities on behalf of such candidacy, or
- become a candidate for election to public office unless he or she shall first resign from his or her office or employment.

Under s. 350.0614, F.S., the salaries and expenses of the Public Counsel and his or her employees are to be allocated by the committee only from moneys appropriated to the Public Counsel by the Legislature. The section states that the Legislature declares and determines that the Public Counsel is under the legislative branch of government within the intention of the legislation as expressed in chapter 216 (the chapter on executive branch planning and budgeting), and that the Executive Office of the Governor or its successor has no power to release or withhold funds appropriated to it. The section also provides that neither the Executive Office of the Governor nor the Department of Management Services or its successor has any power to determine the number, or fix the compensation, of the employees of the Public Counsel or to exercise any manner of control over them.

The Office of Public Counsel is currently composed of fifteen positions, six of which are experienced members of the Florida Bar. The office also includes legislative analysts who are experienced in utility matters, as well as administrative support staff.

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 PSC staff, the Public Counsel, and the Chair of the nominating council.

Findings

As was stated above, the Legislature has not done a comprehensive review of Chapter 350, F.S., since 1990. This project is a review of Chapter 350, of the operations of the three entities created in that chapter, and of laws in other states to determine if further changes to Chapter 350 are necessary.

It is difficult to comprehensively locate all relevant law in all states as the law may be contained in a state's constitution, statutes, administrative rules, or a combination these laws. As such, 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). Even this approach was not without problems. The last hard-copy publication of this report was in 1995, leaving the information outdated. The NRRI is in the process of updating the report, but will not publish a hard copy, instead making it available only online and only to regulatory bodies. Additionally, the update is not yet complete; 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.

A. Florida Public Service Commission

This report will examine a variety of issues relating to the PSC. The issues are interrelated and complex. A number of recent developments help illustrate some of the issues and the interrelationships between issues. Many of the reported complaints and proposals appear to be aimed at a more 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

One of the recommendations of the 1990 report was to enact additional standards of conduct for commissioners, including a prohibition on accepting anything of

value from a regulated utility or an affiliated entity. This was done in section 350.041(2)(a), F.S., which 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.”

Generally speaking, this prohibition is as strict as any of the statutes in those states responding to the questionnaire from NRRI. Common Cause came to the same conclusion, stating “[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.”¹²

There are, however, issues relating to the gift prohibition. These issues are illustrated by four complaints recently filed with the Florida Commission on Ethics that allege that four commissioners violated this prohibition by accepting something of value from utilities by attending the 2002 annual meeting of the Southeastern Association of Regulatory Utility Commissioners (SEARUC), eating food at that conference, and attending other functions while at the conference, all of which were paid for in part by utilities regulated by the PSC.¹³ The issues include:

- is there a benefit to commissioners attending conferences of regulatory organizations or other educational events,
- is there a risk of improper influence in attendance of meetings,
- if so, does the risk relate to giving and acceptance of gifts,
- if there is a risk of improper influence, does the risk outweigh the benefits of attendance,
- does it constitute a gift for a regulated utility to sponsor, co-sponsor, or otherwise assist in direct payment of expenses of the conference or meals or to pay a higher, differential registration fee,
- should there be a prohibition against a person giving anything of value to a commissioner, with an appropriate penalty.

There are benefits to commissioners’ attending some conferences. National conferences, such as those of the National Association of Regulatory Commissioners (NARUC) can have multiple benefits. These conferences can be educational as to potential changes in federal policy, developments in regulation

¹² 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/>.

¹³ Commission on Ethics complaints numbers 03-189, 03-190, 03-191, and 03-192.

or competition, and developing technology. They are sometimes used to develop model proposals for FERC or Congress. They also allow Florida commissioners to develop working relationships with federal officials which help the federal and state agencies to work together better. Regional conferences also can be helpful in developing regional positions on regional issues such as regional transmission organizations. Conferences and programs put on by non-regulatory entities, such as the Public Utility Research Center (PURC) at the University of Florida, can help commissioners learn about a specific subject relating to regulation, developing technology, or developing markets.

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.

