

# REPORT TO THE NEW MEXICO PUBLIC REGULATION COMMISSION

By the League of Women Voters PRC Study Committee

The League of Women Voters of New Mexico began a study of the New Mexico Public Regulation Commission in 2010, prompted by the belief that some reforms of the PRC were needed and that the time was ripe for making such changes.

One product of the study was the formulation of a number of positions on the PRC, which were adopted by the New Mexico League earlier this year. League positions serve as a basis for lobbying by the League; the League's positions on the PRC are highlighted throughout this report, and are also collected at the end of this report.

The second product of the League study is this report, and the third product will be a report to League members. The purpose of this report is to present recommendations for changes at the PRC, some of which the Commission can make itself, and others that will require legislative approval. These changes range from broad policy recommendations to detailed changes designed to improve operations at the PRC. Some of the suggested changes have been proposed in other reports, which will be credited as appropriate in this report.

**Because it deals with both the broad positions adopted by the League and with more detailed recommendations made by PRC study committee members alone, this report is being presented over the signatures of the PRC study committee members rather than as a document approved by the League board.**

**1. Funding the PRC.** Because solution of a number of the problems at the PRC depends on having a funding source that is based more on regulatory needs rather than on the amount that can be made available without too great an impact on other state government needs, our report begins with our recommendation for funding the PRC. The New Mexico League has adopted the following position on funding the PRC:

**The PRC should be funded by assessments on the industries that it regulates and those funds should be sequestered from the general fund. The legislature should provide enough money in the PRC's budget so that it can carry out its allotted duties successfully.**

The League PRC study committee recommends funding the entire PRC with assessments on the industries it regulates; these assessments should be set annually based on projected budgets approved by the legislature. The revenue from these assessments should be put into non-reverting funds. Revenue not expended would carry over to the following year and could be used either to reduce the assessments in that year or to increase reserves up to levels approved by the legislature; reserves would be available for infrastructure improvements, such as computer systems, or to meet unforeseen emergencies. Three of the PRC's functions are currently funded, by non-reverting funds. For these funds—the title insurance fund, the insurance fraud fund and the pipeline safety fee fund—fees are set annually based on the budget approved for the coming year's operations. For example, the unexpended fund balance in the pipeline safety fee fund at the end of 2012 was sufficient to cover the budget for this fund approved by the legislature for FY2013; therefore no assessment was made to operators for FY2013.

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.<sup>1</sup> 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.

Economic theory supports funding of regulatory agencies by the regulated industries in order to promote efficient allocation of spending by consumers. The regulated industries pass the cost of these regulatory assessments on to their customers. Including the cost of regulation in the price of those goods sends the proper price signal to consumers, who thus base their consumption on the true cost of providing the goods, of which the cost of regulation is one component. Having the PRC funded by regulated industries is the fair way to pay for regulation because it ensures that those who buy the goods are those who pay for regulating the industries that produce them. Most states<sup>2</sup> fund their regulatory commissions by separate funds, not part of the state general fund, derived from fees paid by and/or assessments on regulated industries.

New Mexico has flirted with industry funding of regulation in the past. Prior to the mid-1950's, statutes provided that fees assessed on telephone, telegraph, gas, water, electricity, and pipeline companies were to be used for regulation and no other purpose. However, in 1957 all these fees were swept into the general fund and since then most appropriations to regulatory agencies have been made by the legislature from the general fund.<sup>3</sup>

If the PRC is funded by assessments on regulated industries, it will be necessary to make some changes to the statutes that currently provide fees and assessments. Changes are needed in order to clarify which companies must pay the assessments and to provide for assessments that are commensurate with the regulatory oversight exercised by the PRC.

**2. Increasing efficiency.** The League has not adopted a position on increasing efficiency, but the League PRC study committee has several recommendations. The first two deal with acquiring or upgrading computer systems, which will require funding that needs to be approved by the legislature. The third also will require legislative approval. The fourth

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<sup>1</sup> In their study, "Funding the Costs of Public Utility Regulation", Larry Blank and Doug Gegax of the Center for Public Utilities at New Mexico State University advocate funding the PRC from assessments on utilities rather than from the state general fund in order to promote "an independent commission that operates in a stable and autonomous environment."

