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HOUSE BILL 729

**48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007**

INTRODUCED BY

Al Park

AN ACT

RELATING TO ADMINISTRATIVE PROCEDURES; ENACTING THE  
ADMINISTRATIVE NEGOTIATED RULEMAKING ACT; PROVIDING FOR  
PROCEDURES FOR ENGAGING IN NEGOTIATED RULEMAKING BETWEEN  
AGENCIES AND INTERESTED PARTIES; ESTABLISHING REPORTING  
REQUIREMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the  
"Administrative Negotiated Rulemaking Act".

Section 2. DEFINITIONS.--As used in the Administrative  
Negotiated Rulemaking Act:

A. "agency" means a statewide board, authority,  
commission, institution, department, division, officer or other  
statewide government entity that is authorized or required by  
law to make rules or to adjudicate. The term includes the

1 agency head and one or more members of the agency head, agency  
2 employees, or other persons directly or indirectly purporting  
3 to act on behalf of, or under the authority of, the agency  
4 head. The term does not include the governor, the legislature,  
5 and the judiciary;

6 B. "consensus" means unanimous concurrence among  
7 the interests represented on a negotiated rulemaking committee,  
8 unless such committee:

9 (1) agrees to define such term to mean a  
10 general but not unanimous concurrence; or

11 (2) agrees upon another specified definition;

12 C. "convener" means a person who impartially  
13 assists an agency in determining whether establishment of a  
14 negotiated rulemaking committee is feasible and appropriate in  
15 a particular rulemaking;

16 D. "facilitator" means a person who impartially  
17 aids in the discussion and negotiations among the members of a  
18 negotiated rulemaking committee to develop a proposed rule;

19 E. "interest" means, with respect to an issue or  
20 matter, multiple parties that have a similar point of view or  
21 that are likely to be affected in a similar manner;

22 F. "law" means federal or state constitution or  
23 statute, judicial decision, common law, rule of court,  
24 executive order or rule or order of an agency;

25 G. "negotiated rulemaking" means rulemaking through

1 the use of a negotiated rulemaking committee;

2 H. "negotiated rulemaking committee" or "committee"  
3 means an advisory committee established by an agency in  
4 accordance with the Administrative Negotiated Rulemaking Act to  
5 consider and discuss issues for the purpose of reaching a  
6 consensus in the development of a proposed rule;

7 I. "notify" means to take such steps as may be  
8 reasonably required to inform another person in the ordinary  
9 course of business, whether or not the other person actually  
10 comes to know of it;

11 J. "person" means an individual, corporation,  
12 business trust, estate, trust, partnership, limited liability  
13 corporation, association, joint venture, public corporation,  
14 government, or governmental subdivision, agency or  
15 instrumentality or any other legal or commercial entity;

16 K. "record" means information that is inscribed on  
17 a tangible medium or that is stored in an electronic or other  
18 medium and is retrievable in perceivable form;

19 L. "rule" means the whole or part of an agency  
20 statement of general applicability that implements, interprets  
21 or prescribes law or policy or the organization, procedure or  
22 practice requirements of an agency. The term includes the  
23 amendment, repeal or suspension of an existing rule, but does  
24 not include:

25 (1) a statement concerning only the internal

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1 management of an agency and not affecting private rights or  
2 procedures available to the public;

3 (2) an agency declaratory order issued under  
4 this act;

5 (3) a decision or order in a disputed case;

6 (4) an intergovernmental or interagency  
7 memorandum, directive or communication that does not affect the  
8 rights of, or procedures and practices available to, the  
9 public;

10 (5) an opinion of the attorney general;

11 (6) an executive order of the governor;

12 (7) a statement that establishes criteria or  
13 guidelines to be used by the staff of an agency in performing  
14 audits, investigations or inspections, settling commercial  
15 disputes, negotiating commercial arrangements or in the  
16 defense, prosecution or settlement of cases, if disclosure of  
17 the criteria or guidelines would enable law violators to avoid  
18 detection, facilitate disregard of requirements imposed by law  
19 or give a clearly improper advantage to persons who are in an  
20 adverse position to the state; or