The next issue is whether under s. 350.041 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 included as a part of the conference program and part of the registration fee. Differential registration fees do not appear to be unusual. The National Conference of State Legislatures uses them, having different fees for legislators/legislative staff, full time students, spouses/guests, and all others. The Florida Bar uses differential rates, with the categories varying but including members of the Bar in general, members of the section sponsoring the program, full time law college faculty or law student, and persons who get a fee waiver, such as judges. Additionally, any benefit of a conference fee that is lower than it otherwise might be without differential pricing or utility underwriting flows to the state, which ultimately pays such fees, not to the commissioner. The same rationale would apply when a regulated utility underwrites a portion of the expenses of a conference. Any benefit or gift is to the PSC and ultimately the state, not the commissioner attending the conference. 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 events included as a part of the conference program and part of the registration fee.

As to a penalty for a person giving a prohibited gift, although the bribery statute and similar statutes likely would apply, it requires action by another entity, a State Attorney, and could be difficult and time consuming to prove. Instead the statute should be amended 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

A second recommendation of the 1990 report related to the restrictions on ex parte communications contained in s. 350.042, F.S.¹⁴ This section 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 individual who does makes an ex parte communication to a commissioner must submit to the commission a written statement describing the nature of such communication, to include the name of the person making the communication, the name of the commissioner or commissioners receiving the communication, copies of all written communications made, all written responses to such communications, and a memorandum stating the substance of all oral communications received and all oral responses made. 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.

Again, Florida law is, in general, similar to that in other states. Of the 23 states that responded to the NRRI questionnaire (excluding Florida), two states have no restrictions on ex parte communications. There is some variety in the details in the states that have ex parte restrictions. The most significant differences between these other states' laws and Florida's are: seven states prohibit indirect ex parte

¹⁴ 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).

communication, one state requires compliance with judicial standards, and several states provide for intra-commission communications, such as providing that commissioners can discuss matters among themselves, commissioners can discuss matters with and have the aid and advice of commission staff members who are designated to assist them in the particular matter, and staff can file ex parte documents.

These statutory differences raise potential issues with Florida's statute. Again these issues are illustrated by recent developments. A second complaint filed with the Commission on Ethics against one commissioner alleges a violation of the ex parte statute by quoting from an ex parte memo from a telephone company during a hearing on the company's rates.¹⁵ It has also been reported that utility officials discussed a matter with a commissioner approximately one week before a case on the matter was officially opened.¹⁶ This does not appear to constitute a violation of the ex parte statute by the commissioner as the communication was not "relative to a proceeding" officially opened or in existence at the time. While it may have been a violation by the utility officials, assuming they knew at the time that the case would be filed with the commission within 90 days, there are no penalties in the statute for such a violation. The issues include:

- should the statute expressly address communications between commissioners
- should the statute expressly address indirect ex parte communications between commissioners and staff,
- should the statute be amended to cover other communications or circumstances, such as an absolute prohibition on any communication between a utility representative and a commissioner or an expansion of the requirements of disclosure of ex parte communications to make the requirement applicable to all communications, even if there is no open proceeding on the matter discussed,
- should any additional code of conduct be made applicable to commissioners to address ex parte communications, i.e. the code of judicial conduct as discussed in the 1990 report,
- should there be a penalty for the individual involved in the ex parte communication, and if so what.

The first issue is whether commissioners should be able to discuss matters related to an open docket among themselves outside of a hearing. This currently cannot be done in Florida, not because of the ex parte law, but because of the open public meetings law, s. 286.011, F.S. An argument can be made that they should be allowed to do so in quasi-judicial matters as judges do. This might prove more efficient and effective. However, in the absence of any evidence of a problem, the

¹⁵ St. Petersburg Times online, April 24, 2004.

¹⁶ Tampa Tribune online, July 25, 2004

strong public policy of open meetings should be remain applicable to these communications.

The next issue is whether the statute should expressly address indirect ex parte communications between commissioners and staff.¹⁷ It appears that the complaint which was reported to have been recently filed with the Commission on Ethics, and which the Commission has not acted upon, is the only such complaint ever filed that makes allegations of indirect ex parte communications through a commissioner's aide. According to anecdotal evidence, aides know that part of their role is to prevent commissioners from getting or seeing any ex parte material furnished to the aide for use in briefing the commissioner. There has been no problem of indirect ex parte communication involving technical or legal staff. As there does not appear to be a problem with the statute or with procedures in general under the statute, it is not necessary to directly address these communications in the statute.

