COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2009-2010 #58 ("Utility Exemption from Renewable Energy")

JOINT MOTION FOR REHEARING

On behalf of Robert N. McLennan, Kent Singer and Dan Hodges, each registered electors of the State of Colorado, the undersigned hereby files this Joint Motion for Rehearing in connection with Proposed Initiative 2009-2010 #58 ("Utility Exemption from Renewable Energy") which the Title Board heard on April 21, 2010.

A. The Initiative Violates the Single Subject Requirement.

An initiative violates the single subject requirement when it relates to more than one subject and has at least two distinct and separate purposes which are not dependent upon or connected with each other. *See In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000) ("Implementing provisions that are directly tied to an initiative's central focus are not separate subjects.") The purpose of the single-subject requirement for ballot initiatives is two-fold: to forbid the treatment of incongruous subjects in order to gather support by enlisting the help of advocates of each of an initiative's numerous measures and "to prevent surprise and fraud from being practiced upon voters." *See* C.R.S. §§ 1-40-106.5(e)(I), (II).

An initiative with multiple subjects may not be offered as a single subject by stating the subject in broad terms. *See In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 873–74 (Colo. 2007) (holding measure violated single subject requirement in creating department of environmental conservation and mandating a public trust standard); *see also In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, 4 P.3d at 1097 (holding that elimination of school boards' powers to require bilingual

education not separate subject; Titles and summary materially defective in failing to summarize provision that no school district or school could be required to offer bilingual education program; and Titles contained improper catch phrase).

"Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement." *In re Proposed Initiative, 1996-4*, 916 P.2d 528 (Colo. 1996) (citing *In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution to the State of Colorado Adding Subsection (10) to Section 20 of Article X*, 900 P.2d 121, 124–25 (Colo. 1995)).

"The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative." *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006) (holding that there were "at least two unrelated purposes grouped under the broad theme of restricting non-emergency government services: decreasing taxpayer expenditures that benefit the welfare of members of the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits").

"An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative." *In re Title, Ballot Title and Submission Clause 2007-2008 #17*, 172 P.3d at 875. In light of the foregoing, this Court stated, "We must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme." *Id.*

This Board may engage in an inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *See id.* ("While we do not determine an initiative's efficacy, construction, or future application, we must examine the proposal sufficiently to enable review of the Title Board's action."); *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 443 (Colo. 2002) ("[W]e must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.").

The proposed measure contains at least ten separate subjects wrapped up in the broad theme of "exemption from electric resource standards":

1. **New authority for investor-owned utilities regarding Renewable Energy Standard ("RES"):** The measure authorizes the board of directors or governing board of investor-owned utilities, upon passage of a resolution or motion, to hold a binding election seeking a permanent exemption from all or part of the RES and associated standards for approval of additional generation or energy resources.

2. **New authority for municipally owned utilities regarding RES:** The measure authorizes the board of directors or governing board of municipally owned utilities, upon passage of a resolution or motion, to hold a binding election seeking a permanent exemption from all or part of the RES and associated standards for approval of additional generation or energy resources.

3. **New authority to cooperative electric associations regarding RES:** the measure authorizes the board of directors or governing board of cooperative electric associations, upon passage of a resolution or motion, to hold a binding election seeking a permanent

exemption from all or part of the RES and associated standards for approval of additional generation or energy resources.

4. **New restriction on Public Utilities Commission (PUC") authority and decision making:** The measure diverges from its focus on internal electric utility decision-making regarding an exemption from the RES to impose explicit restrictions on the PUC regarding its decision-making in connection with a utility's acquisition of additional generation resources. This restriction will require the PUC to promulgate revisions to its rules regulating electric utilities.

5. **New petition authority for investor-owned utilities:** The measure requires an investor-owned utility to conduct an election to determine whether to permanently exempt the utility from all or part of the RES and associated standards for approval of additional generation or energy resources upon request by petition signed by five-percent of its customers.

6. **New petition authority for municipally owned utilities:** The measure requires a municipally owned utility to conduct an election to determine whether to permanently exempt the utility from all or part of the RES and associated standards for approval of additional generation or energy resources upon request by petition signed by five-percent of its customers.

7. **New petition authority for cooperative electric associations:** The measure requires a cooperative electric association to conduct an election to determine whether to permanently exempt the utility from all or part of the RES and associated standards for approval of additional generation or energy resources upon request by petition signed by five-percent of its members.