21 (8) a guidance document; and

22 M. "rulemaking" means the process for adopting,  
23 amending or repealing a rule.

24 Section 3. DETERMINATION OF NEED FOR NEGOTIATED  
25 RULEMAKING COMMITTEE.--

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1           A. An agency may establish a negotiated rulemaking  
2 committee to negotiate and develop a proposed rule if the  
3 agency determines that the use of the negotiated rulemaking  
4 procedure is in the public interest. In making such a  
5 determination, the agency shall consider whether:

6                   (1) there is a need for a rule;

7                   (2) there are a limited number of identifiable  
8 interests that will be significantly affected by the rule;

9                   (3) there is a reasonable likelihood that a  
10 committee can be convened with a balanced representation of  
11 persons who can adequately represent the interests identified  
12 under Paragraph (2) of this subsection and are willing to  
13 negotiate in good faith to reach a consensus on the proposed  
14 rule;

15                   (4) there is a reasonable likelihood that a  
16 committee will reach a consensus on the proposed rule within a  
17 fixed period of time;

18                   (5) the negotiated rulemaking procedure will  
19 not unreasonably delay the notice of proposed rulemaking and  
20 the issuance of the final rule;

21                   (6) the agency has adequate resources and is  
22 willing to commit such resources, including technical  
23 assistance, to the committee; and

24                   (7) the agency, to the maximum extent  
25 possible consistent with the legal obligations of the agency,

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1 will use the consensus of the committee with respect to the  
2 proposed rule as the basis for the rule proposed by the agency.

3 B. An agency may use the services of a convener to  
4 assist the agency in identifying persons who will be  
5 significantly affected by a proposed rule, including residents  
6 of rural areas, and in conducting discussions with such persons  
7 to identify the issues of concern to such persons and to  
8 ascertain whether the establishment of a negotiated rulemaking  
9 committee is feasible and appropriate in the particular  
10 rulemaking. The convener shall report findings and may make  
11 recommendations to the agency. Upon request of the agency, the  
12 convener shall ascertain the names of persons who are willing  
13 and qualified to represent interests that will be significantly  
14 affected by the proposed rule, including residents of rural  
15 areas. The report and any recommendations of the convener  
16 shall be made available to the public upon request.

17 Section 4. PUBLICATION OF NOTICE--APPLICATIONS FOR  
18 MEMBERSHIP ON COMMITTEES.--

19 A. If after considering the report of a convener or  
20 conducting its own assessment, an agency decides to establish a  
21 negotiated rulemaking committee, the agency shall notify the  
22 public by publishing in the New Mexico register and, as  
23 appropriate, in trade or other specialized publications, a  
24 notice which shall include:

- 25 (1) an announcement that the agency intends to

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1 establish a negotiated rulemaking committee to negotiate and  
2 develop a proposed rule;

3 (2) a description of the subject and scope of  
4 the rule to be developed, and the issues to be considered;

5 (3) a list of the interests which are likely  
6 to be significantly affected by the rule;

7 (4) a list of the persons proposed to  
8 represent such interests and the person or persons proposed to  
9 represent the agency;

10 (5) a proposed agenda and schedule for  
11 completing the work of the committee, including a target date  
12 for publication by the agency of a proposed rule for notice of  
13 formal rulemaking;

14 (6) a description of administrative support  
15 for the committee to be provided by the agency, including  
16 technical assistance;

17 (7) a solicitation for comments on the  
18 proposal to establish the committee, and the proposed  
19 membership of the negotiated rulemaking committee; and

20 (8) an explanation of how a person may apply  
21 or nominate another person for membership on the committee, as  
22 provided under Subsection B of this section.

