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SEC AO2015-001

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SUBJECT: PUBLIC SERVICE COMMISSION, THE CODE OF JUDICIAL CONDUCT AND THE FREEDOM OF INFORMATION ACT

SUMMARY: Staff briefings of the Public Service Commission do not violate the open meeting rules of the Freedom of Information Act or the adjudicative responsibilities of the Code of Judicial Conduct.

QUESTION: The Public Service Commission has requested an Advisory Opinion to seek review of its staff briefings to insure compliance with the Code of Judicial Conduct and the Freedom of Information Act.

DISCUSSION: Except to the extent described below regarding the State Ethics Commission's exclusive responsibilities under Section 58-3-30, the State Ethics Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act no. 248 of 1991; Section 2-17-5 et seq. and Section 8-13-100 et seq., as amended, 1976 Code of Laws of South Carolina). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation. Failure to disclose relevant information may void the opinion.

This matter presents due to a unique statutory arrangement in which the State Ethics Commission is required by statute to interpret and enforce the Code of Judicial Conduct (hereinafter "CJC") only as to the Public Service Commission

South Carolina (hereinafter "PSC") and the members of the PSC staff. Specifically, Section 58-3-30 provides in part:

(B) The commissioners and commission employees are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules, except as provided in Section 58-3-260, and the State Ethics Commission must enforce and administer those rules pursuant to Section 8-13-320. In addition, commissioners and commission employees must comply with the applicable requirements of Chapter 13 of Title 8.

The unique statutory circumstance limits the applicability of this Advisory Opinion to the PSC. The PSC is composed of seven Commissioners and is governed by Rule 501 of the CJC, as well as the Ethics Reform Act and the Freedom of Information Act (hereinafter "FOIA"). In addition to the Commissioners, staff of the PSC is also governed by Rule 501 of the CJC. Canon 2(A) of the CJC requires that a judge respect and comply with the law. The PSC has requested that the State Ethics Commission determine whether its regular briefing procedures comport with its statutory obligations pursuant to the FOIA and the CJC.

Canon 3(B)(7)(c) of Rule 501 of the CJC provides that "a judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges." The definition of court personnel excludes lawyers appearing before the judge. Those PSC employees who meet with the PSC Commissioners are not attorneys who appear before the Commissioners. The PSC Commissioners may consult with staff whose duties are to aid the PSC Commissioners in carrying out the Commissioners' adjudicative responsibilities. The Commissioners act in a quasi-judicial manner in the regulation of public utilities in South Carolina.

To that end the PSC technical advisors and the PSC staff attorneys, who do not appear before the Commission, regularly hold briefings to advise and inform the Commissioners about pending issues to be discussed and decided. The Commissioners who attend each staff briefing do not function as a body and are not authorized to make recommendations to or transact any business for the PSC. The staff briefings are held with up to three Commissioners in attendance. Various briefing times are set up to accommodate the schedules of the individual Commissioners, and no single briefing is attended by a quorum of the Commissioners. No Commissioner attends more than one briefing. Due to the Commissioners' schedules, the combinations of the Commissioners attending the staff briefings vary from week to week. Staff briefings aid the Commissioners in carrying out their adjudicative responsibilities. Staff briefings comply with the requirements of Canon 3(B)(7)(c).

As to the FOIA, Section 30-4-20 provides in part:

(d) "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

(e) "Quorum" unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body.

PSC staff briefings do not constitute a meeting in that a quorum of the Commissioners is never present during the briefings. No fixed group of the Commissioners attends staff briefings. No set group of Commissioners meets from week to week; therefore, it is impossible to conclude that these ever-changing groups are committees or subcommittees of the PSC. The staff briefings are not committees or subcommittees appointed by the PSC. The Commissioners do not act upon the matters presented by staff. Section 30-4-60 provides that public meetings must be open and Section 30-4-80 provides for notice for public meetings. Staff briefings of less than a quorum of the PSC Commissioners are not public meetings. The PSC staff briefings do not require notice to be given or minutes to be taken.

CONCLUSION: Staff briefings of the Public Service Commission do not violate the open meeting rules of the Freedom of Information Act or the adjudicative responsibilities of the Code of Judicial Conduct.

KEY WORDS: Public Service Commission, Code of Judicial Conduct, Freedom of Information Act

ANNOTATIONS: Section 58-3-30(B); Rule 501, SCACR, Section 30-4-20, Section 30-4-60, Section 30-4-80