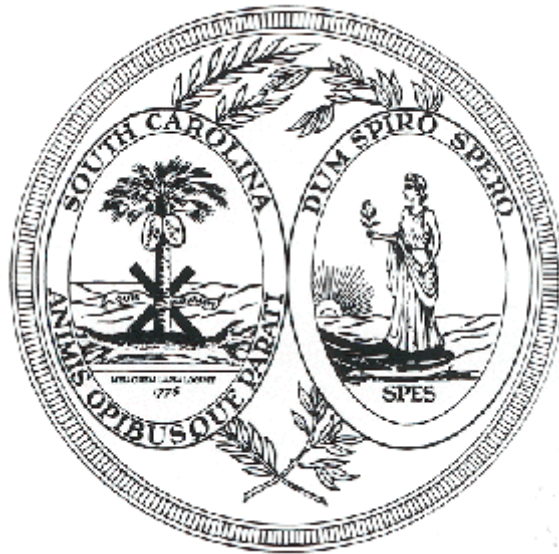


February 2003

A Review of the Public Service Commission



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Report to the General Assembly

A Review of the
Public Service
Commission

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Synopsis

Members of the General Assembly requested the Legislative Audit Council to conduct an audit of the Public Service Commission (PSC). The review focused on whether the PSC was following the due process requirements in cases before the commission. In addition, we were asked to examine the issues of commissioner qualifications and agency structure. Our findings are summarized as follows.

- ' We found several instances in which the PSC may have violated the prohibition on ex parte communications found in the Administrative Procedures Act. In addition, we found other examples of meetings and communications between PSC Commissioners and other parties both before cases were filed and when they were pending before the PSC. These meetings give the appearance of impropriety.
- ' We found that the PSC has no procedure in place for training staff on ex parte communications or for reporting potential ex parte communications. In a survey of PSC staff, 45% reported they did not know to whom they should report suspected inappropriate communications.
- ' PSC Commissioners are not subject to the state's Code of Judicial Conduct. Also, South Carolina law currently does not require commissioners to disclose ex parte communications.
- ' We found that there is a need for a separate staff for commissioners in order to provide them with sufficient expertise and to address concerns about potential ex parte communications.
- ' There are no minimum education or experience requirements to become a PSC Commissioner. Most southeastern states also do not have minimum education or experience requirements for their commissioners. However, in our review of seven southeastern states, we found that 27 (90%) of the 30 commissioners had at least a college degree. When commissioners are elected that do not meet minimum requirements, there is less assurance that complex decisions are made effectively.
- ' PSC Commissioners are currently elected to four-year terms which are not staggered. Staggering commissioner terms would better preserve invaluable experience on the commission and eliminate the possibility that all seven commissioners would be replaced in one election cycle. Also, with staggered terms, there would be more regular oversight by the General Assembly. In five (71%) of the seven southeastern states, commissioners have staggered terms.

Synopsis

Introduction

Audit Objectives

Members of the General Assembly requested that the Legislative Audit Council conduct an audit of the South Carolina Public Service Commission (PSC). Our audit objectives are listed below.

- ! Determine whether the PSC has adequately administered the due process requirements for all persons or parties appearing before the commission.
- ! Determine if the requirements to become a PSC Commissioner should be modified.
- ! Determine whether the structure of the PSC is adequate to effectively serve its mission.

Scope and Methodology

The period covered during this audit was primarily FY 98-99 through FY 01-02. Our sources of evidence included:

- ! PSC records, including records from contested cases and e-mails.
- ! State laws, including the Ethics Reform Act and the Administrative Procedures Act.
- ! Model Code of Judicial Conduct for State Administrative Law Judges.

We also interviewed PSC officials and conducted a survey of PSC employees. We contacted officials in other states and private organizations. We used limited, non-statistical samples as indicated in our report. In cases where we relied on PSC's computer data, we performed a limited review of management controls over the data. This audit was conducted in accordance with generally accepted government auditing standards.

Agency Background

Utility regulation in South Carolina began in 1878 when the General Assembly created a railroad commission to regulate the railroads operating in the state. In 1910, the General Assembly established a Public Service Commission, authorizing it to “fix and establish in all cities of the State rates and charges for the supply of water, gas or electricity furnished by any person, firm or corporation to such cities, the inhabitants thereof, and to prescribe penalties.”

In 1922, the General Assembly combined the two commissions and added an additional member. The seven commissioners, one from each congressional district and an at-large member, are elected by the General Assembly for a term of four years. Commissioners receive a salary of approximately \$78,000 per year. The chairman of the commission receives an additional amount of approximately \$4,500 per year. Commissioners also receive a subsistence and mileage reimbursement. Commissioners can receive subsistence of \$95 per day when traveling more than 50 miles outside the county of their official residence and \$35 per day when traveling within 50 miles. No subsistence is allowed to a commissioner who lives in the same county as the agency's official headquarters.

Table 1.1 shows each commissioner's total compensation for FY 01-02. Table 1.2. shows the number and types of utilities regulated by the PSC.

Table 1.1: Commissioner Compensation, FY 01-02

	SALARY	SUBSISTENCE	MILEAGE	TOTAL
Commissioner A	\$77,833.92	\$8,260.00	\$1,435.00	\$87,528.92
Commissioner B	\$77,833.92	\$6,265.00	\$422.00	\$84,520.92
Commissioner C	\$77,833.92	\$18,240.00	\$3,933.00	\$100,006.92
Commissioner D	\$77,833.92	\$8,050.00	\$1,725.00	\$87,608.92
Commissioner E	\$77,833.92	\$805.00	\$00.00	\$78,638.92
Commissioner F	\$82,395.84	\$20,045.00	\$4,508.00	\$106,948.84

One commissioner resigned in February 2002 and is not included in this table.

Source: PSC expense vouchers.

Table 1.2: Number and Types of Utilities Regulated by the PSC

TYPE OF UTILITY	NUMBER REGULATED BY PSC
Electric	4
Natural Gas	3
Telecommunications	1,938
Water/Wastewater	70

Source: PSC

In addition, the commission regulates over 900 transportation companies including household goods movers, charter buses, limos, taxis, hazardous waste transporters, and railroads.

