



# **Evaluation of Public Regulation Commission Staffing and Budget Allocation**

A Report to the  
New Mexico Legislative Council Service  
Santa Fe, New Mexico

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- The energy advisor to the chairman of the Pennsylvania Public Utility Commission;
- The director of Integrated Resource Planning in the Maryland Public Service Commission; and,
- The regulatory policy administrator in the Delaware Public Service Commission.

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## Executive Summary

### Scope of study

This report focuses on the technical staff of the New Mexico Public Regulation Commission (PRC or Commission). Technical staff includes accountants, economists, engineers, financial analysts and public policy experts. They form an essential role in assisting commissioners to make well-formed decisions that are in the public interest.

Specifically, this report examines the capability of the staff to perform this role. It does this by comparing PRC staffing practices with other state utility commissions and “best practices.” This report applies the authors’ experience and expertise in working for state utility commissions, either as staff personnel or National Regulatory Research Institute (NRRI) employees. A major source for this report comes from NRRI interviews with several stakeholders, along with present and past PRC employees over the period September-November 2016.

### Attributes of good public-utility regulation

This report begins by identifying several traits of good (or “best practice”) regulation. These traits represent benchmarks for evaluating those PRC activities that fall within the scope of this report. *Most fundamental, good regulation makes well-informed decisions directed at the public interest.* This involves, among other things, decisions that reflect justice for all parties. Specifically, good regulation weighs legitimate interests and makes decisions based on facts. Regulators’ decisions do not unduly favor any one interest group over the public interest. They should be supported by law and evidentiary record. Well-informed decisions mean staff and other parties deliver evidence that allows commissioners to evaluate the positions of various stakeholders in terms of the public interest.

Directly pertinent to this report, good regulation requires capable staff personnel, information and financial resources. Their absences can jeopardize a regulatory agency’s ability to fulfill its obligation. A regulatory agency where commissioners are unable to make well-informed decisions will less likely serve the public interest, and are more apt to advance the interest of a narrow group with political clout.

Good regulation also avoids excessive politicization, which weakens regulation as an institution and instrument of public policy. Politically expedient decisions tend to undermine the agency’s commitment to promoting the long-term interest of the state.

The main job of technical staff, which again is the focus of this study, is to assist commissioners in making well-informed decisions. Staff expects commissioners to base decisions on the facts of record and in accordance with the public interest as determined by applicable law. Commissioners in turn expect staff to be technically competent and provide them with balanced information.

There are inherent tensions between staff and commissioners: Commissioners make decisions that may not coincide with staff recommendations; each should not expect captive loyalty from the other. Staff should not have to endure political pressures that commissioners may exercise.

Overall, both staff and commissioners should share the common goal of serving the general public and respect for each other. Staff can either make a recommendation to the commissioners or provide a range of options aligned with facts of record. Commission managers, such as the chief of staff, are crucial for overseeing the day-to-day operations of the agency and for insulating the technical staff from politics. Probably the most daunting challenge for managers is to secure adequate financial resources and employ them effectively. Commission managers also serve the critical function of bolstering staff capability with opportunities for professional development, mentorship, and team building.

### **Challenges facing the PRC**

This report makes several observations and suggested actions. Readers should consider them as tentative, in that a more thorough investigation would heighten the surety of the identified problems and the validity of the suggestions.

By design, this report has a negative tone in identifying problems that seem to obstruct the capability of the PRC to carry out its mission to serve the public interest. The reader should not interpret this report as weighing the positives and negatives of the Commission in determining an overall “rating” of its performance. The specific intent is to find ways for the Commission to best exploit its technical staff in the name of the public interest.

We observe that some of the challenges that the PRC face are common across state utility commissions but others seem beyond the norm. Along with many commissions around the country, the PRC faces increasing demands – for example, from the Legislature, stakeholders – and shrinking resources. This death-spiral-type condition, in our opinion, has seriously jeopardized the capability of the PRC to protect the public interest. The reality is that a reduction in PRC expenditures rarely means a commensurate decline in workload. Frequently, a state utility commission has to undertake more tasks with less money, a situation that can spiral into a situation where the commission is unable to adequately address the issues brought before it.

We discuss a wide array of challenges that the PRC faces. We base our findings on the combination of (1) comments made by interviewees, (2) our observations of the PRC and other state utility commissions, and (3) our experiences working for commissions either as staff personnel or NRRI employees.

We identify a particularly serious situation in the form of an apparent absence of PRC professional staff development and continued education. This problem has become more acute as the utility industries are undergoing dramatic changes because of the confluence of market, technological and public policy developments. In this new environment, it becomes vital for staff to keep abreast of these new developments as they affect the practices and policies of the

PRC that are most beneficial to New Mexicans. Just like utilities have to transform when prevailing conditions change, regulatory agencies must also.

Another area of concern is the PRC currently having several unfunded technical positions, some of which are critical, for example, an electrical engineer. A problem recognized by many interviewees was the difficulty of the PRC to hire new staff and retain current staff. Not only are low salaries a problem, many interviewees pointed to the bad reputation of the PRC that magnifies the obstacle to hiring new staff.

This report uncovers other concerns for the PRC that make its duty to serve the public interest challenging. Some of them may require additional monies while others may be addressed through better use of existing staff resources.

### **Suggested actions**

A major suggestion of this report is for the PRC to add technical staff both to advise the commissioners and to act as public-interest advocates. Advisory staff provides education, advice and technical support (legal, engineering, financial, economic and policy) to the commissioners. They can be a group of technical experts assigned to commissioners as a whole; or they may be part of a commissioner's personal staff. Advocacy staff performs the critical function of representing the general public, for example in docketed proceedings such as rate cases. They serve the commissioners by providing a reference point for judging the positions of interest groups like utilities, consumer advocates, and environmentalists.

A second major suggestion is to have the Legislature demand a comprehensive audit of the PRC. We observe that PRC resources may not be keeping abreast of changing developments in the utility industries. An audit could also investigate, with more surety, whether these problems identified in this report actually exist and pose a serious obstacle for the PRC in carrying out its mission to serve the public interest.

Other suggested actions include:

1. Staff mentoring of new employees;
2. Staggering the work load of technical staff, especially within the Utility Division;
3. Improved regulatory "culture" and teamwork;
4. Consideration of a changing role between chief of staff and commissioners;
5. Better staff allocation; and,
6. PRC retention of utility fees and assessments.

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## I. Purpose of Report

This report focuses on the technical staff of the New Mexico Public Regulation Commission (PRC).<sup>1</sup> Specifically, it covers four areas: technical-staff size, staff allocation, staff competence and expertise, and the work environment for staff. It excludes evaluating the commissioners themselves, other than their actions and policies that affect the performance of technical staff.

A major objective is to examine the capability of the technical staff to assist the commissioners in making decisions and executing other duties directed at serving the public interest.<sup>2</sup> This report does this by comparing PRC staffing practices with other state utility commissions around the country and with “best practices.” It also applies the authors’ experience and expertise in working for state utility commissions, either as staff personnel or NRRI employees.

The outcome of this study has three potential benefits. First, it suggests specific actions for improving the PRC’s performance in serving the general public. Second, by revealing PRC-related problems and their sources, its findings should hold the agency more accountable to the general public, stakeholders and other parties.<sup>3</sup> Third, this study identifies areas where the PRC appears to be falling short of expectations from the perspective of the general public, stakeholders, the Legislature and other entities.

The authors cannot overemphasize the importance of this study for New Mexico. The PRC’s job is vital, as it decides on major infrastructures contributing to the state’s economic growth. Good regulation benefits the public interest, which encompasses primarily the state’s economy, utility ratepayers and shareholders. It represents a “profitable” investment for any state that strives to enhance the well-being of its citizens. While adequate resources do not guarantee good regulation, in their absence good regulation becomes improbable.

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<sup>1</sup> *Article XI, Section 1* of the New Mexico Constitution created the Public Regulation Commission by consolidating the former State Corporation Commission and Public Utility Commission.

<sup>2</sup> Technical staff includes economists, engineers, accountants, financial analysts, and public policy experts.

<sup>3</sup> Accountability requires a commission to justify its actions to (a) stakeholders in rate cases, utility planning, rulemaking and other proceedings, (b) citizens in general, (c) the legislature, (d) the judicial system, (e) the financial markets, and (f) others. Accountability should improve the performance of commissions, since their performance would be publicly reviewed and exposed to criticism.



## II. Methodology of Study

We interviewed different stakeholders, along with present and past PRC employees over the period September-November 2016.<sup>4</sup> We also examined the practices and organizations of other state utility commissions. Finally, we apply our experiences, observations and expertise to review the technical-staff situation at the PRC.

Unlike a detailed audit, we are unable to draw definite conclusions about the challenges and problems that the PRC faces. Instead, the reader should interpret our findings as tentative, or “red flags”, and our recommendations as suggested actions. We believe, however, our findings warrant further review by the PRC and other state entities concerned with the performance of utility regulation in carrying out its duties to the citizens of New Mexico.

## III. The Scourges of Regulation

The three mortal sins of regulation are *ideology, ignorance, and inertia*. Basing policies on political leanings, inadequate information and past conditions that no longer exist is a sure bet for failure.

In the extreme case where the PRC performance is dismal, the term “regulatory failure” is an accurate description of its performance. Such performance can stem from either inappropriate actions or unreasonable inactions. Taking a *laissez faire* position on an issue that requires regulatory intervention illustrates the latter problem. Inappropriate actions can stem from poor information or intentional neglect by the PRC to serve the general public rather than narrow interests. Using a rough-and-ready standard, regulatory failure would then be the sum of actions and failures to act which lead to a less-than-desirable outcome; or, more precisely, a performance that falls short of advancing the public interest.

The primary question posed in this report is: Is the PRC afflicted by one or more of these “sins”? If it is, what are their origins, especially as they relate to the inability of the technical staff to do its job in serving the public interest?

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<sup>4</sup> Interviewees sometimes offered their opinions on the PRC that fell outside the scope of this study. We were somewhat surprised by the openness of many interviewees in articulating their perspectives on the challenges that the PRC faces. The reader can obtain the major comments of anonymous interviewees from the authors.

