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# **ENERGY & UTILITIES POLICY COMMITTEE**

**Wednesday, November 4, 2009**

**1:00 PM – 5:00 PM**

**Morris Hall**

# **MEETING PACKET**

**Larry Cretul  
Speaker**

**Stephen Precourt  
Chair**



# **The Florida House of Representatives**

**General Government Policy Council**

**Energy & Utilities Policy Committee**

**Larry Cretul**  
**Speaker**

**Stephen L. Precourt**  
**Chair**

## **AGENDA**

November 4, 2009

2:00 p.m. – 5:00 p.m.

Morris Hall (17 House Office Building)

Opening Remarks by Chair Precourt

Discussion of Standards of Conduct and Limitations on Communications for Public Service Commissioners, Staff, and Regulated Entities:

- Cochran Keating, Attorney, Energy & Utilities Policy Committee
- Dr. Mary Bane, Executive Director, Florida Public Service Commission
- J.R. Kelly, Public Counsel, Office of Public Counsel
- David Honig, Special Counsel for Civil Rights for the Florida State Conference of Branches of the NAACP

Discussion of the Selection Process of Public Service Commissioners:

- Christiana T. Moore, General Counsel, Office of Legislative Services, The Florida Legislature (Public Service Commission Nominating Council)

Closing Remarks by Chair Precourt

Adjournment

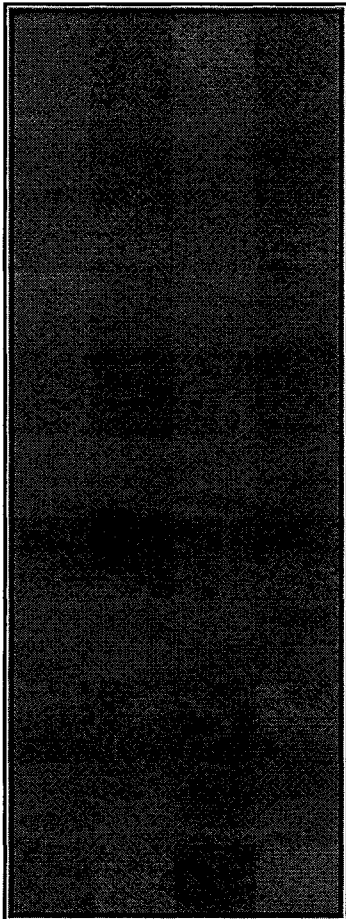


# **STANDARDS OF CONDUCT AND LIMITATIONS ON COMMUNICATIONS FOR PUBLIC SERVICE COMMISSIONERS AND STAFF**

**Cochran Keating, Attorney  
Energy & Utilities Policy Committee**

# Applicable Law

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- **Chapter 112, Florida Statutes (Part III)**
    - ▣ Provisions applicable to all public officers and state employees
  - **Chapter 350, Florida Statutes**
    - ▣ Provisions applicable to the Public Service Commission only
  
    - ▣ In the event of a conflict, the more restrictive statutory provision applies.

# Standards of Conduct for Public Officers and State Employees

Chapter 112,  
F.S.

## Prohibits:

- Soliciting or accepting anything of value to influence vote or official action
- Using official position to secure a special benefit
- Disclosing or using non-public information for personal benefit
- Solicitation of gifts from lobbyists
- Soliciting an honorarium from anyone or accepting one from a lobbyist

# Standards of Conduct for Public Officers and State Employees

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Chapter 112,  
F.S.

## **Establishes restrictions on:**

- 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
- Employment of relatives in the agency

# Standards of Conduct for Public Officers and State Employees

Chapter 112,  
F.S.

## Requires:

- Disclosure of voting conflicts when a vote would result in a special private gain or loss
- Filing of quarterly reports for gifts over \$100 from persons not lobbyists or relatives
- Filing of quarterly reports for receipt of honorarium-related expenses from lobbyists
- Disclosure of financial interests



# Penalties for Violations of Chapter 112, Florida Statutes

Chapter 112,  
F.S.

## **Potential Penalties** (based on findings by Commission on Ethics)

- Removal or suspension from office
- Public censure
- Loss of up to one-third of salary for 12 months
- Civil penalty of up to \$10,000
- Restitution of improper benefits received

# Standards of Conduct for Public Service Commissioners

Chapter 350,  
F.S.

- Adopted in 1990
- More stringent than Chapter 112, F.S.
- Amended in 2005
- Complaints investigated by Commission on Ethics, with findings and recommendations reported to the Governor and the PSC Nominating Council
- Governor may enforce findings and recommendations per Chapter 112, F.S.

# Standards of Conduct for Public Service Commissioners

Section  
350.041, F.S.

- 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).
  - Clarified in 2005 to address attendance and meals at conferences sponsored in part by a utility or utilities

# Standards of Conduct for Public Service Commissioners

Section  
350.041, F.S.

- A Commissioner may not accept **anything from a party** in a proceeding currently pending before the Commission.

# Standards of Conduct for Public Service Commissioners

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Section  
350.041, F.S.

- 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).
  - Separate provision applies to post-employment restrictions

# Standards of Conduct for Public Service Commissioners

Section  
350.041, 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.
  - If a Commissioner acquires a prohibited interest as a result of events beyond his or her control, that interest must be sold or placed in a blind trust.