As of January 2003, the Public Service Commission consisted of 79 employees, including 7 commissioners. The agency is funded through an assessment on the utilities and transportation companies it regulates. The agency is allowed to carry forward any excess funds remaining at the end of the fiscal year. However, in recent years the General Assembly has directed the PSC to transfer these funds to the state's general fund to help with budget shortfalls. The PSC does not receive any state general funds. Table 1.3 shows the expenditures for the agency for FY 00-01 and FY 01-02.

**Table 1.3: PSC Expenditures
FY 00-01 through FY 01-02**

MAJOR BUDGET CATEGORIES	ACTUAL EXPENDITURES			
	FY 00-01		FY 01-02	
	TOTAL FUNDS	OTHER FUNDS	TOTAL FUNDS	OTHER FUNDS
Personal Service	\$3,869,503	\$3,869,503	\$3,785,646	\$3,785,646
Other Operating	1,540,240	1,540,240	1,612,213	1,612,213
Fringe Benefits	993,459	993,459	1,015,564	1,015,564
TOTAL	\$6,403,202	\$6,403,202	\$6,413,423	\$6,413,423

Source: PSC FY 01-02 accountability report.

The Hearing Process

The PSC functions in a quasi-judicial capacity. A typical matter to be decided by the commission begins with an application by a regulated utility. This could be for a rate increase or for an application to conduct business in the state. Depending on the type of case, the PSC will have a certain amount of time within which it must reach a decision. After an application, the PSC issues orders setting deadlines for the pre-filing of testimony. Participants in cases include the regulated utility filing the application, the Consumer Advocate, PSC staff, and other interested parties. After testimony is received, a hearing is held at which parties are represented by legal counsel. Witnesses testify and can be cross-examined. After the hearing, the commission reviews the information and makes a decision, usually during a Tuesday commission meeting. In FY 01-02, the commission held 117 hearings, had 47 commission meetings, and issued 905 orders.

Chapter 1
Introduction

Due Process, Agency Structure, and Commissioners' Qualifications

Due Process Requirements

One of our audit objectives was to determine whether parties appearing before the PSC were afforded due process as required by the Administrative Procedures Act (APA). We found no evidence that the PSC has not complied with most of the due process requirements of the APA. However, we found several e-mails which may have violated the prohibition on ex parte communications. These communications may undermine the integrity of the administrative process and the decisions of the Public Service Commission. In addition, we found the PSC has no procedures in place for training staff regarding ex parte communications or for reporting possible ex parte communications.

Laws Governing Ex Parte Communications

Ex parte is defined by Black's Law Dictionary as "On one side only." Ex parte occurs when one party communicates information with a decision-maker, such as a PSC Commissioner, to the exclusion of other parties. This is prohibited because it allows one party to obtain an unfair advantage over another.

The Administrative Procedures Act, South Carolina Code §1-23-10 *et seq.*, governs which communications may take place in a contested case. Specifically, §1-23-360 states:

Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member:

- (1) May communicate with other members of the agency; and
- (2) May have the aid and advice of one or more personal assistants.

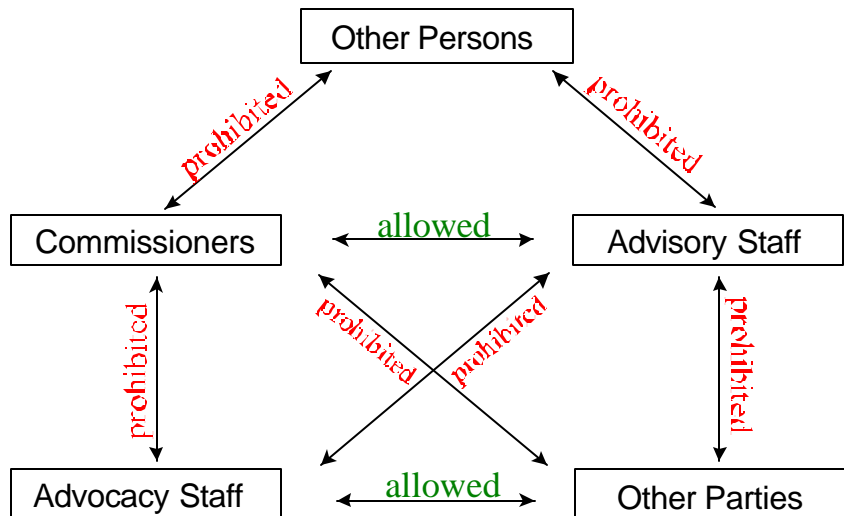
Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than two hundred fifty dollars or imprisoned for not more than six months.

Section 1-23-310(3) defines a contested case as "a proceeding including, but not restricted to, rate-making, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." The PSC is governed by the APA for its contested cases.

Whether an employee may communicate with a commissioner or a commissioner’s advisor without violating the ex parte statute depends on which function the employee is performing. For example, PSC employees who advise the commissioners on technical or legal issues are referred to as “advisory staff.” PSC employees who serve as staff attorneys or witnesses are referred to as “advocacy staff.” Advisory staff may communicate only with commissioners regarding cases; however, advocacy staff may not communicate with either commissioners or their advisors. Advocacy staff may communicate with other parties in contested cases. Also, outside parties are not formally notified of which roles are being performed by PSC staff regarding cases. Chart 2.1 shows which communications are allowed and which are prohibited during contested cases.

Chart 2.1: Communications Flowchart

Communications Allowed or Prohibited During Contested Cases



Communications that would otherwise be prohibited would be allowed if **all** parties are notified and given an opportunity to participate.

Source: Public Service Commission

In 1998, the PSC hired an attorney to serve as the permanent legal advisor to the commission. However, in December 1999, the commissioners approved the elimination of their permanent legal advisor and reassigned the employee to the legal department because the legal staff was overworked and a number of the employees' duties were duplicative. Since that time, the PSC has used a rotational system for the commission's legal advisor. In order to address the issue of ex parte communications, the PSC established a "Chinese Wall" between staff attorneys serving as advisors to the commissioners and all other staff members. This "wall" serves to prohibit communications between certain parties in a case.

We found several e-mails which may have violated the prohibition on ex parte communications.

