



# **PUBLIC REGULATION COMMISSION**

## **“Policies Relating to Recovery and Allocation of Native American Access Costs by Electric Distribution Cooperatives”**

**A Report by  
NMPRC Utility & Legal Division Staff**

**Reporting as Requested by New Mexico House Memorial 17 (HM 17)  
Sponsored by Representative Carl Trujillo**

**October 24, 2014**

The 51st Legislature, 2<sup>nd</sup> Session (2014) passed House Memorial 17 (“HM 17”) requesting that the Public Regulation Commission (“Commission” or “PRC”):

maintain policies consistent with a fair and reasonable methodology for the allocation of access fees, charges and trespass fines paid by the electric distribution cooperatives to any governmental entity, including Indian nations, tribes and pueblos; and

report to the appropriate committee appointed by the legislative council and to the congressional delegation on its policies relating to the recovery and the allocation of Native American access costs by electric distribution cooperatives and whether any changes in law are recommended to protect the electric cooperatives’ obligation to provide adequate service at the lowest feasible cost.

In addition to a report responsive to HM 17, Representative Carl Trujillo, sponsor of HM 17, asked the PRC to address seventeen specific items listed in a letter from him dated July 2, 2014 to the PRC. This letter and the PRC’s response are attached to and supplement this report.

**Policies Relating to the Recovery and Allocation of Native American Access Costs  
by Electric Distribution Cooperatives (“Coops”)**

PRC policies relating to the recovery and allocation of Native American access costs by rural electric distribution cooperatives (“coops”) were first developed in cases where cost recovery rate mechanisms were initially proposed by two coops: Continental Divide Electric Cooperative, Inc (“CDEC”) and Jemez Mountains Electric Cooperative, Inc. (“JMEC”). With stipulated revisions to the original proposals by two electric distribution cooperatives, the PRC approved virtually identical Indian ROW cost recovery mechanisms for both coops: Rate No. 27 on March 20, 2013 for CDEC in NMPRC Case No. 12-00019-UT and Rate No. 19 on August 14, 2012 for JMEC in NMPRC Case No. 12-00020-UT. Cost recovery mechanisms are treated as rates for purposes of utility regulation and rates proposed by coops are not subject to

suspension and review by the Commission unless protested. NMSA 1978, § 62-8-7(G).<sup>1</sup> In both CDEC's and JMEC's cases, notice of the proceeding was served on the 22 Indian nations, tribes and pueblos in New Mexico. The immediately affected pueblo in each case protested and was granted intervenor status.

The mechanism ultimately approved by the PRC in each case applies a functional allocation methodology that recovers costs of ROWs for transmission-level facilities from all customers of the coop and the ROW costs for distribution-level facilities from only customers who live within the geographical boundaries of the Native American government, including customers who live on private lands owned in fee.<sup>2</sup> This methodology was designed to send a price signal to the negotiating parties (both the coop and the Native American government) and also in recognition of the federal law requirement that tribes be compensated for ROWs "over and across" tribal lands that "shall not be less than but not limited to fair market value." 25 U.S.C. §§ 322-328 and 25 C.F.R. Part 169. (The PRC does not have authority over the amount of compensation that is demanded and ultimately agreed to by the coops.)

In some cases the Indian ROW cost recovery mechanism was not proposed by the coop until after one or more ROW agreements were finalized resulting in some confusion and controversy because the parties negotiated and agreed to the compensation amount without full planning and knowledge regarding how these costs were going to be allocated or recovered and without PRC involvement.

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<sup>1</sup> Cooperatives are self-governed entities and subject to less PRC regulatory oversight than other public utilities. See Rural Electric Cooperative Act, NMSA 1978, § 62-15-1, et seq.

<sup>2</sup> To date, JMEC's Rate 19 ROW cost recovery methodology has been applied to allocate ROW costs and develop rate rider charges for ROW agreements with the following Native American Governments: Pueblo of Ohkay Owingeh (NMPRC Case No. 12-00020-UT); Pueblo of Nambe (NMPRC Case No. 12-00202-UT); Pueblo of San Ildefonso (NMPRC Case No. 12-00202-UT); Pueblo of Pojoaque (NMPRC Case No. 13-00111-UT); and Pueblo of Santa Clara (NMPRC Case No. 13-00189-UT).

**Whether Any Changes in Law are Recommended to Protect the Electric  
Cooperatives' Obligation to Provide Adequate Service at the Lowest Feasible Cost**

HM 17 also asks the PRC to study and report on any possible changes to the law that would protect rural electric cooperative ratepayers from rate increases caused by a cooperative's payments to Native American Governments for rights of way. The negotiation and approval of tribal ROW agreements and the associated compensation are an exclusively federal issue within the province of the affected Nation, Tribe or Pueblo and the Bureau of Indian Affairs ("BIA") of the U.S. Department of the Interior. On June 17, 2014, the BIA published a proposed rule that would revise 25 CFR Part 169, including 25 C.F.R. § 169.12.<sup>3</sup> Currently, § 169.12, titled "Consideration for Right-Of-Way Grants," states that the consideration for any right-of-way granted under part 169 "shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate[,]" unless waived in writing by the landowners and approved by the Secretary of the Interior. The proposed rule would replace existing § 169.12 with three new sections: §§ 169.109 to 169.111. Under proposed § 169.109, the Secretary of the Interior defers to a tribe's negotiated compensation for rights of way. A requirement for fair market value is maintained in some instances but the proposed rule adds exceptions.<sup>4</sup> The NMPRC is submitting comments to explain the impact that the existing BIA rules have had on New Mexico utilities — especially rural electric cooperatives and ratepayers -- and how the proposed BIA rules will further affect utility rates. A copy of these comments will be available after November 3, 2014 at:

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<sup>3</sup> Rights-of-Way on Indian Land, 79 Fed. Reg. 34,455 (proposed June 17, 2014) (to be codified at 25 (C.F.R. pt. 169).

