

Positive Steps for Improving the Efficiency and Effectiveness of the New Mexico Regulatory System

**A Minority Report on House Memorial 63
50th Legislature, Second Session (2012)**

Prepared by

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**Submitted to the Science, Technology, and Telecommunications
Committee**

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Introduction

HM 63: A memorial requesting the New Mexico Attorney General and the Public Regulation Commission to cooperate in the development of legislation to transfer consumer advocate staff from the Public Regulation Commission to the Attorney General.

The 50th Legislature, 2nd Session (2012) passed House Memorial 63 directing the Public Regulation Commission and the Attorney General to study the possibility of transferring staff resources from the Commission in order to create a fully-staffed office of ratepayer advocacy at the Attorney General's Office, and to reallocate staff within the Commission to improve the Commission's advisory support staff. The memorial required the agencies to provide a report to the appropriate interim legislative committee by December 1, 2012.

On September 27, 2012 the Commission voted 3-2 against the concept of transferring any PRC staff to the Attorney General to bolster ratepayer advocacy, with Commissioners Howe and Marks opposed, i.e. voting in favor of re-allocation of staff.

Commissioners Howe and Marks present this minority report to the Interim Science, Technology, and Telecommunications Committee in order to provide the Legislature with the results of study in response to the memorial.¹ We find that there are a number of administrative and legislative initiatives that will improve the efficiency and effectiveness of both the Attorney General's Ratepayer Advocate department and the PRC, **at the same cost to the taxpayer**. Essentially, we do not believe that the current regulatory system is delivering to taxpayers an efficient and effective regulatory system.

The Problem

The Attorney General's Office is charged by statute with representing the interests of residential and small commercial consumers (collectively, small consumers) before the PRC. This representation is carried out through the AG's Utilities Division (AGUD), consisting of two lawyers and no technical staff. With such a small staff, the AGUD is unable to represent small consumers in all cases and must pick and chose the cases in which it intervenes – and even then it is imited in the resources it can bring to bear. As a result, consumer advocate representation is almost invariably over-matched by the litigation teams fielded by the regulated companies.

¹ Our study included analysis of statutes and practices affecting current PRC functions, consultation with AGO staff, and consultation with national experts on state utility regulation.

The situation for the PRC is somewhat more complicated. New Mexico statute requires that the PRC have a Utilities Division and a Legal Division. The Utilities Division consists of technical expertise (accountants, engineers and economists) that advocate for the “public interest” in all proceedings before the PRC. The Legal Division, consisting of attorneys admitted to practice in New Mexico, provides legal representation to the Utilities Division. The Utilities Division and the Legal Division are called “**advocacy staff**” because they are charged with advocating for a position in cases before the Commissioners: putting on witnesses, submitted legal briefs, and otherwise acting in a similar role to the regulated companies and interveners.

PRC Utility and Legal Division advocacy staff are a party in all cases decided by PRC and are prohibited by statute from communicating with commissioners on any contested case, which includes, essentially, every utility rate case. The resulting situation is that commissioners cannot be briefed by the Utility or Legal Division on any contested case pending before them. Commissioners more often than not find themselves learning about a case for the first time on the day that they are asked to decide the case. This creates a problem for the regulatory system in two ways: i) frequent delays of weeks and months in adjudicating matters since commissioners have not been kept abreast of case development while the case is ongoing; and ii) frequent appeals of commission decisions on the basis of adjudicating outside of the formal record. In support of this latter point, we note that in the past 4 years, 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.