According to a memorandum to the commissioners from the PSC executive director, "The intent of the Chinese Wall is to isolate the staff attorney, serving as an advisor to the commissioners, from all contact with all other staff members related to all issues involving the matter in which the staff attorney is serving as an advisor." In September of 2002, the PSC revised this rotational system when it recognized that it created a conflict of interest because staff advocacy attorneys report to the PSC general counsel, who may be an adversary in the case. He no longer serves as legal advisor to the commissioners in any case.

We reviewed the e-mails of PSC Commissioners and other employees of the commission to determine whether there were ex parte communications between parties and the commissioners or their advisors while cases were before the PSC. We found several e-mails which may have violated the prohibition on ex parte communications. The e-mails discussed on page 8 are examples of these communications between parties and advocacy staff and PSC Commissioners or their advisors (see Table 2.2). Other parties to these cases were not afforded an opportunity to review the e-mails.

The 17 e-mails listed below occurred in 5 different cases pending before the PSC. According to a PSC official, four of these cases were contested cases. One case accounts for 13 of the e-mails listed in the table. According to PSC officials, this case may not have been a contested case. However, this case was treated the same procedurally as other contested cases, and no notices were issued to parties stating it was not a contested case. A PSC official stated that if the case were contested, the communications which occurred were prohibited.

These e-mails included a broad range of information including:

- Newspaper articles or information from other states sent to commissioners.
- Discussions of meetings between parties’ representatives, commissioners, and staff immediately prior to or while the cases were pending before the PSC.
- A press release prepared by a company’s representative referencing two cases pending before the commission.

Table 2.2: Potential Ex Parte E-mails

E-MAILS SENT BY	SENT TO	NUMBER
PSC Advocacy Staff	Advisor to PSC Commissioners	9
Non-attorney Representative of a Company	PSC Commissioner	3
Advisor to PSC Commissioners	PSC Advocacy Staff	1
Attorney Representing a Company	PSC Commissioner	1
PSC Advocacy Staff	PSC Commissioners	1
PSC Commissioner	PSC Advocacy Staff	1
PSC Legal Advisor*	PSC Technical Advisor	1
TOTAL		17

* This e-mail documents a conversation between the PSC legal advisor to the commissioners and an outside party.

Source: Public Service Commission

Several e-mails document meetings which occurred between parties’ representatives and PSC Commissioners when cases were pending before the PSC. Although it is not possible to determine whether the facts or law of the cases were discussed, these meetings give the appearance of impropriety. According to the agency’s FY 00-01 accountability report, “Obtaining the detailed technical knowledge of specific companies and industries is accomplished through meetings, seminars, hearings, presentations, reading, and, most importantly, frequent interaction with the companies.” Given the extensive amount of contact between parties and PSC staff, this creates ample opportunity for ex parte communications to occur.

There were several e-mails documenting meetings which occurred between parties' representatives and some of the PSC Commissioners and staff immediately prior to filing cases with the PSC. One e-mail read:

Hey guys, [a company representative] wants to set up a meeting for 10 a.m. Wednesday, October 3, 2001 to give us the skinny on their filing for a Certificate for the ... Plant. They will be filing the application that morning when they come by.

There were several e-mails documenting meetings which occurred between parties' representatives and . . . PSC Commissioners and staff immediately prior to filing cases.

Since the case had not yet been filed when the meetings occurred, there is no contested case and therefore these discussions are not ex parte communications. However, a PSC official stated that if these meetings had taken place after a filing, they would be prohibited by the ex parte statute. According to a PSC official, the purpose of these meetings is to provide information to the commissioners. Florida's code of conduct for commissioners states, "A commissioner also shall not knowingly discuss the merits of any case that an individual will be filing within 90 days."

Finally, we found an e-mail from a non-attorney representative of a company to a PSC Commissioner which contained a press release prepared by the company representative. The e-mail referenced two cases which were pending before the PSC at the time. The e-mail read in part:

Here is an example of the type of press release ya'll can send out to get credit for the pro consumer decisions you have made. You can add [Case 1] and [Case 2] at the appropriate time. This is the kind of thing that weekly papers in particular will print exactly as you submit it.

Several PSC staff responding to our survey and outside parties indicated that PSC Commissioners will leave for lunch with parties' representatives immediately after the conclusion of hearings.

In a survey of PSC employees, 45% of the respondents indicated they did not know to whom they should report suspected ex parte communications. In October 2002, an ad hoc committee of PSC Commissioners recommended routine and continuing training for all PSC Commissioners and staff regarding ex parte laws. According to a PSC official, the first formal training for PSC staff regarding ex parte communications occurred in September 2002. However, in March 1999, a PSC staff attorney met with PSC Commissioners and the PSC executive director to discuss ex parte communications. Each commissioner and the PSC executive director signed a form stating that he/she had received the training.

Model Code of Judicial Conduct and the Model Administrative Procedures Act

National organizations and other states have drafted codes to govern administrative procedures. The American Bar Association approved a model code of judicial conduct in 1998 for state administrative law judges to “establish basic ethical standards for administrative law judges or any other hearing officials, whatever their title, in any state.” The model code contains the following five canons of behavior for judges or hearing officials:

- ! A state administrative law judge shall uphold the integrity and independence of the administrative judiciary.
- ! A state administrative law judge shall avoid impropriety and the appearance of impropriety in all activities.
- ! A state administrative law judge shall perform the duties of the office impartially and diligently.
- ! A state administrative law judge shall regulate extra-judicial activities to minimize the risk of conflict with judicial duties.
- ! A state administrative law judge shall refrain from political activity inappropriate to the judicial office.

South Carolina law currently does not require commissioners to disclose ex parte communications. Section 4-213(e) of the model Administrative Procedures Act requires the individual to place the ex parte communications on the record and to identify each person from whom the officer received the communication. The officer must also advise all parties that these matters were placed on the record. Any party desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication. The model Administrative Procedures Act further requires the agency to report violations for disciplinary proceedings and to institute appropriate sanctions for violations.

South Carolina law currently does not require commissioners to disclose ex parte communications.

Administrative law judges in South Carolina are bound by the Code of Judicial Conduct and the South Carolina Ethics Reform Act. All employees of the South Carolina Administrative Law Judge Division are also bound by South Carolina Appellate Court Rule (SCACR) 506, regarding confidences gained in the course of employment, pursuant to court order.