The next issue is whether the statute should be amended to cover other communications or circumstances, such as an absolute prohibition on any communication involving PSC matters between a utility representative and a commissioner or an expansion of the requirements of disclosure of ex parte communications to make the disclosure requirement applicable to 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, 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 remain aware of new information that helps them perform their duties and the communications should not be prohibited. Additionally, if every communication a commissioner had that related to PSC subject matter had to be recorded somewhere, the index to this recording system would become so cumbersome that no one would be able to effectively research whether a commissioner had ever had a communication that might have any bearing on a particular matter.

Another alternative is to make another code of conduct applicable to commissioners. It has recently been suggested that commissioners be made Administrative Law Judges.¹⁸ The explanation for the recommendation was that it

¹⁷ The commissioner involved in the recent complaint has stated that he did not see the memo in question but that his aide may have. His aide has stated that she does not remember seeing the memo. The Lakeland Ledger online edition, May 3, 2004

¹⁸ Letter from Ben Wilcox, Executive Director of Common Cause Florida to Diana Caldwell, Staff Director, Senate Communications and Public Utilities Committee (July 21, 2004).

“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.”¹⁹ The 1990 legislative report recommended that the Code of Judicial Conduct be made applicable to commissioners.²⁰ The report states that the PSC’s Code of Conduct for Public Service Commissioners is insufficient in that it is voluntary and in that it fails to provide commissioners with sufficient guidance as to what activities are and are not appropriate under the PSC’s 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 statute on PSC ex parte communications, s. 350.042, F.S., provides for commissioners. However, the Canon also provides a good example of the danger of simply requiring that commissioners comply with the Code. The Canon expressly allows judges to confer with each other, and, as discussed above, commissioners are prohibited from doing this under the open public meetings law, s. 286.011, F.S., and it likely is best in light of the strong public policy in favor of open meetings to preserve this prohibition.

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. Subsection B prohibits a judge from appearing at a public hearing before, or otherwise consulting with, and executive or legislative body or official except on matters concerning the law and other stated matters. Subsection D is permissive, allowing a judge to serve as a member, officer, director, trustee or non-legal advisor of a organization or governmental agency devoted to the improvement of the law and other specified matters. The subsection implies that any position that is not within its provisions is prohibited. 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 such as the Governor’s Florida Energy 2020 Study Commission 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.

¹⁹ Section 3G-Ethical Standards, Administrative Law Judge Reference Manual.

²⁰ 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.

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 whether there should be a penalty for the individual involved in the ex parte communication, and, if so, what penalty. 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.²¹ Section 350.0605, F.S., contains two restrictions on post-commission employment. The first, enacted pursuant to the recommendations of the 1990 report, 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, enacted in 1993, 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, directly or indirectly, owns or controls a public utility regulated by the commission, from a public utility regulated by the commission, from a business entity which, directly or indirectly, is an affiliate or subsidiary of a public utility regulated by the commission or is an actual business competitor of a local exchange company or public utility regulated by the commission and is otherwise exempt from regulation by the commission under ss. 364.02(13) (specified types of communications companies are excluded from the definition of the term “telecommunications company” and thereby from PSC regulation) and 366.02(1) (specified types of electric and gas entities are excluded from the definition of the term “public utility” and thereby from PSC regulation), or from a business entity or trade association that has been a party to a commission proceeding within the two years preceding the member's termination of service on the commission.

²¹ According to anecdotal evidence, since 1978, when the selection system was changed from election to appointment, nine commissioners have either worked for or represented a regulated utility after leaving the PSC. One went to work for a utility, doing so before the statutory prohibition on employment was enacted. Eight ex-commissioners have represented utilities in front of the PSC after leaving, five of whom were attorneys.

These restrictions are virtually identical to those for other Florida officials as to representation, and more restrictive as to other employment. Article II, section 8(e) of the Florida Constitution provides “No member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office. . . . Similar restrictions on other public officers and employees may be established by law.”

Section 112.313(9), F.S., is the statutory implementation of the constitutional restriction on post-employment restrictions. It applies to legislators, statewide elected officers, appointed state officers, and designated public employees. It prohibits any legislator, appointed state officer, or statewide elected officer from personally representing another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office. It also prohibits any agency employee from personally representing another person or entity for compensation before the agency with which he or she was employed for a period of two years following vacation of position, unless employed by another agency of state government. Any person violating this paragraph is subject to the penalties provided in s. 112.317 (the penalties section of the public employees code of conduct) and a civil penalty of an amount equal to the compensation which the person receives for the prohibited conduct.

