

**REPORT TO THE
LEGISLATIVE COUNCIL
FROM THE
PUBLIC REGULATION COMMISSION
SUBCOMMITTEE**

IN RESPONSE TO
SENATE JOINT MEMORIAL 41

DECEMBER 2002

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EXECUTIVE SUMMARY

In 2001, the legislature passed Senate Joint Memorial 41 requesting that the New Mexico Legislative Council designate an interim committee to examine the organization, financing and performance of the Public Regulation Commission (PRC). The Legislative Council appointed the Public Regulation Commission Subcommittee to meet during the 2001 and 2002 interims to address these issues. The members of the subcommittee were:

Senator Michael S. Sanchez, Co-Chair
Representative Ted Hobbs
Senator William H. Payne

Representative W. Ken Martinez, Co-Chair
Senator Timothy Z. Jennings
Representative Danice Picraux

The PRC was created through a merger of the elected State Corporation Commission and the appointed Public Utility Commission. Despite this significant change, the public policy and regulatory issues involved in such a merger were never fully debated by the legislature or the public. This subcommittee report to the Legislative Council makes recommendations in four areas. An examination of these areas will provide the legislature with the opportunity to debate issues related to restructuring the current authority and responsibilities of the PRC.

I. Organization of the PRC. The legislature should consider the need for a constitutional amendment to address the selection of the PRC commissioners. This would include a debate on whether commissioners should be appointed or elected, and would address the need for qualifications to ensure that commissioners have the background and experience necessary to understand complex regulatory issues.

The legislature should also consider a statutory change to restructure the PRC into a cabinet department. The cabinet secretary would be appointed by the governor with the consent of the senate. The department would have the same management and budget responsibilities as all other cabinet departments. This would allow the PRC commissioners to focus on their policymaking and judicial responsibilities for the regulatory functions defined in the constitution of New Mexico.

II. Scope of the PRC. The legislature should consider a constitutional amendment to define the scope of the PRC authority "as provided by law". This will allow the legislature to be responsive to the need for changes in the future without requiring an amendment to the constitution.

The PRC authority should also be restructured to focus on utility and telecommunications regulation. To do this effectively, the non-utility functions from the PRC should be transferred to other departments. The non-utility functions listed below note whether the change would require a constitutional amendment (CA) or a statutory change (STAT).

- **Insurance Regulation.** The regulation of insurance should be elevated from its current status as a division of the PRC to an independent department of insurance. (CA)
- **Corporation Functions.** The responsibilities for corporations should be transferred to the secretary of state to consolidate commerce and industry documentation and records and create a more efficient system for business transactions in New Mexico. (CA)
- **Transportation Functions.** The responsibilities for transportation service applications and tariffs should be transferred from the PRC. The Taxation and Revenue Department (TRD) or the Department of Public Safety (DPS) may be an appropriate agency to handle these functions. (CA)
- **State Fire Marshal and Fire Academy.** These responsibilities should be transferred to a department that consolidates the fire and emergency response activities in the state. Such changes should be a part of the legislative debate on the creation of a new homeland security department in New Mexico. (STAT)
- **Pipeline Safety.** The responsibilities for on-site field inspection and enforcement related to pipeline safety should be transferred to the Oil Conservation Division (OCD) of the Energy, Minerals and Natural Resources Department (EMNRD), which has on-site field offices and staff to perform these duties. (STAT)
- **Ambulance Services.** A 1994 National Highway Traffic Safety Administration assessment for New Mexico recommended that ambulance services be transferred to emergency medical services of the Department of Health (DOH). This alternative should also be included in the legislative debate on the creation of a new homeland security department. (STAT)

III. Operating Resources. The legislature needs to carefully review the staff and budget resources of the PRC as a part of the debate on the PRC's scope and duties. The PRC needs adequate resources to perform its regulatory responsibilities. Some alternative sources of funding, such as fee assessments as a part of the utility cost of service, should be examined. An enterprise operation supported by industry licensing fees for insurance regulation should also be examined.

IV. Regulatory Legislation. The legislature should consider addressing the Public Utility Act, the New Mexico Telecommunications Act, the Motor Carrier Act and the Patient Protection Act as a part of its examination of the PRC. Specific issues related to these laws are included in the report.

BACKGROUND

In 1996, Constitutional Amendment 6 passed and amended Article 11 of New Mexico's constitution as shown in Appendix A. The State Corporation Commission and, by reference, the Public Utility Commission were abolished. The PRC was created as a single regulatory agency for corporations, public utilities, transportation companies, transmission and pipeline companies, insurance companies and other public service entities as provided by law. The effective date for establishing the PRC was January 1, 1999.

