

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Communications, Energy, and Public Utilities Committee

BILL: SB 212

INTRODUCER: Senator Fasano

SUBJECT: The Public Service Commission

DATE: March 29, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Carter	CU	Favorable
2.	_____	_____	JU	_____
3.	_____	_____	GO	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill requires that Public Service Commissioners follow the Code of Judicial Conduct in docketed proceedings. It prohibits certain communications between Public Service Commissioners or specified members of their staff and any other person, expressly exempting from the prohibition an individual ratepayer who is representing only himself or herself without compensation and including the Governor, a member of the Cabinet, or a member of the Legislature; establishes a monetary penalty for the individuals involved in such communications; and establishes notice requirements for other communications. It establishes prohibitions on certain types of employment for a 4-year period after leaving the Public Service Commission. Finally, it changes the requirement of biennial reconfirmation of the Public Counsel to reconfirmation every 4 years.

The bill takes effect July 1, 2011.

The bill substantially amends the following sections of the Florida Statutes: 350.041, 350.042, 350.0605, and 350.061.

II. Present Situation:

Role and Organization of the Florida Public Service Commission

The Florida Public Service Commission (“PSC” or “commission”) is an arm of the legislative branch of government.¹ The role of the PSC is to ensure that Florida's consumers receive some of

¹ Section 350.001, F.S.

their most essential services – electric, natural gas, telephone, water, and wastewater – in a safe, affordable, and reliable manner.² In doing so, the PSC exercises regulatory authority over utilities in one or more of three key areas: economic regulation; competitive market oversight; and monitoring of safety, reliability, and service issues.³

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

The work of the Florida Public Service Commission is a balancing act. The Commission must balance the needs of a utility and its shareholders with the needs of consumers. Traditionally, the Commission achieved this goal by establishing exclusive utility service territories, regulating the rates and profits of a utility, and placing an affirmative obligation on the utility to provide service to all who requested it. For electric and water customers in the state, many of the Commission's traditional methods for achieving the balance continue today. Legislative action during the 1995 session to open up the local telephone market to increased competition, however, calls for the Commission to facilitate entry of new firms into the local telephone market, while at the same time ensuring that neither the new entrant nor the incumbent local exchange company is unfairly advantaged or disadvantaged. Section 364.01(4), F.S., calls for the Commission to exercise its jurisdiction to encourage and promote competition. The Commission's role in the increasingly competitive telephone industry remains one of balance.

In performing this role, the PSC conducts proceedings ranging from workshops and rulemaking to informal “proposed agency action” proceedings and formal evidentiary hearings. Among state agencies in Florida, the PSC is unique with respect to the manner in which it handles formal evidentiary proceedings.

Most state agencies refer contested matters to the Division of Administrative Hearings (DOAH) for formal evidentiary hearings and fact finding. Under this process, an administrative law judge (ALJ) is assigned to hear the case, with due regard to the expertise required for the matter.⁵ The agency may participate as a party.⁶ After hearing the evidence and arguments presented by the parties, the ALJ issues a recommended order containing findings of fact, conclusions of law, and recommended disposition of the case.⁷ The ALJ's findings of fact must be based “exclusively on the evidence of record and on matters officially recognized.”⁸ Subject to certain requirements, the agency may reject or modify the ALJ's conclusions of law over which the agency has

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

³ *Ibid.*

⁴ *Ibid.*

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

⁶ *Ibid.*

⁷ Section 120.57(1)(k), F.S.

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

substantive jurisdiction. The agency has limited authority to modify or reject the ALJ's findings of fact.⁹

Although it is authorized to refer matters to DOAH for assignment to an ALJ,¹⁰ the PSC is unique in that it conducts most of its own formal evidentiary hearings. In these hearings, commissioners rule on procedural matters, establish evidence of record, weigh the record evidence, and apply the law to the facts of the case. Thus, in conducting formal hearings, *PSC commissioners essentially serve the role of administrative law judges*. Unlike ALJ's, however, commissioners have the authority to make the final findings of fact and conclusion of law.