<sup>4</sup> Rights-of-Way on Indian Land, 79 Fed. Reg. at 34,467.

<http://www.regulations.gov/#!docketBrowser;rpp=100;so=DESC;sb=docId;po=0;dct=PS;D=BIA-2014-0001>

Going forward, coops should ensure that the negotiating parties have a clear understanding of the cost allocation and recovery process and that cooperative members are adequately notified prior to agreement. However, impact may be limited since the number of Indian ROW agreements or issues remaining to be resolved is few and these agreements tend to have terms of 20-25 years. Coops without a cost recovery mechanism in place can choose to recover total ROW compensation from their entire membership or negotiate alternate forms of compensation that may include infrastructure improvements.

# NEW MEXICO PUBLIC REGULATION COMMISSION

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P.O. Box 1269  
1120 Paseo de Peralta  
Santa Fe, NM 87504-1269

## **CHIEF OF STAFF**

S. Vincent Martinez

## **UTILITY DIVISION**

R. Dwight Lamberson, Director  
505.827.4001

October 24, 2014

Carl Trujillo  
NM State Representative 46  
11 West Gutierrez Street #3212  
Santa Fe, New Mexico 87506

RE: Response to July 2, 2014 Letter Requesting Additional Information Relating to House Memorial 17

Dear Representative Trujillo:

Regarding your letter to me dated July 2, 2014, I am writing on behalf of the Staff of the New Mexico Public Regulation Commission ("NMPRC" or "PRC"), specifically NMPRC Utility and Legal Divisions ("Staff"), to address the seventeen (17) items listed in your letter. I will also address the three items you added by e-mail dated October 17, 2014. Some of our responses to your items may note that the information being sought is neither reported to nor collected by the PRC and that the rural electric cooperatives ("coops") or another entity may be the source of more reliable and up-to-date information on that particular item. For ease of reference, the questions, as originally presented in your letter or e-mail, are quoted with our response following. Please note that this letter will be attached as a supplement to the PRC House Memorial 17 ("HM 17") report. Also please note that this letter includes four (4) attached exhibits: a memo from Jemez Mountains Electric Cooperative, Inc. ("JMEC") to NMPRC Staff dated October 7, 2014 providing responses to your questions nos. 5, 7, 10, 15, and 16 (labeled Staff Exhibit 1); a table prepared by JMEC entitled "Native American Right-of-Way Summary" (labeled Staff Exhibit 2); a table prepared by Staff identifying JMEC's annual ROW payments and estimated Rate Rider impact (labeled Staff Exhibit 3); and a letter from JMEC to Dwight Lamberson, Director, PRC Utility Division, dated October 23, 2014 that lists by tribe or pueblo the amounts of possessory interest taxes paid by JMEC for the period 2011-2013 (labeled Staff Exhibit 4).

1. **List the Rural Electrical Cooperatives [“RELs”] (which are member owned) that will have or will have to pay right-of way (ROW) easements to Tribal Governments.**

**Answer:** The list of New Mexico cooperatives that have ROW [right-of-way] or easements on Native American Government or tribal lands are neither reported to nor maintained by the PRC. The negotiation, execution and compliance with ROW easements is the responsibility of the individual utility and is not regulated by the PRC. In this context, the PRC’s jurisdiction over ROW issues does not begin until a filing for recovery of associated ROW easement costs through rates is made by a coop and such filing has received the requisite number of protests from coop members. Currently, through such filings, it has come to the NMPRC’s attention that two coops are in the process of negotiating ROW compensation to tribal governments. The coops are Jemez Mountains Electric Cooperative, Inc. (“JMEC”) headquartered in Hernandez, New Mexico and Continental Divide Electric Cooperative, Inc. (“CDEC”) located in Grants, New Mexico. We understand that three (3) other coops (Kit Carson Electric Cooperative, Inc., Socorro Electric Cooperative, Inc. and Otero County Electric Cooperative, Inc.) have Native American Government or tribal lands within their service areas for which ROWs or easements must be or have been obtained with associated compensation requirements. However, none of these three coops have proposed a rate recovery mechanism that would recover ROW-related costs through rate riders, as have JMEC and CDEC.

2. **Of those RELs which cooperatives have approved ROW easements (PRC rate recovery methodology) with Tribal Governments and which ROW easements are still pending. Also list the cooperative responsible for payment and payment amounts.**

**Answer:** The PRC is not involved in the negotiation of ROW or easement agreements, does not advise the coops on such negotiation and is not otherwise involved in the determination of ROW compensation contained in such agreements. The compensation amounts and other ROW or easement terms are negotiated between the tribal government and the coops pursuant to federal law. The PRC’s jurisdiction is limited by both state and federal law to the collection and recovery through rates of the compensation amounts contained in the agreements reached between coops and tribal governments. Please refer to attached Staff Exhibit 2 for a list of JMEC’s ROW or easement agreements.

