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FISCAL IMPACT REPORT

SPONSOR Trujillo, CP **ORIGINAL DATE** 02/07/14
LAST UPDATED 02/18/14 **HB** 356/aHHGIC
SHORT TITLE Rural Electric Co-Op Access Fees **SB** _____
ANALYST Clark

REVENUE (dollars in thousands)

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

(Parenthesis () Indicate Revenue Decreases)

Relates to HM 17 and SM 26

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Regulation Commission (PRC)
 Indian Affairs Department (IAD)

SUMMARY

Synopsis of HHGIC Amendment

The House Health, Government and Indian Affairs Committee amendment to House Bill 356 adds language to provide that nothing in Subsection H shall be interpreted to allow a cooperative to allocate local access fees to customers residing on private land within the exterior boundaries of an Indian nation, tribe, or pueblo.

The Indian Affairs Department (IAD) notes the amendment significantly limits which customers would pay the local access fees in a situation where Indian nations, tribes, and pueblos, require the electric distribution cooperatives to pay fees or trespass fines for access to power lines and other related utility facilities. Which customers would shoulder the local access fees would depend upon the customers' land status because the amended bill provides that nothing would *require* a cooperative to allocate local access fees to customers residing on private land within the exterior boundaries of an Indian nation, tribe, or pueblo. This would allow for a cooperative to allocate the local access fees exclusively to customers residing on non-private (tribal) land within the exterior boundaries of the nation, tribe, or pueblo, thus having the potential to adversely affect mainly tribal members. Typically, it is non-tribal members who own private land within the exterior boundaries of a reservation, and the amended bill implies non-tribal

members would not have to pay local access fees even though they would benefit from the access provided to the cooperatives by the tribal nations and from the services provided by the cooperatives. Furthermore, cooperative members living outside of the reservation boundaries also benefit from the access provided to the cooperatives by the tribal nations, and from the local access fees, in that more members equates to lower costs per member.

Synopsis of Original Bill

House Bill 356 amends Section 62-15-3 NMSA 1978 of the Rural Electric Cooperative Act to perform three functions:

1. clarify that nothing in the Rural Electric Cooperative Act shall be interpreted to require a cooperative to provide service to any customer within the jurisdiction of a governmental entity, including an Indian nation, tribe, or pueblo, if the provision of that service would result in the cooperative being in violation of the laws of the governmental entity;
2. clarify that nothing in the subsection relating to cooperatives' infrastructure and facilities shall be interpreted to allow a cooperative to pay an access fee or trespass fine to a governmental entity, including an Indian nation, tribe, or pueblo, for utility access to, on, over, or under lands within that jurisdiction if that fee or fine is above the prevailing market value for comparable easements; and
3. make minor grammatical corrections.

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.

However, the Public Regulation Commission (PRC) reports any limitation on a cooperative's obligation to serve its customers may interfere with the rights of its members to electric service. Also, cooperatives meet the definition of a "public utility" under the Public Utility Act, Section 62-3-3 NMSA 1978 et seq., and such a limitation could conflict with the cooperative's obligation to obtain PRC approval before it abandons service rendered by all or any portion of its facilities.

PRC also notes a state law limitation on the amount that cooperatives may pay for rights of way (ROWs) or access to the lands of Indian nations, tribes, or pueblos for its electric facilities may be pre-empted by or otherwise conflict with 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." See, e.g., 25 U.S.C. §§ 322-328; 25 C.F.R. Part 169.

The Indian Affairs Department (IAD) reports one of its primary concerns with the amended language is the limit to whom the cooperative can provide service within the jurisdiction of a governmental entity, tribes included, if service would result in a violation of that jurisdiction's laws. Tribal members at Ohkay Owingeh Pueblo or San Ildefonso Pueblo will be affected, if for instance, the pueblo and the electric cooperative cannot enter into an agreement both agree upon, and the electric cooperative still provides service to tribal members and thus ends up being charged with a civil trespass in tribal court. The tribal members will lose the ability to receive service from this particular electric cooperative if this bill is enacted, because the affected cooperative would not have to provide service to the jurisdictional areas that may impose a fine on the cooperative based on the jurisdiction's sovereign authority to do so. The tribal members will be adversely affected.

IAD also notes concerns regarding the amended language for Section 62-15-3(H), which states the electric cooperative does not have to pay an access fee or a trespass fee to a governmental entity, tribes included, if that fine or fee is above the prevailing market value for comparable easements. This language severely limits what tribes, nations, and pueblos can, under their sovereign authority, charge for an access fee or a trespass fine. **If this bill is enacted, it will be violating a key U. S. Supreme Court case.** In *Williams v. Lee*, a non-Indian merchant sought to sue an Indian couple to collect a debt incurred at a reservation store. The court based its decision that the state court lacked jurisdiction on a finding that “the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe the right of the Indians to govern themselves.” The court made it clear that its reference to self-government meant Indian governance of all people within the reservation, explaining that it was “immaterial that the respondent [was] not an Indian” because the issue is “the authority of Indian governments over their reservations.”

RELATIONSHIP

This bill relates to the subject matter addressed in HM 17 and SM 26.

OTHER SUBSTANTIVE ISSUES

IAD provides the following background information in its analysis.

At the August 19, 2013 interim Indian Affairs Committee (IAC) meeting, Ohkay Owingeh Pueblo Governor Marcelino Aguino and the pueblo's attorney presented an update on the Jemez Mountain Electric Cooperative (JMEC) service area issue. The pueblo negotiated a ROW agreement with JMEC in which Ohkay Owingeh agreed to consolidate all of its rights of way for the cooperative's facilities for a term of 25 years. To minimize the impact on consumers, Ohkay Owingeh agreed to spread payment for the rights of way over the 25-year period. In return, the cooperative agreed to pay Ohkay Owingeh an average of \$450 thousand annually for the rights of way for 25 years for transmission, distribution, and substation rights of way used by the cooperative within Ohkay Owingeh's boundaries. As a result of settlement discussions, a stipulation was negotiated that allocated rights of way costs attributed to transmission and other facilities benefiting the entire system to all ratepayers; rights of way costs attributed to distribution facilities benefiting local customers within Ohkay Owingeh's boundaries would be paid by those local customers.

Ohkay Owingeh provides services to more than 6,700 people living within the exterior boundaries of Ohkay Owingeh; of these, approximately 16 percent are pueblo members. Funds generated from the ROW fees are deposited into Ohkay Owingeh's general fund. A portion of the pueblo's general fund is used to fund governmental services, including: economic development; health and wellness services and facilities; irrigation, water, and wastewater infrastructure; solid waste services; wellness center and senior center programs; a public library and educational and professional development programs; summer youth programs; after-school services; flood protection; transportation infrastructure and free shuttle services; and public safety, including responding to calls from pueblo members and non-pueblo members alike.

JMEC's 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.

JC/ds