This problem could easily be overcome with the creation of a robust **advisory staff** within the PRC, which would act as advisors and facilitators to the commissioners of cases in front of the PRC. The most important job of advisory staff would be to keep commissioners briefed on case development at all stages of its progress through the PRC and would incorporate into the record questions and information requested by the commissioners on a timely basis, not long after the record is closed as is the current practice (and which practice leaves the commissions orders vulnerable to appeal). While the statute envisions that the PRC can have an advisory staff, it does not mandate that it exists as it does the Utility and Legal Staff. Over the years, the PRC has chosen a minimal advisory staff. Today, the advisory staff role is subsumed within the Office of General Counsel (OGC) that provides legal advice but cannot provide technical advice (aside from a single advisory economist), nor does it have the staff to write ongoing briefs of case development. Indeed, OGC has been chronically unable to produce any case briefings until barely scant hours before the commission is to decide a case. However, increasing the PRC budget in order to create a robust technical advisory staff is not a realistic alternative given the state’s current budget realities.

Re-Balancing Staff Functions

There is another way to rectify this situation within the confines of current budget appropriations and which would make both the PRC and the AGUD more effective. This solution involves four steps:

1. **Create a formal, robust Advisory Staff division within the PRC.** The function of the Advisory Staff would include writing all briefing memos and drafting orders, facilitating commissioner involvement in hearings, issuing bench requests on behalf of commissioners, handling all Notice of Proposed Rule-makings and compliance filings and undertaking public hearings as needed. Expertise for the Advisory Staff would come from the Utility and Legal Divisions.
2. **Redefine the duties of the Utility and Legal Divisions.** Both divisions would continue to exist within the PRC (as required by statute) but the duties of Utility and Legal Division would be restricted exclusively to the obligations dictated by statute: representation of the public interest in cases before the commission. This restriction of duties will create excess staff that can be allocated to the Advisory Staff and the AGUD (see below).
3. **Provide supplemental staff to the AGUD.** The AGUD is supplemented with additional technical and legal expertise made available through the reorganization of Utility and Legal divisions, and other PRC divisions.
4. **Streamline PRC processes.** Streamlining obtuse and convoluted processes and procedures will contribute to the reduction in workload on the staff, allowing reallocation to occur. It will have the additional positive benefit of reducing the time required to adjudicate many cases, unclogging the PRC's hearing schedule.

Steps 1, 2 and 3 can be accomplished by the PRC and the AGUD, acting in cooperation with each other, without the need for enabling legislation. However, we have seen that majority of the Commission does not want to pursue this option, particularly Step 3. We would therefore recommend that the Legislature instruct the PRC to pursue this option. We do also recommend a relatively easy legislative change to the Renewable Energy Act that would allow significant improvement and cost-saving under Step 4.

In coming to these recommendations, we have been informed by the approach taken in some other states to dealing with these issues. Most notably, the State of Colorado has provided a prototype as an alternatives to our current staffing arrangement as we discuss below.

The Colorado Approach

The authors of this report consulted a wide range of materials on how other commissions are organized and had direct discussions with staff of the Michigan State University Institute for Public Utilities, the nations oldest academic institution devoted exclusively to public regulation. The authors have learned that, as far as can be discerned, New Mexico is the only state whose regulatory commission does not have an advisory staff which includes substantial technical expertise. The regulatory system of Colorado provided useful insights since their regulatory span-of-control is similar to that of New Mexico.

Like New Mexico, Colorado has a public utilities commission that has jurisdiction over electric, water, telecommunications and transportation companies. Colorado also has an Office of Consumer Counsel which operates like New Mexico’s AGUD. The Colorado PUC has three separate staffs: a policy and advisory staff that serves to support commissioners; a trial staff that performs the same function as our Utility and Legal Division; and a Research Staff which performs forward-looking research on issues facing the energy landscape in Colorado. The table below shows a comparison between the staffing of Colorado’s and New Mexico’s utility regulation systems, including their respective small consumer representation divisions.

