

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

NOTICE OF STAFF WORKSHOP

TO

ALL INTERESTED PERSONS

UNDOCKETED

IN RE: JANUARY 1992 GRAND JURY REPORT AND RULE 25-22.033, FLORIDA
ADMINISTRATIVE CODE, COMMUNICATIONS BETWEEN COMMISSION
EMPLOYEES AND PARTIES

ISSUED: November 13, 2009

NOTICE is hereby given that the staff of the Florida Public Service Commission will conduct a workshop, to which all persons are invited, at the following time and place:

November 24, 2009, 9:30 a.m.
Room 148, Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, FL 32399-0862

Staff will conduct a two-part workshop. Part I of the workshop will be a discussion of the January 15, 1992, Interim Report of the Tenth Statewide Grand Jury: Regulating Utilities – Recommendations to Enhance the Integrity of the Process. During Part II of the workshop, staff will receive comments on whether amendments should be made to Rule 25-22.033, F.A.C., Communications Between Commission Employees and Parties. One or more Commissioners may be in attendance and participate at the workshop.

A copy of the agenda for the workshop is attached. Attached to the agenda are the 1992 Grand Jury Interim Report; and Rule 25-22.033, Florida Administrative Code, Communications Between Commission Employees and Parties.

If you wish to comment but cannot attend the workshop, please submit your comments by December 9, 2009, to Samantha Cibula, Office of the General Counsel, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0852, or at scibula@psc.state.fl.us. Ms. Cibula can be contacted at (850) 413-6199.

Any person requiring some accommodation at this hearing because of a physical impairment should call the Office of Commission Clerk at (850) 413-6770, at least 48 hours prior to the hearing. Any person who is hearing or speech impaired should contact the Florida

DOCUMENT NUMBER-DATE

11287 NOV 13 09

FPSC-COMMISSION CLERK

NOTICE OF STAFF WORKSHOP
UNDOCKETED
PAGE 2

Public Service Commission by using the Florida Relay Service, which can be reached at 1-800-955-8771 (TDD).

By DIRECTION of the Florida Public Service Commission this 13th day of November, 2009.



ANN COLE
Commission Clerk

(S E A L)

SMC

AGENDA

**RE: COMMISSION STAFF WORKSHOP ON JANUARY 1992 GRAND JURY
REPORT AND RULE 25-22.033, FLORIDA ADMINISTRATIVE CODE,
COMMUNICATIONS BETWEEN COMMISSION EMPLOYEES
AND PARTIES**

**November 24, 2009 – 9:30 a.m.
Room 148, Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399**

**PART I: JANUARY 15, 1992, INTERIM REPORT OF THE TENTH STATEWIDE GRAND
JURY: REGULATING UTILITIES – RECOMMENDATIONS TO ENHANCE THE
INTEGRITY OF THE PROCESS**

The 1992 Interim Report of the Statewide Grand Jury, Attachment A, identified a number of issues pertaining to the manner in which utilities communicate with the Commission and recommended certain changes to the Legislature to enhance the integrity of the regulatory process. Although the Statewide Grand Jury submitted the Interim Report in 1992, many of the issues raised in the report may be relevant today. Sections A through E below are the issues identified by the Statewide Grand Jury in its Interim Report. Under each section, Commission staff has set forth discussion points that staff would like interested persons to provide comment on at the workshop.

- A. The current prohibition against ex parte communications in section 350.042, Florida Statutes, only applies to Commissioners.
- Does subsection (5) of Rule 25-22.033, Florida Administrative Code, which prohibits Commission employees from directly or indirectly relaying to a Commissioner any ex parte communication, sufficiently address this issue?
 - If not, what amendments to Rule 25-22.033, Florida Administrative Code, should the Commission consider implementing to address this issue? [See also Part II of this workshop agenda]
- B. The penalties for violation of section 350.042(6), Florida Statutes, which requires Commissioners to report receiving ex parte communications, are insufficient or nonexistent because the section does not address Commissioners initiating or knowingly

NOTICE OF STAFF WORKSHOP
UNDOCKETED
PAGE 4

and willingly receiving ex parte communications nor utilities initiating ex parte communications.