Additionally, section 112.3185, F.S., provides restrictions on employment after leaving state employment for agency employees involved in contractual services.²² The term “agency” expressly includes the PSC. The statute prohibits an agency employee, after retirement or termination, from having any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee. The statute also prohibits an agency employee from, within 2 years

²² The term “contractual service” is defined in s. 287.012(9), F.S., to mean “the rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors, and such services may include, but are not limited to, evaluations; consultations; maintenance; accounting; security; management systems; management consulting; educational training programs; research and development studies or reports on the findings of consultants engaged thereunder; and professional, technical, and social services. “Contractual service” does not include any contract for the furnishing of labor or materials for the construction, renovation, repair, modification, or demolition of any facility, building, portion of building, utility, park, parking lot, or structure or other improvement to real property entered into pursuant to chapter 255 and rules adopted thereunder.”

after retirement or termination, having any employment or contractual relationship with any business entity other than an agency in connection with any contract for contractual services which was within his or her responsibility while an employee. Again, a violation of the section is punishable as provided in s. 112.317, F.S.

Section 350.0605 is more restrictive than the law in other states. Of the 23 states that responded to the NRRI questionnaire (excluding Florida), 17 have some restriction on employment after leaving state employment. Ten of these are not PSC-specific but are applicable to all relevant state officials and employees. Only five of the states restrict general employment by an entity which the person previously played a part in regulating; the rest restrict employment as a representative of a regulated entity before the agency where the person previously worked. Only five states have a two-year restriction on employment; eleven have a one-year restriction and one has a six-month restriction. Seven have a permanent ban on representing anyone before the agency in a matter in which the person participated while a state employee, with varying levels of previous involvement required for the ban to apply.

As Florida law on post-commission employment is more restrictive than that of other states and is virtually identical to that for other Florida officials as to representation, and more restrictive as to other employment, it does not appear that any changes to this law are necessary at this time, 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.²³ 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.²⁴

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,

²³ Letter from Ben Wilcox, Executive Director of Common Cause Florida to Diana Caldwell, Staff Director, Senate Communications and Public Utilities Committee (July 21, 2004).

²⁴ Department of Public Information and Bar Services, The Florida Bar, Merit Selection and Retention (September 2004).
<http://www.flabar.org/DIVCOM/PI/BIPS2001.nsf/1119bd38ae090a748525676f0053b606/db7173e85a333f978525669e004d01f3?OpenDocument>

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 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."²⁵ 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.²⁶ The Court has specifically rejected claims that the PSC is a part of the executive branch.²⁷ 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.

²⁵ Letter from Ben Wilcox, Executive Director of Common Cause Florida to Diana Caldwell, Staff Director, Senate Communications and Public Utilities Committee (July 21, 2004).

²⁶ 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..

²⁷ 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).

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.²⁸ Later, allegations were made that the two commissioners received documents from a representative of the utility that related to the refund case.²⁹ The commissioners said they never received the documents.³⁰ The documents were found only in the offices of these two commissioners,³¹ and the utility representative stated that the documents were not delivered to any other commissioners' offices.³² The Attorney General announced that he was reviewing the matter for possible violations of law.³³
- Two commissioners are members of a newly-created national organization named the Federation for Economically Rational Utility Policy (FERUP).³⁴ FERUP "supports policies that encourage market dynamism and consumer empowerment, while recognizing the difficulties of transitioning from regulated monopoly to competitive markets."³⁵ One of the Florida commissioners is co-chair.³⁶ 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.³⁷ One Colorado consumer advocate called for the commissioner to recuse himself from any such cases.³⁸ Questions were also raised about the objectivity of the members of FERUP because of the acceptance of money from an organization with a broad deregulation agenda.³⁹

²⁸ The Tampa Tribune online edition, May 24, 2003.

²⁹ The Tampa Tribune online edition, May 24, 2003.

³⁰ St. Petersburg Times online edition, April 17, 2004.

³¹ The Tampa Tribune online edition, May 30, 2003.

³² The Tampa Tribune online edition, May 24, 2003.