## IV. Features of “Best Practice” Regulation

This section identifies “best practices” of state utility commissions in regulating public utilities. Our observations come from a combination of knowledge of those agencies, generally acceptable principles for the operation of well-functioning governmental agencies, and the essential attributes for these agencies to serve the general public. While the criteria for determining “best practices” cannot avoid subjective impressions, there are objective metrics that can distinguish between well-performing and poor-performing agencies. One example is the establishment of just and reasonable rates that allow a prudent utility to be financially healthy and able to obtain funds for capital projects without paying a high risk premium. The emphasis, in line with the major topic of this report, is on the capability of the technical staff to assist the commissioners in their duties.

### A. Balancing legitimate interests

As its fundamental duty, “best practice” regulation (hereafter “good regulation”) makes well-informed decisions driven toward the public interest.<sup>5</sup> It strives for balance and justice. Specifically, good regulation weighs legitimate interests and makes decisions based on facts. Its decisions do not unduly favor any one interest group over the public interest. They should coincide with the law and the evidentiary record.

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<sup>5</sup> While the public interest is subject to different interpretation, most regulators over time have defined it in terms of *just and reasonable rates*. State utility regulators generally associate such rates to satisfy the following five conditions: (a) compatible with the costs of an efficient and prudent utility; (b) reflective of the cost of serving different customers and providing different services; (c) avoidance of undue price discrimination; (d) fairness among customer groups, and between utility shareholders and customers; and (e) reasonable opportunity for a prudent utility to receive sufficient revenues to cover its cost of capital so as to attract new capital and enjoy good financial health.

A different perception of the public interest is the composite indicator of the public well-being that “adds up” the individual effects of a regulatory decision on stakeholders’ and other societal interests. A third perception relates the public interest to the stakeholders’ collective consent to a regulatory action.

The central premise in any definition of the public interest is that the aggregate interest of society overrides the well-being of special interest groups. Major obstacles in regulatory decisions are making the various regulatory objectives comparable (e.g., measured in dollars) and scaling up individual objectives to arrive at a “public interest” metric. Because of this impracticability, the ultimate decision of whether one action advances the public interest more than another action comes down to non-qualitative factors or judgment.

Good regulation also avoids excessive politicization<sup>6</sup> and influence by any one interest group<sup>7</sup>, actions which weaken regulation as an institution and instrument of public policy. Politically expedient decisions tend to undermine the agency's commitment to promoting the long-term interest of the state.

Each stakeholder group, as expected, promotes positions and makes arguments that it regards as economically or otherwise beneficial to itself. The regulator's job is to sift these arguments in identifying those that arise only from self-interest, and in discerning those arguments that arise from self-interest but promote the public interest.<sup>8</sup> For example, any regulatory assessment on rate mechanisms is complex, requiring a combination of analytics, unbiased information, and judgment by regulators to make decisions that are best for the public good.

In today's environment, balancing involves the recognition of (1) utility competitors wanting a "level playing field," (2) many customers no longer wanting just plain vanilla service (e.g., lower prices and reliable service) but wanting such things as more control over their utility bill, the ability to self-generate and real-time information from their utility, (3) utilities wanting rates that allow them to be financially healthy, and (4) environmentalists wanting clean energy and energy efficiency.

Trying to accommodate these varied and somewhat conflicting objectives poses a daunting challenge for regulators – certainly much more than in the past when fewer stakeholders appeared before regulators in contested proceedings. Through their history, regulators have emphasized (at least on paper if not always in practice) the longer-term consequences of their actions, rather than trying to appease the immediate demands of stakeholders and others.

## **B. Trust and independence**

A respectable regulatory agency will earn the trust of the general public and the various interest groups that come before it. As perhaps their biggest challenge, regulatory agencies have

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<sup>6</sup> Of course regulation cannot totally remove itself from politics, as its decisions affect the well-being of different groups, including the different classes of consumers, utility shareholders and other stakeholders.

<sup>7</sup> While individual interests have legitimacy, the regulator must consider all the interests collectively to make decisions that advance the public good. By providing useful information from a single perspective, interest groups make an important contribution to good regulatory decisions.

<sup>8</sup> The last condition might include a utility proposing a modification of rate design to avoid serious financial problems. The regulator can conclude that even though the proposal would directly benefit the utility and its shareholders, it would prevent the utility from suffering a higher cost of capital or from difficulty in attracting funds for new investments that would benefit its customers in the long run. Advancing the utility's interest, in this example, can promote the public good by avoiding a zero-sum outcome.

the obligation to make decisions on behalf of the public interest, notwithstanding the decisions' unpopularity and political resistance, even decisions at odds with expressed public preferences.

Mutual trust, perhaps more than anything, requires credibility or integrity. One outcome is an agency responsive to the requests, concerns, and complaints of the various players. Integrity must start at the top with the commissioners and penetrate throughout the agency, with a commitment to the public good, which after all is the social obligation of the agency.

Independence is essential for allowing an agency to protect the general public in the face of strong economic and political pressures. Jeopardy of a commission's independence can originate from different parties: Utilities; the executive branch of state government; the state legislature; special interest groups; and the judicial branch.<sup>9</sup>

Independence is constrained, however, partly by law and because a regulatory agency must be held responsible to the public for its actions. To say differently, good government requires that an agency is held accountable when it makes decisions that affect the general public.

### C. **Effective internal communications**

An important attribute for a regulatory agency, which is particularly germane to this study, is *effective communications within the agency*. Communications refer to the flow of information (1) among commissioners (open/closed meetings), (2) from commissioners to staff (via chief of staff, directly to lower staff), and (3) from staff to commissioners (advice, testimony, memos, reports).

### D. **Optimal agency efficiency**

Agency efficiency is another crucial feature of good regulation. First, it helps to minimize the waste of resources, say, from excessive delay of agency decisions. Second, public utilities and other stakeholders should not have to expend unusually large amounts of money and management resources on litigation and inordinate regulatory procedural requirements.<sup>10</sup> Wasted resources by public utilities will drive up their costs and, ultimately, prices to customers. The reduction of "excessive" regulatory costs is a real economic benefit.

While agency efficiency is commensurate with good regulation, overemphasizing it can lead to inadequate regulatory oversight and generally lax regulation. Utilities may then be able to pass through imprudent costs to their customers and other actions that harm customers to the

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<sup>9</sup> One real-world condition for independence is the inability of the governor or legislature to remove a commissioner unless she is guilty of gross inefficiency, neglecting her duties or violating the law.

<sup>10</sup> One idea is to create a streamlined process for handling routine regulatory cases that come before the commission. Other ideas include the commission encouraging settlement of cases and use of an external mediation approach. Involving commissioners earlier in dockets to define scope and limit the issues can also reduce regulatory costs.

benefit of utilities. A challenge for regulatory agencies is to make sure that efficiency does not interfere with its effectiveness.

### E. Meaningful metrics for agency performance

No single metric and set of criteria, with surety, can measure or evaluate the overall performance of a regulatory agency. Still there are metrics that evaluators can apply to “red flag” problems that warrant further review.<sup>11</sup> They relate to:

1. Utility financial health;<sup>12</sup>
2. Rates;
3. Utility safety, reliability and service quality;
4. Overall customer service;
5. Attainment of state public-policy objectives;<sup>13</sup>
6. Utility adoption of new technologies and other innovations;<sup>14</sup>
7. Avoidance of overt “failure” (e.g., violations of *ex parte* rules, frequent judicial overturn of commission decisions, unresponsive to customer complaints); and,
8. Regulatory agency organization and actions compared with “best practices.”

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<sup>11</sup> Many of the following metrics directly measure utility performance, rather than the output of the regulatory agency. Latter metrics would include such things as the number of orders issued, the number of rate cases heard, and the number of dockets completed. After all, regulation has an obligation to induce high-quality utility performance, whether it is customer service, physical operation of the utility system, service reliability, cost controls, or the adoption of new technologies. The economics literature shows that public utilities left unregulated, or regulated ineffectively, would perform poorly. They would set prices too high, price discriminate among customers, provide an inferior quality of service, deploy a suboptimal mix of inputs, and devote deficient effort to control costs and innovate. Whether and to what extent regulation prevents or mitigates these perverse outcomes is subject to debate. Good regulation, as perceived in this report, should at least improve the state of affairs over bad regulation or no regulation.

<sup>12</sup> The oft-cited “regulatory compact” connotes an implied agreement between the utility and the regulator: The utility will provide affordable, reasonable cost, reliable and universal service in exchange for the exclusive right to serve customers in a geographic territory at an authorized rate of return. In other words, if the utility meets its side of the compact, the regulator should assure its financial health. The latter outcome makes it possible for the utility to invest in physical assets that improve the long-term welfare of customers.

<sup>13</sup> Some regulatory observers contend that the job of the state legislature is to create policies and the regulator’s job is to implement them.

<sup>14</sup> New technologies in the electric industry include solar, wind and other renewable energy resources, storage, the smart grid and electric vehicles. Not all of these technologies are economical presently and will require further technical improvements or changing economic conditions, which may be several years down the road, before they are. Some enjoy large tax subsidies with uncertain futures. The benefit-cost performance of these technologies will also vary by state. In certain states, some of these technologies will fail to pass muster, both politically and economically.

Overall, performance metrics can play an important, even if only a subordinate, role in evaluating a regulatory agency. By themselves, they lack the capability to assess the agency's overall performance. They can, however, supplement other information to assist the legislature and others in assuring that the agency is meeting its duty to serve the public interest.

#### **F. Adaptability to new conditions**

State legislatures have allowed utility commissions broad authority to achieve the principal goals of "public convenience and necessity," "public interest," and "just and reasonable rates."<sup>15</sup> In most states, the legislature's role is to provide broad guidance to regulators, who then establish specific rules, policies and procedures to achieve the legislature's objectives. A commission can then adapt its practices to fulfill its obligations in a dynamic world of changing utility industries, economics, and public policy.<sup>16</sup>

Any successful institution in challenging times must be open to new ideas and new practices. Otherwise, besides being anachronistic, the institution loses the ability to achieve its goals, which for regulatory agencies is to serve the public interest.