- Since the Interim Report, section 350.042(7)(b), Florida Statutes, was amended to address Commissioner violations of ex parte restrictions. Does the current statute sufficiently address the issue raised by the Grand Jury?
- Section 350.042(7)(d), Florida Statutes, was amended to address other persons who violate ex parte restrictions. Does the current statute sufficiently address the issue raised by the Grand Jury?
- On page 4 of the Interim Report, the Grand Jury sets forth recommended penalties for a utility's violation of ex parte prohibitions. Does the Commission have the statutory authority to implement rules to impose fines on a utility for ex parte violations?

C. There needs to be ex parte restrictions in rulemaking proceedings.

- Should there be ex parte communication restrictions in rulemaking proceedings? [See also Part II of this workshop agenda]
- Would restricting ex parte communications in rulemaking proceedings require a statutory change?

D. There is insufficient communication with the Office of Public Counsel.

- Section 120.525, Florida Statutes, requires all notices of public meetings, hearings, and workshops to be published in the Florida Administrative Weekly and on the agency's website not less than 7 days before the event. Does this section provide sufficient notice of meeting, hearings, and workshops to the Office of Public Counsel and the public?
- On page 3 of the Interim Report, the Grand Jury recommends statutory changes to notify the Office of Public Counsel of meetings, written correspondence, etc. Does Rule 25-22.033, Florida Administrative Code, address these recommendations? If not, what additional procedures should the Commission consider implementing? [See also Part II of the workshop agenda]

E. There is currently no statutory provision requiring Commissioners to rule on confidentiality issues in a timely manner.

NOTICE OF STAFF WORKSHOP
UNDOCKETED
PAGE 5

- Is the Commission's current rule on Confidential Information, Rule 25-22.006, Florida Administrative Code, sufficient to address requests for confidential classification of documents?
- If not, should the Commission initiate rulemaking to explore whether changes need to be made to the rule?

PART II: RULE 25-22.033, FLORIDA ADMINISTRATIVE CODE, COMMUNICATIONS BETWEEN COMMISSION EMPLOYEES AND PARTIES

Rule 25-22.033, Attachment B, is the Commission rule pertaining to communications between Commission employees and outside entities. Below is a list of issues identified by staff in regard to the rule that staff would like interested persons to provide comment on at the workshop.

- A. Can and should the rule be amended to apply to Commissioners? If so, how should the rule be amended to apply to Commissioners?
- B. Should the rule be amended to specifically address Commissioner advisors? If so, should the rule differentiate between Commissioner advisors and Commission staff?
- C. The rule currently requires that all scheduled meetings and conference calls be noticed. Should the rule be amended to require notice of one-on-one discussions as well?
- D. Should some or all of the exemptions in subsection (2) of the rule (set forth below) be eliminated?
 - Rulemakings
 - Declaratory statements
 - Staff-assisted rate cases
 - Proposed agency actions
 - Non-rate case tariffs
 - Workshops
 - Internal Affairs
 - Audits
 - Telephone service evaluations
 - Electric and gas safety inspections
- E. Should the rule be amended to require notices of informal meetings between Commission staff and outside entities be posted on the Commission's website? Does the

NOTICE OF STAFF WORKSHOP
UNDOCKETED
PAGE 6

Commission's practice of posting on its calendar informal meetings between Commission staff and outside entities provide sufficient notice?

- F. What, if any, additional communication should be committed to writing?
- G. Workshop participants' suggestions on other potential amendments to the rule.

NEXT STEPS:

- Written comments should be submitted to Samantha Cibula, Office of the General Counsel, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0853, or at scibula@psc.state.fl.us by December 9, 2009. All written comments and the transcript of this workshop will be posted on the Commission's website, www.floridapsc.com, by December 18, 2009.
- Commission staff will review all the comments and draft amendments to Rule 25-22.033, Florida Administrative Code, and any other applicable rules.
- A Commission workshop will be scheduled to discuss the potential rule amendments. The workshop notice will appear in the Florida Administrative Weekly and posted on the
- Commission's website.