PSC Commissioners are not subject to the state’s Code of Judicial Conduct, but they are subject to the South Carolina Ethics Reform Act. Alleged violations of the Ethics Reform Act are investigated by the State Ethics Commission, but the South Carolina Supreme Court investigates allegations made under the Code of Judicial Conduct. However, Public Service Commissioners are not a part of the “unified judicial system.” Therefore, it is unclear which authority would investigate allegations made under the Code

of Judicial Conduct. PSC Commissioners function in a capacity similar to administrative law judges, and should be governed by similar rules.

Tennessee has a code of conduct for its commissioners. North Carolina requires public service commissioners to adhere to the same judicial standards applicable to judges. Finally, Maryland has a provision which states, “If, before hearing a contested case, a person receives an ex parte communication of a type that would violate subsection (a) of this section if received while conducting a hearing, the person, promptly after commencing the hearing, shall disclose the communication....”

Other Due Process Requirements

We reviewed a sample of cases during FY 01-02 and found no evidence that the PSC has not complied with required time limits in contested cases.

However, we found an example where the commission did not follow regulations when taking testimony from a witness. Regulation 103-869 requires that all witnesses must pre-file testimony. During one case, a commissioner called an individual out of the audience to testify who had not pre-filed his testimony.

Conclusion

All parties appearing before the PSC should be allowed to communicate with commissioners or their advisors during hearings with all other parties present and an opportunity to present opposing arguments. When parties are allowed to communicate with commissioners or their advisors to the exclusion of other parties, the integrity of the administrative process and the decisions of the PSC may be undermined. Also, the supervision of staff advocacy attorneys by the PSC general counsel, who may be an adversary in the case, has created a conflict of interest.

Meetings occurring between parties and PSC Commissioners both before the cases are filed and while the cases are pending give the appearance of impropriety. Finally, binding Public Service Commissioners and their assistants to a code of conduct will provide more guidance on what types of activities are prohibited, and a method to prosecute those engaging in inappropriate or unlawful activities.

Recommendations

1. The General Assembly should consider amending §1-23-360 of the South Carolina Code of Laws to provide that any official, including Public Service Commissioners, receiving an ex parte communication during a contested case must note this on the record and allow all parties an opportunity to respond.
2. The General Assembly should consider making Public Service Commissioners bound by the Model Code of Judicial Conduct or ethics rules similar to those applicable to administrative law judges.
3. The General Assembly should consider prohibiting Public Service Commissioners from meeting with parties or their representatives to discuss cases which are to be filed before the commission.
4. The Public Service Commission should ensure that all employees receive training regarding ex parte communications.
5. The Public Service Commission should implement a system for reporting suspected ex parte communications to the State Ethics Commission. If the General Assembly places Public Service Commissioners under the Model Code of Judicial Conduct, then the General Assembly should clarify which authority should enforce these rules.

Agency Structure

One of our audit objectives was to examine the structure of the Public Service Commission. We found that there is a need for a separate staff for commissioners in order to provide them with sufficient expertise and to address concerns about potential ex parte communications. We also reviewed agency structure in other states.

The commissioners at the PSC do not have staff members permanently assigned to advise them. Instead, each case to be decided by the commission is assigned a technical and a legal advisor. In most cases, the agency's executive director serves as the technical advisor to the commissioners. The legal advisor for each case rotates among the PSC legal staff.

At one time, the commissioners did have a permanent legal advisor. In 1998, the PSC hired an attorney to serve as the permanent legal advisor to the commission. However, in December 1999 the commissioners approved the elimination of the permanent legal advisor and reassigned the employee to the legal department.

We contacted seven southeastern states (Alabama, Florida, Georgia, Mississippi, North Carolina, Tennessee, and Virginia). We found that most states have a separate staff for commissioners. For example, in Florida, each commissioner has an assistant, such as a lawyer or a CPA, to provide technical assistance, and a secretary. In Alabama, each commissioner has a staff of four or five, which can include a legal and a technical advisor. In Tennessee, each director has a senior policy advisor. We also found that total staff size varied from state to state. South Carolina's PSC has 79 employees, Florida has a staff size of almost 400.

In its October 2002 ad hoc committee report, the PSC recommended creating a separate advisory staff within the agency consisting of a legal advisor, an undetermined number of technical advisors, and an administrative assistant. In our survey of agency staff, 54% of those who responded agreed that there should be a permanent, separate staff advising the commissioners. Also, 40% of those who responded felt that the current system of rotating staff to serve as advisors was confusing.

Dividing the PSC Into Two Agencies

We found that either a separate or a combined agency can be effective and there are advantages and disadvantages to each. While most of the southeastern states have a consolidated public service commission (including South Carolina), we identified two states, North Carolina and Mississippi, that have separated their PSC into two agencies.

North Carolina created the Office of Public Staff (OPS) out of the North Carolina Utilities Commission (NCUC) in 1997. Prior to the split, the NCUC staff would conduct investigations, testify at hearings, assist in the preparation of orders, and defend those orders on appeals. However, these responsibilities are now part of the duties of the OPS. North Carolina law requires the OPS to intervene in cases before the NCUC. In addition, the North Carolina Attorney General's Office has a utilities section consisting of three staff who specialize in utility matters and may appear before the NCUC as a party in a case. In 1990, Mississippi created the Public Utilities Staff out of the Mississippi Public Service Commission. The staff of this agency is assigned the responsibility of balancing the interests of all parties in a case. In 2002, a bill was proposed that would create a separate agency called the Office of Public Staff in South Carolina.

In 1996, the Utah Legislative Auditor examined the organizational structure of its utility regulation. Utah's structure is similar to that of North Carolina in that it has regulatory functions split between different agencies, the Utah Public Service Commission and a Division of Public Utilities within the Utah Department of Commerce. In addition, it has a Committee of Consumer Services which protects the interests of residential and small commercial consumers during commission proceedings.

One argument in favor of splitting a public service commission is to help address the issue of ex parte communications. With a split agency, commissioners would have their own staff and would be less likely to discuss cases with staff located in another agency. Another argument is that a separate structure helps to provide objective information. Finally, a separate agency would be better able to appeal the commissioners' decisions.

While separating the agency could help address concerns about ex parte, it is important that any separation be done without denying commissioners the staff expertise they need to make informed decisions.