23 B. Persons who will be significantly affected by a  
24 proposed rule and who believe that their interests will not be  
25 adequately represented by any person specified in a notice

1 under Paragraph (4) of Subsection A of this section may apply  
2 for, or nominate another person for, membership on the  
3 negotiated rulemaking committee to represent such interests  
4 with respect to the proposed rule. Each application or  
5 nomination shall include:

6 (1) the name of the applicant or nominee and a  
7 description of the interests such person shall represent;

8 (2) evidence that the applicant or nominee is  
9 authorized to represent parties related to the interests the  
10 person proposes to represent;

11 (3) a written commitment that the applicant or  
12 nominee shall actively participate in good faith in the  
13 development of the rule under consideration; and

14 (4) the reasons that the persons specified in  
15 the notice under Paragraph (4) of Subsection A of this section  
16 do not adequately represent the interests of the person  
17 submitting the application or nomination.

18 C. The agency shall provide for a period of at  
19 least thirty calendar days for the submission of comments and  
20 applications under this section.

21 Section 5. ESTABLISHMENT OF COMMITTEE.--

22 A. If after considering comments and applications  
23 submitted, the agency determines that a negotiated rulemaking  
24 committee can adequately represent the interests that will be  
25 significantly affected by a proposed rule and that it is



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1 feasible and appropriate in the particular rulemaking, the  
2 agency may establish a negotiated rulemaking committee.

3 B. If after considering such comments and  
4 applications, the agency decides not to establish a negotiated  
5 rulemaking committee, the agency shall promptly notify the  
6 public by publishing notice of such decision and the reasons  
7 therefor in the New Mexico register and, as appropriate, in  
8 trade or other specialized publications, a copy of which shall  
9 be sent to any person who applied for, or nominated another  
10 person for, membership on the negotiated rulemaking committee  
11 to represent such interests with respect to the proposed rule.

12 C. The agency shall limit membership on a  
13 negotiated rulemaking committee to twenty-five members, unless  
14 the agency head determines that a greater number of members is  
15 necessary for the functioning of the committee or to achieve  
16 balanced membership. Each committee shall include at least one  
17 person representing the agency.

18 D. The agency shall provide appropriate  
19 administrative support to the negotiated rulemaking committee,  
20 including technical assistance.

21 Section 6. CONDUCT OF COMMITTEE ACTIVITY.--

22 A. Each negotiated rulemaking committee shall  
23 consider the matter proposed by the agency for consideration  
24 and shall attempt to reach a consensus concerning a proposed  
25 rule with respect to such matter and any other matter the

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1 committee determines is relevant to the proposed rule.

2 B. The person or persons representing the agency on  
3 a negotiated rulemaking committee shall participate in the  
4 deliberations and activities of the committee with the same  
5 rights and responsibilities as other members of the committee,  
6 and shall be authorized to fully represent the agency in the  
7 discussions and negotiations of the committee.

8 C. An agency may nominate either a person from the  
9 state government or a person from outside the state government  
10 to serve as a facilitator for the negotiations of the  
11 committee, subject to the approval of the committee by  
12 consensus. If the committee does not approve the nominee of  
13 the agency for facilitator, the agency shall submit a  
14 substitute nomination. If a committee does not approve any  
15 nominee of the agency for facilitator, the committee shall  
16 select by consensus a person to serve as facilitator. A person  
17 designated to represent the agency in substantive issues may  
18 not serve as facilitator or otherwise chair the committee.

19 D. A facilitator approved or selected by a  
20 negotiated rulemaking committee shall:

21 (1) chair the meetings of the committee in an  
22 impartial manner;

23 (2) impartially assist the members of the  
24 committee in conducting discussions and negotiations; and

25 (3) manage and record the keeping of minutes

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1 and records as required under law, except that any personal  
2 notes and materials of the facilitator or of the members of a  
3 committee shall not be subject to public inspection.