In proceedings at either DOAH or the PSC, parties and interested persons are prohibited from making ex parte communications with the decision maker concerning the merits of the proceeding.¹¹

Public Service Commissioners – Standards of Conduct

The PSC is required to perform its duties independently.¹² Part III of Chapter 112, F.S., establishes a code of ethics for public officers and employees, which includes Public Service Commissioners. Generally, this code prohibits public officers, including commissioners, from soliciting or accepting anything of value to influence a vote or official action, using their official position to secure a special benefit, disclosing or using non-public information for personal benefit, soliciting gifts from lobbyists, and soliciting an honorarium from anyone or accepting an honorarium from a lobbyist. This code also establishes restrictions on public officers, including commissioners, from doing business with one's own agency, having outside employment or contractual relationships that conflict with public duties, representing any party before one's agency for compensation for two years after leaving office, and employing relatives in the agency. Finally, this code requires that public officers, including commissioners, disclose voting conflicts when a vote would result in a special private gain or loss, file quarterly reports for gifts over \$100 from persons not lobbyists or relatives, file quarterly reports for receipt of honorarium-related expenses from lobbyists, and disclose certain financial interests.

In addition to the provisions of part III of chapter 112, public service commissioners are subject to more stringent requirements in s. 350.041, F.S. In the event of a conflict between part III of chapter 112 and s. 350.041, F.S., the more restrictive provision applies.¹³ Section 350.041, F.S., provides the following standards of conduct:

- A commissioner may not accept anything from a regulated public utility (or a business entity that owns or controls the utility or an affiliate or subsidiary of the utility).
- A commissioner may not accept anything from a party in a proceeding currently pending before the commission.
- A commissioner may not accept any form of employment with, or engage in any business activity with, a regulated public utility (or a business entity that owns or controls the utility or an affiliate or subsidiary of the utility).

⁹ Section 120.57(1)(l), F.S.

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

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

¹² Section 350.001, F.S.

¹³ Section 350.041(1), F.S.

- A commissioner may not have any financial interest in a regulated public utility (or a business entity that owns or controls the utility or an affiliate or subsidiary of the utility), except for shares in a mutual fund.
- A commissioner may not serve as the representative of, or serve as an executive officer or employee of, a political party; campaign for any candidate for public office; or become a candidate for any public office without first resigning.
- A commissioner, during his or her term of office, may not make any public comment on the merits of a formal proceeding in which a person's substantial interests are determined.
- A commissioner may not conduct himself or herself in an unprofessional manner during the performance of official duties.
- A commissioner must avoid impropriety in all activities and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the commission.
- A Commissioner may not directly or indirectly, through staff or other means, solicit anything of value from a regulated public utility, an affiliate or subsidiary of the utility, or any party appearing in a proceeding considered by the Commission in the last 2 years.

Ex Parte Communications

Commissioners are prohibited from engaging in certain ex parte communications with persons who are “legally interested in a proceeding” before the commission.¹⁴ The prohibition applies only to communications concerning “the merits, threat, or offer of reward” in a proceeding, and thus does not include discussions on procedural issues.¹⁵ It does not preclude ex parte communications in all proceedings: rulemaking, declaratory statements, workshops, and internal affairs meetings are specifically excluded.¹⁶ Thus, the prohibition applies to proceedings in which the substantial interests of a person are determined, including proposed agency action proceedings and formal hearings under ss. 120.569 and 120.57, F.S. The statute prohibits an individual from discussing ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days.¹⁷ The prohibition does not apply to commission staff.¹⁸

If a commissioner receives a prohibited ex parte communication, he or she must: place on the record of the proceeding a copy of any written correspondence or a memo stating the substance of any oral communication; provide written notice to all parties to the proceeding; and provide all parties the opportunity to respond to the ex parte communication.¹⁹ The commissioner may choose to withdraw from the proceeding if he or she believes it is necessary to do so to eliminate the effect of having received the communication.²⁰ Any individual other than a commissioner that makes a prohibited ex parte communication must submit to the commission: a written statement describing the nature of the communication; copies of all written communications made and written responses received; and a memorandum stating the substance of all oral

¹⁴ Section 350.042(1), F.S. The statute does not define either “ex parte communications” nor what persons are “legally interested in a proceeding” for purposes of this section.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Section 350.042(4), F.S.