The Utah report also cites advantages to having a single agency. A single agency may be able to be more pro-active regulating industry and in adapting to changing conditions. A large single agency can give the commissioners greater access to technical staff. It is important for commissioners to base their decisions on the best information possible. A report by the National Regulatory Research Institute found:

The problem with...a bifurcated staff approach for solving separation of functions concerns is that, for states with ex parte communication rules, the commissioners...are isolated from the staff that has the most expertise on the issue.

A single agency can also provide a focal point for accountability.

A single agency also requires fewer staff. According to an official in North Carolina, splitting the agency has resulted in a significant increase in staff of the NCUC. This growth has occurred, in part, due to the fact that the commissioners cannot discuss a case with any party; therefore, they need their own separate staff to advise them. However, in North Carolina, both agencies are funded by an assessment on the revenues of the utilities that they regulate and not through general appropriations. This is similar to the manner in which the South Carolina PSC is funded.

While separating the agency could help address concerns about ex parte, it is important that any separation be done without denying commissioners the staff expertise they need to make informed decisions, particularly given the increasing complexity of the issues they face. The Utah report concluded that either structure can be effective.

Recommendations

6. The General Assembly should consider creating a separate Office of Public Staff out of the Public Service Commission to represent the public interest before the Public Service Commission.

— OR —

The Public Service Commission should create a permanent staff to serve as technical and legal advisors to the commissioners.

Commissioners' Qualifications

We found that 27 (90%) of 30 commissioners currently serving in seven other southeastern states have at least a college degree.

One of our audit objectives was to review the qualifications of PSC Commissioners in South Carolina. We found that there are no minimum education or experience requirements to become a PSC Commissioner. Most southeastern states also do not have minimum education or experience requirements for their commissioners. However, we found that 27 (90%) of 30 commissioners currently serving in seven other southeastern states have at least a college degree.

Pursuant to S.C. Code §58-3-20, South Carolina Public Service Commissioners are elected by the General Assembly for four-year terms. The commissioners are elected concurrently based upon the congressional districts, and one member is elected at large to provide for a seven-member commission.

In order to become a Public Service Commissioner, one must appear before a screening committee. S.C. Code §58-3-26 provides that the committee:

. . . shall consider the knowledge and experience of the potential appointees in such varied fields as business, government, accounting, law, engineering, statistics, consumer affairs and finance. In making its findings the joint committee shall seek to find the best qualified people giving due consideration to their ability and integrity.

A test is also administered by the screening committee to commissioner candidates.

Currently, two of the seven commissioners have high school diplomas while five have college or graduate degrees. We reviewed the qualifications of 30 commissioners currently serving in Alabama, Florida, Georgia, Mississippi, North Carolina, Tennessee, and Virginia. Twenty-seven (90%) of the thirty commissioners have at least a college degree. In many instances, commissioners have educational degrees beyond the collegiate level. For

example, Virginia's three commissioners are all attorneys, and one commissioner also previously served as a judge. Virginia was the only state contacted whose law specified educational prerequisites. One of the three commissioners must be an attorney. In Florida, three commissioners are attorneys and the other two commissioners have graduate degrees. Also, three of Tennessee's four commissioners are attorneys and the other is a college graduate. We also found 83% of PSC non-administrative staff had at least a college degree.

When legislators' relatives are allowed to run for PSC commissioner before the body in which they or their relatives have served, it may result in an unfair advantage.

We also contacted the South Carolina Employment Security Commission and the South Carolina Workers' Compensation Commission to determine whether they have minimal educational requirements for their commissioners. Currently, there are no minimum qualifications for either workers' compensation or employment security commissioners. In our 1988 report entitled *A Program Review of the South Carolina Workers' Compensation System*, we recommended that workers' compensation commissioners have minimum qualifications. Legislation proposed in 2002 required that PSC Commissioners serving after June 30, 2004, must have at least a college or advanced degree and experience in disciplines such as finance, economics, statistics, accounting, engineering, or law.

South Carolina and Virginia are the only two southeastern states in which PSC commissioners are elected by the Legislature. In other states, commissioners are either elected by the citizens of the state in a statewide election or appointed by the Governor and in some cases, confirmed by the Legislature.

Section 58-3-24 of the S.C. Code of Laws provides that no member of the General Assembly may be elected to the PSC while serving in the General Assembly or for a period of four years after ceasing to be a member of the General Assembly. However, legislation proposed in 2002 would also make this prohibition applicable to immediate family members of the General Assembly. Also, the state's nepotism law currently prohibits public officials' family members from serving in a state office or position if it is supervised or managed by the public official. For example, if the Governor appointed Public Service Commissioners, the law would prohibit the appointment of a family member. When legislators' relatives are allowed to run for PSC commissioner before the body in which they or their relatives have served, it may result in an unfair advantage.

Staggered Terms

PSC commissioners are currently elected to four-year terms which are not staggered. According to PSC officials, staggering commissioner terms would better preserve invaluable experience on the commission. This would eliminate the possibility that all seven commissioners would be replaced in one election cycle. Also, there would be more regular oversight by the General Assembly since commissioner elections would occur every two years. Five (71%) of the seven southeastern states have staggered terms for their commissioners. Also, there are staggered terms for commissioners of the South Carolina Workers' Compensation Commission and for South Carolina administrative law judges.

Conclusion

The Public Service Commission is responsible for deciding increasingly complex issues. According to the commission's FY 01-02 accountability report:

As the utility industry becomes more competitive and more technology oriented, a higher level of technological knowledge and abilities is required of Commission employees The Commission needs highly-trained employees and flexibility to function in this environment.

When commissioners are elected who do not meet minimum requirements, there is less assurance that complex decisions are made effectively. Also, when commission terms are concurrent and all commissioners are replaced every four years, invaluable experience may be lost in one election cycle.

Recommendations

7. The General Assembly should consider increasing the minimum requirements to become a commissioner of the Public Service Commission.
8. The General Assembly should consider amending S.C. Code §58-3-20 to provide that Public Service Commissioners' four-year terms are staggered in two-year increments.
9. The General Assembly should consider extending the prohibition of service contained in South Carolina Code §58-3-24 to immediate family members of the General Assembly.

