



The Florida Senate

Interim Project Report 2008-108

October 2007

Committee on Communications and Public Utilities

REVIEW PROCESS FOR SELECTION OF MEMBERS OF THE PUBLIC SERVICE COMMISSION

SUMMARY

During the 2004-2005 interim, staff of this committee conducted a broad review of chapter 350, Florida Statutes, which provides for the Public Service Commission (PSC). The resulting report and proposed legislation recommended the creation of a Joint Committee on Public Service Commission Oversight, with a stated goal of increasing the accountability of PSC commissioners for their actions through increased legislative oversight of and responsibility for the selection and discipline of those commissioners.

However, under the enacted revisions to these statutes, the joint committee does not have the proposed broad selection and discipline authority but rather is a second step in the process of selecting applicants for recommendation to the Governor for appointment. As a result, there is no meaningful increase in legislative oversight, no increased accountability of commissioners for their actions, and no discernable benefit to the joint committee participation in the selection process. There is, however, an apparent detriment in that in the two selection processes which were completed in full under the new selection process, the number of applications has decreased significantly.

Based solely on the above, the joint committee should be abolished. However, under current law this committee also appoints the Public Counsel, so this appointment has to be considered as well. The simplest solution would be to revert to appointment by the Joint Legislative Auditing Committee, however, the Public Counsel really is not compatible with the other responsibilities of that committee. The best solution then, is to continue the Joint Committee on Public Service Commission Oversight solely for the purpose of appointing the Public Counsel. There have been suggestions to make the oversight more active, which the Legislature could consider, but which are beyond

the scope of this project.

BACKGROUND

The duties of the Public Service Commission (PSC), stated broadly and briefly, are: ratemaking; regulation of service quality; planning; adjudication, including resolving disputes between regulated companies; ensuring public safety; and consumer services. The PSC consists of five commissioners, who are appointed pursuant to a statutory appointment process and who must abide by statutory standards of conduct.

During the 2004-2005 interim, the staff of this committee conducted a broad review of chapter 350 of the Florida Statutes, which provides, among other things, for selection of PSC commissioners and operations of the PSC.¹ As the review developed, its primary focus became commissioner ethics and standards of conduct, including gifts and conferences, ex parte communications, and post-commission employment. The process of selection of commissioners was included in the review in the context of PSC oversight and discipline.

At that time, the process for selection of PSC commissioners was as follows: the Florida Public Service Commission Nominating Council reviewed applications to fill vacancies on the PSC, selected the most qualified applicants for interview, interviewed these applicants, and provided to the Governor a list of no fewer than three nominees per vacancy, from which the Governor appointed a commissioner, subject to

¹ Interim Project 2005-115, Florida Public Service Commission, Review of Chapter 350, F.S., for which both a summary and a long report were filed, both of which are available at http://www.flsenate.gov/cgi-bin/View_Page.pl?File=index.html&Directory=Publications/2005/Senate/reports/interim_reports/&Tab=committees&Submenu=2.

confirmation by the Senate. The process for PSC discipline was as follows: complaints involving an alleged violation of standards of conduct by a PSC commissioner or staff person were filed with the Commission on Ethics, which investigated the alleged violations and reported its findings and recommendations to the Governor, who would then determine and implement any disciplinary measures.

The report found that there was a broad public opinion that these processes were insufficient to hold PSC commissioners accountable for their actions. Some interested parties and news articles proposed remedying this perceived insufficiency by having PSC commissioners appointed directly by the Governor, with no nominating council. The underlying rationale for this appeared to be that with the nominating council, the Governor, and the Senate all involved in making appointments, no one person or entity had sufficient authority over or responsibility for PSC commissioners to be able to hold them accountable for their actions. The report found that this rationale had merit. The report also found, however, that the proposed resolution was flawed. The PSC commissioners are, by statute and Florida Supreme Court decisions, legislative employees. As such, the report found that there were two problems with the proposed remedy: first, it created potential problems with the constitutional requirement of separation of powers, and second, the Legislature itself should assume the responsibility for accountability of its employees, including PSC commissioners. Based on these findings, the report recommended increasing the responsibility for and oversight of these legislatively-employed commissioners through the Legislature, not the Governor.

To accomplish this, the report and the accompanying bill² proposed removing the Governor from both the appointment and the discipline processes, replacing the Governor with a proposed joint Committee on Public Service Commission Oversight. Under this proposal, the nominating council would still conduct initial interviews and recommend applicants, but the recommendations would go to the committee, not the Governor, for appointment. Similarly, it was proposed that alleged violations of standards of conduct still be investigated by the Commission on Ethics, but that its report and recommendations would go to the committee, not the Governor, to select and implement discipline. Additionally, to encourage greater

participation in oversight, it was proposed that the joint committee be authorized to file a complaint with the Ethics Commission to begin an investigation into an alleged violation by a PSC commissioner and initiate disciplinary proceedings.

As the bill moved through the committee process, the provisions on selection and discipline of commissioners were significantly amended. The proposed grant to the joint committee of exclusive authority for appointment and discipline was deleted and the Governor was retained in both processes. The bill did, however, still create the joint committee, inserting it into the pre-existing selection process between the nominating council and the Governor. Thus, in the bill as it passed,³ the nominating council would conduct interviews and select six, not three, applicants per vacancy and would pass these applicants on to the joint committee, not the Governor. The joint committee would then interview these applicants and select the three per vacancy to recommend to the Governor for appointment. All provisions on discipline were deleted except a provision authorizing the joint committee to file a complaint with the Commission on Ethics alleging a violation of chapter 350, F.S., by a commissioner or staff person.

