

MEMORANDUM

DATE: SEPTEMBER 14, 2016

TO: MEMBERS OF THE COURTS, CORRECTIONS AND JUSTICE INTERIM LEGISLATIVE COMMITTEE

FROM: MICHAEL SMITH, ACTING GENERAL COUNSEL, NEW MEXICO PUBLIC REGULATION COMMISSION
JUDITH AMER, ASSOCIATE GENERAL COUNSEL, NMPRC *JA*

THROUGH: ERNEST ARCHULETA, CHIEF OF STAFF, NMPRC

RE: **NMPRC RESOLUTION 03-09-16-REQUESTING THE LEGISLATIVE COUNCIL SERVICE TO ASSIGN TO AN APPROPRIATE INTERIM COMMITTEE THE TASK TO REVIEW AND FORMULATE A STATUTORY REMEDY ON THE COMMISSION RECUSAL ISSUE**

Background:

On March 9, 2016, the Commission (“NMPRC” or “Commission”) adopted Resolution 03-09-16, attached hereto as Exhibit A, following a decision by the New Mexico Supreme Court on November 9, 2015, which dismissed the petition of intervenor New Energy Economy (NEE) seeking to compel the recusal of four of the five N.M Public Regulation Commissioners in NMPRC Case No. 13-00390-UT concerning the application of Public Service Company of New Mexico to abandon two units of the San Juan Generating Station and seeking approval of approve replacement power for the capacity lost by abandonment.

The scope of the recusal petition raised issues concerning how the Commission would be able to decide an adjudication matter in the event two or more Commissioners were required to recuse themselves, because a majority of a quorum is needed for a final decision of the Commission. Section 8-8-4 (D) NMSA 1978 provides: “A majority of the commission constitutes a quorum for the transaction of business; provided, however, that a majority vote of the commission is needed for a final decision of the commission.” A quorum¹ of the NMPRC is

¹*McCormick v. Board of Education*, 58 N.M. 648, 274 P.2d 299 (S. Ct. 1954) has expressly stated: “In the absence of the adoption of rules of procedure and in the absence of statutory regulation, the generally accepted rules of parliamentary procedure would control. Such rules are stated 67 C.J.S., Parliamentary Law, 5, pp. 871 and 874, as follows: “In the absence of a contrary provision, a **majority of the authorized membership of a body, consisting of a definite number of members, constitutes a**

a majority of the five member body, and, therefore is at least three Commissioners. Since a quorum is at least three members, if four or three members were recused, the NMPRC could not even convene a meeting for lack of a quorum. Had the New Mexico Supreme Court granted NEE's Petition and recused all 4 Commissioners, the resulting lack of a quorum would have left the Commission unable to act since a quorum of the Commission is required to conduct business and a majority is required to render final decision. *See*, §8-8-4(D), NMSA 1978.

The problem is that while §8-8-18,² NMSA 1978 specifies the circumstances in which recusal is required for the New Mexico Public Regulation Commission, that recusal statute currently lacks any provision regarding the appointment of persons to act as substitute replacement commissioners in the event of a recusal, including criteria for replacements and identification of who would be responsible for naming replacements. Accordingly, because there currently exists the potential that the Commission could be rendered incapable of action, there is a need for legislation to address this issue.

quorum for the purpose of transacting business." Under this rule, there was a quorum of the state board present at the hearing. This text further states: (1) "Where a legal quorum is present, the general rule, in the absence of a provision to the contrary, is that a proposition is carried by a majority of the legal votes cast", and (2) "Where a quorum is present, a proposition is carried by a majority of the votes cast, although some of the members present refuse to vote." Tested by the foregoing statements, the action here taken by the state board constitutes a proper and official action of the board. Robert's Rules of Order, Rev.Ed., supports the same conclusion. We see no merit in this contention."