Prudent regulators must therefore evaluate their existing practices, including ratemaking and the scope of utility functions, in a transformed utility environment. Regulatory errors originate from practices that assume a certain state of affairs rather than what actually transpired. In other words, a mismatch exists between practices and actual conditions. For example, average cost pricing might clash with the desires of engaged customers to control their utility bills with time-varying rates. Another example is old interconnection and other rules unduly restricting customers who want to self-generate because of changed economics or other reasons.

With utility-industry transformation, utility customers can suffer losses from wrongly applied regulatory practices. These practices might relate to the regulators' preference for a particular utility business model, ratemaking method, and financial incentives for clean technologies.

#### **G. Respectful commissioner-staff interaction**

Good regulation requires a relation between commissioners and staff that involves the following five conditions:

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<sup>15</sup> For conditions required for just and reasonable rates, *see* footnote 5. Compatible with the just and reasonable criterion along with the broad public-interest duties of public utility commissions (PUCs), the PUCs strive for the lowest possible cost of service for consumers within a set of constraints, like reliability, financial health of the utility and public-policy mandates.

<sup>16</sup> State utility commissions over the past several years have adapted their practices and policies to these as well as other changing conditions. They include: (a) creating a new mission statement, (b) building new legislative relationships, (c) re-shifting emphasis toward consumer affairs, (d) reorganizing their internal structure, (e) imposing "sunshine restrictions", and (d) evaluating their performance.

1. Respect for each other (each recognizes the role that the other plays);
2. Frequent communications (under appropriate circumstances);
3. Commissioners supporting staff's independence in litigation and rulemaking proceedings (but can disagree with staff);<sup>17</sup>
4. Commissioners not dictating or pressuring staff to take certain positions on key (e.g., politically charged) issues; pressure can be tacit or overt; and,
5. Commissioners not overly influenced by staff (caused often by commissioners who are not knowledgeable on particular issues).

#### H. **Mission statement**

Like other entities, a regulatory agency should have a strong mission statement.<sup>18</sup> Just as a successful business is responsive to consumers, a successful regulatory agency is responsive to the general public; a strong sense of mission is important for crystallizing what the agency's personnel should be doing, and for motivating them to do their jobs well. It can embrace the agency's defining culture of independence and integrity while recognizing the importance of teamwork and workforce competence.

As another benefit, an agency with a strong mission statement will have an open and good relationship with legislators,<sup>19</sup> elected and appointed officials, and citizens. On the other hand, an agency with internal friction or lack of a common vision will often be defensive and have a bad relationship with outside parties.

Finally, a strong mission statement allows a regulatory agency to make decisions according to rules based on principles.<sup>20</sup> For public utilities and other interest groups, a strong mission statement reduces the uncertainty over future agency policies and practices. Similar to a coach's game plan, however, no matter how good, an agency still must well execute its mission statement, or else it has minimal effect. We observe that most utility regulatory agencies have perfectly acceptable mission statements and visions for the future, but many have deviated from

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<sup>17</sup> Commissioners may rightly criticize staff testimony in a docket if it conflicts with long-standing commission policy on a particular topic (e.g., rate design).

<sup>18</sup> The mission statement of the PRC is as follows:  
The New Mexico Public Regulation Commission (NMPRC) regulates the utilities, telecommunications, and motor carrier industries to ensure fair and reasonable rates, and to assure reasonable and adequate services to the public as provided by law. The NMPRC promotes public safety through the offices of State Fire Marshal, the Firefighter Training Academy, Pipeline Safety Bureau and Transportation Division (see NMPRC).

<sup>19</sup> Legislators affect an agency's policies, funding priorities, and the domain of its authority. They have a legitimate oversight function in both policy and fiscal matters. They may also request help in responding to constituents. It is therefore in the interest of an agency to have a good relationship with the legislature.

<sup>20</sup> A commission may use the mission statement to establish compatible goals and objectives that can guide resource allocation within each division and enhance its budget as a planning tool.

them in practice in recent years. One example is while many mission statements stress – implicitly, if not explicitly – the “balancing act” of regulation, their execution has been less than commendable, especially as politics have become a larger part of regulatory decision-making.

## V. Staff Responsibilities within a State Utility Commission

The main job of technical staff is to assist commissioners in making well-informed decisions directed at the public interest. Staff expects commissioners to base decisions on the facts of record and in accordance with the public interest as determined by applicable law. Commissioners in turn expect staff to be technically competent and provide them with balanced information.

There are inherent tensions between staff and commissioners: Commissioners make decisions that may conflict with staff recommendations; each should not expect captive loyalty from the other. Staff should also not have to endure political pressures from commissioners.

Both staff and commissioners should share the common goal of serving the general public. Staff can either make a recommendation to the commissioners or provide a range of options that are aligned with facts of record.

Commission managers<sup>21</sup> (e.g., chief of staff) are crucial for overseeing the day-to-day operations of the agency<sup>22</sup> and for insulating the technical staff from politics. Commission managers can also help staff by providing opportunities for professional development, mentorship, and team building. Probably the most daunting challenge for most commission managers is to secure adequate financial resources and allocate them effectively. Commission managers are also critical in bolstering staff capability with opportunities for professional development, mentorship, and team building.

### A. Advocacy versus advisory technical staff

Advocacy represents the interest of the public. It serves the vital function of countervailing the dominance of individual stakeholders (particularly utilities), presenting a

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<sup>21</sup> In some commissions, the chairman is the chief operating officer, giving that person more authority than the other commissioners. Over the past two or three decades, fewer chairmen assume this role, as supervision of the staff and operating activities shifted to the chief of staff or executive director. This shift helped to equalize each commissioner’s authority.

<sup>22</sup> Among her numerous tasks, a commission’s chief of staff or executive director may be responsible for fiscal administration. In some commissions, the executive director supervises the technical staff while another staff member, sometimes called an executive secretary, handles the administrative matters. In Minnesota, for example, the executive secretary reports to the commission chair and oversees the agency’s finances and operational duties.



public-interest perspective, and helping to create a balanced record for the commissioners. In some jurisdictions, the advocacy staff is independent of the commissioners. Below are some examples:

In North Carolina, the Public Staff is an independent agency charged with reviewing, investigating, and making recommendations to the North Carolina Utilities Commission about “the reasonableness of rates charged and adequacy of service provided by any public utility and with respect to the consistency with the public policy of assuring an energy supply adequate to protect the public health and safety. The Public Staff intervenes on behalf of the using and consuming public in all Commission proceedings affecting rates or service.”<sup>23</sup>

In South Carolina, the Office of Regulatory Staff (ORS) functions as an advocate in addition to administering the state’s telecommunications programs, ensuring utility compliance with Public Service Commission orders, and handling consumer complaints against utilities. Violations of *ex parte* communications between regulated utilities and members of the Public Service Commission led in 1994 to the creation of ORS as a separate state agency.<sup>24</sup>

In Minnesota, the Division of Energy Resources within the state’s Department of Commerce advocates on behalf of the public interest in regulated utility matters. The staff of the Public Utilities Commission acts as advisors by reviewing and preparing decision-option briefs for commissioners in rates cases relating to electricity and natural gas, as well as for all certificate of need applications and siting permits.<sup>25</sup>

In Utah, the state legislature felt that advocacy staff of the public interest should reside outside the Public Service Commission. This supposedly would help advocacy staff to avoid *ex parte* communications by working for a separate agency, the Division of Public Utilities within the Department of Commerce. The Division’s staff consists of accountants, engineers, and economists who execute and enforce the orders of the Commission, as well as monitoring the activities of the state’s public utilities. The Commissioners have access to a small staff of advisors (five persons) to help them in proceedings by interpreting information presented by parties, writing orders, and establishing rules.<sup>26</sup>

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<sup>23</sup> See North Carolina Public Staff.

<sup>24</sup> Ellerbe.

<sup>25</sup> See Minnesota Management Analysis & Development.

<sup>26</sup> See Utah Public Service Commission.

As articulated by a legislative group:

One argument in favor of splitting a public service commission is to help address the issue of *ex parte* communications. With a split agency, commissioners would have their own staff and would be less likely to discuss cases with staff located in another agency. Another argument is that a separate structure helps to provide objective information. Finally, a separate agency would be better able to appeal the commissioners' decisions.<sup>27</sup>

Ideally, advocacy staff arrives independently (i.e., without outside and inside pressures) at positions that are compatible with the public interest.

Advisory's role is to assist the commissioners by providing education, advice and technical support (engineering, financial, economic and public policy). The advisory staff can consist of a group of people assigned to commissioners as a whole, or may be part of each commissioner's personal staff. Part of their job typically is to survey the entire record, present the positions of individual parties, and brief commissioners on the case.

In sum, two staffs effectively coexist but perform distinct functions:

- Advocacy staff creates a record at the hearing giving the commissioners an evidentiary basis for making decisions; and,
- Advisory staff assists and advises the commissioners in making final decisions.

Each shares the common goal of making commissioners better informed in their decision-making to serve the public interest.

Some commissions designate those staff persons in a particular case as either commission advisors or staff advocates. This means that a single staff person can wear the hat of an advisor or advocate, depending on her designation in a particular case. Commission advisors are able to brief the adjudicators (commissioners, hearing examiners or administrative law judges) on substantive topics of the case, but not with the other parties. Staff advocates are free to discuss these topics with the other parties but not with the adjudicators

One important distinction is that:

- Advocacy staff delivers information to the commissioners by way of written testimony subject to cross-examination; and,
- Advisory staff writes memos for direct dissemination to the commissioners or orally communicates with the commissioners.

We believe that, as public-policy issues become more important, the demand for advisory staff will likely grow while the demand for advocacy staff will decrease.

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<sup>27</sup> South Carolina Legislative Audit Council, 14.