	Colorado	New Mexico
Utility & Transportation Staff	31	44
Technical	25	33
Legal	6	11
Policy, Research, Advisory	17	8
Technical	14	1
Legal	3	7
Administrative Law Judge / Hearing Examiner	5	7
Office of Consumer Counsel / AGUD	10	2
Technical	7	0
Legal	3	2

	Colorado	New Mexico
Utility & Transportation Staff	31	44
Technical	25	33
Legal	6	11
Policy, Research, Advisory	17	8
TOTAL	63	61
Total Technical	46	34
Total Legal	17	27
State Population	5.1 million	2.1 million

Several things are immediately apparent from this comparison:

- New Mexico’s regulatory system appears to already have sufficient total FTEs to provide the more robust commission advisory and ratepayer advocate functions present in Colorado.
- The New Mexico regulatory system employs too many attorneys. In fact, the New Mexico system uses attorneys for many functions that do not require a law degree. As an example, all case briefings, written by technical staff in Colorado but attorneys in New Mexico, are created as attorney-client privileged documents when there is no legal or logical reason to do so, frustrating many case participants and the public that would like to see them in advance.
- Although long on legal staff, New Mexico’s system is short on technical expertise especially in the area of Policy, Research and Advisory. Virtually all technical expertise is concentrated in Utility & Transportation Staff areas, which are not permitted to communicate with commissioners, hearing examiners or the Office of General Counsel about any contested matter.

The Colorado model provides a positive illustrative model that through re-assigning and re-balancing staff functions as well as streamlining processes and procedures, the New Mexico regulatory system’s effectiveness and efficiency could be dramatically improved at the same cost than the current situation.

Steps for Positive Improvement in Efficiency and Effectiveness

Area of Improvement	Range of Estimated FTE Additions / (Reductions)
<p>1. Revise the Renewable Energy Act to remove that requirement that each utility file its renewable energy plan every year by July 1. Allowing the PRC to establish a staggered schedule for utility renewable energy filings could better level PRC staff workload. Under the current system, the three utilities file their renewable energy plans simultaneously on July 1 and must complete their review, generally involving extensive litigation, by December 31. Allowing utilities to file every two years, with an alternate year compliance filing, and doing so on a staggered basis would allow the PRC to staff for average workload, not peak workload.</p>	(3-4)
<p>2. Restrict the Office of General Counsel to the provision of legal advice and defense of the commission as needed. Currently, in addition to legal defense and advice, the OGC prepares all orders and briefs for the commission as well as managing public hearings. These extraneous functions, which do not require legal training, can be placed with a newly-created Advisory Staff. This has the additional advantage of allowing the public to see draft orders before they are discussed in open meetings, adding a needed level of transparency</p>	(4-5)
<p>3. Create an Advisory Staff that can support the Commissioners. The Advisory Staff would be responsible for writing briefs, drafting orders, facilitating public hearings as well as establishing the procedural schedule for dockets to be heard by the Commissioners <i>en banc</i>.</p>	+6

Area of Improvement	Range of Estimated FTE Additions / (Reductions)
<p>4. Commissioners to hear high-profile dockets <i>en banc</i>, in their entirety. Under New Mexico’s current regulatory system, commissioners very rarely conduct <i>en banc</i> hearings, and never do so for the entirety of the case. Under the Colorado model, the commissioners are hearing as many as 4 concurrent “high-profile” cases. For these cases, no hearing examiner is assigned (thus reducing the need for hearing examiners). Advisory staff acts to establish the procedural schedule, review all pleadings and filings, and generally ensure that the record for the case is properly and legally constructed. Since the commissioners themselves are conducting the hearings they are fully apprised of the issues and arguments from the very beginning with the positive additional benefit that cases can be adjudicated much more quickly and efficiently unclogging the hearing schedule and delivering decisions on a more timely basis.</p>	(2)
<p>5. Add technical staff to the AGUD. Supplement the existing legal staff of the AGUD with technical staff in the areas of water, gas, electric and telecom utilities. This will allow the legal staff of AGUD to focus on process and legal strategy while the technical staff can focus on content issues in rate cases.</p>	+ 3-5
<p>Net change in FTE</p>	0
<p>AG</p>	+ 3-5
<p>PRC</p>	(3-5)