# Standards of Conduct for Public Service Commissioners

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Section  
350.041, F.S.

- 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
  - Become a candidate for any public office without first resigning

# Standards of Conduct for Public Service Commissioners

13

Section  
350.041, F.S.

- A Commissioner may not make any public comment on the merits of a formal proceeding in which a person's substantial interests are determined.
  - Does not apply to other types of cases, such as rulemaking
  - Applies only during term of office



# Standards of Conduct for Public Service Commissioners

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Section  
350.041, F.S.

- A Commissioner:
  - May not conduct himself or herself in an unprofessional manner during the performance of official duties
  - 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
    - (Added in 2005)

# Standards of Conduct for Public Service Commissioners

Section  
350.041, F.S.

- 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
  - Any party appearing in a proceeding considered by the Commission in the last 2 years

(Added in 2005)

# Enforcement

Section  
350.041, F.S.

- Commission on Ethics investigates complaints then reports any findings and recommendations to the Governor and the PSC Nominating Council
- Governor may enforce findings and recommendations
- Subject to penalties provided for in Chapter 112, F.S.

# Post-Employment Restrictions for Public Service Commissioners

Section  
350.0605,  
F.S.

Section  
112.313, F.S.

- For 2 years following service on the commission, a former member may not:
  - Appear before the commission representing any client or any industry regulated by the commission
  - Accept employment by or compensation from:
    - A regulated public utility
    - An affiliate or subsidiary of the utility
    - Business competitors of regulated companies
    - Any party to a commission proceeding within the last 2 years

# Post-Employment Restrictions for PSC Employees

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Section  
350.0605,  
F.S.

Section  
112.313(9),  
F.S.

A former employee of the commission may not:

- Appear before the commission representing any client regulated by the commission on any matter which was pending at the time of termination and in which the employee had participated.
- Personally represent another person or entity for compensation before the commission for a period of 2 years following vacation of position.

# Ex Parte Communications

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Section  
350.042, F.S.

## General Rule

“A commissioner should accord to every person who is legally interested in a proceeding, or the person’s lawyer, full right to be heard according to law, and, except as authorized by law, shall neither initiate nor consider ex parte communications concerning the merits, threat, or offer of reward in any proceeding other than a proceeding under s. 120.54 [rulemaking] or s. 120.565 [declaratory statements], workshops, or internal affairs meetings.” s. 350.042(1), F.S.

# Ex Parte Communications

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Section  
350.042, F.S.

## Exceptions

- Communications with individual residential customers representing only themselves, without compensation
- Oral communications or discussions in scheduled and noticed open public meetings of:
  - Educational programs
  - Conference or other meetings of an association of regulatory agencies

# Ex Parte Communications

21

Section  
350.042, F.S.

## Required Action - Commissioners

- Written Communications – place a copy on the record of the proceeding
- Oral Communications – prepare a memo stating the substance of the communication and place it on the record of the proceeding
- Provide written notice to all parties
- Provide all parties an opportunity to respond



# Ex Parte Communications

22

Section  
350.042, F.S.

## Required Action – Others

- Submit written statement describing the nature of the communication, including
  - Name of the person making the communication
  - Name of the Commissioner(s) receiving the communication
  - Copies of all written communications
  - Memorandum stating the substance of oral communications made and responses received

# Ex Parte Communications

23

Section  
350.042, F.S.

## Enforcement

- Commission on Ethics receives and investigates sworn complaints of violations
- Findings and recommendations are reported to the Governor and PSC Nominating Council
- Enforcement by Governor

# Ex Parte Communications

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Section  
350.042, F.S.

## Penalties

- A Commissioner who knowingly fails to place a prohibited ex parte communication on the record within 15 days is subject to removal and assessment of a civil penalty of up to \$5,000.
- Other persons, if found by the Commission on Ethics to have participated in the ex parte communication, face a 2-year ban on practice before the PSC.

# PSC Staff Communications

Rule 25-  
22.033,  
Florida Admin.  
Code

## General Rule

- Applicable primarily to the same proceedings as the prohibition on Commissioner ex parte communications
- Requires notice of any written communications from PSC staff to a party or parties to be transmitted to all parties at the same time as the written communication
- Requires reasonable notice to all parties of the time and place of any scheduled meeting or conference call involving PSC staff and any party
- Allows for one-on-one communications between a staff member and any party to a proceeding

# PSC Staff Communications

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Rule 25-  
22.033,  
Florida Admin.  
Code

## Prohibitions

- Relaying to a Commissioner any communications from a party or interested person that would otherwise be a prohibited ex parte communication
- Discussions concerning the merits of a docketed matter between a staff member who testifies in the case and a Commissioner

# 1992 Grand Jury Report

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Issues Raised  
and  
Responsive  
Changes

## 1. Prohibition on ex parte communications applies only to commissioners

- Addressed to some extent by 1993 PSC staff communications rule, which sets guidelines for staff communications with parties and prohibits staff from being a conduit for ex parte communications

## 2. Penalties for violation of ex parte communications statute are insufficient

- Addressed to some extent by 2005 addition of 2-year ban for persons involved in ex parte communications not placed on the record
- Still no penalty for soliciting or initiating a prohibited ex parte communication