Chapter 2
Due Process, Agency Structure, and Qualifications

PSC Employee Survey Results

We conducted a survey of PSC employees designed to measure employee attitudes regarding the structure of the PSC, commissioner qualifications, and ex parte communications. We sent the survey to 74 PSC employees, excluding the PSC Commissioners and the PSC executive director. After the data were collected, we requested the University of South Carolina's Survey Research Laboratory (SRL) to assist us in analyzing survey results and assessing their validity.

We received 59 responses for an overall response rate of 79.7%. The SRL reported that the response rate was average to above average. On the following pages, we present the results for each closed-ended question on the survey, displaying the percentage of responses in each category. The SRL stated that 70% of responses agreeing or disagreeing indicates a general consensus on a given issue.

Please answer the following questions based on your overall knowledge of the PSC. For each statement, check the answer that comes closest to your opinion.

1. How clearly has the law on ex parte communications been communicated to you?

7%	Extremely Clearly	17%	Not too Clearly
12%	Very Clearly	32%	Not at all Clearly
22%	Somewhat Clearly	10%	No Response

2. How clear is your understanding of with whom you may or may not discuss a matter pending before the commission?

8%	Extremely Clear	10%	Not too Clear
12%	Very Clear	30%	Not at all Clear
29%	Somewhat Clear	10%	No Response

3. To what extent are there inappropriate communications between PSC staff and commissioners?

12%	A Great Deal	5%	Not at All
14%	Somewhat	54%	No Response
15%	Not Much		

4. To what extent are there inappropriate communications between commissioners and outside parties?

14%	A Great Deal	0%	Not at All
15%	Somewhat	66%	No Response
5%	Not Much		

5. How often have you been asked by other PSC personnel to change your testimony when testifying before the commission?

2%	Very Often	52%	Never
0%	Often	41%	No Response
5%	Occasionally		

Appendix A
PSC Employee Survey Results

6. How would you rate the PSC's expertise in performing its duties?

22%	Very Good	5%	Poor
46%	Good	8%	Very Poor
14%	Fair	5%	No Response

7. How often are you informed of whom is serving as advisors to the commissioners for cases for which you will be testifying?

8%	Always	10%	Hardly Ever
5%	Most of the Time	17%	Never
8%	Some of the Time	51%	No Response

8. Do you think that the number of commissioners on the PSC should be:

2%	Greatly Increased	27%	Decreased
2%	Increased	15%	Greatly Decreased
39%	Kept the Same as it is Now	15%	No Response

9. How well prepared are commissioners to discuss the issues considered at hearings?

15%	Very Prepared	3%	Not at all Prepared
20%	Somewhat Prepared	42%	No Response
19%	Not too Prepared		

For the following statements, please check the answer that best reflects your level of agreement or disagreement.

10. There is not a clear separation between the roles of staff advising the commissioners and staff testifying in cases before the PSC.

15%	Strongly Agree	10%	Disagree
32%	Agree	0%	Strongly Disagree
10%	Undecided	32%	No Response

11. There should be a permanent, separate staff advising the commissioners.

17%	Strongly Agree	8%	Disagree
37%	Agree	3%	Strongly Disagree
14%	Undecided	20%	No Response

Appendix A
PSC Employee Survey Results

12. The system of rotating staff members to serve as advisors to the commissioners is confusing.

10%	Strongly Agree	8%	Disagree
30%	Agree	3%	Strongly Disagree
10%	Undecided	37%	No Response

13. Current qualifications to become a commissioner are adequate to ensure that commissioners have sufficient knowledge to decide the issues that come before them.

2%	Strongly Agree	24%	Disagree
19%	Agree	27%	Strongly Disagree
17%	Undecided	12%	No Response

14. Commissioners do not work full-time.

36%	Strongly Agree	8%	Disagree
27%	Agree	3%	Strongly Disagree
10%	Undecided	15%	No Response

15. The terms of commissioners should be staggered.

37%	Strongly Agree	3%	Disagree
39%	Agree	5%	Strongly Disagree
10%	Undecided	5%	No Response

16. If you suspect an inappropriate communication has taken place, you know to whom you should report it.

17%	Strongly Agree	25%	Disagree
24%	Agree	20%	Strongly Disagree
3%	Undecided	10%	No Response

17. There is frequent contact between commissioners and representatives of utilities regulated by the PSC.

27%	Strongly Agree	3%	Disagree
17%	Agree	2%	Strongly Disagree
15%	Undecided	36%	No Response

18. The structure of the PSC is adequate to fulfill the mission of the commission.

5%	Strongly Agree	17%	Disagree
34%	Agree	14%	Strongly Disagree
20%	Undecided	10%	No Response

Appendix A
PSC Employee Survey Results

19. The PSC does not have enough staff to carry out its duties.

34%	Strongly Agree	17%	Disagree
36%	Agree	2%	Strongly Disagree
7%	Undecided	5%	No Response

20. The screening process used to select commissioners is effective in ensuring that the individuals most qualified to serve as commissioners are chosen.

2%	Strongly Agree	22%	Disagree
12%	Agree	29%	Strongly Disagree
19%	Undecided	17%	No Response

21. Have you appeared before the Commission in a hearing as a witness, staff attorney, or advisor?

47%	Yes
46%	No
7%	No Response

22. If you are aware of specific instances of inappropriate communication between parties in a case before the commission, please describe them. If possible, please cite or provide documentation which would substantiate such communication.

23. If you have any additional comments concerning the operations of the PSC, please provide them below.

Agency Comments

Appendix B
Agency Comments



Gary E. Walsh
Executive Director
Phone: (803) 896-5133
Fax: (803) 896-5246

The Public Service Commission State of South Carolina

COMMISSIONERS
Mignon L. Clyburn, Sixth District
Chair
Randy Mitchell, Third District
Vice Chairman
William "Bill" Saunders, First District
James Blake Atkins, Ph.D., Second District
Nick Theodore, Fourth District
H. Clay Carruth, Jr., Fifth District
C. Robert Moseley, At-Large

Administrative Department
Phone: (803) 896-5100
Fax: (803) 896-5246

January 29, 2003

George L. Schroeder, Director
Legislative Audit Council
1331 Elmwood Avenue, Suite 315
Columbia, SC 29201

Dear Mr. Schroeder:

Enclosed please find a copy of the Final Response by the South Carolina Public Service Commission to the Legislative Audit Council Report.

We appreciate the opportunity to share our comments with you and wish to thank your staff for the professionalism and courtesy they exhibited throughout the audit process.