3. **Of the agreements approved, list the cost recovery methodology the PRC has approved (recovery method classified as Rate Rider). Do any of these approved cost recovery methods require back loading (increasing payment over time) of lease.**

**Answer:** The only coop rate rider designed to recover ROW costs that have been approved by the PRC, to date, are based on JMEC’s Rate 19, which was adopted by the Commission on August 14, 2012.<sup>1</sup> The ROW cost allocation methodology relies in part on the traditional principle of cost causation (the corollary being “beneficiaries pay”) that is fundamental to rate design. Since all utility customers benefit from transmission-level facilities, all costs associated with transmission ROWs should be paid by all customers. Likewise, since only customers residing within the boundaries of a tribal government benefit from the distribution ROWs procured from the tribal government, those local customers should pay their

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<sup>1</sup> Case No. 12-00020-UT, Order On Reconsideration (issued August 14, 2012)

share of costs associated with distribution ROWs.<sup>2</sup> This is why, under Rate 19, rights of way are grouped into two categories:

(a) **System Rights of Way**, which are rights of way for facilities that are necessary for or otherwise predominantly support service to customers located outside the outer boundaries of the Native American lands of the applicable tribal government; and

(b) **Local Rights of Way**, which are rights of way for facilities necessary to, or otherwise predominantly support, service to Local Customers located within the outer boundaries of the tribal government.

Thus, the payments JMEC makes to tribal governments for ROWs are allocated between System Rights of Way and Local Rights of Way. The ROW acreage amounts are based on the ratio of the surface area of the rights of way in each category relative to the total surface area of all rights of way obtained from the applicable tribal government. "Back loading" or any other particular level or sequence of payments is neither required nor expressly addressed by the Rate 19 methodology. The payment terms to the tribal government, whether back loaded or increasing over time, are negotiated between the coop and the tribal government. However, the recovery of those ROW costs may be levelized and/or amortized over longer time periods to alleviate the impact of rate shock to customers.

4. **How does this current approved methodology differ from franchise fee or tax models used in other local governments?**

**Answer:** Franchise fees are a percentage of the gross receipts from the sale of electricity, etc., billed by the utility to residents of the local government as authorized by state statute (specifically Section 62-6-4.5 of the Public Utility Act, NMSA 1978 Sections 62-3-1 et seq.). Franchise fees, both historically and now, are meant to compensate the local government not only for the use of its ROWs, but also for the right to serve residents within the boundaries of the local government. By and large, the ROWs within a local government, for which franchise fees are intended to compensate, are distribution lines, which serve local customers. In this respect, the above-discussed cost causation methodology is consistent with the collection of franchise fees because both methodologies pass on the costs to local consumers using local distribution facilities within the boundaries of the particular governmental entity within which they reside.

Franchise fees are normally codified by county or municipal governments as ordinances, and imposed as utility franchise fees for rights granted, including ROWs. Franchise fees, since 1999, are collected by a utility through a separate line item on a customer's utility bill. Similar to ROW easement agreements with tribal governments, the PRC has no jurisdiction over and does not regulate franchise fee negotiations or agreements.

5. **Please give an analysis of the different costs from a franchise tax and a ROW. Considering both are a tax from a local government, please use, as an example, the City of Espanola franchise fee and the ROW Ohkay Owingeh charges to the cooperative members of Jemez Mountains Electric Cooperative.**

**Answer:** The information being sought is neither reported to nor collected by the PRC. However, to provide a more complete answer, this information was requested from JMEC who provided the following response: "Franchise taxes are currently collected for the cities/towns of

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<sup>2</sup> Id., ¶ 4



Española, Cuba, San Ysidro and Jemez Springs. The cities/towns assess franchise taxes on gross revenues at a rate of 2%. On the average 2013 JMEC residential bill of \$71.35, the franchise tax amounts to \$1.47. Rate Riders impact the average bill as a per/kWh charge, not on gross revenue. On a 2013 average residential bill of \$71.35, the impact of the Tribal ROW riders ranges from 1.9% to 6%, a low of \$1.36 (Santa Clara) to a high of \$4.33 (Ohkay Owingeh). See attached Staff Exhibit 1, JMEC's response #5.

**6. With the approved cost recovery method (Rate Riders), some approved leases will increase by more than 200% over time, discuss how costs are recovered without violating a cooperative member's right to protest a rate increase under [the] 540 rule.**

**Answer:** Rule 540 applies when the rate rider factors that are charged to customers on a per kWh basis change. New or increased rate rider factors must be filed with the PRC and are subject to the protest and hearing requirements of Rule 540.

**7. To your knowledge, were there any cooperatives that were required to pay a fee to negotiate ROW fees with a Tribal Government? If so, how much?**

**Answer:** According to JMEC, it paid San Ildefonso Pueblo a ROW application fee of \$95,640. See attached Staff Exhibit 1, JMEC's response #7. According to CDEC, it has contested a \$180,908 application fee assessed by Acoma Pueblo.<sup>3</sup>

**8. Have any cooperatives reported collection of an approved Rate Rider? If so, was there over collection or under collection? What is the time period for cooperatives to report on the reconciliation of Rate Rider fees?**

**Answer:** Collections through the Rate Riders must be reconciled annually and reported to the PRC. JMEC and PRC Staff are working to simplify and expedite the annual reporting and reconciliation process.

**9. To your knowledge, has any Tribal Government attempted to leverage or has leveraged trespass fines to a cooperative, if so how much?**

**Answer:** JMEC reports that it has paid \$526,023.00 as a Trespass Term Payment for the years 2012 to 2014. See attached Staff Exhibit 1, JMEC response #10. Continental Divide has disputed the trespass penalties imposed by Acoma Pueblo.<sup>4</sup>

**10. To your knowledge, was there any trespass fee that charged to any of the cooperatives, if so how much?**

**Answer:** See previous response.

**11. What is PRC's authority, under current law, to approve or not approve a cost recovery rider for agreements that may be considered above market value or have an adverse effect on rate payers?**

**Answer:** NMPRC has no authority or ability to influence, negotiate or approve any ROW or easement compensation amounts negotiated between a coop and tribal government. In fact, the PRC's authority is limited to how JMEC collects the payments it makes to a tribal

<sup>3</sup> Case No. 12-00019, Hearing Transcript (January 7, 2013), pages 20-21.