³³ The Tampa Tribune online edition, May 30, 2003.

³⁴ St. Petersburg Times online edition, September 15, 2004.

³⁵ Federation for Economically Rational Utility Policy Mission Statement webpage, <http://www.ferup.org/about/>.

³⁶ Federation for Economically Rational Utility Policy Executive Committee webpage <http://www.ferup.org/>.

³⁷ The Denver Post online edition, October 24, 2004.

³⁸ The Denver Post online edition, October 24, 2004.

³⁹ The Denver Post online edition, October 24, 2004.

- 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.⁴⁰ 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."⁴¹ 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 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 new joint legislative committee, which would hold a public meeting or meetings to interview the nominated applicants and select an appointee to the commission.⁴² 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.⁴³

To increase the accountability and public participation, the Legislature should be authorized to remove or otherwise discipline a commissioner,⁴⁴ again through a

⁴⁰ Commission on Ethics complaint number 02-118.

⁴¹ Florida Public Service Commission Mission Statement, <http://www.psc.state.fl.us/>.

⁴² This stage in the process would be similar to the current process for selection of the Public Counsel under s. 350.061, F.S.

⁴³ s. 350.041(1), F.S.

⁴⁴ Of the 19 states whose response to NRRI included information on removal of commissioners, four states authorize the Legislature to remove PSC commissioners (California, Iowa, Missouri, and North Dakota). In another state, the Governor may only

public meeting or meetings.⁴⁵ 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.⁴⁶

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.⁴⁷ 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.⁴⁸

remove a commissioner with consent of two-thirds of the Senate (Pennsylvania). In nine states, the Governor may remove a commissioner (Georgia, Idaho, Minnesota, Missouri (where the Governor shares this authority with the Legislature), New York, North Carolina, Ohio, Oregon, and South Carolina). In six states, a commissioner may be removed by court action (Alabama, Connecticut, Iowa (where the Legislature also may remove a commissioner by impeachment), Mississippi, New Jersey, and Washington). In one state, which deems its commissioners judges, the Judicial Inquiry and Review Board removes them.

⁴⁵ This new joint legislative committee should do only appointments and discipline of PSC commissioners and selection of the Public Counsel, no substantive matters. 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.

⁴⁶ s. 11.45(2), F.S.

⁴⁷ ss. 350.0614, 11.42, and 112.321 F.S. and Commission on Ethics v. Sullivan, 489 So.2d 10 (Fla.1986).

⁴⁸ s. 350.0614(3), F.S.

5. Miscellaneous issues

There are an assortment of smaller issues relating to PSC operations. The first issue is whether the consumer services functions should be moved from the PSC to the OPC. While there have been no complaints about the current system of resolving consumer complaints, staff considered this as an additional clarification of the role of the PSC. There appears to be a common perception that the PSC represents consumers in matters such as rate cases. It does not, the OPC does.⁴⁹ Having the PSC resolve consumer complaints may re-enforce this misperception.

The PSC rule on customer complaints is 25-22.032, F.A.C. The rule provides for the following three possible stages in resolving complaints.

1. The first stage is an attempt to get the customer and the utility to agree to a resolution. Many complaints are referred directly to the utility by telephone transfer or e-mail transfer. If this is not done, Division of Consumer Affairs staff notifies the utility of the complaint and requests a response. Unless the customer specifically requests that he or she not be contacted by the utility, the response is to go to the customer, and the two are to attempt to agree to a resolution. If the customer does request not to be contacted, the utility's response is to state, among other things, the utility's proposed resolution and the dates by which it will take all steps necessary to implement the proposed resolution. Commission staff normally will not respond further to the customer, however, if a customer objects to the utility's response, staff will propose a resolution.
2. If the customer or the utility disagrees with the staff's proposed resolution, the next step is for the division to refer the complaint to a Process Review Team. The team is to consist of three staff persons, one each from the consumer division, the Office of the General Counsel, and the appropriate technical division. If the team finds that the complaint is within the PSC's subject matter jurisdiction; that the relief sought is within the commission's authority; that the basis of the complaint is not an objection to existing statutes, rules, tariffs, or orders; and that a violation of an applicable statute, rule, tariff, or order may have occurred, the division is to set an informal conference. (Upon a finding that any of these conditions does not exist, the Office of the General Counsel is to send a closure letter ending the case.) The presiding staff member at the informal conference is to be a representative from the division who did