## **B. Attributes of competent technical staff**

Competent technical staff must be highly motivated, dedicated, objective, and committed to the public interest, as well as technically skilled. These qualities cannot be taken for granted, as they require the combination of the right work environment, staff personnel and other conditions.

## **C. Professional categories**

For many regulatory observers, commission lawyers assume the most important staff functions; for example, they:

1. Represent the trial staff at the agency's hearing;
2. Preside over cases (e.g., hearing examiner or administrative law judge) and make recommended decisions (which include findings of facts and conclusions of law);
3. Advise commissioners of final decisions; and
4. Defend commission decisions in the courts.

Consequently, many agencies employ lawyers across different divisions. The PRC, for example, have lawyers in the Legal Division, the Office of General Counsel, and as hearing examiners. The latter two groups report directly to the commissioners, while the Legal Division is under the supervision of the chief of staff.

The following typically comprises the technical staff of a regulatory agency:

1. Economists/financial analysts
2. Engineers
3. Accountants
4. Public policy experts

Economists can, for example, testify as public-interest advocates, offer advice to the commissioners, conduct studies and research, and educate and train other staff and commissioners.

Technical staff plays a vital role by being in the "trenches" to review and evaluate the diverse positions of the parties in a docketed case. They require specialized expertise in dealing with complex issues that often have no clear resolution; that is, many complex issues lie in a "gray area" where regulators must struggle to reach the right decision.

Most technical staff fall under civil service; exempt staff are normally restricted to senior staff, advisors and managers.<sup>28</sup> Civil service provides more job security but typically also have more binding constraints for career advancements and salary increases.<sup>29</sup>

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<sup>28</sup> Most states have a centralized personnel system that administers civil service employment. Often, these systems may administer employment exams, maintain merit lists of eligible candidates, and

## VI. Comparison of the PRC with Other State Utility Commissions

We attempt to compare a few characteristics of the PRC with other state utility commissions. The purpose is to give a rough overview of where New Mexico stands relative to other states. This information may help explain some of the comments received from our interviews with current and former commissioners, current and former PRC staff, and other stakeholders who appear before the PRC.<sup>30</sup>

### A. Caution in comparative analysis

Any analysis should exercise caution in using statistics to compare state utility commissions. One thing we observe is that a commission's budget (number of employees) per capita seems to be inversely related to the population of a state. In other words there exist economies of population in that a portion of a commission's expenditures (number of employees) is fixed irrespective of how many utilities it regulates or the size of the utilities. A low-population state like New Mexico would tend to have a higher budget per capita, assuming other things the same, than a state like New Jersey or Connecticut.

Another reason for caution is that commissions do not have all the same functions. Prior to 2014, the PRC regulated insurance and chartered corporation, which are rare for state utility commissions. Together these functions required about 109 full-time equivalents.

Even today, the PRC is unique in housing the State Fire Marshal's Office, which employees about 34 full-time equivalents or about one-fourth of the PRC's total number of employees. The Office oversees arson investigations and fire code enforcement, provides fire service support, and administers firefighter training at New Mexico's Fire Training Academy. Any budget or staffing comparison of the PRC with other state commissions must therefore adjust for this singular responsibility of the PRC.

Some states also do not have public advocates. They may work for other state agencies.<sup>31</sup> In Utah, for example, the Department of Commerce hosts the advocacy staff. The Public Service

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manage other matters, such as benefits administration, labor agreements, equal employment opportunity, and affirmative action.

<sup>29</sup> Most states have civil service laws, rules and regulations governing employment of workers. Within the confines of those laws, rules or regulations, commissions may have some discretion in developing their own employment policies and employee manuals.

<sup>30</sup> See Institute of Public Utilities and the web pages of Arizona Corporation Commission, Colorado Public Utilities Commission, Florida Public Service Commission, Illinois Commerce Commission, Iowa Utilities Board, Nevada Public Utilities Commission, Oklahoma Corporation Commission, Washington Utilities and Transportation Commission, and West Virginia Public Service Commission.

<sup>31</sup> See Section V(A).

Commission has a staff of only 13, with five acting as technical advisors to the three commissioners.

## B. Brief background of the PRC

The New Mexico Constitution created the PRC in 1996 from the consolidation of the former State Corporation Commission (SCC) and the Public Utility Commission (PUC). Elections selected the SCC commissioners while the governor appointed the three PUC commissioners. Elections select the five PRC commissioners by district to staggered four-year terms. Commissioners cannot serve more than two consecutive terms.

The mission of the PRC is:

[To] regulate the utilities, telecommunications, and motor carrier industries to ensure fair and reasonable rates, and to assure reasonable and adequate services to the public as provided by law...The [PRC] promotes public safety through the offices of State Fire Marshal, the Firefighter Training Academy, Pipeline Safety Bureau and Transportation Division.<sup>32</sup>

In 2012, changes in New Mexico's Constitution severed the Division of Insurance from the PRC and created the Office of Superintendent of Insurance.<sup>33</sup> During that same year, changes in the constitution transferred the authority to charter and regulate corporations from the PRC to the Secretary of State.<sup>34</sup> Few state utility commissions assume these functions. Many observers felt that relieving itself of these functions will allow the PRC to more effectively regulate public utilities and public safety.<sup>35</sup>

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<sup>32</sup> See NMPRC.

<sup>33</sup> A nominating committee appoints the superintendent. The committee composes of four members selected by the Legislature, four by the governor, and a ninth member selected by the eight appointed members. Starting in 2014, 88 full-time equivalents moved from the PRC to the new Office of Superintendent of Insurance.

<sup>34</sup> Twenty full-time equivalents subsequently moved from the PRC to the Secretary of State.

<sup>35</sup> One nonpartisan group recommended that the State Fire Marshal's Office be transferred to another agency, such as the Department of Homeland Security and Emergency Management (Nathan and Fisher, 17).

### C. Minority of states elect their commissioners

Of the 50 states and the District of Columbia, only 13 states have elected commissioners (*see* Table 1 below).<sup>36</sup> Of these 13, eight have commissions that are embodied in their respective state constitutions, including two of New Mexico's neighbors, Arizona and Oklahoma.<sup>37</sup>

The general perception among regulatory experts is that when regulators are elected rather than appointed by the governor with legislative confirmation, politics become a bigger factor in their decisions and other practices.<sup>38</sup> Unlike some other elected states, however, the New Mexico commissioners receive only public funds in their campaigns.<sup>39</sup> Commissioners running for election to the Texas Railroad Commission and the Oklahoma Corporation Commission, in contrast, receive much of their campaign funding from oil and natural gas interests. In the elected states of Alabama, Georgia and Louisiana, funding can come from lobbyists.<sup>40</sup> What this suggests is that the PRC seems to be less captured by those whom they regulate than in some other elected states.<sup>41</sup>

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<sup>36</sup> A joint session of the South Carolina General Assembly elects seven commissioners to its Public Service Commission, and Virginia's General Assembly elects three commissioners to its State Corporation Commission.

<sup>37</sup> For appointed commissioners, three states – Florida, Ohio and Indiana – have nominating boards that screen candidates for qualifications and competence. They then send the governor a list of nominees from which he or she selects an appointee. In Ohio, all nominees must have professional qualifications in relevant fields (e.g. law, economics, accounting, engineering, finance) in addition to specific expertise in one of the industries the Public Utilities Commission regulates (i.e. energy, transport, telecommunications).

<sup>38</sup> One theory holds that because regulated industries typically are better organized than consumers, a regulator may maximize his political support by serving the interests of the regulated industry instead of consumer interests. Pluralist commentators on this regulatory dilemma have suggested that subjecting regulators to greater public accountability would reduce the incentives for such behavior. They recommend that, postulating that specialized political interests have less influence over the elective process than over appointments; regulators should be elected rather than appointed. The empirical evidence is somewhat mixed on whether utility consumers actually benefit, on a long-term perspective, with elected regulators. For example, even if elected regulators hold down rates in the short run more than appointed regulators, this action may jeopardize the financial ability of utilities to finance investments that would benefit their consumers in the long run. *See* Besley and Coate.

<sup>39</sup> The law allows private fundraising, albeit with several restrictions.

<sup>40</sup> *See* Burgam.

<sup>41</sup> This means that the PRC commissioners may be more consumer-oriented than some of the other elected commissions. If this is true, the technical staff, following the leadership of the commissioners, would have the propensity to take a more consumer-advocacy position in their testimony, advice and other information they provide to the commissioners.

**Table 1: States with Elected Commissioners**

<i>States</i>	<i>Created by</i>
Arizona	State Constitution
Georgia	State Constitution
Louisiana	State Constitution
Nebraska	State Constitution
New Mexico	State Constitution
North Dakota	State Constitution
Oklahoma	State Constitution
Virginia	State Constitution
Alabama	Legislation
Mississippi	Legislation
Montana	Legislation
South Carolina	Legislation
South Dakota	Legislation

**D. Typical organizational structure**

**1. States reviewed**

We also examine the organizational structures of the commissions in the following states, including neighboring states, for comparison with New Mexico’s PRC<sup>42</sup>:

- Arizona Corporation Commission;
- Colorado Public Utilities Commission;
- Florida Public Service Commission;
- Illinois Commerce Commission;

<sup>42</sup> Other than the neighboring states of Arizona, Colorado and Oklahoma, the other states were selected from the West, the Midwest and the Southeast, based on state population, commission budgets, etc. that were close to New Mexico.

- Iowa Utilities Board;
- Nevada Public Utility Commission;
- Oklahoma Commerce Commission;
- Washington Utilities and Transportation Commission; and,
- West Virginia Public Service Commission.

## 2. **Descriptive summary by state**

### *Arizona Corporation Commission*

The Arizona CC staff is organized into nine divisions, each headed by a division director; the nine division directors report to the executive director. The divisions are as follows: Administration; Corporations; Hearing; Information Technology; Legal; Media Services; Safety; Securities; and Utilities Divisions. Each commissioner has a policy advisor and an administrative assistant.