# 1992 Grand Jury Report

Issues Raised  
and  
Responsive  
Changes

3. Prohibition on ex parte communications does not apply to rulemaking
  - No change since Grand Jury report
4. Communication with Public Counsel is insufficient
  - Addressed to some extent by 1993 PSC staff communications rule, which requires copies all written correspondence to go to all parties to a proceeding and requires reasonable notice to all parties for scheduled meetings and conference calls

**Last Slide**



**Thank you.**



**Dr. Mary Bane, Executive Director  
Florida Public Service Commission**

PRESENTATION TO THE  
**House of Representatives  
Energy and Utilities Policy Committee**

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**Standards of Conduct and  
Communication Rules  
For Public Service Commission  
Employees**

**Mary Andrews Bane**  
Executive Director  
Public Service Commission

NOVEMBER 4, 2009

# Standards of Conduct and Communication Rules For Public Service Commission Employees

Standards of Conduct and  
EX Parte Restrictions on Communications  
For Public Service Commissioners  
Governed by the Following Statutes

Standards of Conduct For  
Public Service Commissioners  
*Section 350.041, Florida Statutes*

Ex Parte Communications  
*Section 350.042, Florida Statutes*

The Sunshine Law  
*Section 286.011, Florida Statutes*

Other Provisions  
*Section 112, Part III, Florida Statutes*

Actions Taken  
by the Commission  
Subsequent to  
1992 Grand Jury Interim Report

# Commission Code of Ethics

- ◆ Developed in 1993 and posted throughout the agency
- ◆ Ethics Training Manual was developed
- ◆ Multiple training sessions held with staff in 1993 and 1994 to review the ethics initiatives and the related rules and procedures
- ◆ Specific discussion of ethical standards was incorporated into New Employee Training Course in 1994

Rule 25-22.033

## Communications Between Commission Employees and Parties

- ◆ Adopted in 1993 through rulemaking process
- ◆ Internal written procedures give additional guidance to staff

Rule 25-21.050

## Acceptance of Gifts

- ◆ Adopted in 1995 through rulemaking process



## Additional Development of Ethics Training in Late 2006

- ◆ Retained services of an ethics expert to help develop a more formal ethics training program
- ◆ Established an Ethics Advisory Committee
- ◆ Developed and conducted training on Communications with Parties and Public Records
- ◆ Developed training on Receipt of Gifts
- ◆ Training on Gifts to begin before end of year
- ◆ Added procedure that supervisors specifically review with employees during annual performance review the Commission's Code of Conduct for Commission Employees (APM 5.02)

# Commission Actions In Response to Recent Events

SEPTEMBER 15

## Internal Affairs Meeting

Commissioners discussed at length possible actions to improve the transparency and integrity of the regulatory process

At the end of the discussion, staff were directed to prepare a plan of action to address suggestions for reform discussed during that meeting

OCTOBER 7

# Internal Affairs Meeting

Commissioners discussed Proposed Plan of Action and directed staff to undertake specific actions

## WORKSHOP TO DISCUSS 1992 GRAND JURY INTERIM REPORT

Hear from outside parties on the recommendations of the 1992 Grand Jury Interim Report

Discuss what actions should be taken to further address the Grand Jury recommendations

A staff workshop has been scheduled for November 24, 2009

## WORKSHOP TO DISCUSS COMMUNICATIONS RULES

Hear from outside parties on the adequacy of current communications rules

Identify possible revisions to address concerns about communications between Commission employees and parties to cases pending before the Commission

A staff workshop has been scheduled for November 24, 2009

## COMMISSIONER WORKSHOP TO BE SCHEDULED FOR EARLY 2010

Commissioners will consider proposed rule changes and hear from outside parties on suggested changes addressing concerns about communications between Commission employees and parties to pending cases

## OTHER ACTIONS DIRECTED BY COMMISSIONERS

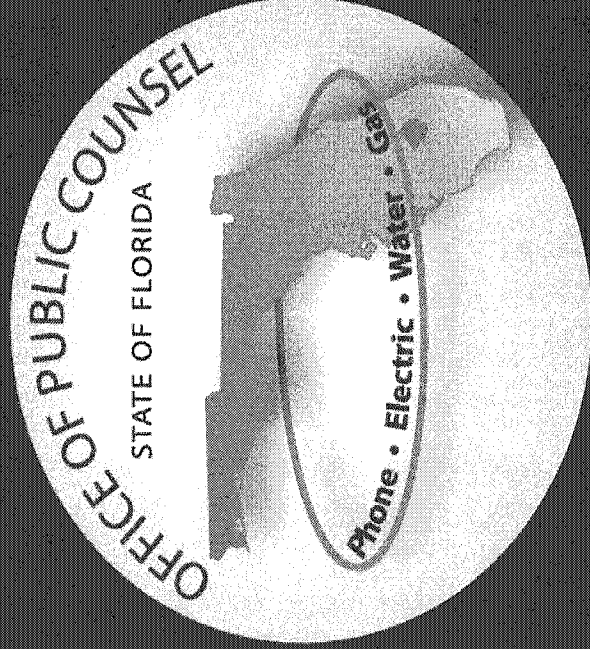
Take steps to use the PSC Web site to increase transparency and make information more readily available to the public

Bring back for discussion at a future Internal Affairs Meeting material related to participation in outside events by Commissioners and Commission staff





