COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2009-2010 #97 ("Standards for Retail Electric Service Generation")

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 #97 ("Standards for Retail Electric Service Generation") 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 six separate subjects wrapped up in the broad theme of "carbon dioxide emissions limits":

1. **Substantive emission limit on cooperative electric associations**: The measure imposes a carbon dioxide emission standard through the Public Utilities Law, to be implemented by the Colorado Public Utilities Commission ("PUC"), on cooperative electric associations that have voted to exempt themselves from PUC authority in accordance with article 9.5 of the Public Utilities Law.

2. **Substantive emission limit on municipally owned utilities**: The measure imposes a carbon dioxide emission standard through the Public Utilities Law, to be implemented by the PUC, on municipally owned utilities that are constitutionally exempt from PUC regulation under Article XXV of the Colorado Constitution.

3. **Grants PUC authority to regulate air emission limits**: The measure addresses the subject of whether the Public Utilities Law shall be amended to regulate carbon dioxide emissions from electric generating utilities when such authority already resides in the federal Clean Air Act, which is implemented in Colorado by Department of Public Health and

Environment ("CDPHE") through regulations promulgated by the Colorado Air Quality Control Commission. *See* C.R.S. 25-7-109 ("Commission to promulgate emission control regulations") (directing Air Quality Control Commission to promulgate emission control regulations, including for carbon oxides, taking into consideration 8 factors, including cost and technical feasibility).

4. **Modifies substantive requirements for air emission limits**: The measure purports to modify the framework of the federal Clean Air Act and Colorado Air Pollution Prevention and Control Act, which employ health-based and technology-based standards, and not preconceived emissions limits. By requiring 1,100 pounds carbon dioxide per megawatt hour of generation, this initiative purports to modify these federal and state, and potentially puts at risk the delegation of various CAA programs to the State of Colorado. The initiative would also create an air emission limit regulation outside of the process established by the Colorado Legislature requiring consideration of "reasonably available, validated, reviewed, and sound scientific methodologies," and evidence that the standard "shall bring about reductions in risks to human health or the environment or provide other benefits that will justify the cost to government, the regulated community, and to the public to implement and comply with the rule." *See* C.R.S. §§ 25-7-110.8(1)(a) & (c).

5. **Violates the Interstate Commerce Clause**: The measure discriminates against municipally owned utilities and cooperative electric associations who obtain electric service from facilities located outside of the State of Colorado, as compared to investor owned utilities such as Public Service Company of Colorado who obtain all of their electric service from facilities within the State of Colorado.

6. **Creates Separate In-State and Out-Of-State Emission Standards:** The measure purports to create separate standards for investor owned utilities who are not subject to the measure and whose facilities are entirely within the State of Colorado, and for municipally owned utilities and cooperative electric associations who are subject to the measure and who serve customers through certain facilities located outside of the State of Colorado.

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 establishment of carbon dioxide emission control standards from the Air Quality Control Commission to the PUC. Second, the measure purports to create substantive carbon dioxide emission limits on cooperative electric associations and municipally owned utilities (which are different than those for investor owned utilities), modify substantive requirements for air emission limits, discriminate against municipally owned utilities and cooperative electric associations, and create separate in-state and out-of-state carbon dioxide emission standards. 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 purports to mandate an emission limit more stringent than the federal Clean Air Act.

2. The Title fails to mention that the measure purports to reallocate authority and control for establishing carbon dioxide emission limits from the Air Quality Control Commission to the PUC.

3. The Title is misleading, unclear and unfair in that it fails to disclose that it is imposing an obligation on the ratepayers of certain utilities (*i.e.*, municipally owned utilities and cooperative electric associations) and not others (*i.e.*, investor owned utilities), and that the result of the selective application of the new carbon dioxide emission limit will be to dramatically increase electric rates for municipally owned electric utilities and cooperative electric associations as compared to investor owned utilities.

4. The Title is misleading, unfair and unclear in that if fails to explain that the initiative would apply to certain out of state "facilities" of "providers of retail electric service," and that the initiative would require that such "providers" insure that such out of state facilities meet the new Colorado carbon dioxide emission standard.

5. The Title fails to mention that the measure purports to invalidate elections by cooperative election associations whose members have voted to opt out of regulation by the PUC.

6. The Title fails to mention that the measure purports to repeal that portion of Article XXV of the Colorado Constitution which provides that municipally owned utilities are not subject to PUC regulation, and the exemption for small municipally owned utilities set forth at C.R.S. § 40-2-124.

7. The Title fails to mention that the measure purports to establish a carbon dioxide emission standard without regard to whether the standard "shall bring about reductions in risks to human health or the environment or provide other benefits that will justify the cost to government, the regulated community, and to the public to implement and comply with the rule" as would be required under the Colorado Air Pollution Prevention and Control Act.

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, 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 purported to apply to "provider[s] of retail electric service," "the utility" or "utilities." *See* Original Text, proposed § 40-2-128. In response, the directors inquired whether the proponents intended that the initiative would apply to all utilities in the State of Colorado, including not only investor owned utilities, but also cooperative electric associations which had opted out of regulation and municipally owned electric utilities which are exempted from the definition of "qualifying retail utility" in Section 40-2-124 or are not subject to regulation pursuant to Article XXV of the Colorado Constitution. In the initiative submitted to the Title Board, this provision was deleted and the measure was modified to apply *not* to investor owned utilities, but *only* to "the electric generation facilities for each provider of retail electric service that is a municipally owned utility or a cooperative electric association that has voted to exempt itself from Commission jurisdiction pursuant to Section 40-9.5-104."

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. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d at 251. The directors did not give such an instruction, however. The directors construed the measure to apply to all "qualifying retail utilities" as defined in section 40-2-124, but asked the proponents to clarify whether they intended to also capture cooperative electric associations who had opted out of regulation before the Commission, and municipally owned electric utilities exempt from the definition of "qualifying retail utility" in section 40-2-124 or exempt from Commission regulation by Article XXV of the Colorado Constitution. The change of definition offered by

proponents changes the persons to whom the statute applies, and reverses the basic premise reflected in the plain language and the directors' comments that the measure would apply not only to investor owned utilities, but also to cooperative electric associations which had opted out of regulation and municipally owned electric utilities which are exempted from the definition of "qualifying retail utility" in Section 40-2-124 or are not subject to regulation pursuant to Article XXV of the Colorado Constitution. This is a substantive change. The proponents must refile 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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