### *Colorado Public Utilities Commission*

The Colorado PUC is divided into several sections and units. The Sections are: Administrative Hearings; Administrative Services; Economics; Energy; Gas Pipeline Safety; Rail/Transit Safety; Research and Emerging Issues; Telecommunications; and Transportation. The Units are External Affairs and Policy Advisory. While each commissioner does not have individual advisors, several sections/units serve the purpose of advising commissioners in a collective manner.

### *Florida Public Service Commission*

The Florida PSC staff is headed by an executive director that is hired by the commissioners. Each commissioner has one chief advisor and one executive assistant. The executive director has two deputies reporting to him, with a clear bifurcation of a Technical division and an Administrative division; each deputy supervises four units each. The Technical division consists of Accounting & Finance, Telecommunications, Engineering, and Economics, and the Administrative division consists of Administrative and IT Services, Consumer Assistance & Outreach, Auditing & Performance Analysis, and the Commission Clerk.

### *Illinois Commerce Commission*

The staff of the Illinois CC is headed by an executive director; reporting to him directly are the director of Retail Market Development, the Public Service Administrator, and four units: External Affairs, General Counsel; Public Utilities, and Administrative Law Judge. The deputy executive director supervises three units: Human Resources, Planning & Operations, and Transportation. Each commissioner has 1-3 Legal & Policy Advisors.



### *Iowa Utilities Board*

Other than the General Counsel and Executive Secretary, the Board has five major units: Customer Service, Energy, Policy Development, Safety & Engineering, and Telecommunications. The commissioners do not have individual advisors.

### *Nevada Public Utility Commission*

The Nevada PUC has demarcated its staff into two distinct units: the decision- and policy-making (policy/advisory) unit and the Regulatory Operations Staff. The commissioners comprise the former, assisted by the executive director, general counsel, and policy analysts. The latter consists of Staff Legal Counsel, Resource & Market Analysis, Financial Analysis, Engineering, Rail Safety, and Consumer Complaint Resolution. In this instance, the clear demarcation ensures that the two groups do not infringe on each other's mandates.

### *Oklahoma Corporation Commission*

Each commissioner at the Oklahoma CC has an administrative aide and an executive assistant. At the staff level, there are nine units: Administration, Consumer Services, Information Technology, Administrative Proceedings, General Counsel, Oil & Gas, Petroleum Storage Tank, Public Utility, and Transportation.

### *Washington Utilities and Transportation Commission*

The Washington UTC has several divisions headed by directors who report to the executive director. The divisions are: Policy, Legislative; Communications; Safety & Consumer Protection; Regulatory Services; Administrative Services; and Administrative Law. Some of these divisions have units under them; for example, Regulatory Services has four units – Energy, Telecommunications, Water & Transportation, and Conservation & Energy Planning. The commissioners have seven common advisors in the Policy and Legislative divisions.

### *West Virginia Public Service Commission*

The West Virginia PSC has several divisions: Administration; ALJs; Communications; Engineering; Executive Secretary; General Counsel; Legal; Pipeline Safety; Quality Assurance; Transportation; Utility; and Water & Wastewater. The commissioners do not have individual advisors.

## **3. How the PRC compare to the selected sample states**

The PRC's organizational structure is not very different from the states described above. While there may be differences in names and industries, the general set-up is similar, namely, three main functions of administrative, legal, and technical. The chief of staff has several divisions reporting to him: Administrative Services, Consumer Relations, Legal, State Fire Marshal, Transportation, and Utility. The hearing examiners and general counsel report directly to the commissioners. Each commissioner has one assistant and their functions can be

administrative and/or technical. Especially in recent years, commissioners generally have chosen their assistants to be office managers or perform administrative functions.

Although the PRC no longer regulates insurance and corporations, it continues to house the state fire marshal. As far as we can determine, no other state utility commission has this function.

Another uniqueness of the PRC is the meager staff for advising the commissioners and others during pending cases.<sup>43</sup> We consider this a serious problem that makes it difficult for commissioners to make well-informed decisions. We observe that most commissions either assign at least one technical advisor to each commissioner or have a pool of advisors that commissioners can draw upon in open dockets or other occasions.

## VII. Major Findings

### A. General

Our review uncovered a wide array of challenges at the PRC. Some of them are common across state utility commissions but others seem beyond the norm, calling for serious review and possible action. One highly unusual situation at the PRC is the sharing of a single technical advisor across the five commissioners. Another example is the lack of opportunities for technical staff for continued education and professional development, which as discussed later, is essential for staff to be well-informed on the latest developments occurring in the utility industries.

As with many commissions around the country, the PRC faces increasing demands – for example from the Legislature, stakeholders – and shrinking resources. This death-spiral-type condition, in our opinion, has seriously jeopardized the capability of the PRC to protect the public interest.<sup>44</sup> The reality is that a reduction in PRC expenditures rarely means a commensurate decline in workload. Frequently, a state utility commission has to undertake more tasks with less money, a situation that can spiral into a situation where the commission is unable to adequately address the issues brought before it. As an example, we observe in New Mexico as well as in other states an increase in general rate cases over the past several years.

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<sup>43</sup> For example, the Pennsylvania Public Utility Commission is an outlier on the opposite spectrum to the PRC: Each commissioner has five support staff, which includes legal and/or technical advisors and executive assistants. These advisors are direct appointments and report only to their respective commissioners.

<sup>44</sup> Increasing stakeholder participation, for example, not only can increase the complexity of proceedings, it can also extend the time for closure.

Although we find the above conditions challenging for the PRC, there are other contributors as well. In Section VIII, we present suggested actions that have the potential to make the PRC a better functioning agency serving the citizens of New Mexico.

We base our findings on the combination of (1) comments made by interviewees, (1) our observations of the PRC and other state utility commissions, and (3) our experiences working for commissions either as staff personnel or NRRI employees. The weights we place on each factor differ by finding, depending in part on the consistency and frequency of comments we received from the interviewees.<sup>45</sup>

We want to stress here that our focus was on identifying problems and challenges. Interviewees discussed many positive aspects of the PRC, including knowledgeable and committed staff. Our purpose was to identify the “weak links” that could be obstructing the PRC from reaching its potential to serve New Mexicans.

We feel that the major challenges facing the PRC are the following, grouped by source.

#### **B. Commissioners’ actions**

Commissioner intrusion into staff activities can jeopardize staff independence and invite internal politics. On occasion, commissioners have pressured the chief of staff and division managers to hire certain people, even though they were not qualified. Political hires take money away from adding critical technical staff.

One apparent problem at state utility commissions across the country is that commissioners and managerial staff with a narrow political agenda, whether leaning toward the left or right, have become more dominant with politically unbiased technical staff relegated to a lesser role. We observe that ideologies of outside groups in recent years have become influential in regulatory decisions, jeopardizing regulators’ independence. They also threaten the public’s trust of regulation as a fair-minded institution protecting society’s interest, rather than narrow interests

Generally, what staff does should, with few exceptions, be outside the purview of commissioners. As told by some interviewees, division managers are not adequately independent from the commissioners and, consequently, have shown lack of assertiveness in fear of retaliation. This is not an uncommon occurrence with state utility commissions, especially when commissioners can jeopardize a manager’s job security.

One option to maintain independence is what occurs in some states where the advocacy staff resides in a different agency from the utility commission. This separation helps to mitigate against *ex parte* communications and allows the staff advocates to hold positions without being influenced by the commissioners or their senior personnel. On the negative side, separation may

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<sup>45</sup> We did not make a major finding if a comment came from only one interviewee.

give commissioners less capability to direct and guide the regulatory process. They therefore become more reactive by responding to others than proactive by initiating actions themselves.<sup>46</sup>

A number of interviewees commented that commissioners act more in a legislative<sup>47</sup> than judicial mode,<sup>48</sup> for example by ignoring or going outside facts of record in their decisions.<sup>49</sup> Commissioners often seem more intent to serve their constituents rather than making decisions based on facts of record. This finding is not completely surprising, since the PRC commissioners are elected officials rather than appointed by the governor.<sup>50</sup> To the extent that observation is accurate, staff advocates who testify can feel underappreciated, causing a negative effect on their morale and willingness to testify in the future.<sup>51</sup>

Commissioners on occasion have displayed disrespect in public for each other as well as for staff. Such actions can also severely harm staff morale and staff's propensity to act independently of commissioner pressures. From our experiences, irrespective of political affiliation or ideology, commissioners around the country generally make a real attempt to work together and not display public animosity.

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<sup>46</sup> See, for example, Section V(A). Most regulatory agencies require both advocacy and advisory staff to observe *ex parte* rules during formal quasi-judicial proceedings. Commonly a Great Wall separates advocates from other staff members. While seemingly appropriate on paper, it may be difficult in practice to prevent advocates from communicating with other staff members.

<sup>47</sup> A legislative role means that the PRC assumes the role of a policy-maker, places emphasis on outcomes, and tries to mediate disparate interests outside of a formal judicial setting. This role enables it, among other things, to establish regulations. The trend for most state utility commissions over the past several years has been toward acting in more of a legislative role. It is generally agreed that a legislative role for commissions is most appropriate in certain situations, for example in addressing industry-wide policy issues.

<sup>48</sup> A judicial mode means that the PRC acts as a court by conducting hearings, taking legal testimony, issuing decisions and orders, placing emphasis on process and, overall, striving for a "fair" fight between competing interests. Its decisions may be subject to court appeal. Regulatory scholars and practitioners consider the judicial mode well-suited for reviewing factual evidence in contested cases.

<sup>49</sup> The PRC also acts in an executive mode in enforcing the rules that it creates.

<sup>50</sup> This is consistent with our experiences working with commissions around the country.

<sup>51</sup> The PRC as well as other commissions sometimes act as a *policy making body* in certain proceedings and a *quasi-judicial body* in other proceedings. An example of the former function is the development of rules for distributed generation. A general rate case would place a commission in a quasi-judicial role. When acting as a quasi-judicial body, the PRC is substantially bound by the same requirements as a court. In failing to do so, advocacy staff in particular would tend to feel frustrated and demoralized because of the little weight that the commissioners place on their testimony.