²⁰ *Ibid.*

communications made and oral responses received. The commission must place this information on the record of the relevant proceeding.²¹

The penalties for failing to timely place a prohibited ex parte communication on the record depend on the party involved. A commissioner who fails to place the communication on the record within 15 days is subject to removal and a civil penalty of up to \$5,000.²² Any other person who participated in the communication faces a 2-year ban on practice before the PSC.²³

Post-Employment Restrictions on Public Service Commissioners and Staff

For the first two years after leaving office, a former commissioner may not appear before the PSC representing any client or industry regulated by the PSC.²⁴ Further, during those first two years, a former commissioner may not accept employment or compensation from a regulated public utility, related business entities, business competitors of local telephone companies, or any entity that was a party to a commission proceeding in the prior two years.²⁵

A former PSC employee cannot appear before the commission on behalf of a regulated entity in any matter that the employee worked on and that was pending at the time the employee left.²⁶ In addition, a former PSC employee cannot personally represent anyone before the commission for a period of two years after leaving the commission.²⁷

Committee on Public Counsel Oversight

Section 350.012, F.S., creates a standing joint committee of the Legislature, the Committee on Public Counsel Oversight, whose duty is to appoint a Public Counsel as provided by general law. The committee is composed of 12 members, 6 Senate members appointed by the President of the Senate and 6 House members appointed by the Speaker of the House of Representatives. The terms of members are for 2 years and run from the organization of one Legislature to the organization of the next Legislature.

Section 350.061, F.S., provides for the appointment of the Public Counsel by the committee. The Public Counsel must be an attorney admitted to practice before the Florida Supreme Court, serves at the pleasure of the committee, and is subject to biennial reconfirmation by the committee. The Public Counsel is to perform his or her duties independently. Vacancies in the office shall be filled in the same manner as the original appointment.

III. Effect of Proposed Changes:

Section 1 amends s. 350.041, F.S, to add to the standards of conduct for PSC commissioners a requirement that in docketed proceedings before the PSC, each commissioner must observe and

²¹ Section 350.042(5), F.S.

²² Section 350.042(6), F.S.

²³ Section 350.042(7)(d), F.S.

²⁴ Section 350.0605, F.S.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Section 112.313(9), F.S.

abide by the Code of Judicial Conduct (Code) as adopted by the Supreme Court. If any canon of the Code is in direct conflict with a statutory provision that applies to the commissioners or the commission, the statutory provision controls. Any material violation of the Code, excluding any canon preempted by a conflicting statutory provision, is grounds for suspension or removal of a commissioner by the Governor.

Section 2 amends s. 350.042, F.S., on ex parte communications. It changes the terminology from ex parte communications to prohibited communications. It provides that the purpose of the section is to ensure the fairness of the commission's proceedings by assuring the public that the decisions by the commission are not influenced by prohibited communications between commissioners and legally interested persons. Further, it is the express intent of the Legislature that the commission afford to every person who is legally interested in a proceeding, or the person's attorney or qualified representative, the full right to be heard according to law except as otherwise prohibited in this section.

The section governs communications made by or directed to commissioners and their direct reporting staff which concern proceedings before the Public Service Commission. It provides the following definitions.

- "Legally interested person" means any party to a proceeding before the commission, or a representative of a party to a proceeding pending before the commission, and includes corporations, partnerships, limited liability companies, elected or appointed officials of state government, and other public and elected officials.
- "Prohibited communication" means any communication regarding a docketed matter which, if written, is not served on all the parties to a proceeding, and, if oral, is made without adequate notice to the parties and an opportunity for them to be present and heard.
- "Commissioner's direct reporting staff" means a commissioner's chief advisor and executive assistant.

Prohibited communications

Neither a commissioner nor a commissioner's direct reporting staff is permitted to initiate, engage in, or consider prohibited communications in any proceeding other than an undocketed workshop or an internal affairs meeting. This prohibition does not apply to communications with an individual ratepayer who is representing only himself or herself without compensation.

No individual may discuss any matter with a commissioner or a commissioner's direct reporting staff which the individual reasonably foresees will be filed with the commission.

The restrictions on prohibited communications also apply to communications made by or directed to a commissioner and the commissioner's direct reporting staff to or from the Governor, a member of the Cabinet, or a member of the Legislature. Any written or oral communication from the Governor, a member of the Cabinet, or a member of the Legislature which is only a status inquiry and does not address the merits of a proceeding is not a prohibited communication. A written communication from the Governor, a member of the Cabinet, or a member of the Legislature which attaches or forwards a constituent's correspondence concerning the merits of a docketed proceeding must be placed in the commission's docket files.

