

RECEIVED



APR 28 2010

3125

COLORADO TITLE SETTING BOARD

~~ELECTIONS~~  
SECRETARY OF STATE

In re Proposed Initiative 2009-2010 #98 ("Retail Electric Sales from Renewable Sources")

**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 #98 ("Retail Electric Sales from Renewable Sources") 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 eight separate subjects wrapped up in the broad theme of “electric resource standards”:

1. **Creates new mandate for municipally owned utilities and cooperative electric associations regarding renewable energy standards (“RESS”):** Purports to require municipally owned utilities and cooperative electric associations to increase the percentage of retail electricity sales from renewable energy sources. *See* Final Text, proposed § 40-2-128(2).

2. **Creates new petition authority for municipally owned utilities:** Requires a municipally owned utility to conduct an election to determine whether to impose a permanent increase in the percentage of its retail electricity sales from renewable energy sources upon request by petition signed by five-percent of its customers.

3. **Creates new petition authority for cooperative electric associations:** Requires a cooperative electric association to conduct an election to determine whether to impose a permanent increase the percentage of its retail electricity sales from renewable energy sources upon request by petition signed by five-percent of its members.

4. **Creates irreversible decisionmaking regarding RESs:** Contains no mechanism for reversing the decision to increase the percentage or renewable energy resources, thus making permanent the impact of a vote under this measure.

5. **Creates procedural requirements for petitions:** Contains a section addressing procedural requirements for petitions, including imposing on municipally owned utilities and cooperative electric associations the obligation to review petitions for sufficiency. Grants new authority to the PUC to review determinations regarding the validity of petition signatures. The creation of these several procedural requirements relating to petitions could be construed as a separate subject.

6. **Grants PUC new authority regarding elections and petitions:** Requires the PUC to supervise municipal elections and decisions regarding the validity of petition signatures. The PUC may not be equipped to perform these duties, and this issues presents a separate subject. The PUC likely does not have the expertise to supervise an election, and it does not have rules governing elections.

7. **Modifies municipal election process:** The measure purports to allow the board of directors of a municipally owned utility, as opposed to the city council, to pass a resolution to require an election. The measure also requires the municipality to conduct an election in the manner approved by the PUC and under the supervision of the PUC, both of which are novel and unprecedented election procedures.

8. **Creates new standard for review of signatures on petitions:** The measure requires municipally owned utilities and cooperative electric associations to ensure petition signatures are in substantial compliance with statutory requirements, which is a new standard for petition signature review.

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 supervision and approval of the form of municipal elections from local governments to the PUC. Second, the measure purports to require increases in sales of retail electricity from renewable energy sources, create a new petition authority for municipally owned utilities and cooperative electric associations, creates irreversible RES decisionmaking, creates procedural requirements for

petitions, modifies municipal elections by allowing the board of a municipally owned utility to call an election and creates a new standard for review of petition signatures. 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 modify the process by which municipalities conduct elections.
2. The Title fails to mention that the measure purports to create new substantive requirements for petition signature review.
3. The Title fails to explain the measure creates new authority for the PUC to supervise municipal and cooperative electric association elections.
4. The Title fails to mention that the measure allows customers to make an irreversible decision to subject their utility to renewable energy standards.
5. The Title fails to mention that the measure applies only to municipally owned utilities and cooperative electric associations, but not to investor owned utilities.
6. The Title fails to mention that the measure allows for customers of a utility, some of whom are located outside the State of Colorado, to vote in a Colorado election to bind their utility to increased renewable energy standards.

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



Respectfully submitted this 28th day of April 2010.

GREENBERG TRAURIG, LLP

By:   
\_\_\_\_\_  
Douglas J. Friednash, #18128  
Christopher J. Neumann, #29831

Petitioners' Addresses:

Robert N. McLennan  
1100 W. 116th Avenue  
Westminster, CO 80234

Kent Singer  
5400 N. Washington Street  
Denver, CO 80216

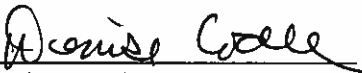
Dan Hodges  
121 S. Tejon Street  
Fifth Floor  
Colorado Springs, CO 80947

Terrance G. Ross  
P.O. Box 288  
Franktown, CO 80116

**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:

Mark G. Grueskin  
Edward T. Ramey  
1001 17th Street, Suite 1800  
Denver, Colorado 80202

  
Denise Coale