8. **Creates irreversible decision-making regarding RES:** The measure contains no mechanism for reversing the decision to permanently exempt the utility from all or part of the RES and associated standards for approval of additional generation or energy resources.

9. **Creates procedural requirements for petitions:** The measure contains a section addressing procedural requirements for petitions, including imposing on investor-owned utilities, municipally owned utilities, and cooperative electric associations the obligation to review and approve the petition format and the validity of each petition signature.

10. **Creates procedural requirements for elections:** The measure contains a section addressing procedural requirements for elections, including imposing on investor-owned utilities, municipally owned utilities, and cooperative electric associations the obligation to conduct the election and setting forth requirements pertaining to ballots.

This Initiative is similar to those that the Colorado Supreme Court rejected in *Water Rights II, In re Ballot Title 1997-1998 #64*, and *In re Ballot Title 2007-2008 #17*.

In *Water Rights II*, an initiative sought to add a "strong public trust doctrine regarding Colorado waters, that water conservancy and water districts hold elections to change their boundaries or discontinue their existence, that the districts also hold elections for directors and that there be dedication of water right use to the public." *In re "Public Water Rights II,"* 898 P.2d 1076, 1077. The Court held that the initiative violated the single subject provision because there was no connection between the two district election requirements paragraphs and the two public trust water rights paragraphs. The common characteristic that the paragraphs all involved water was too general and too broad to constitute a single subject. The Court observed:

> The public trust water rights paragraphs of the Initiative impose obligations on the state of Colorado to recognize and protect public ownership of water. The water conservancy or conservation districts have little or no power over the administration of the public water rights or the development of a statewide public

> trust doctrine because such rights must be administered and defended by the state and not by the local district.

Id. at 1080.

Similarly, in *In re Ballot Title 1997-1998 #64*, the Court examined a proposed amendment to Article VI of the Colorado Constitution intended by proponents to address "the qualifications of persons for judicial office." *In re Ballot Title 1997-1998 #64*, 960 P.2d 1192, 1194-97 (Colo. 1998). After reviewing the ways in which the Initiative proposed "substantial changes to the judicial branch of the state government," the Court held that: "those parts of the Initiative which repeal the constitutional requirement that each judicial district have a minimum of one district court judge, deprive the City and County of Denver of control over Denver County court judgeships, immunize from liability persons who criticize a judicial officer regarding his or her qualifications, and alter the composition and powers of the Commission, constitute separate and discrete subjects," and were not related to the purported single subject of "the qualifications of persons for judicial office." *Id.* at 1197. In short, the Court determined that reallocating government authority and control over judgeships and creating new substantive standards such as those relating to the minimum number of judges in a district and the immunization from defamation liability, constituted separate and discrete subjects.

Finally, in *In re Ballot Title 2007-2008 #17*, the Court examined whether the simultaneous creation of a new department of environmental conservation and a new public trust standard violated the single subject requirement. *In re Ballot Title 2007-2008 #17*, 172 P.3d 871, 872-73 (Colo. 2007). The Court held that: "In this initiative, the public trust standard is paired with the subject of reorganizing existing natural resource and environmental protection division, programs, boards, and commissions, and these are separate and discrete subjects that are not dependent upon or necessarily connected with each other." *Id.* at 875. In short, the Court

determined that reallocating government authority and control over various "environmental conservation" or "environmental stewardship" matters, and creating a new substantive public trust standard, constituted separate and discrete subjects.

This Initiative purports to reallocate government authority and control, and to create new standards, in the same manner declared to constitute multiple subjects by the Colorado Supreme Court in *Water Rights II, In re Ballot Title 1997-1998 #64*, and *In re Ballot Title 2007-2008 #17*. First, the measure purports to reallocate government authority and control over the conduct of municipal elections from city council to the board of municipally owned electric utilities. Second, the measure purports to create new authorities and obligations regarding elections for investor owned utilities, municipally owned utilities and cooperative electric associations, and purports to impose restrictions on the decision-making of the PUC as it relates to utilities' acquisition of additional generation or energy resources. For these reasons, petitioners request that the board set this matter for rehearing and reverse its decision that this Initiative satisfies the single subject requirement.

B. The Title Set by the Title Board is Misleading, Unfair and Unclear.

The Board's chosen language for the titles and summary must be fair, clear, and accurate, and the language must not mislead the voters. *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). "In fixing titles and summary, the Board's duty is to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice." *Id.* (quoting *In re Proposed Initiative for 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999)). *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #104*, 987 P.2d 249 (Colo. 1999) (initiative's "not to exceed" language, repeated without explanation or analysis in summary, created unconstitutional confusion and ambiguity).