The bill amends the existing exemption for oral communications or discussions in scheduled and noticed open public meetings of educational programs or of a conference or other meeting of an association of regulatory agencies to provide that this exemption does not authorize a commissioner or a commissioner's direct reporting staff to discuss matters with any party to a proceeding or legally interested person.

If a commissioner or the commissioner's direct reporting staff knowingly receives a prohibited communication which is related to a proceeding to which the commissioner 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. The commissioner or the commissioner's direct reporting staff must give written notice to all parties to the communication that such matters have been placed on the record.

The bill provides that a member of a commissioner's direct reporting staff who knowingly fails to place on the record any prohibited communications within 15 days after of the date of the communication is subject to dismissal and may be assessed a civil penalty not to exceed \$5,000.

The bill creates monetary penalties for individuals involved in prohibited communications. If, during the course of an investigation by the Commission on Ethics into an alleged violation of this section, allegations are made as to the identity of the person who participated in the prohibited communication, that person must be given notice and an opportunity to participate in the investigation and relevant proceedings to present a defense. If the Commission on Ethics determines that the person participated in the prohibited communication, the person may not appear before the commission or otherwise represent anyone before the commission for a period of 2 years and may be assessed a civil penalty not to exceed \$5,000. The regulated entity represented by the person, if applicable, may also be assessed a penalty of up to one-tenth of 1 percent of the entity's annual operating revenue for the most recent year.

Other communications

The bill establishes the following requirements for communications that are not prohibited.

- Any communication between a commissioner or a commissioner's direct reporting staff and a representative of an entity regulated by the commission that is not otherwise prohibited, whether oral or written, must be made available to the public by posting the communication to the commission's website within 72 hours after the communication is made or received.
- The commission must post on its website a copy of any written communication by the close of the next business day after the communication is received by the commission.
- The commission must prepare a written summary of any communication related to a documented emergency or a communication related to a brief, unscheduled followup to a previously scheduled meeting or previously scheduled telephone conference call. The commission shall post the written summary on its website within 72 hours after the communication is made or received.
- Notice must be posted on the commission's website at least 72 hours prior to the occurrence of any meeting, telephone conference call, or written communication between a commissioner or the commissioner's direct reporting staff and a representative of a regulated

entity. The Public Counsel may participate in the meeting, telephone conference call, or written communication for the purpose of questioning or directly responding to the communication.

- These provisions do not apply to commission staff or representatives of a regulated entity who are required to initiate or receive brief, unscheduled communications for the purpose of obtaining additional information that may be needed after the completion of an audit.

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Section 3 amends s. 350.0605, F.S., on post-PSC employment. It expands the existing prohibition against a former commissioner appearing before the commission representing any client or any industry regulated by the commission for a period of 2 years following his or her termination of service on the commission to 4 years.

It also prohibits any former commissioner from lobbying the legislative or executive branch of state government on behalf of any client or any industry regulated by the commission for a period of 4 years following his or her termination of service on the commission. This provision applies only to commissioners who are appointed or reappointed on or after July 1, 2011.

Similarly, it prohibits any former member of the commissioner's direct reporting staff from appearing before the commission representing any client or industry regulated by the commission, or from lobbying the legislative or executive branch of state government on behalf of any client or any industry regulated by the commission, for a period of 4 years following his or her termination of employment with the commission. This provision applies only to a member of a commissioner's direct reporting staff who is hired with the commission on or after July 1, 2011. For purposes of this prohibition, the term "commissioner's direct reporting staff" means a commissioner's chief advisor and executive assistant.

Additionally, for a period of 4 years following termination of service on the commission or employment with the commission, a former commissioner or former member of a commissioner's direct reporting staff may not accept employment by or compensation from a business entity that, 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 that, 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 that is otherwise exempt from regulation by the commission under ss. 364.02(14) and 366.02(1); or from a business entity or trade association that has been a party to a commission proceeding within the 4 years preceding the former commissioner's termination of service or the former commissioner's direct reporting staff member's termination of employment with the commission. This prohibition applies only to former commissioners and members of a commissioner's direct reporting staff who are appointed or reappointed to or hired with the commission on or after July 1, 2011.

Section 4 amends s. 350.061, F.S., which provides for appointment and reconfirmation of the Public Counsel. The bill changes the requirement of biennial reconfirmation to reconfirmation every 4 years.

Section 5 provides that the bill takes effect July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.