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FISCAL IMPACT REPORT

SPONSOR Montoya/Dow ORIGINAL DATE 3/8/17
LAST UPDATED _____ HB 497

SHORT TITLE Communication with PRC Commissioners SB _____

ANALYST Martinez

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
NFI	NFI	NFI	NFI

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Public Regulation Commission (PRC)

SUMMARY

Synopsis of Bill

HB 497 amends a section of the New Mexico Public Regulation Commission (PRC) Act, Section 8-8-17 NMSA 1978, which pertains to communications between a party and a Commissioner or an assigned hearing examiner during a pending adjudication, made in private, outside of the presence of other parties.

HB 497 changes the ban on all communications between Commissioner/hearing examiners and parties at any time during the pendency of an adjudicatory proceeding or after the record is closed during rulemaking, to a more limited ban, i.e., no communications between parties and Commissioners/Hearing examiners“within thirty days prior to a hearing in a pending adjudication [or after the record is closed in a rulemaking] when a final decision is expected or will be considered.”

FISCAL IMPLICATIONS

HB 497 carries no appropriation, and will not have a fiscal impact on the New Mexico Public Regulation Commission.

SIGNIFICANT ISSUES

The Public Regulation Commission provided the following significant issues:

Ex parte communications have historically been prohibited, by case law and in some instances by statute, in order to maintain the integrity of the judicial system, during pending adjudications. The prohibitions on ex parte communications are aimed at preventing bias and/or pre-judgment by the decision maker and also preventing the appearance of impropriety by the decision maker. In contrast, the ex parte prohibition has been relaxed when the decision maker (the Commission) acts in its legislative capacity. In other words, during rulemaking, before the record is closed, the Commissioners are allowed to have non-public, off- the- record, communications with parties.

Under current law and NMPRC Rule 1.2.3.7.B NMAC, ex parte communications, are prohibited and are defined as : “B. ex parte communication means a direct or indirect communication with a party or his representative, outside the presence of the other parties, concerning a pending rulemaking after the record has been closed or a pending adjudication, that deals with substantive matters or issues on the merits of the proceeding, including any attachments to a written communication or documents shown in connection with an oral presentation that deals with substantive matters or issues on the merits of the proceeding;

- (1) ex parte communications do not include:
 - (a) statements made by commissioners, hearing examiners, or advisory staff that are limited to providing publicly available information about a pending adjudication or rulemaking after the record has been closed; or
 - (b) inquiries relating solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken;
- (2) ex parte communications include a status inquiry which states or implies:
 - (a) a view as to the merits or outcome of a rulemaking after the record has been closed or a pending adjudication;
 - (b) a preference for a particular party, or a reason why timing is important to a particular party;
 - (c) a view as to the date by which a proceeding should be resolved; or
 - (d) a view which is otherwise intended to address the merits or outcome, or to influence the timing, of a pending adjudication or rulemaking after the record has been closed;...”

This above quoted definition means that there should be no communications made between the decision maker and a party at any time during a pending adjudicatory proceeding outside the presence of other parties.

As the term ex parte communications is currently used in the NMPRC Act, Sections 8-8-1 etseq. NMSA 1978 and Rule 1.2.3 NMAC, ex parte communications are prohibited at all times during a pending adjudication or after the record has been closed in a rulemaking. Currently, the ban on communications between decision makers and parties applies to all of the 5 elected Commissioners and any assigned Hearing examiners during the entire pendency of an adjudicatory proceeding.

If HB 497 is enacted, the ban on communications between the 5 elected Commissioners and assigned hearing examiners and parties would only be imposed 30 days prior to a hearing in which a final decision would be made. Therefore, during all other times during a pending adjudication, the 5 elected Commissioners and assigned hearing examiners could have non-public, private communications with any one party and the other parties would not have any knowledge that that particular private communication occurred or what was discussed. This may subject the Commissioners and hearing examiners to more claims of bias and pre-judgment.

ADMINISTRATIVE IMPLICATIONS

If HB 497 is enacted into law, NMPRC Rule 1.2.3 NMAC would need to be revised to reflect the statutory amendment.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The definition of ex parte communication quoted above from NMPRC Rule on Ex Parte Communications, 1.2.3.7 NMAC will remain which is a ban upon communications between Commissioners/hearing examiners and parties at all times during a pending adjudication or after the record is closed in a rulemaking.

JM/sb