# Office of Public Counsel J. R. Kelly



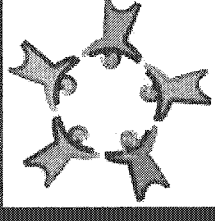
(850) 488-9330  
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[www.floridaopc.gov](http://www.floridaopc.gov)

*Advocates for Fair Utility Rates*

## OVERVIEW – The “Who”

- Created by ss. 350.061 – 350.0614
- Part of the Legislature
- Independent of the Florida Public Service Commission (PSC)

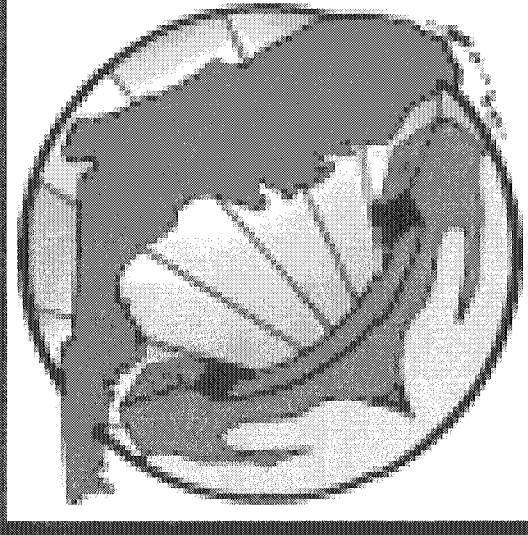
## OVERVIEW – The “What”



- Provide legal representation for Florida citizens on issues:
  - Before the PSC
  - Before counties that opt out of PSC jurisdiction on water/wastewater cases
- Represent ratepayers collectively, not individually

## OVERVIEW – The “What” (cont.)

- Implement Lifeline program
  - Call Center
  - Verify income eligibility



## OVERVIEW – The “Where”

- Located in Tallahassee
- **16.5 FTE’s**
- **2009-10 Budget: \$2.57 million**

## Office of Public Counsel

### Current Cases

- **FPL - \$1.3B annual base rate increase**
- **PEF - \$499M annual base rate increase**
- **FPU C - \$9.9M annual base rate increase**
- **FPL - \$62.8M nuclear costs**
- **PEF - \$436M nuclear costs**

## Current Cases (cont'd):

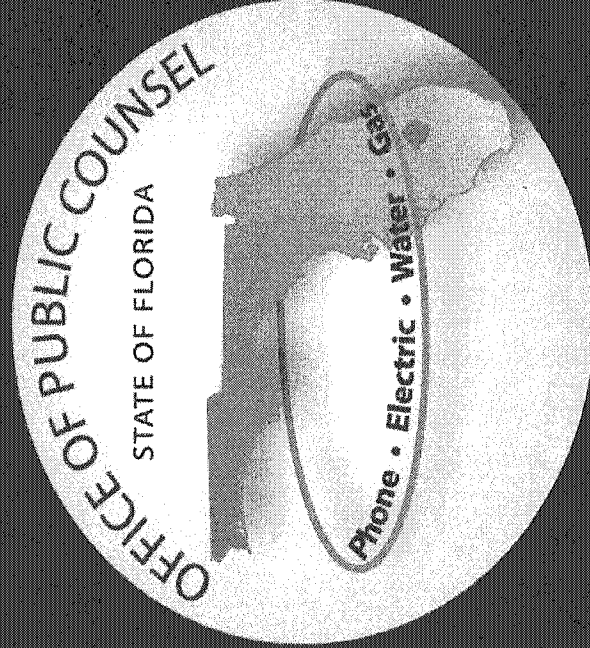
- Fuel cost recovery
- Environmental cost recovery
- Energy efficiency cost recovery
- FPL February 2008 outage
- Verizon – violation of service quality rules
- Multiple water/wastewater cases



Office of Public Counsel

Questions?

# Office of Public Counsel J. R. Kelly



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Advocates for Fair Utility Rates

**David Honig, Special Counsel  
NAACP Florida State Conference**

**STATEMENT OF DAVID HONIG**

**Special Counsel for Civil Rights  
Florida State Conference of Branches of the NAACP**

**Before the Energy and Utilities Policy Committee  
Florida House of Representatives  
November 4, 2009**

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Mr. Chairman, Honorable Members of the Committee,

I am privileged to come before you today on behalf of the Florida State Conference of Branches of the NAACP and at the request of its President, Adora Obi Nweze, to encourage the legislature to create an Ethics and Transparency Task Force that would prepare a modernized Code of Conduct for all state agencies, including the Florida Public Service Commission (PSC).

By way of background, I have been an NAACP Participating Attorney since 1983, having served as General Counsel of the Miami-Dade Branch (1989-1999) and as General Counsel of the Maryland State Conference of Branches (1986-1988). I have also served on two legal ethics committees and have chaired a school board ethics committee. My principal area of interest is the Federal Communications Commission (FCC), the Sunshine, public records and *ex parte* jurisprudence of which are regarded by most telecom practitioners as a model for the nation.

The NAACP – 100 years old this year – has been a driver of much of the ethics reform in government over the course of the civil rights movement. Segregation was possible only because public officials, from 1868 through 1968 (and sometimes beyond), consistently broke federal laws requiring equal protection and due process. Further, public officials covered up those violations in an environment where transparency was a distant dream and Sunshine never shined.