It must be noted that the 2005 review also addressed appointment of the Public Counsel, which is also accomplished pursuant to Chapter 350, F.S. At the time, the Public Counsel was appointed by a majority vote of the members of the Florida Legislature's Joint Legislative Auditing Committee, and served at the pleasure of that committee, subject to annual reappointment. As the report and resulting legislation proposed creating a new joint committee to make PSC commissioner appointments, it seemed logical for this new committee to select the Public Counsel as well. This change was made in the legislation.⁴

The purpose of this project is to: review the statutes on selection of Public Service Commission members, the legislative history of these statutes, and the appointment processes that were conducted under the statutes; determine any problems with the statutes and processes; and propose resolutions for any such problems.

² 2005 SB 1322, by the Committee on Communications and Public Utilities, as originally filed.

³ ch. 2005-132, L.O.F.

⁴ s. 6, ch. 2005-132, L.O.F.

METHODOLOGY

Staff reviewed the 2004-2005 report, the 2005 legislation, and the appointment processes conducted since the 2005 revisions to the appointment statutes.

FINDINGS

As was discussed above, the goal of the original 2005 proposal to create the Joint Committee on Public Service Commission Oversight was to increase legislative oversight of and responsibility for the PSC commissioners by making that committee responsible for both appointment and discipline of commissioners. Although the powers and duties of the committee were changed, presumably the goal of increased oversight remained.

However, under the enacted revisions to the selection statutes, the joint committee has only limited, divided selection authority, with the Governor still making the ultimate appointments. The joint committee has no discipline authority. As a result, there is no meaningful increase in legislative oversight or interaction with the PSC applicants or commissioners, and no increased responsibility for actions of PSC commissioners. Instead, the joint committee simply selects three applicants from a list of six. It is in effect a second nominating council. The most that can be said is that individual legislators benefit from being a part of the selection process. However, legislators also participate as members of the nominating council, so this potential benefit can be had at that level. There is no discernable benefit to the joint committee participation in the selection process.

There is, however, at least one apparent detriment. The statutory changes to the PSC commissioner selection process took effect on June 2, 2005. Staff of the Public Service Commission Nominating Council provided the following information as to the number of applicants for vacancies since that date and for a similar number of vacancies before that date.

Year	Number of vacancies	Number of applicants
2003	2	118
2004	1	51
2005	3 (including one resignation)	131
2006	2	38
2007	2 (resignations)	66

In the two selection processes which were completed in full under the new selection process (the 2005 selection process was begun and the applications were filed before the new law took effect), the number of applications has decreased significantly. Given that nothing else about the selection process has changed, it appears that the new selection process, with its additional step of the joint committee further narrowing the list of applicants forwarded by the nominating council, including the additional burdens of travel and another interview, is having a chilling effect on the number of applications.

Based solely on the above, the joint committee should be abolished and the nominating council restored to its former role. However, this would create an issue with the appointment of the Public Counsel. As was discussed above, prior to 2005, the Public Counsel was appointed by a majority vote of the members of the Florida Legislature's Joint Legislative Auditing Committee. When the recommendation was made to create the joint Committee on Public Service Commission Oversight to appoint PSC commissioners, it seemed logical to also recommend that this new committee select the Public Counsel. This recommendation was included in the proposed bill and was enacted into law. As such, a repeal of the joint committee statute would require creation of another method of selecting the Public Counsel.

The simplest method would be to revert to appointment by the Joint Legislative Auditing Committee. However, the Public Counsel really is not compatible with the other responsibilities of that committee. The long-time staff director of the joint auditing committee compared and contrasted the Public Counsel with the Auditor General and the director of the Office of Program Policy Analysis and Government Accountability. Similar to the past appointment of the Public Counsel, both of these latter officials are appointed by the Joint Legislative Auditing Committee, although with confirmation by both houses of the Legislature.⁵ However, both of these officials perform audit and analysis functions and the auditing committee staff works closely with both throughout each year. In contrast, the Public Counsel works with legal issues relating to utilities, issues totally unrelated to the joint auditing committee. The joint auditing committee staff director suggested that a new legislative body be created, with full-time staff, to provide a more active oversight of the Public Counsel. This makes sense, particularly with the recently heightened importance of

⁵ s. 11.42 and s. 11.511, F.S., respectively.

energy and climate change issues. However, converting the joint oversight committee to a fully-staffed committee with more active oversight of the Public Counsel is beyond the scope of this project.

In reviewing the recent appointment processes, another issue arose when some of the provisions on timing and effect of steps in the selection process were given a new interpretation. The Legislature could consider technical changes to clarify the meaning of these provisions.

RECOMMENDATIONS

Based on the foregoing report, the Legislature should:

- delete the Joint Committee for Public Service Commission Oversight from the process for selecting Public Service Commission commissioners;
- delete the authority for the joint committee to file a complaint with the Commission on Ethics on an alleged violation of PSC commissioner standards of conduct; and,
- consider retaining the joint committee for purposes of appointment and oversight of the Public Counsel.