² **8-8-18. Recusal of commissioner or hearing examiner. (1998)**

A. A commissioner or hearing examiner shall recuse himself in any adjudicatory proceeding in which he is unable to make a fair and impartial decision or in which there is reasonable doubt about whether he can make a fair and impartial decision, including:

(1) when he has a personal bias or prejudice concerning a party or its representative or has prejudged a disputed evidentiary fact involved in a proceeding prior to hearing. For the purposes of this paragraph, "personal bias or prejudice" means a predisposition toward a person based on a previous or ongoing relationship, including a professional, personal, familial or other intimate relationship, that renders the commissioner or hearing examiner unable to exercise his functions impartially;

(2) when he has a pecuniary interest in the outcome of the proceeding other than as a customer of a party;

(3) when in previous employment he served as an attorney, adviser, consultant or witness in the matter in controversy; or

(4) when, as a candidate for office, he announced how he would rule on the adjudicatory proceeding or a factual issue in the adjudicatory proceeding.

B. If a commissioner or hearing examiner fails to recuse himself when it appears that grounds exist, a party shall promptly notify the commissioner or hearing examiner of the apparent grounds for recusal. If the commissioner or hearing examiner declines to recuse himself upon request of a party, he shall provide a full explanation in support of his refusal to recuse himself.

Preferred statutory amendment:

The Commissioners' preferred proposal is a statutory amendment to the recusal statute to address the problem detailed above by codifying the common law *rule of necessity*. This principle allows an otherwise disqualified judge, or in the case of the NMPRC Commissioner acting in an adjudicatory capacity, to participate if the case cannot be heard otherwise, due to a lack of quorum. The common law *rule of necessity*, which is an exception to a disqualification of a judge deciding a court case, allows an otherwise disqualified judge to participate if the case cannot be heard otherwise.

In the context of recusal of NMPRC Commissioners, that would mean that if 3 or more Commissioners, under ordinary circumstances, should recuse themselves from hearing an adjudicatory matter due to falling within one of the 4 categories set out in the recusal statute, there would not be a quorum to render a final decision. However, if the Commission applied the *rule of necessity*, that would allow the recused Commissioners to still be able to make up a quorum and render a final decision.

The amendment proposed below would allow Commissioners to hear a matter in which he or she has an interest and would ordinarily recuse themselves but for the fact that if they did recuse themselves there would not be a quorum to render a final decision. The United States Supreme Court in *U.S. v. Will*, 449 U.S. 200, 101 S.Ct. 47, 166 L.Ed.2d 392 (December 15, 1980), upheld and applied the *rule of necessity*. The U.S. Supreme Court stated that the *rule of necessity* has been consistently applied in this country in both state and federal courts wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide the case.

Preferred proposed Statutory Amendment to recusal statute Section 8-8-18 NMSA 1978 (additions are underlined and revisions are strikethrough);

8-8-18. Recusal of commissioner or hearing examiner. (1998)

A. Except as provided for in Subsection C., a ~~A~~-commissioner or hearing examiner shall recuse himself in any adjudicatory proceeding in which he is unable to make a fair and impartial decision or in which there is reasonable doubt about whether he can make a fair and impartial decision, including:

(1) when he has a personal bias or prejudice concerning a party or its representative or has prejudged a disputed evidentiary fact involved in a proceeding prior to hearing. For the purposes

of this paragraph, "personal bias or prejudice" means a predisposition toward a person based on a previous or ongoing relationship, including a professional, personal, familial or other intimate relationship, that renders the commissioner or hearing examiner unable to exercise his functions impartially;

(2) when he has a pecuniary interest in the outcome of the proceeding other than as a customer of a party;

(3) when in previous employment he served as an attorney, adviser, consultant or witness in the matter in controversy; or

(4) when, as a candidate for office, he announced how he would rule on the adjudicatory proceeding or a factual issue in the adjudicatory proceeding.

B. Subject to Subsection C., i If a commissioner or hearing examiner fails to recuse himself when it appears that grounds exist, a party shall promptly notify the commissioner or hearing examiner of the apparent grounds for recusal. If the commissioner or hearing examiner declines to recuse himself upon request of a party, he shall provide a full explanation in support of his refusal to recuse himself.