Report of the Statewide Grand Jury

REGULATING UTILITIES

January 15, 1992

IN THE SUPREME COURT OF THE STATE OF FLORIDA -- CASE NUMBER 78,035

Interim Report #1

**INTERIM REPORT OF THE TENTH STATEWIDE GRAND JURY REGULATING UTILITIES -
RECOMMENDATIONS TO ENHANCE THE INTEGRITY OF THE PROCESS**

(This document has been re-formatted for the Internet)

I. INTRODUCTION

We, the members of the Tenth Statewide Grand Jury, hereby submit an interim report concerning the statutory requirements governing communications between regulated utilities and the government entity charged with - the responsibility of regulating those utilities, the Florida Public Service Commission (PSC).

During the course of our investigation into the activities of a regulated utility, it became apparent that the manner in which utilities communicate with the PSC is in need of reform. Although the investigation of the utility is not yet complete, we have gathered enough information to recommend changes in the legislative and procedural rules currently governing ex parte communications.

The witnesses who have appeared before us to date include a member of the Public Service Commission, a commissioner's aide and several past and present employees of the Commission. We also heard from representatives of the Office of Public Counsel and an employee of a utility who holds a position which requires frequent contact with the Commission.

Although the witnesses did not all agree with every recommendation that appears in this report, they all agreed to the one factual finding that led us to write it: regulated utilities with the financial resources to hire the necessary staff often meet alone (ex parte) with individual commissioners, commissioner's aides or PSC staff to discuss regulatory issues.

Without the cooperation and suggestions of many of the witnesses who agreed on that one pertinent fact, this report would not have been possible.

This report is not intended to be critical of any individual, public official or government entity, rather our criticisms are directed to the process itself. This report addresses the issue of ex parte communication and its impact on the integrity of the regulatory process.

II. ISSUES

A. Current statutory prohibition applies only to commissioners

The only time a commissioner is statutorily prohibited from meeting privately with a representative of a regulated utility is when the communication involves a pending issue that is already before the PSC or which will soon be before the Commission as part of a formal docket. This sole statutory provision fails to place any restrictions on the ability of regulated utilities to communicate privately with commissioners' aides or other PSC staff:

A commissioner should accord to every person who is legally interested in a proceeding, or his 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 or s. 120.565, workshops, or internal affairs meetings. No individual shall discuss ex parte with a commissioner the merits of any issue that he knows will be filed with the commission within 90 days. The provisions of this subsection shall not apply to commission staff.

Section 350.042 (1), Florida Statutes (emphasis added).

This statute does not prohibit aides and other staff from sharing verbatim the content of ex parte communication with each commissioner. The Commission or individual commissioners may from time to time decide at their own discretion to restrict the flow of communication. It is our understanding that some aides to commissioners currently refuse to act as a conduit for ex parte communication. While this is laudable, it is an inadequate and piecemeal approach to the problem. There is nothing to prevent a commissioner's aide or any member of the PSC staff from being used as a conduit for what would otherwise be prohibited communication if he or she chooses to be used in that manner. The only permanent solution is to strengthen the statute and then vigorously enforce it.

The problem is not addressed entirely by prohibiting aides and other staff from being used as direct conduits to commissioners. Even if they do not directly share ex parte communication received from regulated utilities, it may be included in recommendations made by staff to the commission.

B. Penalties for violation insufficient or nonexistent

The current statute prohibiting ex parte communication includes a penalty to be imposed on any commissioner who fails to report receiving the communication:

Any commissioner who knowingly fails to place on the record any such communications, in violation of the section, within 15 days of the date of such communication is subject to removal and may be assessed a civil penalty not to exceed \$5000.

Section 350.042(6), Florida Statutes.

Unfortunately, the above statutory provision fails to impose any penalty if a commissioner initiates prohibited ex parte communication with a utility, or knowingly and willingly receives such information from the utility. The penalty is only imposed if the commissioner fails to report having received it. Perhaps the most glaring omission in the statute is the fact that no penalty is imposed upon a utility initiating prohibited ex parte communication.

C. Ex parte restrictions on rulemaking function needed

There are no statutory restrictions on ex parte communications concerning the rulemaking function as opposed to the ratemaking function of the Commission. The above statutory provision specifically exempts the rulemaking proceedings found in Section 120.54 or Section 120.565, Florida Statutes, from the ex parte communication prohibition. Yet, the rules promulgated by the PSC can and often do have a direct impact on ratemaking.