<sup>2</sup> Dr. Gegax's study, referred to in the previous footnote, found that in 42 states utility regulation is funded entirely from a separate public utility regulation fund.

<sup>3</sup> When the Public Service Commission was created in 1941, the statute establishing it provided that utilities (gas, water, steam, and electricity) pay 0.5% of gross receipts into the Public Utility Fund "for the purpose of defraying the salaries and other expenses of the Commission, and said monies shall be used for no other purpose." Inspection fees, set at .0025% of gross receipts, were first assessed on motor carriers and utilities (defined in the statute as telephone and telegraph companies) in 1951. The enacting statute provided that the fees were to be used to pay the expenses of the State Corporation Commission, and "no part shall revert to the general fund." Both laws were amended in 1957 to direct all receipts to the state general fund. The tax on telephone and telegraph companies is currently .00511% of gross receipts, and on motor carriers, .00256% of gross receipts. The tax on gas, water, steam, and electricity sales is currently 0.506% of gross receipts.

recommendation seems likely to be achieved by actions already under way at the PRC, but is included here to bring the problems addressed to the Commission's attention.

A. Tracking Cases: The League PRC study committee has observed a number of instances of problems in scheduling cases before the Commission—deadlines missed, cases scheduled to be heard too close to a deadline, cases that “fall through the cracks”, that is, are heard by a hearing examiner but then not brought to the Commission for a final decision in a timely way. Sometimes cases languish for months or years only to be closed without resolution because they have become stale. Note that failure to dispose of cases in a timely way is perceived to be a sign of inefficiency at the PRC, one that the legislature has in the past tried to change through its powers of appropriation.<sup>4</sup>

To deal with these problems, the League PRC study committee recommends that the PRC invest in case management software of the type used by courts, and assign a staff member to use this software to track cases from the time they are docketed until they are heard by the Commission.

B. Upgrading eDocket: The problems with eDocket are frustrating for both PRC staff and outside users. For example, at the open meeting of August 28, 2012, the Associate General Counsel presenting to the Commission complained that the case he was presenting, which dealt with El Paso Electric's Integrated Resource Plan, was hard to find on eDocket because it had no case number. A review of how documents in this case are accessed in eDocket shows other problems (see first item in the eDocket Glitches box on the following page).

To deal with these problems, the League PRC study committee recommends that the PRC either replace eDocket with a better system, or invest in an upgrade if one is available.

C. Electronic filing: The PRC has made great strides in the use of e-filing in several of its divisions, but there are other areas where it could be utilized. For example, the Transportation Division should enable electronic filing of proof of insurance by motor carriers to reduce staff processing burden.

Motor carriers are required to carry insurance, and their insurance company must file a proof of insurance form (Form E) with the PRC to prove they are covered. The filing fee is \$15. Because New Mexico is the only state that has a fee for filing proof of insurance, the nationwide systems that have been set up to process such forms cannot handle checks. The need to send a check along with Form E means that staff in the Transportation Division must enter the information by hand and manually file Form E in the motor carrier's file. Motor carriers can and do change insurers, sometimes resulting in the filing of several copies of Form E annually for the same company. In the 2011 legislative session a bill was introduced, SB468, the Free Market for Motor Carriers Act, which, among other provisions, would have eliminated the \$15 filing fee. The Fiscal Impact Report for this bill noted that it would greatly reduce the burden on the staff of

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<sup>4</sup> For example, the appropriation bill passed in 2003 for FY2004 required the PRC to submit data, on a quarterly basis, to the department of finance and administration and the legislative finance committee verifying that it had reduced the average number of days to complete a water utility rate case by twenty-five percent, and had reduced the number of docketed cases and water utility rate cases on the PRC docket by twenty-five percent from fiscal year 2003. Failure to submit such verification or meet the targets would result in a reduction of the general fund appropriation to the policy and regulation program of the public regulation commission by five percent for the ensuing three-month period.

the PRC's Transportation Division. The bill did not make it out of committee, and no similar bill was introduced in the 2012 legislative session.