### C. Staff related matters

A serious problem is the lack of mentoring/training for new staff; for example, deficiency of senior staff to mentor and assist more junior staff. Some interviewees mentioned that when the commissioners were appointed there was more staff training and mentoring. Our observation is that in many if not most state utility commissions mentoring and training is a common practice.<sup>52</sup>

There is also an apparent absence of professional staff development and continued education. This is particularly critical when the utility industries are undergoing dramatic change because of market, technological and public policy developments. In this new environment, it becomes vital for staff to keep abreast of these developments as they affect the practices and policies of the PRC that are most beneficial in serving New Mexico.<sup>53</sup>

Technical staff seems to be overwhelmed, especially when they have to handle more than one major rate case simultaneously.<sup>54</sup> This certainly hurts staff morale, aggravated by the reality of little opportunities for career advancements and salary increases.<sup>55</sup>

A number of interviewees indicated a deteriorating work environment over time as the commissioners shifted from being appointed to elected.<sup>56</sup> Why this would be is uncertain,

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<sup>52</sup> We observe that, at NARUC meetings, few PRC staff members attend compared with those from other commissions.

<sup>53</sup> The PRC, as well as other utility commissions around the country, has had to deal in recent years with complex issues relating to ratemaking, the dire financial condition of small water utilities, the role of utilities in society, utility business models, distributed generation and other new technologies, the erosion of utility monopoly power, and a host of other issues.

As an illustration, under the American Recovery and Reinvestment Act (ARRA), the federal government provided funding to states to help in advancing electric grid modernization. Several states used these funds to send staff to meetings, workshops and technical conferences so that they become aware of the latest technologies and their effects on rates, tariffs and other aspects of utility regulation. It is our understanding the PRC failed to take advantage of these opportunities.

<sup>54</sup> Some interviewees commented that the Utility Division fails to fulfill its duty to provide the commissioners with as complete a record as possible. This may stem from an overwhelmed staff, especially when they have to handle major dockets that overlap in time.

<sup>55</sup> More than one interviewee pointed out that salaries at the PRC are not competitive with those of state commissions in adjacent states. More apparent are the low salaries at the PRC compared with the private sector. A detailed study could more precisely measure the extent to which PRC salaries are not competitive either with other state commissions or the private sector. It is also important for an agency to have “internal equity of pay,” where pay differentials correspond to differences in job responsibilities, experience, skill levels, and so forth.

<sup>56</sup> A basic difference between appointed and elected commissions is their constituency. An elected commission has to appeal to the majority of voters, who generally are unaware or have little knowledge of the issues brought before a commission.

although one possibility is that elected commissioners less appreciate the professionalism of technical staff and see staff's role in a different light than do appointed commissioners.

We observe a noticeable deficiency in technical advisors for commissioners. The five commissioners share one technical advisor, which is an outlier compared with state utility commissions in other states.

There seems to be low morale among technical-staff from a combination of factors:

1. Overwork;
2. Lack of respect from commissioners and outside parties;
3. Absence of training and professional development;
4. Limited career growth; and,
5. Salary freezes and higher employee contribution for benefits (medical, pension).

It is our observation that experienced and competent staff stay because of habit, passion for their work and the public interest, and, for particularly the older staff, good retirement benefits. This situation is not unique to the PRC, as other state utility commissions are able to retain experienced staff for similar reasons.

The PRC currently has several unfunded positions, some of which are critical – notably, an electrical engineer. A problem recognized by most interviewees was the difficulty of the PRC in hiring new staff and retaining current staff. Not only are low salaries a problem, many interviewees pointed to the bad reputation of the PRC making the hiring of new staff challenging. Incidentally, the PRC can consider offsetting these negative factors, for example, by considering flex-time, part-time and job sharing options to accommodate employees.

The PRC may also want to consider offering technical and other employees the opportunity to telecommute. Many employers provide these options to employees, and it seems from our interviews that the PRC can do more in offering them to its workers.

As a broad observation, commissions around the country commonly face the difficulty of adjusting salaries to levels required for recruitment and retention of the best employees. Especially problematic is good staff quitting and taking jobs from companies that they previously regulated. Often, new staff members will gain experience at a commission by working, say three to five years. Assuming they are competent employees, their value to utilities or other potential employers will exceed the compensation that the commission is able to pay to

retain them. The traditional concept that commission staff be the approximate “match” of utility staff suffers in this circumstance.<sup>57</sup>

A regulatory “culture” for teamwork and a positive attitude seems to be lacking. This affects how the PRC personnel think about their tasks and how they relate to other agency personnel. Culture is especially important to retain staff when budget constraints prohibit career advancements and salary increases.

Other staff-related problems that we identify are:

1. It is sometimes difficult for advocacy staff to be independent, with the presence of outside and inside pressures;
2. Incomplete record in dockets caused in part by inadequate advocacy input;<sup>58</sup> and
3. Lack of open-mindedness by technical staff to new ideas (e.g., utilities’ changing role, holding on to traditional views with regard to ratemaking) that may be incongruous with today’s changing utility environment.<sup>59</sup>

A potentially serious problem is emerging as senior staff retires. These people have years of experience, institutional memory and technical knowledge, and many are highly committed to their work and serving the public interest. They have technical expertise that allows them to deal with complex issues that come before the PRC. The question then becomes, who will replace them? Will the PRC be able to recruit new people with that expertise or the potential to acquire it in the future after mentoring, training and work experience?

#### **D. External**

The PRC currently has bad relations with the Legislature. The PRC does not seem to have the public trust.<sup>60</sup> There has been considerable negative press coverage, especially of

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<sup>57</sup> We observe that the utility industry, especially electric utilities, are elevating their efforts to hire new employees with backgrounds to understand the “cutting edge” technologies that will shape the industry in the years ahead. Regulatory personnel need to keep pace by acquiring comparable skills and knowledge.

<sup>58</sup> Some interviewees pointed out this problem, leading in some instances to the hearing examiners asking additional questions to a utility or other party for the purpose of creating a complete record.

<sup>59</sup> As a broader problem, the lack of open-mindedness by technical staff to new ideas – for example, utilities’ changing role and innovative ratemaking mechanisms — may be at odds with today’s changing utility environment. This behavior reflects conservatism by staff to avoid taking non-traditional positions on highly politicized issues. A major motivator of government employees, at least in the eyes of some experts, is to “follow the rules” by not straying from precedent (*see*, for example, Wilson). The hierarchical structure of the PRC, as well as most state utility commissions, may also explain lower-staff reluctance to take “innovative” or “independent” positions in docketed cases.

commissioners' actions, over the past several years.<sup>61</sup> Overall, the PRC has a bad public image throughout the state.<sup>62</sup>

This widespread negative view of the PRC makes it hard for it to recruit new people and hurts the morale of current staff. It also reduces the chances for the PRC to receive approval for budget increases, jeopardizing its ability to hire needed technical staff either as advisors or advocates.<sup>63</sup>

#### E. Other challenges

There seems to be little research of major issues – for example, new industry developments, ratemaking, integrated resource planning – by staff. Some commissions have a policy and research staff to address major complex topics of interest that will inevitably come before it in future proceedings.<sup>64</sup> This allows both staff and commissioners to be better prepared to address these issues more promptly and proficiently.

Some interviewees point to the growing trend of judicial reversals of commission decisions. A number of interviewees lamented that this problem has escalated in recent years because of Commission decisions based less on the law and the record for a particular case.<sup>65</sup>

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<sup>60</sup> This finding comes from both press coverage of the PRC and the comments made by several interviewees.

<sup>61</sup> For examples of PRC controversies between 1999 and 2011, *see* Nathan and Fisher, 11.

<sup>62</sup> One of the authors of this report lives in New Mexico and is acutely aware of the bad press that the PRC has received over the last several years.

<sup>63</sup> Presently, the PRC's chief of staff acts as the primary liaison to the Legislature. Some state commissions employ a staff member whose sole duty is to deal with the Legislature. Other states have a separate division to interact with the legislature. For example, the Indiana Utility Regulatory Commission has an "External Affairs Division [that] leads the Commission's public relations and communication efforts, which include responding to media inquiries, special initiatives such as cybersecurity and billing transparency, open forums with all stakeholders, and other public events. Using in-house technical expertise, the division also serves as an independent, neutral resource for state—and, on occasion, federal—legislative-related matters." [*See* Indiana Utility Regulatory Commission, 6.]

<sup>64</sup> For example, the Indiana Utility Regulatory Commission has a Research, Policy, and Planning Division that provides advice and education on wide-ranging topics to the commission, with an emphasis on integrated resource planning. Another example is the Colorado Public Utilities Commission, which in addition to having a pool of technical advisors to serve the commissioners and an advocacy staff, has a Research and Policy Division. [*See* Colorado Public Utilities Commission.]

<sup>65</sup> As one report noted:  
Many of the PRC's decisions have been overturned by the courts, often because the commissioners simply did not understand the law. For example, in August 2011 the New Mexico Supreme Court struck down an energy efficiency surcharge that the PRC had approved for PNM because the PRC



Follow-up research would compile data to determine whether court reversals have actually increased, and to what extent they have, since the selection of PRC commissioners changed from appointment to elected; overturned PRC decisions reflect poorly on the quality of its orders.

Inefficiency in reaching decisions, partially largely because of commissioners' unwillingness to take timely action, has too often occurred, according to some interviewees. A few people told us that when a docket has no statutory deadline for a decision, the commissioners often let it "hang" by not issuing an order; our interpretation is that this is more a commissioner problem than a staff problem. The cost of this inaction is that parties expended resources and time to provide evidence, sometimes at substantial levels, that leads to no useful outcome.

It is our opinion that the PRC needs to consider reallocating its staff resources, specifically toward having more technical advocacy and advisory staff. While additional monies would improve matters, given the state government budget situation, this may not be feasible. Scarce financial resources can mean budget reductions, hiring freezes, salary freezes, and layoffs.

The question therefore turns to how the PRC can better use its staff resources to serve the public interest. This may require increased staff productivity or resource reallocation, or both.<sup>66</sup> This problem has become increasingly acute over time, especially with more severe budget constraints, growing demands placed on the Commission, and the commissioners being elected.