If you have any questions concerning this response, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Gary Walsh".

Gary Walsh
Executive Director

Enclosure:

Response by the South Carolina Public Service Commission To the Legislative Audit Council Report

During the past several months the Public Service Commission has worked cooperatively with the Legislative Audit Council (LAC) to examine and evaluate selected aspects of the Commission's operations. During the process, staff members of the Legislative Audit Council displayed the highest levels of professionalism and interacted with Commissioners and agency personnel in a very courteous and understanding manner.

The agency is committed to providing the lowest possible customer rates, while ensuring the viability and recognizing the increased competitive environment that the State's utility companies now experience. This awareness is explicated in the mission of the Public Service Commission which is "...to carry out the regulatory functions and responsibilities set forth for it by the laws and policies of the State of South Carolina pertaining to the utility and transportation companies through a dynamic and proactive regulatory process reflecting the increased competitive nature of the companies within the nation and this State while seeking to best serve the needs of all the citizens of the State and also while encouraging a sense of satisfaction and accomplishment for employees."

In addition, the agency must be aware of and ensure that it operates within the parameters of various Federal and State Legislative Acts, including the Telecommunications Act of 1996, the Clean Water Act, and the State Telecommunications Act, as well as the mandates emanating from Federal agencies such as the Federal Energy Regulatory Commission and the Federal Communications Commission. The Commission must attempt to apply these mandates to all parties appearing. The Commission must balance the interests of the companies over which it has jurisdiction with the interests of the consumers of the State.

The Commission recognizes that it has a tremendous responsibility to the citizens of South Carolina and as an aid to fulfilling this responsibility, formed a Joint ad hoc Committee during the Summer of 2002 to evaluate the agency's structure, organization, administration, and operating policies. This Committee has met several times over the last few months and spent many hours studying these

various issues. Several changes were agreed upon and have already been implemented, while other positive changes are still in the planning stages. The Committee will continue to meet on a regular basis and will strive to keep fine tuning the agency's operations so as to provide the maximum service to our State's citizens.

The Public Service Commission appreciates the LAC's efforts and believes that the process will ultimately result in an improvement of the agency's effort to serve the citizens of South Carolina and fulfill its stated mission. The Audit Council's work resulted in a total of nine recommendations, most of which the Commission either concurs with or believes are legislative issues to be evaluated and acted upon by the General Assembly.

Agency Response to Selected Parts of the LAC's Report:

The Audit Council reports in the second paragraph of page 7 and in the first paragraph of the conclusion on page 11 that a conflict of interest existed because the staff advocacy attorneys report to the PSC General Counsel, who may be an adversary in a case, and that the PSC General Counsel no longer serves as legal advisor to the Commissioners in any case. The conflict as perceived was actually because staff advocacy attorneys reported to the PSC General Counsel, who, at one time could be acting as advisor to the Commission. It is correct to say that the PSC General Counsel no longer serves as legal advisor to the Commissioners in any contested case, thus avoiding the perceived conflict.

The Audit Council reports on page 11 under "Other Due Process Requirements" that the Council found an example where the Commission did not follow Commission Regulation 103-869, which requires that all witnesses must pre-file testimony. In the case in question, an individual did testify who had not pre-filed his testimony. However, at the time the witness appeared, no counsel involved in the case objected to the testimony. The Commission allowed the witness to proceed with the testimony accordingly, thereby waiving the requirement of Regulation 103-869. A waiver of the regulation is permissible under Commission Regulation 103-803 on a case-by-case basis.

Agency Response to LAC Recommendations

Recommendation 1 *The General Assembly should consider amending §1-23-360 of the South Carolina Code of laws to provide that any official, including Public Service Commissioners, receiving an ex parte communication during a contested case must note this on the record and allow all parties an opportunity to respond.*

The Commission has no objection to a statutory change requiring any official, including Public Service Commissioners, receiving an ex parte communication during a contested case to note it on the record and allow all parties an opportunity to respond.

Recommendation 2 *The General Assembly should consider making Public Service Commissioners bound by the Model Code of Judicial Conduct or ethics rules similar to those applicable to administrative law judges.*

The Commission has no objection to being bound by a Code of Conduct. The Commission, at present, is studying Codes of Conduct from other Commissions, for example, in an attempt to determine an appropriate Code of Conduct.

Recommendation 4 *The Public Service Commission should ensure that all employees receive training regarding ex parte communications.*

The agency agrees with this recommendation and on September 17, 2002 and September 19, 2002, ex parte communication training was provided to Commission staff by the agency's legal counsel. During these training sessions, among other things, the principles of ex parte communications and the avoidance thereof were discussed. Additionally, ample time was provided to allow for staff questions (An outline of this training is provided on pages 6-9 of this response).

Moreover, all new employees will receive training and a schedule for ongoing training is being devised and will be implemented for all employees. Continuing training and educational opportunities will also be provided to the agency's commissioners.

Recommendation 5 *The Public Service Commission should implement a system for reporting suspected ex parte communications to the State Ethics Commission. If the General Assembly places Public Service Commissioners under the Model Code of Judicial Conduct, then the General Assembly should clarify which authority should enforce these rules.*

The Commission agrees with the implementation of a system for reporting suspected ex parte communications to the State Ethics Commission. In fact, during the above-mentioned training sessions, employees were instructed to report any such ex parte communications to the Executive Director of the agency, who would then pass on the report to the proper authorities, in this case the State Ethics Commission.

The Commission also agrees with the proposal that if the General Assembly should place the Commissioners under the Model Code of Judicial Conduct, then the General Assembly should clarify which authority should enforce the rules.

Recommendation 6 *The General Assembly should consider creating a separate Office of Public Staff out of the Public Service Commission to represent the public interest before the Public Service commission.*

OR

The Public Service Commission should create a permanent staff to serve as technical and legal advisors to the commissioners.

During the Summer of 2002, the Commission formed a joint ad hoc committee to study and evaluate its organizational structure and administration and came to the

same conclusion as the LAC, that the Public Service Commission should create a permanent and separate staff to serve as technical and legal advisors to the commissioners. On October 15, 2002, by order of the Commission, the agency modified its organizational structure (see page 10 of this response).

