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FISCAL IMPACT REPORT

ORIGINAL DATE 1/25/16

SPONSOR HGEIC LAST UPDATED 2/5/16 HJR 8 & 18/HGEIC

SHORT TITLE Appointment of PRC Members, CA SB _____

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

Conflicts with SJR 7

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Regulation Commission (PRC)

Attorney General's Office (AGO)

Secretary of State (SOS)

SUMMARY

Synopsis of Bill

The House Government, Elections and Indian Affairs Committee Substitute for House Joint Resolutions 8 and 18 (the "Substitute") calls for a constitutional amendment to replace the five-member *elected* PRC with a five-member *appointed* PRC. Unlike HJR08, the Substitute would not set specific qualifications for commissioners, except that they be New Mexico residents. Like HJR8 and HJR18, the Substitute would retain the current constitutional provision for additional commissioner qualifications to be determined by the Legislature. Like HJR08 and HJR18, the Substitute uses the permissive "may" instead of the mandatory "shall," (which is in the current constitutional provision) to describe the Legislature's role in determining qualifications.

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 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,

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

Like HJR8 and HJR18, the Substitute would add a requirement that no more than three commissioners may be members of the same political party at the time of their appointment. Like HJR8 and HJR18, the Substitute would also provide for appointments to fill any vacancy for the remainder of a commissioner's term.

Like HJR8 and HJR18, the Substitute 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 Substitute, and like HJR8 and HJR18, this limitation would apply only to members of the commission, not to candidates for the commission.

Like HJR8 and HJR18, the Substitute 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.

Like HJR8 and HJR18, the Substitute would add 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.

Like HJR8 and HJR18, the Substitute would be implemented by referendum or on the ballot at the next general election.

Like HJR8, but unlike HJR18, the Substitute would require "the advice and consent of the Senate" for the governor's appointments.

Unlike both HJR8 and HJR18, the Substitute would require that the governor's appointments be made "from a list of three potential appointees submitted to the governor by the New Mexico Legislative Council." This process would replace the "nominating committee" provided for in HJR18.

The Substitute also differs from HJR18 in that the Substitute does not include the requirement that the governor "shall ensure, to the greatest extent practicable, that members represent the ethnic diversity of the state." The Substitute also differs from HJR18 in that the Substitute does not include requirements with regard to the designation of commissioners by congressional district during the transition period from elected to appointed commissioners.

The Substitute departs from HJR8 and HJR18 in deleting the description of the commission as a "full-time" commission. The Substitute is consistent with the current constitutional provision in this regard.

The Substitute also departs from HJR8 and HJR18 in requiring that the Commissioners be appointed from "districts provided by law." This is consistent with the current constitutional provision insofar as commissioners are currently elected from "districts provided by law."

The Substitute would be implemented 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 10 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.

Currently, PRC contributes \$200 thousand annually to the public election fund for use by PRC candidates, and this statutory provision should be revisited if voters approve the proposed constitutional amendment.

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.

While the joint resolution requires that commissioners be residents of the state, it does not specifically require that commissioners reside in the districts from which they are appointed. Nor does it specifically require that the legislative council only recommend appointees who reside in the district for which they are recommended to represent. Currently, the question of residence within the district is addressed by NMSA 1978, Section 8-7-3 (1998). However, by its own terms that section only applies to elected commissioners.

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.

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.

CONFLICT

This joint resolution conflicts with Senate Joint Resolution 7, which also would transition the commission from elected to appointed members but contains conflicting provisions.

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.

JC/jle/al