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FISCAL IMPACT REPORT

ORIGINAL DATE 1/25/16

SPONSOR Neville LAST UPDATED _____ HB _____

SHORT TITLE Appointment of PRC Members, CA SJR 7

ANALYST Clark

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$104.0			Nonrecurring	General Fund

Parenthesis () indicate expenditure decreases

Duplicates HJR 8

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Regulation Commission (PRC)

Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

Senate Joint Resolution 7 calls for a constitutional amendment to replace the five-member elected commission with a five-member commission appointed by the governor with the advice and consent of the Senate. It would also set qualifications for four of the five appointed commissioners. Three of these would hold professional licenses: there would be one New Mexico licensed attorney, one New Mexico registered engineer, and one New Mexico certified public accountant. The fourth qualified commissioner would be a person with at least five years of experience working in a regulated industry in New Mexico. The fifth commissioner would only need to be a "member of the public."

There are no current constitutional qualifications for PRC commissioners, but the Public Regulation Commission Act, at NMSA 1978, § 8-8-3.1(A) (2013), requires that in order to be elected or appointed as a commissioner, a person must have at least ten years of professional experience (as further defined in the statute) in an area regulated by the commission or in the energy sector; have a total of ten years of combined professional experience and higher education in an area regulated by the commission, including accounting, public or business

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administration, economics, finance, statistics, engineering or law; or have held the office of commissioner on January 1, 2013.

PRC provided the following detailed synopsis of the joint resolution.

It would add a requirement that no more than three commissioners may be members of the same political party at the time of their appointment. It would also provide for appointments to fill any vacancy for the remainder of a commissioner's term.

It would alter the current constitutional limitation that “[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.” See N.M. Const. Art XI, § 1. Under the joint resolution, this limitation would apply only to members of the commission, not to candidates for the commission.

It would retain the continuing education requirements for commissioners, to be determined by the Legislature, as in the current constitutional provision. See N.M. Const. Art XI, § 1.

It would also retain the current constitutional provision for additional commissioner qualifications to be determined by the Legislature. However, the joint resolution uses the permissive “may” instead of the mandatory “shall” to describe the Legislature's role.

It adds a provision for removal of commissioners “for malfeasance, misfeasance or neglect of duty after a hearing before the supreme court...,” which would have exclusive jurisdiction.

It would be implemented by referendum or on the ballot at the next general election.

FISCAL IMPLICATIONS

Under Section 1-16-13 NMSA 1978 and the NM constitution, SOS is required to print samples of the text of each constitutional amendment, in both Spanish and English, in an amount equal to ten percent of the registered voters in the state. SOS is also required to publish them once a week for four weeks preceding the election in newspapers in every county in the state. If the ballot size is greater than one page, front and back, it would increase the cost of conducting the general election. In addition to the cost of the ballot, there will be added time for processing voters to vote and would mean additional ballot printing systems would be required to avoid having lines at voting convenience centers. SOS estimates the cost per constitutional amendment to be \$104 thousand based on 2010 actual expenditures.

SIGNIFICANT ISSUES

PRC has the constitutional responsibility for regulating public utilities, including electric, natural gas, and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph, and information transmission companies; and other public service companies in such manner as the legislature shall provide. The agency currently is composed of five members elected by district.

There are no current constitutional qualifications for PRC commissioners. However, the Public Regulation Commission Act, at NMSA 1978, § 8-8-3.1(A) (2013), requires that in order to be elected or appointed as a commissioner, a person must have at least 10 years of professional experience (as further defined in the statute) in an area regulated by the commission or in the energy sector; have a total of 10 years of combined professional experience and higher education in an area regulated by the commission, including accounting, public or business administration, economics, finance, statistics, engineering, or law; or have held the office of commissioner on January 1, 2013.

The Attorney General's Office (AGO) provided the following analysis.

The joint resolution addresses the issue of whether to return to a prior New Mexico practice to provide for appointed rather than elected officials to the body that oversees state public utilities. In its various iterations over recent decades, New Mexico has vacillated between having an elected State Corporation Commission; an appointed Public Utility Commission; and, as currently provided, an elected Public Regulation Commission. States around the country have been similarly split. One argument for elected commissioners is that they are arguably more responsive to the voters and all the state's citizens as a result of having to run for election. An argument in favor of appointed commissioners, particularly with criteria for professional backgrounds as provided in this joint resolution, is that the body can be composed of officials with proven expertise in the often complicated issues and areas being regulated, which can result in better informed decisions.

Another significant change to be considered is whether to do away with the mandatory geographical distribution that is currently provided with the PRC commissioners being elected from separate districts. Conceivably, under this joint resolution, all the newly appointed commissioners could be from the same exact area in the state.

The proposed constitutional amendment's provision that "[a] commission member shall be removed only for malfeasance, misfeasance, or neglect of duty after a hearing before the supreme court pursuant to court rules" (emphasis added) could be in conflict with, or create confusion as to the applicability of, other constitutionally sanctioned methods of removing public officials from office. One such method is impeachment. Article IV, Section 6 of the New Mexico Constitution states that "[a]ll state officials and judges of the district court shall be liable to impeachment for crimes, misdemeanors or malfeasance in office...." Another is the writ of quo warranto. Article VI, Section 3 vests original jurisdiction with the supreme court for quo warranto actions. As our supreme court recently noted, "[o]ne of the primary purposes of quo warranto is to ascertain whether one is constitutionally authorized to hold the office he claims". State ex rel. King v. Sloan, 2011-NMSC-020, ¶9, 253 P.3d 33. By providing that a commission member can only be removed for malfeasance, misfeasance, or neglect of duty, the proposed amendment suggests that a member could not be removed pursuant to a writ of quo warranto where, for instance, they no longer met a requirement for serving as a member such as being a resident of the state or not working in a regulated industry. Correspondingly, by providing that a commission member could only be removed after a hearing before the Supreme Court, the proposed amendment can be interpreted to at least suggest that commission members, as state officials, are not subject to impeachment. The Supreme Court recognized in the Sloan decision that "the related constitutional powers of legislative impeachment and judicial quo warranto can co-exist as part of a harmonious,

constitutional whole. . .”. Sloan, 2011-NMSC-020, ¶12, 253 P.3d 33. However, the use here of the qualifier “only” in the proposed amendment suggests otherwise.

DUPLICATION

This joint resolution duplicates House Joint Resolution 8.

TECHNICAL ISSUES

PRC notes the Public Regulation Commission Act, at NMSA 1978, § 8-8-1 *et seq.* (2013), would need to be amended to conform to those portions of the joint resolution that differ from the current constitutional provision.

AGO reports the requirement that there be at least one commissioner who “worked in a regulated industry in New Mexico” may be problematic. If the intent is to require that it be in an industry regulated by the Public Regulation Commission, perhaps that should be stated explicitly. Otherwise, it might be argued that someone like a doctor or other health professional, a building contractor, realtor or anyone working in a profession “regulated” or overseen by a professional licensing board or commission, could be deemed to have worked in a “regulated industry;” and yet those persons would not be any more qualified than anyone else to oversee the specific utility industries regulated by PRC.

OTHER SUBSTANTIVE ISSUES

PRC reports there may be some difficulty in appointing qualified members in an expeditious manner if there is a lack of qualified candidates at the time appointments are needed.

JC/jo/jle