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## FISCAL IMPACT REPORT

SPONSOR Griego DATE TYPED 2/12/2004 HB \_\_\_\_\_

SHORT TITLE Ex Parte Communications With PRC Staff SB 369/aSJC/aSFL#1

ANALYST Garcia

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY04	FY05	FY04	FY05		
			NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

Response Received From  
Public Regulation Commission

### SUMMARY

#### Synopsis of SFL#1 Amendment

The Senate Floor Amendment #1 restores language that was removed in the original bill: *“pursuant to the public regulation commission’s rulemaking authority,”*

#### Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to SB 369 eliminates the following language on page 3 lines 5 through 13: “rules that allow a party to a proceeding to consult directly with any member of the commission’s advisory staff on matters that are before the commission. The rules shall ensure open access for all parties to discuss matters with the advisory staff before, during and after such matters being heard by the commission and shall direct the advisory staff on how to present a fair and balanced view of all interested parties of a proceeding to commissioners.”

In lieu thereof, the amendment inserts “such rules.”

#### Significant Issues

The amendment eliminates specific direction to the PRC for creating rules allowing parties to consult with advisory staff. The amendment essentially allows the PRC to determine the rules.

### Synopsis of Original Bill

The bill would amend the Public Regulation Commission Act by requiring the commission to establish rules that allow a party to a proceeding to consult directly with any member of the commission's advisory staff on matters that are before the commission.

The bill would amend the Act's *ex parte* provisions. The bill permits a party to a proceeding to "consult with the commission's advisory staff," pursuant to the commission's rulemaking authority. The bill would establish a deadline of July 1, 2004 for the commission to "establish rules that allow a party to a proceeding to consult directly with any member of the commission's advisory staff on matters that are before the commission."

Currently, the existing statute prohibits direct or indirect communications between commissioners and hearing examiners on the one hand, and parties or their representatives on the other hand. Subsection (C) sets forth the exceptions in which *ex parte* communications are permitted.

### Significant Issues

1) The bill could result in Open Meetings Act and due process challenges. The bill could create a risk of Open Meetings Act challenges by encouraging substantive communications regarding pending matters before the commission to be addressed through non-public consultations between interested parties and the commission's advisory staff. Commission proceedings must at all times conform with applicable constitutional standards. Because the commission's actions often condition private rights and interests, due process is always a matter of key importance in commission proceedings. The commission's existing procedural rules provide due process protection for parties appearing in commission proceedings.

2) The bill requires the commission to develop new rules that would allow parties to consult with the commission's advisory staff. The word "consult" suggests that private communications are intended. By encouraging communications between parties and advisory staff "before, during, and after" matters are heard by the commission, the bill effectively would open a flow of communication that would bypass existing administrative hearing processes for both rulemakings and adjudications.

3) The commission currently has already adopted widely accepted administrative procedures that have low risk of due process or other challenges to commission actions.

### **FISCAL IMPLICATIONS**

The bill presents no fiscal impact.

### **ADMINISTRATIVE IMPLICATIONS**

It is not clear whether "consult" is intended in the usual sense of "seeking advice from," or communication in a more general sense. This language (which appears in both the existing and proposed wording of subsection (C)(5)) could have unintended adverse consequences by placing the attorney members of the advisory staff in a difficult position with regard to meeting their ethical obligations under the New Mexico Supreme Court's Professional Code of Conduct if they were expected to act in the dual role of providing advice to both the commission and to parties.

**TECHNICAL ISSUES**

The bill may have possible conflicts with the U.S. and New Mexico constitutions, existing sections of PRC Act, and the Open Meetings Act.

**DG/yr:lg:dm**