<sup>4</sup> Id. at pages 21-22.

government through its rates. If the PRC found that JMEC agreed to or incurred excessive or unreasonable ROW payments, those costs could theoretically be excluded from rates. However, such an exclusion would simply mean that the coop would have to recover those costs from its members through reduced payments of patronage capital [capital credits].<sup>5</sup> In other words, the coop and its members remain responsible for the costs it agreed to pay the tribal government.

**12. Under §169.12 Consideration for right-of-way, Tribal Governments are not limited to charging fair market value for ROW's. Please comment on how this may affect a cooperatives ability to negotiate ROW easements that will protect affordable electrical bills for cooperative members.**

**Answer:** The impact of federal law on negotiated ROW easement amounts is that it establishes fair market value as the floor of negotiated ROW value. Federal law authorizes tribal governments to negotiate valuation of ROW in excess of fair market value. In addition, an appraisal of the ROW area in question is not required. Federal regulations are silent with regard to considering impact on coop members, electric rates, or affordable electric bills in deriving ROW value.

**13. §169.12 Consideration for right-of-way does not explicitly state whether right-of-way should be charged for local distribution service lines. Please comment on why the PRC accepted cost recovery on local distribution lines in addition to transmission lines. Could the PRC have refused to hear the case for rate recovery methodology since local distribution lines are not explicitly stated? If not, please explain why?**

**Answer:** It would be reasonable for Coops to assume that federal law requires payment of compensation to tribal governments for rights of way associated with both transmission and distribution facilities. Moreover, PRC Staff understands that service lines for which no compensation is required are intended to include only those lines that extend from distribution lines to the property receiving electric service.

25 CFR § 169.22 specifies that “[a] service line shall be for the sole purpose of supplying the individual owner or authorized occupant or user of land... with telephone, water, electric power, gas, and other utilities for use by such owner, occupant, or user of the land on the premises.”<sup>6</sup> Service lines, therefore, are distinguished from transmission lines, which serve the entire customer base, and distribution lines, which serve multiple local customers.

25 CFR § 169.12 refers to ROWs generally and does not distinguish between ROWs used for transmission lines that serve the entire customer base or distribution lines that serve the local customer base.<sup>7</sup> As previously noted, federal law controls ROW easement negotiations and agreements between a coop and tribal government. In the case of an adequately protested petition, the PRC's authority is limited to allocating costs associated with such ROW easement agreements among the coop's customers. Rate 19 allocates ROW acreage, and respective compensation for such acreage, for both transmission and distribution lines, in accordance with the ratesetting principle of cost causation/beneficiaries pay.

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<sup>5</sup> Case No. 13-00202, Certification of Stipulation, page 53.

<sup>6</sup> *Id.*

<sup>7</sup> “Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate.” *Id.*

**14. New Mexico has a right of service. If local distribution lines are currently being charged ROW fees, should a cooperative consider adopting policies to not add any new lines extensions that will be subjected to future ROW fees? Explain?**

**Answer:** It is expected that utilities may weigh the costs of building transmission and distribution lines, subject to access fees, around tribal and local governments should the increase or anticipated increase in access costs justify this approach. In exchange for a service territory that is protected from competition by other utilities, and as part of the regulatory compact, regulated public utilities are obligated to serve customers within their service territory. With respect to service line extensions that serve only one customer, utilities have discretion to adopt policies consistent with cost causation methodology, that pass the cost of a line extension to the customer requesting such extension. Adoption of policies by a utility “to not add any new line extensions that will be subject to future ROW fees” may be consistent with a utility’s right to collect the costs of extensions from the customer requesting the service, however, such a policy applied in the context of tribes and pueblos who are entitled to compensation for the use of its lands for ROWs for electric facilities, is a question of first impression requiring further analysis.

**15. With regard to approved ROW leases, after full implementation of back loaded costs approved in the leases, please give the worst case scenario for what a cooperative member will pay due to rate riders added to their electrical bill.**

**Answer:** Please see attached Staff Exhibit 2 (JMEC’s “Native American Right-of-Way Summary”). According to JMEC, the information and rate impact reflected in the attached summary present the rate impact at a specific point in time. The rate riders and the rate impact will vary slightly over time as true-up mechanisms are implemented pursuant to orders of the NMPRC. See attached Staff Exhibit 1, JMEC response # 15.

**16. Some of the Tribal Governments are also charging Possessory Interest Taxes in conjunction with ROW fees to cooperatives, what is the definition of the Possessory Interest Tax and under what circumstances should it be applied?** Please add the amounts that Cooperatives have paid in Possessory Interest Taxes in the last three years to Tribal Governments.

**Answer:** The information being sought is neither reported to nor collected by the PRC, nor does the PRC have jurisdiction or authority over possessory interest taxes. However, to provide a more complete answer, this information was requested from JMEC who provided the following response: “The following Native American governments currently charge JMEC a possessory tax. JMEC signed a renewal agreement in 2012 with Pojoaque Pueblo for payment of the tax. The additional possessory tax information dates back several years, and based upon JMEC’s records identified to this point, the possessory tax has been assessed by the Native American governments as follows:

- Jicarilla Apache Nation, first payment - 7/28/06
- Pueblo of Pojoaque, prior to 1999
- Ohkay Owingeh, first invoice 2/1/12
- Santa Clara, prior to 2000

See attached Staff Exhibit 1, JMEC response # 16.

- 16a. **Please add the amounts that Cooperatives have paid in Possessory Interest Taxes in the last three years to Tribal Governments.** [this item of inquiry added by e-mail from you to Vince Martinez dated October 17, 2014]

**Answer:** Information regarding the amounts paid in possessory interest taxes for the period 2011 - 2013 has been provided by JMEC. See attached Staff Exhibit 4.

