

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/CS/SB 1322

SPONSOR: Governmental Oversight and Productivity Committee and Communications and Public Utilities Committee

SUBJECT: Public Service Commission

DATE: April 6, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Caldwell</u>	<u>CU</u>	<u>Fav/CS</u>
2.	<u>Wilson</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill is the result of Interim Project 2005-115, Florida Public Service Commission, Review of Chapter 350, F.S. It:

- creates the joint legislative Committee on Public Service Commission Oversight to receive the list of nominees for commissioner from the nominating council and select one nominee to recommend to the Governor as the appointee, and revises the nominating procedure to reflect this change;
- provides for the application of the gift prohibition statute to commissioner attendance at conferences and associated meals and events;
- creates a penalty for a person giving a prohibited gift to a commissioner and for the person involved in an ex parte with a commissioner;
- requires that commissioners avoid impropriety and act in a manner that promotes public confidence in the integrity and impartiality of the commission
- codifies the independence of the Public Service Commission;
- removes the Public Service Commission's budget from the Governor's budgeting process and its employees from administrative control of the Governor or the Department of Management Services;
- codifies the independence of the Public Counsel; and
- authorizes the Public Service Commission Nominating Council to spend nominal amount to advertise vacancies on the council.

This bill substantially amends the following sections of the Florida Statutes: 350.001, 350.031, 350.041, 350.042, 350.043, 350.05, 350.061, and 350.0614. It also creates an un-numbered section and repeals section 350.03 of the Florida Statutes.

II. Present Situation:

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

The last comprehensive legislative review of chapter 350 and these three entities was in 1990. Many of the issues discussed in that report relating to oversight of the PSC and ethics continue to be of concern today. The purpose of this project was to review the responsibilities and the performance of these three entities and to identify any changes that should be made to the chapter to improve the efficiency and effectiveness of operations.

A. 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. Commissioners must meet statutory qualifications and abide by statutory standards of conduct. The Commission on Ethics investigates any alleged violations and reports its findings and recommendations to the Governor for enforcement. The potential penalties are set forth in s. 112.317, F.S., and include a variety of penalties such as public censure and reprimand, 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.

The prohibition on commissioners accepting gifts is set forth in s. 350.(2)(a) and (d), F.S. Paragraph (a) 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. Paragraph (d) provides that a commissioner may not accept anything from a party in a proceeding currently pending before the commission.

The provisions on ex parte communications¹ are set forth in s. 350.042, F.S. 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 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.

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).

B. Public Counsel

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

C. Florida Public Service Commission Nominating Council

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

III. Effect of Proposed Changes:

A. Public Service Commission

1. Responsibility for oversight of the PSC

To provide a clearer line of accountability for actions by commissioners and a method for public participation in decisions involving the PSC, the bill increases the legislative responsibility for oversight of the PSC, a legislative entity according to both statute and case law.² The starting point for this increase in legislative responsibility is the creation of a standing joint legislative committee to make appointments to the commission, replacing the current practice of having the Governor make these appointments.³ Section 1 of the bill creates the Committee on Public Service Commission Oversight. The committee is composed of twelve members, appointed as follows: six members of the Senate appointed by the President of the Senate, two of whom must be members of the minority party; and six members of the House of Representatives appointed by the Speaker of the House of Representatives, two of whom must be members of the minority party. The terms of members is for two years and runs from the organization of one Legislature to the organization of the next Legislature. The President appoints the chair of the committee in even years and the vice chair in odd years, and the Speaker of the House of Representatives appoints the chair of the committee in odd years and the vice chair in even years, from among the committee membership. Vacancies are filled in the same manner as the original appointment. Members serve without additional compensation, but are to be reimbursed for expenses. The committee is governed by joint rules of the Senate and the House of Representatives. The committee is authorized to recommend to the Governor a nominee to fill a vacancy on the Public

² Sections 350.001 and 350.041, F.S., *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).

³ In s. 350.001, F.S., the Legislature 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 general law.

Service Commission as provided by general law and to appoint a Public Counsel as provided by general law.

To assist in accomplishing the disciplinary duties, the committee is authorized to file a complaint with the Commission on Ethics alleging a violation of chapter 350 by a commissioner, former commissioner, former commission employee, or member of the Public Service Commission Nominating Council. The committee will not have a permanent staff, but the President and Speaker select staff members from among existing legislative staff, when and as needed.

