COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2009-2010 #95 ("Renewable Energy Standards")

JOINT MOTION FOR REHEARING

On behalf of Robert N. McLennan, Kent Singer, Dan Hodges and Terrance G. Ross, each registered electors of the State of Colorado, the undersigned hereby files this Joint Motion for Rehearing in connection with Proposed Initiative 2009-2010 #95 ("Renewable Energy Standards") 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 seven separate subjects wrapped up in the broad theme of "electric resource standards":

1. **Repeals small utility exemption:** Repeals the exemption from PUC implementing regulations under C.R.S. § 40-2-124 for small municipally owned utilities. To the extent the affected municipalities are home rule municipalities, this measure addresses the subject of the self-governing powers vested in municipalities under the Colorado Constitution. The measure reallocates local governmental authority and control with respect to renewable energy portfolio decisions affecting municipally owned electric utilities.

2. **Repeals cooperative electric association "opt-out" exemption:** Repeals the exemption from PUC implementing regulations under C.R.S. § 40-2-124 for cooperative electric associations that have voted to exempt themselves from commission jurisdiction pursuant to C.R.S. § 40-9.5-104. The general assembly has authorized cooperative electric associations to self-regulate and exempt themselves from PUC regulation under C.R.S. § 40-9.5-101. The measure addresses the subject of self-governance under Article 9.5 of the Public Utilities Law by

reallocating control with respect to renewable energy portfolio decisions affecting cooperative electric associations.

3. **Invalidates "opt-out" actions:** Inasmuch as the measure is vague as to whether and how it would apply to cooperative electric associations who have already opted out of PUC regulation, it purports to repeal or invalidate actions lawfully taken by cooperative electric associations pursuant to the Public Utilities Law at C.R.S. § 40-9.5-104 to exempt themselves from PUC regulation implementing the renewable energy standard at C.R.S. § 40-2-124.

4. **Grants PUC new authority:** Creates new authority for the PUC over entities over which it has limited authority, *i.e.*, cooperative electric associations exempted from PUC authority under C.R.S. § 40-9.5-104 and municipally owned utilities exempted from PUC authority under Article XXV of the Colorado Constitution.

5. **Modifies adopted Renewable Energy Standards ("RESs"):** Purports to modify any RESs already adopted by municipally owned utilities or cooperative electric associations under their separate authorities.

6. **Retroactive obligations:** Addresses the subject of retroactivity and *ex post facto* laws by having the immediate effect of placing all municipally owned utilities and cooperative electric associations who do not meet the statutory RES, which began in 2007, in violation of PUC regulations and subject to enforcement.

7. **Grants full Article 2 regulation:** Purports to subject municipally owned utilities and cooperative electric associations to regulations established under all of Article 2, Title 40, and not just the renewable energy standard at C.R.S. § 40-2-124. The measure provides that "Each qualifying retail utility shall be subject to the rules established **under this article** by the commission." *See* Final Text, proposed § 40-2-124(1) (emphasis added). To make all qualifying

retail utilities subject to the renewable energy standard, the measure should only have made such utilities subject to "**this section**," or C.R.S. § 40-2-124. Article 2, Title 40 contains 29 sections, and speaks, *inter alia*, to the PUC's general rulemaking authority over qualifying retail utilities, incentives for distributed generation, natural gas regulation, new energy technologies, eminent domain restrictions, transmission facilities and community energy funds. *See* C.R.S. §§ 40-2-108, 109.5, 122, 123, 125, 126, 127.

During the underlying hearing to set the title for this measure, the Title Board's decided to construe the proposed amendment to C.R.S. § 40-2-124 to avoid constitutional infirmities by deciding that the plain language "under this article" in the proposed measure really meant "under this section." This action was improper. It is true the Colorado Supreme Court has explained that in seeking to determine legislative intent, "we are guided by the rubric that the legislature intends a statute to be constitutional and we should construe it in a manner avoiding constitutional infirmity, if possible." *Board of Directors, Metro Wastewater Reclamation Dist. v. National Union Fire Insur. Co.*, 105 P.3d 653, 656 (Colo. 2005) (en banc). However, we are not dealing with a statute enacted by the Colorado Legislature, but instead a citizen initiative; and this is not a case where the statute is ambiguous. The proponents' language is clear: "article" means "article." As the Colorado Supreme Court further explained in *Metro Wastewater*: "**In determining the legislature's intent, we look first to the language of the statute and apply its plain and ordinary meaning, if possible.**" *Id.* at 657 (emphasis added). Petitioners respectfully submit the Title Board should not seek to construe the proposed measure's unambiguous plain language. On its face, the proposed measure subjects municipally owned utilities and cooperative electric associations to regulations established under all of

Article 2, Title 40, and not just the renewable energy standard at C.R.S. § 40-2-124. This regulation is a separate subject from "electric resource standards."

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 regulation and implementation of renewable energy standards from self-regulating municipally owned utilities and cooperative electric associations to the PUC. Second, the measure purports to

invalidate opt out actions, modify already-adopted RESs, make utilities retroactively subject to RESs and subject municipally owned utilities and cooperative electric associations to full regulation under all 29 sections of Article 2, Title 40 by the PUC (and not just the renewable energy standard at C.R.S. § 40-2-124). 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 is misleading, unfair and unclear in that it suggests all utilities in the State of Colorado are subject to the same renewable energy standard, when municipally owned utilities and cooperative electric associations are subject to different standards than other qualifying retail utilities.

2. The Title is misleading, unfair and unclear in that it suggests that municipally owned utilities and cooperative electric associations are not presently subject to any renewable energy standard, and that the measure purports to demand that such utilities meet the same standard as all other qualifying retail utilities in the State of Colorado. In fact, many municipally owned utilities and cooperative electric associations are subject to, and have implemented renewable energy standards.

3. The Title fails to mention that municipally owned utilities are exempt from regulation by the PUC not only by statute, but by Article XXV of the Colorado Constitution, and that the measure purports to repeal both statutory and constitutional exemptions from PUC regulation.

4. The Title fails to mention that it applies retroactively and constitutes an unlawful *ex post facto* law inasmuch as it purports to hold municipally owned utilities and cooperative electric associations to renewable energy standards which took effect beginning in 2007.

5. The Title fails to mention that the implementation of renewable energy standards for municipally owned utilities and cooperative electric associations is presently addressed by

such utilities, and not by the PUC; and that the measure purports not only to create a new renewable energy standard, but to give the PUC new authority to implement this standard.

6. The Title fails to mention that the measure purports to make all qualifying retail utilities subject to regulation under all of Article 2, Title 40, and not just the renewable energy standard set forth at C.R.S. § 40-2-124.

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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