

STATE OF MISSISSIPPI



JIM HOOD  
ATTORNEY GENERAL

OPINIONS  
DIVISION

July 2, 2009

The Honorable Lynn Posey  
The Honorable Brandon Presley  
The Honorable Leonard Bentz  
Mississippi Public Service Commission  
501 North West Street, Suite 201-A  
Jackson MS 39201

Re: Ability of Public Service Commission to Spend Funds

Dear Gentlemen:

Attorney General Jim Hood has received your opinion request and has assigned it to me for research and reply. Your letter states and asks: "The Mississippi Legislature has failed to appropriate funds for the Mississippi Public Service Commission. Please provide us with an official opinion as to whether the Public Service Commission can continue to operate and regulate utilities defined in the Public Utilities Act of 1956 absent a budget." We note that the legislature has also failed to appropriate funds for the Public Utilities Staff.

RESPONSE:

The laws establishing the authorities and duties of the Public Service Commission, and of the entities regulated by it, continue to be in effect. Only the power of the PSC to spend or obligate funds is diminished by the lack of legislative appropriation.

As stated in our recent opinion to Cecil Brown, dated June 26, 2009, the general rule is that the PSC has no authority to spend funds without an appropriation therefor having been made by the legislature. Colbert v. State, 39 So. 65, 66-67 (Miss. 1905). There are four exceptions: (1) offices and agencies expressly mentioned in the constitution; (2) agencies responsible for carrying out duties of government expressly mentioned in the constitution; (3) agencies responsible for administering funds, trusts or bonds for which the Legislature has authorized continuous funding; and (4) agencies responsible for administering federally mandated programs or federal court ordered functions.

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The PSC is not mentioned expressly in the constitution. However, it has been charged with carrying out some of the duties expressly required by the constitution to be addressed by statute:

Section 186. Telephone, telegraph and railroad charges. The legislature shall pass laws to prevent abuses, unjust discrimination, and extortion in all charges of express, telephone, sleeping-car, telegraph, and railroad companies, and ***shall enact laws for the supervision of railroads, express, telephone, telegraph, sleeping-car companies, and other common carriers in this state, by commission or otherwise,*** and shall provide adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their franchises.

(Emphasis added).

For example, the PSC has the duty to enforce the Mississippi Telephone Solicitation Act, Miss. Code Ann. Section 77-3-701 et seq. The PSC may spend and obligate funds to the extent that it determines such expenditures are necessary to fulfill its constitutionally essential duties to "prevent abuses" and conduct "supervision of" telephone companies.

The phrase "telephone . . . and other common carriers" in section 186 includes supervision of other public utilities such as electricity, water, sewer, and other similar utilities. Utilities such as natural gas and electricity share the same "common carrier" characteristics as do telephone and telegraph companies, the utilities specifically mentioned in Section 186. See *Ohio Oil Co. v. Fowler* 232 Miss. 694, 701, 100 So.2d 128, 130 (Miss.1958)(natural gas pipeline is "common carrier"). See also, *Capital Elec. Power Ass'n v. Mississippi Power & Light Co.* 240 Miss. 139, 152, 125 So.2d 739, 743 (Miss.1961)(equating electric utility with common carrier with regard to the granting of a certificate of convenience and necessity).

The PSC can only obligate the state to pay the minimum number of employees necessary to carry out its core function of "supervision" of utilities. By contrast, the Public Utilities Staff has no authority for the "supervision" of utilities. Its duties are primarily advisory. Only the PSC has been given authority to enter orders effecting "supervision". Any employees of the PSC who are not necessary to carry out the "supervision" or enforcement functions of the PSC may not be paid. Therefore, the PSC may spend and obligate funds to the extent, and only to such extent, that it determines such expenditures are necessary to fulfill its constitutionally essential duties to provide supervision of common carriers, including public utilities (natural gas, electricity, telecommunications, water and sewer) as well as common carriers by motor vehicle.

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Although we are not aware of any federal law specifically requiring the PSC to spend money, we will readily advise the PSC with respect to any specific federal law or proposed expenditure.

In sum, without an appropriation, the PSC may continue to make only such expenditures as are necessary to fulfill its constitutionally essential functions. One core constitutional function of the PSC is to provide "supervision" of public utilities to the extent they are common carriers. The PSC can therefore expend monies to provide the bare minimum of staffing within its office to meet that constitutional obligation, and no more. A review of the statutes authorizing the Public Utilities Staff, on the other hand, shows it is not itself an agency exercising constitutionally essential "supervision" over public utilities; rather, most of its duties are to assist the PSC.

This office cannot, in an Official Opinion, foresee or enumerate each and every possible permissible or impermissible expenditure. What few expenditures are constitutionally essential and necessary is a determination that must be made by the PSC in the exercise of its sound discretion. Although the PSC has discretion to determine its essential functions, abuse of that discretion would raise issues of constitutional dimension over which the judiciary would exert its supreme prerogative of judicial review, and may ultimately result in personal liability. See *Fletcher v. Commonwealth of Kentucky*, 163 S.W.3d 852 (Ky. 2005).

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:

  
Mike Lanford  
Deputy Attorney General