17. **If ROW fees are found to affect cooperative members' rates adversely, what recommendations can the PRC make as possible to their members? This includes tribal members and non-tribal members.**

**Answer:** These ROW fees obviously affect member's rates adversely. Rate 19 is designed to put downward pressure on ROW costs, and is most effective if all parties are aware of the consequences at the beginning of ROW negotiations. Good faith negotiations are required for Rate 19 to work, with consideration of the impact of the rate riders on all parties. The PRC has attempted to reduce the negative impacts from ROW payments that would otherwise have caused rate shock to customers by designing rates that levelize or average the recovery of ROW costs over time.

18. **Did the PRC have any knowledge 1) that monies were paid from cooperatives to Tribal Governments before appraisals and final approvals were granted by BIA [Bureau of Indian Affairs] and 2) that any of the ROW agreements had not been ratified by a cooperative board of directors prior to approving the rate recovery methodology. If so, did the PRC have a responsibility to request these actions be completed prior to a cooperative bringing an agreement to the PRC.**

**Answer:** 1.) Yes. 2.) The Commission does not have the responsibility or authority to enforce a cooperative's board policies or the responsibility to oversee the actions or decisions of cooperative management or its Board that relate to ROW payments being made prior to BIA approval.

19. **In the letter dated April 28th, 2014, Senators Richard Martinez, Carlos Cisneros and myself, listed an Alternate Rate No. 19 that deviated from the Original Rate No. 19. The was filed from JMEC with the PRC under Advice Notice 59 dated January 5, 2012. Could you please explain the differences between the Original Rate No. 19 and the Alternate Rate No. 19.**

**Answer:** There is no Alternate Rate No. 19 that has been approved by the Commission. However, if the question is referring to the original Rate No. 19, as proposed by JMEC, that rate does not anticipate any allocation of costs. The original Rate No. 19, as explained in JMEC's Advice Notice No. 59, states in pertinent part:

- Rate No. 19 is established to provide a mechanism for the Cooperative to recover Actual Costs, incurred by the Cooperative, as a result of payment for access to Local Governments. Recovery will occur through Rate Riders filed in accordance with this rate schedule from Local Consumers located within the jurisdictional boundaries of the Local Government to which the payments are made.

- Rate Riders filed in accordance with this rate schedule will each consist of a charge per kWh per month that is applied to all applicable Local Consumers and will continue each month until the Actual Cost of the access is paid in full. The charge will be shown as a separate line item entitled “Access Cost Recovery” on the bills to Local Consumers to whom the Rate Rider applies.
- If you are located within the boundaries of the local government and are a private land owner not subject to the jurisdiction of the local government, please contact the Cooperative to apply for an exemption from the access charges.

JMEC’s proposed Rate 19 was protested and suspended by the Commission, docketing NMPRC Case No. 12-00020-UT. The case was referred to mediation and the parties entered into a stipulation. Based on the fact that transmission facilities benefit the electrical system and customer base as a whole, the stipulating parties agreed that transmission ROW costs should be recovered from all customers through systemwide rates. However, distribution ROW costs should be recovered like franchise fees — from only those customers residing within the boundaries of the government entity imposing the costs. After a public hearing reviewing the merits of the stipulation, it was ultimately approved by the Commission.

Please let us know if you have any additional questions.

Sincerely,



S. Vincent Martinez  
Chief of Staff

cc: Senator Tom Udall  
Senator Martin Heinrich  
Representative Michelle Lujan Grisham  
Representative Steve Pearce  
Representative Ben Ray Luján  
Senator Michael Padilla, Chair, Science, Technology & Telecommunications Committee  
Representative Sandra D. Jeff, Co-Chair, Indian Affairs Committee  
Senator John Pinto, Co-Chair, Indian Affairs Committee



Phone:  
Española 505-753-2105  
Cuba 575-289-3241  
Jemez Springs 575-829-3550

**Electric Cooperative, Inc.**  
P.O. Box 128, Espanola, New Mexico, 87532

TO: Milo Chavez, NMPRC Staff

FROM: Ernesto Gonzales, General Manger  
Carmen Campbell, Tribal Liaison

DATE: October 7, 2014

RE: Response to NMPRC Staff's Request for Information per Letter Dated July 2, 2014

Pursuant to your request for information related to the inquiries made by Representative Carl Trujillo, in his letter of July 2, 2014, attached please find the information specific to Jemez Mountains Electric Cooperative, Inc. ("JMEC"). We can only respond to the questions that were raised by Representative Trujillo as they pertain to JMEC.

#5. Franchise taxes are currently collected for the cities/towns of Española, Cuba, San Ysidro and Jemez Springs. The cities/towns assess franchise taxes on gross revenues at a rate of 2%. On the average JMEC residential bill of \$71.35, the franchise tax amounts to \$1.47. Rate Riders impact the average bill as a per/kWh charge, not on gross revenue. On a 2013 average residential bill of \$71.35, the impact of the Tribal ROW riders ranges from 1.9% to 6%, a low of \$1.36 (Santa Clara) to a high of \$4.33 (Ohkay Owingeh).

#7. In testimony filed in the San Ildefonso ROW case, NMPRC Case No. 13-00202-UT, JMEC identified the fact that it paid the Pueblo a ROW application fee of \$95,640.00.

#10. As presented in testimony of the witness for San Ildefonso Pueblo in NMPRC Case No. 13-00202-UT, JMEC has paid \$526,023.00 as a Trespass Term Payment for the years 2012 to 2014.

#15. Please see the attached Native American Right-of-Way Summary for JMEC. The information and rate impact reflected in the attached summary present the rate impact at a specific point in time. The rate riders and the rate impact will vary slightly over time as true-up mechanisms are implemented pursuant to orders of the NMPRC.

