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FISCAL IMPACT REPORT

ORIGINAL DATE 02/03/14

SPONSOR Martinez LAST UPDATED HB

SHORT TITLE Electric Co-Op Fee & Fine Allocation SM 26

ANALYST Clark

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY14	FY15	FY16		
	NFI	NFI		

(Parenthesis () Indicate Revenue Decreases)

Duplicates HM 17

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Regulation Commission (PRC)

Indian Affairs Department (IAD)

SUMMARY

Synopsis of Bill

Senate Memorial 26 requests the Public Regulation Commission (PRC) “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 further requests PRC, “in establishing a uniform rule and methodology... consult with management and members of the electric distribution cooperatives as well as the Indian nations, tribes and pueblos and the congressional delegation.”

FISCAL IMPLICATIONS

There is no fiscal impact.

SIGNIFICANT ISSUES

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. 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.

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. These access fees, charges, and trespass fines impose burdensome costs passed directly on to all members, including those on fixed incomes, including Native Americans. The failure to pay these 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.

The Public Regulation Commission (PRC) reports that, with some stipulated revisions to the original proposals by two electric distribution cooperatives, it has already approved a uniform functional allocation methodology for the recovery of right-of-way (ROW) costs from consumers. Any changes to this methodology by new commission rules may affect the rights and interests of stakeholders to existing Indian ROW cost recovery mechanisms in electric distribution cooperative rates that have already been approved by PRC pursuant to lengthy and involved litigation and mediation processes.

The Indian Affairs Department (IAD) provides the following analysis.

The Jemez Mountains Electric Cooperative's (JMEC) service area includes Native American lands within the jurisdictional boundaries of eight Pueblos -- the pueblos of Ohkay Owingeh, Santa Clara, San Ildefonso, Pojoaque, Nambe, Santa Ana, Jemez, and Zia -- and includes the Jicarilla Apache Nation and the Navajo Nation. Except for the Pueblo of Santa Ana, on which JMEC maintains a distribution line for the limited purpose of providing electric service to the historic Village of Tamaya, JMEC maintains utility plant and facilities. This includes overhead and underground transmission and distribution lines, substations, and related facilities and equipment on Native American lands subject to the jurisdiction of each pueblo and tribe, including utility facilities that provide service to customers located on Native American lands, to customers located on private land within the outer boundaries of Native American lands, and to customers located outside the outer boundaries of Native American lands.

In order to operate and maintain its utility facilities on Native American lands, JMEC must have ROWs or other rights of access and occupancy granted by the United States with the contest and approval of the applicable Native American tribal government. If and to the extent JMEC operates utility facilities on Native American lands without properly approved ROWs, JMEC is exposed to claims by the affected Native American tribal governments for trespass, which, in addition to damages, may include exposure to civil fines and penalties under tribal ordinances. Ohkay Owingeh, for example, has enacted a civil trespass ordinance, imposing civil penalties of up to \$10 thousand per day for each trespass violation.

Subject to approval by the United States, JMEC has concluded agreements with the Pueblos of Santa Ana and Ohkay Owingeh for ROWs for its utility facilities in place on Native American lands of those Native American tribal governments. The agreement with Santa Ana involves only the extension of a distribution line providing service to the historic Village of Tamaya and does not require the

payment of other compensation by JMEC. JMEC represents that it is or will likely soon be in negotiations with the remaining six Pueblos and the Jicarilla Apache and Navajo Nations to obtain ROWs for its utility facilities on the Native American lands of those Native American tribal governments and is in the process of finalizing agreements with the Pueblos of San Ildefonso, Pojoaque, and Nambe.

JMEC anticipates that the process of negotiating and obtaining federal approval of ROWs on the Native American lands within its service area may take several years. During this process, JMEC anticipates that it will likely be paying compensation to Native American tribal governments in substantial amounts, as it is currently paying to Ohkay Owingeh. In order to pay those obligations, JMEC represents that it needs the ability to recover the costs of the ROWs on a timely basis. JMEC proposed Rate 19 to PRC as a mechanism for timely recovery of ROW costs on Native American land on an incremental basis as and when the costs are incurred and for equitably allocating such costs among its customers through rates. PRC approved Rate 19 in Case No. 12-00020-UT.

System costs to JMEC will be recovered through a rate surcharge applied on a unit of consumption basis to all JMEC customers. However, a local costs surcharge will be recovered through a rate surcharge applied on a unit of consumption basis to only those customers receiving service at locations within the exterior boundaries of the applicable Native American tribal government, whether those locations are on Native American lands or privately owned lands. The local surcharge will be specific to each Native American tribal government to which ROW compensation is paid. Thus, Indians and non-Indians living within the exterior boundaries of Native American lands will be paying a higher cost for their JMEC services as opposed to people living off the Native American lands who will only be paying the system costs.

OTHER SUBSTANTIVE ISSUES

PRC provides the following information in its analysis.

PRC approved virtually identical Indian ROW cost recovery mechanisms for two electric cooperatives: Rate No. 27 on March 20, 2013 for Continental Divide ("CDEC") in Case No. 12-00019 and Rate No. 19 on August 14, 2012 for Jemez Mountains ("JMEC") in Case No. 12-00020. 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 PRC unless protested pursuant to Section 62-8-7(G) NMSA 1978. 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 intervener status.

The mechanism ultimately approved by 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. 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. PRC does not have authority over the amount of compensation that is demanded and ultimately agreed to by the coops. In some cases, the ROW cost recovery mechanism was proposed by the coop after a ROW agreement and compensation was finalized.

ALTERNATIVES

PRC reports a rulemaking by the agency could address the appropriate procedure to be followed by cooperatives going forward to 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, cooperatives are self-governed entities and subject to less PRC regulatory oversight than other public utilities. However, the number of Indian ROW agreements or issues remaining to be resolved is few and since these agreements tend to have terms of 20-25 years, the impact of such a rulemaking at this stage is limited.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Electric cooperatives will continue to allocate and recover ROW costs pursuant to the cost recovery mechanisms approved by the PRC or negotiate alternative forms of compensation that may include infrastructure improvements.

JC/jl