### eDocket glitches, a sample

1. El Paso Electric's Integrated Resource Plan (IRP), filed on July 16, 2012, was not assigned a docket number; either for this reason or for other reasons, it is difficult to assemble the relevant documents in this case. The relevant documents are the original IRP filing, an addendum to the original IRP filed on August 17, 2012, and the final order in this case, filed on August 28, 2012. It is not possible to get all three documents with a single search, although all are on eDocket. The following nitty-gritty details tell what search strategies must be used to get each of these documents.

To obtain the Final Order, use the Document Search option, and search on case number 12-00294-UT. It can also be found by using the Company Search option, entering El Paso Electric, and then selecting further options in a circuitous way—that is, select the Cases List tab, and then and only then select case 12-00294-UT, and then the Case Documents tab. The circuitous route is necessary because if the user selects the Company Search option, enters El Paso Electric, and then immediately selects the Docs List tab, the list of documents returned does not contain the Final Order.

To obtain the IRP originally filed and the addendum filed on August 17, 2012, use the Company Search option, enter El Paso Electric, and then select the Case Documents tab. Note that the document list returned by using this search option does not contain the Final Order filed on August 28, 2012.

2. The League PRC study committee has found that it is never possible to be sure that the records supplied by eDocket in response to a request are complete; the number supplied depends on whether the Company Search option or the Documents Search option is used and also on the way the company name is presented in the request. For example: depending on the search option used and whether the name of the company being searched for is entered as

“New Mexico-American,”

“New Mexico-American Water Company,” or

“New Mexico American Water Company,” eDocket will return one of four different responses: a “no record found” message, 190 records with dates from 1988 to 2005, 500 records with dates from 1986 to 2012, or 706 records with dates from 1986 to 2012. There is nothing to indicate to the user that some records are missing when fewer than 706 records are returned. Also, there is no way for the user to know if the list of 706 records is complete.

3. Some documents on eDocket contain sensitive information and viewing them is supposed to be restricted to those cleared to view those documents. Although a document title shows up in the list of records supplied to all users of eDocket, only users with clearance can click on the title to view the document.

However, the home page of eDocket lists all the records received in eDocket in the last 2 to 10 days (the user selects the number), and during that period of time restricted documents may be viewed by all users. This needs to be corrected; if a document is to be restricted at all, it should be restricted at all times.

The League PRC study committee recommends that the Commission give strong backing to getting legislation passed in 2013 to eliminate the Form E filing fee; we have been told that staff intends to submit a bill making the change in the upcoming session.

D. Fee collection: The PRC collects a number of fees from companies that it regulates. Responsibility for collecting these fees is allocated to various divisions in the PRC. Responsibility for seeing that receipts are promptly deposited with the state's fiscal agent, properly entered into the state's accounting system, and for allocating the revenue collected to the proper funds is assigned to the chief financial officer (CFO).

This fragmented system has contributed to problems in revenue collection. For example, the current system apparently does not enable the PRC to keep track of which railroads should be paying Utility and Carrier Inspection Fees. Only two of the nine railroads in New Mexico for which eDocket has records pay these fees, even though four of the nine have records in eDocket indicating they are under the jurisdiction of the PRC. (The PRC staff is investigating whether the railroads not now paying these fees should be paying them.)

Changes, which are now under way, in the way receipts are deposited and tracked, will provide the CFO with the information needed to track revenue assessments and collection. In addition, the League PRC study committee believes that the PRC and its chief of staff need a study to determine if all revenues that the law requires it to collect are being collected and if not, to develop a process which will ensure that they are collected. Such a process should include adequate staffing and performance standards in each division responsible for revenue collection, together with adequate information systems support.

**3. Corruption.** Because the PRC has a great deal of power over the companies it regulates, and because some of it is exercised at the employee level rather than by the Commission, there is an opportunity for employees to exercise this power in unethical ways.