#16. The following Native American governments currently charge JMEC a possessory tax. JMEC signed a renewal agreement in 2012 with Pojoaque Pueblo for payment of the tax. The additional possessory tax information dates back several years, and based upon JMEC's records identified to this point, the possessory tax has been assessed by the Native American governments as follows:

- o Jicarilla Apache Nation, first payment - 7/28/06
- o Pueblo of Pojoaque, prior to 1999
- o Ohkay Owingeh, first invoice 2/1/12
- o Santa Clara, prior to 2000

**STAFF EXHIBIT 1**



Phone: 505-753-2105  
 Espanola 575-289-3241  
 Cuba 575-829-3550  
 Jemez Springs

**Electric Cooperative, Inc.**

P.O. Box 128, Espanola, New Mexico, 87532

# Native American Right-of Way Summary

Native American Entry	Current ROW Costs	Term of ROW	Acres Under ROW	Date of ROW Agreement	Date of BIA Approval	Approx. # of Meters Within Tribal Boundaries	Approx. # Res. Tax Exempt Meters Within Tribal Boundaries	% of Total Cost Assigned to Local	% of Total Cost Assigned to System	Current Local Rate Rider Charge per/kWh	Current System Rate Rider Charge per/kWh	Rate Impact to Average Residential Bill (564 kWh) for Both Local & System Charges*
Jemez	In Progress					621	621					
Jicarilla Apache	In Progress					142	37					
Nambe	\$1,490,424	22 years	66.82	9/28/11		848	119	53.31%	46.69%	\$0.00713	\$0.00025	\$4.16
Navajo	In Progress					1,642	1,642					
Ohkay												
Owingeh	\$11,250,000	25 years	153.66	8/4/11	6/19/12	2,322	510	52.40%	47.60%	\$0.00727	\$0.00040	\$4.33
Pojoaque	\$2,419,138	25 years	69.73	8/4/11	9/28/12	1,811	136	28.85%	71.15%	\$0.00304	\$0.00094	\$2.24
San Ildefonso	\$4,671,333	25 years	58.19	2/11/12		1,328	127	46.37%	53.63%	\$0.00562	\$0.00049	\$3.45
Santa Ana	In Kind Service	In Perpetuity		12/14/11		2	2	0%	0%	\$0.00	\$0.00	\$0.00
Santa Clara	\$5,808,395	25 years	71.11	3/1/13	4/23/13	5,557	327	32.58%	67.42%	\$0.00173	\$0.00068	\$1.36
Zia	In Progress					269	247					
<b>TOTAL to Date</b>	<b>\$25,639,290</b>											

\*These rates include only the amount of the System Rate Rider for each specified Pueblo. However, each customer is charged a cumulative System Rate Rider charge that includes the system charges for each Pueblo, resulting in a total System Rate Rider charge for all Pueblos that is higher than the specified Pueblo system charge reflected in this chart. The total rate impact with the cumulative system charges from all Pueblos will be a rate increase in the range of 3.5%-7.9%.

Updated October 15, 2014 by clc

<b>Jemez Mountain Electric Cooperative ROW Costs</b>				
<b>Cooperative ROW Costs</b>	<b>Average Annual ROW Cost - Total</b>	<b>Average Annual ROW Cost - System</b>	<b>Avg Annual kwh sales</b>	<b>System Charge for ROW</b>
2015-2019	\$ 1,176,710	\$ 660,258	389,383,885	\$ 0.001696
2020-2024	\$ 975,499	\$ 539,869	413,311,559	\$ 0.001306
2025-2029	\$ 1,151,754	\$ 636,443	430,122,055	\$ 0.001480
2030-2034	\$ 1,127,469	\$ 627,560	449,802,402	\$ 0.001395

Costs included above include Ohkay Owingeh, Santa Clara, San Ildefonso, Nambe and Pojoaque Pueblos. Others are pending.

Source: Exhibit A, Third Revised Rate Rider No.2 System with San Ildefonso.

Case 13-00202-UT.

### **STAFF EXHIBIT 3**





Phone:  
Española 505-753-2105  
Cuba 575-289-3241  
Jemez Springs 575-829-3550

**Electric Cooperative, Inc.**  
P.O. Box 128, Espanola, New Mexico, 87532

October 23, 2014

New Mexico Public Regulation Commission  
Dwight Lamberson, Utility Division Director  
1120 Paseo de Peralta  
Santa Fe, NM 87504

Dear Mr. Lamberson,

Please find the following information on the amounts of Possessory Interest Taxes paid by Jemez Mountains Electric Cooperative, Inc. ("JMEC") for the period 2011-2013. We are providing this information in response to Staff's request expressed at the New Mexico Public Regulation Commission's Open Meeting on October 22, 2014, to enable Staff to respond to the request for additional information from Representative Carl Trujillo. This information is responsive to question #16a in Staff's draft response letter.

**Possessory Interest Tax Paid by JMEC to Native American Governments**

	<b>2013</b>	<b>2012</b>	<b>2011</b>	<b>TOTAL</b>
<b>Jicarilla Apache</b>	\$ 51,818.48	\$ 51,818.00	\$ 51,893.00	\$ <b>155,529.48</b>
<b>Ohkay Owingeh</b>	\$ 16,253.15	\$ 16,137.40	\$ 16,253.15	\$ <b>48,643.70</b>
<b>Pojoaque</b>	\$ 52,020.00	\$ 51,000.00	\$ 50,000.00	\$ <b>153,020.00</b>
<b>Santa Clara</b>	\$ 66,391.75	\$ 75,425.39	\$ 59,435.43	\$ <b>201,252.57</b>

Please let us know if you have any questions or can be of any further assistance.