In 1997, the legislature passed the Public Regulation Commission Apportionment Act in preparation for the 1998 general election. The law apportioned the state into five PRC districts. The elected commissioners serve staggered terms and are limited to two consecutive four-year terms.

Article 11 of the constitution specifies the regulatory functions of the new commission. The legislature, however, has the responsibility to provide by law how the regulation is addressed. Therefore, in May 1997, the Legislative Council created the Regulation Commission Reorganization Committee to study and make recommendations on the merger of the State Corporation and Public Utility commissions into the PRC. The committee held seven meetings during the 1997 interim and prepared a December 1997 report that included a number of recommendations for legislative action.

The 1998 legislature passed the Public Regulation Commission Act, now codified as Sections 8-8-1 to 8-8-21 NMSA 1978. The Insurance Division was created within the PRC under Section 59A-2-1 NMSA 1978. In the 2000 legislative session, the Public Regulation Commission Act was amended to create the Telecommunications Bureau in the Utility Division of the PRC. The current statutes are included in Appendix B.

During the 2001 legislative session, five pieces of legislation were introduced to review the responsibilities of the PRC. Senate Joint Memorial 41 passed and requested that the Legislative Council designate an interim committee to examine the organization, financing and performance of the PRC. The joint memorial addressed PRC oversight and regulation of the following industries: insurance, transportation and utilities, including telecommunications. A report of the findings is to be made to the legislature in January 2003. A copy of the joint memorial is included in Appendix C.

PUBLIC REGULATION COMMISSION SUBCOMMITTEE MEETINGS

During the 2001 interim, the Legislative Council appointed a Public Regulation Commission Subcommittee to address Senate Joint Memorial 41. The November 21, 2001 organizational meeting defined the scope of work to be addressed by the subcommittee. Six meetings were held during 2002, and the PRC commissioners, PRC staff, other government agencies, regulated industries and consumer representatives discussed issues related to PRC operations. The focus of the meetings is summarized below.

January 4, 2002: Discussion of PRC responsibilities, operations and resources. Potential transfer of non-utility functions to other agencies. Regulation of utilities and telecommunications.

July 3, 2002: 2002 legislative matters related to telecommunications and utilities. Telecommunications issues — current regulatory structure, role in economic development and consumer protection and education. Motor transportation issues — state vs. federal regulation, passenger transportation issues and field enforcement by the PRC and the DPS.

August 16, 2002: Insurance regulation — state and federal roles and responsibilities. Potential for regulatory consolidation with financial institutions and securities. Health insurance regulation in New Mexico. Consumer issues and the public interest protection process. Insurance fee revenue and operating budget expenditures.

September 18, 2002: Discussion of consumer issues, including citizens' utility ratepayer boards, consumer protection and advocacy, and complaints systems. Campaign contributions by lobbyists. Panel discussion on ex-parte laws. Reorganization alternatives related to corporations, pipeline safety, the state fire marshal and Firefighter's Training Academy, and motor transportation field enforcement. Potential statutory changes in the areas of power plants, utilities, telecommunications and transportation.

October 24, 2002: Subcommittee policy discussions/recommendations related to elected or appointed commissioners and PRC structure, organization, operations, financing and performance. Possible 2003 session legislation for utilities, telecommunications and transportation.

November 22, 2002: Discussion of the subcommittee report and recommendations to the Legislative Council related to the authority and responsibilities of the PRC and issues related to organization, financing and performance.

The Public Regulation Commission Subcommittee meeting agendas and minutes are included in Appendix D. Complete meeting files are located in the Legislative Council Service.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

The PRC has a complex mix of policymaking, regulatory, judicial and administrative responsibilities for diverse industries essential to the economic health and future of New Mexico. Information and discussions at the subcommittee meetings focused on the difficulties faced by the PRC due to the broad and complex scope of duties and the current operating resources available.

The subcommittee makes recommendations in four areas as discussed below. These recommendations provide an opportunity for the legislature to examine and debate how to effectively restructure the current authority and responsibilities of the PRC.

I. ORGANIZATION OF THE PRC

The PRC was created through a merger of the elected State Corporation Commission and the appointed Public Utility Commission. Despite this significant change, the public policy and regulatory issues involved in such a merger were never fully debated by the legislature or the public.

Changes That Require A Constitutional Amendment

Selection of Commissioners. The subcommittee discussed the issue of elected or appointed commissioners and reviewed the approaches used in other states. **The members agreed that defining qualifications in law is important to ensure that commissioners have the background and experience necessary to understand the complex issues involved in decisions that impact the businesses and citizens of New Mexico.**

There was also agreement that having staggered terms for commissioners is important to continuity, and that grounds for removal only for cause should be included in the law.