C. In cases where three or more commissioners are required to recuse themselves due to Subsection A., such that a quorum of the commission does not exist to render a final decision in an adjudicatory proceeding, the otherwise recused commissioners are permitted to participate and render a decision in that adjudicatory proceeding.

Other legislative options:

New Mexico Constitution, Article V. Sec. 5: Article V, Sec. 5³, states in the event of a vacancy of an elected official, except for lieutenant governor and members of the legislature, the Governor shall appoint a replacement. While a recusal by a NMPRC Commissioner from deciding one adjudicated matter is not a "permanent vacancy", it certainly is a "temporary vacancy". Another legislative solution to the above stated problem would be to amend the recusal statute to expressly state that Article V. Sec. 5 applies when a Commissioner recuses him or herself from an adjudicatory matter. In addition, the amendment would also state that the appointee must fulfill all of the statutory qualifications for NMPRC Commissioners and must be from the same district as the recused Commissioner. This option is supported by Article XI, Sec. 1, which uses the phrase "and to commissioners appointed to fill a vacancy at any time." Article V. Sec. 5, was used recently for Governor Martinez to appoint a vacancy of the Secretary of State and was used several years ago to fill Commissioner Carole Sloan's vacancy.

³ Article V, Sec. 5. [Governor's appointive and removal power; interim appointees.]

The governor shall nominate and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for and may remove any officer appointed by him unless otherwise provided by law. **Should a vacancy occur in any state office, except lieutenant governor and member of the legislature, the governor shall fill such office by appointment, and such appointee shall hold office until the next general election, when his successor shall be chosen for the unexpired term.** (As amended November 8, 1988.)

Revise the New Mexico Constitution: Article XI, Sec. 1⁴ could be amended to provide for election of three “at large” Commissioners elected by the entire State of New Mexico electors who would only serve on the Commission in the event of a temporary vacancy due to recusal or in the event of a permanent vacancy. This would require a Joint Memorial adopted by the Legislature in order to place a Constitutional Amendment on the ballot in the next general election (November 2017).

Amend the quorum statute: As stated above, the current NMPRC statute, Section 8-8-4 (D) NMSA 1978, provides that a quorum is a majority of the 5 Commissioners, i.e., at least 3 Commissioners and further provides that a majority of a quorum is needed to make a final decision. This statute could be amended to state that, only in cases of recusal of 3 or more Commissioners that would make it impossible to have a “quorum” of 3 Commissioners, the definition of a “quorum” would no longer be 5 members. Rather, in those cases, a quorum will be a majority of the remaining non-recused members. There are issues with this amendment, in particular in cases where there were only 3, 2 or 1 non-recused members because there could be a final decision in an adjudicatory case that was decided by far less than a majority of the 5 Commissioners. Another issue is that since all 5 Commissioners are not elected at-large, and are elected to represent one particular district of the State, if the recused Commissioners are not replaced, and the case proceeds with a reduced quorum, then the recused Commissioners’ districts would be disenfranchised and unrepresented.

⁴ **Section 1. [Creation and composition of public regulation commission.] (2012)**

The "public regulation commission" is created. The commission shall consist of five members elected from districts provided by law for staggered four-year terms beginning on January 1 of the year following their election; provided that those chosen at the first general election after the adoption of this section shall immediately classify themselves by lot, so that two of them shall hold office for two years and three of them for four years; and further provided that, after serving two terms, members shall be ineligible to hold office as a commission member until one full term has intervened. The legislature shall provide, by law, increased qualifications for commissioners and continuing education requirements for commissioners. The increased qualifications provided by this 2012 amendment shall apply to public regulation commissioners elected at the general election in 2014 and subsequent elections and **to commissioners appointed to fill a vacancy at any time** after July 1, 2013. No commissioner or candidate for the commission shall accept anything of value from a person or entity whose charges for services to the public are regulated by the commission. (As added November 5, 1996; as amended November 6, 2012.)