The PRC's 2012 management study<sup>5</sup> recommends requiring ethics training for Commissioners and all exempt staff. While such training can be helpful in educating staff members about the difference between permitted and unpermitted actions in dealing with the public, ethics training is not adequate to deal with employees who set out to enrich themselves by exercising their power over regulated companies. The League PRC study committee concluded that the most effective way of combating this sort of corruption would be to have an inspector general at the PRC, one of whose functions would be to investigate possible corruption on his/her own initiative or in response to internal and external complaints. The League position states:

**The PRC should have an inspector general charged with reviewing practices for handling incoming payments properly, conducting internal audits of other functions, and pursuing such other investigations as are deemed necessary.**

A more subtle form of corruption can occur when staff members who exercise regulatory authority over an industry are induced to offer favorable treatment to the companies they regulate

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<sup>5</sup> New Mexico Public Regulation Commission, "2012 Management Study: Reforming the PRC."

by the implicit promise of a job in the industry when they leave the PRC. The League has adopted a position designed to delay such employment.

**PRC Commissioners and advisory staff should be prohibited from working in a business regulated by the PRC for at least one year after they complete their tenure at the PRC.**

#### **4. Improving the ability of Commissioners to make appropriate decisions.**

Because Commissioners are elected, and because the PRC has quite broad regulatory powers, Commissioners may lack the expertise needed to make appropriate decisions in some of the cases brought before them. There are two ways to deal with the problem. One is to have more knowledgeable Commissioners; the other is to reduce the barriers to communication that now exist between Commission members and staff members with knowledge about contested cases.

More knowledgeable Commissioners: It would be helpful to voters, when electing a Commissioner, to have some basis for casting their vote. Commissioners are elected in general elections when most publicity and attention are devoted to names at the top of the ticket—President, governor, members of congress, and members of the state legislature. Most voters know very little about the people running for the PRC. The League has adopted two positions on candidate qualifications—one in favor of requiring more education and experience, and one in favor of having a committee that would evaluate candidates' education and experience. Evaluation is not selection, but it can provide information about candidates that will enable the public to make a selection on the basis of actual knowledge about the candidates.

**Candidates for the PRC should have education and/or appropriate professional experience in a related field or in consumer advocacy. There should also be mandated, ongoing professional training after election.**

**PRC candidates should be evaluated on the basis of qualifications by a broad-based nonpartisan process.**

The second position is intended to address the fact that it is difficult to specify experience requirements in a clear-cut way that will allow the Secretary of State, who must determine whether prospective candidates for elective office are qualified, to determine whether a candidate meets these requirements. Having a nonpartisan committee evaluate candidates would allow judgment to be used in evaluating the relevance of both education and experience, and its rules could allow for favorable evaluation of candidates of exceptional ability whose formal qualifications fall outside the legally specified requirements.

The League PRC study committee believes that all Commissioners benefit from being part of a Commission whose members have the knowledge needed to make good decisions, and urges the Commission to support legislation designed to achieve that goal.

Reducing barriers to communication between Commissioners and staff. The League PRC study committee believes the Commission can reduce the barriers that prohibit communication about contested cases between Commissioners and staff by changing some procedures and transferring some positions in the legal and utility staffs to an advisory staff with

which Commissioners may discuss pending cases without violating *ex parte* rules. At the New Mexico PRC, technical staff is charged with representing the public interest in disputed cases, and in doing so may become a party to disputed cases. In those cases, communication between them and the Commissioners is considered *ex parte* and is not allowed. In many other states, Commissions have their own technical staff to evaluate all the evidence from disputed cases, and because such staff is not a party to the case, there are no *ex parte* problems when commissioners seek out their aid and advice. At one time, the New Mexico Public Regulation Commission had such staff, but they were eliminated as a cost-saving measure, and the General Counsel staff has had to fill the void.

A proposal for reorganizing staff to avoid *ex parte* problems and still give the Commissioners the technical advice they need was one part of House Memorial 63 passed by the 2012 legislature; HM63 directed that the “attorney general and the public regulation commission be requested to cooperate in studying and developing legislation to transfer professional and legal staff from the public regulation commission to the attorney general to form a fully staffed office of ratepayer advocacy and to transfer the remaining utility advocacy staff within the commission to enhance the advisory function” and to report their recommendations to a committee of the New Mexico legislative council by December 1, 2012.