For example, Public Service commission Rules set measurable standards for the quality of service provided by regulated utilities. Quality of service is one of the factors considered when the Commission sets the allowable rate of return on equity for each regulated utility. Therefore, a change in the rules governing the quality of service may have a direct impact on the Commission's ratemaking decisions.

The following excerpt from the statute governing telephone companies provides another example of the relationship between the rulemaking and ratemaking functions of the Commission:

Each local exchange telecommunications company regulated pursuant to this section shall file with the commission every 4 years or 4 years after the company's most recent proceeding conducted under this section, a report consisting of, at a minimum, the modified minimum filing requirements then required by the commission by rule for rate review proceedings held pursuant to this section.

Section 364.035 (3), Florida Statutes (emphasis added).

The above excerpt from Chapter 364 states that the Commission sets the modified minimum filing requirement rules for telephone companies. It also states that the information required by those PSC rules is then used as part of the "rate review" process. This clearly demonstrates that the rulemaking and ratemaking functions cannot be separated because they bleed into one another. Commissioners cannot be expected to close their ratemaking ears while being privately persuaded by a well-paid representative of a regulated utility concerning a rulemaking matter. Ex parte communication concerning either of these two Commission responsibilities should be prohibited because the two functions form an artificial dichotomy without a boundary.

This direct, unfettered and frequently undocumented one-to-one access to the PSC occurs despite the fact that commissioners are supposed to be neutral "judges" or decision-makers who reach their regulatory decisions only after hearing from all interested parties and weighing the evidence presented by each of them. Aside from the regulated utilities, the interested parties most affected by the decisions made by the commissioners and their staff are the citizens who use and pay for water, sewer, electricity and telephone service. The amount paid for those regulated services is ultimately determined by the five members of the Public Service Commission.

D. Insufficient communication with Office of Public Counsel

The government entity charged with the responsibility of representing the interests of individual utility customers is the Office of Public Counsel. That office does not have the staff or the resources equal to one major utility, much less the myriad of regulated utilities that may have daily access to commissioners, their aides and other PSC staff.

There is no systematic mechanism whereby the Office of Public Counsel is given the opportunity to be aware of and respond to the information provided during private communications between the regulator and regulated

utilities. We believe that the creation of such a mechanism should be required and made a part of the provisions of Chapter 350 of the Florida Statutes.

III. LEGISLATIVE RECOMMENDATIONS

Due to the specific nature of our first recommendation, we have divided it into two subsections. The "general rule" subsection is a general requirement that could readily be incorporated into Chapter 350 of the Florida Statutes. The "procedure" subsection applies to all communication between representatives of the PSC and regulated utilities. The following recommendations are being submitted because we believe, if implemented, they will help ensure that the interests of the people of the State of Florida are represented in a fair and equitable manner before the Public Service Commission.

A. Communications between regulated utilities and representatives of the PSC

1. General Rule

Any communication between a regulated utility and any representative of the Public Service Commission concerning any regulatory function should be open and advance notification should be given to the Office of Public Counsel, with the following exceptions: (1) written correspondence; (2) communication related to a documented emergency; and (3) communication related to a brief, unscheduled follow-up to a previously scheduled meeting or previously scheduled telephone conference call.

With regard to written correspondence, a copy of all such correspondence must be provided to Public Counsel at the same time it is provided to the PSC. A written summary of communication related to a documented emergency, and communication related to a brief, unscheduled follow-up to a previously scheduled meeting or previously scheduled conference call should be provided to Public Counsel within ten working days after the communication.

These same requirements regarding open communication and advance notification should also apply to any similar communication between the Office of Public Counsel and the PSC concerning any regulatory function directly concerning a regulated utility.

2. Procedure

a. With the exception of documented emergencies that cannot be scheduled in advance, Public Counsel should be notified in writing at least five working days prior to meetings and/or conference calls between any representative of the PSC and any representative of a utility. Public Counsel should have the option of participating in said communication for the purpose of questioning and/or directly responding to the communication.

b. Written correspondence between a utility and any representative of the PSC should be provided to Public Counsel at the same time it is provided to the PSC representative.

c. The substance of emergency meetings and conference calls should be documented in written memoranda provided to Public Counsel no later than ten working days following the meeting or conference call.

d. The five-day notice requirement should not apply to Public Service Commission staff, or utility staff required to initiate or receive brief, unscheduled communication, such as additional information that may be needed after the completion of an audit.