The NAACP is highly interested in the ethical and governance issues surrounding the Florida PSC and other state agencies because, during this time of economic turbulence, all of our citizens rely on agencies like the PSC to follow their mandate and engage in good government. Immediate action is needed to help restore the public trust and to get the Public Service Commission refocused on protecting the public interest. In performing this critical watchdog role for Florida's consumers, a top priority is to protect the poor – especially those living in older energy-inefficient homes in inner cities. Thus, the people of Florida need immediate action to enable the PSC to be able to refocus on doing its job.

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New communications technologies have been a boon to all Floridians. A seemingly endless array of new technologies has created a vibrant information society where anyone with a cell phone or laptop and an Internet connection can literally change the world by launching a blog, developing a cutting-edge new app, or starting a small business. However, despite the many new opportunities created by modern communications technologies and the many positive impacts these tools can enable, such technologies also create challenges for open government – and for

good government. And to the extent these new communications technologies are aggressively deployed to disseminate attacks and innuendo (and sometimes just plain inaccurate or incomplete information) without forcing those with partisan agendas to stand behind their claims, it then interferes in the public's ability to understand how particular problems arose and how to in turn fix them.

The recent scrutiny of, and attacks on, the Florida PSC are instructive. It is in that scrutiny and those attacks that we see open government issues intersect with privacy issues. We see public outcries over what types of communications and activities *should* be allowed with what *is* allowed. We see allegations of government employees being too close to those they regulate. We see vested interests utilizing government processes to achieve their goals.

Much of the controversy surrounding the PSC specifically has its genesis in the complex set of rules that govern the process and manner by which the PSC and its staff communicate with stakeholders, the complexity of which is furthered by new modes of communicating in the digital age. The PSC's current set of rules permit a wide range of communications that some would say should not be allowed. While Commissioners are prohibited from *ex parte* communications on the merits of docketed matters, other types of communications are not prohibited. For example, the current rules allow Florida PSC Commissioners to communicate with interested parties on procedural matters, rulemaking proceedings, declaratory statements, the issues on the Internal Affairs dockets and other matters. There is no requirement that any such communications be made in writing or that they be summarized or put into the record. As a factual matter, it is not surprising to see the existence of communications between the PSC and third parties. Given the range of communications that the law allows, the question to be addressed is whether the law should be changed. We ask that the Legislature explore both the process and the mode of communications by the PSC, and all state agencies, with a focus on how to best serve the public interest.

An additional complicating factor is that PSC Commissioners, currently an arm of the Florida Legislature, serve both a legislative function and a judicial function. Each role requires a different "hat" and creates a distinct set of expectations for how a Commissioner conducts him or herself. As a result, the types of communications made by Commissioners participating in different aspects of their job and other parties are often at odds. The current rules, which allow for an array of communications, perhaps reflect more of the legislative nature of a Commissioner's job. However, some have argued that Commissioners should act more like judges, which would require a more closed decision-making process and might necessitate a revisiting of the many types of communications that are currently allowed.

It is respectfully submitted that it is time for these rules to be re-examined and clarified. Constant attacks on the Florida Public Service Commission by those with perhaps "an axe to grind" comes across to many of us as an attempt to confuse rather than inform and appear to have shifted the focus away from the merits of important proceedings and towards an unproductive game of "gotcha" by a number of stakeholders. Whether and the extent to which the rules are changed is of course largely the prerogative of the Legislature, but re-examining the rules would serve several purposes. It would:

- Provide a public forum for all stakeholders to discuss what works, what does not, and what can be changed;

- Allow the best practices of other government agencies (within and without Florida) to be examined for adoption as appropriate; and
- Create an informed, more inclusive avenue for establishing clarity and certainty in the rules that govern the Commission (and that could govern other agencies as well).

While the Florida PSC is the current focus of many discussions, the issues of concern are not limited to that agency. Indeed, these issues are ones that have to be addressed across the whole of state government, in all of the branches.

The issues are fundamental. Several key questions must be asked. What is the right balance between transparency and privacy? How do policymakers craft a set of rules that are forward-looking and that can be recalibrated in light of experience or new technologies? How do we avoid *ad hominem* attacks on individuals engaged in lawful conduct but conduct that is nonetheless “not liked” by interested parties or others? This last aspect is important – the toxic climate created by such allegations impedes morale at state agencies and discourages many of the best and brightest young people from considering careers in public service. I would venture to guess that there are bright accountants, economists, lawyers, and other subject-matter experts who have been deterred from seeking employment at the Florida PSC because of the vitriolic mudslinging that has characterized the agency over the past year. Looking forward, we must carefully guard and protect Florida’s ethics rules and broad sunshine and public records laws but not allow such to be used as weaponry to destroy a person’s fundamental right to privacy.

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Several proposals have been proffered to solve these conflicts. Some have suggested wide-ranging restrictions on the use of many new communications tools in order to assure adherence to the current set of rules. Others have suggested a wholesale revision of the rules in order to bring government processes into the 21<sup>st</sup>-century. Such a discussion of how to reconcile new methods of communications with historically inflexible government processes is an essential one to have at a time when new technologies have the potential to transform how government governs and how the governed participate in the democratic process.

