COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2009-2010 #96 ("Petitions from Cities and Counties to be Covered by Requirements of the 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 #96 ("Petitions from Cities and Counties to be Covered by Requirements of the 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 "petitioning for coverage under renewable energy standards":

1. **Grants PUC new authority—municipally owned utilities:** Creates new authority for the PUC over municipally owned utilities to require submittal of a resource acquisition plan and to regulate rates, which conflicts with Article XXV of the Colorado Constitution which says the PUC has no authority over them. Currently, these matters are subject to the discretion of the municipally owned utility itself to set its own rates.

2. **Grants new local authority:** Creates new authority for city and county governing bodies, and citizens of home rule municipalities, to make an irrevocable determination for their residents that they will only take electric service from a utility satisfying the Renewable Energy Standard ("RES") requirements.

3. **Grants extra-territorial authority:** The new authority granted to city and county governing bodies, and citizens of home rule municipalities, purports to extend beyond the primary jurisdiction where the affected utility serves more than one jurisdiction. This may raise a separate subject whether the governing body of one city or county, or its citizens, shall be

authorized to decide for citizens of other cities or counties whether their electricity provider shall comply with the RES. This decision would likely result in higher electricity rates for all of the utility's customers.

4. **Grants PUC new authority—cooperative electric associations:** Grants the PUC several new authorities to regulate a cooperative electric association for purposes of the RES notwithstanding that the cooperative has voted not to be regulated by the PUC. These authorities include regulation of resource acquisition plans, jurisdiction-specific rates, and enforcement of a just, reasonable and non-discrimination standard with respect to rates.

5. **Grants PUC new authority—"subdivision" regulation:** The third paragraph purports to treat cities, counties and "subdivisions" differently, which is a new concept to ratemaking. Also, one can question how a subdivision could go through the initiative process, as opposed to a city with a governing body.

6. **Creates new ratemaking standard:** Creates a new standard for reviewing rates by mandating the PUC ensure "equitable rates," instead of just, reasonable and non-discriminatory rates.

7. **Creates new initiative process:** The measure creates a novel and unprecedented use of the initiative process. Proposed Section 128(1) suggests that "through a citizen initiative" citizens may "petition the [PUC]" for their jurisdiction to be covered by the Section 124 renewable energy standard. *See* Final Text, proposed § 40-2-128(1). Municipal initiatives are governed by C.R.S. § 31-11-104, and county initiatives are governed by C.R.S. § 30-11-103.5. These statutes allow for citizens to petition for the adoption of a proposed ordinance. C.R.S. §§ 31-11-104, 30-11-103.5. They do not contemplate that citizens could petition their local governing body to submit a petition to the PUC, as opposed to petitioning for the adoption of an

ordinance. The creation of a right for citizens to petition their local governing body to submit a petition to the PUC for coverage under the renewable energy standard creates a new initiative process.

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 grant local authorities the right to make irrevocable decisions on coverage under renewable energy standards, grants city and county governments and the PUC extra-territorial authority, creates a new ratemaking standard to ensure "equitable rates," and creates a new initiative process. 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 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 process to petition for coverage under new renewable energy standard, but to give the PUC new authority to implement this standard. There is no reason that municipally owned utilities and cooperative electric associations could not implement the standard once their members or customers vote to opt in to the standard, and by giving this authority to the PUC the measure violates the single subject standard.

2. The Title fails to explain that in order to ensure "equitable rates" between utilities who opt in and those who have opted out, the PUC must have new authority over both exempt and non-exempt utilities.

3. The Title fails to explain, as the proponents clarified during the title board hearing, that the main purpose of the measure is to allow a small subdivision of customers to vote to opt in to the renewable energy standard, and to thereby force the entire customer base to pay for the costs of meeting the renewable energy standard.

4. The Title fails to mention that it establishes a new standard for the PUC to determine rates are "equitable," and not "just, reasonable, and nondiscriminatory."

5. The Title fails to mention that the measure purports to allow citizens of Colorado to bind citizens of other states who are served by the same utility to the new Colorado renewable energy standard.

6. The Title fails to mention that the measure purports to allow "subdivisions" to vote to opt in to the renewable energy standard, and that separate regulation of "subdivisions" is a new class of regulation and authority for the PUC.

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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