## VIII. Suggested Actions

The core of this report makes several observations and suggested actions. Readers should view them as tentative, in that a more thorough investigation (as suggested in the following subsection) would pinpoint more accurately the extent and nature of the challenges plaguing the PRC.

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had not followed the legally required ratemaking principles. Two months earlier, the Supreme Court had struck down a PRC decision establishing new regulations for the Qwest telecommunications company. The court found that the PRC had violated the legal requirement of providing due process to all parties. The lone attorney serving on the PRC had dissented from the commission's decisions in both cases due to his concerns about these legal issues (Nathan and Fisher, 13).

Another source commented that "in the past 4 years [2009-2012], 29 Commission decisions were appealed. Of these, the court ultimately heard 11 cases and the commission's rulings were reversed in 7 cases – a 36% win average" (Howe and Marks, 3).

<sup>66</sup> It will take almost heroic management action to have technical staff become more productive given the present work environment at the PRC.

## A. Audit of the PRC directed by the Legislature

Regulatory agencies must constantly adapt and reorganize as economic, policy and technological conditions change. One salient observation is that PRC resources may not be keeping abreast of changing developments in the utility industries. We get the impression that the environment within the PRC is unable to produce regulatory decisions in conformity with the dynamics of the utility industry and public policy. An audit could evaluate whether this is a problem and, if so, its seriousness. The PRC, although an independent entity, like other state agencies should be held accountable for their actions, including operating efficiently and earning the trust of the general public. The legislature holds them accountable through the budgeting process and audit oversight. Several state utility commissions also set performance goals (e.g., percentage of customer complaints resolved within 50 days; percentage of dockets completed within 10 months) for different functional areas and report on variances between these goals and actual performance.<sup>67</sup>

An audit is a systematic assessment of the tools, processes, and policies of regulatory-agency management in resource usage, planning, and organizational activities. A comprehensive audit would encompass the PRC's organizational structure, operations, management, governance, and finances. It can: (1) assess the current effectiveness of management, (2) recommend improvements, and (3) establish "best practices" standards for future use.

U.S. regulators often audit utilities to evaluate their performance. An audit of the PRC can help the agency, the Legislature and the general public to better understand current processes, to evaluate those processes relative to generally accepted practices, and to recommend changes.

An audit can address the following three questions:

1. Determine whether the PRC's organizational structure is compatible with meeting new regulatory responsibilities;
2. Determine whether existing staff resources are adequate and properly allocated to the PRC's tasks and responsibilities; and
3. Evaluate whether processes and management methods optimize the efficiency and effectiveness of staff; for example, whether the PRC need new tools to better motivate its staff.

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<sup>67</sup> The PRC sets performance goals, as contained in its *Annual Report*. Under *New Mexico Statute § 8-8-20*:

By December 1 of each year, the commission shall report to the legislature and the governor regarding its activities for the previous year in sufficient detail to disclose the workings of the commission and the impact of regulation on the industries regulated by the commission. The report may include suggestions and recommended changes in law, as the commission deems appropriate, that would be in the public interest.

An audit can also address the problems perceived and identified in Section VII of this report. An audit could evaluate, with more accuracy, whether these problems actually exist and pose a serious obstacle for the PRC in performing its duties.

In uncovering problems, an audit can begin the process to correct them and ultimately lead to the improved future performance of the PRC. An audit would also hold the PRC more accountable to the stakeholders, the Legislature and the general public.

We were informed that an audit of the former Public Utility Commission conducted in the late 1970s triggered the hiring of professional staff, which was better able to cope with increasingly complex issues.<sup>68</sup> The same dynamics may hold today, justifying a management audit to evaluate whether the technical expertise of the PRC is capable of responding to the new developments in the utility industries.

#### **B. Additions to technical staff**

We feel that a top priority should be to hire technical advisors for commissioners, which the vast majority of other state utility commissions have.<sup>69</sup> As one rationale, we have seen the rise in complex issues facing the electric industry, involving for example net metering, demand charges, integration of renewable energy, demand response, cloud services and so forth, that state utility commissions will have to address. These issues involve technological, economic, and political (e.g. socialization/subsidization) factors that require new and special skills by both advisory and advocacy staff.

Each commissioner should have at least one technical advisor or, alternatively, the commissioners could have a pool of technical advisors from which to choose.<sup>70</sup> As mentioned earlier, presently there is only one technical advisor (residing in the Office of General Counsel) shared among the five commissioners.

A former PRC commissioner and other interviewees emphasized the difficulty of commissioners making well-informed decisions when given inadequate assistance in reviewing

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<sup>68</sup> During the 1950s and 1960s, the cost of generation, both because of scale economies and technological advances, declined and demand for electricity grew at a robust rate. Rate reviews were infrequent and utilities consistently earned above their authorized rate of return. Starting around the early 1970, utilities filed rate cases much more frequently to account for low realized rates of return caused by a confluence of events, including slower demand growth, higher interest rates, massive overruns of nuclear power plants, inflation and new federal mandates. *See*, for example, Joskow.

<sup>69</sup> Under *New Mexico Statute §8-8-13*:  
The *chief of staff* may hire, with the consent of the commission, advisory staff with expertise in regulatory law, engineering, economics and other professional or technical disciplines to advise the commission on any matter before the commission. [Emphasis added]

<sup>70</sup> The Legislature might want to require that budgets for additional commissioner personal assistants should include the hiring of a technical advisor.

the record in a complex docket, such as a major rate case.<sup>71</sup> Especially with widespread criticism of the commissioners' qualifications to make decisions on highly technically issues, it becomes especially imperative that they receive technical support from advisors.<sup>72</sup>

Advisors can provide technical and policy counsel and research support to the commissioners; for example, they can either recommend a decision in a docketed case or identify the positions of different parties.<sup>73</sup> Advisors can also brief the commissioners and staff personnel on recent developments in the utility industries. Overall, technical advisors can provide invaluable service to the PRC commissioners that seems highly needed.<sup>74</sup>

But even if the commissioners have access to advisors, they must make the commitment to use them effectively in their decision-making. Advisors, even though they are not party or witness to a proceeding, can steer the commissioners to decisions supported by the record. This function can mitigate the recent tendency of the commissioners to make decisions based on factors outside the evidence presented by parties in a proceeding.<sup>75</sup>

Priority should also be given to hiring an electrical engineer. This is a pivotal position in many PRC dockets that require immediate attention.<sup>76</sup> Some interviewees lament the fact that without adequate engineering expertise, the staff is lacking vital capability in rate cases and other important dockets involving, for example, energy efficiency, integrated resource planning, and information technologies.

One suggestion is for the PRC to show the Legislature, the general public and others the benefits from having additional technical staff. Benefits may include better-informed commissioners, dockets completed in less time, and overall higher-quality decisions. All of these benefits stand to improve the performance of the PRC in serving New Mexico.

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<sup>71</sup> In Minnesota, for example, advisors prepare decision-option briefs for commissioners.

<sup>72</sup> More than one interviewee mentioned the lack of commissioners' qualifications. Studies identifying the same problem include League of Women Voters of New Mexico and Nathan and Fisher.

<sup>73</sup> Advisors can also assist the hearing examiners on technical matters that may arise during a proceeding. Advisors should be subject to the same *ex parte* requirements as commissioners are. In our interviews, one PRC commissioner noted preference for a legal advisor while another commissioner indicated preference for an economic advisor.

<sup>74</sup> As one advisor in a state commission remarked, "We tee-up the issues so the commissioners can make their own value judgments." The recommendation for technical advisors agrees with the report of two former Commissioners. See Howe and Marks.

<sup>75</sup> This desirable outcome presumes that the advisors do not have their own agenda in guiding commissioners to a decision not supported by the record.

<sup>76</sup> As an alternative to hiring in-house technical staff, the PRC can contract with outside consultants to provide the needed expertise in particular areas. Consultants are more justified when a commission has to address a complicated topic in a docket that will likely not recur in the future.

A core challenge to effective regulation is what analysts call information asymmetry. Regulators are at a distinct disadvantage relative to a utility in interpreting and evaluating the utility's performance. Regulators generally lack the knowledge, for example, to detect a utility's opportunities to minimize its costs and when it is efficient or inefficient. In fulfilling its obligation to protect ratepayers, regulators need to evaluate whether the utility's costs that it proposes to recover from ratepayers are prudent and consistent with competent utility management.<sup>77</sup> A utility would generally take the position that its actions reflect its best effort given the conditions it faces. To rebut this claim or evaluate its veracity, regulatory staff and interveners would need to provide evidence to the contrary. This is difficult to do, requiring highly trained and skilled technical staff.<sup>78</sup> This reality probably best rationalizes the need for the PRC to have adequate and competent technical staff.<sup>79</sup>

### C. Staff professional development and training

It is essential for staff to keep abreast of new developments in the utility industries. A key way to achieve this is through professional development and training. In-house training may be more economical but exposure to staff from other commissions has its benefits. Technical staff used to but now rarely attends NARUC-sponsored meetings, regulatory conferences and education forums. PRC management may want to consider forming a committee directed at developing a training program for the future.

Technical staff also lacks access to publications that can enhance their knowledge of regulatory and utility-industry developments. The PRC also seems to lack an adequate in-house technical library that analysts can use to acquire information on a particular topic needed, say, for testimony, a report, or a response to a commissioner request. At the minimum, a library can be a self-service collection of organized resources.<sup>80</sup> Because of budget constraints, however, a library may fall outside a top priority for the PRC.

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<sup>77</sup> When a regulatory agency is negligent in adequately reviewing the costs of a utility, rate increases may be larger than necessary to cover the utility's expenses and provide a reasonable return on equity to attract sufficient investment. In other words, such rate increases violate the "just and reasonable" doctrine of ratemaking.

<sup>78</sup> The authors' experience working for state utility commissions attests to the difficulty of identifying the "balanced solution" to a particular issue. Staff, for example, must first thoroughly understand the issue at hand and then be able to evaluate disparate positions in term of advancing the public interest. What to do in these situations is not immediately obvious, as many complex issues lie in a "gray area".