While the majority of the Commission rejected the idea of moving some PRC staff members to the AG’s office, the majority report on HM 63 recognized the need to increase the size of the advisory staff at the PRC. It states that the PRC is continuing to study the possibility of undertaking a re-organization of staff<sup>6</sup>, but makes no specific suggestions for such a reorganization.

Specific suggestions are made in some detail in a minority report on HM63 submitted by Commissioners Howe and Marks titled “Positive Steps for Improving the Efficiency and Effectiveness of the New Mexico Regulatory System.” It suggests changes in current rules governing submission of reports by utilities, changes in staff duties, and the staff transfers this would make possible. Such transfers would include a shift of six staff members to a PRC advisory staff, which would be separate from the office of General Counsel, and a transfer of three to five PRC staff members to the Attorney General’s office to increase the size of the consumer advocate staff there.

The League PRC study committee recommends that the PRC take steps to increase the size of the PRC advisory staff, either by seeking legislative approval for additional positions or by staff reorganization.

**5. Improving representation of consumer interests when balancing public, consumer, and investor interests.** Balancing the interests of these three groups most often

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<sup>6</sup> The majority report states, “The PRC Commissioners, its management and staff, all recognize areas of potential improvement. The PRC is continuing to conduct various studies, including a management study, and reforming its internal practices and procedures for a number of purposes to improve its impact on consumers, the utility companies and the overall public interest. Possible recommendations and outcomes: range from additional training, undertaking a re-organization in accordance with current legislation, to seeking additional funding from the legislature in order to support the addition of professional advisory staff for Commissioners.”

means taking care of consumers and the public interest, since most regulated companies have staff or consultants paid to look after their interests at the PRC. The League's position is:

**Consumer interests should have strong representation when the PRC is making policy decisions and setting rates.**

New Mexico, like many other states, places representation of consumer interests under the Attorney General. The AG staff assigned to this consists of two lawyers, but no technical staff. Because its staff is small, the AG's office cannot represent consumer interests in all cases; it must choose the cases in which it intervenes. Consumer interests could be represented more strongly if the size of the staff assigned to do this in the AG's office were increased.

The majority of the PRC Commission has taken the position, stated in the majority report on HM 63, that, "The AG has the opportunity and the ability to organize his available resources, including his staff, or seek additional resources, as he sees fit." This implies that the PRC has no role to play in increasing the size of the consumer advocacy staff in the AG's office. In fact, however, there are several things the PRC could do to accomplish this. The League PRC study committee recommends that the PRC advocate funding the AG's consumer advocacy staff as well as the PRC itself through assessments on regulated industries. Most states fund their consumer advocacy staff from the separate funds collected to fund their utility regulation commissions.<sup>7</sup>

**6. Improving transparency and provision of information to the public.** The League PRC study committee believes the most obvious opportunity to improve transparency is to make proposed orders available to the public. The fact that proposed orders are not available to the public makes it difficult for those attending the Commission's open meetings to follow the discussion of the proposed Order, but it also results in more significant problems. For example, a company affected by a proposed Order may make an inappropriate decision on whether or not to attend the meeting at which it is discussed because they don't know the contents of the Order. At one meeting observed by the League PRC study committee, a Commissioner asked a party to a case a question about the Order being discussed, and was told, "I can't answer that, I haven't seen the Order."

The League PRC study committee recommends that proposed Orders be made available to the public at the same time as the agenda in which they are scheduled to be presented to the Commission. Previous General Counsels have deemed proposed Orders to be attorney-client privileged and have said that for that reason they should not be available to the public. However, the Commission is under no obligation to invoke attorney-client privilege in these cases. We think, in the interest of public transparency, it might be advisable to make proposed Orders available to the public while retaining attorney-client privilege for the legal memoranda that underlie the proposed Orders.

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<sup>7</sup> "Funding the Cost of Public Utility Regulation," Larry Blank and Doug Gegax, November 2010, states that 34 states fund a separate consumer advocacy function out of the separate funding source used to fund their utility regulation commissions.

In some cases, the lack of adequate public information is not the result of a specific decision to withhold information but is inadvertent; it can occur because staff has not been provided with adequate funding or time to make information publicly accessible in a searchable data base. The Corporations Bureau data base is a good example of what can be done, but other bureaus and divisions which have information in their files that is frequently requested by the public need to do more work in this area.