Section 3 amends s. 350.031, F.S., to provide a new nominating procedure. The Nominating Council is required to submit to the joint committee not fewer than three persons for each vacancy on the PSC. The list must be submitted by August 1 for a vacancy due to the end of a term and within 60 days after a vacancy occurs for any reason other than expiration of a term. The committee will select from the list one nominee to recommend to the Governor to be appointed to the PSC. The recommendation must be submitted to the Governor within 45 days of receipt of the list of nominees. If the Governor rejects the recommendation or has not made an appointment within 30 days after receipt of the recommendation, the nominating council is to immediately begin the nominating process again, considering all new applicants and all previous applicants for this vacancy. For the second and subsequent nominations, the council submits its list within 30 days of the rejection or failure to appoint. The committee must then make its recommendation to the Governor within 30 days of receipt of the list of nominees. The Governor must act on the recommendation within 30 days of receipt. The appointment is subject to confirmation by the Senate during the next Regular Session after the vacancy occurs.

Section 2 of the bill amends s. 350.001, F.S., to codify the independence of the PSC and to remove its budget from the Governor's budgeting process and remove the PSC employees from administrative control of the Governor or the Department of Management Services.

2. Gifts

Section 4 amends the gift prohibition statute, s. 350.041, F.S., the standards of conduct for commissioners. The bill provides that commissioners may attend conferences and associated meals and events that are generally available to all conference participants without payment of any fees in addition to the conference fee. Additionally, while at a conference, a commissioner may attend meals or events that are not sponsored in any part by a regulated utility and that are available only to commissioners, committee members, or speakers at the conference, provided the commissioner is a committee member or speaker. Also, it is not a violation of the gift prohibition for a commissioner to attend a conference for which conference participants who are employed by a utility regulated by the commission have paid a higher conference registration fee than the commissioner, or to attend a meal or event that is generally available to all conference participants without payment of any fees in addition to the conference fee and that is sponsored, in whole or in part, by a utility regulated by the commission.

A related change would address the potential problem of ex parte communications or other improper interaction between commissioners and those with interests before the commission while in attendance at conferences, meals, or events. The bill further amends the standards of conduct statute to require commissioners to avoid impropriety in all of the commissioner's

actions and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the commission.

The bill also creates a penalty for those giving a prohibited gift, providing that, if, in the course of an investigation by the Commission on Ethics, allegations are made as to who gave the prohibited gift, the person must be given notice and an opportunity to participate in the investigation and relevant hearings to present a defense. If the Commission on Ethics determines that the person gave or provided the prohibited gift, the person may not appear before the commission or otherwise represent anyone before the commission for a period of two years.

3. Ex parte

As discussed above, the bill supplements ex parte prohibitions by requiring that commissioners at all times avoid impropriety and act at all times in a manner that promotes public confidence in the integrity and impartiality of the PSC.

In section 5, the bill amends s. 350.042, F.S., the ex parte statute, to create a penalty for the person involved in an ex parte with a commissioner. The penalty is the same as that created for giving a prohibited gift. If, in the course of an investigation by the Commission on Ethics, allegations are made as to who engaged in the ex parte communication, the person must be given notice and an opportunity to participate in the investigation and relevant hearings to present a defense. If the Commission on Ethics determines that the person participated in the ex parte communication, the person may not appear before the commission or otherwise represent anyone before the commission for a period of two years.

B. Public Counsel

Section 6 of the bill amends s. 350.061, F.S., to conform to the appointment of the Public Counsel by the new joint committee and to codify the independence of the Public Counsel.

Section 7 of the bill makes additional conforming changes, to s. 350.0614, F.S., relating to appointment of Public Counsel.

C. Public Service Commission Nominating Council

Section 3 also amends s. 350.031, F.S., to authorize the Public Service Commission Nominating Council to spend up to \$10,000 to advertise vacancies on the council.

D. Administrative Review

The bill provides that an agency action affecting the substantial interests of a water or wastewater utility shall cause a referral to the Division of Administrative Hearings for assignment of an administrative law judge.

E. Effective date

Section 9 provides that the bill takes effect on October 1, 2005, but the provisions creating penalties or new standards of conduct apply to violations occurring after that date.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The authority for the Public Service Commission Nominating Council to spend up to \$10,000 to advertise vacancies will result in more expenditures from the Public Service Regulatory Trust Fund, the source of the nominating council's expense money.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