To improve efficiency and effectiveness, the agency reorganized its structure to provide clearer lines of authority, thus creating a more favorable environment for increased accountability. A critical aspect of these changes in organizational structure was affected by creating a separate staff to advise the Commissioners on technical and legal matters.

These staff members will be comprised of an attorney (legal advisor), technical advisors, and as needed, an administrative assistant. These employees will report directly to the Commissioners and be physically separated from other agency legal and technical staff. The Commission believes that this structure will aid in complying with ex parte communication laws and regulations and remove any confusion that may have existed with a rotating system of advisors which the commission formerly employed.

On December 17, 2002, The Commission employed an attorney to fill the legal advisor's position and is currently advertising for an engineer to fill a technical advisor's position.

The Commission is requesting approximately \$550,000 in additional personnel service funds from the General Assembly in the fiscal year 2004 Appropriation Act to address the needs that this new Office of highly educated and experienced professionals will require. Considering the many various types of regulated utilities and the highly complex technical issues associated therewith, the additional technical advisors needed for the Commissioner's Office should include individuals with expertise in the gas, electric, telecommunications, and water-wastewater utility fields.

The agency would like to note that to create a separate Office of Public Staff as suggested as one alternative by the Audit Council, would, at a minimum double the costs currently incurred to operate the South Carolina Public Service Commission.

As noted by the Legislative Audit Council, the State of North Carolina has divided its Public Service Commission into two separate agencies. Based on the North

Carolina example, the Commission estimates that it would require, at a minimum, approximately six million dollars in additional recurring funds to operate an additional separate agency.

Recommendation 8 *The General Assembly should consider amending South Carolina Code §58-3-20 to provide that Public Service Commissioners' four-year terms are staggered in two-year increments.*

The Commission agrees with having the General Assembly consider amending South Carolina Code § Section 58-3-20 to provide that Public Service Commissioners' four-year terms be staggered in two-year increments. The Commission agrees that it is conceivable all institutional knowledge could be lost in one election under the present system if all Commissioners were not re-elected. Staggering terms would preserve valuable institutional knowledge from one Commission to the next.

EX PARTE COMMUNICATION: AN OUTLINE OF INSTRUCTION PROVIDED TO PSC STAFF

- I. What does the term “ex parte” mean? The definition in Black’s Law Dictionary states that it means “on one side only; by or for one party; done for, in behalf of, or on the application of one party only.” Statute prohibits any direct or indirect one party communication on the merits of a pending proceeding between Commissioners and other persons. (Analysis will be focused on Commissioners and “other persons.”)

- II.** Elements of S.C. Code Ann. Section 1-23-360 (1976), the statute under the Administrative Procedures Act prohibiting ex parte communication.
- A. Members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law. In our case, this would be the Commission.
 - B. “Contested case”-Definition in S.C. Code Ann. Section 1-23-310(3)(Supp. 2001):
 - 1. “A proceeding, including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” Arguably, this applies from the time an application is filed, until the Commission makes its final decision.
 - C. The ex parte statute prohibits either direct or indirect communication with the Commission under the circumstances stated in the statute.
 - D. Prohibited subjects of communication would be
 - 1. Issue of fact-with any person or party.
 - 2. Issue of law-with party or his representative.
 - E. When is communication in contested case not prohibited between Commission and parties? Answer: When notice and opportunity for all parties to participate has been given.
 - F. Agency members (i.e. the Commission) may
 - 1. Communicate with other members of the agency. (Does not mean that they can talk to anybody in agency during contested case.)
 - 2. May have the aid and advice of one or more personal assistants.
 - G. Any person who violates the provisions of this Code Section is guilty of a misdemeanor crime. If convicted, you can get
 - 1. \$250 fine, or
 - 2. Six months in prison.

- III. Prohibited Communications Under the Statute in a contested case.**
 - A. Between Commissioners and Staff participating as a party, i.e. witnesses or attorneys.
 - B. Between Commissioners and other parties on an individual basis.
 - C. Between Commission Staff participating as a party and Commission Advisory Staff.
 - D. Between Advisory Staff and individual parties, if communication could result in an indirect communication with the Commission.
 - E. Between Commissioners and outside persons.

- IV. Non-Prohibited Communications**
 - A. Between Commissioners and their advisory staff.
 - B. Between parties to a contested case.
 - C. Between Commissioners and all parties if all parties have been given an opportunity to participate.
 - D. Between Commission advisory staff and all parties if all parties have been given an opportunity to participate.
 - E. Between Commissioners and anyone if in a non-contested situation.
 - F. Anyone can talk to anyone if there is not a contested case, or the matter is not an issue of fact or an issue of law in a contested case. Example: Can have discussions about scheduling of hearings, requesting extensions of time, or requesting information on the status of cases, for example.

- V. Consequences of Ex Parte Communication with Regard to the Decision in a Contested Case**
 - A. Discovery of ex parte communication in a contested case does not necessarily void the agency's findings on appeal. The Court looks at the individual situation to see if prejudice to the proceeding resulted. If no prejudice resulted, the finding of the agency may be upheld.
 - 1. Example in South Carolina: Ross case. The Supreme Court cited Article I, Section 22 of the South Carolina Constitution as ensuring that adjudications are conducted by impartial administrative bodies. Adjudicator in case received an ex parte communication, but there was no evidence that he could not make an objective decision. Even if there was improper ex parte communication, no prejudice resulted in this case, and result of the tribunal was upheld. View is consistent with other states.

- VI.** Possible Remedies for Ex Parte Communications Found in Other Jurisdictions
- A. Notice of ex parte communication, followed by opportunity for rebuttal. Presiding officer may withdraw and new presiding officer may be assigned to the case. Florida Statutes Section 120.66 (2).
- B. Another view: “The remedy for ex parte contacts, unlike bias of combination of functions, cannot be disqualification; otherwise a party could eliminate unfavorable decision makers by initiating ex parte contacts with them. The remedy is to place the communication on the public record. The person who knowingly commits an ex parte contact, however, may be deprived of the opportunity for a hearing and forfeit the contested interest.” 7 West’s Fed. Admin. Prac. Section 8307 (3rd ed.).
- VII.** If an instance of ex parte communication during a contested case becomes known, report it to the Executive Director.
- VIII.** When in Doubt, Just Say No!!!

ORGANIZATION CHART

