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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/03/06

SPONSOR Adair LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE PRC Order Appeal Settlement Restrictions SB 638

ANALYST Earnest

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY06	FY07		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Senate Bill 638 duplicated House Bill 600.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Public Regulation Commission (PRC)  
 Attorney General's Office (AGO)  
 Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 638 restricts the authority of the PRC to accept a compromise settlement of an appealed PRC order by a telecommunications company prior to a decision by the Supreme Court, unless specific conditions are met. Senate Bill 638 creates the "telecommunications settlement fund" in the state treasurer. The bill contains an emergency clause.

If a PRC final order compels a telecommunications company to pay fines, make refunds or credits, or make infrastructure investment, the PRC is specifically prohibited from settling the case if it is on appeal to the New Mexico Supreme Court, unless:

- the company agrees to comply with the original final order, or the company and the PRC agree to a "monetary payment" under one of two conditions:
  - the amount must be refunded to the company's customers pursuant to an equitable distribution agreement; or

- the money is placed in the newly created “telecommunications settlement fund” for future appropriation by the legislature “to benefit customers of the payor telecommunications company.” The fund does not revert to the General Fund and the PRC is charged with recommending the best way to appropriate monies.

## SIGNIFICANT ISSUES

This bill addresses the situation existing between Qwest Corporation and the Public Regulation Commission. A PRC audit found that Qwest will be \$200 million short of the \$788 million AF-OR (Alternative Form of Regulation) investment agreement by the March 2006 deadline. In April 2005, PRC ordered Qwest to invest the full amount or return it to customers as rebates. Qwest appealed the order to the state Supreme Court, which is scheduled to hear the case February 14.

Qwest’s proposed an \$85 million investment settlement offer, which PRC determined to be insufficient.

According to the AGO, because litigation has started there would be significant due process concerns when trying to apply this statute to the current situation. Furthermore, HB 600 would limit the PRC’s discretion in settling high profile cases. It may result in additional funds to be appropriated by the Legislature, but it is impossible to determine how much. Hampering PRC discretion to settle cases may have unintended consequences.

The PRC indicates that the bill, if enacted, might so limit the Commission’s regulatory authority that it could neither vigorously defend its orders on appeal nor engage in appropriate oversight of stipulations among parties before it.

According to the PRC, SB 638 would require that a single final order on appeal be treated differently, depending on the court in which the appeal is brought. In essence, this would require a bifurcation of the Commission’s appellate efforts. For example, a telecommunications carrier may appeal a given Commission order to two different courts simultaneously. (This is far from unusual; in fact, it is currently the case with the appeal of Commission Case No. 04-00237-UT involving, in substance, the Qwest Alternative Form of Regulation, which the Commission is defending in both the New Mexico Supreme Court and Federal District Court.) Thus, the Commission would — in addition to defending its orders in the parallel appeals — be required to apply to the pending state court appeal the procedures outlined in the bill. In addition, the Commission might well have to devise a separate appeal strategy for the state court proceeding in order to accommodate the bill’s procedural requirements.

As a general matter, the Commission has the authority to interpret and enforce its own orders, and the Commission retains continuing jurisdiction to make any subsequent orders or determinations regarding any matter decided by the Commission as the factual situation before it, the public interest and due process may require. *See, e.g., Public Service Company v. New Mexico Public Service Commission*, 92 N.M. 721, 594 P.2d 1177 (1979); *e•spire v. New Mexico Public Regulation Comm’n*, 392 F.3d 1204 (10th Cir. 2004), *reh’g denied*.

The bill would preclude any non-monetary alternatives. For example, there may be exceptional occasions when, due to significantly changed circumstances such that a specific requirement of the Commission’s original order no longer makes practical sense. Although such occasions are

quite rare, to limit the Commission's ability to modify its own orders in the *exceptional* case where such modification might be warranted would appear to preclude practical outcomes and to run counter to established law and precedent.

### **ADMINISTRATIVE IMPLICATIONS**

While the administrative impact is not clear, PRC finds that procedural changes brought by this legislation could be complicated and time-consuming. Because of the potentially large amount of money involved, and its tracking and allocation, an additional FTE might be needed at a professional level.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Senate Bill 638 duplicated House Bill 600.

### **OTHER SUBSTANTIVE ISSUES**

According to the PRC, this bill appears to assume that the Commission always has an option to settle a pending appeal with a telecommunications company independently of other interested parties. However, this is not the case, for at least three reasons. First, although the Commission may be the respondent in an appeal, it finds itself in that position as a regulator, not as a party in a contractual relationship with the appellant (as might be the case in an ordinary civil appeal between private parties.)

Second, any settlement that takes place between and among the parties before the Commission. As a practical matter, most, if not all, telecommunications cases that have public interest significance involve more than one party. Typical interveners would include the Attorney General, non-profit organizations, and other (usually competitively situated) telecommunications carriers. The Commission's procedural rules required that settlements be stipulated in writing and brought before the Commission for consideration. The Commission may, but is not required to, accept a stipulation.

Third, Commission final orders have the force of law as prescribed under the Commission's constitutional authority and state statute. A Commission final order may not be modified except by reopening the case to which the order pertains. The Commission's procedural rules preclude the reopening of a final order unless exceptional circumstances warrant it. Rarely, if ever, are Commission final orders reopened — and then only according to formal (and well-scrutinized) procedures.

BE/nt