This requirement helps to ensure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant provision that was obfuscated by other elements of the proposal. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002). Eliminating a key feature of the initiative from the title is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. *Id.*; *see also In re Ballot Title 1997-1998 #62*, 961 P.2d at 1082; *In re Proposed Initiative 1999-2000 #37*, 977 P.2d 845, 846 (Colo. 1999) (holding that titles and summary may not be presented to voters because more than one subject and confusing).

For the following reasons, the title set by the Title Board is misleading, unfair and unclear:

1. The Title fails to mention that the measure addresses three types of electric utilities: qualifying electric utilities, cooperative electric associations, and municipal owned utilities. These entities operate differently and are subject to different statutory and regulatory requirements, and the voters should be informed that the measure applies to all of these entities.

2. The Title fails to mention that the measure prohibits the promotion of eligible energy resources as a consideration in decisions made by the PUC regarding acquisition of additional generation or energy resources by utilities that have become exempt.

3. The Title fails to mention that the exemption is permanent, and there is no provision for reversing the exemption.

4. The Title fails to mention that the election may be prompted by either a resolution by the utility's board of directors or governing board or a petition signed by at least five-percent

of the utility's customers. A key provision of the measure is the trigger for the election, and the voters should be made aware of these triggers.

5. The Title fails to mention that the measure imposes on electric utilities requirements regarding petitions.

6. The Title fails to mention that the measure creates new authority in municipally owned utilities to conduct elections, upon resolution by the utility's governing board, to determine whether to permanently exempt the utility from all or part of the RES. Although a municipality may conduct elections, municipally owned utilities currently have no authority to call or conduct elections separate and apart from their municipalities.

7. The Title is vague and unclear where it refers to "statutory and associated regulatory electric resource standards." First, the title would be clearer by referring to what is commonly known as the Renewable Energy Standard. Second, it is misleading inasmuch as "associated regulatory electric resource standards" does not reflect the true effect of the measure with regard to the PUC rules, *i.e.*, it restricts the Commission's decision-making in connection with the acquisition of generation and energy resources.

C. Proponents substantively amended the title without submitting it to the directors of the Legislative Council and Office of Legislative Legal Services.

The proponents submitted an amended title to the Title Board at the April 21, 2010 Title Board Hearing without having first submitted it to the directors of the Legislative Council and Office of Legislative Legal Services. Because proponents made substantive changes to the title which were not in response to the directors' comments, these bodies must be given a new opportunity to review the title. "The requirement that the original draft be submitted to the legislative council and office of legislative legal services permits the proponents to benefit from

the experience in constitutional and legislative drafting, and allows the public to understand the implications of a proposed initiative at an early stage in the process." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246 (Colo. 2000) (citing *In re Proposed Initiated Constitutional Amend. Concerning Limited Gaming in the Town of Idaho Springs*, 830 P.2d 963, 966 (Colo. 1992)).

The original text that the proponents submitted to the directors prohibited both the PUC and the "governing board of any utility or association" from considering the promotion of eligible energy resources in decision-making. *See* Original Text, proposed § 40-2-128(5). In the comment memorandum provided to proponents by the directors, the applicability of this prohibition to the governing board of any utility or association was not the subject of any comment. The only mention of this provision was in the statement of the measure's purpose, which stated this prohibition as the measure's second purpose.

In the initiative submitted to the Title Board, the proponents modified the provision restricting consideration of the promotion of eligible energy resources in decision-making such that it only applied to the PUC. The proponents deleted the provision's reference to "the governing board of any utility or association" even though the directors did not comment on this issue.

Had the directors of the Legislative Council and Office of Legislative Legal Services directed the proponents to make this material change in the draft, it might have been proper. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d at 251. However, the directors neither have such an instruction, nor commented on this issue. The directors accepted the provision as stated and incorporated it into their statement of the measures purposes. The change of this provision by the proponents changes the persons to whom the

prohibition applies. This is a substantive change. The proponents must re-file their initiative with the directors of the Legislative Council and the Office of Legislative Legal Services.

Please set a rehearing in this matter for the next Title Board Meeting.

Respectfully submitted this 28th day of April 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2010, a true and correct copy of the foregoing **JOINT MOTION FOR REHEARING** was Hand Delivered and sent U.S. Mail as follows to:

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