Sincerely,

Carmen Campbell  
Director of Member Services

A MEMORIAL

REQUESTING THE PUBLIC REGULATION COMMISSION TO REPORT ON THE ALLOCATION AND RECOVERY OF ACCESS FEES, CHARGES AND TRESPASS FINES PAID BY THE ELECTRIC DISTRIBUTION COOPERATIVES TO ANY NATIVE AMERICAN GOVERNMENTAL ENTITY AND TO INCREASE AWARENESS OF RECENT DEVELOPMENTS IN NATIVE AMERICAN ACCESS AGREEMENTS AFFECTING THE COOPERATIVES' ABILITY TO PROVIDE ELECTRICITY AT THE LOWEST FEASIBLE COST.

WHEREAS, New Mexico's electric distribution cooperatives are the primary source of electric power for rural communities throughout the state, many of which are economically depressed; and

WHEREAS, the cost of monthly utility bills has increased steadily over the years and has become increasingly difficult for many customers to afford during difficult economic circumstances; and

WHEREAS, the electric distribution cooperatives are not-for-profit entities owned and operated by its members; and

WHEREAS, the primary obligation that electric cooperatives owe their members is to provide reliable service at the lowest feasible cost; and

WHEREAS, many governmental entities, including Indian nations, tribes and pueblos, require the electric distribution cooperatives to pay fees, other charges and trespass fines for

access to power lines and other related utility facilities to, over and across lands subject to the jurisdiction of these governmental entities; and

WHEREAS, these access fees, charges and trespass fines impose burdensome costs passed directly on to all members, including those on fixed incomes, including Native Americans; and

WHEREAS, the failure to pay the fees, charges and fines imposed by governmental entities for access to, over and across lands within the jurisdiction of the governmental entity imposing such fee, charge or fine will result in the electric distribution cooperative being subject to penalties that must be recovered from members; and

WHEREAS, the public regulation commission has jurisdiction over the rates charged by the electric distribution cooperatives and must determine fair, just and reasonable rates to all consumers; and

WHEREAS, many members have complained to the public regulation commission about the fairness of having to pay rates that include access fees, charges and trespass fines imposed by governmental entities, notably Indian nations, tribes and pueblos; and

WHEREAS, the Indian nations, tribes and pueblos are separate sovereign entities authorized under federal law to impose access fees, charges and trespass fines without limit

for certain types of utility facilities;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NEW MEXICO that the public regulation commission be requested to maintain policies consistent with a fair and reasonable methodology for the allocation of access fees, charges and trespass fines paid by the electric distribution cooperatives to any governmental entity, including Indian nations, tribes and pueblos; and

BE IT FURTHER RESOLVED that the public regulation commission be requested to report to the appropriate committee appointed by the legislative council and to the congressional delegation on its policies relating to the recovery and the allocation of Native American access costs by electric distribution cooperatives and whether any changes in law are recommended to protect the electric cooperatives' obligation to provide adequate service at the lowest feasible cost; and

BE IT FURTHER RESOLVED that copies of this memorial be transmitted to the public regulation commissioners and to the New Mexico congressional delegation.



State of New Mexico  
House of Representatives  
Santa Fe

**CARL TRUJILLO**  
D - Santa Fe  
District 46

11 West Gutierrez Street #3212  
Santa Fe, NM 87506  
Home Phone: (505) 699-6690  
E-mail: carl.trujillo@nmlegis.gov

COMMITTEES:  
Business & Industry  
Enrolling & Engrossing - A  
Taxation & Revenue

Vincent Martinez  
Chief of Staff  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
P.O. Box 1269  
Santa Fe, NM 87504

July 2, 2014

Mr. Martinez,

House Memorial 17 (HM17) was passed by the New Mexico State Legislature in the 2014 session. HM17 requests the Public Regulation Commission (PRC) to report on the allocation and recovery of access fees, charges, and trespass fines paid by rural electric cooperatives to any Native American Governmental Entity. The intent of this report is to identify possible solutions and consistency from one electrical cooperative to another, specifically with regard to its ability to provide electrical service to New Mexicans at the lowest feasible cost.

The State of New Mexico, under Article 15 Rural Electric Cooperatives Sections 62-15-1 to 62-15-37, has the statutory authority over the Rural Electric Cooperatives (REL). There are 16 REL's in the state serving more than 200,000 residents and small business. The utility cooperatives were part of a series of domestic programs under the New Deal Act that President Franklin D. Roosevelt initiated between 1933-36. The idea was to bring electrical service to rural America with a cost as low as reasonably possible.

HM17 asks the PRC to report their findings to an interim legislative committee. As of now, The Science, Technology, and Telecommunications and the Indian Affairs interim committees have placed this subject on their work agenda.

Of primary concern, is the fact that many of the 50 year right-of-way easements have expired on Tribal land within the past few years, leaving REL's to negotiate new right-of-way easements.

Since the last negotiated period, §169.12 *Consideration for right-of-way (ROW) grants* has been revised.