4 E. A negotiated rulemaking committee may adopt  
5 procedures for the operation of the committee.

6 F. If a committee reaches a consensus on a proposed  
7 rule, at the conclusion of negotiations the committee shall  
8 transmit to the agency that established the committee a report  
9 containing the proposed rule. If the committee does not reach  
10 a consensus on a proposed rule, the committee may transmit to  
11 the agency a report specifying any areas in which the committee  
12 reached a consensus. The committee may include in a report any  
13 other information, recommendations or materials that the  
14 committee considers appropriate. Any committee member may  
15 include as an addendum to the report additional information,  
16 recommendations or materials.

17 G. In addition to the report of the committee, a  
18 committee may submit to the agency any other records used to  
19 generate or support the report.

20 Section 7. TERMINATION OF COMMITTEE.--A negotiated  
21 rulemaking committee shall terminate upon promulgation of the  
22 final rule under consideration, unless the agency, after  
23 consulting the committee, specifies an earlier termination  
24 date.

25 Section 8. SERVICES, FACILITIES AND PAYMENT OF COMMITTEE

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1 MEMBER EXPENSES.--

2 A. An agency may employ or enter into contracts for  
3 the services of an individual or organization to serve as a  
4 convener or facilitator for a negotiated rulemaking committee  
5 or may use the services of a government employee to act as a  
6 convener or a facilitator for such a committee. An agency  
7 shall determine whether a person under consideration to serve  
8 as convener or facilitator of a committee has any financial or  
9 other interest that would preclude such person from serving in  
10 an impartial and independent manner.

11 B. An agency may use the services and facilities of  
12 other agencies and persons with the consent of such agencies  
13 and persons, with or without reimbursement to such agencies and  
14 persons, and may accept voluntary and uncompensated services.

15 C. Members of a negotiated rulemaking committee  
16 shall be responsible for their own expenses of participation in  
17 such committee, except that an agency may, in accordance with  
18 applicable law, pay for an employee's reasonable travel and per  
19 diem expenses and any other expenses to obtain technical  
20 assistance.

21 Section 9. REPORTING.--By July 2008, and by July of each  
22 year thereafter, each agency shall prepare a written report to  
23 submit to the governor, president pro tempore of the senate and  
24 speaker of the house of representatives regarding the number of  
25 rulemaking proceedings engaged in by the agency, whether

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1 negotiated rulemaking under the Administrative Negotiated  
2 Rulemaking Act was considered and used, whether negotiated  
3 rulemaking under the Administrative Negotiated Rulemaking Act  
4 was either successful or unsuccessful and a brief explanation  
5 as to why such negotiated rulemaking was either successful or  
6 unsuccessful. If a negotiated rulemaking committee reaches  
7 consensus and the agency later promulgates a final rule that is  
8 inconsistent with the consensus of the negotiated rulemaking  
9 committee, the agency shall include in its written report a  
10 listing of all facts and legal reasons as to why the agency  
11 departed from the consensus of the negotiated rulemaking  
12 committee. The president pro tempore of the senate and the  
13 speaker of the house of representatives shall forward the  
14 written reports from the agencies on to the appropriate interim  
15 committee or committees for review.

16 Section 10. JUDICIAL REVIEW.--Any agency action relating  
17 to establishing, assisting or terminating a negotiated  
18 rulemaking committee shall not be subject to judicial review.  
19 Nothing in the Administrative Negotiated Rulemaking Act shall  
20 bar judicial review of a rule if such judicial review is  
21 otherwise provided by law. A rule that is the product of  
22 negotiated rulemaking and is subject to judicial review shall  
23 not be accorded any greater deference by a court than a rule  
24 that is the product of other rulemaking procedures.

25 Section 11. EXEMPTIONS.--The governor, by executive

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1 order, may exempt an agency from one or more provisions of this  
2 act. The executive order shall set forth any and all reasons  
3 for providing an agency with an exemption from this act. A  
4 copy of the executive order shall be delivered to the president  
5 pro tempore of the senate and the speaker of the house of  
6 representatives. The president pro tempore of the senate and  
7 the speaker of the house of representatives shall forward the  
8 executive order to one or more interim or standing committees  
9 for further review.

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