The stakes are enormously high for residents who depend on a properly functioning government for the administration of essential services. Since thousands of state employees work in dozens of agencies like the PSC and are governed by a similar set of ethics rules, the possibility exists that an epidemic of uncertainty could impede the business of government. This is preventable.

*To determine the approach that is best for Florida, we encourage you as legislators to create an Ethics and Transparency Task Force to develop an updated code of conduct that provides all stakeholders and interested parties with both clarity and certainty.*

Ideally, the Task Force would be interdisciplinary in nature. Members should include academics who are experts on these issues, government experts, communications experts, policymakers and regulators, consumer interests, the media, and others. Having at the table experts who have focused their scholarship on or who have experience in key subject-matter areas is important. Key areas of inquiry include:

- The nature and roles of communication between those who govern and those who are governed, between those who regulate and those who are regulated, and between policymakers and regulators;
- The ability of new technologies to transform the way individuals communicate with government officials;
- Reforming public records laws to address new technologies;
- The appropriate balance between transparency and privacy, and
- The successful application of transparency and privacy regulations in administrative agencies and the potential for use and abuse of telephone message tracking, recording and archiving made possible by new telecommunications technologies.

Importantly, given the current climate surrounding much of government, not just at the Florida Commission but also across the board, I would respectfully urge that any Task Force convened be tasked with examining the impact of a climate of allegations on the recruitment and retention of a quality workforce and on the functionality, collegiality, morale, and credibility of government agencies.

As noted, the current rules governing the PSC allow for a wide range of communications by Commissioners. They are prohibited from discussing the merits of docketed matters but are free to communicate on numerous other issues. As such, the specific agenda of the Task Force should include addressing very specific questions about the communications rules that should apply to Commissioners (and staff) going forward. What types of communications are allowed and in what types of proceedings? What is the rationale? What communications are prohibited? Does the medium of the communication matter? Must allowed communications be made in writing? How must communications be memorialized?

The FCC's experience may be instructive. As it takes up major rulemakings as well as adjudications such as large mergers, the FCC operates on a system of "permit but disclose" until the "Sunshine Date" – one week before a decision is to be voted upon by the commissioners. Florida does not have such a procedure. At the FCC, notices of *ex parte* communications are posted online for public review. Florida might consider adopting the FCC's model, which has led to far greater consumer and especially minority consumer participation in the regulatory process.

The Task Force should examine other issues as well in order to provide as comprehensive guidance as possible. Such issues include: the extent to which Commissioners should be treated like judges or whether administrative law judges should play a role in commission dockets; the extent to which communication rules apply with equal force to commissioners and staff at all levels; commission participation in conferences; the process of subjecting commissioners to ethics complaints; and the education of all commission employees on the applicable communications regime and on the roles and issues relating to new technologies.

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The Task Force should be constituted *posthaste*, assigned adequate staff, and be directed to complete its work within six months. It should take note of what has already been learned, especially the lessons of the 1992 Grand Jury Report, and dispassionate analysis of the current PSC controversy.

Thank you for this opportunity to appear before the Committee. I would be happy to take any questions.

David Honig  
Special Counsel for Civil Rights  
Florida State Conference, NAACP  
(Licensed in DC only)  
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[dhonig@crosslink.net](mailto:dhonig@crosslink.net)



## DAVID HONIG

David Honig co-founded the Minority Media and Telecommunications Council (MMTC) in 1986. MMTC has represented 70 minority, civil rights and religious national organizations in selected proceedings before the FCC, and it operates the nation's only full service, minority owned media and telecom brokerage. Mr. Honig has served MMTC since its inception as Executive Director.

Since 1983, Mr. Honig has also been engaged in the private practice of communications and civil rights law, representing national organizations, broadcasters and broadcast applicants.

Mr. Honig is a member of the bars of the D.C. Court of Appeals, the U.S. District Court for the District of Columbia, the D.C. Circuit and Second Circuit of the U.S. Court of Appeals, and the U.S. Supreme Court. He has litigated twenty federal appeals in four courts, and participated in over 80 FCC rulemaking proceedings and hundreds of adjudicatory cases.

From 1975 to 1985, Mr. Honig taught communications policy, research and law at the School of Communications, Howard University. Mr. Honig served as an adjunct lecturer at Catholic University's Columbus School of Law in 1988, teaching the advanced seminar in International Regulation of Communications. He taught Civil Rights Litigation at the University of Miami School of Law in 1996. Mr. Honig has published numerous journal articles, monographs and empirical research studies on international and domestic communications issues. He is the author of law review articles on group defamation, minority broadcast station ownership, and municipal services discrimination.

Mr. Honig served as a U.S. Delegate to the 1979 World Administrative Radio Conference in Geneva, where he helped write the ITU's rules governing AM radio. He has chaired working groups of the FCC's Advisory Committee on Radio Broadcasting and Advisory Committee on Broadcast Satellite Service Planning. In 2003, he was named by (then) FCC Chairman Michael Powell to serve on the FCC Advisory Committee on Diversity for Communications in the Digital Age, on which he serves as Chair of the Constitutional Issues Subcommittee.

Mr. Honig's current professional and public service work includes service as Special Counsel for Civil Rights for the Florida State Conference of Branches of the NAACP, and as founding General Counsel of the Broadband Opportunity Coalition, an association of the nation's leading civil rights organizations that promotes universal broadband adoption, literacy and minority business participation.