Subcommittee members, however, support two different approaches regarding the selection of PRC commissioners, and recommend a full debate by the legislature on the need for a constitutional amendment to address this issue.

- Three members of the subcommittee support an appointed commission for the PRC. The governor should appoint commissioners with the consent of the senate. An appointed commission would address the need for a statewide focus on regulatory issues and improve accountability in the process. An appointed commission would also resolve concerns related to campaign financing as a part of the election process.

This position is consistent with the 1995 *Report of the Constitutional Revision Commission* to the governor and the legislature, which states:

"Because the essential task (of utility regulation) requires special expertise, judicial-like adjudicatory responsibility, as well as administrative and rule-making responsibility, it is also recommended that the entity be appointive rather than elective, and that the powers and duties and process of removal be established by law." (page 36)

The 1997 *Report of the Regulation Commission Reorganization Committee* also recommended a constitutional amendment "to provide for appointment rather than election of the public regulation commission..." (page 6)

- Two members of the subcommittee support an elected, districted commission and recommend that the judicial election and retention process be examined to address the need for knowledgeable and experienced commissioners. This may also be a good opportunity for public campaign financing to separate the commissioners from the regulated entities.

Changes That Can Be Made By Statute

Structure of the Department. New Mexico's constitution specifies the regulatory functions of the commission. It then gives the legislature the responsibility to provide by law how the regulation is to occur. The legislature passed the Public Regulation Commission Act that defines the PRC management and operating structure. The legislative debate on the operations of the PRC should include consideration of a change in the current structure of the commission as follows:

- The PRC could be restructured to be a cabinet department. The cabinet secretary would be appointed by the governor with the consent of the senate. This would give the department the same powers and responsibilities for agency management, budgets, hiring staff, etc., as all other cabinet agencies.
- The elected commissioners would remain responsible for their current policymaking and judicial responsibilities related to the regulatory functions defined in the constitution. This would allow the commissioners to focus on the complex issues facing the PRC and free them from agency management and administrative responsibilities. Most other state commissions are structured to focus on policymaking and judicial responsibilities, and agency management is handled as a separate function.

It has been difficult to make changes to the PRC due to the 3- to 4-year time period it takes to pass a constitutional amendment and then enact legislation. The momentum for

change is lost during this period. Restructuring the commission to cabinet status would be a significant and meaningful change, allowing the PRC commissioners to focus on their complex regulatory responsibilities.

II. SCOPE OF THE PRC

The legislature should fully debate the scope of PRC authority and responsibilities. If a bill passes in the 2003 legislative session and becomes law, a constitutional amendment would be required during the 2004 general election. The subcommittee recommends the following.

- The legislature should consider a constitutional amendment to define the scope of the PRC authority "as provided by law". This will allow the legislature to be responsive to the need for changes in the future without requiring an amendment to New Mexico's constitution.
- The legislature should consider focusing PRC authority on utility and telecommunications regulation, and transfer other non-utility functions from the PRC.

This recommendation is also consistent with the 1995 *Report of the Constitutional Revision Commission*, which discussed utilities and telecommunications regulation and stated:

"The existing separate constitutional article dealing in great detail with the organization and operation of the Corporation Commission is largely historical-typical of turn-of-the-century concerns... The primary function of the Corporation Commission today involves regulation of public utilities in the communications field. Because that field is so rapidly changing, the entity charged with regulating must be capable of change and adaptation as well, leading to the recommendation that the organization and structure of the regulatory authority be left to law, rather than fixed in the constitution... Furthermore, it is recommended that utility regulation be combined in one single entity"...and "that its non-utility functions be transferred to other departments." (pages 35-36)

The 1997 *Report of the Regulation Commission Reorganization Committee* also recommended a constitutional amendment "to define the functions of the commission to be those concerned with utility regulation, including telecommunications" (page 6). The minutes of the committee meetings included discussions on removing the non-regulatory functions of the commission from the constitution to allow the legislature to leave such duties with the commission or to move them to other departments of state government.

When the legislature examines the scope of PRC authority, the subcommittee recommends debate on the transfer of the current responsibilities and functions of the PRC as follows.

Changes That Require A Constitutional Amendment

Insurance Regulation. The regulation of insurance in New Mexico should be elevated from its current status as a division of the PRC. An independent department of insurance should be considered by the legislature. The governor should appoint the superintendent of insurance with the consent of the senate. Qualifications and reasons for removal for cause should be defined in statute. Under the current structure, the PRC does not add any real value to the process. The superintendent of insurance is essentially autonomous and any appeal of decisions now goes to district court. This change would increase the accountability in New Mexico's insurance regulation.