If only a small amount of follow-up information is required, as opposed to an actual audit, monitoring session or formal face-to-face meeting, a written memorandum explaining the purpose, date and content of the communication should be prepared and a copy provided to Public Counsel within five working days of the date of the communication. The PSC staff member initiating and/or receiving the above communication should be responsible for preparing the written memorandum and forwarding it to Public Counsel.

e. Public Counsel should have the option of preparing a written response to any of the above communication within ten working days of receiving it. The written response should become part of the written record to be considered prior to the time the Commission makes any decision concerning any rulemaking or ratemaking issue in any way related to the communication.

f. Some communication such as trade secrets or other proprietary information provided by regulated utilities may legitimately be confidential. Material claimed to be confidential should be made available to Public Counsel, prior to a ruling as to its confidentiality, if a nondisclosure agreement is executed.

We are aware that the duties of some PSC employees require them to be in frequent contact with regulated utilities, and for that reason they may consider some of the above recommendations to be unduly burdensome. In response to that concern, other interested parties have been eliminated from the recommended advance notification requirement in order to relieve some of the burden of frequently communicating with a large number

of parties. It will also avoid problems that may arise when discussing materials that have been deemed to be confidential.

However, it is not unreasonable to require PSC employees to prepare and maintain a written summary of regulatory communications with regulated utilities. The act of memorializing communication of this type is a regular business practice in the modern world. If taking out information claimed to be confidential is too burdensome, it should be possible to develop a standard non-disclosure form to be executed by Public Counsel prior to reviewing the summary. A summary memorandum format can be developed and made accessible on each computer terminal, along with a standard form for those employees who may not have access to a computer. It should minimally include date, time, name of utility representative, name of PSC employee and a summary of the content and purpose of the communication. Written summaries can be made immediately available to Public Counsel, and then to all interested parties once confidentiality issues have been addressed.

B. Confidentiality rulings

There is currently no statutory provision requiring commissioners to rule on confidentiality issues in a timely manner. A utility that makes a confidentiality claim regarding company records does not have to make any of those records public until the Commission rules and the process of appeal has been exhausted. While non-disclosure agreements may be executed to allow interested parties to have access to the materials claimed to be confidential, the free flow of information may be hindered if the Commission does not decide in a timely manner whether it can make information supplied by a utility available to the public. Confidentiality rulings should be issued by the Commission within 10 working days of the claim in order to ensure the earliest possible public access to regulatory information.

C. Penalties

The current statute prohibiting certain ex parte communication fails to provide any penalty for utilities who violate the prohibition. A penalty in direct proportion to the size and resources of a regulated utility should be imposed if the utility initiates prohibited ex parte communication with any representative of the Public Service Commission. Since a monetary fine of a few hundred dollars would be nothing more than a gentle slap on the wrist to a utility whose regulated rate of return may be several hundred million dollars, the penalty needs to be large enough to get the attention of the offending utility.

An appropriate penalty should be based on the regulated yearly rate of return received by the utility. For example, one basis point or one-tenth of one percent of the yearly rate of return on equity. That would be equivalent to a fine of \$ 20 imposed on an individual earning \$ 20,000 per year. The fine for a company generating a regulated rate of return of \$100 million per year would be \$100,000. Intentional violation of the ex parte prohibition should include a criminal as well as a civil penalty.

In addition to the penalty imposed in the statute, a commissioner should be penalized for initiating or knowingly and willingly receiving prohibited ex parte communication.

IV. CONCLUSION

These are recommendations. We do not presume to suggest that we have all the answers or all the possible solutions to the problem. We do believe the specific recommendations we have made are a good starting point from which legislation closing the gaps in the ex parte section of Chapter 350 of the Florida Statutes can emerge.