The National Law Journal has named Mr. Honig one of the thirty most influential communications lawyers. He has received the National Bar Association's Presidential Award, the National Association of Minorities in Communications' Mickey Leland Humanitarian Achievement Award, the International Black Broadcasters Association's Visionary Award, and the National Association of Minority Media Executives' Lifetime Achievement Award.

Mr. Honig received a B.A. degree in mathematics from Oberlin College in 1971 and an M.S. Degree in Systems Analysis from the University of Rochester in 1974. He earned his J.D. cum laude in 1983 from Georgetown University Law Center. His hobby is restoring Checker autos (best known as New York cabs.) He has a 19 year-old daughter, Josephine.

September 28, 2009

The Honorable Jeff Atwater  
President of the Florida Senate

The Honorable Larry Cretul  
Speaker of the Florida House of Representatives

The Honorable Charlie Crist  
Governor of the State of Florida

The Honorable Bill McCollum  
Attorney General of the State of Florida

Dear Florida Leaders:

As an advocate for the poor and the underserved, and in the spirit of good government, I write on behalf of the Florida NAACP to encourage you to bring into being an Ethics and Transparency Task Force that would prepare a modernized Code of Conduct for the Florida Public Service Commission (FPSC) and all state agencies.

Recent allegations of unethical conduct by members of the FPSC highlight the importance of having a clear set of modern rules to govern their conduct – and the conduct of all other government agencies.

It also cautions us to take a closer look at the motives and tactics of the industry and other special interests involved in these matters as well.

The FPSC is charged with the enormously important task of providing Florida's consumers with access to essential utilities – telecommunications, energy, and water – at affordable prices. During this time of economic turbulence, citizens rely on agencies like the FPSC to protect them. As such, immediate action is needed to help restore the public trust and to get the Florida Public Service Commission refocused on protecting the public interest. And in performing this critical watchdog role for Florida's consumers, a top priority is to protect the poor – especially those living in older energy-inefficient homes in inner cities. Thus, the people of Florida need immediate action to enable the PSC to be able to refocus on doing its job.

### ***The Allegations***

Accusations of unethical conduct have been leveled against each of the five FPSC Commissioners. In particular:

- *Commissioner Argenziano* is alleged to have business dealings with a lobbyist for municipal electric companies in Florida who appear in Commission proceedings and whose interests are impacted by Commission decisions.

- *Commissioner Carter* has been under “public opinion” pressure to fire his advisor as a result of the advisor sharing his blackberry “pin” with industry representatives.
- *Commissioner Edgar* has been accused of wrongly sharing her Blackberry pin with industry and of improperly communicating with Florida Power & Light during a hearing.
- *Commissioner McMurrian* has been asked to be disqualified from the FPL rate case for participating in a Standard & Poor’s Annual Utility Conference and attending a dinner to which an FPL executive attended.
- *Commissioner Skop*, who also attended the same Standard & Poor’s annual utility Conference, will presumably be subject to the same criticism and scrutiny as that leveled against Commissioner McMurrian.

While we support a review of each allegation, we believe the impetus for making the allegations arise from interested parties on both sides who are trying to use the current ethics process as a tool to distract the Commission from the work at hand and perhaps make it impossible to render impartial decisions.

Indeed, it appears as though the commissioners and the FPSC are being used as pawns by wealthy special interest groups pitted against the big utility companies in a high-stakes game of chicken. As the African proverb goes, *when the elephants fight, it is the grass that suffers*. The unfortunate casualties of this political brinksmanship are the very consumers that these special interest groups purport to serve. The stakes are too high to let this conduct continue.

### ***The Stakes***

These allegations have disrupted the business of the FPSC. They threaten to derail a number of important regulatory proceedings that directly impact Florida’s consumers. Specifically, over the next few weeks, the FPSC will consider the two multi-billion dollar rate cases for Florida Power and Light and Progress Energy. These rate cases will impact the lives of over six million customers across the state, many of whom are on fixed incomes. While the investigations continue, the FPSC needs to focus all of its energies on these issues. And the public needs to have confidence that this regulatory agency will spend the time it needs to produce informed outcomes that further the public interest - not the interests of specific stakeholders.

### ***Code of Conduct***

While Commissioners Argenziano and McMurrian are to be applauded for calling attention to these issues and for proposing corrective action be taken, we believe that the approaches they have suggested will meet with limited success.

While Commissioner McMurrian’s proposal could serve as a starting point for a reexamination of the current framework of ethics and transparency in government, it is a somewhat narrow

approach that draws only on the internal experience of the FPSC in revising its own rules and policies.

Commissioner Argenziano calls for a closed grand jury process to lead the investigation. Such a process likely would not include the collective, public input of the Governor, the Legislature or the citizens of Florida. As such, it would probably not obtain the buy-in and adoption that is needed for a truly successful approach.

Only a constructive investigation and open dialogue among all concerned parties – and a dialogue that occurs in the Sunshine - will protect Florida's consumers.

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Our leaders must step into the fray and focus attention on what is needed most – forward-looking reforms that will get the FPSC back to serving the public interest. This means the development and implementation of an updated code of conduct that provides all stakeholders with clarity and certainty.

Bold action is needed now.