The subcommittee also discussed the importance of distinguishing between health insurance and health care issues in today's complex health care environment. In 1998, the legislature passed the Patient Protection Act that addresses both provider and patient rights. The legislature also created and funded the Managed Care Bureau in the Insurance Division to address the requirements of the law. These legislative initiatives created a new and significant role for the superintendent of insurance to address the broader issue of health care. A commitment is needed to aggressively implement an effective program for the citizens of New Mexico to better understand their health care options and the services available.

Corporation Functions. The responsibilities for corporations should be transferred to the secretary of state to consolidate commerce and industry documentation and records. Currently, 41 states handle such transactions through the secretary of state. The Uniform Commercial Code and other corporate requirements are now being computerized by New Mexico's secretary of state, who supports the transfer. This will create more efficient systems for business transactions in New Mexico.

Transportation Functions. The PRC has transportation regulatory responsibilities for applications for service and tariffs for certain intrastate and interstate carriers. Currently, there is little field enforcement of the regulations, and the most significant areas can be addressed by statutory changes or improved enforcement efforts as discussed below. However, if the legislature decides to transfer all non-utility regulatory matters from the PRC, the responsibilities for transportation service applications and tariffs should be transferred to another agency. The TRD and the DPS may be appropriate agencies to consider.

Changes That Can Be Made By Statute

State Fire Marshal and the Firefighter's Training Academy. The responsibilities of the state fire marshal and the Firefighter's Training Academy should be transferred to a department created to consolidate fire and emergency response activities in the state. Local government fire representatives testified that there is a need to elevate and

coordinate such functions to provide better services throughout the communities in New Mexico. They stated that such functions are not a priority and are not well served in the PRC. In the discussions of a possible transfer to the DPS, they made compelling arguments that emergency response activities are significantly different from the law enforcement focus of the DPS. These functions should be included in the legislative debate on the creation of a new homeland security department in New Mexico.

Pipeline Safety. The responsibilities for on-site field inspection and enforcement related to pipeline safety should be transferred to the OCD of the EMNRD. OCD responsibilities include transportation of oil and natural gas; regulation of pipelines to prevent waste and protect natural resources; and public health and environment.

OCD field offices currently have field inspection responsibilities for pipeline facilities and on-site field staff to support these efforts. Currently, OCD and PRC staffs both evaluate the integrity of the pipeline systems. A transfer to OCD would reduce this duplication of efforts, and the consolidation would benefit both the industry and the public. The PRC also recommends examining the Oil and Gas Act to consider an update of fees related to pipeline safety.

Ambulance Services. A 1994 National Highway Traffic Safety Administration assessment for New Mexico recommended that ambulance services be transferred to the EMS Bureau of the DOH. The EMS Bureau and the PRC both support the transfer to better coordinate safety efforts in the state. This coordination would improve services to both the transportation industry and the public. This alternative should also be included in the legislative debate on the creation of a new homeland security department.

Enforcement of Current Statutes

Motor Transportation Field Regulation and Enforcement. The PRC has regulatory responsibilities under the Motor Carrier Act for certain motor carrier applications for service and transportation rates. However, the PRC does not enforce the regulations in the field.

The Motor Transportation Division (MTD) of the DPS is charged with field enforcement responsibility under both New Mexico's Motor Carrier Act and the federal Motor Carrier Safety Act. Currently, the MTD does not enforce PRC rules and regulations as a part of its field activities. This statutory requirement should be addressed by the MTD to improve enforcement and safety on New Mexico's roads.

III. OPERATING RESOURCES

The subcommittee supports a careful review of the staff and budget resources of the PRC as a part of the debate on the PRC's scope and duties. The PRC needs to be adequately funded to perform its regulatory responsibilities.

It is especially important for the PRC to have the resources necessary for experts to be involved in rate reviews. The public needs an increased sense of confidence in the fairness of the state's utility and telecommunications rates. This may require alternative sources of funding. For example, some states have a fee assessment as a part of the utility cost of service to support activities related to rate review. The subcommittee heard testimony that such an approach benefits the public because utility rates remain lower despite assessment fees due to effective intervention in the rate review process.

Industry, consumer and PRC representatives report that the current resources are not adequate to address workload requirements. There is also a significant need to provide better consumer protection, information and outreach services. Further, as long as PRC commissioners remain elected, support for activities related to constituent services, including reasonable travel expenses and district offices, should be examined.

Enterprise Operation for Insurance Regulation. The subcommittee supports legislative consideration of statutory changes to allow an enterprise operation for insurance regulation. Operating resources would come from industry licensing fees rather than from the General Fund. This is similar to the funding arrangement currently in place for workers' compensation. Further, insurance license fees should be established by statute so the legislature has control over fee increases.