<sup>79</sup> An example of information asymmetry is what economists call the "market for lemons." In that market, the party with the better information will leverage its favorable position to its advantage. A seminal economics article says that in markets plagued by information asymmetry, the market participant holding an information advantage will likely dominate the outcome at the expense of others (Akerlof).

<sup>80</sup> A library could include hard-copy resources or documents in electronic form, or both.

We suggest that the PRC includes a separate budget item for technical staff development and training. This action would foster development and training as a more permanent and continuous activity with potentially large returns for staff morale, productivity and overall performance.

As with any professional endeavor, technical staff needs to interact with their peers in other commissions and organizations, in addition to acquiring new skills and knowledge that will better prepare them to grapple with new issues as they confront the Commission. Training can also involve a mentorship program where senior employees work with less experienced employees.

#### D. **Staggering the work load of technical staff**

One major action would be to stagger rate cases and areas of interest, for example by separating rate cases into revenue requirement and rate design components. More than one interviewee mentioned the Wisconsin practice as a model for staggering general rate cases across utilities.

Another action would be to stagger the renewable energy plans required by utilities.<sup>81</sup> Commonly after filing, stakeholders contest the plans, consequently demanding considerable staff time and effort in their involvement.<sup>82</sup> One suggestion is to have the utilities stagger their filings and to file less frequently, perhaps on a biennial basis.

Both of the above actions to stagger dockets would especially help the Utility Division.<sup>83</sup> Staggering the staff's load becomes crucial in view of (1) the uncertainty over hiring new technical staff and (2) severe technical-staff constraints.

<sup>81</sup> Utilities must file Renewable Energy Portfolio Reports to the PRC by July 1 of each year. The PRC has until the end of the year to complete its review. The requirements are pursuant to the *Renewable Energy Act ("REA")*, §§ 62-16-1 et seq. *NMSA 1978 and Title 17.9.572 NMAC ("Rule 572")*.

<sup>82</sup> These plans raise a number of issues for which interested parties typically disagree. Under the Renewable Energy Act, the PRC reviews and approves the renewable energy procurement plans of investor owned utilities and rural electric cooperatives.

<sup>83</sup> As stated on the PRC's website the Utility Division:  
[S]erves as staff to the Commission in the regulation of electric, natural gas, renewable energy resources, telecommunications, and water and wastewater systems. The Utility Division also represents the public interest in utility matters before the Commission. The Division makes presentations to the Commission in the form of testimony and exhibits to ensure that adequate utility and telecommunications services are provided at fair, just and reasonable rates (NMPRC Utilities Division).  
*New Mexico Statute §8-8-12* states that “[i]n order to represent the public interest, the utility division shall present to the commission its beliefs on how the commission should fulfill its responsibility to balance the public interest, consumer interest and investor interest.”  
The Utility Division has 18 full-time equivalents; out of that, six work on telecommunications, four

### **E. Improved regulatory “culture” and teamwork**

One action would be to hold retreats for commissioners and division heads to review the past year, plan for the next budget, and discuss policy and administrative issues. The chief of staff is pivotal in creating a positive regulatory culture that is critical for staff morale and productivity.

### **F. Consideration of a changing role between chief of staff and commissioners**

The PRC’s chief of staff has undergone a number of turnovers over recent past.<sup>84</sup> Changing the chief of staff frequently and unexpectedly jeopardizes the stability of the work environment. Such a serious situation turns to whether the current relationship between the chief of staff and the commissioners needs revisiting:

1. Should the commissioners have no role or authority in setting budgets or selecting the chief of staff?
2. Should the chief of staff be civil service and not serve at the will of the commissioners?
3. Should the chief of staff be selected by a bipartisan committee, which is the same process used to select the state’s supervisor of insurance?
4. Should the chief of staff be removed from office by a bipartisan committee only for cause, not for convenience?

### **G. Improved staff allocation**

One course of action is to eliminate the least productive, antiquated, or redundant positions and add new technical staff, with minimal effect on the total PRC budget. For example, the chief of staff may want to investigate whether there is duplication of staff functions or redundancy of management positions.

The likely reality is that the PRC will have to operate indefinitely with a constrained budget. One outcome of budgetary constraints not previously mentioned is a reduced ability of the PRC to allocate staff time and travel funds toward participation in federal commission proceedings (e.g., involving interstate gas pipelines and wholesale electricity) whose outcomes affect New Mexico.<sup>85</sup> The challenge is then to allocate the resources so that the commissioners

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are accountants, five are economists, two work on gas, waste and water, and one is an electrical engineer (NMPRC Employee Directory).

<sup>84</sup> The commissioners appoint the chief of staff, who supervises the daily operations of the commission staff under the general direction of the commissioners. With the consent of the commissioners, the chief of staff appoints division directors. S/he serves at the will of the commissioners, and can therefore be terminated when losing majority support.

<sup>85</sup> Several state utility commissions have staff dedicated to following dockets and other activities by federal agencies, such as the Federal Communications Commission and the Federal Energy Regulatory Commission. Occasionally, they provide testimony and are active intervenors.

are well-informed on issues that will have a long-lasting effect on utility-customer protection, the environment for utility investments, and the overall well-being of New Mexico's citizens.<sup>86</sup> It may be that the Legislature could examine the feasibility of moving the State Fire Marshal Division out of the PRC to a better-related agency in the State such as one that has to do with emergency services, or as an independent agency. While there would be criticism that positions in the PRC would be reduced, such an action would correspondingly reduce the roles, responsibilities, and workload of the PRC, especially the commissioners. We believe that the State Fire Marshal Division is a very important function but it is a non-compatible unit with the PRC's other utility regulatory functions. The importance is evident from the fact that over a third of the staff belongs to this division (*see* fn 86).

#### H. PRC retention of utility fees and assessments

New Mexico is one of a minority of states that return most of the monies from utility fees and assessments to the general fund.<sup>87</sup> This has caused the PRC to rely on the State Legislature for most of its funds, which creates uncertainty and difficulty for budget planning.<sup>88</sup> As remarked in one study, changing the PRC's funding method would promote "an independent

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<sup>86</sup> Present trends in the telecommunications industry, for example, could warrant a decrease in the number of dedicated telecommunication regulatory staff. Currently, the Utility Division has six full-time equivalents working in the Telecommunications Bureau. Most state commissions around the country have seen a drastic decline in telecommunications filings over the past 20 years. The Federal Telecommunications Act of 1996 in particular has reduced a state commission's role in regulating the telecommunications industry. Its major goal was to replace traditional regulated monopoly service with a competitive market. For competitive segments of the industry, commissions do not regulate rates, but they typically facilitate market development, certify providers, arbitrate interconnection agreements, and resolve complaints among competitors. Viewing the number of employees in the different divisions and offices of the PRC, one sees that the Administrative Services Division has 15 employees, the State Fire Marshal Office has 34 employees and the Transportation Division has 23 employees. In comparison, the Utility Division has 18 employees. Given the importance of the Utility Division in rate cases, utility planning dockets and other matters, it seems that the burden of proof should fall on the PRC to rationalize this allocation of staff personnel among the different divisions and offices. For example, what is the justification for the seemingly "top heaviness" of administrative personnel?

One report remarked that the PRC "employs too many attorneys." This was based on a comparison with the Colorado Public Utilities Commission. The report calculated that the ratio of technical staff to legal staff for the Colorado commission was over twice that for the PRC; namely, 2.7 to 1.3 (Howe and Marks, 5).

<sup>87</sup> State law typically specifies the utility assessment. The actual method for computing the assessed cost and collecting the funds vary by state. In many instances, the assessment to an individual regulated entity is subject to a cap. Utilities usually recover the assessment from its ratepayers.

<sup>88</sup> During recessionary times, legislatures across the country typically cut commission budgets, even for agencies with fee assessments. One explanation is the desire of legislatures to treat all agencies similarly on grounds of fairness.



commission that operates in a stable and autonomous environment.”<sup>89</sup> Another study argued in favor of a commission funding mainly through assessments:

Funding the PRC with assessments on regulated industries will allow the PRC’s budget to be based on the actual cost of the regulation required by New Mexico statutes rather than being tied to tax revenues that rise and fall with the state of the economy. Money not expended in the year should not be returned to the general fund because this would, in effect, retain the PRC’s current position of competing with all other expenditures financed from the general fund.<sup>90</sup>

The most common funding source for state utility commissions, and arguably the most rational, is assessments on the regulated entities, which they can pass through to their customers or other beneficiaries of their service. Its rationale stems from six factors. It:

- (1) internalizes regulatory costs to the regulated entity;
- (2) treats regulatory assessments as fees for service rather than taxes;<sup>91</sup>
- (3) represents a stable, reliable source of funds;
- (4) has low administrative costs;
- (5) reduces regulatory dependence on the legislature, and,
- (6) is seemingly transparent.

As emphasized earlier, it is highly suggested that the PRC

- (1) fill its vacant technical-staff positions;<sup>92</sup>
- (2) hire new technical staff; and,
- (3) designate monies toward staff training and professional development.

Retention of utility fees and assessments can help the PRC to undertake these critical actions.<sup>93</sup>

In conclusion, we believe that the PRC is an important entity for New Mexico and the challenges facing the PRC is not insurmountable; these can be fixed with the suggestions made in this report.

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<sup>89</sup> Gegax and Blank.

<sup>90</sup> League of Women Voters of New Mexico, 4-5.

<sup>91</sup> The economic logic is that the users of regulatory services, i.e., the consumers of the regulated service, should bear the cost of regulation.

<sup>92</sup> As of February 3, 2017, the PRC had 15 vacant positions, which included an electrical engineer and utility economist (*see* NMPRC Employee Directory).

<sup>93</sup> As one study pointed out, prior to 1957 utility assessment stayed with the regulatory agencies rather than reallocated to the general fund. Since then, most of the funding for the PRC (as well as the old State Corporation Commission and the Public Utility Commission) has come from the general fund (League of Women Voters of New Mexico, 5.)

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