Thus, we respectfully ask that the Florida Legislature and our Governor, working with the Attorney General, immediately convene a statewide Ethics and Transparency Task Force to address these critical issues across all of state government before they destroy our government, our economy and most importantly our people.

To follow up on this recommendation, please be in touch with our Florida NAACP Legislative Fellow, Ms. Natalia Hunte, Esq., at [natalia.hunte@gmail.com](mailto:natalia.hunte@gmail.com).

Very truly yours,

*Adora Obi Nweze*

ADORA OBI NWEZE  
President  
Florida State Conference of Branches of the NAACP

**Chris Moore, General Counsel  
PSC Nominating Counsel**

# Public Service Commission Nominating Council

## Overview and Selection Process

Office of Legislative Services  
111 West Madison Street, Room 874  
Claude Pepper Building  
Tallahassee, FL 32399  
(850) 922-5035  
[www.flsenate.gov/pscnc](http://www.flsenate.gov/pscnc)

# Public Service Commission Nominating Council

- Created by s. 350.031, Florida Statutes
- Conducts application process, interviews and selects applicants to nominate to the Governor for appointment to the Florida Public Service Commission
- 12 members (at least one 60 years of age or older)
  - 6 appointed by House Speaker
    - 3 House members (1 from minority party)
    - 3 nonlegislator members
  - 6 appointed by Senate President
    - 3 Senate members (1 from minority party)
    - 3 nonlegislator members

- Terms of Members
  - Legislator Members: 2-year term, concurrent with 2-year elected terms of House members; may serve 2 terms
  - Nonlegislator Members: One 4-year term
- Council Chair
  - Appointed by Senate President in even-numbered years, by Speaker in odd years
  - Vice Chair appointed by Speaker in even-numbered years, by President in odd years
- Staff support provided by the Legislature's Office of Legislative Services



- **Conflict of Interest Prohibited [s. 350.031(2)(a)]**

Council members and spouses may not own stocks or bonds of any company or affiliate regulated by the Public Service Commission except through shares in a mutual fund, and may not have employment or other specified relationships or have any interest in any company or an affiliate regulated by the Commission.

- **Meetings and Proceedings of Nominating Council [s. 350.031(3)]**

- **Sunshine Law** (§ 286.011, F.S.) applies to meetings of Nominating Council
- **Public Records Law** (§ 119.07, F.S.) applies to records of the Nominating Council
- Members of the Council receive **per diem and travel expenses** from the Public Service Commission Regulatory Trust Fund

## ● Statutory Requirements Governing Selection Process for Nominees to Public Service Commission –

s. 350.031(5), F.S.—A person may not be nominated to the Governor for appointment to the Public Service Commission until the council has determined that the person is **competent and knowledgeable in one or more fields**, which shall include, but not be 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 shall fairly represent the above-stated fields.** Recommendations of the council shall be **nonpartisan**.

s. 350.031(6), F.S.—It is the responsibility of the council to nominate to the Governor **no fewer than three persons for each vacancy** occurring on the Public Service Commission. The council shall submit the recommendations to the Governor **by September 15** 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.

- Selection Process – Nominating Council Procedural Rules
  - Advertise vacancy and solicit applications
  - Application requires financial disclosure and college transcripts
  - Staff verifies
    - Licensure status
    - Bar membership
    - Disciplinary records
    - Commission on Ethics records
  - Applications distributed to Council members for review

- **First Meeting of Council to Designate Candidates for Interview**
  - The Council votes on each applicant to designate a list of "most qualified applicants" who will be interviewed
  
- **Second Meeting of Council to Interview Candidates**
  - Applicants designated "most qualified" must attend interview in person
  - All votes of the Council are by roll call
  - Nomination requires majority vote of entire Nominating Council membership (7/12 vote)
  - No fewer than three persons must be nominated to the Governor for each vacancy [s. 350.031(6), F.S.]
  
- **Names of Nominees sent to Governor**

- Appointment by Governor

- Must first have background investigation of applicants by Florida Department of Law Enforcement
- Governor has 30 days to make appointment
- If Governor fails to make appointment within 30 days, Nominating Council makes appointment from list of nominees

350.031(7), F.S.: The Governor shall fill a vacancy occurring on the Public Service Commission by appointment of one of the applicants nominated by the council only after a background investigation of such applicant has been conducted by the Florida Department of Law Enforcement. If the Governor has not made an appointment within 30 consecutive calendar days after the receipt of the recommendation, the council, by majority vote, shall appoint, within 30 days after the expiration of the Governor's time to make an appointment, one person from the applicants previously nominated to the Governor to fill the vacancy.

- **Confirmation by Senate [s. 350.031(8), F.S.]**

- Appointments subject to Senate confirmation during next regular session
- If appointment is not confirmed, the Nominating Council starts the nominating process again within 30 days.

- **Recall of Appointment [s. 350.031(9), F.S.]**

- A new Governor—in the first 30 days after taking office—may recall an appointee of the former governor as long as the Senate hasn't yet confirmed the appointment, and make a replacement appointment from the list of names that the Council provided to the previous Governor.
- If the Governor doesn't make the replacement appointment in time or the Senate doesn't confirm, then the Nominating Council shall make the appointment from the list of nominees within 30 days after the Legislature adjourns sine die.

# Questions?

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