The following are specific examples of problems we have encountered looking for information on the PRC's web site:

--On the web site, the Transportation Division provides a list of permitted carriers that is an outdated, non-searchable PDF file which provides no list at all of permitted incidental carriers. This is the type of information that consumers often seek out and, as it should be readily available from the files that are kept by the Division, it also should be relatively easy to list on the web site.

--SB 208, passed in 2011, requires the PRC to post specified information on its website whenever a health insurer files a rate change, including a link to the company's most recently filed financial statement and actuarial memorandum. As of December, 2012, this had not yet been done. It is possible, albeit difficult<sup>8</sup>, to get information on filings and their disposition, but no link to the actual filing is provided. The SERFF tracking number for the filing is given, but members of the public do not have access to SERFF data.<sup>9</sup>

--The PRC's website lists the date, time and subject of upcoming meetings. The subject descriptions are usually quite cryptic, for example, "Thursday, October 18, 9:30 a.m. 12-00217-UT EPE Hearing". A click on this entry expands it to show the location and a link to "more details". Clicking on "more details" takes the user to a blank page on which the information previously given is repeated. It would be very useful if this page also included some information about the subject of the hearing, for example, "El Paso Electric has filed its 2012 Annual Procurement Plan for renewable energy, and is seeking Commission approval. This hearing provides an opportunity for those interested in the plan to comment." The hearing examiner who is appointed to preside over these hearings could be responsible for writing the information sentences.

--The same comment applies to descriptions printed on the PRC's agenda for open meetings. For example, the title "IN THE MATTER OF THE IMPLEMENTATION OF THE STATE RURAL UNIVERSAL SERVICE FUND," does not tell the reader that what is to be considered is the percentage to be added to all telephone bills to finance the Fund.

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<sup>8</sup> On the PRC web site, click on Insurance. Below the introduction there is a list of topics that can be selected. Click on New Mexico Health Insurance Rate Review. This brings up a page with tabs at the top. Click on Recent Rate Requests.

<sup>9</sup> SERFF is the System for Electronic Rate and Form Filing used by insurance companies to file information with regulators. It is designed to enable companies to send rate and form filings to state regulators, and to allow the regulators to comment on and approve or reject the filings.

**7. Seeking feedback from the public.** The League PRC study committee recommends that the Commission seek feedback from people who attend hearings and open meetings at the PRC and people who seek help from the PRC, on the quality of their experience. Comments should be anonymous to encourage frankness, and forms should be supplied to suggest the matters to be covered, which should include whether their cases are dealt with fairly, and whether employees and Commissioners are helpful and knowledgeable.

In conclusion, the League PRC study committee would like to thank the Commission and members of the PRC staff for the gracious aid they have given us in making our study.

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The League of Women Voters of New Mexico supports the following positions with respect to the PRC.

1. PRC candidates should be evaluated on the basis of qualifications by a broad-based nonpartisan process.
2. Candidates for the PRC should have education and/or appropriate professional experience in a related field or in consumer advocacy. There should also be mandated, ongoing professional training after election.
3. The PRC should be funded by assessments on the industries that it regulates and those funds should be sequestered from the general fund. The legislature should provide enough money in the PRC's budget so that it can carry out its allotted duties successfully.
4. Insurance and Utilities should be regulated by separate agencies. *(Note: Although the LWVNM supports this position, the proposed constitutional amendment removing insurance regulation from the PRC will be neither supported nor opposed by the LWVNM, as the members thought the proposed amendment lacked appropriate detail.)*
5. The laws forbidding *ex parte* communications between commissioners and those who are interested parties in cases before the PRC should be very strong, and penalties for violating these laws also should be strengthened.
6. The PRC should have an inspector general charged with reviewing practices for handling incoming payments properly, conducting internal audits of other functions, and pursuing such other investigations as are deemed necessary.
7. PRC Commissioners and advisory staff should be prohibited from working in a business regulated by the PRC for at least one year after they complete their tenure at the PRC.
8. Consumer interests should have strong representation when the PRC is making policy decisions and setting rates.