The subcommittee heard testimony that improving licensing transactions is essential in order to create competition in the state. Some companies now bypass New Mexico to do business in other states where licensing is more responsive. There is also a need for enhanced and improved consumer information and services, especially in understanding health care issues. These areas should be addressed through meaningful changes in administrative and budget initiatives.

IV. REGULATORY LEGISLATION

The legislature should consider the following statutory issues and changes.

Public Utility Act and New Mexico Telecommunications Act. These statutes will sunset on July 1, 2003. The subcommittee supports the following elements related to debate by the legislature for statutory changes in the 2003 session:

- legislation to remove or to extend the sunset dates for the Public Utility Act and the New Mexico Telecommunications Act;
- recommendations for statutory changes from the PRC and regulated industries;
- amendments to address the need for improved quality of service throughout the state;
- amendments to include a specific economic development role for the PRC;
- statutory changes for rural electric cooperatives to remove requirements that are no longer meaningful or that duplicate federal requirements;
- consideration of amendments to the requirements for power plants in New Mexico;
- examination of the statutes related to the universal service fund; and
- examination of the statutes related to whether "service" should be considered separate from "transmission".

Motor Carrier Act. The subcommittee recommends that the Motor Carrier Act be updated to address federal preemption issues and streamline certain provisions as defined by the PRC and regulated industries.

Patient Protection Act. The subcommittee recommends that the legislature examine the responsibilities assigned to the Insurance Division under the Patient Protection Act. The purpose of the review is to examine whether the health care assistance and coordination functions are properly assigned to the Insurance Division or could be more effectively addressed in another state agency involved in health care matters. A distinction must be made between health insurance matters and health care. Health care assistance must address the actual delivery of services. To be effective, this requires that staff have a thorough understanding of available services and the different state and federal regulatory requirements.

OTHER ISSUES EXAMINED BY THE SUBCOMMITTEE

The subcommittee also addressed the following issues when examining the organization, financing and performance of the PRC. The subcommittee does not recommend any legislative action to make changes in the following areas.

Campaign Contributions by Lobbyists. The attorney general issued an opinion that a lobbyist has a right to give a donation to support a candidate for PRC commissioner. A lobbyist may not, however, then bill the regulated entity for the contribution. There is a \$500 statutory cap on all campaign contributions, a provision unique to PRC commissioners. The discussions included public campaign financing and examining the judicial election process for procedures that may apply to the election process for PRC commissioners.

The subcommittee does not recommend any changes in statute at this time. If the PRC returns to an appointed commission, campaign contributions would no longer be an issue.

Ex-parte Laws. The subcommittee examined the dual responsibilities of the PRC commissioners to make policy and serve a judicial role. The subcommittee recommends that ex-parte communications be addressed through training for the PRC commissioners, staff and intervenors to ensure that all parties are informed on acceptable practices. Ex-parte issues should also be addressed through more effective administrative policies and procedures.

The PRC, regulated industries and consumer representatives did not make any specific recommendations for statutory changes to the ex-parte laws. The subcommittee does not recommend statutory changes at this time.

Consumer Protection, Information and Outreach Services. Significant improvements are needed to effectively provide information, education and services to consumers. The issues discussed during the subcommittee meetings are summarized below.

Responsive and Expert Service. The public has a right to expect courteous and efficient service when they call for assistance. Phone calls should be answered by a person, not a recorded message with directions to be followed. Any referrals should be accurate and carefully made so that the consumer is not just forwarded to another agency that may not be able to help.

- In matters related to consumer information and complaints, the role and responsibilities of the PRC and the Office of the Attorney General need to be clearly defined and effectively conveyed to the public.
- Consumer complaints should be effectively handled initially, and then resolved in a timely manner.
- Better consumer education is important to both the industry and the public.

Regulatory Matters. More effective communication and advocacy for the residential ratepayer and small business are needed. Discussions on this issue included the concept of citizens' utility ratepayer boards as used by other states to represent small ratepayers. It is also important for the public to be meaningfully informed on regulatory changes and how the consumer will be impacted.

Health Care Services. Today's health care environment is complex and frustrating to the public. There is a tremendous need for expert assistance in this area. The public needs accurate information to understand and pursue health care services. To be effective, staff must have a thorough understanding of available services and the different state and federal regulatory requirements. Improving services in this area must be a priority for the PRC.

The subcommittee recommends that support for the much-needed information and outreach services for consumers be addressed through administrative and budget initiatives. Statutory changes are not recommended at this time.