⁴⁹ The commission is a regulatory decision-maker, comparable to a court, and does not represent any of the interest holders in actions before it. It does consider consumer interests, but also considers the interests of the regulated companies, and attempts to balance these interests, with a long-term view. For example, in setting electric rates, the commission is to set rates that are fair, just, and reasonable for each customer class and that yield reasonable compensation for the services rendered. s. 366.06, F.S.

not participate in the proposed resolution of the complaint. At the conference, parties may present information, orally or in writing, in support of their positions. If a settlement is not reached within 20 working days following the conference and the complaint is not withdrawn, staff is to submit a recommendation to the PSC for consideration at the next available commission conference.

3. The commission will either issue a notice of proposed agency action or set the matter for a formal hearing.

Some consumer complaints involve technical or complex issues, such as the interpretation and application of the terms of a utility's tariff. In these cases, during the initial stage of encouraging a settlement without a hearing, PSC consumer division staff can consult with PSC technical staff and attorneys. This can be very beneficial in resolving the complaint.

The Public Counsel is confident that his office could perform the consumer services function, if given additional resources.⁵⁰ He stated that he could do the same three-stage process used now, with his attorneys and technical staff able to do the consultation, or could perhaps develop a quicker method of resolving complaints. His attorneys could prepare and present consumer-complaint-related cases to the PSC. He would need additional staff to do the intake, initial settlement discussions, and other processing of consumer complaints. He also mentioned concerns about adequate office space. The best way to do the transfer, if it were to be done, would be to transfer all personnel, equipment, office space and any other resources assigned or allocated to the PSC's Division of Consumer Affairs to the OPC, with these functions still to be funded from the Florida Public Service Regulatory Trust Fund.

However, as there are no complaints about the current complaint-resolution process, and as the potential benefits are uncertain, it is recommended that the transfer not be done at this time.

This would be in keeping with other states. Based on a review of other states' regulatory agencies' websites, the regulatory entity in all but four has a consumer service division.

The second issue is whether the PSC should use Administrative Law Judges (ALJ) more. Commissioners make every attempt to allow customers to participate in a case. Administrative Law Judges have tighter deadlines and less discretion to allow all interested persons to speak and participate. Cases before the commission may take longer than with an ALJ, but there is a more open forum for the public to speak their concerns. There is also a concern that electric and

⁵⁰ Telephone interview with Harold McLean, Florida Public Counsel (November 11, 2004).

telecommunications cases are too complex, requiring too much expertise for an ALJ. Additionally, water/wastewater cases frequently involve small companies that need help they couldn't get with an ALJ, such as the PSC staff-assisted rate cases. Staff-assisted rate cases allow these small companies to avoid a lot of legal expenses, which would otherwise be passed on to their customers in rates. Given this, greater use of ALJs is not recommended.

A third issue is whether the PSC should be doing less complicated cases like pay phone and water/wastewater. Pay phone and water/waste water cases do not take much time relative to other matters. Pay phones cases are simply a certification, which involves administrative staff getting forms completed and the commission approving completed certification forms on a consent docket. The purpose is to keep identification and location information on communication providers. Having the PSC do water/waste water helps customers of small utilities, as discussed above.

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.⁵¹

There are issues with advertising these vacancies. Attempting to advertise in all areas of the state would be cost prohibitive.⁵² 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.⁵³ 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

⁵¹ Interview with Greg Krasovsky, Chair, Florida Public Service Commission Nominating Council (November 8, 2004).

⁵² Interview with Greg Krasovsky, Chair, Florida Public Service Commission Nominating Council (November 8, 2004).

⁵³ Interview with Greg Krasovsky, Chair, Florida Public Service Commission Nominating Council (November 8, 2004).

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.⁵⁴ 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.⁵⁵

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,⁵⁶ 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.

⁵⁴ 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/>.

⁵⁵ 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/>.

⁵⁶ The Association information is at <http://www.nasuca.org/>.

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 newly-created joint legislative committee discussed above. 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 biennial basis by each newly appointed committee.

Recommendations

The Legislature should take the following actions.

- 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 take the following actions.

- A merit retention system should not be applied to the PSC commissioners.
- The Office of the Public Counsel should not be moved to the Office of the Attorney General.