While the specific wording of legislation to reform the communications process can and should be vigorously debated, there can be no doubt that reform is necessary. Individuals charged with responsibilities similar to those of a judge must conduct themselves in a manner that exhibits fairness. A judge cannot meet with one party alone to discuss an issue of importance if the judge is the final arbiter of that issue. Judges are required to avoid even the appearance of impropriety. Ex parte communication concerning a regulatory function with a representative of a regulated utility not only appears to be improper, it is improper. Moreover, using a third party to receive the prohibited communication does not remove the taint.

The important issues decided by members of the PSC include the interpretation, revision and development of rules related to ratemaking. It is clear that the rulemaking function is an integral part of the ratemaking function. Since they cannot be separated, the procedures normally applied to rulemakers must bow to the requirements applicable to members of the judiciary.

We believe legislative and procedural reforms which address these concerns will help form the foundation necessary to ensure the integrity of the regulatory process.

Respectfully submitted to the Honorable Frederick T. Pfeiffer, Presiding Judge, this ____ day of January, 1992.

Herman A. Robandt
Foreperson
Tenth Statewide Grand Jury
of Florida

MELANIE ANN HINES
Statewide Prosecutor
Statewide Grand Jury Legal Adviser

JOHN A. HOAG
Special Assistant Statewide Prosecutor
Assistant Statewide Grand Jury
Legal Adviser

Received in Open Court by the Honorable Frederick T. Pfeiffer this _____ day of January, 1992.

Frederick T. Pfeiffer
Presiding Judge
Tenth Statewide Grand Jury

1 **25-22.033 Communications Between Commission Employees and Parties.**

2 The Commission recognizes that Commission employees must exchange information with
3 parties who have an interest in Commission proceedings. However, the Commission also
4 recognizes that all parties to adjudicatory proceedings need to be notified and given an
5 opportunity to participate in certain communications. The intent of this rule is not to prevent
6 or hinder in any way the exchange of information, but to provide all parties to adjudicatory
7 proceedings notification of and the opportunity to participate in certain communications.

8 (1) This rule shall govern communications between Commission employees and
9 parties to docketed proceedings before the Commission. This rule shall not apply in
10 proceedings under Sections 120.54, 120.565, 367.0814, Florida Statutes, proposed agency
11 action proceedings before the Commission has voted to issue a proposed agency action order,
12 non-rate case tariffs, workshops or internal affairs meetings. Also exempted are docketed and
13 undocketed audits, telephone service evaluations, and electric and gas safety inspections.
14 Nothing in this rule is intended to modify or supersede the procedural requirements for formal
15 discovery under the Commission's rules and applicable provisions of the Florida Rules of
16 Civil Procedure, or affect communications regarding discovery requests, procedure, or other
17 matters not concerned with the merits of a case.

18 (2) Written Communications – Notice of any written communication between
19 Commission employees and parties shall be transmitted to all other parties at the same time as
20 the written communication, whether by U.S. Mail or other means.

21 (3) Scheduled Meetings and Conference Calls – All parties to the proceeding shall be
22 given reasonable notice of the time and place of any scheduled meeting or conference call
23 between Commission employees and parties. For purposes of this subsection, a conference
24 call is defined as a telephone call involving three or more persons.

25 CODING: Words underlined are additions; words in ~~struck through~~ type are deletions
from existing law.

1 (4) Response to Communications – Any party to a proceeding may prepare a written
2 response to any communication between a Commission employee and another party. Notice of
3 any such response shall be transmitted to all parties.

4 (5) Prohibited Communications – No Commission employee shall directly or indirectly
5 relay to a Commissioner any communication from a party or an interested person which would
6 otherwise be a prohibited ex parte communication under Section 350.042, Florida Statutes.

7 Nothing in this subsection shall preclude non-testifying advisory staff members from
8 discussing the merits of a pending case with a Commissioner, provided the communication is
9 not otherwise prohibited by law. However, a staff member who testifies in a case shall not
10 discuss the merits of that case with any Commissioner during the pendency of that case.

11 Specific Authority 350.01(7), 350.127(2) FS. Law Implemented 120.569, 120.57, 350.042 FS.

12 History–New 3-24-93.

13

14

15

16

17

18

19

20

21

22

23

24

25

CODING: Words underlined are additions; words in ~~struck through~~ type are deletions from existing law.