Keeping in mind that the overall objective is to keep the price of electrical service as low as is feasible for all cooperative members including our native and non native population, I request the PRC to study and report on any possible changes to the law that would protect cooperative members from possible sharp increases or graduated increases that would have an adverse impact to a cooperative member's electrical bills due to ROW's. To the point, a comparison of ROW's to other governmental fees such as franchise tax is requested. The following is a list to be addressed, but it is not limited to:

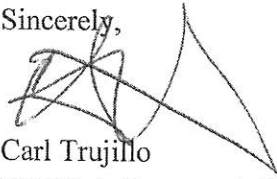
- 1.) List the Rural Electrical Cooperatives (which are member owned) that will have or will have to pay right-of-way (ROW) easements to Tribal governments.
- 2.) Of those REL's, which cooperatives have approved ROW easements (PRC rate recovery methodology) with Tribal Governments and which ROW easements are still pending. Also list the cooperative responsible for payment and payment amounts.
- 3.) Of the agreements approved, list the cost recovery methodology the PRC has approved (recovery method classified as Rate Rider). Do any of these approved cost recovery methods require back loading (increasing payment over time) of lease?
- 4.) How does this current approved methodology differ from franchise fee or tax models used in other local governments?
- 5.) Please give an analysis of the different costs from a franchise tax and a ROW. Considering both are a tax from a local government, please use, as an example, the City of Espanola franchise fee and the ROW Ohkay Owingeh charges to the cooperative members of Jemez Mountain Electrical Cooperative.
- 6.) With the approved cost recovery method (Rate Riders), some approved leases will increase by more than 200% over time, discuss how costs are recovered without violating a cooperative member's right to protest a rate increase under 540 rule?
- 7.) To your knowledge, were there any cooperatives that were required to pay a fee to negotiate ROW fees with a Tribal Government? If so, how much?
- 8.) Have any cooperatives reported collection of an approved Rate Rider? If so, was there over collection or under collection? What is the time period for cooperatives to report on reconciliation of Rate Rider fees?
- 9.) To your knowledge, has any Tribal Government attempted to leverage or has leveraged trespass fines to a cooperative, if so, how much?

- 10.) To your knowledge, was there any trespass fee that has been charged to any of the cooperatives, if so, how much?
- 11.) What is the PRC's authority, under current law, to approve or not approve a cost recovery rider for agreements that may be considered above market value or have an adverse effect on rate payers?
- 12.) Under *§169.12 Consideration for right-of-way*, Tribal Governments are not limited to charging fair market value for ROW's. Please comment on how this may affect a cooperatives ability to negotiate ROW easements that will protect affordable electrical bills for cooperative members.
- 13.) *§169.12 Consideration for right-of-way* does not explicitly state whether right-of-way should be charged for local distribution service lines. Please comment on why the PRC accepted cost recovery on local distribution lines in addition to transmission lines. Could the PRC have refused to hear the case for rate recovery methodology since local distribution lines are not explicitly stated? If not, please explain why?
- 14.) New Mexico has a right of service. If local distribution lines are currently being charged ROW fees, should a cooperative consider adopting policies to not add any new line extensions that will be subjected to future ROW fees? Explain?
- 15.) With regard to approved ROW leases, after full implementation of back loaded costs approved in the leases, please give the worst case scenario for what a cooperative member will pay due to Rate Riders added to their electrical bill.
- 16.) Some of the Tribal Governments are also charging Possessary Interest Taxes in conjunction with ROW fees to cooperatives, what is the definition of the Possessary Interest Tax and under what circumstances should it be applied?
- 17.) If ROW fees are found to affect cooperative members rates adversely, what recommendations can the PRC make to existing law that will allow Rural Electrical Cooperative to keep rates as reasonable as possible to their members? This includes tribal members and non tribal members.

Please compose as a report or answer each question individually. Please feel free to elaborate on subjects or questions posed. Legislative staff will contact you with committee dates for reporting. A minimum of 80 calendar days before first reporting will be requested.

Please feel free to contact me, if any of the questions or subjects are not well defined or with any other question.

Sincerely,

A handwritten signature in black ink, appearing to be 'Carl Trujillo', written over a faint, light-colored signature or stamp.

Carl Trujillo  
NM State Representative 46

Cc: Commissioner Chair Theresa Becenti-Aguilar  
Commissioner Karen L. Montoya  
Commissioner Valerie Espinoza  
Commissioner Ben L. Hall  
Commissioner Patrick H. Lyons  
NM Rural Electrical Cooperative Assoc.



## Lamberson, Dwight, PRC

---

**From:** Martinez, S Vincent, PRC  
**Sent:** Friday, October 17, 2014 12:07 PM  
**To:** Beadles, Cydney, PRC  
**Subject:** Fwd: HM17

Thanks

Sent from S Vincent Martinez, NM-PRC Chief of Staff  
iPhone

Begin forwarded message:

**From:** "Trujillo, Carl" <Carl.Trujillo@nmlegis.gov>  
**Date:** October 17, 2014 at 12:00:09 PM MDT  
**To:** "svincent.martinez@state.nm.us" <svincent.martinez@state.nm.us>  
**Cc:** Keven Groenewold <kgroenewold@nmelectric.coop>, John Tapia <johnjt66@yahoo.com>  
**Subject:** HM17

Mr. Martinez,

In follow up to the PRC Commission meeting this past Wednesday, I would ask the following three items be added to the report.

Document dated July 2, 2014, number 16. Please add the amounts that Cooperatives have paid in Possessary Interest Taxes in the last three years to Tribal Governments.

Additional responses requested:

18.) Did the PRC have any knowledge that 1.) monies were paid from cooperatives to Tribal Governments before appraisals and final approvals were granted by BIA and 2.) any of the ROW agreements had not been ratified by a cooperative board of directors prior to approving the rate recovery methodology. If so, did the PRC have a responsibility to request these actions be completed prior to a cooperative bringing an agreement to the PRC.

19.) In the letter dated April 28th, 2014. Senators Richard Martinez, Carlos Cisneros and myself, listed an Alternate Rate No. 19 that deviated from the Original Rate No. 19. The was filed from JMEC with the PRC under Advice Notice 59 dated January 5, 2012. Could you please explain the differences between the Original Rate No. 19 and the Alternate Rate No. 19.

Thank You,  
Carl Trujillo  
NM State Representative

Sent from my iPad